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

Below is a list of the Rules (and corresponding decisions which apply or interpret those Rules) that are addressed in the case summaries that follow.

1.2	• GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205
	• KOHLENDORFER v NORTHCOTT, 2013 ABQB 145
	• STANNERS v ALEXANDRE, 2014 ABQB 253
	• SOLIS v DEL ROSARIO, 2014 ABQB 310
	• NORTHBRIDGE INDEMNITY INSURANCE CORPORATION v INTACT INSURANCE COMPANY, 2014 ABQB 345
	• NASH v SNOW, 2014 ABQB 355
	• STEPARYK v ALBERTA, 2014 ABQB 367
	• SM v ALBERTA, 2014 ABQB 376
	• ALLIANCE CONCRETE LTD v ROBERTSON, 2014 ABQB 401
1.4	• MILNER'S ALOHA MOBILE HOME PARK (1998) LTD v JENKINS, 2014 ABQB 229
1.7	• KOHLENDORFER v NORTHCOTT, 2013 ABQB 145
	• NASH v SNOW, 2014 ABQB 355
2.11	• FRN v ALBERTA, 2014 ABQB 375
	• SM v ALBERTA, 2014 ABQB 376
	• CHUTSKOFF v BONORA, 2014 ABQB 389
2.12	• SM v ALBERTA, 2014 ABQB 376
3.2	• NORTHBRIDGE INDEMNITY INSURANCE CORPORATION v INTACT INSURANCE COMPANY, 2014 ABQB 345
3.23	• SOBEYS WEST INC v ALBERTA COLLEGE OF PHARMACISTS, 2014 ABQB 333
3.26	• MCGOWAN v LANG, 2014 ABQB 403
3.27	• MARCIL v ELLEFSON, 2014 ABCA 169
	• MCGOWAN v LANG, 2014 ABQB 403
3.28	• MCGOWAN v LANG, 2014 ABQB 403
3.37	• BODKIN LEASING CORPORATION v MIGHTY MOOSE HOLDINGS LTD, 2014 ABQB 280
3.44	• O'CONNOR ASSOCIATES ENVIRONMENTAL INC v MEC OP LLC, 2014 ABCA 140
3.62	• OLYMPIA TRUST COMPANY v ODEGARD, 2014 ABQB 204
	• GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205
	• RESOURCE WELL COMPLETION TECHNOLOGIES INC v CANUCK COMPLETIONS LTD, 2014 ABQB 209
	• PINO BROS COMMERCIAL INC v SILVER GOLD BULL INC, 2014 ABQB 227
	• JIN v REN, 2014 ABQB 250
3.63	• GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205

3.65	• GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205
	• PINO BROS COMMERCIAL INC v SILVER GOLD BULL INC, 2014 ABQB 227
3.66	• GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205
3.68	• ASHRAF v SNC LAVALIN ATP INC, 2014 ABQB 220
	• BEAULIEU v UNIVERSITY OF ALBERTA, 2014 ABCA 137
	• O'CONNOR ASSOCIATES ENVIRONMENTAL INC v MEC OP LLC, 2014 ABCA 140
	• ARABI v ALBERTA, 2014 ABQB 295
	• FISHER v CORAL HILL ENERGY INC, 2013 ABQB 437
	• FRN v ALBERTA, 2014 ABQB 375
	• SM v ALBERTA, 2014 ABQB 376
	• CHUTSKOFF v BONORA, 2014 ABQB 389
3.74	• GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205

4.11	• CHUTSKOFF v BONORA, 2014 ABQB 389
4.22	• VACCARO v TWIN CITIES POWER, LLC, 2014 ABCA 146
	• ARABI v ALBERTA, 2014 ABQB 295
4.23	• ARABI v ALBERTA, 2014 ABQB 295
4.29	• ASHRAF v SNC LAVALIN ATP INC, 2014 ABQB 220
	• DECHANT v REBER, 2014 ABQB 342
4.31	• STEPARYK v ALBERTA, 2014 ABQB 367
4.33	• KRIETER v ALBERTA, 2014 ABQB 349
	• NASH v SNOW, 2014 ABQB 355
	• STEPARYK v ALBERTA, 2014 ABQB 367
	• MILNE v DZIADYK, 2014 ABQB 407
	• CHORNEY v THOMPSON, 2014 ABQB 410
4.34	• OLYMPIA TRUST COMPANY v ODEGARD, 2014 ABQB 204
	• SILVERADO OILFIELD VENTURES LTD v DAVIDSON, 2014 ABQB 218

5.2	• AMACK v WISHEWAN, 2014 ABQB 242
5.3	• KOHLENDORFER v NORTHCOTT, 2013 ABQB 145
	• CARROLL v ATCO ELECTRIC LTD, 2014 ABQB 378
5.10	• CUBBON BUILDING CENTER LTD v CONDOMINIUM CORPORATION NO 1023241, 2014 ABQB 365
5.17	• CARROLL v ATCO ELECTRIC LTD, 2014 ABQB 378
5.19	• SOLIS v DEL ROSARIO, 2014 ABQB 310
5.34	• ALBERTA (MINISTER OF JUSTICE AND ATTORNEY GENERAL) v KOUCH, 2014 ABCA 215
5.41	• KOHLENDORFER v NORTHCOTT, 2013 ABQB 145
5.42	• KOHLENDORFER v NORTHCOTT, 2013 ABQB 145
5.43	• KOHLENDORFER v NORTHCOTT, 2013 ABQB 145

6.3	• BRANDNER v ALBERTA (JUSTICE & SOLICITOR GENERAL), 2014 ABQB 211
6.6	• CHORNEY v THOMPSON, 2014 ABQB 410
6.14	• KULAGA v FIRST NATIONAL FINANCIAL GP CORPORATION, 2014 ABQB 400

7.2	• GATEWAY MORTGAGE INVESTMENT CORP v 1384125 ALBERTA LTD, 2014 ABQB 45
	• ROYAL BANK OF CANADA v BENCHMARK REAL ESTATE APPRAISALS LTD, 2014 ABQB 297
	• TRUEHOPE INC v STRINGAM, 2014 ABQB 386
7.3	• BRANDNER v ALBERTA (JUSTICE & SOLICITOR GENERAL), 2014 ABQB 211
	• ROYAL BANK OF CANADA v BENCHMARK REAL ESTATE APPRAISALS LTD, 2014 ABQB 297
	• 1214777 ALBERTA LTD v 480955 ALBERTA LTD, 2014 ABQB 301
	• FISHER v CORAL HILL ENERGY INC, 2013 ABQB 437
	• SOLIS v DEL ROSARIO, 2014 ABQB 310
	• 1214934 ALBERTA LTD v CLEAN CUT LTD, 2014 ABQB 330
	• PRUNKL v TAMMY JEAN'S DINER LTD, 2014 ABQB 338
	• TRUEHOPE INC v STRINGAM, 2014 ABQB 386
	• KULAGA v FIRST NATIONAL FINANCIAL GP CORPORATION, 2014 ABQB 400
7.4	• TRUEHOPE INC v STRINGAM, 2014 ABQB 386
7.5	• STANNERS v ALEXANDRE, 2014 ABQB 253
	• GATEWAY MORTGAGE INVESTMENT CORP v 1384125 ALBERTA LTD, 2014 ABQB 45
	• FISHER v CORAL HILL ENERGY INC, 2013 ABQB 437
7.10	• STANNERS v ALEXANDRE, 2014 ABQB 253
7.11	• STANNERS v ALEXANDRE, 2014 ABQB 253

8.7	• GLOBAL FIRST LTD v 1237007 ALBERTA LTD, 2014 ABQB 288

9.2	• MURPHY v CAHILL, 2014 ABQB 274
9.14	• RICHTER v CHEMERINSKI, 2014 ABQB 322
9.15	• PINO BROS COMMERCIAL INC v SILVER GOLD BULL INC, 2014 ABQB 227
	• MARCIL v ELLEFSON, 2014 ABCA 169
	• ALBERTA TREASURY BRANCHES v ELABORATE HOMES LTD, 2014 ABQB 350
	• ALLIANCE CONCRETE LTD v ROBERTSON, 2014 ABQB 401
9.16	• RICHTER v CHEMERINSKI, 2014 ABQB 322

10.29	• BYRON v BYRON, 2014 ABQB 240
	• SNIHUR v GRACE, 2014 ABQB 268
10.31	• BYRON v BYRON, 2014 ABQB 240
	• SNIHUR v GRACE, 2014 ABQB 268
10.33	• BEAULIEU v UNIVERSITY OF ALBERTA, 2014 ABCA 137
	• BYRON v BYRON, 2014 ABQB 240
10.52	• RICHTER v CHEMERINSKI, 2014 ABQB 322
	• KENT v POSTMEDIA NETWORK INC, 2014 ABQB 343

11.4	• PINO BROS COMMERCIAL INC v SILVER GOLD BULL INC, 2014 ABQB 227
11.21	• ALBERTA TREASURY BRANCHES v ELABORATE HOMES LTD, 2014 ABQB 350
11.25	• JIN v REN, 2014 ABQB 250
	• NORFOLK SOUTHERN RAILWAY COMPANY v CROWSHAW, 2014 ABQB 273
	• BANSAL v FERRARA PAN CANDY CO INC, 2014 ABQB 384
	• GULEVICH v MILLER, 2014 ABQB 377

11.31	• BANSAL v FERRARA PAN CANDY CO INC, 2014 ABQB 384 • GULEVICH v MILLER, 2014 ABQB 377 13.9 * JIN v REN, 2014 ABQB 250
13.9	• JIN v REN, 2014 ABQB 250
13.18	• RESOURCE WELL COMPLETION TECHNOLOGIES INC v CANUCK COMPLETIONS LTD, 2014 ABQB 209
15.2	• STEPARYK v ALBERTA, 2014 ABQB 367
15.4	• NASH v SNOW, 2014 ABQB 355 • STEPARYK v ALBERTA, 2014 ABQB 367 • CHORNEY v THOMPSON, 2014 ABQB 410
15.6	• CHORNEY v THOMPSON, 2014 ABQB 410
15.15	• NASH v SNOW, 2014 ABQB 355 • STEPARYK v ALBERTA, 2014 ABQB 367
Schedule C	• ASHRAF v SNC LAVALIN ATP INC, 2014 ABQB 220

GEOPHYSICAL SERVICE INCORPORATED v NWEST ENERGY CORP, 2014 ABQB 205 (MASTER ROBERTSON) Rules 1.2 (Purpose and Intention of These Rules), 3.62 (Amending Pleading), 3.63 (Identifying Amendments to Pleadings), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.66 (Costs), and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Plaintiff, a former seismic licensing company, commenced an Action against the Defendants claiming breach of contract, breach of copyright and conversion for the alleged sharing of seismic data. The Plaintiff applied to amend the Statement of Claim to add additional claims against the Defendants and to increase the quantum, and to add three new named Defendants and 26 additional "John Doe" style Defendants under Rules 3.62, 3.63, 3.65 and 3.66.

Following the principles set out in *Balm v 3512061 Canada Ltd*, 2003 ABQB 98, Master Robertson noted that:

> The classic rule is that an amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is repaired.

Master Robertson clarified that, particularly where the amendment is to add new Defendants, the Applicant must provide some evidence of the claim; however, the evidence must be meaningful. That bar is still present though it may be low. Master Robertson observed that, if no exceptions to the classic rule applied, the pleadings could generally be amended. In addition, Master Robertson also noted that Rule 3.74 was applicable to adding parties after the close of Pleadings. The express caution in that Rule is that the Court is precluded from making an Order if prejudice would result that could not remedied by a Costs award, adjournment or the imposition of terms. Once the Court has established that a party would be seriously prejudiced by an amendment, Rule 3.74(3) requires that no amendment be made.

Master Robertson analysed each of the proposed amendments in the Application and held that there was little or no evidence to support the claims. "Housekeeping" amendments that were routine in nature were allowed, but many parts of the claims were hopeless because they proceeded on a faulty legal premise without evidence. The proposed amendment to increase the quantum was disallowed as it was not supported by evidence. Master Robertson also declined to add the 26 "John Doe" Defendants and two of the three proposed named Defendants on the basis that fishing for evidence to support the claims against the proposed Defendants was not

acceptable: there must be modest evidence of wrongdoing by a party prior to their addition as a Defendant. Master Robertson observed that, if the amendments had been allowed adding all of the proposed parties, significant terms would have been imposed as well as Costs, Security for Costs and deadlines for filing and service, taking into account Rule 1.2(2)(b).

KOHLENDORFER v NORTHCOTT, 2013 ABQB 145 (READ J) Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 5.3 (Modification or Waiver of this Part), 5.41 (Medical Examinations), 5.42 (Options During Medical Examination) and 5.43 (Payment of Costs of Medical Examinations)

This Decision consolidated two Actions which dealt with the same issues. In both Actions the Plaintiffs opted to videotape medical examinations which were conducted by medical experts chosen by the Defendants. The Plaintiffs in both Actions provided the videotapes to counsel for the Defendants, but sought to disallow the examining expert doctors the ability to review the videotapes prior to completing their reports. Justice Read considered whether Rule 5.43 permitted the Plaintiffs' restriction on the use of the video. Her Ladyship considered the applicable Rules and noted that Foundational Rules 1.2 and 1.7 should be applied to interpret the other Rules in a manner which would facilitate the fair and just resolution of the claims in a cost effective and timely way. Further, Her Ladyship stated that Rule 5.3 clearly provided that the Court retained discretion to modify or waive provisions of the relevant Rules where so warranted. The Plaintiffs in both Actions argued that Rule 5.43(3) should be interpreted restrictively, and that Rule 5.43 was remedial and only benefitted the Plaintiffs. The Defendants argued that it would be inherently unfair to disallow the examining medical professional from reviewing a video recording of their own assessment if it existed. The Defendants conceded that there were restrictions set out in Rule 5.43(4), but strict restrictions on dissemination of video recordings would effectively reduce the number of available experts who would be willing to complete medical reports. The Defendants argued that allowing the medical expert to verify the video was consistent with the proper interpretation of Rule 5.43 and with the general purpose and intention of the Rules.

Read J. observed that the new Rules mark a change from the former Rules which were silent on whether a medical examination could be video recorded. Justice Read noted that, despite the significant change with respect to the availability of a video recording, Rules 5.41, 5.42 and 5.43 are similar to the language of former Rule 217; the case law interpreting the former Rule was therefore still applicable. However, the new Rules are silent about what use a party may make of the video once available. Her Ladyship concluded that the Foundational Rules suggested an interpretation of Rule 5.43 which would permit a Defendant's expert to review the video recording prior to finalizing their expert's report, and which permitted the Defendants counsel to review the recording as well. The new Rules require the Plaintiff to provide the Defendant with a copy of the videotape "as soon as practicable" which was indicative that the Defendant should be permitted to use the video recording. Read J. agreed that providing the video recording to the Defendants was consistent with the Foundational Rules which require open and honest communication between the parties to encourage settlement. "Trial by ambush" is to be avoided. In the result, the medical examiners' requests to review the video recording were reasonable, and since the requests could be accommodated in a way which was not contrary to the Rules, the video recording should be provided. Read J. commented that the video recordings were sensitive, but, the new Rules did not stipulate that the video recordings needed to be filed with the Court. The Plaintiffs' Application was dismissed.

STANNERS v ALEXANDRE, 2014 ABQB 253 (MILLER J) Rules 1.2 (Purpose and Intention of These Rules), 7.5 (Application for Judgment by Way of Summary Trial), 7.10 (Judge Remains Seized of Action) and 7.11 (Order for Trial)

The divorced parties had a lengthy history of litigation regarding the parenting terms for their two children. The father brought an Application to vary the parenting terms of a Corollary Relief Order which was ultimately addressed by way of Summary Trial pursuant to Part 7, Division 3.

Miller J. provided an overview of the history of disputes between the parties on the issue of parenting dealt with by the Court. This included a total of four Provincial Court Orders, the Divorce Judgment and Corollary Relief Order, and at least four further Orders in the Court of Queen's Bench. In light of this background, Miller J. referred to the purpose and intention of the Rules, as stated in Rule 1.2, in declaring that resolution of these types of issues or disputes are best reached using a Summary Trial. Here, the Summary Trial would present the opportunity for the parties to testify under oath and have the issue of parenting dealt with rather than incurring further costs in a litigation war.

SOLIS v DEL ROSARIO, 2014 ABQB 310 (LEE J) Rules 1.2 (Purpose and Intention of These Rules), 5.19 (Limit or Cancellation of Questioning) and 7.3 (Summary Judgment)

This was an Application by the Defendant, WCB, to cancel a Notice of Appointment to Question one of their employees, pursuant to Rule 5.19.

WCB had brought a Summary Dismissal Application against the Plaintiffs. The Application was heard by Lee J. on February 7, 2014. Lee J. reserved his Decision, which Decision was still outstanding at the time the Application was heard.

The Defendants argued that the Questioning was premature and improper at this time. If Summary Dismissal was granted, the Questioning would have been unnecessary. The Court agreed, and after reviewing Rule 5.19 and Rule 1.2, cancelled the Appointment for Questioning pending the outcome of the Summary Dismissal Application.

NORTHBRIDGE INDEMNITY INSURANCE CORPORATION v INTACT INSURANCE COMPANY, 2014 ABQB 345 (SULLIVAN J) Rules 1.2 (Purpose and Intention of These Rules) and 3.2 (How to Start an Action)

The underlying dispute involved the development of a condominium project ("Centuria Project"). A condominium neighbouring the development site ("Central Park Manor") sued for damages it sustained from a sink-hole on the lands of the Centuria Project.

The Applicant, Northbridge Indemnity Insurance Corporation ("Northbridge"), was one of the insurers of the Defendant owner of the Centuria Project, Lake Placid Investments Inc. Northbridge filed an Originating Application, pursuant to Rule 3.2(1), seeking contribution from Intact Insurance Company ("Intact") and Zurich Insurance Company ("Zurich"), the insurers of the other Defendants involved in the Centuria Project. The issue before the Court was whether the Originating Application was the proper way to resolve the coverage dispute.

Sullivan J. held that the Applicant had followed the proper process by way of Originating Application. There was no substantial factual dispute, as argued by Intact and Zurich, pursuant to Rule 3.2(2)(a). There was no dispute that all three insurers insured the Centuria Project; the dispute was between the insurers and the law appeared clear with respect to the legal issues between the parties. Foundational Rule 1.2(1) was also referenced to support the decision that an Originating Application was the most timely and cost-effective resolution of the dispute.

NASH v SNOW, 2014 ABQB 355 (TOPOLNISKI J) Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 4.33 (Dismissal for Long Delay), 15.4 (Dismissal for Long Delay: Bridging Provision) and 15.15 (Coming into Force)

The Defendant applied to strike the Plaintiff's claim for long delay. The Application turned on whether a settlement letter sent nine weeks before the "drop dead date" and an 11th hour Notice to Admit Facts qualified as having "significantly advanced" the Action, which was otherwise dormant for more than four years.

Justice Topolniski discussed transitional Rule 15.4, which came into force on November 1, 2010 and was in effect until November 1, 2013, the date the Notice to Admit was served. Rule 15.4 fixed the "drop dead date" at the earlier of five years after "the last thing done that significantly advanced" the Action, or three years following November 1, 2010, the coming into force date of the new Rules. Under the transitional Rule, if the last thing done to significantly advance the Action was prior to November 1, 2010, the

drop dead rule would be triggered on November 1, 2013, at the very latest. Rule 4.33 provides that if three or more years have passed without a significant advance in an Action the Court must dismiss the Action as against the Applicant. Justice Topolniski noted that Rule 4.33 is mandatory. Subject to agreement of the parties to the delay or another of the exceptions listed in subsection (1), there is no discretion to save a dormant Action.

Topolniski J.'s interpretation of Rule 4.33 began with reference to the purpose of the Rules and Rule 1.7, which states that interpretation of the Rules requires a purposive and contextual approach. While many Courts may describe the purpose of Rule 4.33 and its predecessors in different ways, its underlying purpose is always the same: to advance lawsuits and put an end to flagging litigation. Pursuant to Rule 1.2(1), the purpose of the Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way.

In interpreting Rule 4.33, Topolniski J. noted the absence of the words "the last thing" or "step", which necessarily modifies the focus of the purposive and contextual assessment. The issue is "advancing" or moving the action and the issues in dispute forward. Accordingly, the Court must take a macro-view of what transpired in the three year window. This approach does not affect the view that there is no difference between the words "materially advance" (in former Rule 244.1) and "significantly advance". However, it may affect the applicability of certain pre-November 1, 2013 authorities, particularly those that applied an analysis based on categories rather than functional impact. Topolniski J. observed the culture shift called for in *Hryniak v Mauldin*, 2014 SCC 7, and *Windsor v Canada Pacific Railway Ltd*, 2014 ABCA 108, which supported the Plaintiff's contention that the end goal of "significant advancements" under Rule 4.33 is not necessarily trial, but rather resolution. Topolniski J. agreed.

Topolniski J. found that neither the settlement offer nor the counter-offer of Discontinuance on a without costs basis reset the clock on delay. While a significant advancement towards resolution can mean advancement to settlement, a functional analysis mandates something more than a bare offer to settle in the three year window; it must result in progress of some sort in the Action.

Topolniski J. found that the Plaintiff's 11th hour attempt to breathe life into her lawsuit by serving the Notice to Admit on the drop dead day was too late. The Defendants made no admissions, deemed or actual. Rather, the response was a firm objection to the Notice to Admit and the Motion to Dismiss, brought well within the time for responding to the Notice to Admit. To significantly advance an Action, an admission sought from the other party must be relevant to the issues in the litigation, and it must add something new to the proceedings. The Notice to Admit did not significantly advance the Action, either alone or in combination with the letter. Topolniski J. held that nothing happened in the three years preceding the drop-dead date of November 1, 2013 which would have enabled the Plaintiff to avoid the effect of Rule 4.33. The Defendants neither agreed to, nor acquiesced in, the delay. Accordingly, there was no option but to dismiss the Action.

STEPARYK v ALBERTA, 2014 ABQB 367 (CRIGHTON J) Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal With Delay), 4.33 (Dismissal for Long Delay), 15.2 (New Rules Apply to Existing Proceedings) and 15.4 (Dismissal for Long Delay: Bridging Provision) and Repealed AR 124/2010 s 15.15

The Crown brought an Application to dismiss an Action for long delay which related to alleged abuses the Respondent was subjected to in the 1970s and 1980s while in the care of the Alberta Government. The Application was filed on October 21, 2013 pursuant to Rule 15.4 and Rule 4.31. Rule 15.4 had been repealed by the time the Application was heard and Rule 4.33 was in effect, which changed the period of inexcusable delay from more than five years to more than three years.

Crighton J. first considered which period of inexcusable delay applied to the Application and held that, while Rule 4.33 governed the Application, transitional Rule 15.4 preserved the five year clock and "should be interpreted to mean that the relevant period of inexcusable delay must be determined by the date the Application was filed, not

heard". The application of Rule 15.2 did not affect this interpretation.

The Court reviewed the litigation activity from the five year period immediately preceding the date the Application was filed to determine whether anything genuinely advanced the Action. Crighton J. confirmed that: (i) the present approach to Rule 4.33 is a functional one with a focus on substance and effect rather than on form; and (ii) the test under former Rule 244 still applies to new Rule 4.31, namely that the Applicant must demonstrate an inordinate, inexcusable delay that is likely to cause serious prejudice.

During the five year period, the acts taken primarily involved a change in representation for the Respondent, conditional upon a successful Application for advanced Costs, and some steps pursuant to the Application for advanced Costs. Just prior to the Application for dismissal for long delay, the Respondent requested that a Case Management Justice be appointed. Crighton J. stated that an Application for advanced Costs is neutral; because the Application was brought by counsel who was not yet retained on the file, it was essentially an act taken by a third party for funding which is neutral to the issue of advancing litigation. In the meantime, original counsel did not cease representation and was responsible for advancing the Action. The request for Case Management did nothing to significantly advance the Action, and given the nature and timing of the request, it was held to be nothing more than an attempt to do something before Rule 15.4 was repealed.

Crighton J. then considered whether any exceptions applied under Rule 4.33, specifically whether the Respondent's participation in the Application for advanced Costs was done for a purpose and to the extent that warranted the lawsuit proceeding under Rule 4.33(1)(d). Crighton J. held that it did not because the Application and the issues stood apart from the main Action.

The Action was dismissed under Rule 4.33, but Crighton J. also analyzed the delay under Rule 4.31, which required a broader review and assessment of the entire progress of the Action from its commencement to the date the Application was filed. The Court referred to the foundational principles in Rule 1.2 which require "the parties to engage in purposeful, efficient, and timely litigation". The Action was commenced on August 31, 2001. The only step attributable to advancing the main Action was the filing of the Statement of Defence and Affidavits of Records in 2007. No questioning had been commenced, nor any other significant steps taken, notwithstanding the Respondent being represented by counsel during the period of delay. Such facts amounted to an inordinate delay which was *prima facie* evidence of serious prejudice. The Respondent submitted no excuse or legitimate doubt on the question of prejudice, and therefore Crighton J. would have also dismissed the Action under Rule 4.31.

SM v ALBERTA, 2014 ABQB 376 (GRAESSER J) Rules 1.2 (Purpose and Intention of These Rules), 2.11 (Litigation Representative Required), 2.12 (Types of Litigation Representatives and Service of Documents) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff, SM, commenced an Action in her own right and as litigation representative for the estate of her deceased son, CM. CM was apprehended by Child and Family Service and placed with two of the Defendants; he was assaulted by one of the Defendants and later died of his injuries. The Plaintiff claimed against the Crown and two individual Defendants in negligence, and alleged that her own involvement with Child and Family Services as a child resulted in her ongoing difficulties and lack of parenting skills. The Defendant Crown sought to strike the entire Amended Statement of Claim or significant parts of it. The Crown argued that it was plain and obvious that the claims had no reasonable prospect of success. The Plaintiff argued that the Court should be slow to strike or limit claims when they relate to important or serious issues of law, and the expense and inconvenience of defending a complex action was not a ground to strike out a pleading. Justice Graesser considered each of the Crowns specific complaints with respect to the Amended Statement of Claim, striking many of the impugned claims.

Justice Graesser considered how the Foundational Rules, specifically Rule 1.2, dovetailed with the request for striking particular causes of action from an

Amended Statement of Claim. Graesser J. held that in the circumstances of this claim, it was difficult to see how the Action was served by expanding the number of Defendants and adding an "unnecessary level of complexity to the claims". Justice Graesser held that the number of Defendants should be narrowed and stated that:

> Facilitating the quickest means of resolving the claims at the least expense is not served by preserving claims which, on the present pleadings are hopeless.

The Crown sought to have several portions of the Amended Statement of Claim struck on the basis that they were argument or meaningless facts and allegations. Justice Graesser considered Rule 3.68(2)(c) as the basis for striking irrelevant and embarrassing allegations. His Lordship agreed with the Crown and held that the Amended Statement of Claim should be further amended to remove the allegations which were "embarrassing, irrelevant, legal conclusions and argument". Justice Graesser concluded that the Rules of Court sought to have parties identify the real issues in dispute quickly and to manage the litigation together within the language of Rule 1.2.

His Lordship observed that the failure to bring a proper claim for any financial loss to CM under the *Survival of Actions Act*, RSA 2000, c. S-27, by his executor or administrator, had been cured by Rule 2.11(e) which allowed for a litigation representative to be appointed for the estate of a person for whom probate had not yet been completed. Justice Graesser noted that a failure to appoint a litigation representative under Rule 2.12 was likely an irregularity.

ALLIANCE CONCRETE LTD v ROBERTSON, 2014 ABQB 401 (DARIO J) Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying And Discharging Judgments and Orders)

The Applicant applied to set aside a Judgment issued in favour of the Respondent. The Application was made pursuant to Rule 9.15(1)(b), on the basis that the Applicant's counsel did not appear because of an accident or mistake. After reviewing the case law, the Court held that setting aside the Judgment was not appropriate in these circumstances. The Court gave several reasons for coming to such a conclusion:

1. The Court was not convinced that the evidence demonstrated that the Applicant had an intention to participate in the Action.

2. Even if the Applicant could bring itself within the scope of Rule 9.15, the Court had to consider the prejudice to the other side if the Judgment was set aside and the parties were to have another Trial. The costs for legal fee had far exceeded the claimed amount.

3. The Applicant suggested that it had a meritorious defence to the Counterclaim; the Respondent's questioned this defence. The Court concluded that, unlike Rule 9.15(3), proving a meritorious defence for Rule 9.15(1)(b) was not required.

4. To provide relief to the Applicant would not be consistent with the ideal of solving claims "fairly and justly", in a "timely and cost-effective way". Granting the Application would run counter to the purposes expressed in Rule 1.2(1).

Overall, the Court found that it was not appropriate in these circumstances to set aside the Judgment and dismissed the Application.

MILNER'S ALOHA MOBILE HOME PARK (1998) LTD v JENKINS, 2014 ABQB 229 (MASTER ROBERTSON) Rule 1.4 (Procedural Orders)

The Plaintiff landlord commenced an Action against a tenant for the termination of the tenancy as well as Judgment for rental arrears. The landlord had tripled the rent; he then claimed that the full amounts were never paid and that rental arrears had therefore accrued. Master Robertson considered the evidence before the Court regarding the increase in rent and the arrears, holding that the rental increase was in reality "a notice… to terminate a periodic tenancy" and was not for a proper

reason. The notice of the rent increase was therefore of no effect. Master Robertson cited Rule 1.4(2)(g) and held that the Court was authorized to give advice including providing guidelines and making proposals, suggestions and recommendations. Master Robertson made six recommendations with respect to the conduct of the landlord and tenant towards one another. Master Robertson emphasized that the six recommendations were not Orders, but that they could be explained further at the parties' request.

FRN v ALBERTA, 2014 ABQB 375 (GRAESSER J) Rules 2.11 (Litigation Representative Required) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Crown applied to strike the Plaintiffs' Statement of Claim in its entirety. In the alternative, the Crown sought to have the Action dismissed against some Defendants and have some portions of the Statement of Claim struck.

The Crown made a number of objections to the Statement of Claim, including that large parts of the pleadings were "irrelevant, improper, contradictory, repetitive, inflammatory, frivolous and/or vexatious or plead facts not evidence or argument". The Crown argued that the pleadings offended Rule 3.68(2)(c). The Court agreed with the Crown's argument; however, the Court noted that the issue with striking pleadings lay entirely with the limitation period. If the Statement of Claim was struck, the Plaintiffs would be out of time to bring a new claim on the same matters. The Court thus held that it would be unjust to the Plaintiffs to strike the pleadings and allowed the Plaintiffs to amend the claim to cure any deficiencies.

The Court also noted that the failure by the Plaintiffs to bring a proper claim for any financial loss under the *Survival of Actions Act*, RSA 2000, c. S-27, by the executor or administrator had been cured by Rule 2.11(e), which allowed for a litigation representative to be appointed for an estate that has not obtained a grant under the Surrogate Rules.

CHUTSKOFF v BONORA, 2014 ABQB 389 (MICHALYSHYN J) Rules 2.11 (Litigation Representative Required), 3.68 (Court Options to Deal with Significant Deficiencies) and 4.11 (Ways the Court May Manage Action)

The Plaintiff claimed against the Defendant lawyers and law firm for allegedly compromising his ability to respond to the registration of a Saskatchewan Judgment in Alberta. The primary issue was whether the Plaintiff and the litigation were vexatious. A secondary issue of the Plaintiff's competence to conduct his own litigation was raised by the Plaintiff himself.

Justice Michalyshyn reviewed the Plaintiff's extensive litigation history in both Saskatchewan and Alberta. The Plaintiff had been the administrator of an estate against which a claimant obtained Judgment in Saskatchewan. That litigation led to a series of reported Judgments and Appeals. The Plaintiff also initiated complaint proceedings against lawyers and judges. The Claimant then passed away and her estate attempted to enforce the Judgment by registration in Alberta. It was discovered that the Plaintiff had entirely depleted the estate funds in excess of $1 million. On its own motion, the Court had found the Plaintiff in criminal contempt for breach of various Court Orders. In the within Action, Justice Michalyshyn stated that litigation commonly referred to as "vexatious" may be struck under either Rule 3.68(2)(c) or (d), as the term is synonymous with impropriety and abuse of process. Micalyshyn J. found that both the Plaintiff and the litigation were vexatious. The Action was accordingly terminated immediately on the basis of Rules 4.11(d), and 3.68(2)(c) or (d).

Michalyshyn J. briefly commented on the secondary issue of whether or not the Plaintiff was competent to represent himself in the Action. Rule 2.11 explicitly indicates that for an adult person the existence or absence of legal capacity is defined in the *Adult Guardianship and Trustees Act*, SA 2008, c A-4.2. The two key aspects of capacity are the ability to understand (1) a litigation scenario, and (2) the foreseeable consequences of an action or inaction. Justice Michalyshyn concluded that any common law definition of legal capacity is irrelevant in Alberta, as the legislature has codified the appropriate legal test. There was no expert

evidence of incompetence and the Plaintiff's capacity was self-evident and obvious from his conduct in the litigation. There was no doubt the Plaintiff had capacity to conduct his own litigation. The Defendants were entirely successful and awarded Costs.

SOBEYS WEST INC v ALBERTA COLLEGE OF PHARMACISTS, 2014 ABQB 333 (GILL J) Rule 3.23 (Stay of Decision)

The Defendant College of Pharmacists decided to amend their Code of Ethics to prohibit inducements and loyalty programs at pharmacies across Alberta. The Plaintiffs sought an Interim Order staying the Defendant's decision to amend their Code of Ethics pending the hearing of the Plaintiffs' Application for Judicial Review of that decision. Justice Gill considered the test for granting a Stay in such circumstances. Gill J., citing Rule 3.23, noted that the test for granting a Stay pending determination of a Judicial Review had not been changed from that under former Rule 753.15(1). Justice Gill stated that the test to be applied under the prior Rule was the tri-partite test for an interim injunction as set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334:

1. A preliminary assessment must be made of the merits of the case to ensure there is a serious issue to be tried;

2. It must be determined whether the applicant would suffer irreparable harm if the application were refused; and

3. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

His Lordship noted that the threshold on the first part of the test is low, and there are no specific requirements which must be met to satisfy it. The Court should make a preliminary assessment of the merits without a prolonged examination. Gill J. noted that it was not necessary for the Court to make a preliminary assessment of the outcome of the Judicial Review. Justice Gill was satisfied that the Plaintiffs had met the relatively low threshold for a establishing that there was serious question to be tried. With respect to the second element, irreparable harm, Justice Gill stated that the term "irreparable" referred to the nature of the harm suffered rather than its scale. Gill J. was satisfied that the Plaintiffs would suffer irreparable harm if the Court were to dismiss the Application. With respect to the third branch of the test, the balance of convenience, Justice Gill observed that, in assessing the balance of convenience, the Court must determine which party will suffer greater harm from granting a refusal of the stay pending a decision on the merits. The factors will vary in each case. His Lordship noted that the inducement provisions must be assumed to benefit the public interest and the Court should take that into account when considering the Stay. Upon weighing the balance of convenience, Justice Gill held that the balance favoured granting the Stay. Accordingly, the Plaintiffs met the test for the Stay and the implementation of the inducement prohibitions was stayed pending the resolution of the Judicial Review Application.

MCGOWAN v LANG, 2014 ABQB 403 (YUNGWIRTH J) Rules 3.26 (Time For Service of Statement of Claim), 3.27 (Extension of Time For Service) and 3.28 (Effect of Not Serving Statement of Claim In Time)

The Defendant appealed an Order of a Master granting the Plaintiff an extension of time to serve the Statement of Claim relating to a motor vehicle accident. The filed Statement of Claim had been forwarded to the insurance adjuster, but at no point did the insurance adjuster advise the Plaintiff that: (i) service on the Defendant was not necessary; (ii) the Statement of Claim had been served on the Defendant; or (iii) liability was not or would not be contested. However, there were ongoing negotiations throughout and, shortly before the expiry of the one year period for service, the insurance adjuster advised Plaintiff's counsel that he would file a Statement of Defence if no medical documents were received soon.

The Plaintiff made no attempt to serve the Statement

of Claim on the Defendant and there was no evidence suggesting the Defendant's whereabouts was unknown during the required time period for service. The Defendant was eventually served with the Statement of Claim 68 days after it had expired, at which point the Plaintiff applied to extend the time for service.

The Master granted an extension of time to serve the Statement of Claim pursuant to Rule 3.27(1)(c) and stated that, in exercising discretion under this Rule, the Court should:

(a) Aim to eliminate procrastination and delay in litigation;

(b) Consider whether there is any prejudice to any of the parties as a result of the limitation issue;

(c) Determine if the special or extraordinary circumstances result solely from the Defendant's conduct or from the conduct of a person who is not a party to the action; and

(d) Strike an appropriate balance of the interests of the parties in order to achieve the most justice with the least injustice.

Applying these factors, the Master held that there was no procrastination or delay and no prejudice to the Defendant. The Master held that the ongoing negotiations and comments made by the insurance adjuster regarding the filing of a Statement of Defence constituted special circumstances within the meaning of Rule 3.27(1)(c).

Upon reviewing the Master's Decision, Yungwirth J. stated that:

- Rules 3.26 to 3.28 were similar to former Rule 11;
- The principles under the former Rules have been incorporated into the requirements of Rules 3.26 to 3.28;
- Rules 3.26 to 3.28 impose a strict and mandatory limit on the service of a Statement of Claim;
- Only the rare exceptions listed in Rule 3.27 alter the limit on service; and
- The Court's discretion to grant an extension pursuant to Rule 3.27 arises only after a Plaintiff brings itself within the exceptions laid out in Rule 3.27.

Yungwirth J. went on to comment more thoroughly about Rule 3.27(1)(c), stating that while it is intended to be more of a general exception, the reference to exceptional circumstances suggests that it will rarely be used. Analysis under Rule 3.27(1)(c) is a two-step process:

1. The Plaintiff must bring itself within the requirement that special or extraordinary circumstances exist resulting solely from the Defendant's conduct or from the conduct of a person who is not a party to the action. As part of this step, the Plaintiff must demonstrate that the special or extraordinary circumstances are connected in some way to the lack of service.

2. Once the Plaintiff establishes the type of special or extraordinary circumstances contemplated by Rule 3.27(1)(c), the Court then considers if is it appropriate to exercise its discretion to extend time for service. As part of this step, the Court will consider policy considerations of the limitations legislation and prejudice.

Yungwirth J. allowed the Appeal and held that the Plaintiff had not brought himself within the requirements of Rule 3.27(1)(c). There was no evidence that the Plaintiff's lawyer relied on anything done by the Defendant or by any third party when he failed to serve the Statement of Claim within the required time period. Moreover, there was no evidence that the Plaintiff decided not to serve the Statement of Claim because he relied on the comments made by the insurance adjuster regarding his intention to file a Statement of Defence. The evidence was that the limitation for service was not noted on the file's diary

system and Plaintiff's counsel simply neglected to serve the Statement of Claim. Extensions under Rule 3.27 should not be permitted in circumstances where the failure to serve is caused by Plaintiff's counsel's inadvertence, even if there is no demonstrated prejudice to the Defendant.

MARCIL v ELLEFSON, 2014 ABCA 169 (WATSON, MCDONALD and BIELBY JJA) Rules 3.27 (Extension of Time for Service) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Appellant (Defendant) appealed an Order that refused to set aside an *ex parte* Order granted to the Respondents (Plaintiffs) extending the time for service of an Amended Amended Statement of Claim ("Statement of Claim") and Substitutional Service on the Appellant.

By way of background, the Respondents (Plaintiffs) filed the Statement of Claim for failure to disclose a leak in the basement of a house prior to its sale, but were unsuccessful in serving the Appellant (Defendant) prior to the required service date. A week before the date of expiry, the Defendant's counsel contacted the Plaintiffs' counsel requesting further information. The Statement of Claim was provided during this communication, but service was not accepted. The Respondents (Plaintiffs) successfully applied and received an *ex parte* Order to extend the limitation period for service of the Statement of Claim. The Appellant applied to set aside the *ex parte* Order. The Respondents responded by providing fresh Affidavit evidence from the counsel's assistant. Brown J., in Chambers, declined to set aside the *ex parte* Order.

The Court noted that the Chambers Judge carefully observed that the permissibility of additional evidence on an Application to set aside an *ex parte* Order is a matter of discretion (*Hansraj v Ao*, 2004 ABCA 223). The Court also noted that the Chambers Judge observed Rule 9.15(4), which permits the Court to set aside an interlocutory Order and does not limit the type of evidence the Court may consider during an Application. The Court inferred from *Hansraj* that in many or most cases:

> . . . it is appropriate to treat an application to set aside an *ex parte* order as a new application for the same order, without any restriction on the type of evidence the party with the benefit of the order may produce in its support.

The Court held that Brown J. had not improperly considered arguments and evidence not tendered at the time of the Application for the initial *ex parte* Order. The Court also held there were ample reasons to support the Chambers Judge's Decision that special or extraordinary circumstances existed under Rule 3.27(1)(c).

BODKIN LEASING CORPORATION v MIGHTY MOOSE HOLDINGS LTD, 2014 ABQB 280 (MASTER PROWSE) Rule 3.37 (Application for Judgment Against Defendant Noted in Default)

The Plaintiffs commenced an Action against the Defendants due to the Defendant's default of a financing lease for a semi-trailer truck. The Plaintiffs had seized and sold the vehicle and applied the net proceeds to the debt, and then sued for the balance owing. The Defendant lessees were noted in default. The Plaintiff applied *ex parte* to the Court for Judgment pursuant to Rule 3.37. The Court adjourned the *ex parte* Application and requested written argument on the issue of whether a portion of the amount being claimed was an unenforceable penalty. Following a review of the written argument, and citing prior Alberta case law, Master Prowse held that the acceleration clause was arbitrary, unconscionable, and an unenforceable penalty. The Application was dismissed.

O'CONNOR ASSOCIATES ENVIRONMENTAL INC v MEC OP LLC, 2014 ABCA 140 (PAPERNY, SLATTER JJA and KENNY J (AD HOC)) Rules 3.44 (When Third Party Claim May Be Filed) and 3.68 (Court Options To Deal with Significant Deficiencies)

The Plaintiff purchased assets from the Defendant Respondents using the Third Party Appellants to conduct the due diligence process leading up to the purchase. The Plaintiff sued the Defendant Respondents alleging that the description of the assets was inaccurate, and the Defendant Respondents claimed against the Third Party

Appellants. The Third Party Appellants sought to strike the Third Party Claims against them, arguing that the Claims were not of the type that could be properly added under Rule 3.44, and the Claims did not disclose a reasonable cause of action. The Case Management Judge allowed the Third Party Claim to be amended holding that there was a reasonable prospect that the new cause of action could succeed. Further, the Case Management Judge concluded that it was reasonably possible that the Third Parties could be found partly responsible and so they should be bound by the decision; this was enough to engage Rule 3.44. The Third Parties appealed.

The Court of Appeal stated that the interpretation of the Rules of Court is a question of law, with the standard of review being correctness. The application of Rules to a particular of set of facts is a mixed question of fact and law with the standard of review being palpable and overriding error. With respect to the failure to disclose a cause of action, the Court noted that any pleading can be struck out under Rule 3.68(2)(b) if it discloses "no reasonable claim or defence to a claim". No evidence is admitted on such an Application, and the facts as pleaded are presumed true under Rule 3.68(3). Citing prior Supreme Court of Canada authority, the Court of Appeal set out the modern test for striking out pleadings and noted that the trend towards simplifying proceedings had been reinforced recently by the Supreme Court in *Hryniak v Mauldin*, 2014 SCC 7. Striking pleadings that have no reasonable prospect of success is consistent with the new authority. With respect to the scope of the Third Party Claims, the Court observed that the third party process is governed by Rule 3.44: this Rule permits a wider range of Third Party Claims and is broader than its predecessor because it is not limited to claims of indemnity or contribution. The Rule is now another form of joinder, but it does not mean that any potential issue or claim should be joined together using the third party process. The Court clarified (at para 26):

> … At a minimum, the third party notice must disclose a legally recognized claim by either the plaintiff or the defendant against thethird party. The complexity, expense, and time demands of an action will vary directly depending on the number of parties and causes of action. At some point issues of proportionality and efficiency dictate that collateral claims be tried on their own. Prevention of multiplicity of proceedings is desirable, but so too is allowing the economic and timely advancement of the original action.

The Court held that there was no independent duty of care owed by the Third Party Appellants to the Defendant Respondents, so the Third Party Notice could not be supported based on Rule 3.44(b). The Court considered the Defendant Respondent's argument that the Third Party Appellants should bound by any decision in the Action in order to avoid inconsistent results as between the Plaintiffs and Third Parties, and that any damage suffered by the Plaintiff was the fault of the Third Parties. The Court commented that the flexibility of Rule 3.44(c) should not be undermined by rigid rules about when it can or cannot be used, especially at the early stages of litigation. However, in the result, the Court held that there was no prospect of any findings being made which would engage the Third Party sufficiently to make the Third Party Notices necessary. The Appeal was allowed and the Third Party Notices were struck.

OLYMPIA TRUST COMPANY v ODEGARD, 2014 ABQB 204 (MASTER SCHLOSSER) Rules 3.62 (Amending Pleading) and 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

The Plaintiff in a foreclosure Action assigned its entire interest in the lawsuit to a third party, (the "Assignee") post Order *Nisi*/Order for Sale in 2010. More than 3 years after the assignment, the Plaintiff brought an Application to have the Assignee substituted as Plaintiff, or added, and the Pleadings amended, pursuant to Rule 3.62(1).

The Court noted that assignment of the Order *Nisi* was an assignment of a Judgment. Rule 4.34 did not apply in the circumstances. However, because there were further procedural steps before this Action would be concluded, the Court granted the amendment to the Pleadings to have the Assignee substituted as Plaintiff.

Master Schlosser stated that, because this was an assignment of a Judgment, the 3 years did not create a limitation problem. Section 11 of the *Limitations Act* only prevents liability on a Judgment after ten years.

RESOURCE WELL COMPLETION TECHNOLOGIES INC v CANUCK COMPLETIONS LTD, 2014 ABQB 209 (MASTER HANEBURY) Rules 3.62 (Amending Pleading) and 13.18 (Types of Affidavit)

This was an Application by the Plaintiff to amend its Statement of Claim to add a claim against another party, an individual named Graf. Graf contested the amendment on a number of bases.

Master Hanebury first reviewed the case law in relation to amending pleadings, and cited *Balm v 3512061 Canada Ltd*, 2003 ABCA 440 for the proposition that "an amendment should be allowed, no matter how careless or late, unless there is prejudice". Master Hanebury also noted that:

1. The amendment must raise a triable issue;

2. The evidentiary threshold is low and hearsay evidence is allowed;

3. There must, however, be some evidence to support the amendment; and

4. The necessary amount of evidence is "modest".

With those considerations in mind, Master Hanebury turned to the specific arguments raised by Graf. The first was that the Plaintiff's Affidavits supporting the amendment ought to be struck, or portions ought to be struck, because they contain unattributed hearsay. Master Hanebury reviewed Rule 13.18(2) which states that, if an Affidavit is sworn on the basis of information and belief, the source of the information and belief must be disclosed. Although it was true that the paragraphs which the Respondent sought to have struck constituted unattributed hearsay, Master Hanebury found that in some cases there were documents in the Plaintiff's Affidavit of Records which supported the information in question, and therefore those paragraphs were not struck. In one instance, it was found that some information which was unattributed hearsay was acknowledged by another party to the Action. Master Hanebury allowed these paragraphs to remain in the Affidavit; however, Master Hanebury did strike some paragraphs which were unattributed hearsay and not supported by any other evidence before the Court. Master Hanebury also struck several more paragraphs from the Affidavits because they contained inappropriate evidence by a lay person.

Further, Master Hanebury had to determine whether the Affidavits, as now redacted, contained sufficient evidence to support the amendment. Master Hanebury determined that they did, and further determined that the amendments were not hopeless. In the result, Master Hanebury allowed the Application to amend.

PINO BROS COMMERCIAL INC v SILVER GOLD BULL INC, 2014 ABQB 227 (MASTER SCHULZ) Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.4 (Methods of Service in Alberta)

The Defendant, Silver Gold Bull Inc. ("SGB"), applied under Rule 9.15 to set aside a Default Judgment obtained by the Plaintiff, Pino Bros. Commercial Inc. ("Pino Bros"). Pino Bros contracted with SBG for the supply and delivery of six "monster boxes" of silver bullion for the purchase price of $101,310. SGB retained Fedex Ground Package System Ltd. ("Fedex") to make an initial test delivery of one box. The delivery was successfully made to the delivery address given by Pino Bros. SGB retained then Fedex to deliver the five remaining boxes. Fedex attempted to deliver the bullion to the delivery address but there was nobody present to accept delivery. A sign at the delivery address directed deliveries to an adjacent address. Fedex attempted to make delivery to the adjacent address, but again there was nobody present to accept delivery. Fedex then tried a nearby commercial address and the delivery was accepted. The shipment went missing after it was delivered and signed for. A representative of Pino Bros attempted to

discuss the situation with a representative of SGB but to no avail. On April 8, 2013, counsel for Pino Bros sent a demand letter to SGB at its registered office address, the registered address for Silver Spoon Holdings Ltd (the majority shareholder in SGB), and the address listed for wire transfers to SGB on its website. SGB acknowledged receipt of a demand letter but did not respond because it had no intention of paying any money to Pino Bros.

Pino Bros filed a Statement of Claim and purported to serve it by registered mail at SGB's registered office on May 13, 2013. The recorded mail was signed for by "M. Belandis", who was a director of SGB. On June 11, 2013, Pino Bros filed an Amended Statement of Claim, pursuant to Rule 3.62, changing the name of the other Defendant to Fedex but making no additional claims against SGB. There was no evidence that the Amended Statement of Claim was served on SGB. On June 28, 2013, Pino Bros noted SGB in Default pursuant to the original Statement of Claim, and subsequently entered Default Judgment and filed a Bill of Costs. Pino Bros then garnisheed $86,040.07 from SGB's bank account, which amount was held in Court.

SGB took the position that the first notice it had of the Action or Default Judgment was when its managing partner, Nikolas Morianos, noticed the funds missing from the SGB account on July 25, 2013. Counsel for SGB sent correspondence on the same day to Pino Bro's counsel objecting to the garnishee and advising that it would likely receive instructions to seek to set aside the Default Judgment. An Application to set aside the Default Judgment was filed by SGB on August 9, 2013, to be heard August 13, 2013, and was then adjourned indefinitely by consent. It was brought back on November 26, 2013 and adjourned for submission of briefs by the parties. Fedex was aware of the proceedings but made no submissions.

The issues were whether Pino Bros could proceed to Default Judgment upon service of the Statement of Claim when the Amended Statement of Claim had not been served, and whether the Default Judgment should be set aside.

SGB argued that it was not properly served with either the Statement of Claim or Amended Statement of Claim. After reviewing and referring to Rule 11.4 and s. 256 of the *Business Corporations Act*, RSA 2000, c B-9 ("BCA"), Master Schulz summarized that service on a corporation is deemed to be effected by recorded mail sent to the registered office, and deemed effective on the date that the acknowledgment of receipt is signed. Master Schulz added that the deeming provision can be set aside if there are reasonable grounds for believing that the corporation did not receive the document.

An Affidavit of Service was filed showing service of the Statement of Claim on SGB by recorded mail at the registered office on file with the corporate registry pursuant to s. 20 of the BCA. Receipt was recorded by "M. Belandis", a director on the corporate registry search. SGB said it did not receive the Statement of Claim. Nikolas Morianos, the managing partner of SGB, deposed that the registered office address for SGB is that of Peter Crossley Law Office, and that Mr. Crossley told SGB's lawyer (Mr. Averbach), who told Mr. Morianos, that he had no record of receiving the Statement of Claim. Mr. Morianos further deposed that he did not recognize the signature as his own or as one of his employees. There was no evidence before the Court from Mr. Belandis or from Mr. Crossley, nor was there any explanation for the absence of evidence. Master Schulz stated that the failure of someone with personal knowledge to give evidence and the lack of explanation for that failure leaves an adverse inference.

Master Schulz did not accept the double hearsay evidence of Mr. Morianos as reasonable grounds for believing that the corporation did not receive the Statement of Claim. Master Schulz found that service of the Statement of Claim was made in accordance with the legislation and was therefore deemed to be effective on the date receipt was acknowledged.

SGB argued that the Amended Statement of Claim replaced the original Statement of Claim such that it could no longer be relied upon to establish service in support of Default Judgment. Master Schulz noted that the amendments corrected the misnomer of another Defendant and did not affect the claim against SGB. The Statement of Claim was amended pursuant to Rule 3.62, which allows amendments

without court order before pleadings close. Master Schulz emphasized the salient points of the Rule: that a party may amend its pleading, including an amendment to add, remove, substitute or correct the name of a party before pleadings close, any number of times without the court's permission, and an amended pleading must be served on each of the other parties within 10 days after the date on which it is filed. The Rule does not dictate a consequence to the failure to serve within the specified 10 days. Master Schulz opined that the drafters of the Rules of Court must have meant there to be some consequence associated with the time limitation otherwise it would not have been included. Master Schulz looked to Rule 3.65(3) for guidance, which provides that an order giving permission to amend a pleading under the Rule ceases to have effect unless the amended pleading is filed and served within the time specified by the court. From this, Master Schulz deduced that, if the court order ceases to have effect, then the amendments allowed by the court order also cease to have effect and the amended pleading is then a nullity. Presumably the affected party would have to re-apply for an order to amend the pleading. In the meantime, the original pleading is operative. Master Schulz commented that, if the drafters wanted the same consequences to apply to non-service under Rule 3.62, then the Rule would have said so, and silence on that point must mean that something different should result. However, it makes sense that the Rules of Court would address the situation where there is an apparent conflict between the Rules and an extant court order, but be silent and allow the Rules to govern when there is no court order. Master Schulz determined that the consequence set out in Rule 3.65 is consistent with the plain reading of 3.62, and found that that the Amended Statement of Claim filed by Pino Bros ceased to have any effect because it was not served on SGB. The original Statement of Claim was the operating pleading and it was properly served.

Master Schulz repeated the test to set aside a default judgment as set out by Justice Poelman in *Palin v Duxbury*, 2010 ABQB 833, at para 21:

> …the Defendants must show that:
>
> (a) they have an arguable defence;
>
> (b) they did not deliberately let judgment go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and
>
> (c) after learning of the default judgment, they moved promptly to open it up.

Master Schulz added that the three part test must be tempered by the overarching principle of fairness, and the answers to the three questions of delay, excuse or inadvertence, and arguable defence, provide guidance to the Court in the overall exercise of judicial discretion to promote fairness between the parties.

Master Schulz commented that, while there was no adequate reason given for SGB's failure to file a Statement of Defence, there was no delay in moving to set aside Default Judgment and there were arguable defences raised by SGB. There was no evidence of prejudice to Pino Bros if the Default Judgment was opened up that could not be remedied by a monetary award. Fairness dictated that SGB should be allowed to litigate the "possibly reasonably meritorious defences".

Master Schulz noted the evidence that Pino Bros approached SGB in advance of commencing the Action in an attempt to resolve the matter, an attempt that SGB ignored. SGB had demonstrated that it was prepared to ignore the matter and became motivated to deal with it only when serious enforcement measures were undertaken by Pino Bros. Further, SGB did not provide a draft Statement of Defence in support of a genuine intention and readiness to defend. Master Schulz found that, given SGB's approach to the claim, fairness dictated that the money paid into Court should remain in Court during the litigation until further Order of the Court or agreement of all parties, in order to provide incentive to SGB to address the matter and bring it to resolution. Master Schulz set aside the Default Judgment and directed SGB to file and serve its Statement of Defence on Pino Bros within 5 days of the filing and service of the Order. Master Schulz awarded Pino Bros thrown away Costs and the Costs of the Application

on a solicitor and client basis, payable forthwith and in any event of the cause.

JIN v REN, 2014 ABQB 250 (SHELLY J) Rules 3.62 (Amending Pleading), 11.25 (Real and Substantial Connection) and 13.9 (Defence of Tender)

The Defendant sought to amend his Statement of Defence and file a Counterclaim approximately seven years after the commencement of the lawsuit, and after the matter had been set down for Trial. The Court stated that the threshold for amending pleadings is low. However, there are four major exceptions to the "Classic Rule" of permitting late amendments, which are set out in Dow Chemical Canada Inc v Nova Chemical Corporation, 2010 ABQB 524.

The Court reviewed the case law and the circumstances of this case and determined that all of the exceptions in Dow Chemical were engaged, and the amendments should not be allowed. The Court placed particular emphasis on the prejudice that the Plaintiff would face given the circumstances. The Court also stated that one of the proposed amendments raised the defence of tender, which, pursuant to Rule 13.9, required the Defendant to pay into Court the amount alleged to have been tendered before filing a defence based on tender. This pre-requisite had not been met by the Defendant and was thus another bar to allowing the amendments.

With respect to the Counterclaim, the Court stated that the Defendant had the onus of showing that there was a "real and substantial connection" between Alberta and the facts on which the proposed Counterclaim was based: Rule 11.25(1). The Court also noted that, in making this determination, factors to be considered included where the cause of action arose and convenience or inconvenience to potential witnesses: Kuffner v Manitoba Public Insurance Corporation, 2005 ABCA 440. After reviewing the facts, the Court determined that the Applicant had not made out a real and substantial connection. Finally, the Court stated that to allow a Counterclaim at this stage of the proceedings would be highly prejudicial to the Plaintiff, and that the Defendants had more than ample time over the last 7 years to seek to file a Counterclaim, but failed to do so.

In the result, the Court dismissed the Application to amend the Statement of Defence and file a Counterclaim.

ASHRAF v SNC LAVALIN ATP INC, 2014 ABQB 220 (MAHONEY J) Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 4.24 (Formal Offers to Settle) and Schedule C (Tariff of Recoverable Fees)

The self-represented Plaintiff, Ashraf, commenced an Action against his former employer claiming abuse, harassment and bullying in the workplace. The Defendant, SNC, applied to strike the Statement of Claim or to stay the Action. The Application was dismissed on the basis that the Plaintiff's Action was statute barred pursuant to the Worker's Compensation Act ("WCB"). Costs for the Application were awarded to the Defendant. The Plaintiff appealed and sought leave to add a claim for constructive dismissal. The Plaintiff's Appeal was dismissed. Mahoney J. held that the Defendant was entitled to its Costs for the Appeal under Schedule C, Item 8(1), at Column 5. The Plaintiff was disappointed with the Costs award and came before Mahoney J. to contest the Cost Order. His Lordship considered the Plaintiff's argument that each party should bear their own Costs because of mixed success in the Application. His Lordship clarified that the Master was correct in striking the Statement of Claim in its entirety pursuant Rule 3.68(1), and that if the Statement of Claim was amended it would be struck in its entirety on the same basis. Mahoney J. stated that success was not mixed at all: the Defendants was entirely successful and should have their Costs as set out in the Order. The Plaintiff further argued that the Costs Order of the Master should be revoked, but Mahoney J. dismissed this argument stating that, having won the Appeal, the Defendants were entitled to their Costs as ordered by the Master. His Lordship observed that the Plaintiff was warned at the start of the Application that if he was unsuccessful in his Application further Costs might be awarded against him. The Plaintiff indicated that he understood and wanted to proceed; therefore, it was appropriate that the Defendants were awarded their Costs for a contested motion under Schedule C, Item 7(1), Column 5.

BEAULIEU v UNIVERSITY OF ALBERTA, 2014 ABCA 137 (BERGER, COSTIGAN and O'FERRALL JJA) Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 10.33 (Court Considerations in Making Costs Award)

The Appellant, Beaulieu, was employed by the Respondent, University of Alberta (the "University"), as a professor under the terms of a collective agreement. The Respondent, Lynch ("Lynch"), was the Dean of Faculty and the Respondent, Marquez ("Marquez"), was the Chair of the Appellant's department. The Appellant's claim alleged harassment, denial of access to research funding records, breach of a settlement agreement, breach of confidentiality, defamation, intentional infliction of mental suffering and a failure to stop disciplinary proceedings to accommodate his medical condition. The Respondents applied to strike the Statement of Claim on the basis that the Court lacked jurisdiction because the dispute resolution procedures in the collective agreement provided an exclusive forum for the resolution of disputes. The Appellant applied for an interlocutory injunction prohibiting the Respondents from proceeding with collective agreement proceedings against him until his physician gave medical clearance. The Chambers Judge struck the Statement of Claim pursuant to Rule 3.68, declined to grant an injunction, and awarded double Column 4 Costs against the Appellant: 2013 ABQB 237.

The Court of Appeal dismissed the Appeal and, because the Statement of Claim was struck, determined it was unnecessary to consider the Appellant's injunction Application as there was no longer a jurisdictional basis for the relief sought in the Statement of Claim. The Court of Appeal referenced Rule 10.33(2)(g) which provides that, in making a Costs award, a court may consider whether a party has engaged in misconduct. Costs awards are not restricted to cases that have been adjudicated on the merits. The Appellant had engaged in activity to embarrass and harass Lynch and Marquez. No determination on the merits of the allegations in the Statement of Claim was necessary to make the finding of misconduct, which finding alone supported the Costs award.

ARABI v ALBERTA, 2014 ABQB 295 (GILL J) Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order) and 4.23 (Contents of Security for Costs Order)

In 2012, the Plaintiff was facing nine criminal charges, including counselling and coercing child prostitution, sexual assault, assault with a weapon, production and possession of child pornography and unlawful confinement. Of the nine charges, the Plaintiff was found guilty of assault and possession of child pornography. During those proceedings it was alleged that the Plaintiff was threatening witnesses with bodily harm. The Plaintiff was charged and convicted of three counts of attempt to obstruct justice via interference or intimidation and four counts of uttering a threat to cause death or bodily harm. The civil action brought by the Plaintiff was based on wrongs he alleged occurred to him in the criminal proceedings.

The Plaintiff named various Defendants, including members of the Edmonton Police Service, Edmonton Remand Centre employees, federal Crown Prosecutors, the Chief of the Edmonton Police Service, his lawyers from the criminal proceedings and members of the Law Society.

All of the Defendants sought to strike the Pleadings and, in the alternative, an Order requiring the Plaintiff to pay $150,000 in Security for Costs. The Court held that the Action was (a) factually and legally hopeless; (b) an abuse of process; and (c) frivolous and vexatious litigation. The Action was struck and the Court held if it erred in striking the claim that Security in the amount of $150,000 should be paid into Court by the Plaintiff.

FISHER v CORAL HILL ENERGY INC, 2013 ABQB 437 (MARTIN J) Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 7.5 (Application for Judgment By Way Of Summary Trial)

The Plaintiff commenced an Action on behalf of a proposed class consisting of former shareholders of one of the Corporate Defendants, Wave Energy Ltd ("Wave"). The Plaintiff alleged that all of the Defendants conspired to divert certain petroleum and gas rights to another corporate

entity Coral Hill Energy Inc. (also a Defendant), thereby depriving the Wave shareholders. The Defendants applied to dismiss the proceedings pursuant to Rule 7.3; and, in the alternative, to strike the proceedings pursuant to Rule 3.68. The individual Defendants also applied for Summary Trial.

Martin J. considered whether Summary Dismissal should be granted pursuant to Rule 7.3. The parties agreed that the test for Summary Dismissal was whether the Defendant Applicants could show, on a balance of probabilities, that there was no genuine issue of material fact requiring Trial. If the Defendants succeeded, the burden shifted to the Plaintiff to counter the Defendants' evidence and demonstrate that there was a genuine issue for Trial. The Plaintiffs and the Defendants did not dispute the bare facts of the case but did dispute the explanations and motivations underlying the facts.

Justice Martin reviewed whether the Action was properly pursued as a class action on behalf of the Wave shareholders, or whether it should have been commenced as a derivative Action. The Defendants argued that the Action was properly a derivative Action and that Summary Dismissal should be granted pursuant to Rule 7.3 because the Plaintiff did not have the legal right to pursue the requested remedies. Justice Martin noted that the case law was not clear, but an overlap existed between derivative actions and claims of oppression. Overall, it was not plain and obvious that a Court would not allow a derivative action as a remedy for oppression in this case. The Defendants had not established that they were entitled to Summary Dismissal on the basis that the Plaintiff lacked the legal right to proceed.

Her Ladyship considered the various disputed contractual clauses and concluded that the Defendants had provided a satisfactory explanation for the clauses and the basis for them. Martin J. held that there was no genuine issue of material fact in respect of the inclusion of the contractual provisions; this was so whether the Action was a derivative claim or a claim in oppression. Justice Martin held that sufficient evidence to meet the Plaintiff's burden was lacking. Additionally, Justice Martin held that there was no genuine issue of material fact with respect to the Plaintiff's claim respecting lack of disclosure of portions of the asset transaction, and the Plaintiff had provided no evidence to show that there was a genuine issue. Justice Martin also held that there was no evidence of conspiracy as between the Defendants or unjust enrichment by the Defendants.

Her Ladyship concluded that:

> The Defendants have tendered evidence that provides a cogent, non-nefarious explanation of the events in question. That evidence satisfies me that there is in this case no genuine issue of material fact requiring trial. The burden therefore shifts to Fisher to provide this Court with evidence that there is a genuine issue for trial here. That he has not done.

Justice Martin briefly stated that, in light of the conclusions respecting Rule 7.3, the Defendants' application to strike out the Plaintiff's claim pursuant to Rule 3.68 did not need to be addressed. Similarly, the conclusions respecting Summary Dismissal made it unnecessary to address the Application for Summary Trial. The Defendants' Application for Summary Dismissal was granted.

VACCARO v TWIN CITIES POWER, LLC, 2014 ABCA 146 (ROWBOTHAM JA) Rule 4.22 (Considerations for Security for Costs Order)

The Applicants, numerous related American companies, sought a Stay of a Court of Queen's Bench Judgment that ordered, inter alia, that security be posted in the amount of $1,376,726. The Respondent previously obtained Judgment for $1,376,726 against a Canadian company related to the Applicants. After that Judgment was granted the Canadian company ceased operations and transferred its funds to the American companies.

The Court cited Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA, 2013 ABCA 357, for the test for a stay pending appeal: (a) there is an arguable issue to be determined on appeal; (b) the applicant will suffer irreparable harm; and (c) the balance of convenience favours granting the stay.

The Court held that there was an arguable issue on appeal, noting that it was somewhat novel to provide Security for Costs in the amount of the entire earlier Judgment when alternative options for pre-judgment relief were available. In relation to Rule 4.22, the Court held that "there is an arguable issue about the scope of the new rule which, unlike the old rule, does not specifically apply merely to security for costs". However, the Court held there was no irreparable harm as the Appellants had adequate funds to continue operations. The Application was dismissed.

DECHANT v REBER, 2014 ABQB 342 (ANDERSON J) Rule 4.29 (Costs Consequences of Formal Offer to Settle)

The Defendant was fully successful at Trial over disputed land valued at $1.2 million. The Defendant had served a Formal Offer to Settle on January 2, 2013, which the Plaintiff did not accept. At Trial, the Defendant fared better than the Formal Offer. In accordance with Rule 4.29, the Defendant sought double Costs. The Plaintiff took no issue with respect to the Defendant's entitlement to double Costs after January 2, 2013. The issue was that the Defendant sought Costs pursuant to Column 4 of the Tariff, and alternatively an amount of Costs greater than Column 1. The Plaintiff argued that Column 1 should apply because the Action was for specific performance and there was no claim for damages.

The parties agreed that a number of factors should be considered in determining a Costs award, including the degree of success of each party, the importance of the issues, the complexity of the issues and the conduct of the parties that tended to shorten the Trial. While the Action was not particularly complex, Justice Anderson considered the complete success of the Defendant and the importance of the issue to the Defendant, countered against a relatively simple two day Trial with two documents and three witnesses, and held that the Defendant should have its Costs as against the Plaintiff in accordance with Column 2 of Schedule C. In addition, the Defendant was awarded double Costs under Column 2 for any steps taken after January 2, 2013.

KRIETER v ALBERTA, 2014 ABQB 349 (MASTER HANEBURY) Rule 4.33 (Dismissal for Long Delay)

Various Defendants applied to have the Action struck for long delay. The Plaintiffs argued that a Notice to Admit and the Reply, from one of the Defendants, advanced the Action. Additionally, the Plaintiffs argued that the Notice to Admit and the Reply were proceedings which warranted the Action continuing.

The Reply was a complete denial of the facts sought to be admitted, and the Court held that a denial of all the admissions sought under a Notice to Admit does not significantly advance an Action. The Notice to Admit and Reply were both served before the drop dead date, and thus were not proceedings taken since the delay. The Application to strike was granted.

MILNE v DZIADYK, 2014 ABQB 407 (MASTER HANEBURY) Rule 4.33 (Dismissal for Long Delay)

The Defendant applied to have the Action dismissed for long delay. In the three years preceding the Application, the Applicant's counsel and the self-represented Respondent exchanged correspondence in an attempt to set the matter for Judicial Dispute Resolution ("JDR") but the matter was never set for a JDR.

The Court cited *Kurian v Alberta* (*Motor Vehicle Accident Claims Act, Administrator*), 2007 ABQB 369 ("*Kurian*"), where that Court analyzed whether the preparation for a JDR and the exchange of materials therein constituted a material advancement of the Action. The Court in *Kurian* held that the pursuance and preparation for the JDR did not materially advance the Action. The Court held that *Kurian* is in step with a line of cases that holds planning a step in an Action or discussing taking a step in an Action, does not significantly advance the Action. The Court further held that the fact the Respondent was self-represented could not be taken into account, and the Application was granted.

CHORNEY v THOMPSON, 2014 ABQB 410 (MASTER SCHLOSSER) Rules 4.33 (Dismissal for Long Delay), 6.6 (Response and Reply To Application), 15.4 (Dismissal for Long Delay: Bridging Provision) and 15.6 (Resolution of Difficulty or Doubt)

The Plaintiff commenced an Action against his doctor and his local hospital, claiming that he had been misdiagnosed with multiple sclerosis by the Defendant physicians, and the treatment of steroids and other drugs had caused him to become addicted and homeless. The Claim was commenced in 2001, Questioning was completed in 2009 and a Pre-Trial Conference was held in 2010. A proposed Litigation Plan respecting the exchange of expert's reports in preparation for Trial was prepared in 2011, and Plaintiff's counsel filed a Notice of Withdrawal in December of 2011. The Plaintiff did not obtain further counsel. The Defendants applied to dismiss the Action for delay under Rule 4.33.

Master Schlosser considered whether the incapacity of the Plaintiff might suspend the calculation of time under Rule 4.33, or whether Rule 15.6 could be invoked to prevent injustice. The Plaintiff had filed an Affidavit, but did not serve it on the Defendants and Master Schlosser discovered the Affidavit on file when drafting the Decision for the Application. Master Schlosser allowed Defendants' counsel the opportunity to respond to the Affidavit noting that, technically the direction was not compliant with Rule 6.6. Master Schlosser relied upon the Affidavit pursuant to the discretion afforded to the Court in Rule 6.6(3).

Master Schlosser observed that transitional Rule 15.4 was in effect until November 1, 2013 when Rule 4.33 replaced it. Rule 4.33 now requires that an Action must have a "significant advance" within three years or the Action will be dismissed; "things" or "steps" are no longer needed. Master Schlosser noted that the issue in this case was whether it would be appropriate to apply the five year drop-dead period set out in Rule 15.4(1)(b) instead of the three year period in Rule 15.4(1)(a) or 4.33 in order to avoid a "difficulty or injustice" under Rule 15.6. Master Schlosser held that, even if broad equitable powers were read into the words "difficulty or injustice" in Rule 15.6, there were limits; the circumstances of this case were not sufficient for equity to intervene. Master Schlosser noted that the Plaintiff's issue appeared to be the loss of representation, but this was not the sort of "injustice" contemplated by Rule 15.6. Further, Rules like 4.33 are absolute and mandatory. Rule 4.33 was intended to be a "bright line Rule" subject to the exceptions in 4.33(1)(a)-(d). Master Schlosser noted that such Rules remind us that the privilege to litigate in Court is easily lost. In the result, the Application was allowed and the Plaintiff's lawsuit was dismissed for long delay. Based on the analysis of Rule 4.33, it was unnecessary to decide whether incapacity might suspend the running of time under Rule 4.33.

SILVERADO OILFIELD VENTURES LTD v DAVIDSON, 2014 ABQB 218 (ROMAINE J) Rule 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

The Plaintiff, Silverado, went into receivership, and its assets were sold to 1773907 Alberta Ltd. ("177"), causing the Action to be stayed pursuant to Rule 4.34. This Application was for a Court Order lifting the stay and substituting 177 as the Plaintiff in place of Silverado. The Defendants sought to have the Action struck as abuse of process, alleging that the assignment of the Action from Silverado to 177 was tainted by champerty and maintenance.

Romaine J. ordered that the stay be lifted and that 177 be substituted as the new Plaintiff, stating it was "clear that the cause of action has been transferred from Silverado to 1773907, and Silverado no longer has any right or interest in the litigation". However, after a thorough review of the law on champerty and maintenance, Romaine J. struck the resulting claim by 177 as an abuse of process on the basis that the assignment of the Action was tainted by champerty and maintenance.

AMACK v WISHEWAN, 2014 ABQB 242 (GILL J) Rule 5.2 (When Something is Relevant and Material)

The Defendants in this Action brought applications for Summary Judgment. At issue was whether certain identified documents and evidence from other proceedings could be relied upon by the parties in the Summary

Judgment Applications. The other proceedings involved an investigation and report regarding certain aspects of the business and financial affairs of two businesses affiliated with the Defendants.

Gill J. analyzed the evidentiary issue in two parts:

1. Pursuant to Rule 5.2, were the documents and evidence relevant and material to the Summary Judgment Applications?

2. Was it necessary for reasons of fairness and justice that the documents and evidence be available for the parties?

The principles for relevance and materiality under Rule 5.2 remain those that were applicable under former Rule 265:

- The parties' pleadings are the basis for determining relevance and materiality;

- Discovery of records is now confined to eliciting facts of primary relevance (facts directly in issue), or of secondary relevance (facts from which the existence of the primary facts may be directly inferred);

- Records must be material, in that they must be reasonably expected to significantly help determine one or more of the issues raised in the pleadings;

- Relevance is determined by the pleadings, while materiality is more a matter of proof; and

- At an interlocutory stage of proceedings, it is sufficient if counsel can disclose a rational strategy in which the disputed documents play a material part.

Considering these principles, Gill J. held that documents and evidence in question were relevant and material to the issues raised in the pleadings and in the Summary Judgment Applications. Gill J. held that the documents and evidence were so clearly relevant and material that it may be impossible to have a proper adjudication without them, and thus they were necessary to achieve fairness and justice. As such, the documents and evidence from the other proceedings were permitted to be relied upon by the parties.

CARROLL v ATCO ELECTRIC LTD, 2014 ABQB 378 (SHELLEY J) Rules 5.3 (Modification or Waiver of This Part) and 5.17 (People Who May Be Questioned)

The Applicants (Defendants) appealed a Master's Order requiring their executive to attend one day of Questioning. The Respondent (Plaintiff) took the position that the executive had knowledge of the reason behind his dismissal and not being awarded a performance bonus.

After reviewing the facts of the case, the Court held that the executive had or appeared to have relevant and material information acquired as a result of her position with the Applicants (Rule 5.17(1)). The Court found that the executive was personally involved and played a hands-on role in the process that led to the Respondent not being awarded the bonus. Thus, the Court agreed with the Master's Decision that the Respondent was entitled to question the executive.

With respect to whether the executive should be excused from having to attend Questioning pursuant to Rule 5.3(1)(a), the Court stated that it was not satisfied that the Respondent was acting in a manner that was vexatious, abusive, oppressive or improper. The Court was also not satisfied that the expense, delay or difficulty for the executive would outweigh the likely benefit gained from Questioning (Rule 5.3(1)(b)). The Court upheld the Master's Order for the executive to attend Questioning and awarded the Respondent its Costs on the Appeal.

CUBBON BUILDING CENTER LTD v CONDOMINIUM CORPORATION NO 1023241, 2014 ABQB 365 (MASTER SCHLOSSER) Rule 5.10 (Subsequent Disclosure of Records)

The Plaintiff hardware store commenced an Action against the Defendant condominium corporation for unpaid invoices related to the supply of materials for a condominium

project. The Plaintiff's employee deposed in an Affidavit in support of a Summary Judgment Application that the purchases were authorized which prompted the Defendants to review their file materials. The review revealed documents which contradicted the Plaintiff's employee's evidence and the Defendants sought to use them at the Plaintiff employee's Questioning without showing the documents to the Affiant beforehand.

Master Schlosser considered whether the Plaintiff's employee was entitled to see the documents in advance. The Defendants acknowledged that they were under a continuing obligation to disclose documents pursuant to Rule 5.10. Master Schlosser considered the elements of Rule 5.10, noting that the Defendants had given notice that there were additional documents as required by Rule 5.10(a). However, neither the Rule nor the principles drawn from prior case law overruled section 22 of the *Alberta Evidence Act*, RSA 2000, c A-18, which requires production before Questioning.

Master Schlosser held that the Defendant's documents could not have been discovered with reasonable diligence earlier in the Action; and, as the effect of disclosing the records for the first time at the questioning would be lost "on paper", that was not a reason to deprive the Defendants of the advantage that might be gained from putting the substance of the records before the witness in the Questioning on Affidavit.

ALBERTA (MINISTER OF JUSTICE AND ATTORNEY GENERAL) v KOUCH, 2014 ABCA 215 (CONRAD, O'FERRALL and BROWN JJA) Rule 5.34 (Service of Expert's Report)

The Calgary Police Service discovered the basement of the Appellant's house had been converted into a marijuana grow operation. The Court of Queen's Bench granted a property disposal Order pursuant to section 19.94 of the *Victim Restitution and Compensation Payment Act*, SA 2001, c V-3.5. The homeowner appealed.

The Court of Appeal considered whether relief from forfeiture should have been granted in the circumstances. In reviewing the relevant factor of the value of the property in comparison to the value of the drugs, the Court noted that evidence regarding the value of the marijuana found in the home was not in compliance with the laws of evidence. The Chambers Judge was provided a single document, attached as an Exhibit to the Affidavit of a member of the Calgary Police Service. The document purported to be the "professional opinion" of another member of the Calgary Police Service. However, that opinion was unsworn, not signed by its supposed author, and failed to conform with Rule 5.34 (i.e. it was not in Form 25 and did not contain all the required information, including a statement his qualifications).

Because questions relating to admissibility of evidence are reviewed on the standard of correctness, the Court held that it was an error to admit the evidence regarding the crop value and profitability which did not conform to the requirements of the Rules of Court. Therefore, relying upon that evidence to determine the value of the drugs relative to the property was in error. The Appeal was allowed and the property disposal Order was vacated.

BRANDNER v ALBERTA (JUSTICE & SOLICITOR GENERAL), 2014 ABQB 211 (MASTER HANEBURY) Rules 6.3 (Applications Generally) and 7.3 (Summary Judgment)

This was an Application to summarily dismiss the Civil Claim of the Plaintiff on the basis that it was filed out of time. The Plaintiff was pulled over for speeding. The routine traffic stop ended with the Plaintiff pepper sprayed, handcuffed and arrested. The incident occurred on June 13, 2010, and the Plaintiff filed his claim on August 9, 2012. The Plaintiff made claims for assault and battery, wrongful arrest and detention, breach of his Charter rights, negligent investigation and malicious prosecution.

A preliminary issue arose with respect to the claims for negligent investigation and malicious prosecution. The Applicant conceded that these two claims were not out of time, but asked the Court to dismiss them on the merits. The Court stated that Rule 6.3(2)(b) requires that the Notice of Application for Summary Judgment include the grounds for making the Application. The only grounds

provided in the Notice in this case were that the claim was filed out of time.

The Court stated that the grounds the Applicant was attempting to rely on with respect to negligent investigation and malicious prosecution were not obvious to the Plaintiff or the Court in either the Application or the supporting Affidavit. The Court further stated that "[w]hether intentional or unintentional, ambush is not a tactic supported by the courts". The Court declined to consider any evidence respecting these two claims.

With respect to the remaining claims, Master Hanebury stated that the test for Summary Judgment under Rule 7.3 was no longer the same as it had been under the Former Rules. A Summary Judgment Application is not confined to the test of "a genuine issue for trial" found in the Former Rules. Rather, interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication.

After reviewing the facts of the case, as well as section 3 of the Limitations Act, Master Hanebury determined that the Plaintiff had everything he needed to determine if proceeding with the claim was warranted, on June 13, 2010. As such, the claims were out of time. Master Hanebury granted the Summary Judgment Application and dismissed the Plaintiff's claims, with the exception of the claims for negligent investigation and malicious prosecution.

KULAGA v FIRST NATIONAL FINANCIAL GP CORPORATION, 2014 ABQB 400 (MCCARTHY J) Rules 6.14 (Notice of Appeal of Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff, a straw buyer in a real estate transaction, commenced an Action against, *inter alia*, his lawyer. The Plaintiff had agreed to arrange financing and buy a house for an unknown third party. When the third party failed to make the payments on the home the bank pursued the Plaintiff for payment of the mortgage. The Defendant lawyer sought Summary Dismissal of the Action before a Master, arguing that the Plaintiff could not seek indemnity or contribution due the common law doctrine of *ex turpi causa non oritur actio*. The Master declined to summarily dismiss the Plaintiff's Claim against the Defendant lawyer; the Defendant lawyer appealed. Justice McCarthy stated that the standard of review on an Appeal from a Master to a Justice is correctness. In addition, an Appeal from a Master's Decision is a hearing *de novo* pursuant to Rule 6.14.

McCarthy J. stated that the test for Summary Judgment under Rule 7.3 accorded with recent Supreme Court of Canada and Alberta Court of Appeal decisions. His Lordship agreed that the modern test for Summary Judgment is to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record. McCarthy J. observed that the Alberta Court of Appeal made it clear that it must be determined whether there is any issue of merit that requires Trial. Further, an issue of law may be appropriate for Summary Judgment, but the determination of facts often requires Trial. In the case at bar, the proper disposition of the Defendant's Application for Summary Judgment required an examination of whether a fair and just decision could be made from the record. His Lordship found that the Master's analysis was correct: further evidence was needed with respect to the purchase contract, the property transaction and the Defendant lawyer's knowledge about the fraudulent nature of the transaction. Justice McCarthy dismissed the Appeal, holding that the factual discrepancies and questions of credibility were beyond the scope of a Summary Judgment Application.

GATEWAY MORTGAGE INVESTMENT CORP v 1384125 ALBERTA LTD, 2014 ABQB 45 (LEE J) Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

This Application was brought by the Plaintiff, Gateway, for Summary Judgment against one of the Defendants, Capital. Capital also brought a concurrent Application for Summary Dismissal. The issue was essentially whether Capital was liable to Gateway for a $70,000 holdback.

Capital entered into a mortgage agreement with another of the Defendants, 1384125 Alberta Ltd., the mortgagor.

Under the terms of the mortgage, while some amounts were advanced to the mortgagor, $70,000 was held back. Its release was conditional on certain steps being taken by the mortgagor.

The mortgagor then granted a second mortgage over the same lands to Gateway. Shortly after, Capital received a copy of an "Irrevocable Assignment" from the mortgagor's solicitor, advising that the mortgagor had assigned any further funds to be advanced from the unfunded mortgage proceeds to Gateway. Following receipt of the assignment, Capital nevertheless advanced $43,000 under the holdback to the mortgagor, rather than Gateway. Gateway brought this Action against Capital claiming it owed it the entire amount of the holdback. Capital argued that it had no liability to Gateway.

Lee J. determined that this matter could proceed by way of Summary Judgment, as the only issue to be determined was whether, as a matter of law, any liability ought to be imposed on Capital to Gateway for the payments made from the holdback funds, or any other amount.

Lee J. stated that the test for Summary Dismissal was set out in Rules 7.2 and 7.3. After reviewing the circumstances of the case, Lee J. granted Summary Judgment in favour of Gateway in the amount of $43,000.

ROYAL BANK OF CANADA v BENCHMARK REAL ESTATE APPRAISALS LTD, 2014 ABQB 297 (MASTER HANEBURY) Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

Upon default by the mortgagor, the Royal Bank of Canada ("RBC") commenced a foreclosure Action and obtained a final Order of foreclosure. After the foreclosure Order was obtained, RBC discovered that the mortgage may have been obtained fraudulently by several parties colluding to inflate the price of the property which was in fact worth much less. RBC then commenced two suits:

1. An Action against the mortgagor, alleging misrepresentation, breach of contract and negligence; and
2. An Action against the lawyer who acted for RBC with regard to the mortgage and the real estate appraisers, alleging negligence and breach of contract.

The mortgagor, the lawyer who acted for RBC during the mortgage and the appraisers brought Applications for Summary Dismissal of the Actions, pursuant to Rules 7.2 and 7.3, which were heard together. The lawyer and the appraisers argued that once RBC obtained an Order of foreclosure, it no longer had a claim against them because the debt was extinguished pursuant to section 48 of the *Law of Property Act*, RSA 2000 c L-7 ("LPA"). Alternatively, they argued that the Action was a collateral attack on the Order for foreclosure. On a similar basis, the mortgagor sought to dismiss the claim against him by arguing that the claim was barred as a result of merger or *res judicata*. The mortgagor also argued that there was no evidence that he acted fraudulently and thus could not be held liable on the third party claim brought by the appraisers.

The Court held that, while section 48 of the LPA prohibits the ability to sue under the covenant to pay in contract, it does not bar a claim in tort. Therefore, the claims against the mortgagor, the lawyer and the appraisers could not be dismissed on that basis.

The Court further held that the doctrines of merger, *res judicata* and collateral attack were inapplicable. A claim under a mortgage against the property alone is different than a claim in tort, and thus merger does not apply. The issues and causes of action in a negligence action are different than those in a foreclosure action, and thus *res judicata* does not apply. The claims made by RBC did not vary, nullify or render the foreclosure Order nonsensical, and thus did not constitute collateral attacks.

Finally, the Court held that the evidence contradicted the assertion by the mortgagor that he was an innocent dupe, which presented a genuine issue for trial with respect to the degree of his participation in the alleged scheme. For these reasons, the Applications for Summary Dismissal were dismissed.

TRUEHOPE INC v STRINGAM, 2014 ABQB 386 (MILLER J) Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 7.4 (Proceedings After Summary Judgment Against Party)

The Plaintiff (the "Supplier") entered into a Marketing and Distributorship Agreement ("MDA") with the Defendants (the "Distributor") who subsequently assigned their rights under the MDA to the remaining Defendants (the "Assignees"). The dispute regarded which of the parties had the right to market, sell and distribute the Supplier's nutritional products in the United States. The Assignees and the Supplier both brought Applications for Summary Judgment, the issue being whether the MDA was validly assigned. The Distributor did not participate in the Summary Judgment Applications.

The Court referred to Rules 7.2 through 7.4 which set out the Summary Judgment procedure and stated that the test to be applied is whether it is plain and obvious that the Action cannot succeed. Miller J. held that the plain and ordinary meaning of the language in the MDA required the consent of both the Distributor and the Supplier be obtained for any valid assignment. The undisputed evidence was that neither the Assignees nor the Distributor ever contacted the Supplier to obtain its permission for the assignment. Further, the evidence put forward by the Assignees indicated that the Distributor did not contract out of their contractual rights and obligations, but were working in partnership with the Assignees. Therefore, Miller J. held that it was plain and obvious that there was no assignment of the MDA and granted the Supplier's Application for a declaration that the assignment was null and void. The Summary Judgment Application brought by the Assignees was dismissed.

1214777 ALBERTA LTD v 480955 ALBERTA LTD, 2014 ABQB 301 (MASTER SCHLOSSER) Rule 7.3 (Summary Judgment)

Both the Plaintiffs and the Defendant sought Summary Disposition. The Plaintiffs (tenants) sought specific performance for renewal of the lease with the Defendant (landlord). The Defendant sought termination of the lease. The lease consisted of a three page hand-written document. It was for a five-year term with a renewal for another five years. The nature of the business was expressed as "massage therapy" and was to be operated in a "first class reputable manner", and the tenants were to "follow all the rules, regulations of the landlord, provincial and municipal governments".

Master Schlosser, citing *Hyrniak v Mauldin*, 2014 SCC 7, and *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, held that the starting point on a Summary Disposition Application is to examine the record to see if a disposition that is fair to both parties can be made on the record. This includes looking at the record and the dispute to decide whether it is essential to resolution to see the witnesses. If the answer is *yes* then the matter must proceed to Trial. If the answer is *no* then Court is to engage in the following six-step process:

1. The Court is to presume that the best evidence from both sides is before the Court: *Canada v Lameman*, 2008 1 SCR 372.

2. The Court is to determine if any negative inferences should be drawn from the absence of any evidence.

3. The Court is to determine if the evidence presented is admissible.

4. The Court must determine if there is a conflict in the evidence and, if so, whether (a) the conflict has been resolved on cross-examination: *Janvier v 834474 Alberta Ltd*, 2010 ABQB 800 or (b) whether the conflicting evidence is purely self-serving and otherwise unsupported: *Guaranty v Gordon*, [1999] 3 SCR 423.

5. The Court must then examine the evidence. Master Schlosser cited the recent Ontario decision of *Pammett v Ashcroft*, 2014 ONSC 2447 for the proposition that the Court may assess the sufficiency and reliability of evidence without using enhanced fact-finding powers. Also cited was *Tottrup v Clearwater Municipal District* (99),

(2007) 68 Alta LR (4th) 237 and *Gayton v Lacasse*, 2010 ABCA 123 for the proposition that assessing the sufficiency of the evidence will involve considering whether the issue can be fairly decided on the factual record.

6. The Court must then determine in relation to a Plaintiff seeking summary disposition, whether all of the elements of the cause of action are proven and the Defendant cannot maintain a defence; and in relation to a Defendant seeking summary disposition, whether the Plaintiff cannot prove an essential element of the cause of action, or whether the Defendant has a complete defence.

The Defendant, ostensibly, took the position that the renewal was invalid as the tenants were in default when they purported to renew the lease. However, no specific evidence of this was provided and Master Schlosser held that the lease had been renewed.

The Defendant argued that the failure to pay rent, operating the premises for the purposes of prostitution and issues with the HVAC and sprinkler systems were all defaults by the Plaintiffs that justified termination of the lease.

In relation to rent, Master Schlosser set out what the rent would be going forward based on the lease, and ordered the Plaintiffs to pay arrears within 30 days or the lease would be terminated. In relation to the use of the premises for prostitution, Master Schlosser held that the lease speaks to legality not morality and the lease would not be terminated based on the state of the law (prostitution laws being in flux) and the evidence before the Court. In relation to the HVAC and sprinkler systems, Master Schlosser held there was insufficient evidence to determine if there had been a breach of the lease.

The Plaintiff's Application was granted, and the Defendant's Application was dismissed.

1214934 ALBERTA LTD v CLEAN CUT LTD, 2014 ABQB 330 (VEIT J) Rule 7.3 (Summary Judgment)

This was a Summary Judgment Application relating to the purchase of a business. The Court attempted to determine whether the case was proper for Summary Judgment. The Applicant argued that the case could properly be determined on the record, as the contract in question contained an entire agreement clause.

The Respondents argued that a full Trial was required, as they sought to introduce parol evidence of collateral representations, which evidence constituted an exception to the parol evidence Rule, and that evidence of such collateral representations raised issues which required a Trial.

The Court summarized the recent developments in the area of Summary Judgments as follows:

> … the Supreme Court of Canada, and our Court of Appeal have recently insisted that a culture shift is required to promote timely and affordable access to our civil justice system and that this culture shift affects the way in which courts assess applications for summary judgment: *Windsor, Hryniak* (sometimes referred to as *Combined Air Mechanical Services Inc. v Flesch*). As our Court of Appeal put it in *Windsor*: "The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record."

After reviewing the facts, Veit J. determined that this case was appropriate for Summary Judgment. The Court considered the collateral representations, and determined that they were not material and that the Respondents would have entered the contract regardless of whether those representations were made or not. Therefore, no Trial was needed on the issue of collateral representations, and the matter could fairly be decided on the record. Accordingly, Veit J. granted Summary Judgment in favour of the Applicant.

PRUNKL v TAMMY JEAN'S DINER LTD, 2014 ABQB 338 (MANDERSCHEID J) Rule 7.3 (Summary Judgment)

Devon Hotel Ltd., 836618 Alberta Ltd., and 836618 Alberta Ltd. operating as Devon Hotel Ltd (the "Applicants" or "Owners") applied for an Order for Summary Judgment against Lorne Prunkl (the "Plaintiff" or "Respondent"), pursuant to Rule 7.3 of the Rules of Court. The primary issue was whether the Applicants were entitled to Summary Judgment dismissing the Plaintiff's claim against them on the basis that there was no merit to the claim and there were no genuine issues for Trial.

The Applicants were owners of a property, part of which was leased by another Defendant, Tammy Jean's Diner Ltd. (the "Diner"). The Plaintiff was injured on the Diner's property. The Diner had not obtained liability insurance as required, and the Plaintiff sued the owners of the property and the lessee Diner (the "Defendants").

The Applicants stated that they were not occupiers of the property as defined under the *Occupiers' Liability Act*, RSA 2000, c O-4. The Applicants also argued that insurance was optional and for their own benefit, and there was no requirement for them to purchase a policy of comprehensive general liability indemnifying the lessee Diner. The Plaintiff countered by stating that the Applicants had control over the premises. The Plaintiff also argued that where the lessee Diner failed to obtain insurance coverage, the Applicants were required to arrange for insurance coverage to prevent the risk of loss.

After canvassing the law, the Court held that there was no satisfactory or clear evidence on the issue of whether the Owners were in sufficient control of the premises, thus making the matter unsuitable for summary disposition. The Court also held that, given the facts of the case and the interpretation of the lease, there was still unanswered questions and issues which required further evidence for the Court to make a fair and just disposition of the matter. As a result, the Court concluded that it was unable to make a determination that there was no merit to the Plaintiff's claim in the Action. The Court denied the Application for Summary Judgment.

GLOBAL FIRST LTD v 1237007 ALBERTA LTD, 2014 ABQB 288 (BORROWS J) Rule 8.7 (Confirmation of Trial Date)

In this Application, the Plaintiffs sought an adjournment of Trial, and the Defendants resisted. Two Actions were scheduled to be tried together during an eight day Trial starting on May 20, 2014. The Plaintiffs in both actions sought an adjournment, despite the fact that a Confirmation of Trial Date Form had already been submitted pursuant to Rule 8.7. This Application was heard 12 days before the Trial was scheduled to commence. The reason that the Plaintiffs sought an adjournment was to prepare an expert rebuttal report.

Several months earlier, the parties had submitted a Form 39 Confirmation of Trial Date, notwithstanding the fact that the requirements of Part 5 Division 2 had yet not been completed. The form stated:

> … we are ready to proceed with the trial on the scheduled date of May 20, 2014 save for the requirements set out in Part 5, Division 2 of the *Alberta Rules of Court*. However, counsels *(sic)* for the Plaintiffs and Defendants, in both actions above, agree to proceed with the scheduled trial date and permit the procedure set out in Part 5, Division 2 of the *Alberta Rules of Court* to be conducted in the interim period prior to the scheduled trial date…

Approximately 3 weeks before Trial, the Plaintiffs received the Defendant's expert's report.

The Plaintiffs claimed that the report had been expected months earlier, and that it was clear from the report that a rebuttal report would be needed, and the Plaintiffs would not have enough time to prepare one.

Counsel for the Defendants stated that the Plaintiffs knew that an expert's report was coming, and did nothing until after the report was received to suggest that the delay was a problem. The Defendants submitted that the Plaintiffs should be forced to go ahead with the Trial.

After reviewing the circumstances, Burrows J. determined that justice required the Plaintiffs have the chance to marshal evidence to respond to the expert's report they had received, and that the time remaining before the scheduled Trial date was not sufficient for that purpose. He noted that the Defendants would suffer little prejudice as a result of the delay.

Borrows J. reprimanded counsel for both parties for failing to be ready for Trial despite submitting a Confirmation of Trial Date Form. He stated that normally "it is reasonable for court officers to schedule scarce judicial resources in reliance on lawyers' representations" and normally "lawyers do not make such commitments unless they are sure they can meet them". Borrows J. further noted that the situation was a frustrating one, since "[o]ther litigants who might have secured a slot on the crowded court schedule will continue to wait".

MURPHY v CAHILL, 2014 ABQB 274 (VEIT J) Rule 9.2 (Preparation of Judgments and Orders)

The Applicant applied to settle the minutes of a previous Order resulting from a hearing in which the Respondent was represented by two law firms. In the previous hearing, the Respondent's first law firm was seeking redaction from the proceedings of materials filed in an Irish Court. The Respondent's second law firm was seeking leave to have the Respondent examined by way of written interrogatories rather than in person.

On receiving the Decision from the previous hearing, the Applicant's lawyer drafted the proposed form of Order for Costs, which included double Costs on the basis of a Calderbank letter. The Respondent's law firm dealing with the redaction Application promptly consented to the Order. The law firm dealing with the interrogatories Application did not provide a response. Pursuant to Rule 9.2(2)(c), the Applicant's lawyer waited 10 days before sending the proposed form of Order to the Court for signature.

The firm dealing with the interrogatories Application subsequently objected to the Order for Costs. First, the firm argued that because the Applications brought by the first and second law firm were intertwined, there should really be only one set of Costs. Second, the firm argued that the letter the Applicant purported to rely on as a Calderbank offer, could not be properly characterized as a Calderbank letter and therefore should not have attracted double Costs.

The Court held that when determining Costs, it may consider whether any non-privileged settlement discussions should be taken into account. This was the same whether the discussions occurred formally as outlined in the Rules, or informally. The Court held, in this case, that the Applicant was entitled to be paid double Costs for the interrogatories Application.

The Court then reviewed whether there should only be one set of Costs awarded. The Court held that although there was a common objective behind the applications made by the law firms, two separate Applications were made for two separate issues. Each required and deserved separate treatment. Thus, two sets of Costs were warranted.

RICHTER v CHEMERINSKI, 2014 ABQB 322 (VEIT J) Rules 9.14 (Further or Other Order After Judgment or Order Entered), 9.16 (By Whom Applications Are To Be Decided) and 10.52 (Declaration of Civil Contempt)

By way of a Consent Order endorsed by Sanderman J., the Respondent was to construct a roadway across the Applicant's property to provide access to a subdivided parcel of land for farming operations. A dispute arose over the specifications and location of the proposed roadway and the Applicant brought three Applications for Contempt against the Respondent for failure to comply with the Consent Order.

Justice Veit noted that the standard of proof to establish civil contempt is only on a balance of probabilities, but held that the Consent Order was not sufficiently clear, precise and unambiguous to ground an Application for Contempt. The Consent Order lacked sufficient clarity with respect to the location and specifications of the roadway and there was conflicting Affidavit evidence on whether the parties had reached an agreement.

The Respondent cross-applied under Rule 9.14 to vary the Consent Order to approve his proposal of the roadway. Veit J. dismissed the Cross-Application and emphasized that Rule 9.14 could only be invoked to correct a slip or a failure to reflect the intention of the Court when it granted the Order. The Respondent's proposal would have involved a more substantive change to the Consent Order. In any event, Rule 9.16 requires the Judge or Master who granted the original Order to vary it under Rule 9.14. Therefore, such an Application should be made to Sanderman J.

ALBERTA TREASURY BRANCHES v ELABORATE HOMES LTD, 2014 ABQB 350 (NIELSEN J) Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.21 (Service by Electronic Method)

The Defendant condominium developer became insolvent and a Receiver was appointed to market the Defendant's assets and property pursuant to a Receivership Order. One of the secured creditors, Alco Industrial Inc. ("Alco"), held a second mortgage on the condominium in the amount of $1,075,000. The Receiver was advised that the appropriate contact at Alco for communications with respect to the insolvency and related creditor information was the President of the company, and Alco provided the email address for the President. The Receiver served Alco by email with notices relating to the Receiver's status, communications with respect to the receivership and notice of an Order Approving Sale. The President of Alco agreed that he had received the emails but had not opened them since he was unfamiliar with computers. The sale of the Defendant's assets proceeded and Alco ultimately received a sum which was insufficient to pay out the mortgage. Alco sought leave to file a Statement of Claim against the Receiver for gross negligence or wilful misconduct in handling the sale of the Defendant's assets and property.

Nielsen J. considered Rules 9.15 and Rule 11.21 with respect to service via email. Justice Nielsen noted that it was reasonable to infer that whoever provided the email address to the Receiver was not aware that the President of Alco would not access his email; and, it was also reasonable to infer that the President of Alco would not have an email address if he was "totally computer illiterate". Justice Nielsen stated that Rule 11.21 requires that the recipient specifically provide an address, and that there was nothing in the material before the Court to suggest that the Rule's requirements were not met. Justice Nielsen also noted that, if Alco wished to argue that the Order Approving Sale had been obtained without notice, Alco could have applied pursuant to Rule 9.15 to vary or discharge the Judgment or Order due to lack of notice. His Lordship observed that an Application under Rule 9.15 must be made within 20 days after the service of Order on the Applicant, or the date the Order first came to the Applicant's attention, whichever occurred first. Justice Nielsen commented that Alco was well aware of the Application for the Order Approving Sale and took no timely steps to set it aside upon becoming aware of it. Justice Nielsen also noted, that electronic service is a reflection of the practical realties in the area of bankruptcy and insolvency. Justice Nielsen held that there was no factual basis to suggest that the Receiver was either grossly negligent or that it willfully misconducted itself in effecting service of the documents by email. Alco's Application for leave to file the Statement of Claim against the Receiver was dismissed.

BYRON v BYRON, 2014 ABQB 240 (JONES J) Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant sought an Order declaring an Order made without notice, granted Justice Wong of the Supreme Court of British Columbia (the "Wong Order") was unenforceable; an Order for abridgment of the time for service; and Costs. The Application was dismissed, and the Applicant sought a stay of enforcement of Justice Jones' Decision until it could be appealed. The Decision to deny the Applicant's request for a stay pending an Appeal (the "Jones Decision") was to permit the Wong Order to be given effect, which meant the parties' two children would be returned to the care of the Respondent on Vancouver Island. The Court of Appeal ultimately dismissed the Applicant's request for a stay of the Jones Decision. The Wong Order was implemented and the parties' two children returned to the care of the Respondent.

In considering a Costs award, Jones J. noted Rules 10.29, 10.29(a), 10.31, 10.33, and 10.33(1). The Respondent was successful and sought full indemnity of solicitor and own client Costs. She provided a draft Bill of Costs which reflected time charges of $14,805.36, disbursements of $195.80, and "other charges" of $2,047.57, which included travel costs. The Respondent sought full indemnity alleging that the Applicant: wrongfully and without prior notice refused to return the children; should have known he would fail in his attempt to have the Wong Order declared unenforceable; and was guilty of blameworthy conduct including unnecessary delay of resolution of the issues and improper allegations that the children's needs were not being met and their safety was at risk. The Applicant believed that no Costs should be awarded, but if awarded, they should be limited to $500 with reference to item 7(1) of Schedule C of the Rules.

Jones J. awarded Costs to the Applicant in the amount of $13,055.85. Justice Jones reasoned that he was not prepared to go so far as to find that the Applicant was guilty of positive misconduct and was therefore not prepared to order Costs on a full indemnity basis, but found the circumstances appropriate to depart from Column 1. The matter was complex, involved jurisdictional issues and the interaction of legislation together with lengthy argument and discussion of the tests to be applied. The Applicant acted inappropriately in retaining custody of the children beyond their expected return date, in contravention of the understanding historically existing between the parties. Further, the Applicant's actions required the Respondent to incur legal and other expenses, on short notice, and necessitated the participation of the Respondent's British Columbia lawyer on very short notice and who was invaluable to laying the groundwork for an informed decision in the best interests of the children.

SNIHUR v GRACE, 2014 ABQB 268 (VEIT J) Rules 10.29(1) (General Rule for Payment of Litigation Costs) and 10.31(6) (When Costs Award May be Made)

The Plaintiff sued certain members of the Edmonton Police Service, the Edmonton Remand Centre and certain of its employees for damages she alleged she suffered as a result of wrongful arrest and imprisonment. The Plaintiff had chosen a psychiatrist as an expert witness who would not provide a written opinion prior to trial in December of 2013. As a result, the Court required the psychiatrist to testify in chief and then adjourned the Trial for several months to allow the Defendants to decide how to cross-examine that witness and whether to call experts of their own. The Court ordered the Plaintiff to pay $4,750 in thrown-away Costs in connection with the lengthy adjournment.

The issue here was whether those Costs already ordered should be paid forthwith, as required by Rule 10.29(1) and as requested by the Defendants; or whether the Court should, because the Plaintiff had not abused the process and because a requirement to pay Costs forthwith might constitute an impediment to her ability to continue the Action, exercise its discretion to award Costs in the cause.

Justice Veit determined that the Costs should be paid forthwith. Justice Veit observed that Alberta has, since the decision in *Anderson Preece & Associations Inc v Dominion Appraisal Group Inc*, 2000 ABQB 979, adopted a "pay-as-you-go" Costs regime; therefore, even assuming for the purpose of the Application that Rule 10.31(6) had not restricted the Court's discretion to deviate from Rule 10.29(1), in order to make access to the Court system as predictable as possible, the Court should depart from the adopted Costs regime only if such a departure is justified by the particular circumstances of a case. In determining whether the Court should exercise its discretion to depart from Rule 10.29(1), Veit J. provided five reasons that militate against interference with the standard rule that interlocutory Cost awards should be paid forthwith. Three of the reasons have general application, and two are particular to the facts of the case:

1. The Rules have changed since *Anderson Preece*, which held: for the policy reasons that have been well explored in the case law, the standard, or general, or default interlocutory Costs rule is now "pay-as-you-go";

2. Access to the Courts should be made as predictable as possible; therefore, standard rules should only

be displaced where the circumstances of the case establish that it would be unfair or inappropriate to apply the general rule;

3. Thrown-away Costs are, by their very nature, Costs which should not have had to be incurred; it doesn't matter if the party who has wasted money on those steps eventually wins or loses the lawsuit. Therefore, there is no point in waiting to pay for those Costs until the final result of the lawsuit is known;

4. While it is true that in this particular case, the Plaintiff did what she could to alleviate or reduce the prejudice caused to the Defendants by her choice of expert, that effort on her part was already recognized in the substantive award of Costs by reducing the amount of Costs that would otherwise have been awarded; and

5. The Plaintiff, who is the party who asks the court to depart from the rules and who therefore, bears the burden of convincing the court that such a departure is justified, had not provided any evidence to suggest that the obligation to pay the Costs forthwith would constitute an impediment to the continuation of her lawsuit.

Under the circumstances, Veit J. ordered that the Costs be paid forthwith by the Plaintiff.

KENT v POSTMEDIA NETWORK INC, 2014 ABQB 343 (SULLIVAN J) Rule 10.52 (Declaration of Civil Contempt)

The Plaintiff obtained an Order which stated, *inter alia*, that the Defendant, Postmedia, would preserve for disclosure and production all relevant and material records related to the Action. For a short period of time, Postmedia "automatically" deleted 30 day old logs, which occurred in their system as a matter of routine. The evidence demonstrated, however, that the records were available from another source.

The Plaintiff sought an Order declaring Postmedia to be in civil contempt. Sullivan J. reviewed Rule 10.52, and stated that, in order to make a finding of civil contempt, the Court must first find "(1) an existing requirement of the Court; (2) notice of the requirement to the person alleged to be in contempt; and (3) an intentional act (or failure to act) that constitutes a breach of the requirement".

Upon reviewing the facts, Sullivan J. concluded that the Defendants acted "reasonably and with diligence to carry out the Order" and that there had "not been any intentional destruction of material upon which [Sullivan J.] could make a finding of contempt".

NORFOLK SOUTHERN RAILWAY COMPANY v CROWSHAW, 2014 ABQB 273 (NIXON J) Rule 11.25 (Real and Substantial Connection)

On July 25, 2008, the US Plaintiff obtained Default Judgment ("Default Judgment 1") in Pennsylvania against the Defendant's companies for the balance of an unpaid purchase contract for railway equipment (the "Debt"). Default Judgment 1 was endorsed by the Alberta Court on September 10, 2008. During the examination in aid of execution, it was discovered that the Defendant had used the funds from the resale of the railway equipment for personal investments and to pay gambling debts.

In 2011, the Plaintiff obtained Default Judgment ("Default Judgment 2") in Pennsylvania against the Defendant personally for the Debt, alleging fraud, misappropriation and conversion. The Defendant had been automatically assigned into bankruptcy prior to the Plaintiff obtaining the Default Judgment 2. The Court considered whether Default Judgment 2 was enforceable in Alberta and whether it survived the bankruptcy of the Defendant.

The first stage of assessing whether a foreign Judgment is enforceable in Alberta is whether (i) there is a real and substantial connection between the foreign jurisdiction and either the subject matter of the litigation or a party to it, or (ii) the party attorned to the foreign jurisdiction.

Nixon J. held that a series of emails from the Defendant indicating an intent to defend the Claim in Pennsylvania

were insufficient to demonstrate attornment. Notice of intent to defend is not binding on a Defendant, especially when he has not yet retained counsel. The Court went on to consider whether there was a real and substantial connection to the jurisdiction of Pennsylvania.

The Court reviewed a number of decisions governing the test for a real and substantial connection, and also referred to the factors listed at Rule 11.25(3) which establish a real and substantial connection for service *ex juris*. The Court held that there was insufficient evidence to establish that the Defendant or his companies carried on business in Pennsylvania, such that a presumptive connecting factor existed. Moreover, the actions upon which Default Judgment 2 was based did not occur in Pennsylvania; the conversion and misappropriation of funds alleged in order to pierce the corporate veil, occurred in Alberta. Furthermore, it was not sufficient to establish a real and substantial connection where the damage occurred in the jurisdiction but the alleged wrongdoing occurred outside of the jurisdiction.

The Court further held that Default Judgment 2 did not survive bankruptcy because there was no clear finding that the Defendant obtained the property by deceit.

BANSAL v FERRARA PAN CANDY CO INC, 2014 ABQB 384 (VEIT J) Rules 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

The Defendants brought an Application requesting that the Court order that it did not have jurisdiction to deal with the Action. Alternatively, the Defendants argued that, even if the Court had jurisdiction, Alberta was not the most appropriate forum.

The Plaintiffs took the position that because one of the Defendants had taken additional steps in Alberta, including having the original lawyer removed, the Defendants had attorned to Alberta. The Court noted that, although Rule 11.31 stated what is not required to constitute an attornment to the jurisdiction, it did not state what actions constitute attornment. The law firm representing the Plaintiffs had previously acted for the Defendants and potentially had confidential information. Thus, the Court held that making an Application to remove the law firm did not mean that the Defendants had attorned to the jurisdiction.

The Court then dealt with whether Alberta had original jurisdiction as a result of a contract. Justice Veit agreed with the Defendants that Rule 11.25(3) provided some guidance as to what constituted a real and substantial connection. The Court (following *Club Resorts Ltd v Van Breda*, 2012 SCC 17) noted that there were four presumptive connecting factors in contract cases in Alberta:

1. The defendant is resident in Alberta;

2. The defendant carries on business in Alberta;

3. A contract or alleged contract is made, performed or breached in Alberta; and,

4. A tort connected with the contract was committed in Alberta.

Because the Plaintiffs alleged that a contract was made in Alberta, the Court had jurisdiction to hear the matter in Alberta. However, based on the facts the Court stated five reasons why Alberta was not the most appropriate jurisdiction:

1. The corporate Defendant 1163196 Ontario Inc. and the individual Defendant Sarbjit Singh were residents and would have committed the conspiracy in Ontario. Furthermore, Illinois could also have been the original jurisdiction because the Defendants Ferrara Pan Candy Co. Inc. and Salvatore Ferrara II were residents there;

2. Many of the contractual relationships occurred outside of Alberta;

3. Only one of the Plaintiffs was a resident of Alberta. The corporate Plaintiff was not registered in Alberta and its status as an extra-provincial corporation could not be revived;

4. The Statement of Claim demonstrated that a major part of the Plaintiffs' claim centred on the alleged conspiracy to cause economic harm. None of the conspiracies were committed in Alberta; and

5. The issue of whether the Plaintiffs would lose judicial advantage if they were deprived of an Alberta action was not fully explored at the hearing.

In summary, the Court held that although Alberta had jurisdiction, Ontario and Illinois had greater substantial connection to the dispute than Alberta.

GULEVICH v MILLER, 2014 ABQB 377 (SULLIVAN J)
Rules 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

The Defendant brought an Application seeking an Order pursuant to Rule 11.31 setting aside service of the Plaintiffs' Statement of Claim, as well as a direction that the Court lacked jurisdiction to entertain the Action. The Plaintiff had filed a Statement of Claim seeking damages against Dr. Miller, a radiologist in Ontario who failed to diagnose the Plaintiff's malignant brain tumour. The Plaintiff filed an Amended Statement of Claim that asserted grounds for service outside of Alberta, namely that her claim was governed by the law of Alberta and related to a tort committed in Alberta.

The sole issue before Justice Sullivan was whether the Action should be allowed to proceed in Alberta. The relevant question was whether the requirements for service *ex juris* under the Alberta Rules of Court were met. Rule 11.25 governs the service of commencement documents *ex juris*. A commencement document may be served outside Alberta but within Canada only if (a) a real and substantial connection exists between Alberta and the facts on which a claim on the action is based, and (b) a commencement document discloses the facts in support and specifically refers to the grounds for service of the document outside Alberta and in Canada. Pursuant to Rule 11.25(3)(c) and (d) other instances where a real and substantial connection are presumed to exist include where the claim is governed by the law of Alberta, or relates to a tort committed in Alberta.

The Plaintiffs failed to establish an arguable case that their cause of action was sufficiently connected to Alberta for the Court to assume jurisdiction. Accordingly, the Court lacked jurisdiction to entertain the Plaintiffs' Action, and Justice Sullivan set aside the service *ex juris* of the Statement of Claim pursuant to Rule 11.31(1)(a).