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

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GREENIDGE V ALLSTATE INSURANCE COMPANY, 2018 ABQB 266 (NIELSEN J)
Rules 1.1 (What These Rules Do), 5.41 (Medical Examinations), 5.42 (Options During Medical Examination) and 7.1 (Application to Resolve Particular Questions or Issues)

The Parties attended before Nielsen J. for the Trial of an issue pursuant to Rule 7.1; specifically whether the Defendant had breached the terms of an insurance policy. Pursuant to the insurance policy, the Defendant made arrangements for an independent medical evaluation of the Plaintiff. The Plaintiff wanted the medical examination to be recorded by video, but the independent medical examiner would not allow video to be taken during the medical evaluation. The Plaintiff wrote to the Defendant and stated that she wished to either have the medical evaluation recorded by video, or attend before another medical practitioner who would allow the examination to be video recorded. The Defendant declined both of these options and denied all further benefits to the Plaintiff pursuant to the insurance policy.

Nielsen J. referred to Rule 5.41, which provides that the parties may agree that the mental or physical condition of a person is at issue in an action and may also agree on a health care professional to conduct a medical examination; and Rule 5.42(1)(b), which stipulates that unless otherwise ordered by the Court, a person who is to be the subject of a medical examination by a health care professional may elect to video tape the medical examination.

The Plaintiff argued that Rule 5.42(1)(b) should be incorporated into the insurance policy. Nielsen J. stated that pursuant to Rule 1.1, the Rules govern the practice and procedure in relation to actions in the Court of Queen's Bench. The Defendant sought the medical examination in the context of the Plaintiff's Claim pursuant to the insurance policy, and not in the context of litigation before the Court. Nielsen J. noted that there was no evidence to indicate that the Defendant and Plaintiff had intended the Rules to apply to their contractual arrangement. In the result, Nielsen J. held that the Defendant had not breached the terms of the insurance policy when it discontinued coverage for further benefits pursuant to the policy.

NORTH AMERICAN POLYPROPYLENE ULC V WILLIAMS CANADA PROPYLENE ULC, 2018 ABQB 281 (EAMON J)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules), 4.22 (Considerations for Security for Costs Order) and 13.18 (Types of Affidavit)

The Defendants applied for Security for Costs as against the Plaintiff, relying on s. 254 of the *Business Corporations Act*, RSA 2000, c B-9. Eamon J. noted that Security for Costs may be obtained against a corporate entity pursuant to s. 254 of the *Business Corporations Act*, or under Rule 4.22. There was little evidence before the Court regarding the Plaintiff's ability to pay Costs. The Defendants' witness deposed that the Plaintiff held no exigible assets in Alberta and would be unable to pay Costs if awarded. Eamon J. held that bald statements of belief without proper grounds have no evidentiary value pursuant to Rule 13.18.

Justice Eamon considered Rule 4.22, and observed that the Court is permitted to make an Order for Security for Costs where it is just and reasonable to do so. Rule 4.22 is directed at all litigants, natural or artificial (such as corporations, whose shareholders may attempt to litigate with impunity to Costs). The Court's powers to manage litigation can only be achieved if the Rules govern all persons who come to the Court for resolution of a Claim as set out in Rule 1.1(2). Rule 4.22 should be read in light of the foundational Rules, in particular Rule 1.2(2)(d) which encourages "open and timely dialogue" about material issues. The Respondent to a Security for Costs Application may be expected to inform the Court about its ability to pay.

Eamon J. determined that uncertainty arising from a party's failure to engage in an open dialogue about ability to pay Costs may be a component of justice and reasonableness under Rule 4.22. Eamon J. considered the applicable evidentiary and other standards in s. 254 of the *Business Corporations Act* and Rule 4.22, and held that "impecunious companies should not receive the same generous treatment as impecunious individuals". His Lordship observed that the price of incorporation is not a "bonus of immunity from R 4.22". The Defendants failed to meet the more stringent evidentiary burden under s. 254, and as such, the Application was dismissed.

CJD V RIJ, 2018 ABQB 287 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules), 10.49 (Penalty for Contravening Rules) and 10.52 (Declaration of Civil Contempt)

The Applicant, CJD, sought a Declaration of civil contempt as against the Respondent, RIJ for failing to comply with an Order of the Court in a high conflict family dispute. RIJ resisted the Application for contempt, and submitted that he had not received notice of the prior Application or the Order as he no longer had access to the email address which was being used for service. Graesser J. considered Rules 10.52(3)(a)(iii) and (iv) which provide that a Court may declare a party to be in civil contempt if the party, without reasonable excuse, does not comply with an Order which the party had actual knowledge of. Graesser J. observed that obtaining a declaration for civil contempt had become more challenging following the Supreme Court's Decision in *Carey v Laiken*, 2015 SCC 17. His Lordship found that, while it was tempting to impute wilful blindness

of the Order on the Respondent, he did not have actual knowledge of the Order. Graesser J. concluded that the "Order" was really a Case Management direction and was not a formal Order within the meaning of Rule 10.52.

Graesser J. referred to Rule 1.2(2)(e) which sets out the purposes of the Rules, including that they are meant to be used as a credible system of remedies and sanctions to enforce Rules, Orders, and Judgments. Justice Graesser noted that it was highly likely that the Respondent was still checking the email account in question, and that he knew what was required from him following the procedural direction that came from Case Management.

Graesser J. considered Rule 10.49(1) which provides that a Court may order a party to pay a penalty to the Court if the party contravenes or fails to comply with the Rules, a practice note, or a direction of the Court without adequate excuse and stated that the Rule must be read in conjunction with the foundational Rules. Justice Graesser noted that RIJ's Affidavit in response to the Application made reference to several emails to and from the Court. Graesser J. held that the Respondent had evaded service by choosing to disregard an email account he had provided for Court purposes, and as a result, RIJ had failed to comply with the Court's direction. Justice Graesser ordered that RIJ pay a penalty to the Court of $1,000, as well as Costs in the amount of $1,500 to CJD.

IVKOVIC V TINGLE MERRETT LLP, 2018 ABQB 308 (HALL J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 8.7 (Confirmation of Trial Date)

The Defendant, Amden Investment Ltd. had applied to a Master to dismiss the Respondent/Plaintiff's claim for delay. That Application was dismissed, and the Defendant appealed. At the same time, the Defendant applied for an Order for Summary Dismissal. The Plaintiff, Mr. Ivkovic, cross applied for Summary Judgment. Hall J. considered Rule 4.33(2)(b) which provides that where three or more years have passed without a significant advance in the action, the Court must dismiss the action on application unless the applicant has participated in proceedings to the extent that the action should continue. Hall J. considered whether the Application for Summary Judgment constituted a step taken by the Applicant that would warrant the Action continuing. Hall J. determined that the Application for Summary Dismissal and the Cross-Application for Summary Dismissal would be adjourned pending resolution of the Appeal of the Master's Decision.

The Respondent argued that the filing of a Form 37 significantly advanced the Action, but the Appellant argued that without the completion of a Form 39 confirming the Trial date, the step was incomplete and nothing had been accomplished. Referring to the Respondent's arguments with respect to Rules 1.2 and 8.7(1) and (3), jurisprudence which established that the Plaintiff has the onus of moving the litigation forward, and the fact that commencing a step which is not completed does not materially advance the Action, Hall J. held that filing the Form 37 did not significantly advance the Action without filing the Form 39. In the result, there was no significant advance of the Action. Hall J. noted that although the Respondent had filed a Summary Judgment Application in 2014, it had not proceeded. Because this step was not complete, the filing of the Summary Judgment Application did not significantly advance the Action.

Justice Hall noted that "Rule 4.33 does not permit excuses" and that the Rule is mandatory. Hall J. also noted that there was no evidence that the Appellant had obstructed or stalled the Action; as such, Hall J. granted the Appeal pursuant to Rule 4.33 and dismissed the Action.

Hall J. noted that the Appellant had also argued that the Action ought to be dismissed under Rule 4.31, but noted that a discussion regarding Rule 4.31 was not necessary, as the Action had been dismissed pursuant to Rule 4.33.

ALBERTA (MINISTER OF JUSTICE AND ATTORNEY GENERAL) V MCNAIR, 2018 ABQB 314 (HUNT MCDONALD J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Attorney General had commenced an Action for forfeiture of the Applicant's residence pursuant to the *Victim Restitution and Compensation Payment Act*, RSA 2001, c V-3.5 ("VRCPA"). A restraint Order was granted on May 6, 2013. Questioning was completed in September 2014, and in June 2017 the matter was set for a disposal hearing to be heard in June 2018. The Defendant, McNair, applied to have the Action dismissed pursuant to either Rule 4.31 or 4.33. The Application was heard on December 15, 2017.

Hunt McDonald J. rejected the Attorney General's argument that Crown Actions brought pursuant to the VRCPA were not subject to the Rules, noting that s. 51 of the VRCPA expressly states that the Rules apply. Accordingly, this Action was subject to Rules 4.31, 4.33, and foundational Rule 1.2. Hunt McDonald J. emphasized that Rule 1.2 expressly provides that the Rules are to serve as a means for claims to be resolved in a timely way.

Pursuant to Rule 4.31, Hunt McDonald J. stated that the assessment of inordinate and inexcusable delay is context dependent, which considers what a "'reasonable litigant acting in a reasonably diligent manner' would have done in comparable conditions". Hunt McDonald J. rejected the Respondent's submission that a delay is generally not considered inordinate until after 10 years of litigation has passed, holding that there is no minimum time frame for an application under Rule 4.31. In this Application, Hunt McDonald J. held that the forfeiture remedy provided by the VRCPA was an extraordinary one, and that the scheme of the legislation contemplated "disposal hearings to be heard soon after a restraint Order is granted". Hunt McDonald J. held that the delay was inordinate in the context of this case, and that the Respondent had not rebutted the presumption of prejudice. Further, Hunt McDonald J. held that the Applicant demonstrated actual prejudice due to the impact the restraint Order had on his ability to rely on his home equity to meet financial obligations while his income fluctuated.

Hunt McDonald J. noted that the inquiry under Rule 4.33 is whether there has been a significant advance in a three-year period, which is assessed using the functional approach. Hunt McDonald J. found that the scheduling of the matter for Trial in June 2017 "signalled the parties' intention to move the action forward to resolution", and noted that such a step has often been acknowledged as a significant advance in an Action. No Order pursuant to Rule 4.33 was therefore appropriate. Hunt McDonald J. dismissed the Action on the basis of inordinate delay, pursuant to Rule 4.31.

BOLAND V CAREW, 2018 ABQB 317 (SULYMA J)
Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay) and 12.2 (What This Part Applies to)

The Applicant, Mr. Carew, applied to dismiss an Action for divorce and division of matrimonial property (the "Action") for delay under Rule 4.33. The Application was in response to an Application for child support brought by the Respondent, Ms. Boland (the "Support Application"). The initial pleadings in the Action were filed in 2010. Mr. Carew submitted that the last significant advance in the Action was the filing of the Statement of Defence and Counterclaim in February of 2010.

The Respondent argued that, around the time the initial pleadings were filed, the Parties had arrived at an agreement without the necessity of further Court involvement. Both Parties had conducted themselves in accordance with that agreement, which covered the payment of child support, until July of 2017. It was at that point that Mr. Carew unilaterally stopped abiding by the agreement. Ms. Boland asserted that, while no formal steps had been taken from February 2010 until the Support Application, the steps taken by the Parties outside of Court were in line with Rule 1.2(2)(c), which encourages parties to resolve a claim themselves, by agreement, as early as practicable.

Sulyma J. reviewed prior authority and noted that there is no limitation period for a divorce Action or a support Application under the *Divorce Act*, RSC 1985, c 3. Justice Sulyma noted that while Rule 4.33 is applicable to divorce proceedings pursuant to Rule 12.2(2), a gap in the law may arise in certain circumstances since a divorce Action which is dismissed for long delay leaves the parties married and a plaintiff may commence a second Action which would only lead to further delays.

Justice Sulyma considered Rule 4.33(2), and following the functional approach concluded that while there were no formal litigation steps taken to materially advance the Action, Mr. Carew had continued to participate in the Action and had otherwise acquiesced in the delay. The Application to dismiss for delay was therefore dismissed.

1664992 ALBERTA LTD V PADOAN, 2018 ABQB 348 (LEE J)
Rules 1.2 (Purpose and Intention of These Rules), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Plaintiffs appealed a Master's Decision refusing to permit the addition of certain individual realtors as Defendants. The Action involved a dispute arising from an asset purchase agreement between the Plaintiffs as the purchasers, and the Defendants as the vendors (the "APA"). The realtors had assisted both the Plaintiffs and the Defendants with the transaction.

Justice Lee referred to Rules 1.2, 3.65, and 3.74, and reviewed leading Alberta jurisprudence that sets out the classic test for amending pleadings: generally, a pleading may be amended, no matter how careless or late the party seeking the amendment, subject to four major exceptions: (a) the amendment would cause serious prejudice to the opposing party, not compensable in costs; (b) the amendment requested is hopeless; (c) unless permitted by statute, the amendments seeks to add a new party or new cause of action after the expiry of a limitation period; and (d) there is an element of bad faith associated with the failure to plead the amendment in the first instance. Justice Lee noted that hopeless amendments are not permitted and an amendment will be hopeless where it does not disclose a cause of action, the amendment is inconsistent with the record, or if it is clear and obvious that there is no triable issue.

Lee J. reviewed the record and observed that the Plaintiffs had provided multiple Affidavits, and that the evidence in the most recent Affidavit conflicted with the Plaintiffs' previous evidence. After reviewing the APA, Justice Lee found that the terms of the APA prevented a finding of liability against the realtors and thus the amendments were hopeless. Additionally, the amendments were limitations barred. For these reasons, Lee J. dismissed the Appeal with Costs.

1664992 ALBERTA LTD V 1260055 ALBERTA LTD, 2018 ABQB 367 (LEE J)
Rules 1.2 (Purpose and Intention of These Rules), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 13.7 (Pleadings: Other Requirements)

The Plaintiffs appealed a Master's partial refusal to allow an amendment to their pleadings. The proposed amendments added claims of negligent or fraudulent misrepresentation related to the auditing of financial statements for nightclubs purchased by the Plaintiffs.

Lee J. considered Rule 3.65, which allows pleadings to be amended, and Rule 13.7, which requires that pleadings must set out particulars of fraud and misrepresentation. Referring to authority, Justice Lee set out the law with respect to amending pleadings:

> a. An amendment should be allowed if it can be made without prejudice or injustice to the opposing party, it raises a triable issue, it is not embarrassing, it is pled with particularity, and there is some evidence to support any new facts of substance alleged.
>
> b. An amendment will be refused if:
>
> > i. it will create prejudice that can't be compensated by costs or other measures;

ii. it is hopeless, bound to fail on the merits, there is no genuine issue for trial, it would not survive a summary judgment application;

iii. it does not disclose a cause of action;

iv. it would have been struck out in the original pleading as vexatious, embarrassing, an abuse or process or otherwise improper; or

v. a limitation period has passed.

c. Amendments must be pled with particularity. Evidence is required in support of substantive amendments.

d. There is a general rule against amending to allege fraud. Significant evidence is required to show that "exceptional circumstances" or "good grounds" exist, and evidence of intent is required.

Lee J. held that the amendments would prejudice the Respondents, and that the amendments were hopeless. Lee J. held that the Plaintiffs did not provide adequate particulars of the alleged negligent and fraudulent misrepresentation as the particulars of key facts were missing and the only evidence of the misrepresentation was in an Affidavit without any other supporting evidence. The Affidavit did not meet the standard of "significant evidence" required to allow an amendment to allege fraud. Finally, Lee J. found that the amendments were limitations barred, claims did not have any chance of success, did not raise an issue that genuinely required a Trial, and would not survive Summary Judgment. The Appeal was dismissed.

CARON V CANADIAN ENERGY INC, 2018 ABQB 394 (GRAESSER J)
Rule 1.2 (Purpose and Intention of These Rules) and Schedule C

The Plaintiffs abandoned their Action against the Defendants. The parties were unable to agree to the amount of Costs that the Defendants were entitled to. The individual Plaintiff maintained that party and party Costs based on Schedule C were appropriate. The Defendants argued for solicitor and client Costs.

Graesser J. noted that it has become common for successful parties to seek solicitor and client Costs, in part perhaps because Schedule C Costs have not been updated since the year 2000, and have not kept up with the rate of inflation. However, unless a party is entitled to such Costs pursuant to a statute or contract, Graesser J. noted there must be "exceptional circumstances" to award solicitor and client Costs. Justice Graesser referenced Rule 1.2, stating that a Court's exercise of discretion when granting a remedy or imposing sanctions must be "proportional to the reason for granting or imposing it".

Graesser J. held that this was not a case where the award of solicitor and client Costs was justified. Unlike cases where solicitor and client Costs were justified because of a failed attempt to impugn a witness' honesty or integrity, there were no allegations pertaining to honesty and integrity in this case, and the "litigation misconduct" did not rise to the level necessary to "push the exercise of discretion" to award solicitor and client Costs.

Graesser J. awarded Costs assessed on the basis of three times Column 5 of Schedule C. In addition, to account for inflation, Grasser J. held that the basic column numbers listed therein should be increased to 135 percent.

330626 ALBERTA LTD V HO & LAVIOLETTE ENGINEERING LTD, 2018 ABQB 398 (FEEHAN J)
Rules 1.2 (Purpose and Intention of These Rules), 3.46 (Third Party Defendant Becomes Party), 3.55 (Application of Rules to Third Party Claims), 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

In an Action relating to a number of roof collapses at a grocery store in Whitecourt, Alberta, four Defendants: Ho & Laviolette, Cameron & Associates, Gulf & Pacific, and Johnson (the "Moving Defendants"), applied for dismissal of the Action against them under Rule 4.31 (the "Prejudice Application") and under Rule 4.33 (the "Delay Application").

Justice Feehan noted that under the "standstill" provision of Rule 4.33(5), if the parties agree in writing to a suspension, the three year limitation period under Rule 4.33(2) does not include the agreed period. With respect to the Delay Application, Justice Feehan found that an exchange of correspondence between the Parties in August of 2016 resulted in the Moving Defendants and the Plaintiff entering into a "standstill agreement" pursuant to Rule 4.33(5). For this reason, the Delay Application was dismissed.

With respect to the Prejudice Application, Justice Feehan explained that, collectively, Rules 1.2(1), 4.1, and 4.2 require parties to be responsible in managing their disputes in a timely and cost-effective manner. Feehan J. found that while the roof collapses at issue had occurred in 2007, the Statement of Claim was not filed until 2009. Thereafter, it took over four years for pleadings to close and an additional five years to file Affidavits of Records. Since no Questioning had yet been commenced, let alone completed, Feehan J. emphasized that potential witnesses would now have to be questioned for the first time on events which occurred over 13 years ago.

Justice Feehan, referring to leading Court of Appeal authority, set out the six criteria for analyzing Applications under Rule 4.31. Applying the six criteria the facts, Feehan J. found that: the Plaintiff had failed to advance the Action to the point on a litigation spectrum that a litigant, acting reasonably, would have attained within the time frame; the delay was inordinate and inexcusable; the delay impaired important interests of the Moving Defendants; the delay was sufficient to establish significant prejudice; and there was no compelling reason not to dismiss the Action. As a result, Justice Feehan dismissed the Action pursuant to Rule 4.31.

The Third Party Defendant, RND Engineering (1997) Ltd. had also applied to dismiss the Action under both Rules 4.31 and 4.33. Feehan J. granted this Application by concluding that the dismissal of the Plaintiff's Claim against the Moving Defendants resulted in the dismissal of all subsequent claims flowing directly from, and dependent on the original Claim, as Rule 3.46 provides that a third party becomes a party to the Action, and Rule 3.55 provides that the Rules apply equally to a third party to the Action.

DRAIN V DRAIN, 2018 ABQB 468 (MASTER MASON) Rules 1.2 (Purpose and Intention of These Rules), 3.26 (Time for Service of Statement of Claim), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.5 (When Affidavit of Records must be Served) and 5.6 (Form and Contents of Affidavit of Records)

The Defendants applied to dismiss the Action against them on the basis of long delay, pursuant to Rules 4.33 and 4.31. The Action, which was commenced in 2009, related to a dispute between four brothers about the distribution of their mother's estate.

Regarding dismissal for long delay pursuant to Rule 4.33, Master Mason explained that any period of three or more years without significant advance in the Action will require dismissal of the Action, unless an exception set out in Rule 4.33(2)(a) or (b) applies. Master Mason further noted that determining whether an Action has been "significantly advanced" requires an assessment of the effect of the steps taken in the Action during the period of the alleged delay. The objectives enumerated in Rule 1.2, including timely litigation, should also be kept in mind. Additionally, even if a step is mandated by the Rules, it should still be assessed using the functional approach to determining whether the Action has been "significantly advanced". Master Mason held that the Action was significantly advanced when one of the Defendants served his Affidavit of Records in May, 2011. Although the Defendants argued that the Affidavit of Records was only served as a matter of housekeeping, Master Mason noted that each party is required to deliver a sworn Affidavit of Records pursuant to Rules 5.5 and 5.6, and that the Affidavit of Records contained a significant number of documents, many of which had not previously been produced.

With respect to dismissal for delay pursuant to Rule 4.31, Master Mason noted that Rule 4.31 is concerned with delay in the proceedings causing prejudice, and not pre-lawsuit

delay. Master Mason noted that in considering Rule 4.31, "delay" refers to a comparison of the non-moving party's progress with the progress that would have been made by a reasonably diligent litigant. Pursuant to Rule 4.31(2), if inordinate and inexcusable delay has been proven, there is a rebuttable presumption of significant prejudice. The Court should consider the length and reason for any delay, and then consider whether significant prejudice resulted from the delay. Master Mason noted that the Action had been ongoing for over 9 years and included periods of 10 months and 31 months of non-activity. The Plaintiff had also taken 10 months to serve the Statement of Claim in the Action, with no explanation. Master Mason concluded that the lengthy periods of inactivity over the course of the Action constituted an inordinate and inexcusable delay.

However, Master Mason concluded that the inordinate and inexcusable delay did not result in significant prejudice to the Defendants. Although one witness had passed away over the course of the litigation, this occurred two years after the commencement of the Action and could not be attributed to the delay. As such, Master Mason dismissed the Application and ordered that the matter should immediately be set for Trial.

PRECISION FOREST INDUSTRIES LTD V EAST PRAIRIE INVESTMENTS CORP, 2018 ABQB 489 (MASTER BIRKETT)
Rules 1.2 (Purpose and Intention of These Rules), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.67 (Close of Pleadings) and 13.6 (Pleadings: General Requirements)

The Defendants applied to amend their Statement of Defence and Counterclaim over 10 years after the close of pleadings and after a Trial had been set. Master Birkett noted that the effect of the amendments would be to add parties to the Action, add a new cause of action, and withdraw the admission of a paragraph in the Plaintiff's Statement of Claim.

Master Birkett noted that Rules 3.62 and 3.65 govern when the Court may allow amendments to pleadings. Further, Rule 1.2 sets out that the Rules should provide a means through which Claims can be resolved in a way that is fair, timely and cost effective, and to identify the real issues in dispute. Master Birkett explained that if there is modest evidence in support of amending a pleading, it may be amended regardless of how careless or late the party seeking the amendment is, unless (a) the amendment would cause serious prejudice to the opposing party that is not compensable by costs; (b) the amendment is hopeless; (c) the amendment seeks to add a new cause of action or party after the expiry of a limitation period (unless permitted by statute); or (d) there was bad faith in not pleading the amendment in the first instance. The decision to allow an amendment is discretionary, and the amount of evidence required to obtain an amendment is low. The party seeking the amendment is not required, for example, to show that it meets the test for Summary Judgment. Master Birkett noted that, although amendments are "relatively easy" to obtain even after the close of pleadings, the passage of time is still relevant to the Court's determination. Merely producing one piece of evidence on each point may not be enough evidence to support an amendment.

Master Birkett assessed the evidence adduced by the Defendants and held that it met the low evidentiary threshold to support the proposed amendments and found that the requested amendment was not hopeless. However, the Plaintiff would suffer serious, non-compensable prejudice if the amendments were allowed since the limitations period to add new Defendants had passed. As a result of the Defendants' delay in seeking to amend, certain relevant and material evidence would be unavailable from third party corporations and the Parties' witnesses would suffer from fading memories regarding the new allegations in the proposed amendments. Master Birkett concluded that withdrawing the admission in the Statement of Defence would result in non-compensable and substantial delay, as well as additional work, which could not be fully compensated by Costs. As such, the Defendants' Application was dismissed.

ANGUS PARTNERSHIP INC V SALVATION ARMY (GOVERNING COUNCIL), 2018 ABCA 206 (MCDONALD, VELDHUIS AND GRECKOL JJA)
Rules 1.2 (Purpose and Intention of These Rules), 6.8 (Questioning Witness Before Hearing) and 7.3 (Summary Judgment)

The Appellants sought Summary Dismissal of a Claim commenced by the Respondents pursuant to Rule 7.3. A Master denied the Summary Dismissal Application, and a Chambers Justice affirmed the Master's decision. The Chambers Justice had determined that there was further material evidence to emerge through *viva voce* evidence and concluded that the Appellant had not presented uncontroverted facts and law which made it highly unlikely that the Respondent would succeed at Trial. The Appellants appealed to the Court of Appeal.

The Court affirmed that the standard of proof on a Summary Dismissal Application is on a balance of probabilities. As such, the Chambers Justice's dismissal of the Summary Dismissal Application because the Appellant had not shown that it was "highly unlikely" that the Respondents would succeed at Trial was an error. Rather, the question was whether, on a balance of probabilities, the Appellant would succeed at Trial.

Additionally, the Court of Appeal held that gaps in the evidence would not necessarily prevent summary disposition. Parties are expected to put their best foot forward for the purpose of an Application for summary disposition. If evidence from third parties was required, procedures were available to obtain the evidence for the Summary Dismissal Application, such as those set out in Rule 6.8.

The Court noted the new culture for Summary Judgment Applications in promoting the pace of litigation and simplifying proceedings pursuant to Rule 1.2. The Appeal was granted.

ANGLIN V ALBERTA (CHIEF ELECTORAL OFFICER), 2018 ABQB 309 (FEEHAN J)
Rules 1.4 (Procedural Orders), 3.14 (Originating Application Evidence (Other Than Judicial Review)), 3.18 (Notice to Obtain Record of Proceedings), 5.2 (When Something is Relevant and Material), 5.33 (Confidentiality and Use of Information), 6.11 (Evidence at Application Hearings), 6.14 (Appeal from Master's Judgment or Order), 7.1 (Application to Resolve Particular Questions or Issues), 7.2 (Application for Judgment), 7.3 (Summary Judgment), 7.4 (Proceedings after Summary Judgment Against Party), 7.5 (Application for Judgment by way of Summary Trial), 7.6 (Response to Application), 7.7 (Application of Other Rules), 7.8 (Objection to Application for Judgment by way of Summary Trial), 7.9 (Decision After Summary Trial), 7.10 (Judge Remains Seized of Action), 7.11 (Order for Trial), 8.17 (Proving Facts), 10.26 (Appeal to Judge), 10.44 (Appeal to Judge) and 14.16 (Filing the Appeal Record – Standard Appeals)

The Respondent in an Appeal, the Chief Electoral Officer, filed an Application requesting direction from the Court regarding the content of a certified record produced under the *Election Act*, RSA 2000, c E-1 (the "*Election Act*") to be filed in response to an Appeal of a decision made under the *Election Act*. The Appellant, Anglin, filed a Cross-Application asking the Court to order significant further production from the Chief Electoral Officer not included in the draft certified record.

Feehan J. considered whether the entire content of the Chief Electoral Officer's investigative file needed to be produced on the Appeal, or if the Chief Electoral Officer was able to redact certain information. Feehan J. determined that in producing a record disclosed in an Affidavit pursuant to Rule 3.14, the Chief Electoral Officer should produce all records which were relied on for the decision being appealed that are relevant and material. Feehan J. held that the Chief Electoral Officer did not need to produce information that was not relevant or material in coming to the decision as defined under Rule 5.2(1).

Anglin advanced a number of procedural arguments on the Cross-Application, submitting that the Court did

not currently have the jurisdiction to determine whether additional documents should be produced on the certified record, as the matter could only be addressed at a Trial or at a Trial of an issue pursuant to Part 7 of the Rules. Feehan J. considered Rules 7.1 to 7.11, which address the resolution of Claims without a full Trial by means of Trial of an issue, Summary Judgment, or Summary Trial. Feehan J. emphasized that, pursuant to Rule 1.4, the Court may determine matters of process and procedure *within* the Action, Application or proceeding before the Court. Justice Feehan also noted that Rules 3.14, 3.18(2), 6.14(4), 10.26(3), 10.44(3) and 14.16(1) dictate the contents of records for the purposes of review or Appeal of an earlier decision, and determined that Part 7 of the Rules and Rule 1.4 allow the Court to determine matters of process and procedure before Trial. Justice Feehan concluded that the Court had the jurisdiction to hear the Application and the Cross Application.

Anglin also argued that the Chief Electoral Officer did not need to be concerned about his duty of confidentiality set out in the *Election Act*, as the directions regarding confidentiality set out in the Rules would impose an implied undertaking on the Chief Electoral Officer. In determining the scope of the Chief Electoral Officer's obligations of confidentiality, Feehan J. referred to Rule 5.33, which provides that information and records disclosed in an Affidavit, in a record referred to in an Affidavit, or in a recorded transcript of Questioning must be treated as confidential and may only be used by the recipient of the information for the purposes of the litigation; Rule 6.11(1)(f), which provides similar provisions with respect to evidence that may be used on an Application before the Court; and Rule 8.17(3), which provides similar provisions with respect to Trial. His Lordship determined that the Rules would not protect the information in the certified record, for as soon as the certified record is filed, it would become public. Further, the Rules would not assist Anglin in obtaining the information that he sought from the Chief Electoral Officer, and the duty of confidentiality set out in the *Election Act* was still in effect.

Justice Feehan determined that the Appeal of a decision is conducted based on the record which was before the decision maker, and the information sought by Anglin was not before the Chief Electoral Officer when the decision was made. Feehan J. dismissed Anglin's Cross-Application with Costs.

WINTER V 4SPORTS & ENTERTAINMENT AG, 2018 ABQB 449 (MASTER SCHLOSSER)
Rules 1.4 (Procedural Orders) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiffs commenced an Action in defamation against five Defendants (the "Alberta Action"). Four of the five Defendants applied to have the Alberta Action struck pursuant to Rule 3.68 as an abuse of process or, alternatively stayed pursuant to Rule 1.4(2)(h) as the basis that Alberta was not the convenient forum.

The Defendants argued that the Claim was an abuse of process because there was ongoing litigation between some of the parties in California (the "California Action"). Master Schlosser found that two of the Defendants were not parties to the California Action and, as a result, had no standing to ask that the Alberta Action be stayed, and dismissed their Application under Rule 3.68. To decide the Rule 3.68 Application made by the Defendants who were parties to the California Action, Master Schlosser reviewed the pleadings in the California Action. Master Schlosser noted that the California Action was for fraud, breach of contract, and similar causes of action unrelated to defamation. While the California Action and the Alberta Action arose from the same relationships and events, the two Actions were, for the most part, based on different causes of action. For this reason, Master Schlosser dismissed the Application to strike the Alberta Action, subject to the Plaintiffs' voluntarily discontinuing the portions of the Alberta Action which overlapped the California Action.

Master Schlosser considered Rule 1.4(2)(h) which governs Applications to challenge jurisdiction and Stays based on *forum non conveniens*. Master Schlosser noted that there is no parallel to former Rule 27, and a Defendant seeking immediately to challenge jurisdiction was unlikely to attorn by doing so, but that the common law made attornment "a risky business". Master Schlosser considered the factors

set out in *Breeden v Black*, 2012 SCC 19, and found that the Plaintiffs resided and carry on business in Alberta and that their reputations were chiefly domiciled in Alberta. Additionally, the corporate Defendant maintained an office in Edmonton and the personal Defendants conducted business in Alberta. Master Schlosser was not persuaded that California was clearly the more appropriate jurisdiction, and thus dismissed the Application to stay the Alberta Action under Rule 1.4.

1920341 ALBERTA LTD V JONSSON, 2018 ABCA 231 (SLATTER JA)
Rules 1.4 (Procedural Orders), 2.27 (Retaining Lawyer for Limited Purposes), 4.22 (Considerations for Security for Costs Order), 11.15 (Service on a Person Providing an Address for Service) and 14.5 (Appeals Only With Permission)

The Plaintiffs commenced an Action against the Defendants (the "1920341 Action"), claiming that an earlier Action issued by the Defendants against the Plaintiffs was an abuse of process (the "Jonsson Action"). The 1920341 Action was struck by a Master in Chambers for disclosing no cause of action. The Plaintiffs appealed the Master's Decision.

The Appeal was adjourned, and counsel for the Plaintiffs subsequently withdrew as counsel and applied for a further adjournment so that the Plaintiff could retain new counsel. A Chambers Justice adjourned the Appeal for one month on the condition that the Plaintiffs post Security for Costs. The Plaintiffs failed to post Security for Costs and no Notice of Change of Representation was filed for the Plaintiffs. On March 23, 2018, a third Chambers Justice refused any further adjournments and struck the Appeal. The Plaintiffs applied for Leave to Appeal the Order relating to posting Security for Costs, and the Order striking the Appeal.

Justice Slatter noted that a limited retainer is permitted by Rule 2.27. Counsel who filed the materials in the Leave Application had described themselves as "counsel for the purpose of filing leave to appeal only" but had provided their own address as the address for service. As such, pursuant to Rule 11.15, the Defendants were entitled to serve their response materials on counsel at that address, as Rule 2.27 does not allow parties to bypass the rules on service.

Slatter J.A. noted that Rule 14.5(1)(b) and (h) were the relevant provisions, but there was no appeal as of right from the type of orders listed in that Rule. Permission to appeal will only be granted if the appeal raises a serious question of general importance and has a reasonable chance of success.

The Plaintiffs proposed to raise two issues on Appeal: that there was a denial of procedural fairness when they were denied a further adjournment; and that the Justice who ordered Security for Costs had not discussed or applied the criteria set out in Rule 4.22. Justice Slatter held that the proposed Appeal related to the way the Justice exercised discretion regarding granting an adjournment, and that Rule 4.22 does not directly apply when Judges and Masters are exercising their discretion to grant procedural Orders pursuant to Rule 1.4. Finally, there was no obvious reason to doubt the correctness of the Master's Decision. Justice Slatter refused to grant the Plaintiffs' Application for Leave to Appeal.

WASHBURN V MARSHALL, 2018 ABQB 301 (JERKE J)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.1 (Rules Govern Court Actions), 3.2 (How to Start an Action) and 10.50 (Costs Imposed on Lawyer)

In a consolidated personal injury Action which followed a boat collision, a passenger of the boat, Mr. Washburn, sued the Estate of the driver Melvin Marshall (the "Estate") as well as the Estate's Personal Representative, Mark Marshall ("Marshall"). Mr. Washburn included allegations and claims against Mr. Scholly, a non-party and prior counsel for the Estate of Melvin Marshall in the consolidated Action. Mr. Washburn also sought costs against Mr. Scholly on a solicitor-client basis. Mr. Scholly made an Application to strike the allegations.

Jerke J. canvassed Rules 3.1 and 3.2 which collectively state that an Action may only be commenced by Statement of Claim against a Defendant or by Originating Application

against a Respondent. Jerke J. referred to Rule 1.5(1)(b) which states that the Court may set aside an Application or proceeding it if does not comply with procedural requirements, and the non-compliance causes prejudice. Applying these Rules, Jerke J. granted the Application to strike. Neither Mr. Scholly nor his firm were properly named as Defendants or Respondents in the Action. Moreover, allowing allegations against Mr. Scholly and his firm to stand would cause prejudice because Mr. Scholly would be forced to defend against the allegations which could compromise his duties of confidentiality to his client.

Jerke J. addressed Mr. Washburn's claim for Costs and noted that Mr. Washburn had included a claim for solicitor-client Costs from the Estate and Personal Representative, as well as their solicitors in his initial Application. Justice Jerke noted that Mr. Washburn was seeking to adjourn the matter of Costs pending a determination of Court proceedings or a Trial in order to see if there was a shortfall and evaluate whether he wanted to pursue the Application against Mr. Scholly. Jerke J. confirmed that Costs may be personally awarded against a lawyer. The basis for such an award is set out in Rule 10.50 which allows the Court to award Costs against a lawyer where the lawyer for a party has engaged in "serious misconduct". Jerke J. referred to recent Supreme Court authority which stated that Costs against a lawyer will only be granted in exceptional cases where the Court has before it a proceeding representing a "serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate…".

Jerke J. dismissed the Application for Costs against Mr. Scholly and found that there was no evidence of serious misconduct on the part of Mr. Scholly which would warrant a Costs award against him or his firm. The allegations were descriptive only of counsel mounting a defence for his client in the usual course.

PERCY V VALUE CREATION INC, 2018 ABCA 189 (SLATTER JA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.2 (How to Start an Action) and 14.9 (Appeals from Several Decisions)

The Respondents, George and Barbara Percy, had applied for permission to Appeal a Decision of the Alberta Energy Regulator. Following the Respondents filing their Application for Permission to Appeal, the Alberta Energy Regulator declined the Respondents' Application to have the Decision reconsidered. The Respondents then amended their Application for Permission to Appeal, seeking permission to appeal both the original Decision of the Alberta Energy Regulator and the subsequent Decision of the Alberta Energy Regulator (which was the Decision not to reconsider the original Decision).

The Applicant, Value Creation Inc. cross applied to strike out the amendment to the original Application for Permission to Appeal, arguing that separate Appeals are required for separate Orders, and that permission to Appeal separate Orders cannot be combined. Slatter J.A. referred to Rule 14.9 which provides that in some circumstances, it is more efficient to combine Appeals. Rule 14.9(c) states that a separate Notice of Appeal must be filed for each Decision that is appealed, except where the Appeal is from a Decision that varies, confirms, explains, or provides for the enforcement of a previous Decision, and the previous Decision is also being appealed. Relying on this Rule, Slatter J.A. held that where one proposed Appeal is about a substantive Decision, and the other proposed Appeal is about an Order refusing to consider the first substantive Decision, there is no practical reason for filing and hearing two Appeals. Therefore, the Application to strike the amendment to the Application for Permission to Appeal was dismissed.

The Applicant had also argued that the time to Appeal the second decision of the Alberta Energy Regulator had now expired, and that the amendment to the Application for Permission to Appeal should be struck on that basis. Slatter J.A. held that this argument did not need to be considered given that the Application had already been

dismissed. Regardless, the Applicant had not shown that it had suffered any prejudice, as there was a clear intention to appeal within the time limit. Slatter J.A. referred to Rules 1.5 and 3.2(6), and held that if there had been an irregularity, striking out the amendment would not have been a proportionate remedy.

CAMPBELL V ALBERTA (CHIEF ELECTORAL OFFICER), 2018 ABQB 248 (FEEHAN J)
Rules 1.7 (Interpreting These Rules), 3.14 (Originating Application Evidence (Other Than Judicial Review)), 3.15 (Originating Application for Judicial Review), 3.18 (Notice to Obtain Record of Proceedings), 3.19 (Sending in Certified Record of Proceedings), 3.20 (Other Circumstances When Record of Proceedings May be Required), 3.24 (Additional Remedies on Judicial Review), 5.2 (When Something is Relevant and Material) and 5.6 (Form and Contents of Affidavit of Records)

Two Applicants, Jarrett Campbell and Jaskaran Sandhu (together, the "Originating Applicants"), brought separate Originating Applications appealing decisions of the Chief Electoral Officer of Alberta (the "Officer") under the *Election Act*, RSA 2000, c E-1 (the "Act"). The Officer applied to the Court for guidance regarding the content of the certified record to be produced by the Officer. Specifically, the Officer sought to redact from its investigative file any information that was private and confidential, and neither relevant nor material to the issue under appeal in the Originating Applications.

Justice Feehan noted that Rules 3.15 through 3.24 provide assistance regarding Originating Applications for Judicial Review, and that the Originating Applicants had made use of a form for a Notice to Obtain Record of Proceedings pursuant to Rule 3.18 despite the fact that the Originating Applications were statutory Appeals, not Applications for Judicial Review. Feehan J. indicated that the Rule applicable to the Originating Applications was Rule 3.14(1)(d).

Justice Feehan reviewed the law with respect to the production of records in litigation, referring to Rules 5.2 and 5.6. Justice Feehan noted the lack of statutory guidance regarding what should be included in a record in a statutory Appeal under the Act and determined that it was appropriate for the Court to apply the general rules of production. Feehan J. applied the general rules of production and held that the Officer could redact the cell phone numbers and email address of the individuals contacted by the investigator, but that the name of the complainant should not be redacted. Justice Feehan further directed the Officer to use discretion to determine whether to redact the names of individuals who were interviewed or investigated, but not the contents of the interviews or investigations. Feehan J. ordered the Officer to revise the record in accordance with the Court's directions and to send it to the Originating Applicants. If the parties continued to disagree, the Court would view the unredacted record and determine what information would be redacted.

Justice Feehan indicated that the result would have been similar by relying on Rules 1.7, and Rules 3.18 to 3.20, by analogy, to the current facts. Feehan J. noted that the Rules would have been modified as required by the duty of confidentiality imposed on the Officer by the Act.

D'ABADIE V HER MAJESTY THE QUEEN, 2018 ABQB 438 (ASHCROFT J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance before the Court), 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and 14.5 (Appeals Only With Permission)

The Applicant's Originating Application was struck under Rule 3.68 ("Application 1") as it was an example of "Organized Pseudolegal Commercial Arguments" ("OPCA") as defined in *Meads v Meads*, 2012 ABQB 571 ("*Meads*"). Ashcroft J. considered the Applicant's liability for Costs, and whether the Applicant should be subject to Court access restrictions. Ashcroft J. noted that the Respondent Crown was "entirely successful" in Application 1, and as such was presumptively entitled to Costs calculated on Schedule C, in accordance with Rule 10.29(1).

Justice Ashcroft also found that the Applicant's Action "was hopeless, conducted for an ulterior motive, and was an

abuse of the Court's processes." In this context, Ashcroft J. held that an elevated Costs award was appropriate pursuant to Rule 10.33. Ashcroft J. noted that elevated Costs are ordered frequently in unsuccessful OPCA litigation, as it is "inherently abusive", and that in many cases, Courts have endorsed the approach in *Meads*, in which the Court held that litigants who are subjected to OPCA strategies should bear minimal or no Costs. Justice Ashcroft further remarked that OPCA litigation has previously attracted a lump sum award of Costs. Adopting this approach, Ashcroft J. found it appropriate to award the Respondent $3,500 in Costs.

Ashcroft J. observed that "the Court's inherent jurisdiction to control its processes provides the authority to implement court access restrictions". Justice Ashcroft noted the relevant indicia of abusive litigation, reviewed jurisprudence on how the Court is to evaluate such indicia, and ultimately held that the "critical question" in considering whether to implement a Court access restriction, is whether the Court anticipates future litigation abuse.

Ashcroft J. found that several of the indicia of abusive litigation applied to the Applicant, and that the Applicant had a "problematic litigation history". Based on this, Ashcroft J. held that "broad court access restrictions" should be placed on the Applicant, and that the Applicant should obtain leave to initiate or continue litigation in Alberta. However, Ashcroft J. held that the Applicant's access to the Court of Appeal should not be restricted and found that Rule 14.5(1)(j) should apply, whereby the Appellant would need to obtain permission to appeal.

Accordingly, Ashcroft J. held that the Applicant was a vexatious litigant and made an Order to that effect. The Order included a prohibition on the Applicant acting as an agent, next friend or McKenzie Friend pursuant to Rules 2.22 and 2.23. Finally, Ashcroft J. directed that the Court would prepare the Order, and pursuant to Rule 9.4(2)(c), directed that the Applicant's approval of the form and content of the Order was not required.

ENMAX CORPORATION V ALBERTA (LABOUR RELATIONS BOARD), 2018 ABQB 431 (HUNT MCDONALD J)
Rule 3.15 (Originating Application for Judicial Review)

In April 2016, the Canadian Union of Public Employees Local 38 ("CUPE 38") and the International Brotherhood of Electrical Workers Local Union 254 (collectively, the "Unions") successfully applied to the Alberta Labour Relations Boards ("ALRB") for a determination that engineers-in-training ("EITs") employed by ENMAX are "employees" under section 1(1) of the *Labour Relations Code*, RSA 2000, c L-1 (the "Original Application").

ENMAX filed an Originating Application for Judicial Review of the Original Application (the "ENMAX Application"). The Unions sought an Order striking the ENMAX Application, or alternatively, summarily dismissing the ENMAX Application on the grounds that ENMAX had failed to comply with Rule 3.15.

The Unions asserted that ENMAX failed to serve the Association of Professional Engineers and Geoscientists of Alberta ("APEGA") and the EITs at ENMAX as required by Rule 3.15. Justice Hunt McDonald considered Rule 3.15 and if the ENMAX Application directly affected APEGA and the EITs. Hunt McDonald J. noted that both the EITs and APEGA had been granted intervenor status in the Original Application and that both parties had a "direct legal interest in the outcome" of the Original Application. ENMAX argued that APEGA and the EITs were not directly affected by the ENMAX Application because both parties only had a limited role in the Original Application and, while not having been formally served with the ENMAX Application, both Parties had knowledge of the general nature of the ENMAX Application but chose not to participate.

Justice Hunt McDonald noted that the limitation period of six months in Rule 3.15 has been strictly applied by the Courts and cannot be extended. The fact that APEGA and the EITs had knowledge of the general nature of the ENMAX Application did not satisfy the mandatory service requirement in Rule 3.15(3). Hunt McDonald J. determined that whether or not formal service would have altered the

interest or participation level of APEGA or the EITs was irrelevant. The strict interpretation of the Rules imposes a mandatory obligation on the Applicant which cannot be waived by an affected party. Hunt McDonald J. concluded that ENMAX had failed to serve APEGA and the EITs as required by Rule 3.15 and that the limitation period had expired. Accordingly, Justice Hunt McDonald granted the Union's Application for Summary Dismissal of the ENMAX Application.

VANMAELE V MARYNIAK, 2018 ABCA 179 (BIELBY, STREKAF AND KHULLAR JJA)
Rules 3.25 (Contents of Statement of Claim), 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Appellant, Vanmaele, appealed a decision of the Case Management Justice which struck the Statement of Claim pursuant to Rule 3.68(2) and dismissed the Appellant's Application for Security for Costs or advanced Costs pursuant to Rule 4.22. The Case Management Justice held that there was no merit to the Appellant's Statement of Claim, and there was evidence that the Respondent could pay a Costs award.

The Appellant argued that the Statement of Claim should not have been struck until after Questioning was completed, and that striking a Statement of Claim before Questioning is completed creates an inconsistency between Rule 3.68, which sets out when a Court may strike pleadings, and Rule 3.25, which sets out the requirements for the contents of a Statement of Claim. The Appellant submitted that the Rules do not require that a Statement of Claim be supported or proven at the pleadings stage, and that such support or proof occurs during Questioning. The Court of Appeal noted that the Appellant's interpretation of the Rules disregarded the distinction between an Application to strike a Claim pursuant to Rule 3.68, as Rule 3.68(3) provides that no evidence may be submitted on an Application made under Rule 3.68(2)(b), and an Application for Summary Dismissal pursuant to Rule 7.3. The Court also noted that Rule 3.25(b) requires that a Statement of Claim state the claim and the basis for it which requires that material facts are plead that establish a legal cause of action. The Court held that the Case Management Justice had taken a generous approach to interpreting the facts set out in the Statement of Claim, and was correct in striking the Statement of Claim pursuant to Rule 3.68. The Court of Appeal also held that the Case Management Justice was correct in dismissing the Application for advanced Costs or Security for Costs. Vanmaele's Appeal was dismissed.

GALANDY V EDWARD'S MOLDINGS AND PAINTING LTD, 2018 ABQB 251 (MASTER MASON)
Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 11.27 (Validating Service)

Master Mason provided written reasons following an Application by the Plaintiffs, Galandy et al, to either validate service or extend the time for service of a Statement of Claim. The Plaintiffs attempted to serve the Defendant, Top-Notch Projects Inc. ("Top-Notch"), by registered mail approximately six weeks prior to the expiry of the one-year period for service as set out by Rule 3.26(1). The package containing the Statement of Claim was returned "unclaimed" and no further action was taken to serve Top-Notch until five days past the expiry of the one-year period.

Master Mason summarized Rule 11.27 which allows the Court to validate service if the Court is satisfied that: a method of service other than those specified in the Rules was used and was likely to have brought the document to the attention of the recipient, or the document would have been served on time but for the recipient's evasion of service. Master Mason ruled that neither of these conditions were met in this case. There was no evidence to suggest that the method of service (unclaimed registered mail) likely brought the Statement of Claim to the attention of Top-Notch. Moreover, there was no evidence that Top-Notch had evaded service. The package was "unclaimed"; it was not "refused".

In regards to an extension of time for service, the Court reiterated that even though the threshold is low for obtaining a three-month extension for service under Rule

3.26(1), the Rule expressly applies only to Applications filed before the expiry of the one-year time limit. However, the Court noted that Rule 3.27(1)(c) allows the Court to grant an extension "at any time" where special or extraordinary circumstances exist stemming solely from the conduct of the Defendant or a person who is not a party to the Action. Master Mason ruled that these conditions also did not apply in this case. The Applicant sought to rely on Top-Notch's evasion of service as well as the Applicant's own reasons for failing to serve on time. Master Mason repeated that there was no evidence of evasion of service on the part of Top-Notch and, in any event, the package was returned with sufficient time to serve by alternative means, even if Top-Notch had evaded service. Moreover, as the Rule is express that the "special circumstances" must be attributable to the Defendant or third party, the Applicant's personal reasons for the delay were not relevant. The Application was dismissed with Costs.

TESLA EXPLORATION LTD V ENCANA CORPORATION, 2018 ABQB 286 (MASTER FARRINGTON)
Rules 3.59 (Claiming Set-Off) and 7.3 (Summary Judgment)

The Plaintiffs were placed into receivership as a result of a consent Receivership Order granted by Romaine J. Shortly thereafter, Nixon J. granted a Consent Order allowing the Defendant to pursue its Counterclaim. The Receiver filed an Application seeking approval of the sale of the Plaintiffs' assets to a third party. The Receiver's Application was granted, the sale was approved and a vesting Order was granted. The Order approving sale and consequent vesting Order directed that any rights or interests of the Plaintiffs' creditors were expunged. Romaine J. held further that the Defendant's Counterclaim was a non-permitted encumbrance.

The Plaintiffs applied before Master Farrington for Summary Judgment against the Defendant respecting two unpaid invoices for seismic services. The Defendant cross-applied for Summary Dismissal of the Plaintiffs' Claim on the basis that there was proof of defects in the Plaintiffs' work. The Plaintiffs subsequently applied to strike the Summary Dismissal Application as an abuse of process instead of opposing the Application in the usual way. The Plaintiffs argued that Justice Romaine's Order to expunge the Counterclaim prevented any arguments of set-off by the Defendant.

Master Farrington noted that Rule 3.59 permits set-off to be raised either by Counterclaim or by Defence. Master Farrington held that, pursuant to Rule 3.59 the Defendants were still entitled to raise set-off, even if the Counterclaim had been expunged. As such, the Order approving sale did not conclusively determine the Plaintiffs' entitlement to the amounts that they sought.

Master Farrington considered the Parties' Cross-Applications for Summary Judgment and Summary Dismissal. Master Farrington noted the "identifiable litigation culture shift" which should be applied to Summary Judgment Applications. Master Farrington cited recent Court of Appeal authority which clarified the test for summary determinations and set out that "[s]ummary judgment is one procedure for deciding whether the moving party has proven its case on a balance of probabilities". Master Farrington added that the "best foot forward" principle was important in such Applications.

Master Farrington granted Summary Judgment in part to the Plaintiffs, and severed the issues that were more suitable to be determined at Trial. Master Farrington dismissed the Defendant's Application for Summary Dismissal, and dismissed the Plaintiffs' Application to strike the Defendant's Summary Dismissal Application.

D'ABADIE V HER MAJESTY THE QUEEN, 2018 ABQB 298 (ASHCROFT J)
Rules 3.62 (Amending Pleading), 3.68 (Court Options to Deal with Significant Deficiencies), and 10.29 (General Rule for Payment of Litigation Costs)

The Plaintiff, Luc Bernard d'Abadie ("Mr. d'Abadie"), brought an Originating Application requesting, among other things, to be acquitted of charges relating to two Provincial Court docket matters and for "damages" relating to the events at issue (the "Application"). The Respondent, Alberta Justice and the Solicitor General (the

"Attorney General"), applied to have the Action struck as an abuse of process under Rule 3.68. Mr. d'Abadie, in morning chambers, requested an adjournment to amend his Originating Application under Rule 3.62(1)(a). Justice Ashcroft granted the adjournment Application on the condition that the Parties provide written submissions concerning the Action.

In its written submission, the Attorney General identified multiple defects in both Mr. d'Abadie's initial and proposed post-amendment Originating Applications. The Attorney General argued that the scope and type of defects merited the Action's dismissal. Mr. d'Abadie's materials included a draft "Order to Safeguard Rights" and two invoices for amounts owing to him by the Attorney General for his arrest.

Justice Ashcroft, referring to prior leading authority, found Mr. d'Abadie's arbitrary demands for money and immunity to police and legislation within the Originating Application to be an organized pseudolegal commercial argument ("OPCA"). Justice Ashcroft emphasized that OPCAs are legal-sounding but erroneous rules that are purported to be a real and true concealed law. Ashcroft J. noted that many OPCA concepts form the basis for a finding of civil contempt.

Ashcroft J. agreed with the characterization of the lawsuit by the Attorney General and dismissed Mr. d'Abadie's adjournment Application. Her Ladyship concluded that the Application was a collateral attack on criminal proceedings in Provincial Court, named the incorrect parties, and sought remedies not available in law. Accordingly, the Attorney General's Application to Strike the Originating Application was granted.

ELLIOTT V RAINBOW HOMES LTD, 2018 ABQB 328 (HOLLINS J)
Rules 3.62 (Amending Pleading) and 13.6 (Pleadings: General Requirements)

The Plaintiffs applied to amend their pleadings on the first day of a two-week Trial. The Defendants consented to adjourn the Trial subject to thrown-away Costs. The Defendants also consented to all but one of the proposed amendments, which was an additional claim for fraudulent misrepresentation.

Hollins J. noted that pursuant to Rule 3.62(1)(b), a party may amend their pleadings after the close of pleadings with the permission of the Court. The Court's discretion to allow amendments is governed by common law, and any pleading may be amended no matter how careless or late. There are four major exceptions to this general principle: i) the amendment would cause serious prejudice to the opposing party not compensable in costs; ii) the amendment requested is hopeless; iii) the amendment seeks to add a new party or cause of action after expiry of a limitation period not permitted by statute; and iv) there is an element of bad faith.

Justice Hollins held that pursuant to Rule 13.6, in order to make allegations of fraud in a pleading, the party must include particulars to enable the Defendant to know precisely the case he must meet. Here, the alleged fraudulent misrepresentations were sufficiently described, and none of the exceptions applied. As such, Justice Hollins granted the Application to amend the pleadings.

BULL V CANADA (ATTORNEY GENERAL), 2018 ABQB 350 (LEE J)
Rules 3.62 (Amending Pleading) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff, Ms. Bull, sued the Defendants for damages on the basis of false arrest and false imprisonment following her arrest, detention, and alleged mistreatment at an RCMP holding facility. At Trial, Justice Lee ruled that no evidence would be led with respect to claims for either false arrest or false imprisonment; however, His Lordship did permit the Plaintiff to bring an Application to formally amend her Statement of Claim pursuant to Rules 3.62 and 3.65. Justice Lee noted that amendments to pleadings may be made after the close of pleadings no matter how careless or late, subject to four exceptions: a) the amendment would cause serious prejudice to the opposing party, not compensable in costs; b) the amendment requested is "hopeless"; c) unless permitted by statute, the amendment

seeks to add a new party or a new cause of action after the expiry of a limitation; and d) there is an element of bad faith associated with the failure to plead the amendment in the first instance.

The Plaintiff did not proceed with the amendments, but rather attempted to proceed with the Trial. Following a further ruling by the Court on an evidentiary issue, Plaintiff's counsel requested an adjournment of the Trial to Appeal the Court's rulings to the Court of Appeal. The Defendants applied for double thrown away Costs as a result of the adjournment of the Trial.

Lee J. observed that, in determining thrown away Costs, the Court primarily needs to deal with both the events that took place when the Trial was set to begin, and the events that took place during the course of the Trial. Justice Lee noted that Costs are generally within the discretion of the Court. As such, Justice Lee concluded that the Defendants should be awarded some thrown away Costs as a result of the Trial having to be adjourned for the Plaintiff's Appeal. Justice Lee awarded Costs under Schedule C, Column 3 for Trial preparation and for the Plaintiff's unsuccessful Applications related to admissibility and scope of the Claim.

MORRIS V 1934809 ALBERTA LTD, 2018 ABQB 299 (KUBIK J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicants, a landowners group, sought judicial review of a Decision by the Cardston County Subdivision and Development Appeal Board ("SDAB Decision") which dismissed the Applicants' Appeal of a development permit issued to 1934809 Alberta Ltd. ("Westbrook").

Westbrook applied to dismiss the Judicial Review Application pursuant to Rule 3.68. Westbrook argued that, although the Court has the jurisdiction and discretion to judicially review the SDAB Decision, the Court should decline to do so because an adequate alternate remedy existed at law.

Justice Kubik considered Rule 3.68 and found that a statutory right of Appeal of the SDAB Decision existed for the Applicants. This statutory right of Appeal was an adequate alternate remedy to Judicial Review. Further, there were no extant special circumstances which would cause the Court to exercise its inherent jurisdiction. For these reasons, Kubik J. granted Westbrook's Application and dismissed the Judicial Review Application pursuant to Rule 3.68.

ALBERTA LAWYERS INSURANCE ASSOCIATION V BOURQUE, 2018 ABQB 311 (MANDZIUK J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 8.1 (Trial Without Jury), 8.2 (Request for Jury Trial) and 11.31 (Setting Aside Service)

The Alberta Lawyers Insurance Association (ALIA) filed an Originating Application seeking to declare Stephen Bourque and his mother, Stephanie Bourque, vexatious litigants. Mr. Bourque filed two Applications in response requesting, among other things, a Trial by jury.

Mandziuk J. stated that a Trial by jury is not a remedy that the Court can grant in the usual course. Justice Mandziuk noted that there is no absolute right in Alberta to a civil jury Trial. Rules 8.1 and 8.2, as well as the *Jury Act*, RSA 2000, c J-3 prohibit a Trial by jury unless an Application is made in writing to the Chief Justice of the Court of Queen's Bench of Alberta and the Chief Justice directs that a Trial by jury take place. Mandziuk J. concluded that the Court had no jurisdiction to grant a jury Trial as no such request had been made to the Chief Justice in this case.

Justice Mandziuk noted that "[a]ny indicium of abusive litigation is a basis to investigate whether court access restrictions are warranted". Based on the Bourques' litigation conduct, Justice Mandziuk ordered that they were immediately prohibited on an interim basis from continuing or instituting further proceedings in any Court in Alberta without prior leave. Mandziuk J. cancelled the hearing of both ALIA's Originating Application the Bourque's Applications and stated that all of the Applications would be determined by way of written Decisions following a paper-only Application procedure.

RP V ALBERTA (DIRECTOR OF CHILD, YOUTH, AND FAMILY ENHANCEMENT), 2018 ABQB 391 (HENDERSON J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant filed an Originating Application for *habeas corpus*, seeking to compel the release of a child to him, after the Court granted a permanent guardianship Order in 2015 granting guardianship of his child to his sister in law and her husband. The Respondent had previously sought to strike out the *habeas corpus* Application pursuant to Rule 3.68, and the Court directed that the Application be addressed by the Accelerated *Habeas Corpus* Review Procedure (the "Procedure"), a paper only "show cause" mechanism which allows for *habeas corpus* Applications to be considered efficiently, justly, and proportionately.

Henderson J. provided the Applicant with one month to send the Court his written reply, after which the Court would issue its final assessment. His Lordship also noted that if no response is received by the deadline, the Application would be dismissed.

EDMONTON KENWORTH LTD V KOS, 2018 ABQB 439 (DARIO J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Applicant Mr. Kos applied for Summary Judgment against the Respondent Edmonton Kenworth Ltd., or in the alternative, for an Order striking the Respondent's Statement of Claim. The Respondent cross-applied for Summary Judgment. The Applicant was the sole director and shareholder of a transportation company. The Applicant and the transportation company entered into a lease agreement with the Respondent under which the transportation company would lease equipment from the Respondent. The Applicant also provided a personal guarantee related to the lease agreement in favour of the Respondent.

Dario J. first considered the Application to strike, noting that a Court may strike out all or part of a Claim where the pleading discloses no reasonable claim. In making this assessment, the Court must assume that the facts pleaded are true unless they are manifestly incapable of being proven. Justice Dario analysed whether the lease agreement fell within the scope of the *Personal Property Security Act*, RSA 2000, c P-7 (the "Act"). Dario J. held that the Act applied in part to the lease agreement; however, it was not plain and obvious that the Respondent's claim would not succeed even if the Act applied. The Application to Strike was dismissed.

Justice Dario addressed the Cross-Applications for Summary Judgment and Summary Dismissal. Dario J. reiterated that an Application for Summary Judgment is not appropriate where *viva voce* evidence is needed or where the Judge is required to weigh evidence or make findings of credibility. The Applicant argued that the personal guarantee was no longer binding against him as the lease agreement had been terminated. The Respondent argued that the personal guarantee did apply to the Applicant, and sought a determination of quantum of damages. Justice Dario found that, in light of the wording of the lease agreement and the Parties' subsequent conduct, the lease agreement had not been terminated, and the Applicant would still be liable under the personal guarantee. As such, the Court held that it could not arrive at a fair and just disposition with respect to the matter on the existing record.

Dario J. found that the Respondent had not yet disposed of the leased equipment and did not have knowledge of the quantum of the deficiencies that would be outstanding following the summary disposition. On that basis, Her Ladyship also refused to grant Summary Judgment to the Respondent.

BRUDERHEIM COMMUNITY CHURCH V MORAVIAN CHURCH IN AMERICA (CANADIAN DISTRICT), 2018 ABCA 134 (WATSON JA)
Rules 4.22 (Considerations for Security for Costs Order), 14.48 (Stay Pending Appeal) and 14.67 (Security for Costs)

In an Action involving a grant of land in 1897, the Court of Appeal had previously upheld the granting of an interim injunction which was to remain in place "until the

conclusion of the trial of this Action, or until further order". The Court of Queen's Bench subsequently held, among other things, that the congregation of the Moravian Church at Bruderheim was the beneficiary of a trust created by the grant of land, and ruled that the injunction was no longer in force. The Appellants, Bruderheim Community Church and Bruderheim Moravian Church (the "Applicants") who were not deemed to be the "congregation" applied pursuant to Rule 14.48 for a Stay pending Appeal so that the injunction would remain in place. The Respondent, the Board of Elders of the Moravian Church in America, filed a Cross-Application for Security for Costs against the Applicants.

Watson J.A. stated that while it may have been appropriate to grant a Stay in the circumstances, the Applicants lacked legal status as they were not beneficiaries under the trust. His Lordship noted that this was dispositive of the Application and it was not necessary to engage the test for granting a Stay pending Appeal, including whether there would be irreparable harm or the balance of convenience. The Stay Application was therefore dismissed.

The Respondents also sought Security for Costs under Rules 14.67 and 4.22, and specifically sought Costs under Column 5 of the Rules on the basis that the value of the land in dispute would place the Action in that column. Justice Watson held that while the value of the land was high, the matter was in fact a dispute over the administration of a trust for which the Attorney General could step in. As such, Watson J.A. held that in the circumstances, even Column 1 Costs would be too great, and instead fixed Security for Costs in the amount of $10,000. The Appeal was stayed until the amount was posted by the Applicants.

PRESTIGIOUS PROPERTIES INC V COLD LAKE ESTATES INC, 2018 ABCA 218 (BERGER JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.5 (Appeals Only With Permission)

The Plaintiff sought permission to appeal a Decision of the Case Management Judge denying the Plaintiff's Application for Security for Costs (the "Security for Costs Application"). Berger J.A. noted that an Order for Security for Costs is a discretionary matter, and permission to appeal will be withheld absent an error of law, an unreasonable exercise of discretion apparent on the record, or a misapprehension of an important fact.

In the Security for Costs Application, the Case Management Judge stated that the Defendants' evidence was unchallenged because the Affiant had not been cross-examined. The Plaintiff argued that the Case Management Judge improperly and erroneously ignored previous and contradictory Affidavit evidence from the same Affiant.

Justice Berger agreed that there was an arguable error, but found that the Security for Costs Application would have failed in any event. The Case Management Judge was entitled to, and did conclude that, based on the relative merit of the Parties' claims, the Plaintiff's prospect of success was problematic given the Defendants' meritorious limitations defence. For this reason, Berger J.A. dismissed the Plaintiff's Application for permission to Appeal.

THE OWNERS: CONDOMINIUM PLAN NO 982 6403 V CPI CROWN PROPERTIES INTERNATIONAL CORPORATION, 2018 ABCA 232 (SCHUTZ JA)
Rules 4.22 (Considerations for Security of Costs Order), 4.31 (Application to Deal with Delay) and 14.67 (Security for Costs)

The Applicants, CPI Crown Properties International Corporation, CPI Crown Development Corporation, and Camrose Crown Care Corporation applied to restore their Appeal that was struck for failing to file their factum on time. Their factum was filed two days past the limitation date. The Respondents, Finlay Masonry 1980 Ltd., Annie's Stucco Ltd., Pradip K. Misra Architect, and A.D. Williams Engineering Inc. objected to the Application to restore the Appeal and in the alternative, requested an Order requiring the Applicants pay Security for Costs.

Schutz J.A. reviewed the five-part test to restore an Appeal. There must be: 1) arguable merit; 2) explanation for the defect or delay that caused the Appeal to be taken off the list; 3) reasonable promptness in moving to cure the defect;

4) timely intention to proceed with the Appeal, and 5) potential prejudice to the Respondents including the length of the delay. No single factor is determinative.

Justice Schutz noted that the only factor to be considered in this case was whether the Claim had arguable merit. The basis for the Appeal was the dismissal of the Action due to long delay pursuant to Rule 4.31. Schutz J.A. confirmed that Rule 4.31 allows the Court to dismiss a Claim when the delay is inordinate or inexcusable. Inordinate and inexcusable delay results in a rebuttable presumption of significant prejudice suffered by the moving party, and it is then incumbent on the non-moving party to prove on a balance of probabilities that significant prejudice has not been suffered. Schutz J.A. then ruled that the Applicants had met the "very low bar" for proving arguable merit, and granted the Application to restore the Appeal.

In regards to the Cross-Application for Security for Costs, Schutz J.A. confirmed that the Court has jurisdiction to grant Security for Costs according to Rules 14.67 and 4.22 upon consideration of several factors: the likelihood of enforcement of a Judgment or Order by an Applicant; a Respondent's ability to pay; the merits of the underlying Action; any resulting and undue prejudice to the Respondent's ability to continue in the Action; and any other matter the Court considers appropriate. Applying the factors, Schutz J.A. held that Security for Costs was appropriate in this case. The Application to restore the Appeal was granted pending the posting of Security for Costs by the Applicants.

KLIPPSTEIN V KAPASIWIN (SUMMER VILLAGE), 2018 ABQB 407 (NATION J)
Rules 4.24 (Formal Offers to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and Schedule C

Following the dismissal of an Application by the Applicant, Klippstein, to discharge an easement, Nation J. addressed the issue of Costs. The Respondent, Summer Village, sought Costs based on Column 5 of Schedule C including double Costs after a Formal Offer to Settle was served. The remaining Respondents (who were included by Court Order) requested single Costs based on Column 5 of Schedule C. Klippstein argued that he should not have to pay any Costs on the basis that his Application was in the public interest; that the Respondents by Court Order were intervenors who were not entitled to Costs; and that the Formal Offer to Settle did not comply with Rule 4.24.

Nation J. confirmed that Rule 10.29 provides that a successful party in litigation is entitled to Costs subject to the Court's discretion, and Rule 10.31 gives the Court wide discretion when awarding Costs by allowing the Court to consider numerous factors including the degree of success, the amount in issue, the importance of the issues, complexity, and any other factor the Court deems appropriate and relevant. Nation J. held that Costs in this case should be awarded based on Column 5 of Schedule C as the Application required a significant amount of research and canvassed a wide variety of legal issues.

Nation J. noted that the Respondents by Court Order were not intervenors, but interested parties required to be served with the Application. Moreover, though there had been discussion between the Parties about the easement prior to the Application, this did not mean that the Application was in the public interest as argued by Klippstein. Finally, Justice Nation found that the Formal Offer to Settle in this case did comply with Rule 4.24; however, double Costs were not awarded as requested. Justice Nation found that it would have been difficult for Klippstein to accept an Offer to Settle from only one party, so Klippstein's refusal of the Formal Offer to Settle was reasonable in the circumstances. Costs were awarded to the Respondents.

KOZAK ESTATE (RE), 2018 ABQB 272 (RENKE J)
Rule 4.29 (Costs Consequences of Formal Offer to Settle)

Following a Trial in an estate Action in which the Applicant, a sister of the Testator, sought to have the two most recent wills of the Testator (the "Wills") declared invalid, Renke J. concluded that both of the Wills were the product of undue influence by the Respondent and therefore invalid. Renke J. directed that the Parties provide written submissions on Costs.

Justice Renke considered Rule 4.29 which provides that if a party makes a Formal Offer to Settle that is not accepted and the party subsequently obtains a Judgment or Order in the Action that is equal to or more favorable than the Formal Offer, that party is entitled to double the Costs awarded. His Lordship noted that Rule 4.29 applied to Actions governed by Surrogate Rule 2.

Prior to Trial, the Applicant had made a Formal Offer to the Respondent (the "Offer") which was less favorable than what the Applicant ultimately received at Trial. Renke J. noted that, under Rule 4.29, beating an offer is a necessary component to receiving double Costs but it is not a "sufficient condition" for such entitlement. Justice Renke explained that there are two qualifications to an award of double Costs. First, under Rule 4.29(4)(e), the Court may order that Rule 4.29(1) shall not apply, if "special circumstances" are established. Second, under Surrogate Rule 2(2) "[t]he court may vary any rule in any case where the court decides it is appropriate to do so".

Justice Renke concluded that the Formal Offer was genuine and was a reasonable proposal to conclude the litigation in advance of Trial. His Lordship found that there were no special or other circumstances that would warrant varying Rule 4.29(1). Given the $330,000.00 value of the estate, Justice Renke awarded the Applicant double Costs for all steps taken in relation to the Action after service of the Formal Offer under Schedule C, Column 3, of the Rules.

YASSA V PARKER, 2018 ABQB 403 (TOPOLNISKI J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle)

The Applicant, Mr. Parker, was awarded Costs in a prior spousal and child support Decision and subsequently applied for the Costs to be doubled under Rule 4.29, as the Respondent, Ms. Yassa had not responded to a Formal Offer, and it had expired.

Topolniski J. remarked that a Formal Offer to settle is "an important and powerful litigation tool", and Courts should not lightly deviate from the Costs consequences that flow from it. A Formal Offer must be reasonable and realistic. Further, it must be assessed in light of the surrounding circumstances that existed when the Formal Offer was served and remained open, and the outcome of the Trial or Appeal.

In this case, Topolniski J. found that the Formal Offer was reasonable and realistic, meeting the threshold of a genuine offer. Justice Topolniski examined the outcome of the case for the Applicant and compared it to the Formal Offer, having regard to the particular words of the Formal Offer. Topolniski J. held that the Respondent did not beat the Formal Offer, and there were no special circumstances that would counter an award of double Costs.

Topolniski J. noted that pursuant to Rule 4.29(4)(e), the onus is on the Respondent to explain if there are special circumstances which would avoid the awarding of double Costs. However, the Respondent did not provide an explanation in this case. Accordingly, Topolniski J. found that the Applicant was entitled to double Costs plus disbursements.

CARROLL V ATCO ELECTRIC LTD, 2018 ABCA 186 (WATSON, VELDHUIS AND CRIGHTON JJA)
Rules 4.29 (Cost Consequences of Formal Offer to Settle) and 14.88 (Cost Awards)

The Respondents were successful in responding to an Appeal by the Appellant, Carroll. The Respondents applied to the Court seeking directions regarding the Costs of the Appeal following the offer made in writing to the Appellant to consent to a discontinuance of the Appeal without Costs. The Respondent applied under Rules 4.29 and 14.88(3) seeking double Costs for the Appeal due to the offer.

The Court held that under the circumstances, the Respondent should receive double Costs for the Appeal starting from the day that the Offer was made. However, the Court limited the counsel fee to a single counsel for the Respondent.

TRANSAMERICA LIFE CANADA V OAKWOOD ASSOCIATES ADVISORY GROUP LTD, 2018 ABQB 320 (MASTER ROBERTSON)
Rule 4.31 (Application to Deal with Delay) and Rule 4.33 (Dismissal for Long Delay)

The Defendant, George Goulet, and his business organizations applied under Rule 4.31 to dismiss the Claim against them on the basis of delay. The Claim was commenced in February 2007, and the Application to dismiss was filed in August 2017.

Master Robertson found that delay occurred in the Action, but the issue was whether there was significant prejudice as a result, noting that there is a rebuttable presumption of significant prejudice if the delay is found to be inordinate and inexcusable.

The Applicants asserted both non-litigation prejudice and litigation prejudice, referring to the 10 years which had elapsed from the filing of the Claim, and the nature of the allegations which it contained. The Applicant asserted that the nature of the allegations (which were tantamount to fraud) had a negative impact on his ability to do business. The Respondent asserted that the Applicant had not provided sufficient detail concerning the non-litigation prejudice. The Respondent also tendered opinion evidence from a senior lawyer who remarked that the progress of the Action "cannot be said to be unusual" and that he was generally aware of matters which had "taken as long or longer". Master Robertson held that the lawyer's opinion did not address the issue of prejudice. In addition, the reference to other cases, which had taken as long or longer to proceed to Trial, were irrelevant as each case is fact-specific. Further, the introduction of Rules 4.31 and 4.33, and the application of and comment on those Rules by the Alberta Court of Appeal indicate that the Court is encouraged to utilize the tools available to dispose of claims which have languished unreasonably.

Ultimately, Master Robertson found that the delay was not inordinate and inexcusable, noting that Mr. Goulet had himself contributed to the delay by at least three years. Further, Master Robertson found that the Applicant had not been able to demonstrate actual prejudice, noting that the reputational harm was not "oppressive". If it had been, the Applicant would have been less likely to contribute to the delay. Finally, although both Parties were having difficulties obtaining evidence from witnesses, Master Robertson found that the Applicant had failed to demonstrate how the unavailability of certain witnesses would impair his ability to defend himself.

Master Robertson accordingly held that dismissal of the Action was not appropriate. However, Master Robertson issued a Procedural Order under Rule 4.31 which set timelines for the required steps to have the Action set down for Trial.

4075447 CANADA INC V PACRIM DEVELOPMENTS INC, 2018 ABQB 358 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 8.4 (Trial Date: Scheduled by Court Clerk)

The Defendants applied to dismiss the Plaintiff's claim for long delay, pursuant to Rule 4.31. The parties were involved in a dispute regarding the building of a hotel in Edmonton approximately 20 years ago. The lawsuit was commenced by the Plaintiff close to the 10 year ultimate limitations deadline. Master Robertson noted that when the evidence has already been "perforated by faded memories" the pre-claim period may be a factor to consider when the Court looks at the subsequent delay once the claim is filed. Master Robertson noted that a long pre-claim period may be relevant to a Rule 4.31 Application, as further delay when evidence is already "stale" can be expected to cause prejudice.

After the Action was commenced, Affidavits of Records were exchanged, and mediation was discussed but not completed. The Plaintiff served an expert report on October 7, 2013, and on October 30, 2013, the Parties entered into a Litigation Plan with deadlines for Questioning in 2014. Master Robertson noted that "a few things were done in 2014", after which there was a period of 14 months of inactivity. The Plaintiff completed additional Questioning in the fall of 2016; a "flurry of activity" occurred in the

litigation; and then another 13 month period of inactivity occurred, until one of the Defendants filed its Application to dismiss in August, 2017.

Defendants' Counsel emphasized that several steps set out in the litigation plan had yet to be completed. At least two potential witnesses died and others had left their positions as employees of the various Defendants and Third Parties, or could no longer be found. One Third Party went bankrupt, and other corporate parties ceased to exist. The Plaintiff argued that with so many parties to the litigation, the delays were not unusual and scheduling was difficult. However, Master Robertson noted that there was very little evidence of such difficulty. The Parties could have also sought case management, but did not do so. Master Robertson held that there was no evidence of any delay due to the Parties changing counsel.

Master Robertson noted that the Plaintiff, following the filing of the dismissal Application, had circulated a Form 37 to certify that it was ready for Trial. Pursuant to Rule 8.4(3), parties requesting a Trial date must "certify that questioning under Part 5 is complete", and that "any undertaking given by a person questioned under Part 5 has been discharged". However, Master Robertson held that the Parties were not ready for Trial; Questioning had not been completed and Undertakings had not been discharged. As such, Master Robertson characterized the Form 37 as a "Hail Mary pass", a desperate attempt with only a small chance of success, when time is about to run out.

Master Robertson noted that disputes must be pursued at a reasonable rate, and that access to the Courts has a temporal limitation period. Delay becomes inordinate where it is a delay in excess of what is reasonable, having regard to the circumstances and issues in the litigation. Master Robertson considered the authorities which held that after 10 years of litigation, there is a "presumptive ceiling" at which point the parties, and the Court, should ask why the matter has not yet made it to Trial. Master Robertson also noted that "mere discussion about settlement does not satisfy the expectations under rule 4.33".

Master Robertson held that the delay was inordinate and inexcusable. Once such a finding is made, there is a presumption that the delay has prejudiced the Defendants. The burden to rebut the presumption is on the Plaintiff. Master Robertson held that there was no evidence to rebut the presumption of prejudice; and there was evidence of actual prejudice. Master Robertson dismissed the Action.

SANGHA V ALBERTA (MOTOR VEHICLE ACCIDENT CLAIMS ACT, ADMINISTRATOR), 2018 ABQB 385 (NIXON J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant applied before a Master for dismissal of the Action for delay under Rule 4.33. The Master dismissed the Application and found that the Action had been significantly advanced in the relevant period (the "Master's Decision"). The Defendant appealed the Master's Decision but relied on Rule 4.31, which was not argued before the Master.

Justice Nixon noted that an appeal from a Master is an appeal *de novo* and thus it is permissible for a party to present new arguments. Nixon J. referred to the six part test for dismissal pursuant to Rule 4.31 as set out in leading Alberta authority. When applying the test, Justice Nixon found that there was inordinate delay because the Action was a simple tort claim commenced in October 2004 but it had not yet been set down for Trial by May 31, 2016 when the Defendant brought its Application. The Court noted that delay does not cease to be inordinate simply because the Plaintiff is self-represented. However, Justice Nixon found that there was an explanation for the delay, which made it excusable. In this case, the Plaintiff was under the impression during the first six years of the litigation that it was a collaborative process with the Defendant Administrator. Once the Plaintiff was informed that the process was not a collaborative one, he made significant efforts to move the matter along but experienced unexpected delays in obtaining expert reports.

Nixon J. held that because the delay was excusable, the Defendant could not rely on the presumption of prejudice

and had to demonstrate actual prejudice. Justice Nixon found that the Defendant had not established prejudice. On the contrary, because the Defendant was a statutory body, prejudice did not arise solely from having an Action outstanding for a prolonged period. Nixon J. stated that, even if the delay was inexcusable, it would not be appropriate to dismiss the Action given the significant steps the Plaintiff took to advance the Action in the three years immediately prior to the Application. Justice Nixon dismissed the Application.

TRG DEVELOPMENTS CORP V ALLAN BEACH RESORT (2013) LTD, 2018 ABQB 304 (MASTER SMART)
Rule 4.33 (Dismissal for Long Delay)

The Defendants applied to dismiss the Plaintiff's Statement of Claim under Rule 4.33 on the basis that there had been no significant advance in the Action for three years. The Plaintiffs admitted that there had been no significant advancement in the Action for three years, but argued that there had been significant advancements in a related Action during the period.

Master Smart considered Rule 4.33 and explained that under Rule 4.33(2), if the Plaintiff has not significantly advanced an Action for three years, then the Court must dismiss the Action unless certain exceptions are met. One of the exceptions is that a significant advance in a separate but related Action may constitute a significant advance in the Action in which the Rule 4.33 Application is brought. The primary consideration is determining whether the Actions are inextricably linked.

Master Smart stated that, in determining whether the Actions are inextricably linked, the Court considers four factors: i) whether the two Actions are inextricably linked in the sense that the result in the related Action would be "legally or factually determinative" of the issues in the primary Action; ii) whether the issue determined in the related Action is "relevant and binding" in the primary Action; iii) whether the related Action materially advanced the primary Action; and iv) whether the decision in the related Action could be a "barrier in law" to the Court's adjudicating the primary Action.

Master Smart held that, while the two Actions were clearly related, a finding that two Actions were "inextricably linked" was dependent on the determination that the second Action will have a legal or factual impact on the issues in the primary Action. The Court should also consider whether the determination of the issues in the secondary Action will be relevant and binding on the primary Action. Further, a determination of whether liens were valid in the secondary Action would factually impact the determination of whether breaches occurred in the primary Action. As such, the Actions were inextricably linked.

Since the Actions were inextricably linked, Master Smart held that filing a Statement of Defence, bringing an Application, and adding Third Party Defendants in the secondary Action constituted significant advances in the primary Action such that it should not be dismissed. The Application was denied.

ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY V SCHUSTER, 2018 ABQB 372 (HALL J)
Rules 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)

The Plaintiff applied to a Master for Summary Judgment (the "Summary Judgment Application"), and Edmund Schuster ("Mr. Schuster"), a lawyer, and his professional corporation (together, the "Defendants"), cross-applied to have the Action dismissed for long delay (the "Dismissal Application"). The Master dismissed both Applications, and both the Plaintiff and the Defendants appealed the Master's Decision.

The Dismissal Application was filed on December 19, 2016. Justice Hall upheld the Master's Decision that the partial discontinuance of the Action against certain Defendants in October 2014 was a significant advance as it streamlined the Action by reducing the number of Defendants. As a result, Hall J. dismissed the Defendants' Appeal.

Justice Hall considered the Plaintiff's Application seeking Summary Judgment for its Claim against the Defendants for breach of fiduciary duty. Hall J., referring to recent Court of

Appeal authority which set out the refined test for Summary Judgment, stated that Summary Judgment may be granted on a claim for breach of fiduciary duty. However, on the facts of the case, Justice Hall found that further *viva voce* evidence was required. For this reason, Hall J. dismissed the Plaintiff's Appeal.

ROBERTS V CLEARWATER ENERGY SERVICES LP, 2018 ABQB 420 (MASTER SCHLOSSER)
Rule 4.33 (Dismissal for Long Delay)

The Defendants applied for dismissal for delay pursuant to Rule 4.33. Master Schlosser found that the Action had "slowed to a stop" on January 22, 2015 with the service of an Affidavit of Records. Master Schlosser noted that, if there were nothing else, the Action would have expired on January 23, 2018.

Master Schlosser noted that on March 9, 2016, the Plaintiff served a Formal Offer to Settle (the "Offer") and requested dates for Questioning. Unfortunately, the Fort McMurray Wildfire intervened, leaving many homes and businesses destroyed and the city evacuated. The evidence before the Court was that life for the Fort McMurray Plaintiff and his counsel did not return to normal until late July of 2016.

Master Schlosser noted that while it was doubtful the Offer itself could have constituted a significant advance as required by Rule 4.33, as there were no admissions or narrowing of issues, the delay caused by the Fort McMurray Wildfire had to be considered. Master Schlosser concluded that if the nearly three months' delay caused by the fire were treated as an involuntary suspension of the Plaintiff's ability to prosecute the lawsuit, the March 14, 2018 Application was premature. Master Schlosser therefore dismissed the Application and granted a procedural Order requiring that Questioning be completed within 90 days.

SUTHERLAND V BROWN, 2018 ABCA 123 (BERGER, MCDONALD AND STREKAF JJA)
Rule 4.33 (Dismissal for Long Delay)

The Appellant appealed a Chambers Judge's decision, which upheld a Master's decision to dismiss the Appellant's Action for long delay pursuant to Rule 4.33. The issue on Appeal was whether a settlement offer (the "Settlement Offer") significantly advanced the Action so as to re-start the three year period set out in Rule 4.33.

The Settlement Offer was a 12-page letter sent on a "without prejudice" basis. It summarized the facts at issue, referenced case law, and proposed that the Plaintiff and Defendant equally share liability. The Appellant argued that the partial liability admitted in the Settlement Offer significantly advanced the Action. It was also argued that the Chambers Judge erred in holding that the without prejudice Settlement Offer was not properly before the Court, and that the Chambers Judge placed too much emphasis on the outcome of the Settlement Offer. The Court of Appeal noted that the Chambers Judge had acknowledged that the Settlement Offer was before the Court; as such, the Appellant's argument that the Chambers Judge erred on that basis was without merit.

The Court of Appeal explained that a step may significantly advance an Action if it serves to narrow issues or clarify the parties' positions. While the outcome of a step should not be over-emphasized, outcomes are not irrelevant. Rather, the functional approach to Rule 4.33 requires that the Court assess the step by reviewing the "whole picture of what transpired over the three year period". In some cases, this necessarily includes the outcome of the step.

The Court of Appeal noted that progress towards settlement, including the exchange of settlement offers, may constitute a significant advance in an Action. However, here, the Master and Chambers Judge reasonably held that the Settlement Offer did not advance the Action in this case. The Chambers Judge did not err in interpreting Rule 4.33. The Appeal was dismissed.

KENT V MARTIN, 2018 ABCA 202 (MARTIN, SLATTER AND CRIGHTON JJA)
Rules 5.6 (Form and Contents of Affidavit of Records) and 10.31 (Court-Ordered Costs Award)

The Plaintiff succeeded at Trial, where the Trial Judge awarded damages of $200,000 for defamation, and Costs of $250,000. When awarding Costs, the Trial Judge found that the Plaintiff had made unproven allegations of misconduct which justified reducing the Costs award. The Plaintiff appealed the Costs award, arguing that the Trial Judge erred in finding that the Plaintiff had not proven allegations of fraudulent concealment and giving false evidence (the "Fraud Allegations").

The Court considered previous authority on Rule 5.6 and noted that the process of document production depends on the diligence and integrity of the litigants in ensuring that full disclosure is made. The Court also referred to jurisprudence which focussed on the factors to consider when deciding whether to increase a Costs award. After reviewing the findings of fact made at the Trial, the Court disagreed with the Trial Judge's conclusion that the Fraud Allegations were unproven. As a result, the Court held that the Trial Judge had erred in setting the quantum of the Costs award. The Court awarded a further $200,000 in Costs, increasing the total Costs award to $450,000.

AARC SOCIETY V SPARKS 2018 ABCA 177 (O'FERRALL, WAKELING AND SCHUTZ JJA)
Rule 5.11 (Order for Record to be Produced)

The Appellant, Alberta Adolescent Recovery Centre Society ("AARCS") applied to the Court of Queen's Bench to have the Respondents, Ms. Sparks and her lawyer produce their communications on the basis of the future crimes and fraud exception to solicitor-client privilege. The Application was dismissed, and AARCS appealed to the Court of Appeal. On Appeal, AARCS requested in the alternative that the Court of Appeal exercise its jurisdiction under Rule 5.11 to inspect the communications over which solicitor-client privilege was claimed.

The Court of Appeal held the appropriate procedure for determining whether the future crimes and fraud exception to solicitor-client privilege applies would be to first make the records available for inspection by a Justice. Furthermore, before the Court could Order the inspection of allegedly privileged communications, there must be a sufficient evidentiary basis to support an inference that would justify the exception to solicitor-client privilege. AARCS would have to show that there was sufficient evidentiary basis to give colour to the allegation that Ms. Sparks approached her lawyer with a view to facilitating future unlawful conduct.

The Court of Appeal held that there was a sufficient evidentiary basis based on the evidence on the record. The Court therefore allowed the Appeal and the Respondents were required to produce records of any communications between them in relation to the allegedly unlawful conduct for inspection by a Justice of the Court of Queen's Bench.

HACHE V WEST EDMONTON MALL PROPERTY INC, 2018 ABQB 461 (BURNS J)
Rules 5.34 (Service of Expert's Report), 5.37 (Questioning Experts Before Trial) and 7.3 (Summary Judgment)

The Plaintiff, Hache, sued the Defendant, West Edmonton Mall, in negligence and occupiers' liability. The Defendant unsuccessfully applied for Summary Dismissal before a Master, and appealed the Master's Decision.

Burns J. considered the evidentiary record and specifically addressed the Defendant's contention before the Master that an expert report tendered by the Plaintiff should not have been admitted as it had not been filed in the form of an Affidavit allowing the report to be tested through Questioning. Burns J. noted that the report had been filed in the proper Form 25 providing the information required by Rule 5.34, and that Rule 5.37 allows for Questioning on an expert report. Therefore, the fact that the report was not filed in the form of an Affidavit did not preclude the Defendant from Questioning the expert.

Justice Burns considered the test for Summary Judgment noting that Summary Judgment is appropriate where the process a) allows the Court to make the necessary findings of fact, b) allows the Court to apply the law to the facts, and c) is proportionate, more expeditious and less expensive means to achieve a just result. Burns J. clarified that the parties to a Summary Judgment Application are required to be their "best foot forward" meaning gaps in the record do not necessarily prevent Summary Judgment.

Burns J. held that Summary Judgment was appropriate in this case as there were no material facts in dispute, no issues of credibility, and Burns J. was satisfied that the Court could apply the law to the facts. The Appeal from the Master's decision was allowed and the Action was dismissed.

ALBERTA TREASURY BRANCHES V HOK, 2018 ABQB 316 (MOREAU CJ)
Rule 6.14 (Appeal from Master's Judgment or Order)

The Applicant, Shirley Anne Hok ("Ms. Hok") was subject to a vexatious litigant Order which prevented her from commencing an Appeal without leave from the Court. Ms. Hok was a Defendant in a foreclosure Action commenced by the Respondent bank, and she applied for permission from Chief Justice Moreau to appeal a listing Order granted by Master Birkett. One of Ms. Hok's proposed grounds of Appeal was that the Master was biased and that the hearing was procedurally unfair.

Chief Justice Moreau noted that if Ms. Hok's Appeal had merit, it would potentially be appropriate to extend the deadline for the Appeal of a Master's Decision as set out in Rule 6.14 given the time and documentary requirements to prepare a leave Application.

However, Moreau C.J. reviewed Ms. Hok's Application and supporting Affidavit and found that the materials did not demonstrate that the proposed Appeal was a valid litigation step. Specifically, Ms. Hok claimed bias and procedural unfairness but did not provide a transcript of the hearing before Master Birkett. Chief Justice Moreau noted that, generally, a vexatious litigant seeking leave to Appeal a Master's Decision will need to provide the record of proceedings as defined by Rule 6.14(4) so that the Court can evaluate the merit of the Appeal. Ms. Hok's Application was dismissed.

ALTA WEST MORTGAGE CAPITAL CORPORATION V FRASER, 2018 ABQB 255 (MASTER PROWSE)
Rules 6.45 (References to Referee), 6.46 (Referee's Report), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.26 (Appeal to Judge) and 10.34 (Court-Ordered Assessment of Costs)

In accordance with Rule 6.45, Justice Neufeld appointed Master Prowse, in Chambers, as a Referee. Master Prowse was directed to hold an inquiry and draft a report in accordance with Rule 6.46 with respect to the reasonableness of the legal fees and disbursements assessed by the Review Officer in relation to a foreclosure Action (the "Referee's Report").

Pursuant to the mortgage at issue, the mortgagor was required to pay the mortgagee's solicitor and own client Costs on default. Master Prowse noted that it is well established that this contractual entitlement is subject to reasonableness as reflected in Rule 10.9. To aid in determining the reasonableness of legal fees, the Alberta Masters and the Alberta foreclosure bar instituted the Foreclosure Fee Guidelines for assessing a reasonable range of solicitor and client costs in routine foreclosure actions (the "Guidelines"), which are not meant to prevent the Review Officers from acting with the discretion pursuant to directions given by the Court pursuant to Rule 10.34.

The Review Officer had concluded that the foreclosure in dispute was considerably more complicated and time consuming than a standard foreclosure action and, therefore, indicated a fee outcome higher than the prescribed Guidelines. Alta West Mortgage Capital Corporation (the "Appellant") appealed the Review Officer's Decision on the basis that the Award should have been substantially higher pursuant to Rule 10.26(1).

Master Prowse reviewed the Review Officer's methodology and recommended that the matter be remitted back to the

Review Officer. Master Prowse directed that the Appellant provide the Review Officer with timesheets containing the full listing of things done during the conduct of the foreclosure in order to provide a more fulsome record for the Review Officer's consideration.

GAW V YELLOWHEAD COUNTY, 2018 ABQB 271 (GRAESSER J)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiff, Mr. Gaw, sued for breach of a construction contract. The Defendant, Yellowhead County, applied for Summary Dismissal of the Action, and the Plaintiff cross applied for Summary Judgment.

Graesser J. reviewed recent authorities relating to the test for Summary Judgment and Summary Dismissal under Rules 7.2 and 7.3, noting that the essential principles for Summary Dismissal were summarized as: a) the existing record must provide for a fair and just disposition for both parties; b) where there is no issue of a potentially decisive material fact, a claim has no merit, and Summary Dismissal can be granted; c) a central consideration is whether viva voce evidence is required to resolve an issue, or whether the Claim or Defence is so compelling that the likelihood of its success is very high; d) the mere assertion that further evidence will be adduced at Trial or at Questioning is insufficient to resist Summary Judgment or Summary Dismissal; and e) the Respondent must "put its best foot forward".

Justice Graesser held that the record before the Court provided the information necessary to summarily determine the Action. Graesser J. applied the principles for Summary Judgment to the circumstances of the case and held that there was no breach of contract. The Defendant's Application for Summary Dismissal was therefore granted and the Plaintiff's Cross-Application for Summary Judgment was dismissed.

HOOPP REALTY INC V EMERY JAMIESON LLP, 2018 ABQB 276 (MASTER ROBERTSON)
Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment), 13.6 (Pleadings: General Requirements) and 13.18 (Types of Affidavit)

The Defendants were the Plaintiff's former counsel in an Action involving deficiencies in a warehouse ("Underlying Action"). The Underlying Action was struck because the Plaintiff had sued in the Court of Queen's Bench instead of arbitrating the dispute. By the time the Plaintiff were advised that they had brought the Underlying Action in the wrong forum, the Action was limitations barred.

The Plaintiff had changed counsel during the course of the Action. The first counsel commenced the Underlying Dispute by Statement of Claim on behalf of the Plaintiff, and second counsel continued the Action until it was ultimately struck by the Court of Appeal and that Decision was affirmed by the Supreme Court of Canada. The second counsel did not discover the fatal flaw in the Underlying Dispute until several years after assuming conduct of the file. The Plaintiff subsequently commenced an Action against both of their former counsel in negligence. The Defendants sought Summary Dismissal of the Plaintiff's negligence claims against them and the Plaintiff cross applied for declarations that the Defendants' conduct of the Underlying Dispute was negligent.

Master Robertson noted that under Rule 7.3 Summary Judgment is appropriate where there is no genuine issue requiring a Trial, which will be the case where the process allows the Court to make the necessary findings of fact, apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result. Master Robertson confirmed that the parties must put their best foot forward, and where the facts are not entirely clear, the Court is to assume the truth of the Respondent's evidence. Rule 13.18 allows the Respondent to rely on hearsay regarding what evidence is expected to be tendered at Trial. Master Robertson also noted that the Applicant in an Application for Judgment under Rule 7.2 may rely on admissions.

Master Robertson noted that Rule 13.6(3)(q) requires that a party expressly plead a limitations defence under the *Limitations Act*, RSA 2000, c L-12, and the Rules expressly require that a party plead that the proceedings should be stayed pursuant to the *Arbitration Act*, RSA 2000, c A-43. Based on the timing of the discovery of the flaw in the Underlying Dispute, Master Robertson granted the first counsel's Application for Summary Dismissal. Master Robertson held that expert evidence was required to assess the negligence Claim against second counsel. Neither party advanced such expert evidence on the Summary Judgment Application. Therefore, the second counsel's Application for Summary Dismissal was dismissed, as was the Plaintiff's Cross Application for declarations on liability.

330626 ALBERTA LTD V HO & LAVIOLETTE ENGINEERING LTD, 2018 ABQB 478 (FEEHAN J)
Rule 7.3 (Summary Judgment)

In an Action resulting from the failure of the roof of a shopping mall, the Applicants applied for Summary Dismissal of the Claims against them in four related Actions. The Actions involved over 30 parties, and the Applicants were named in each as Third Party Defendants, Co-Defendants or both. The Applicants argued that there was no merit to the Third Party Claims or Notices to Co-Defendants filed against them.

Feehan J. reviewed the modern test for Summary Judgment, and noted that the jurisprudence is unclear on the standard of proof that the moving party must meet. Feehan J. held that there was merit to the Claims made against the Applicants. Feehan J. reviewed case law from Ontario which "reveals some concern as to whether dismissal of Third Party claims in complex actions with a significant number of parties is appropriate." Feehan J. noted that dismissing Third Party Claims "creates a risk of inconsistent findings of fact concerning the responsibility of the defendants to the plaintiffs and the third parties to the defendants". In addition, it requires the "defendant to make the plaintiff's case in order to justify the defendant's own claim....on a third party's motion for summary judgment".

Justice Feehan held that not enough information was available to make the relevant findings of fact with respect to the failure of the mall's roof, and that this was a decision that ought to be made in the context of the litigation as a whole. Feehan J. held that more evidence and more detailed argument were necessary to make a fair and just disposition. Based on the context and the fact that the litigation was at an early stage, Justice Feehan stated that "it would be unfair to make findings of fact and apply the law to findings of fact in third party proceedings at this time".

Feehan J. held that Summary Judgment was not appropriate and a Trial would be required as there were many "genuine and meritorious" issues and the legal issues involved were complex and closely tied to the facts. The Application for Summary Dismissal was dismissed.

BRIO-TECH INC V WESTERN PRESSURE CONTROLS (2005) LTD, 2018 ABQB 500 (HENDERSON J)
Rule 7.3 (Summary Judgment)

Following a purchase and sale transaction, the Plaintiffs commenced an Action against the Defendants for unjust enrichment and wrongful dismissal, and the Defendants counterclaimed in debt and for breach of a non-competition clause and a breach of fiduciary duties. The Plaintiffs applied for Summary Judgment while the Defendants applied for Summary Dismissal.

Henderson J. considered the test for Summary Judgment pursuant to Rule 7.3, stating that Summary Judgment is available "where there is no defence to the claim, or part of it, or where there is no merit to a claim, or part of it, or where the only issue is as to the amount to be awarded". Henderson J. reviewed leading jurisprudence and noted that it is an appropriate remedy where there is no genuine issue for Trial based on the record. Further, Summary Judgment may be granted where the record allows the Court to make findings of fact, and draw inferences from those facts "in a way which permits the Court to arrive at a result which is fair and just for both parties and which is proportionate".

Each of the Parties maintained that the Court could arrive at a fair and just result based on the record. Henderson

J. held that a portion of the Counterclaim relating to allegations of breach of fiduciary duty could not be resolved where the evidence was conflicting and involved considerations of credibility.

Henderson J. dismissed the Application for Summary Judgment and granted the Application for Summary Dismissal in respect of all of the Plaintiffs' Claims and some of the issues advanced in the Counterclaim.

RECYCLING WORX SOLUTIONS INC V HUNTER, 2018 ABQB 395 (EAMON J)
Rules 9.12 (Correcting Mistakes or Errors), 9.16 (By Whom Applications are to be Decided) and 10.52 (Declaration of Civil Contempt)

The Applicant, Recycling Worx Solutions Inc. ("Recycling Worx"), applied to have the Respondent, Hunter, held in contempt of Court for breaching a Court Order. Hunter had been briefly contracted to work for Recycling Worx before the relationship broke down and resulted in litigation. Hunter then picketed at various building sites where Recycling Worx was engaged and harassed its employees. Recycling Worx applied for and obtained a number of Orders against Hunter culminating in an injunction restraining Hunter from picketing or harassing Recycling Worx, or distributing materials to third parties regarding Recycling Worx or its customers. Eamon J. noted that Hunter had raised the issue of the wording of the Order, contending that it did not reflect the intention of Anderson J. who pronounced it; however, Eamon J. also noted that the Order had been approved by counsel for both parties and signed by Anderson J. Furthermore, Hunter had never applied to correct any alleged mistake as permitted by Rule 9.12, or to obtain direction as to whether the Judge who gave the Order should hear the Application as permitted by Rule 9.16.

In regards to the contempt Application, Eamon J. confirmed that further to the definition of civil contempt in Rule 10.52, one type of civil contempt is breaching a Court Order without reasonable excuse. Eamon J. referred to recent jurisprudence from the Supreme Court of Canada stating that contempt requires proof beyond a reasonable doubt that: the Court Order allegedly breached is clear as to what should or should not be done; the party alleged to have breached the Order had actual or inferred knowledge of the Order; and the party alleged to have breached the Order must have intentionally done or failed to do what the Order compels.

Eamon J. applied these factors to the facts and held that the Order restraining Hunter from harassing Recycling Worx was clear as to what Hunter could and could not do. Hunter did not dispute that he had actual notice of the Order, but even if he had, Justice Eamon stated that knowledge of the Order could be inferred as Hunter's counsel was present when the Order was pronounced and also approved its wording. Finally, the Court found that Hunter intentionally breached the Order. Hunter admitted to continued picketing of building sites where Recycling Worx was active and even administered a website and published flyers disparaging Recycling Worx and its frequent customer homebuilder, Mattamy. The Application for contempt was granted.

AUBIN V PETRONE, 2018 ABQB 259 (KHULLAR J)
Rule 9.13 (Re-Opening Case)

The Applicant applied pursuant to Rule 9.13 seeking a variation of the Court's reasons for granting an injunction. Khullar J. held that Rule 9.13 expanded the scope for correcting errors in Judgments. In determining whether to exercise its discretion under the Rule, the Court should consider the purpose of the Rules generally, including the avoidance of unnecessary and costly Appeals, and the desirability of the Appeal Court having fully developed consideration of the facts and the law. At the same time, the Court should also consider the principles of finality and certainty as they are also important objectives of the judicial process.

Khullar J. noted that in prior leading jurisprudence, the Court held that the jurisdiction to exercise discretion under Rule 9.13 to correct a judgment depended on the circumstances. Based on the circumstances, Khullar J. held that the Applicant had not raised grounds appropriate for an Application under Rule 9.13. The Application was dismissed.

YASSA V PARKER, 2018 ABQB 305 (TOPOLNISKI J)
Rule 9.14 (Further or Other Order after Judgment or Order Entered)

Following a high conflict family dispute involving 76 Orders and two Trials, the Applicant, Mr. Parker applied for the apportionment of Costs. After the Action had concluded, the Respondent, Ms. Yassa made an assignment into bankruptcy. The bankruptcy was later discharged. The Order discharging the bankruptcy provided that all Costs related to "support issues" survived the bankruptcy, and that apportionment of those Costs was still to be determined.

The Applicant argued that 75% of the Cost award at the second Trial related to support matters and should survive the bankruptcy. The Respondent argued that the Applicant was attempting to re-litigate the issue of Costs, and that the Court had no jurisdiction to apportion the "mixed cost award" provided for at Trial.

Topolniski J. held that the Court had "ample clear and convincing authority" to apportion Costs after the entry of a Judgment, pursuant to Rule 9.14(b). Rule 9.14(b) permits the Court to make further or other Orders that are required, so long as they do not vary the original Judgment or Order, and are needed to provide a remedy that a Party is entitled to in connection with the Order or Judgment. As such, the Court had jurisdiction to apportion the Costs as between the Parties in the Action. Her Ladyship held further that, as argued by the Applicant, 75% of the Costs awarded at Trial related to support issues. Costs of the Application, were awarded to the Applicant in accordance with Column 1 of Schedule C.

SHEHU V IQBAL, 2018 ABQB 338 (TOPOLNISKI J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant Applicants sought to set aside a Default Judgment issued against them. After being added to the Action following a contested Application to Amend the Statement of Claim, the Applicants attempted to file an Amended Statement of Defence on April 13, 2017, however, they were prevented from filing because the Court record did not show a filed Amended Statement of Claim. The Applicants then attempted to again file the Statement of Defence on April 20, 2017, despite the Amended Statement of Claim still not appearing on the procedure card. In the meantime, and unbeknownst to the Applicants, the Applicants were noted in Default, and Default Judgment was entered on April 18, 2017. The Applicants subsequently became aware of the Default Judgment and moved to set it aside two days after becoming aware of it.

Topolniski J. applied the test for setting aside a Default Judgment under Rule 9.15(2), which requires the Applicant to demonstrate i) the Default was unintentional; ii) the Application to set aside the Default Judgment was brought as soon as the Applicant became aware of it; and iii) there is a good defence on the merits. Topolniski J. held that the Default was unintentional, as it "came to be in most unusual circumstances". Justice Topolniski also found that the Application to set aside the Default Judgment was brought within days of the Applicant discovering it. Topolniski J. confirmed that the applicable threshold for finding a good defence on the merits is establishing a triable issue of fact or law, and does not require establishing that ultimate success is likely. As a result, Topolniski J. set aside the Default Judgment.

YEHYA V LAS PALMAS ESTATE HOMES LTD, 2018 ABQB 374 (MANDERSCHEID J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicants, Las Palmas Estate Homes Ltd. and Ryan Thomas, applied to set aside a Default Judgment obtained by the Respondents, Jamie Yehya and Jaled Yehya.

Manderscheid J. confirmed that Rule 9.15(3) empowers the Court to permit a Statement of Defence to be filed by a party who has been noted in default, and to set aside a Default Judgment. Manderscheid J. also confirmed that the test for setting aside a Default Judgment is as set out in *Palin v Duxbury*, 2010 ABQB 833: the Defendants must show that: a) they have an arguable defence; and b) they did not deliberately let the Judgment go by default, and they 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 set it aside.

Manderscheid J. considered the facts and dismissed the Application on the basis that the Applicants had not shown that they had an arguable defence to the claim of fraudulent misrepresentation against them and they were simply relying on the bare assertion that the claim would be difficult to prove. Moreover, the Court did not accept the Applicants' ongoing bankruptcy proceedings as a reasonable excuse for the delay in filing a Defence. Finally, Manderscheid J. rejected the Applicants' argument that the period of delay should be calculated from the date that the Applicants realized the Respondents were seeking to personally enforce the Default Judgment to the time when the Applicants applied to set aside the Default Judgment. Justice Manderscheid clarified that, according to the Rules, the delay period is calculated from the time the Applicants became aware of the Default Judgment to the time they applied to set it aside. Even applying a liberal construction to this requirement, the delay period was in excess of 9 months, which indicated the Applicants had not moved promptly as required.

Justice Manderscheid determined that, in the circumstances the interests of justice and fairness favoured leaving the Default Judgment intact. The Application to set aside the Default Judgment was dismissed.

WRUTH V WILSON, 2018 ABCA 181 (MCDONALD, BIELBY AND STREKAF JJA)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

Following the commencement of an Action for child and spousal support by the Respondent, Ms. Wilson, against the Appellant, Mr. Wruth (the "Family Law Action"), Mr. Wruth caused his company to commence an Action against Ms. Wilson for allegedly taking monies from the company in order to pay her counsel in the Family Law Action (the "Theft Action"). A Chambers Judge ordered the payment of spousal support and stayed the theft Action upon Ms. Wilson applying to consolidate both Actions. The Actions were not consolidated. Mr. Wruth appealed the Chambers Judge's Order, without applying to have the Stay lifted at the Court of Queen's Bench.

The Appellant argued that the remedy of the Stay was not sought by any party and thus no party had an opportunity to respond to that issue and to offer evidence by way of Affidavit or otherwise.

The Court held that the Chambers Judge's Order should have been challenged under Rule 9.15, which allows the Court of Queen's Bench to vary or discharge an Order which was made without notice. The Court noted that such an Application could have been brought and heard in a matter of weeks, rather than the months that it took to hear the Appeal, and that "Appeals should be discouraged where there is an available remedy in the Court of Queen's Bench". The Court held that an Appeal of the Order was not the appropriate mechanism and dismissed the Appeal as the Appellant had not "availed himself of the opportunity to apply in Queen's Bench to have the stay lifted".

DOWNES V BOTAN, 2018 ABQB 341 (INGLIS J)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyers Non-Compliance with Contingency Fee Agreement) and 10.18 (Reference to Court)

The Applicant, Ms. Downes was a former client of the Respondent lawyer. The Applicant sought to have a Contingency Fee Agreement between herself and the Respondent declared unenforceable on the basis that it breached the Rules, and the Respondent breached his fiduciary duty towards the Applicant.

Inglis J. considered Rule 10.7, which governs the requirements for contingency fee agreements, and in particular Rule 10.7(2)(e)(ii) and (f)(iv) which provide that the contingency fee agreement must contain precise and understandable terms about the maximum fee payable, the disbursements, as well as whether the lawyer is to receive anything from a Costs award. In addition, Rule 10.7(3) provides that the contingency fee agreement

must be witnessed. Finally, Rule 10.7(4) provides that the client must be served with a copy of the contingency fee agreement. Justice Inglis considered the authorities which set out contingency fee agreement requirements, and determined that the Contingency Fee Agreement did not meet the requirements of the Rules, and therefore the Contingency Fee Agreement was invalid.

Inglis J. also referred to Rule 10.8 which states that if a lawyer does not comply with Rule 10.7, the lawyer will be entitled to only the lawyer's charges determined in accordance with Rule 10.2. Justice Inglis, referring to prior authority, stated that the Court has dual jurisdiction: to interpret and enforce contracts, and to vary, modify or disallow a contingency fee agreement through the operation of Rule 10.18(3)(b).

Justice Inglis considered each of the factors set out under Rule 10.2 and noted that there was little evidence before the Court regarding the manner in which the legal services were performed, or the skill with which they were performed. Justice Inglis noted that the Applicant would likely not have been able to pursue the claim without counsel willing to work on contingency; that the Respondent lawyer had conducted the litigation from start to settlement; and that a substantial fee payable to the Respondent would represent a large portion of the funds that were received in the settlement of this matter. Her Ladyship also noted that no time records by the lawyer were available for review by the Court. In the result, Inglis J. held that the appropriate fee to be paid to the Respondent lawyer was $26,250.00 plus disbursements.

GILMAR V GILMAR, 2018 ABQB 285 (SULLIVAN 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 Plaintiff in the underlying Trial Decision (the "Underlying Decision") was successful in obtaining a Declaration with respect to the beneficial ownership of corporate shares in Gilmar Crane Service Ltd. (the "Corporate Shares"). In considering an appropriate Costs award, Justice Sullivan noted that Rule 10.33(1) provides guidance and the Court should consider, among other things, the complexity of the Action, the amount claimed, the success of the Parties, and any other matter that the Court considers appropriate.

The Plaintiff argued that the matter involved an extensive amount of work, was complex, and required a copious amount of documentation review. As such, the Plaintiff requested Costs in accordance with Schedule C, Column 5. While not disputing that Costs were appropriate in this instance under Rules 10.29 and 10.31, the Defendant argued that the matter involved a Declaration with respect to the ownership of the Corporate Shares and was, therefore, akin to an injunction. As such, The Defendant argued that Costs should be payable in accordance with Schedule C, Column 1.

Justice Sullivan agreed with the Plaintiff to the extent that the underlying Action was complex and required detailed preparation. His Lordship therefore awarded Costs in accordance with Column 4 of Schedule C, consistent with the $500,000 valuation of the Corporate Shares.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2018 ABCA 137 (WATSON JA)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.50 (Costs Imposed on Lawyer) and 14.5 (Appeals Only With Permission)

The Applicant, who was former counsel for Maurice Stoney, a party in the underlying Action, sought to Appeal a portion of a Judgment in which she was held jointly and severally liable for solicitor client Costs along with her client. Watson J.A. referred to Rule 14.5(1)(e), which provides that permission to Appeal must be obtained for any Decision relating to Costs only. Watson J.A. stated that the test for permission to Appeal was as set out in a related Appeal Action. The test was whether the Applicant could show (1) a good arguable case having sufficient merit to warrant scrutiny by a full panel of the Court of Appeal; (2) issues of importance to the parties and in general; (3) that the Costs Appeal has practical utility; and (4) no delay in proceedings would be caused by the Costs Appeal.

Justice Watson observed that:

> The Rules of Court contain a number of presumptions about costs awards. For example, R. 10.29 creates a presumption that the successful party is entitled to costs, and a presumption that costs are awarded on a "pay as you go" basis, not just at the end of the litigation. Schedule C creates a presumptive scale of costs. Costs that are consistent with the presumptions, guidelines and rules set out in the Rules of Court are resistant to appellate review, making appeals inappropriate. …

Further, Costs awards against lawyers as a form of sanction are recognized by Rule 10.50. Justice Watson noted that there was no direct appellate authority on Rule 10.50, but that such awards were considered to be extraordinary. Watson J.A. concluded that the Applicant had met the test and granted the Application for permission to Appeal.

BOUDREAU V DE PALMA, 2018 ABQB 336 (ASHCROFT J)
Rule 10.31 (Court-Ordered Costs Award) and Schedule C

The Plaintiffs, Trevor Boudreau et al, and the Third Parties to the Action, Antonio Parrotino et al, applied for a Costs award in excess of the general rule for Costs following the Court's Decision that the Defendant, De Palma, committed fraudulent misrepresentation and caused delay in the litigation.

Ashcroft J. stated that Costs are in the discretion of the Court, and a departure from the usual party and party Costs should only be done in rare and exceptional circumstances; however, those rare and exceptional circumstances include where there has been fraudulent conduct or a deliberate delay in litigation. Justice Ashcroft confirmed that Costs are not usually awarded in a JDR pursuant to Rule 10.31(2)(c) unless a party engages in "serious misconduct" in the course of the JDR proceedings. Ashcroft J. held that the Defendant's unavailability at a JDR due to a death in the family did not amount to serious misconduct.

However, Ashcroft J. held that the nature of the Defendant's liability, specifically his fraudulent conduct and, "to a lesser extent" the Defendant's purposeful delay by not engaging counsel for over a year after he was discharged from bankruptcy warranted an elevated Costs award. The Court awarded the Plaintiffs and Third Parties two times the Costs set out in Column 3, Schedule C of the Rules.

STORAGE CAPITAL (2) LP V 1288314 ALBERTA LTD, 2018 ABQB 292 (SHELLEY J)
Rules 10.33 (Court Considerations in Making Costs Award), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment For Civil Contempt of Court) and Schedule C

The Applicant, Storage Capital (2) LP sought a Declaration that the Defendants were in Civil Contempt, and/or liable on a solicitor-client basis for several Applications which the Applicant argued were unnecessary. The dispute concerned the movement of storage containers from one property to another. The Defendants obtained five Orders on an *ex parte* basis to move the storage containers (the "*ex parte* Orders"). The Applicant subsequently obtained an Order on short notice to the Respondents (the "Applicant's Order") for the preservation of security. The Defendants subsequently moved some of the property to an undisclosed location, and refused to return the property or disclose its location. The Defendants returned to the Court twice seeking to vary or vacate the Applicant's Order and to "clarify" the Applicant's Order.

Shelley J. considered Rule 10.52 and Rule 10.53 and confirmed that the test for civil contempt requires the Applicant to demonstrate, beyond a reasonable doubt, that: i) the Order alleged to have been breached "clearly and unequivocally" stated the required and prohibited conduct; ii) the Respondent had actual knowledge of the Order; and iii) the Respondent intentionally refused to comply with the Order. Justice Shelley also noted that some Courts have approached the qualifier to the third element of "without adequate excuse" as being a separate element of the test, though the Alberta Court of Appeal has not yet endorsed the approach.

Justice Shelley found that the Applicant's Order was clear and unequivocal; however, the Defendants' behaviour in returning to the Court on two further occasions following the

Applicant's Order could be viewed as an attempt to clarify their understanding of their obligations under the Order, and thus, a reasonable doubt existed as to whether the Order was intentionally breached. As such, Her Ladyship held that the Defendants were not in contempt.

Notwithstanding the Defendants not being held in contempt, Shelley J. considered Rule 10.33 which sets out the considerations a Court may make when making a costs award, and held that enhanced Costs for the Defendants' Applications were appropriate. The Defendants were ordered to pay double the Applicant's Costs under Schedule C.

EXTREME EXCAVATING & BACKHOE SERVICES LTD V SCOTT, 2018 ABQB 414 (RENKE J)
Rule 10.33 (Court Considerations in Making Costs Award)

In the underlying Decision, Justice Renke dismissed the Plaintiff's Appeal from a previous Arbitration Award (the "Appeal"). The Defendant sought Costs of the Appeal on a solicitor-client basis in accordance with Article 10.3 of a share purchase agreement between the Defendant and the corporate predecessor of the Plaintiff (the "SPA"). Alternatively, the Defendant sought Costs on a multiple of two or three times Column 5 of Schedule C.

Renke J. noted that a contract providing for a different scale of Costs is a recognized as an exception to the general rule that Costs are presumptively assessed on Schedule C. Justice Renke reviewed Article 10.3 of the SPA but concluded that the conduct of the Parties did not fall into the enumerated heads of indemnity found within the SPA.

Renke J. considered awarding multiples of Costs under column 5 of Schedule C of the Rules. His Lordship noted that Courts generally rely upon the considerations under Rule 10.33, including: (1) complexity of the Action, (2) if the amount in dispute significantly exceeds the $1.5 million threshold; or (3) whether the conduct of one of the Parties warrants a multiplier.

Justice Renke found that the amount at issue in the Appeal was about $1.7 million and that this sum did not significantly exceed the Column 5 threshold. Additionally, neither the complexity of the Action nor the conduct of the Parties was sufficient to warrant Costs at a multiple of Column 5. Justice Renke awarded the Defendant Costs assessed on a party-party basis under Schedule C with no multipliers.

BOURQUE V TENSFELDT, 2018 ABQB 419 (MICHALYSHYN J)
Rules 10.49 (Penalty for Contravening Rules) and 14.5 (Appeals Only With Permission)

The Plaintiff, Stephanie Bourque was subject to Court access restrictions including an Order requiring Bourque to obtain permission from Michalyshyn J. to bring any further proceedings or to take any further steps against parties related to the litigation. Nevertheless, Bourque wrote a letter to Chief Justice Moreau demanding various forms of relief including the appointment of a new "impartial" Case Management Judge.

Michalyshyn J. concluded that Bourque's correspondence was a Leave Application directed to the wrong Justice. After reviewing the law relating to the recusal of Judges in Alberta, Michalyshyn J. refused Bourque's Application on the basis that a person subject to Court access restrictions must rebut the presumption that they are litigating in an abusive and illegitimate manner by filing a valid Leave Application. Justice Michalyshyn concluded that this was not done in this case.

Michalyshyn J. confirmed that the standard practice of the Court was that a rejection of a Leave Application is final and may not be repeated. Rule 14.5(4) prohibits an appeal from an Order which denies a vexatious litigant permission to institute new proceedings. Michalyshyn J. cautioned that continued non-compliant Leave Applications would risk more stringent Court access restrictions including the requirement to pay a fine pursuant to Rule 10.49. The Application was dismissed.

MAYFIELD TELEVISION PRODUCTIONS LTD V STANGE, 2018 ABQB 294 (GRAESSER J)
Rule 10.52 (Declaration of Civil Contempt)

The Applicant, Mayfield Television Productions Ltd. ("Mayfield"), sought a Declaration of contempt against Kevin Van der Kooy ("Van der Kooy") and his numbered company ("692") after Van der Kooy allegedly breached Orders previously made in the Action. The Action was part of a complex dispute relating to the operation of a casino in Medicine Hat.

At issue was whether Van der Kooy was in contempt of Court for failing to provide relevant documents and records as ordered, for entering into or completing a transaction to sell shares in 692, breaching a Unanimous Shareholders Agreement ("USA"), and acting as a director of a corporation called Vanshaw Enterprises Ltd. ("Vanshaw") in contravention of numerous Court Orders.

In July of 2017, Van der Kooy was held in contempt of Court respecting two Orders to produce records (the "Production Orders"). Between July and August of 2017, the Court held Van der Kooy in contempt of the Production Orders, and made numerous Orders restricting Van der Kooy from selling shares of 692, or dissipating, transferring, or disposing of funds arising from such a sale (the "Non-Dissipation Orders"). Van der Kooy and 692 subsequently entered into an agreement to sell two thirds of the shares in 692, in spite of the numerous Non-Dissipation Orders.

Graesser J. explained that civil contempt has three elements, which must be demonstrated beyond a reasonable doubt: the Order alleged to have been breached must unequivocally state what should, or should not, be done; the Party alleged to have breached the Order must have actually known about the Order (though knowledge may be inferred by the circumstances); and, the breach must have been intentional. The power to hold a Party in contempt of Court is discretionary, and should be used as a last resort. His Lordship noted that this approach been codified "to some degree" by Rule 10.52(3).

Graesser J. noted that the Supreme Court's recent decision in *Pintea v Johns*, 2017 SCC 23 reinforced that Respondents must have actual knowledge of the Order that they are alleged to have breached in a contempt Application. Since Van der Kooy was present when each Order was pronounced, was represented by counsel, and did not suggest that he was unaware of the Orders; and because he had previously been held in contempt of the same Orders, His Lordship held that contempt had been proven beyond a reasonable doubt. Costs on a solicitor client basis were awarded to Mayfield.

BURN V BURN, 2018 ABQB 275 (BOKENFOHR J)
Rule 10.53 (Punishment for Civil Contempt of Court)

The Respondent, Chantal Burn, was held in contempt of Court following an Application by Trevor Burn. Mr. Burn sought both solicitor-client Costs and "punitive Costs" following the contempt Application but then deferred his request for solicitor-client Costs until Trial.

Bokenfohr J. clarified that the concept of a separate, punitive Costs award does not exist. A Costs award can be issued according to the tariff in the Rules, on a full indemnity basis, or somewhere in between. Though Costs awarded on one of these bases can have a punitive element, there is no separate category of Costs for punitive purposes.

Justice Bokenfohr noted that a monetary award against a party found in contempt of Court must be ordered as a fine pursuant to Rule 10.53(1)(c). Since Mr. Burn had not sought such a fine under Rule 10.53, no fine was imposed. Justice Bokenfohr held that the matter of Costs from the contempt Application would be reserved for the Trial Judge.

689799 ALBERTA LTD V EDMONTON (CITY), 2018 ABCA 212 (COSTIGAN, MCDONALD AND WAKELING JJA)
Rule 14.4 (Right to Appeal)

The Appellant, the City of Edmonton, appealed a Decision of the Alberta Land Compensation Board (the "Board"). A preliminary issue on Appeal was the Board's jurisdiction (or lack thereof) to consider and make determinations on

issues of settlement privilege. Both the majority of the Appeal panel and McDonald J.A. in dissent determined that the legislation and the rulings of the Supreme Court of Canada conferred jurisdiction on the Board to consider and determine issues of settlement privilege. The Court considered the general rule that the Court of Appeal will not hear Appeals from interlocutory Orders of boards or tribunals save for exceptional circumstances. The Court considered the Appeal to be of an exceptional nature and agreed that the Court of Appeal should hear the Appeal. In dissent, McDonald J.A. likened the Appeal to an Appeal from a case management ruling, and noted that Rule 14.4(1) allows the Court of Appeal to hear Appeals from Orders arising from case management or chambers proceedings.

The majority held that the Board had made no reviewable error in its Decision regarding settlement privilege, and dismissed the Appeal. MacDonald J.A. held that the Board had made a reviewable error in its Decision, and would have allowed the Appeal.

BULL V CANADA (ATTORNEY GENERAL), 2018 ABQB 349 (LEE J)
Rule 14.5 (Appeals Only With Permission)

The Plaintiff, Ms. Bull, requested a formal Order from the Court reflecting certain rulings made during Trial that were being appealed to the Court of Appeal prior to the conclusion of a Trial.

Lee J. referred to recent case law from the B.C. Court of Appeal which stated that evidentiary rulings made in Trial typically do not give rise to formal Orders. This is because the entering of formal Orders would preclude a Trial Judge from revisiting evidentiary rulings if the evolving circumstances of a Trial warrant reconsideration. Lee J. also noted that Rule 14.5(1)(c) prohibits an Appeal of rulings made during Trial when the Appeal is brought before the Trial has concluded.

Nevertheless, Lee J. granted the Plaintiff's Application for a formal Order, but noted that such an Order is generally not appropriate in these circumstances. Lee J. reasoned that a formal Order may be helpful in this case because the rulings at issue involved contentious Applications going to the scope of the Claim. Moreover, as the Parties agreed on the questions being appealed, no problem or confusion would arise from issuing a formal Order.

FUNK V FUNK 2018 ABCA 210 (MCDONALD JA)
Rules 14.5 (Appeals Only With Permission)

The Applicant sought permission to extend the time to file an Appeal, a Stay of enforcement pending Appeal, and applied to file a further Affidavit. The Applicant's Appeal sought to set aside a Judgment which incorporated an arbitral award which was derived from a settlement agreement. The Appeal was filed three days after the 30 day Appeal period for the Judgment had expired.

McDonald J.A. applied the test to extend time to Appeal which requires the Applicant to establish i) they had a *bona fide* intention to Appeal while to right to Appeal existed, and some special circumstance existed to excuse or justify the failure to Appeal in time; ii) an explanation for the delay and that the opposing party was not so seriously prejudiced by the delay that it would be unjust to disturb the Judgment, having regard to the position of both parties; iii) that the Applicant has not taken the benefits of the Judgment from which the Appeal is sought; and iv) that the Appeal has a reasonable chance of success if allowed to proceed.

Justice McDonald found that the Applicant failed to demonstrate any evidence beyond a mere assertion that there was an intention to Appeal while the right existed. McDonald J.A. noted that the holiday season which occurred during the time to Appeal did not constitute a special circumstance in this case to justify granting the Applicant additional time. Justice McDonald found that the Respondent had suffered serious prejudice, notwithstanding a delay of only 3 days, noting that the Respondent had agreed to cancel the continuation of the Trial of the Action on account of the settlement agreement which had ultimately been converted to the Judgment which the Applicant sought to Appeal. The Applicant was also found

to have taken all the benefits which were to accrue to him as a result of the Judgment, yet had not abided by its terms.

McDonald J.A. held that the Applicant failed to demonstrate a reasonable chance of success for four reasons: the Applicant sought to set aside the Judgment on the basis of fraud, and that the alleged fraud did not go to the foundation of the case; the Judgment was derived from an arbitral award, which the Applicant would have to Appeal as well, but he had not commenced any proceedings to do so within the 30 day period set by the *Arbitration Act*, RSA 2000, c A-43 and the Rules do not permit a Court to extend statutory appeal periods; the Parties had agreed to arbitration, and any remedy for fraud should be sought through arbitration; and that the Judgment to be Appealed appeared to be a consent Judgment which requires Permission to Appeal pursuant to Rule 14.5. The merits of the Applicant's Appeal were doubtful. Finally, issues pertaining to the settlement agreement and its force and effect were expressly submitted to arbitration.

The Applicant's Application to extend the time to Appeal was dismissed, which rendered the subsequent Applications moot, and the Applications were dismissed accordingly.

SUN V SUN, 2018 ABCA 223 (ROWBOTHAM JA)
Rule 14.5 (Appeals Only With Permission)

The Appellant had initially applied in the Court of Queen's Bench for an Order compelling his sister and others to join the Church of Jesus Christ of the Latter Day Saints (the "Initial Application"). The Chambers Judge dismissed the Initial Application, stating that the Court had no jurisdiction to resolve this sort of religious dispute. Thereafter, the Appellant sought permission to Appeal the Initial Application (the "Initial Appeal"). The Initial Appeal was struck for failure to file the Appeal Record and Justice Rowbotham subsequently dismissed the Application to restore the Initial Appeal on the basis that there was no merit to the Appeal.

The Applicant then sought to appeal the dismissal of his Application to a three Judge panel pursuant to Rule 14.5(1)(a) (the "Appeal"). Rowbotham J.A. found that an Application for permission to appeal a single Judge's decision to a panel must establish that there is: (a) a question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts. Justice Rowbotham concluded that the Appeal had no reasonable chance of success and stated that the Court of Queen's Bench and the Court of Appeal have no jurisdiction to resolve this sort of religious dispute. Justice Rowbotham noted that that this determination was recently confirmed by the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witness v Wall*, 2018 SCC 26. Accordingly, the Application for permission to Appeal was dismissed.

PARSLEY V PATENAUDE, 2018 ABCA 131 (WATSON JA)
Rules 14.37 (Single Appeal Judges) and 14.48 (Stay Pending Appeal)

The Appellant, Mr. Parsley, applied for an extension of time pursuant to Rule 14.37(1) to appeal a Decision pronounced on January 15, 2018 and reduced to a formal Order on March 8, 2018, and to stay the Order pursuant to Rule 14.48(b). The Decision involved a change in a parenting arrangement schedule as well as directions relating to back payments and partner support payments.

Watson J.A. noted the "multi-factorial test" that must be satisfied for an extension of time. In so doing, Watson J.A. observed that "the overarching objective is to serve the interests of justice", and that where success is unlikely, an extension of time will typically not be granted.

The Respondent argued that the extension of time should not be permitted as the Appeal could have been filed before the form of Order from the Court of Queen's Bench was settled. Watson J.A. noted that the approach taken by the Appellant should not be viewed strictly. In addition, Watson J.A. found that the Appellant intended to move the Appeal promptly and had taken steps to ensure the Appeal was heard within the same timeframe as if it had been initiated in time. Accordingly, the Respondent had not been significantly prejudiced because the time for hearing the Appeal had not been significantly delayed. Justice Watson granted an extension of time to file the Appeal.

Watson J.A. considered the Stay Application, and noted that the test for such relief required the Applicant to satisfy the Court that an arguable issue to be determined on Appeal exists; that the Applicant "will suffer irreparable harm if the stay is not granted"; and that the balance of convenience favours granting a Stay. Having regard to the family law context in which the Application arose, Watson J.A. did not grant a Stay of the Order.

ANGEBRANDT V SHAW, 2018 ABCA 174 (STREKAF JA)
Rules 14.48 (Stay Pending Appeal) and 14.68 (No Stay of Enforcement)

The Applicant sought to stay the enforcement of an Order for ongoing and retroactive child support pending his Appeal of that Order (the "Stay Application"). The Applicant also sought to delay the filing deadline for his Factum, Authorities and Extracts of Key Evidence (the "Extension Application").

Justice Strekaf noted that Rule 14.68 provides that filing an Appeal does not stay the enforcement of the Decision under Appeal unless otherwise ordered under Rule 14.48. Strekaf J.A. noted that, in order to obtain a Stay pending Appeal, the Applicant must first establish: (1) an arguable issue on Appeal; (2) that the Applicant would suffer irreparable harm if a Stay is not granted; and (3) that the balance of convenience favours a Stay.

The Applicant asserted that he was between employment contracts and was therefore unable to make the support payments contemplated in the Order. While the Applicant maintained equity in two properties, he was concerned that the Maintenance Enforcement Program ("MEP") would take enforcement steps against the property on which he resided with his daughter. Justice Strekaf found that the Applicant had not demonstrated that it was likely that any enforcement steps taken by the MEP would result in irreparable harm prior to the hearing of his Appeal. Moreover, Her Ladyship determined that there was no evidence that monies collected by the MEP would not be recoverable if the Applicant's Appeal was ultimately successful.

Strekaf J.A. therefore dismissed the Stay Application but concluded that, since the Appeal record and hearing transcript had already been filed and that the self-represented Applicant resided in British Columbia, in the circumstances, the Extension Application should be granted.