JSS BARRISTERS

RULES

OCTOBER 2018

Jensen Shawa Solomon Duguid Hawkes LLP

Volume 2 Issue 11

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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BLACKBURN V BOUCHER, 2018 ABQB 509 (MANDZIUK J)
Rule 1.2 (Purpose and Intention of These Rules), 3.2 (How to Start an Action), 4.33 (Dismissal for Long Delay) and 12.16 (Starting Proceeding Under Family Law Act)

The Applicant brought an Application under Rule 4.33 to dismiss two Actions involving the same parties dealing with the same subject matter (the "Application"). The two Actions arose from a personal relationship between the Applicant ("Mr. Boucher") and the Respondent ("Ms. Blackburn") governed by the *Family Law Act*, SA 2003, c F-4.5 (the "Act"). One of the Actions was commenced in 2013 (the "2013 Action") and the other was commenced in 2016 (the "2016 Action") (collectively, the "Actions"). The question before the Court was whether either or both of the Actions should be dismissed for long delay.

Rule 12.16(1) states that, despite Rule 3.2(1), a proceeding under the Act must be started by filing a Claim

in Form FL-10. This requirement operates notwithstanding Rule 3.2(1)(a) which requires that an action be started by filing a Statement of Claim. In other words, Rule 12.16(1) overrides Rule 3.2(1)(a). Ms. Blackburn failed to commence the 2013 Action in accordance with Rule 12.16(1).

To avoid a dispute about procedural matters, and at the behest of Mr. Boucher's former counsel, the 2016 Action was commenced in accordance with Rule 12.16(1). In 2016, Ms. Blackburn appeared before Graesser J. for an Order joining the two Actions, and Mr. Boucher cross-applied for dismissal of the Actions (the "Joinder Application"). Graesser J. chose not to dismiss the Actions and ordered that the 2016 Action would not be joined with the 2013 Action but rather, that the Actions would be heard concurrently at Trial.

Justice Mandziuk noted that the application of the Rules is guided by Rule 1.2(1), which states that the intent of the Rules is to provide a means by which claims can be fairly and justly resolved in a timely and cost effective way. Mandziuk J. emphasized that this is a fundamental consideration for the Court when dealing with issues that arise as claims make their way through the Court process.

In determining whether to dismiss the Actions, Mandziuk J. found that in the Joinder Application Graesser J. chose not to dismiss either of the Actions but rather indicated that they should be tried together. Justice Mandziuk determined that the Joinder Application, though unsuccessful, significantly advanced both the 2013 Action and the 2016 Action and that three years had not yet elapsed from the date of Justice Graesser's Decision. Further, because Graesser J. had ordered that the two Actions be tried together (even if not formally joined), Mandziuk J. concluded that any steps taken in the 2016 Action applied equally to the 2013 Action. Accordingly, the Application was dismissed with Costs to Ms. Blackburn.

WILSON V CORDY MANUFACTURING INC, 2018 ABQB 592 (ANDERSON J)
Rules 1.2 (Purpose and Intention of These Rules), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 6.3 (Applications Generally), 6.6 (Response and Reply to Application) and 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

The Plaintiffs filed a Statement of Claim in June 2015 and sought to add an additional party, Cordy Oilfield Services Inc. ("Cordy") through an *ex parte* Application in February 2017. Master Robertson adjourned the Application so that Cordy could receive notice pursuant to Rule 6.3 which refers to "every other person affected by the application". Upon receiving service of the Application and supporting Affidavit, Cordy sought to further adjourn the Application to question on the Affidavit. The Plaintiffs opposed the adjournment, arguing that Cordy was only entitled to notice. Master Robertson disagreed and granted the adjournment to allow for questioning on the Affidavit.

The Plaintiffs appealed Master Robertson's Decision. As stated by Justice Anderson, "[t]he issue to be decided is whether a proposed party has any standing to participate in or oppose the application to add it as a party to an action". Anderson J. also noted that Rule 3.74 governs the addition of a party in the circumstances.

While each of the Plaintiffs and Cordy made submissions concerning Rule 1.2, Anderson J. held that the foundational Rule is not "particularly determinative or helpful in deciding this issue".

Cordy submitted that each of Rules 6.3, 6.6 and 6.7 supported its position. In particular, Rule 6.3 regarding notice of an application, and Rule 6.7 regarding affidavits in support of an application, refer to "person(s)" rather than parties. Further, Rule 6.6, regarding response to an affidavit, refers to a "respondent", which is not defined in the Rules and according to Cordy, ought to "include anyone responding to an application".

The Plaintiffs suggested that Master Robertson's Order created two classes of Defendants, however Justice

Anderson did not find this to be an issue, as the old Rules also created two types of Defendants, those requiring the Court's permission to be added and those that did not.

Her Ladyship then went on to note that to add a Defendant after the close of pleadings, there must be an application and supporting evidence. The Court then has the discretion to allow the application. Further, Justice Anderson remarked that adding a party is an amendment to a pleading, granting the amendment is discretionary, and that discretion should be exercised "generously", and "especially [so] when the amendment is sought early in the proceedings".

Justice Anderson then reviewed the test to amend pleadings, remarking that the threshold to do so is low. Her Ladyship found that allowing a proposed party to participate in the amendment Application would help the Court "decide whether there is prejudice that cannot be remedied and whether the Court is satisfied that the order to add the party should be made". Accordingly, Anderson J. maintained that allowing Cordy to participate in the Application was not contrary to the Rules. Further, Justice Anderson held that for notice to be meaningful there must be a right to participate in the Application and thus there was no error in Master Robertson's Decision. Anderson J. therefore dismissed the Appeal.

DEJA VU HOLDINGS LTD V SECUREX MASTER LIMITED PARTNERSHIP, 2018 ABQB 597 (BOKENFOHR J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 15.2 (New Rules Apply to Existing Proceedings), 15.4 (Now Repealed) and 15.8 (Increased or Decreased Time Limits)

The Defendants in a debt Action applied for an Order dismissing the Plaintiff's Action under Rules 4.33 and 4.31. Justice Bokenfohr considered Rule 4.33 first. In so doing, Her Ladyship noted that the parties had agreed that a Consent Order entered on February 1, 2010 significantly advanced the Action. At issue were a Statement of Defence to Counterclaim filed by the Plaintiff on September 27, 2013 and a Supplemental Affidavit of Records served by the Plaintiff on the Defendants on September 26, 2016.

Bokenfohr J. noted that though the proceedings commenced in 2007, the Rules that came into effect on November 1, 2010 apply to existing proceedings pursuant to Rule 15.2. Justice Bokenfohr also noted Rule 15.8 provides for increased or decreased time limits (under the Rules) and that there was formerly a transitional Rule dealing with dismissal for long delay (the now repealed Rule 15.4), which applied during the life of the Action. Interpreting the now repealed Rule 15.4, Justice Bokenfohr maintained that:

> R 15.4 provides that in this situation a court could have dismissed the Action if three years elapsed after the Rule came into force without a significant action (November 1, 2010-November 1, 2013), or five years elapsed without a significant advancement (February 1, 2010 (Consent Order) – February 1, 2015), whichever came first. After November 1, 2013 the three year drop dead period under r 4.33 applied.

Her Ladyship then noted that the Action would have to be dismissed if the Statement of Defence to Counterclaim did not significantly advance the Action, as the delay between the Consent Order and the next possible advance, the Supplemental Affidavit of Records, was six and a half years. Similarly, the Action would have to be dismissed if the Supplemental Affidavit of Records did not significantly advance the Action (but if the Statement of Defence to Counterclaim did), as more than three years had passed between the filing of the Statement of Defence to Counterclaim and the service of the Supplemental Affidavit of Records.

Bokenfohr J. proceeded to review case law pertinent to Rule 4.33, remarking that the functional approach ought to be adopted in applying Rule 4.33. Considering the five paragraph Statement of Defence to Counterclaim at issue, Bokenfohr J. remarked that "a pleading will usually significantly advance an action". Justice Bokenfohr then proceeded to contrast the Statement of Defence to Counterclaim at issue to a fulsome Statement of Defence to Counterclaim that the Court of Appeal analyzed in *Brost v Kusler*, 2016 ABCA 363, and found that it was a "boilerplate denial". Based on this, Her Ladyship held

that the Statement of Defence to Counterclaim did not significantly advance the Action.

Next, Justice Bokenfohr considered whether the Supplemental Affidavit of Records had significantly advanced the Action. Bokenfohr J. noted that it contained a general ledger, which ought to have been included in the original Affidavit of Records, but was instead provided almost ten years after the Action began. In addition, the other records included in the Supplemental Affidavit of Records (balance sheets) did not significantly advance the Action. Accordingly, Her Ladyship concluded that the Supplemental Affidavit of Records also did not significantly advance the Action. Thus, Bokenfohr J. concluded that the Action should be dismissed pursuant to Rule 4.33.

Justice Bokenfohr then considered whether the Action should be dismissed pursuant to Rule 4.31 as well. Bokenfohr J. remarked that one difference between Rule 4.31 and Rule 4.33 is that Rule 4.33 is mandatory, while Rule 4.31 is discretionary.

Justice Bokenfohr noted that *Humphreys v Trebilcock*, 2017 ABCA 116 sets out the questions that are relevant in applying Rule 4.31. Considering these questions in the circumstances, Bokenfohr J. found that the Action had been ongoing for over 10 years, with a Trial still being "a long time away". According to Justice Bokenfohr, the Plaintiff had "failed to advance the Action to a point on the litigation spectrum that a reasonable claimant ought to have attained in ten years". This delay was inordinate according to Her Ladyship. Further, upon review of the evidence, Justice Bokenfohr found that there was "no real evidence to explain the delay".

Bokenfohr J. noted that prejudice is presumed upon finding "inordinate and unexplained delay". The Plaintiff had not rebutted the presumed prejudice. Of note, though the Defendants also argued that they had suffered actual prejudice, Bokenfohr J. held that it was unnecessary to decide on actual prejudice given the presumption of prejudice.

Justice Bokenfohr then remarked the plaintiff has the onus of advancing the litigation, and that the defendant ought not to come in the way of that advancement, in accordance with Rule 1.2. However, they are not expected to carry the action where the plaintiff fails to. Here, Bokenfohr J. found that the Defendants "did not actively obstruct or delay any steps taken" by the Plaintiff.

Finally, in holding that there was no compelling reason not to dismiss the Action, Justice Bokenfohr found that there was inordinate and inexcusable delay resulting in significant prejudice to the Defendants, and also dismissed the Action pursuant to Rule 4.31.

ALTEX INTERNATIONAL HEAT EXCHANGER LTD V FOSTER WHEELER LIMITED, 2018 ABQB 620 (MANDZIUK 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 Defendant applied for dismissal of the Action pursuant to Rule 4.31 or, alternatively, under Rule 4.33(2). Before reviewing the facts or the relevant tests, Justice Mandziuk noted that the delay Rules must be read in the context of Rule 1.2, specifically Rule 1.2(3) which requires litigants to resolve the claim quickly and at the least expense.

Justice Mandziuk noted that the Action was mostly a contractual dispute, in which the Plaintiff filed the Statement of Claim on October 24, 2000. The litigation was generally active until a Pre-Trial Conference on February 26, 2006. Several procedural deadlines were set at the Pre-Trial Conference, but none were met and the Action became dormant for some time. The Action was revived briefly when the Plaintiff provided some outstanding undertaking responses on August 16, 2010. The Plaintiff then applied on October 19, 2010, and again on October 5, 2011, to have the matter set for Trial, but neither of those Applications proceeded. The Defendant brought an Application for dismissal for delay on March 1, 2010 (the "First Dismissal Application") and that Application was heard and dismissed on July 27, 2012. The Defendant filed an Appeal of the First Dismissal Application but discontinued the Appeal on July 10, 2013. The Action was dormant again for some time until the Plaintiff provided

further undertaking responses (the "2016 UT Responses") and a Supplemental Affidavit of Records on June 29, 2016 (the "SAOR"). The Plaintiff then sent a letter enclosing a Form 37 – Request to Schedule a Trial Date on May 30, 2017 (the "2017 Trial Request"). The Defendant filed the within Application on October 3, 2017.

After reviewing the facts, Mandziuk J. applied the six-part test set out by the Alberta Court of Appeal in *Humphreys v Trebilcock*, 2017 ABCA 116. Justice Mandziuk found that: (i) there was a shortfall between the Action's current point on the litigation spectrum and the point where it reasonably ought to be; (ii) the Plaintiff conceded that there was inordinate delay; (iii) there was no reasonable excuse for the delay; (iv) not only did the presumption of prejudice arise, but the Defendant demonstrated significant actual prejudice due to the death of a key witness, the effects of the passage of time on memories, and corporate personnel shifts; (v) the Plaintiff offered no evidence to rebut the presumption of prejudice; and, (vi) the case was a clear example of litigation delay and the Plaintiff had not established a compelling argument against dismissing the claim. For these reasons, Justice Mandziuk dismissed the Action under Rule 4.31.

Justice Mandziuk also discussed whether the Action should be dismissed under Rule 4.33. First, Mandziuk J. noted that the relevant period of delay is determined by looking back from the date the Application was filed, not the date it was heard. The steps the Plaintiff sought to rely on as significant advances in the Action were the 2016 UT Responses, the SAOR, and the 2017 Trial Request. Justice Mandziuk noted that the Court was required to apply a functional approach under Rule 4.33 and, following *Sutherland v Brown*, 2018 ABCA 123, was required to consider factors including the nature, value and quality, genuineness, timing, and outcome of the steps taken. Mandziuk J. went on to find that the 2016 UT Responses were perfunctory and incomplete, and that the evidence did not support a finding that the SAOR significantly advanced the Action. For these reasons, neither step significantly advanced the Action. At the hearing of the Application, the Plaintiff did not attempt to rely on the 2017 Trial Request, and the Court agreed that it did not constitute a significant advance in the Action. As a result, Justice Mandziuk also dismissed the Action under Rule 4.33.

PIIKANI NATION V KOSTIC, 2018 ABCA 234 (PAPERNY, SLATTER AND GRECKOL JJA)
Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 4.14 (Authority of Case Management Judge), 5.3 (Modification or Waiver of this Part) and 13.5 (Variation of Time Periods)

The Appellant, Kostic, appealed six Decisions of the Case Management Justice. One of the Appeals was an Appeal of a procedural Order (the "Order") made by the Case Management Justice. The Piikani Nation (the "Nation") was a Respondent in all six Appeals.

In one of the six Appeals, Kostic claimed that the Case Management process was unfair and that the litigation plan was not scrupulously followed.

The Court of Appeal discussed the reasons given by the Case Management Justice during a Case Management Meeting on August 26, 2016. It determined that based on the Case Management Justice's comments, it was clear that the parties and the Court were not in a position to deal with substantive issues at the Case Management Meeting wherein the Order was granted. The Order, which arose from the August 26, 2016 Case Management Meeting, was finalized and entered in October of 2017. Among other things, the Order required that the parties prepare a revised litigation plan. Kostic argued that the Case Management Justice should not have directed the preparation of the revised litigation plan without leave of the Court, and without bringing a formal application to do so. Kostic claimed that the Case Management Justice should have rigidly and strictly complied with litigation protocol, regardless of the circumstances and the ultimate objective of Case Management.

The Court of Appeal held that Case Management requires a strong element of flexibility. Litigation under Case Management is still governed by the Rules, but the Rules themselves, are to some extent, flexible. In support of

this rationale, the Court of Appeal cited Rules 1.4(2)(c) and 1.4(2)(d), which give the Court authority to make procedural orders, and Rule 4.14, which sets out the authority of a Case Management Justice.

On the contrary, Kostic's arguments relied on procedural irregularities, which are governed by Rule 1.5. Rule 1.5 implies that variations from a litigation plan or a litigation protocol can be cured, so long as there is no prejudice rising out of the irregularity or non-compliance.

In addition, Kostic had obtained a Fiat from a Justice other than the Case Management Justice that gave her leave to bring a Summary Dismissal Application at the August 26, 2016 Case Management Meeting. Under Rule 4.14(2) and 1.4(2)(h), the Case Management Justice was within her powers to treat the Fiat as being of no effect.

Kostic also argued that because the Respondent had not produced expert evidence pursuant to a previously set deadline, that the Respondent was now forever precluded from bringing forward expert evidence. The Court of Appeal held that deadlines in Orders can always be extended under Rule 13.5, which governs the variation of time periods.

In another of the six Appeals, Kostic argued that a document that was sealed under litigation privilege by the Nation should be produced. Kostic claimed that the litigation privilege had been waived pursuant to Rule 5.3, which allows the Court to waive or modify disclosure requirements, since the privileged document had been widely distributed to the Nation's Council Members, who then provided copies to Band Members. While the Court acknowledged that the privileged document may no longer be secret, the privilege attached to the document still prevented its use in Court. The Court of Appeal concluded that Rule 5.3 does not extend so far as to allow a Court to override a valid claim of privilege.

In yet another of the six Appeals, Kostic appealed an Order made by the Case Management Justice that denied Kostic leave to bring an Application for indemnification from the Nation.

The Court of Appeal noted that Kostic did not claim indemnity from the Nation in any of her pleadings. Kostic relied on Rule 1.3(2), which governs the general authority of the Court, to claim that a remedy may be granted despite her having failed to claim indemnity. The Court of Appeal held that Rule 1.3(2) does not allow the Court to grant a remedy for a cause of action that has not been pleaded.

All six of Kostic's Appeals were dismissed.

KNISS V TROLLEY, 2018 ABQB 499 (MASTER ROBERTSON)
Rules 1.7 (Interpreting These Rules), 4.31 (Application to Deal with Delay), 6.11 (Evidence at Application Hearings) and 8.14 (Unavailable or Unwilling Witness)

The Defendants applied to have the underlying Action, commenced in 2009, dismissed on the grounds of delay and prejudice pursuant to Rule 4.31 (the "Dismissal Application"). The Plaintiff ("Mr. Kniss") was an employee of Telus and sought counselling through a Defendant, Shepell FGI. His counsellor ("Ms. Wiggins") was concerned about certain things that Mr. Kniss had said during their sessions and concluded that Mr. Kniss may be a risk to himself or others (the "Concerns"). Ms. Wiggins passed the Concerns on within the Shepell FGI organization which ultimately led to Mr. Kniss' dismissal as an employee of Telus.

Mr. Kniss brought numerous dispute resolution actions, including the underlying Action, in relation to the foregoing facts, before various boards and tribunals. Mr. Kniss was unsuccessful at every level and in every forum with only the underlying Action against these Defendants remaining. The issue, as described by Master Robertson, was whether one Defendant can rely on Rule 4.31 to claim that there has been "delay" when the Plaintiff has been busy, although not with that particular Defendant, in the absence of a standstill agreement. Additionally, over this time period, Ms. Wiggins had died and many of her case files lost. Therefore, an additional issue was whether the absence of Ms. Wiggins as a witness constituted significant prejudice.

Master Robertson applied the test, as set out by the Alberta Court of Appeal in *Humphreys v Trebilcock*, 2017 ABCA

116 (*"Humphreys"*), for considering an Application under Rule 4.31. Master Robertson found that Ms. Wiggins, prior to her death, was examined in one of the arbitration proceedings about what Mr. Kniss had told her and that Mr. Kniss, under Rule 8.14, could rely on that evidence at Trial. Master Robertson noted that, while Rule 8.14 generally applies to "evidence given at questioning conducted under Part 5", which was not the case here, Master Robertson concluded that Rule 1.7(2) specifically allows the Rules to be applied by analogy "to any matter that is not dealt with by these rules", and further that Rule 6.11(1)(f) provides that the Court may consider evidence taken in any other action if the party proposing to submit the evidence obtains the Court's permission.

Master Robertson, returning to the factors in *Humphreys*, concluded that, while Mr. Kniss may be said to have failed to advance the Action to the point that a litigant acting reasonably would have, that shortfall or differential was not of such a magnitude to qualify as inordinate. Accordingly, Master Robertson dismissed the Dismissal Application.

TORONTO-DOMINION BANK V LEADBETTER, 2018 ABQB 611 (MICHALYSHYN J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only With Permission)

The Respondent, Leadbetter, had made various filings and intrusions into Court processes apparently motivated by her anti-establishment beliefs which are characteristic of followers of the "Freemen-on-the-Land", "Sovereign Citizen", and "Detaxer" movements. As a result, the Court considered whether to deem the Respondent a vexatious litigant and to impose Court access restrictions upon her.

Michalyshyn J. confirmed that the Court has inherent authority to impose Court access restrictions on a litigant and also ruled that the common-law factors governing such an imposition weighed in favour of restricting the Respondent's Court access. The restrictions imposed by the Court included a requirement that the Respondent seek leave from a single Appeal Judge to continue or commence an Appeal which may also result in the Respondent having to apply for permission to appeal under Rule 14.5 even if leave is granted. Furthermore, Michalyshyn J. specifically references Rules 2.22 and 2.23, prohibited the Respondent from acting as a representative of any sort before the Court.

Michalyshyn J. then dispensed with the need to obtain the Respondent's approval of the Order imposing Court access restrictions pursuant to Rule 9.4(2).

GETSCHEL V CANADA (ATTORNEY GENERAL), 2018 ABQB 632 (GILL J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only With Permission)

The Respondent, Getschel, was a prison inmate who had previously made a *Habeas Corpus* Application before Gill J. that His Lordship determined was meritless and an abuse of Court process. As a result, Gill J. invited submissions regarding whether Court access restrictions should be imposed on Getschel.

Gill J. considered the common law authorities and declared Getschel a vexatious litigant. Gill J. then imposed Court access restrictions including a requirement that Getschel apply for Leave to commence or continue an Appeal. The Court clarified further that even if leave is granted Getschel may still be required to apply for permission to appeal in accordance with Rule 14.5. The Court also ruled that Getschel may not act as a representative of any kind before the Court including such representation as contemplated by Rules 2.22 and 2.23.

Gill J. then ruled that the Court would prepare the Order reflecting its ruling and dispensed with the requirement to seek Getschel's approval of the Order pursuant to Rule 9.4(2)(c).

MCKECHNIE (RE), 2018 ABQB 677 (SIMPSON J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only with Permission)

The Court had previously determined that the Respondent, McKechnie's, Court activities may require management by a Court access restriction Order. This Decision related to whether or not such an Order was appropriate, and what its parameters should be. Simpson J. first noted that McKechnie had previously commenced abusive, improper and hopeless claims; engaged in "busybody" litigation on behalf of other parties; sought "impossible or excessive remedies"; and threatened to kill or harm a number of individuals within Court proceedings. He had been instructed to submit written submissions regarding whether or not he should be subject to Court restrictions, and if so, what those restrictions could be. However, "McKechnie did not make written submissions… Instead… he left a voice mail message with the Court indicating he would kill [Simpson J]".

Next, Simpson J. noted that since his prior hearing, McKechnie had improperly attempted to file an additional "Originating Application – Notice of Appeal/Reference Under an Enactment" naming Simpson J. personally as the Respondent. Simpson J. also noted that McKechnie was currently incarcerated and facing numerous charges, was diagnosed with a number of psychiatric disorders, and had made "explicit threats" to other justice system participants in addition to Simpson J. while in Court.

His Lordship then explained that the Court's authority to impose access restrictions stems from its inherent jurisdiction to control its own processes. Restrictions may be appropriate in a number of circumstances, including where a litigant has indicated "indicia" of abusive conduct, including collateral attacks, hopeless proceedings, escalating proceedings; where a litigant has persistently engaged in inappropriate behaviour in Court; and where the litigant has previously used the "Organized Pseudolegal Commercial Argument" strategies (such as "sovereign citizen" or "freeman-on-the-land" rhetoric). Courts may refer to a litigant's activities inside and outside of the courtroom, and review his or her "entire public dispute history" including Actions brought in other jurisdictions or in non-judicial proceedings. Court intervention is generally favoured where multiple indicia are present, but the presence of any indicia presents a basis for the Court to evaluate whether intervention is warranted to prevent future abusive litigation.

In most cases, Courts merely impose restrictions that require an abusive litigant to seek leave before initiating a new action or application, or before continuing an ongoing action. However, Courts will sometimes go further, by requiring that the abusive litigant be represented by a lawyer in order to submit a leave application or pay Security for Costs prior to initiating a new action.

Given the degree of McKechnie's abusive conduct, Simpson J. held that he should be required to retain a lawyer to initiate or continue any Action in Alberta. His Lordship noted that such Orders are only appropriate where they are proportionate to the abusive litigant's "plausible future misconduct". Simpson J. also ordered that McKechnie was prohibited from being "inside or within 300 meters of any Courthouse in Alberta" unless authorized to do so by Court Order. Here, McKechnie had a history of using the Courts to initiate hopeless proceedings in order to intimidate others or cause harm to them. He also subscribed to the "freeman-on-the-land" ideology, and had a history of making serious threats against police officers, Judges, and others.

His Lordship also ordered that McKechnie could only commence proceedings with leave from the Court, and could only commence an appeal by obtaining permission pursuant to Rule 14.5(1)(j). Simpson J. also ordered that McKechnie be prohibited from acting as an agent or next friend of another individual pursuant to Rules 2.22 and 2.23, or from acting as "any other form of representative in Court proceedings", along with a number of other restrictions on McKechnie's litigation activities. Lastly, His Lordship held that McKechnie would not be required to approve the form and content of the Order pursuant to Rule 9.4(2)(c).

ALBERTA LAWYERS INSURANCE ASSOCIATION V BOURQUE, 2018 ABQB 821 (MANDZIUK J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 3.68 (Court Options to Deal with Significant Deficiencies), 3.75 (Adding, Removing or Substituting Parties to Originating Application), 8.1 (Trial without Jury), 8.2 (Request for Jury Trial), 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 11.31 (Setting Aside Service) and 14.5 (Appeals only with Permission)

The Alberta Lawyers Insurance Association ("ALIA") filed an Originating Application, which was subsequently amended, requesting that the Court declare Stephanie Bourque and her son, Stephen Bourque (collectively, the "Bourques") as vexatious litigants, and to prohibit them from initiating or continuing litigation in Alberta. Subsequently, the Bourques filed two Applications, which included a request for an Order setting aside service of the Amended Originating Application pursuant to Rule 11.31(1)(a), an Order to strike out the Amended Originating Application pursuant to Rule 3.68(4), and in the alternative, a Trial by jury.

Mandziuk J. noted that the Bourques made "a difficult to understand argument that Rule 3.75… prohibits them from being 'added' to this action." Finding that the parties were set by the Originating Application filed by ALIA, His Lordship maintained that there was no merit to the complaint. In relation to Rule 3.68, Mandziuk J. found that the Bourques did not raise valid grounds in support of their Application.

In relation to the request for a Trial by jury, Mandziuk J. noted that the Rules prohibited His Lordship from ordering a jury Trial. The Bourques did not acknowledge this as an impossible remedy and instead made excuses for seeking it. His Lordship found these excuses to be "after-the-fact fabrication… made in bad faith," that were not believable. Further, Mandziuk J. held that the Bourques were aware of Rules 8.1 and 8.2 governing jury Trials, meaning that the Bourques "knowingly made a quixotic application", which aggravated the Bourques' litigation misconduct.

In the end, Mandziuk J. found that it was necessary to impose Court access restrictions on the Bourques. These included that the Bourques may be required to apply for permission to appeal under Rule 14.5(1)(j) if granted leave to commence an appeal by a single Appeal Judge. Pursuant to Rule 9.4(2)(c), Mandziuk J. held that the approval as to the form and content of the Order was not required by the Bourques. In addition, each of the Bourques was prohibited from acting as any form of representative in accordance with Rules 2.22 and 2.23, in any Alberta Court.

Finding that ALIA was entirely successful, Mandziuk J. noted that ALIA was presumptively entitled to Costs in accordance with Rule 10.29. Elevated Costs were warranted as the Bourques' conduct was "abusive, in bad faith, and intended to frustrate this proceeding." Further, Stephen Bourque had made late supplemental arguments and submitted late materials. At that time, he was warned that Costs may be awarded against him if those arguments and materials did not raise substantive issues. Mandziuk J. found that the additional arguments and materials had no merit, and parts of them were advanced in bad faith. Accordingly, His Lordship awarded additional Costs against Stephen Bourque. Finally, Mandziuk J. remarked that lump sum Cost awards may be appropriate in abusive litigation and chose to adopt the lump sum approach. Accordingly, His Lordship ordered that Stephanie Bourque pay $4,500 in Costs and that Stephen Bourque pay $7,000 in Costs.

Mandziuk J. dismissed the Bourques' Applications and, under the Court's own motion and inherent jurisdiction, declared the Bourques as vexatious litigants, subject to Court access restrictions in Alberta.

SAID V ALBERTA (WORKERS' COMPENSATION BOARD), 2018 ABQB 593 (GATES J)
Rule 3.15 (Originating Application for Judicial Review)

The Applicant filed an Originating Application (the "Application"), asking the Court to direct the Workers' Compensation Board ("WCB") to consider new medical evidence pertaining to the Applicant, and to allow the Applicant to reopen his claim with the WCB (the "WCB

Claim"). In the supporting Affidavit, the Applicant stated that he was injured in a workplace accident in September of 1985 and that he had recently received medical treatment which he believed to be material to his 1985 workplace injury. The Applicant asserted that the WCB refused to reopen his WCB Claim on the basis of this new medical information. The second branch of the Applicant's requested relief related to his apparent dissatisfaction with a Decision of the WCB Appeals Commission dating back to March of 2010.

Gates J. noted that, pursuant to Rule 3.15, an Originating Application for Judicial Review must be filed with the Court and served on all relevant parties within 6 months of the date of the Decision that is the subject of the Application. Justice Gates emphasized that the Court has consistently held that these time limits are not capable of extension: *Barker v Drouin*, 2017 ABQB 204.

While sympathetic to the fact that the Applicant was a self-represented litigant, Gates J. agreed with the Court's conclusion in *Raczynska v Alberta (Human Rights Commission)*, 2015 ABQB 494, which held that the Rules are not subject to some lesser standard of compliance when one of the parties is self-represented. As such, Justice Gates concluded that the Court could not extend the strict time limits prescribed by the Rules and therefore dismissed the Application on the basis that it was not filed and served within the prescribed time limit.

CAMPEAU V KNECHT, 2018 ABQB 504 (GERMAIN J)
Rule 3.22 (Evidence on Judicial Review)

The Applicant, an inmate, was accused of assaulting a police officer. The conduct of the investigating officer (the "Officer") led the Applicant to file a complaint with the Chief of the Edmonton Police Services (the "Chief"). The Applicant filed an Application for Judicial Review of the Chief's Decision regarding his complaint.

The Applicant sought to rely on an Affidavit sworn by his counsel's paralegal. The Affidavit exhibited documents and other rulings that the Applicant argued were useful to determine whether the Chief's Decision was reasonable.

The Respondent Officer agreed that two of the exhibits were admissible, but not the rest of the Affidavit (the "Unopposed Exhibits"). The Respondent Chief took no position.

Justice Germain cited prior case law for the proposition that the Court has the discretion to consider affidavit evidence on an application for Judicial Review, but that such use of affidavit evidence is exceptional and cannot be used to "alter or supplement the factual record used by the tribunal to decide the issue on its merits". After reviewing the Affidavit, Germain J. permitted the Unopposed Exhibits to be entered, as they were materials that the Chief would have had before him, but rejected the other exhibits on the basis that they were hearsay and irrelevant.

NEWLAND CONSTRUCTION LIMITED V BROOKES 2018 ABQB 655 (MASTER PROWSE)
Rule 3.61 (Request for Particulars)

The Applicants applied for particulars of the Respondents' Statement of Claim pursuant to Rules 3.61(1) and 3.61(2). Master Prowse noted that in seeking particulars, the applicant cannot require the respondent to provide evidence supporting its allegations. If an applicant feels that allegations in a Statement of Claim are factually unfounded, then the applicant may bring an Application for Summary Dismissal.

Master Prowse also noted that in certain causes of action, the plaintiff will necessarily have few particulars. In those circumstances, it is not appropriate for the defendant to request particulars. Furthermore, the Court noted that in the present case, the Applicants should have no difficulties framing their Statement of Defence without the particulars, and in any event, records held by the Respondents would be disclosed in their Affidavit of Records. Master Prowse dismissed the Application.

O'NEIL V YASKOWICH, 2018 ABQB 599 (SHELLEY J)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 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) and 7.11 (Order for Trial)

Following the dissolution of their marriage, the parties sought Judgment from the Court regarding the division of matrimonial property by way of a two-day Summary Trial.

Before ruling on the appropriate division of property, Justice Shelley discussed whether the matter could proceed as a Summary Trial pursuant to Part 7, Division 3 of the Rules, being Rules 7.1 to 7.11. Shelley J. applied the two part test set out by the Alberta Court of Appeal in *SHN Grundstuecksverwaltungsgesellschaft MBH & Co Seniorenresidenz Hoppegarten – Neuenhagen KG v Hanne*, 2014 ABCA 168 and considered (1) whether the Court could decide disputed questions of fact on the Affidavits filed by the parties; and (2) whether it would be unjust to decide the issues in such a way. After discussing some of the complicated and voluminous evidence, Justice Shelley noted that the matter would likely have benefitted from a two week Trial due to the value of the assets at issue, the complex and confusing evidence, the lack of obvious urgency or prejudice, and the significant disagreements between the evidence of the parties. Notwithstanding these concerns, Shelley J. found that at least some of the issues between the parties were appropriate for Summary Trial. Specifically, Justice Shelley ruled on: the Plaintiff's claimed entitlement to exemptions; whether the Plaintiff had dissipated matrimonial property following separation; the just and equitable distribution of the matrimonial property; and, appropriate child support from the date of separation.

The Plaintiff also requested an Order amending her Statement of Claim for division of matrimonial property to seek an unequal division of property. The Defendant argued that the issue of unequal distribution was first raised by the Plaintiff only 18 days before the Summary Trial and thus objected to the requested amendment. Justice Shelley found that, although the Plaintiff should have realized earlier that the evidence may support a claim for unequal distribution, the Defendant "could not have been unaware of the evidentiary foundation that would support an unequal distribution claim." The evidence was clearly established at the Summary Trial, was obvious in the previously filed materials, and was within the Defendant's personal knowledge. For these reasons, Shelley J. permitted the amendment and allowed the claim for an unequal division of property.

GEOPHYSICAL SERVICE INCORPORATED V HUSKY OIL LIMITED, 2018 ABQB 622 (HORNER J)
Rules 3.62 (Amending Pleading) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Applicant, Geophysical Service Incorporated ("GSI"), applied to amend its twice-amended Statement of Claim. The Respondent, Husky Oil Limited ("Husky"), opposed the Application on the basis that the proposed amendments disclosed new causes of action outside of a limitations period.

The Court confirmed that a party may amend its pleadings pursuant to Rules 3.62 after the close of pleadings with permission from the Court if the proposed amendments include more than simply a correction to the names of parties to the Action. However, the Court has discretion pursuant to Rule 3.65 as to whether permission to amend is granted. The Court further confirmed that the starting point for assessing whether amendments will be allowed is the direction given by Wittmann C.J. (as he then was) in *Dow Chemical Canada Inc v Nova Chemicals Corp*, 2010 ABQB 524 where His Lordship stated that generally, any pleading may be amended at any time unless: the amendment causes prejudice not compensable by Costs; the amendment is hopeless; the amendment seeks to add a new party or cause of action outside of a limitation period; or there is an element of bad faith associated with the decision not to plead the amendment at the outset.

The Court then referred to the case of *Canadian Natural Resource Ltd v Arcelormittal Tubular Products Roman SA*, 2012 ABQB 679 as authority for what constitutes a

new cause of action. A new cause of action arises when a new claim is based on new and distinct events that results in a different and distinct loss. However, if the proposed amendments are simply changes to the quantum of damages, or even the heads of damages claimed, this is allowable provided that the damages claimed still stem from the events originally pled.

The Court then assessed the amendments proposed by GSI and ruled that a number of them amounted to new causes of action; they were based on events that had not been previously pled within the requisite limitation period. The Court also found that certain other proposed amendments were "hopeless" based on previous jurisprudence also involving GSI which had disposed of similar claims. The remaining proposed amendments that the Court did not deem new causes of action or hopeless were allowed; however, the Court still granted Husky Costs "in recognition of the depreciation in the value of Costs on Schedule C since the last amendment date and the delay of GSI in bringing the application forward."

EON ENERGY LTD V FERRYBANK RESOURCES LTD, 2018 ABCA 243 (BERGER, MARTIN AND O'FERRALL JJA)
Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff and the Defendant were joint owners of several oil and gas wells, some of which were the subject of a joint operating agreement. Various issues were in dispute including the parties' respective ownership interests in the wells, the entitlement to operate the wells, and the amounts owed or payable to each party for well revenues and expenses. The Defendant applied to amend its pleadings on the eve of Trial (the "Amendment Application"). The Amendment Application was heard and denied on the first day of Trial. The Trial itself was also decided in the Plaintiff's favor. The Defendant appealed both the Trial Decision and the Trial Judge's Decision to deny the Amendment Application.

The Court of Appeal cited the applicable test for amendments pursuant to Rule 3.65, which gives the Court a broad discretion to permit the parties to amend pleadings unless: the amendment would cause non-compensable prejudice; the amendment is hopeless; unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; or, there is an element of bad faith. The Trial Judge had found that the proposed amendments would result in non-compensable prejudice because: the litigation had been ongoing for some time; the amendments would shift the focus to matters occurring many years ago, possibly as far back as the 1980s; the amendments would fundamentally change the issues in the lawsuit; granting the Amendment Application would require the Trial to be adjourned; and, the Defendant could have raised the amendment issue as early as 2010 or 2013 but did not raise it until three weeks before Trial, which was heard in October 2014. The Court of Appeal saw no error with the Trial Judge's identification and application of the test to amend pleadings or with the denial of the Amendment Application and thus dismissed the Appeal on this point. The Defendant's appeal of the Trial Decision was also dismissed on all grounds.

MIKKELSEN V TRUMAN DEVELOPMENT CORPORATION, 2018 ABQB 540 (MASTER PROWSE)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendant Applicant, Truman Development Corporation ("Truman"), applied to strike portions the Plaintiff's ("Mikkelsen") Claim under Rule 3.68 and the Plaintiff cross-applied to amend its Claim. The Plaintiff initially commenced two Actions for declarations that the two Joint Venture Agreements (the "JVAs") entered into with Truman were not binding legal agreements or, alternatively, that the JVAs had been breached and could be rescinded. The within Action commenced in 2012 (the "Chestermere Action"), and the second Action commenced in 2013 (the "Langdon Action").

The Langdon Action went to Trial but counsel for the parties failed to discuss what influence the outcome of the Langdon Action might have on the Chestermere Action. Truman, who had ultimately lost the Langdon Action, nevertheless had a number of issues decided in its favour. Truman argued that those issues (the "Decided

Issues") were subject to "issue estoppel" and could not be re-litigated in the Chestermere Action. To prevent the re-litigation of the Decided Issues, Truman proposed striking those related parts of the Chestermere Action from Mikkelsen's existing pleadings.

Master Prowse noted that the evidence of surrounding circumstances leading up to the Chestermere Action could be different than the evidence presented in the Langdon Action and that the Application in the Chestermere Action was not the time to argue that the two Actions should have been tried together. In other words, counsel could not now argue that the outcome of the Decided Issues in the Langdon Action should bind the result in the Chestermere Action. Accordingly, Master Prowse declined to strike portions from Mikkelsen's existing pleadings relating to the Decided Issues and allowed the Plaintiff's Application to amend the Statement of Claim in order to facilitate an orderly hearing of the Chestermere Action.

OUELLETTE V MAY, 2018 ABQB 596 (MASTER FARRINGTON)
Rules 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants applied to strike the Action pursuant to Rule 3.68, after the Plaintiff was permitted to file an Amended Amended Statement of Claim. The Amended Amended Statement of Claim alleged that the Defendants (Crown counsel and the Minister of Justice) had acted with malice, engaged in intentional torts, and breached the Canadian *Charter of Rights and Freedoms* (the "Charter") when they applied to have the Plaintiff, a criminal lawyer, disqualified as counsel in a criminal Trial due to incompetence.

The matter had first come before Master Farrington several months prior in morning Chambers. At that time, the Master had ordered that it be heard as a Special Application, and directed that if the Plaintiff sought to apply to amend the Statement of Claim, he should do so within a certain timeline. The Plaintiff applied to amend that Statement of Claim outside of the timeline, and then filed a further Application to amend the Statement of Claim to a different version the next day. At the Special Application, the Plaintiff was allowed to file his Amended Amended Statement of Claim, and Master Farrington then considered whether it should be struck.

Master Farrington first noted that pursuant to Rule 3.68(3), an application to strike is not based on evidence. Although the Defendants had emphasized that the surrounding circumstances and context of the Action could be considered, the Master was still required to assume that the allegations as pled in the Amended Amended Statement of Claim were true and consider the pleadings from that perspective.

Master Farrington then assessed the two categories of claims in the Amended Amended Statement of Claim. First, there were claims for abuse of process and malice. Second, there were claims that the Defendants had breached s. 7 of the Charter. With respect to malice, Master Farrington noted that the Plaintiff had pleaded the required elements of malice. Although there were issues as to whether or not the Courts were the proper venue for a complaint about counsel's conduct (as opposed to a complaint to the Law Society of Alberta), "the limits of the various concepts likely require much testing and exploration" and could not be determined at an Application to strike. With respect to the Charter, Master Farrington considered whether the Plaintiff had set out a breach of his right to life, liberty, and security of the person in the Amended Amended Statement of Claim, and found that he had not done so. As such, the Charter aspect of the Amended Amended Statement of Claim was struck. The Application to strike in all other respects was dismissed.

HOOPP REALTY INC V GUARANTEE COMPANY OF NORTH AMERICA, 2018 ABQB 634 (LEMA J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.5 (Application for Judgment by way of Summary Trial)

After a property owner's claim against a builder was deemed to have expired due to the operation of the *Limitations Act*, RSA 2000, c L-12 (*the Limitations Act*) and the *Arbitration Act*, RSA 2000, c A-43, the Court was tasked with

determining whether the limitations period had a "spillover effect" which immunized a surety of the builder. The matter was heard as a Summary Trial.

First, Lema J. noted that the Defendant had previously applied to strike the Plaintiff's claim pursuant to Rule 3.68, on the basis that the dismissal of the Plaintiff's claim against the builder extinguished its claim against the builder's surety. However, the Court (and later the Court of Appeal) held that the Defendant had not established that the Plaintiff's claim plainly and obviously could not succeed. As such, the Plaintiff applied for a Summary Trial of the issue.

Next, Lema J. considered whether the issue was appropriate for Summary Trial pursuant to Rule 7.5 based on the test set out in *SHN Grundstuecksverwaltungsgesellschaft MBH & Co v Hanne*, 2014 ABCA 168. Since the parties both agreed that the issue was suitable for Summary Trial, and there were no disputes about relevant facts or issues regarding findings of credibility, the Court determined that Summary Trial was appropriate – but emphasized that the Summary Trial would only deal with the issue of whether the expiration of a limitations issue against the builder had a "spillover effect" which immunized the surety.

Lema J. ultimately held that the claim against the surety was not extinguished by virtue of the claim against the builder being time barred. Section 3(1) of the *Limitations Act* allows a defendant to obtain "immunity", but does not extinguish the underlying claim. Rather, the ability to pursue the claim against the defendant ceases to exist. As such, the expiry of the Plaintiff's limitation period against the builder, while providing immunity to the builder, did not extinguish its claim against the surety (which was not time barred). The Plaintiff had a separate and distinct claim against the surety, which was triggered by the builder's defaults under the construction contract. The Court went on to consider and reject the surety's position that surety law entitled it to "invoke any defence" available to the builder. As such it could not benefit from the expiry of the limitation period against the builder.

NOVA POLE INTERNATIONAL INC V PERMASTEEL CONSTRUCTION LTD, 2018 ABQB 672 (ROSS J)
Rules 3.72 (Consolidation or Separation of Claims and Actions), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant/Applicant, Permasteel Construction Ltd. ("Permasteel"), appealed a Master's dismissal of its Application to dismiss the Action for delay pursuant to Rules 4.31 and 4.33. The Master had considered Rule 4.33 which requires the Court to dismiss an action where three or more years have passed without a significant advance in the action. The Master ruled that an Order to have two matters underlying the Action tried concurrently was a significant advance and thus declined to dismiss the Action on the basis of Rule 4.33. Permasteel took no issue with the finding that the Order was a significant advance, but argued that the Order had simply formalized an earlier agreement, meaning the significant advance had actually occurred more than three years prior. Ross J. disagreed and noted that consolidation can take at least three forms under Rule 3.72: full consolidation, Trial at the same time, or Trials one after another. Although consolidation of some sort had been advocated for as early as 2006, there was no agreement between the parties about how to consolidate the two Actions until the Order to consolidate was granted. Therefore, Ross J. upheld the Master's ruling that the Action could not be dismissed pursuant to Rule 4.33.

In considering the Application brought under Rule 4.31, Ross J. confirmed that once the Court finds that delay is "inordinate" and "inexcusable", it is presumed that the moving party has suffered the significant prejudice required by Rule 4.31 to dismiss the claim. However, the non-moving party has the opportunity to rebut this presumption. There was no debate that the delay in this case was inordinate – the Action had been ongoing for some 11 years. However, the Master had ruled that the presumption of significant prejudice had been rebutted, as the case was primarily a document case that would not be hampered by the passage of time, and because the matter was essentially ready for Trial. Ross J. disagreed, and held that the Master had applied the old standard of rebutting the presumption of significant prejudice - that of a "legitimate doubt."

As Ross J. noted, this standard has been replaced by a requirement to displace the presumption of significant prejudice on a balance of probabilities. Ross J. held that had the Master applied the correct standard, the presumption would have remained intact, and the Action would have been dismissed. There was evidence that this case was not simply a documents case and there was not definitive evidence that the Action was ready for Trial. Ross J. dismissed the Action pursuant to Rule 4.31.

GREEN V KHATTAB, 2018 ABQB 523 (MACKLIN J)
Rules 4.18 (Judicial Dispute Resolution Process), 4.19 (Documents Resulting from Judicial Dispute Resolution) and 7.3 (Summary Judgment)

The Appellant appealed a Master's Order which had granted Summary Judgment. The Order directed specific performance of a settlement agreement between the Appellant and the Respondents that had been reached during a Judicial Dispute Resolution ("JDR") between the parties.

The Appellant argued that she had withdrawn her consent to the JDR process as required by Rules 4.18 and 4.19, which govern the JDR process. Additionally, the Appellant argued that she was denied her right to meaningfully participate in the JDR process pursuant to Rule 4.18(2) because she was bullied and threatened into accepting an unjust resolution.

Macklin J. explained that Rule 7.3(1)(a) provides that Summary Judgment may be granted when there is no defence to a claim or part of the claim, and that Summary Judgment is an appropriate remedy where there is no genuine issue requiring a Trial. Macklin J. then briefly addressed the fact that there are currently two different tests for Summary Judgment that different panels of the Alberta Court of Appeal have set out recently in *Whissell Contracting Ltd. v Calgary (City)*, 2018 ABCA 204 and in *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125. Despite the different standards for Summary Judgment, it was not necessary for the Court in this instance to choose one of the two tests.

Macklin J. noted that Rule 4.19 provides an exhaustive list of the documents that may result from the JDR process, which includes an agreement between the parties, a transcript, and a Consent Order. Here, no Consent Order or Judgment resulted from the JDR process, but the Court determined that to be a result of the Appellant's refusal to execute a Consent Judgment. Macklin J. then addressed Rule 4.18(2), which provides that parties who agree on a proposed JDR process are entitled to participate in the process. Based on the available evidence, the Court refused to find that the Appellant was threatened or intimidated into the settlement agreement. Even though there was no evidence to the contrary, the Court refused to accept the Appellant's position because it was not supported by the transcript of the JDR process. Furthermore, the Appellant was represented by counsel during the proceedings. Macklin J. affirmed the Summary Judgment Decision granted by Master Smart.

FJN V JK, 2018 ABQB 659 (MOEN J)
Rules 4.20 (Confidentiality and Use of Information), 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff was successful at a Trial concerning retroactive and ongoing child support after the Defendant denied paternity. The parties then returned to Court to determine Costs. The Plaintiff sought Costs amounting to double Column 4 of Schedule C of the Rules.

Moen J. first noted that since the Plaintiff was the "substantially successful" party, she was entitled to her Costs. Rule 10.33 sets out the principles that must be applied when Courts consider Costs awards. Her Ladyship also noted that Costs awards are discretionary and that, although Review Officers are bound by Schedule C, Judges are not.

Next, Moen J. considered which Column of Schedule C was applicable. Since the amount of retroactive and ongoing child support awarded exceeded $500,000, but was less than $1.5 million, it was held that Column 4 should apply. Although the Defendant had argued that some of the go-forward child support costs may become lower in the

future, and therefore a lower Column of Schedule C should apply, Moen J. disagreed. Her Ladyship noted that, because the child at issue had special needs and would require additional care after the age of 18, retroactive and ongoing child support would exceed $500,000 in any event.

Moen J. also agreed that double Costs should be awarded for all steps taken in the Action. Her Ladyship noted that the Defendant – who was the party disputing paternity – refused to take a DNA test, which would have easily determined the issue. Instead, after the Court determined that the Defendant was the father based on other evidence, the Defendant appealed the issue, but eventually took a DNA test and admitted his paternity after six years. As a result of his refusal to take the test, extensive judicial resources were required to determine a simple issue. Her Ladyship held that this course of action, as well as the Defendant's suggestion that he did not know he was the father, despite the Plaintiff advising him of that fact before the child was born, constituted blameworthy conduct and was an attempt to mislead the Court. Additionally, the Defendant's refusal to disclose his income and failure to produce his tax returns in breach of Court Orders constituted blameworthy conduct in the litigation.

Lastly, Moen J. addressed particular Costs issues that were raised by the parties. It was noted that the Plaintiff was entitled to two sets of Costs for Questioning because her lawyer had attended Questioning of a third party. Moen J. also noted that even though the Plaintiff's lawyer acted for her on a pro bono basis at one point, she was still entitled to Costs for those steps. However, the Plaintiff was not entitled to Costs for expert fees or other expenses relating to a JDR, as the JDR was confidential and ought not to be compensated by Costs pursuant to Rule 4.20.

BROADWAY V ROBSON, 2018 ABQB 463 (MASTER PROWSE)
Rule 4.22 (Considerations for Security for Costs Order)

The Defendants, including a corporate Defendant, applied for Security for Costs under Rule 4.22. Master Prowse remarked that the circumstances of the Plaintiff, who had been bankrupt twice, resided out of province, had no assets in Alberta, and had two outstanding unpaid Judgments in British Columbia, would typically result in a Security for Costs Order.

In resisting the Application, the Plaintiff relied on section 243(3) of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "ABCA") which states that "[a] complainant is not required to give security for costs in any application made or action brought or intervened in under this Part". Master Prowse noted that the definition of "complainant" under the ABCA includes a "beneficial owner" and the Plaintiff indeed alleged that he was a beneficial owner of the corporate Defendant.

Master Prowse noted that there should be a threshold test to qualify as a complainant, and articulated the test as requiring that a plaintiff "produce evidence that supports an arguable case that they are a 'complainant'." Based on this test, Master Prowse reviewed the evidence and found that the Plaintiff had an "arguable case" of being a beneficial owner, and therefore of being a complainant as defined in the ABCA. Accordingly, Master Prowse dismissed the Defendants' Application for Security for Costs.

MUDRICK CAPITAL MANAGEMENT V WRIGHT, 2018 ABQB 648 (YAMAUCHI J)
Rule 4.22 (Considerations for Security for Costs order) and 10.33 (Court Considerations in Making Costs Award)

Following a previous Decision of the Court, Yamauchi J. invited the parties to make further submissions as to whether the Defendants met the test to allow the Court to award Security for Costs, and if so, for what amount. The Defendants, as Applicants for Security for Costs, bear the initial onus of proof. If the evidentiary burden shifts, then the Respondent Plaintiffs would need to establish why the Court should not exercise its discretion to make and Order for Security for Costs. The Court then reiterated a list of non-exhaustive factors established in *Amex Electrical Ltd. v 726934 Alberta Ltd.* 2014 ABQB 66 (*"Amex"*) that a Court will consider when determining whether it will require a respondent to post Security for Costs. If one or more of the factors exist, then the likelihood that a Court will award Security for Costs increases. The Court also noted that

there are similarities between the Rule 4.22 factors and the factors provided in *Amex*.

In applying the factors to the present case, the Defendants argued that because the Plaintiff corporations did not hold assets in Alberta and the Plaintiffs only had offices in the United States, it would be difficult to enforce an Alberta Judgment against them. Consequently, the onus shifted to the Plaintiffs to show that they had assets in Alberta. The Plaintiffs failed to meet this evidentiary burden.

The Plaintiffs then argued that the Defendants did not meet their burden to show that the Plaintiffs would not be able to pay Costs if they were unsuccessful. The Court held that since the onus had shifted, it was now in fact the Plaintiffs' burden to show that they would be able to pay Costs. Yamauchi J. also found, without commenting on the relative strength of the parties' respective positions, that the Defendants had raised meritorious defences to each cause of action that the Plaintiffs raised.

With respect to the last factor under Rule 4.22, the Plaintiffs did not provide any evidence that they could not fund the lawsuit. Therefore, the Court refused to find that the Security for Costs would be prejudicial to the Plaintiffs.

Yamauchi J. noted that the Court had discretion to order that the Plaintiffs post security for past as well as future Costs, and elected to do so in this case. Additionally, Yamauchi J. ordered that the award for Security for Costs would be made in stages. The first stage would include steps up to the end of a Summary Judgment Application. Since the Defendants had retained two separate sets of counsel, they would incur two sets of Costs. As such, they were also entitled to two separate sets of Security for Costs. The fact that the Defendants had chosen to retain two sets of counsel was not determinative of their entitlement to Security for Costs.

With respect to Costs for the Application, Yamauchi J. relied on Rule 10.33 in determining whether a Costs multiplier should be used. Yamauchi J. elected to award triple Costs under Column 5 of Schedule C, since the Plaintiffs had claimed $150 million, which far exceeded the $1.5 million threshold for Column 5. Additionally, the allegations made against the Defendant were complex.

SCOTT & ASSOCIATES ENGINEERING LTD V GHOST PINE WINDFARM, LP, 2018 ABQB 616 (JONES J)
Rules 4.24 (Formal Offers to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Justice Jones addressed the Costs award arising from His Lordship's earlier Decision (the "Dismissal Application"). In the within Costs Application, Ghost Pine Windfarm LP ("Ghost Pine") argued that it was entirely successful in the Dismissal Application and should be awarded Costs accordingly.

Justice Jones noted that Rule 10.29 provides that, subject to the discretion of the Court, a successful party is entitled to Costs against an unsuccessful party. Rule 10.31 also directs the Court to take into account the factors prescribed in Rule 10.33. Justice Jones agreed with Ghost Pine's submissions that the case was both factually and legally complex consisting of, *inter alia*: (a) three briefs and reply briefs; (b) five half-day examinations on Affidavits; (c) five named Defendants, each requiring a separate Statement of Defence; (d) a total of 20 Affidavits sworn and filed; and (e) hearings on three separate sub-issues to the issues forming the basis of the Dismissal Application.

Additionally, Ghost Pine argued that it served a Formal Offer to Settle on Scott & Associates Engineering Ltd. ("Scott") pursuant to Rule 4.24, on September 3, 2010. The offer was for Scott to discontinue the underlying Action upon receipt of $10,000.00, inclusive of interest and Costs, from Ghost Pine. Justice Jones, noting the forgoing, determined that the potential value of Scott's claim to be upwards of $3 million dollars and as such awarded Costs based on Column 5 of Schedule C. Additionally, Jones J. added a multiple of 2 for all steps taken after September 3, 2010.

BRUEN V UNIVERSITY OF CALGARY, 2018 ABQB 650 (SHELLEY J)
Rules 4.24 (Formal Offers to Settle), 4.29 (Cost Consequences of Formal Offer to Settle), 15.1 (Definitions), 15.2 (New Rules Apply to Existing Proceedings), 15.6 (Resolution of Difficulty or Doubt), 15.11 (Formal Offer to Settle) and Schedule C

After the Plaintiff's Action was dismissed as a non-suit, the parties returned to Court to determine the quantum of Costs the Defendant was entitled to. The Defendants sought party-party Costs under Column 5 of Schedule C plus disbursements, and argued that double Costs should be ordered from the date of a formal offer made by the Defendants in 2010, or alternatively, the date that a second formal offer was made by the Defendants in 2017. They noted that the second formal offer was left open for two months, as required by Rule 4.24(3) and 4.29(3) of the Rules. The Defendants also sought second counsel Costs and expert witness fees.

Shelley J. first noted that pursuant to Rule 4.29(2) to (3), if a formal offer to settle is not accepted and is later "beaten", then the party making the formal offer is entitled to double Costs for steps taken after serving the formal offer. However, the formal offer must have been genuine at the time it was made. An offer to discontinue without Costs is more likely to be "genuine" where it was made after the offeror had already incurred a substantial legal bill, or where the Action has no obvious merit. If an offer of settlement is held to be genuine, the Court must then ask if there are circumstances which warrant departing from the double Costs rule. Shelley J. held that the offer made in 2010 was not a genuine offer of compromise, because at the time it was made the litigation was in its early stages and the facts had only been minimally tested. Instead, it held that the 2017 offer more realistically reflected the merits of the parties' strengths and weaknesses in the Action. As such, double Costs were awarded only after the 2017 offer was made.

Shelley J. then considered whether the Defendants' second counsel Costs were appropriate. In doing so, it considered the following factors: (1) the general importance of the issues to the parties or others; (2) the value of the case; (3) the complexity and scope of the issues, (4) the size of the Trial record; (5) the manner in which the Plaintiff conducted the case; and (6) whether second counsel addressed the Court. Shelley J. held that second counsel Costs were appropriate, because although the sums at issue were relatively small, the case was important to both parties, the Defendants' second counsel addressed the Court, six defence witnesses were required to be prepared, and other witnesses were required to be cross-examined.

Shelley J. also held that the fees claimed for two expert reports were reasonable. The main consideration in determining the reasonableness of expert witness fees is whether the fees were reasonable at the time they were incurred. The Court held it was reasonable to retain two experts to prepare expert reports, especially since the claim sought to recognize a novel duty of care.

Shelley J. also held that Column 5 Costs should be awarded, rather than Column 4. A Defendant is "entitled to take seriously the [P]laintiff's pleadings and to think that it is for the larger sum" until he is advised that the Plaintiff is seeking less. Since the Plaintiff sought damages of over $1.5 million and did not amend his claim, Column 5 was the appropriate column to use. Shelley J. also ordered the parties to attend before a Review Officer if they could not reach agreement regarding disputed items in the Defendants' Bill of Costs.

Lastly, Shelley J. noted in *obiter* that, although the litigation began prior to the new Rules coming into effect in November, 2010, the new Rules apply to matters that existed at the time they came into effect pursuant to Rules 15.1 and 15.2. Rule 15.11 mandates that a formal offer that existed and was not withdrawn or accepted prior to the new Rules coming into effect "remains open for acceptance in accordance with the former rules". Additionally Rule 15.6 allows the Court to modify or suspend the new Rules or substitute one of the old Rules if there is doubt about the application of the current Rules. Shelley J. commented that a strict application of the current Rules to the offer made in 2010 would not be just, as the 2010 offer was made when the previous Rules were in place and therefore was not

withdrawn using the procedure permitted by the new Rules. The fair thing to do would be to allow the Defendants to receive the benefit of the old Rules. This analysis did not affect the Court's Decision because it held that the 2010 offer made by the Defendants was not a genuine offer of compromise in any event.

422252 ALBERTA LTD V MESSENGER, 2018 ABQB 576 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 7.1 (Application to Resolve Particular Questions or Issues)

The Applicant law firm applied to dismiss the Respondent's Action for long delay pursuant to Rule 4.31. The dispute related to an opinion that the Applicant provided to the Respondent in 1990 and a Notice of Assessment issued by Revenue Canada in 1994.

Master Schlosser noted that the leading case for long delay Applications is *Humphreys v Trebilcock*, 2017 ABCA 116 (*"Humphreys"*), but qualified that the analysis of whether there was delay in this case must be performed considering that the litigation has spanned two limitations regimes, a revision of the Rules, and a culture shift regarding the way that civil disputes may be summarily resolved. Master Schlosser went on to cite and apply the six part test set out in *Humphreys*. The Court found that the Respondent failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review. Despite acknowledging that the appeal of a tax liability issue took a very long time, the Court found that more could have been done to establish liability in the meantime. It also noted that splitting liability and quantum is more acceptable following *Hryniak v Mauldin*, 2014 SCC 7 and the reinterpretation of Rule 7.1.

Master Schlosser also found that the shortfall or differential between the advancement in the Action and what a reasonable litigant would have attained qualified as inordinate. It had been 28 years since the impugned event had occurred, 18 years since the Statement of Claim was issued, and 10 years since a final resolution was reached with Revenue Canada. The Court held that the case was not so complex and that it could have been ready for Trial or summary disposition by now. Master Schlosser then found that the delay was inexcusable. Despite the fact that some of the delays could be attributed to factors outside the control of the Respondent, the Respondent still had opportunities to advance the matter.

With respect to prejudice, the Court noted that prejudice is presumed where there is inordinate and inexcusable delay. Despite the fact that the Action was a "documents case", the Court found prejudice in part due to the responsible lawyer leaving the Applicant law firm and fading memories resulting from the passage of 28 years. Master Schlosser held that the Applicant satisfied the *Humphreys* test and dismissed the Action for long delay.

866546 ALBERTA LTD V SKENE, 2018 ABQB 825 (MASTER PROWSE)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicants, Masuch, Albert and Neale ("Masuch"), applied to dismiss a Counterclaim that had been in existence for sixteen years. The basis of the Counterclaim was that Masuch had breached its duty of care as solicitors to the Respondents, David Skene and Sandy Skene (the "Skenes"), in connection with transactions for lands subject to a mortgage.

The main issue before the Court was the calculation of the period of delay. The Court ruled that the last significant advance in the Action, as required by Rule 4.33, occurred on May 16, 2011. There was then no significant advance for the next 254 days until January 19, 2012. At that time, a standstill agreement was entered into which lasted until November 13, 2015.

The Court stated that there are three ways to calculate the delay period under Rule 4.33 when a standstill agreement has been entered into and has ended: the Court can calculate from the initial starting point of the delay before the standstill agreement; the Court can count the initial period of delay plus the period following the end of the

standstill agreement; or the Court could ignore the period of delay before the standstill agreement and count only from the end of the standstill agreement. Master Prowse stated that the parties to a standstill agreement could agree on which option the Court should use, but in this case, it was appropriate to count the initial period of delay before the standstill agreement was entered into and also count the period of delay after the standstill agreement ended. Therefore, the question for the Court was to determine whether there had been a "significant advance" in the Action by March 2, 2017 which would have amounted to three years including both timeframes.

Master Prowse ruled that there had been no significant advance in this timeframe. The Skenes had contended that their efforts to subdivide the property at the root of the Counterclaim had significantly advanced the Action. Master Prowse disagreed and referred to jurisprudence stating that commencing a step that is not completed in the Rule of Court does not significantly advance an Action.

Master Prowse dismissed the Action pursuant to Rule 4.33 but also stated that he would make the same ruling pursuant to Rule 4.31 which gives the Court discretion to dismiss an Action where "inordinate" and "inexcusable" delay has occurred. Master Prowse ruled that there had in fact been inordinate and inexcusable delay in this case. The Counterclaim had been in existence for sixteen years and the only potential excuse for this delay might have been the Respondents' attempts to subdivide property which could have resolved the matter. However, Master Prowse ruled that "the reasonableness of this approach dissolved by the end of 2015 at the latest."

Having ruled that inordinate and inexcusable delay had occurred, Master Prowse confirmed that it is presumed that Masuch had suffered significant prejudice allowing the Court to dismiss the Action. The Skenes had submitted no evidence sufficient to rebut this presumption. The Action was dismissed.

MCDONALD V SPROULE MANAGEMENT GP LIMITED, 2018 ABCA 295 (MCDONALD, WAKELING AND CRIGHTON JJA)
Rules 5.1 (Purpose of this Part), 5.3 (Modification or Waiver of this Part) and 5.19 (Limit of Cancellation of Questioning)

The Defendant appealed the Decision of the Chambers Judge to uphold a Master's Decision setting aside the Defendant's Notice of Appointment to conduct Part 5 Questioning of the Plaintiff prior to the Plaintiff's Application for Summary Judgment.

Crighton J.A., writing for the Court briefly noted that a Master's decision is reviewable on a correctness standard and that a decision of a Chambers Judge regarding production and discovery is a discretionary decision entitled to deference on review.

Crighton J.A. noted that there is no Rule suspending the usual proceedings relating to Part 5 Questioning once a party files a Summary Judgment Application. Justice Crighton then reviewed Rules 5.1, 5.3, and 5.19 and found that those Rules discouraged unnecessary delay, and permitted the Court to cancel unnecessary appointments or make any Order warranted in the circumstances if the delay resulting from complying with a Rule is grossly disproportionate to the likely benefit. The Court then found that it was implicit in the Chambers Judge's reasons that he had concluded that Part 5 Questioning would add a disproportionate expense if undertaken prior to the Application for Summary Judgment. For this reason, there was no error in the Chambers Judge's Decision and the Court of Appeal dismissed the Appeal.

BLOUGH V BUSY MUSIC INC, 2018 ABQB 560 (JONES J) Rules 5.1 (Purpose of This Part), 5.2 (When Something is Relevant and Material), 5.5 (When Affidavit of Records Must Be Served), 5.6 (Form and Contents of Affidavit of Records), 5.7 (Producible Records), 5.12 (Penalty for Not Serving Affidavit of Records), 5.25 (Appropriate Questions and Objections), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.8 (Questioning Witness Before Hearing) and 6.20 (Form of Questioning and Transcript)

The underlying Action (the "Main Action") and two Counterclaims (the "Counterclaims") arose out of the validity and enforceability of a song-writing agreement between the Plaintiff, country music artist ("Blough"), and the Defendant, music publisher ("BMI"). The Defendant counterclaimed against Blough, Blough's initial counsel in the Main Action ("Rath"), and Blough and Rath's corporation ("WE") (collectively, the "Defendants by Counterclaim").

In April of 2016, the Defendants by Counterclaim filed an Application for an Order striking BMI's Counterclaims in their entirety (the "Strike Application"). In November of 2016, both Blough and Rath were cross-examined in relation to the Strike Application. BMI brought an Application (the "Within Application") seeking an Order, *inter alia*: (1) compelling Rath to produce a proper Affidavit of Records in compliance with Rules 5.5, 5.6, and 5.7 without the alleged improper assertion of solicitor-client privilege; (2) compelling the production of undertakings and answers to questions refused by both Rath and Blough; and (3) sanctions related to alleged obstructionist conduct by the Defendants by Counterclaim, including the imposition of a penalty pursuant to Rule 5.1.

In making his determination, Jones J. considered a number of Rules contained in Parts 5 and 6 of the Rules and the applicable jurisprudence. Jones J. noted that, pursuant to Rule 5.6(b)(i), an Affidavit of Records must disclose all records that "are relevant and material to the issues in the action" and Rule 5.2(1) which states that a record or information is relevant and material only if it can reasonably be expected to (i) significantly help determine one or more of the issues raised in the Pleadings, or (ii) to ascertain evidence that could reasonably be expected to do the same.

Justice Jones went on to discuss the sanctions requested pursuant to Rule 5.12 for Rath's failure to produce a compliant Affidavit of Records. While refusing to penalize Rath on the current record under Rule 5.12, Justice Jones stated that he intended to review Rath's solicitor's file to determine if the claims of solicitor-client privilege would afford the type of blanket relief requested.

Justice Jones moved on to discuss the appropriateness of questions and objections under Rule 5.25. His Lordship noted that Blough was Questioned on his Affidavit in support of the Strike Application under Rule 6.7, while Rath was Questioned as a witness before a hearing pursuant to Rule 6.8. Justice Jones highlighted that Rule 6.20 provides guidance on the form of Questioning under both Rules 6.7 and 6.8 and emphasized that the form of the Questioning is more akin to Cross-Examination at Trial and distinct from Questioning for discovery pursuant to Part 5. Justice Jones determined that the possible scope of questions in Cross-Examination under Rule 6.7 is very wide and is not confined to the contents of the Affidavit but rather, covers anything relevant to the pending motion. Additionally, Justice Jones found that there are few restrictions on when Rule 6.8 may be used, as long as its use is to get information for an application and not merely a concealed Questioning under Part 5 (examination for discovery).

Jones J. applied the above Rules and reasoning to each specific refused question or undertaking and concluded that Rath was to produce the files in question. He concluded that if there were any relevant and material records that were not privileged, then Rath was required to provide a further and better Affidavit of Records in accordance with the Rules. Additionally, Justice Jones ordered that Rath and Blough both provide answers to undertakings and answer to the questions objected to as set out in his Lordship's reasons.

AARC SOCIETY V SPARKS, 2018 ABCA 280 (SCHUTZ JA)
Rules 5.11 (Order for Record to be Produced), 14.37 (Single Appeal Judges) and 14.48 (Stay Pending Appeal)

The Defendant Applicants each applied under Rules 14.37 and 14.48 for a Stay of an Order. Pursuant to Rule 5.11, the Order required the Applicants to submit records for inspection by a Judge of the Court of Queen's Bench. In its Decision, the Court had directed that the Judge, to whom the matter was referred, was to determine whether "an exception to solicitor-client privilege applies to the records produced for inspection". In support of the Applications, the Applicants relied on an Affidavit confirming the retention of counsel to bring an Application for leave to appeal to the Supreme Court of Canada, and the deadline for filing materials for leave to appeal.

Counsel agreed that the matter should be resolved in accordance with the test set out in *RJR Macdonald v Canada (Attorney General)*, [1994] 1 SCR 311, which requires the following considerations:

> ...(i) whether there is a serious question to be determined in the sense of a claim that is not frivolous or vexatious; (ii) whether the applicants would suffer irreparable harm if the stay is refused; and, (iii) an assessment of the balance of convenience in the sense of which party would suffer the greater harm from the granting or refusal of a stay pending a decision on the merits...

Justice Schutz proceeded to consider each of these factors, noting that the moving party has the onus of establishing that a Stay should be granted. Given that the issues at hand involved consideration of solicitor-client privilege, which is a substantive rule, Her Ladyship maintained that there was a serious question to be considered, which may be of public and national importance. Justice Schutz then considered the second and third stages of the test together. Schutz J.A. remarked that the parties agreed that the Case Management Judge, who was "intimately familiar with all matters in issue", would review the records and make privilege determinations, that the parties would undoubtedly have input on the safeguards to be taken for the inspection and privilege determinations, and that the Case Management Judge's procedures would undoubtedly not "permanently interfere with the confidentiality of such communications in a way that cannot be undone". Based on this, Her Ladyship was not persuaded that the Applicants would suffer harm or that the Appeal would be rendered nugatory if the Stay were not granted. Further, Justice Schutz held that the balance of convenience did not favour granting a Stay.

Accordingly, Schutz J.A. dismissed the Applications without prejudice to future Stay Applications, having regard to the fact that circumstances might change and that solicitor-client privilege is of a "sacrosanct nature".

WOITAS V TREMBLAY, 2018 ABQB 588 (MASTER WACOWICH)
Rules 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Applicant applied for Summary Judgment on a dispute involving a rear-end collision between numerous parties. The Court referenced *Stefanyk v Sobeys Capital Incorporation*, 2018 ABCA 125 as the standard for determining whether Summary Judgment under Rule 7.3 is appropriate. A case should be determined summarily where there is no genuine issue for Trial and the Court is able to reach a fair and just determination on the merits. This will be the case 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 a proportionate, more expeditious and less expensive means to achieve a just result.

The Respondent opposed the Summary Judgment Application on the basis that there was conflicting evidence on some facts. However, the Master Wacowich held that since the Decision in *Hryniak v Mauldin*, 2014 SCC 7, it is no longer sufficient to require a Trial simply because there is a conflict on some facts.

The Respondent further argued that he had provided further expert evidence to the Applicant, who failed to respond to it. As a result of the Applicant's failure to respond or consent to the further expert evidence, the Respondent did not submit his expert evidence to the Court in preparation

for the Summary Judgment Application. Master Wacowich rejected the Respondent's argument, stating that Rule 6.11 provides that expert evidence may be provided to the Court by way of Affidavit.

Master Wacowich found that the Applicant and additional Defendants were entitled to Summary Judgment, and dismissed the Statement of Claim.

NORTH BANK POTATO FARMS LTD V THE CANADIAN FOOD INSPECTION AGENCY, 2018 ABQB 505 (FAGNAN J)
Rule 7.3 (Summary Judgment)

The Appellant, the Canadian Food Inspection Agency ("CFIA"), appealed a Master's Decision which had dismissed his Application for Summary Dismissal of the Respondent, North Bank Potato Farm's claim for losses resulting from a CFIA Order to dispose of crops after finding "cysts" in the Respondent's soil samples. The finding turned out to be a false alarm after further testing.

Fagnan J. canvassed the authorities regarding Rule 7.3 which governs Summary Judgment and Summary Dismissal. The Court confirmed that Summary Dismissal is appropriate where the Court is able to reach a fair and just determination based on the merits of the case. This will be the case where the Court can make the necessary findings of fact; apply the law to the facts; and where the process is a proportionate, more expeditious and less expensive means to resolving the matter than a Trial. The Court also clarified that Summary Dismissal is ideally suited where the dispute pertains to the applicable law. However, a Trial is often more appropriate to resolve allegations of common law duty given their factual nature.

Applying the test for Summary Dismissal, Fagnan J. determined that the Court could reach a fair and just determination using the Summary Dismissal process in this case. The Respondent had received and accepted compensation for the losses it suffered as a result of CFIA's mistaken testing. As such, the Respondent was barred from taking further action against CFIA by operation of section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. The Appeal of the Master's Decision was allowed, Summary Dismissal was granted, and the Respondent's Claims were dismissed.

SOBEYS CAPITAL INCORPORATED V WHITECOURT SHOPPING CENTRE (GP) LTD, 2018 ABQB 517 (FEEHAN J)
Rule 7.3 (Summary Judgment)

The Plaintiff, Sobeys Capital Incorporated ("Sobeys"), applied for Summary Judgment against the Defendant, Whitecourt Shopping Centre (GP) ("Whitecourt") in two Actions stemming from a roof collapse.

The Court canvassed the case law interpreting Rule 7.3 in some detail. The Court confirmed that the "modern test" for Summary Judgment has been adopted in Alberta and permits Summary Judgment where a Court can fairly and justly make necessary findings of fact, apply the law to those facts, where the process is a proportionate, more expeditious, and a less expensive means to resolve a dispute than going to Trial. Summary Judgment can be granted where the Court finds there is no issue of merit requiring a Trial.

Notably, the Court discussed a "dispute" in the jurisprudence regarding the burden of proof to be met by a party applying for Summary Judgment. In some very recent cases the Court of Appeal has stated that the standard of proof to show there is no issue of merit requiring a Trial is on a balance of probabilities. However, other cases from the Court of Appeal state that the burden of proof is to show that the applicant's position is "unassailable." The Court stated that it has been advised that the Court of Appeal has assembled a panel to resolve this issue in September of 2018.

The Court further confirmed that once an applicant for Summary Judgment meets the preliminary burden of proof on a balance of probabilities, the burden then shifts to the responding party to show there is arguable merit to the case. Applying the test for Summary Judgment, the Court stated that Summary Judgment was appropriate in this case

regardless of what burden was imposed on Sobeys as the applying party. The Court ruled that the damages claimed by Sobeys were clearly the natural result of breaches of the Head Lease by Whitecourt. Summary Judgment was granted in both Actions.

NELSON V GRANDE PRAIRIE (CITY), 2018 ABQB 537 (MASTER SCHLOSSER)
Rule 7.3 (Summary Judgment)

The Plaintiff, Nelson, sued the Defendant, the City of Grande Prairie (the "City") for personal injuries resulting from a slip and fall on a City sidewalk. The City brought an Application for Summary Dismissal of the Claim.

Master Schlosser first considered whether the City's Defence needed to be unassailable or merely probable; the Master noted division in the Court of Appeal on the issue of the applicable standard for Rule 7.3 applications. After surveying the leading authorities on the standard of proof in Summary Judgment cases, Master Schlosser proposed that there might be a middle way. As stated by the Master, "to require that the standard be high that a claim or defence is (or has been) proved on a balance of probabilities is not to incorporate two civil standards of proof but only to require a higher standard for what the Court thinks of the record, or the quality of the evidence at this stage of the proceedings."

Ultimately, Master Schlosser did not decide which standard was applicable to Rule 7.3 applications. Instead, Master Schlosser found that the gaps in the evidence prevented Summary Dismissal on the current record. Master Schlosser dismissed the City's Application with leave to re-apply on a more fulsome record.

MORIN V TRANSALTA UTILITIES CORPORATION, 2018 ABQB 578 (MASTER SMART)
Rules 7.3 (Summary Judgment) and Schedule C

The Defendants applied to strike, or alternatively summarily dismiss, the Plaintiff, Morin's, pleadings. Morin was the only Plaintiff remaining in the Action after other Plaintiffs' Claims had been discontinued. The Defendant also sought enhanced Costs against Morin's counsel personally, on the basis that he had acted without taking instructions from a number of the Plaintiffs.

Morin had previously entered into an agreement through which he had agreed to cooperate with the other parties to attempt to have the Action withdrawn, discontinued, dismissed or struck out, in exchange for consideration. After signing a Discontinuance of Claim, Morin backed out of the agreement, stating that he had been induced to sign it through intimidation and bribery while under duress, and that he had been lied to. He also said that he had been told not to show or tell his counsel about the agreement.

Master Smart noted that the proper circumstances for Summary Dismissal under Rule 7.3 were summarized in *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125. Master Smart then reviewed the evidence and held that although the Affidavits filed by the Parties contained conflicting facts, those matters were addressed on questioning and the conflicts were resolved. Where the conflicting matters were not resolved, the conflicting evidence was self-serving and unsupported. The evidence did not support Morin's claim that he signed the agreement under duress, and similarly did not demonstrate that Morin had been lied to. As such, the Court found that it could make a fair and just determination under Rule 7.3, and dismissed Morin's Claim. Master Smart did not comment on whether or not the Action could or should be struck.

In assessing Costs pursuant to Schedule C, Master Smart first explained that all nine of the original Plaintiffs' Actions had been dismissed, and that Costs had been reserved pending the determination of Morin's Claim. Master Smart first dealt with the Costs of the Application, and ordered that the Defendants have their Costs against Morin and his counsel jointly, because Morin's counsel had not established that he had authority to act. Additionally, Morin's counsel had not provided evidence or legitimate basis to demonstrate he had authority to commence the Action on behalf of the eight other Plaintiffs, so enhanced Costs were therefore ordered against him personally.

AXCESS MORTGAGE FUND LTD V 1177620 ALBERTA LTD, 2018 ABQB 626 (RENKE J)
Rule 7.3 (Summary Judgment)

The parties each appealed an Order of Master Schultz, dismissing both parties' Applications for Summary Judgment. Renke J. reviewed the recent Alberta Court of Appeal Decision in *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125, and reiterated that Summary Judgment is a procedural alternative to Trials where a disposition would be fair and just to both parties on the existing record. A fair and just disposition may be reached if the Summary Judgment process allows the Court to make the necessary findings of fact, allows the Court to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result.

In reviewing *Arndt v Banergi*, 2018 ABCA 176, Renke J. stated that there are two types of Summary Judgment cases. First, there are cases where the merits of the claim rest on the facts and the evidence. Second, there are cases where the merit rests on the legal basis for the claim. In determining which type of case the Summary Judgment application falls under, the Court is required to assess both the moving and non-moving party's cases. A moving party should not be entitled to Summary Judgment if it cannot establish its case on the existing record through a balance of probabilities. In determining whether a non-moving party would be entitled to Summary Judgment, a Court must determine whether a fair disposition on the record is available to determine the critical legal issues, on the assumption that the non-moving party's evidence is established.

In determining whether there is a genuine issue requiring a Trial, the discussion often turns to whether the issue has "merit". Merit has two aspects. First, the issue must be significant and important to the litigation, and should be resolved before judgment may be granted. Second, the non-moving party must have a sufficient prospect of success on the issue to warrant resolution through Trial as opposed to resolution on the Summary Judgment record.

Renke J. then discussed what constitutes a "sufficient" prospect of success for the non-moving party. Merit no longer means that there must be a triable issue in the non-moving party's favour. At the same time, merit cannot require that the non-moving party prove its case on a balance of probabilities. An issue has merit where it cannot be fairly and justly decided on the Summary Judgment record. It would not be fair to decide against the non-moving party if the non-moving party had a real chance of success on the issue. The question becomes whether the probative value of the non-moving party's evidence is so low that it does not preclude the inferences sought by the moving party. Where the record includes conflicting evidence, the Master or Justice still have latitude for fact-finding and assessing the chance of success at Trial if the record provides a foundation for substantially discounting the probative value of a party's claims.

Based on the evidence and argument, Renke J. considered Rule 7.3 and found that both the Plaintiff and the Defendant failed to establish that there were no genuine issues in the dispute. His Lordship upheld Master Schultz's Decision and dismissed both Summary Judgment Applications.

CANADA (ATTORNEY GENERAL) V BOUZ, 2018 ABQB 670 (MASTER SCHLOSSER)
Rules 7.3 (Summary Judgment), 10.42 (Actions Within Provincial Court Jurisdiction), 13.6 (Pleadings: General Requirements) and 13.18 (Types of Affidavit)

The Crown applied for Summary Judgment on a student loan debt. The Defendant formally admitted the principal debt, but there was a dispute regarding the amount of interest. The Defendant took the position that interest was not owed because he was a full time student in the United States for the bulk of the relevant period. The Crown's position was that the Defendant had not completed the form required to obtain interest-free status. Master Schlosser noted that the amount in dispute was small and could have been heard in Provincial Court but for the Crown's policy not to commence proceedings in a Court in which the Crown cannot be sued.

Master Schlosser considered four issues in his Reasons. First, Master Schlosser found that even though relief from forfeiture was required to be pleaded pursuant to Rule 13.6 - which sets out the general requirements for pleadings - in these circumstances, there was no prejudice and it was appropriate for the Court to excuse the defect in the pleading. Second, Master Schlosser considered whether the Crown's evidence met the requirements of Rule 13.18, which sets out the required form and contents of affidavits. While some of the Crown's evidence was business records admissible without the necessity of calling the author, much of the Crown's evidence was based on information and belief, and thus was not admissible on the central point in issue in the Summary Judgment Application. Third, Master Schlosser reviewed the admissible evidence and determined that the Defendant had substantially complied with the relevant statutes and would have enjoyed interest-free status if there was a form for his particular situation. Fourth, Master Schlosser determined that, although there were various bars to relief, proportionality required the Court to prioritize dispute resolution.

Based on the above, Master Schlosser granted the Crown Summary Judgment pursuant to Rule 7.3 for the principal debt, but for interest only for the period after the Defendant completed his studies in the United States. Master Schlosser awarded the Crown Costs under Column 1 of Schedule C, reduced to 75% of Column 1 on a discretionary basis on analogy with the application of Rule 10.42, which applies to actions brought that are within the subject matter of the jurisdiction of the Provincial Court.

1336868 ALBERTA LTD V ROMSPEN INVESTMENT CORPORATION, 2018 ABQB 824 (MASTER SMART)
Rule 7.3 (Summary Judgment)

The Defendant applied for Summary Dismissal of the Plaintiffs' Claim arising out of a financing agreement between the parties. The Defendant had issued a commitment letter to the Plaintiffs (the "Commitment Letter") and the Plaintiffs had paid the deposit required by the Commitment Letter (the "Deposit"). Various issues arose in the due diligence process and ultimately the Plaintiffs terminated the Commitment Letter and the Defendants did not advance any funds and did not return the Deposit. The Plaintiffs later sued the Defendant, alleging that the Defendant breached its duty of honest performance of the contract because it knew early on in the process that it could not advance funds under the Commitment Letter and did not bring this to the Plaintiffs' attention. Further, counsel for the Defendant had indicated that the Defendant was intending to advance funds shortly, subject to resolution of remaining matters.

Master Smart stated that the test for Summary Dismissal under Rule 7.3(1)(b) required the Court to consider whether a fair and just determination could be made on the record. The Master reviewed the evidence and indicated that the Plaintiffs were informed throughout the process that much more needed to be done before funds could be advanced under the Commitment Letter. Master Smart determined that a single careless statement by counsel could not have misled the Plaintiffs. The suggestion that the Defendant, who was in the business of lending and who continued to work with the Plaintiffs to provide funding, would want to deceive the Plaintiffs and drag out the process lacked any air of reality. For this reason, Master Smart granted Summary Dismissal of the Claim, with the exception that the Plaintiffs could renew their Application for return of the Deposit within 30 days of entry of the Master's Order.

HILL V BUNDON, 2018 ABQB 506 (ANDERSON J)
Rules 9.4 (Signing Judgments and Orders) and 10.29 (General Rule for Payment of Litigation Costs)

The Applicants brought an Application to have the Respondent declared a vexatious litigant and to impose Court access restrictions. The Applicants further sought a lump sum award of Costs on an enhanced basis in case of success on the Application.

Justice Anderson, under Her Ladyship's own motion and the Court's inherent jurisdiction, ordered that the Respondent was a vexatious litigant and imposed certain Court access restrictions. Justice Anderson noted that the Court would prepare the Order, and that the Respondent's approval as to its form and content was not required pursuant to Rule 9.4(2)(c).

In the circumstances, Justice Anderson agreed that enhanced Costs were appropriate. Justice Anderson remarked that the successful party in an action is presumptively entitled to Costs under Rule 10.29(1). Justice Anderson found that a factor contributing to enhanced Costs was that the Respondent failed to disclose a lawsuit that was "clearly material".

ALBERTA TREASURY BRANCHES V HAWRYSH, 2018 ABQB 618 (MICHALYSHYN J)
Rules 9.4 (Signing Judgments and Orders) and 14.5 (Appeals only with Permission)

The Appellant appealed a Decision of Master Schlosser which held that the Appellant had no rights in relation to a property that he previously owned, as the property was now held by the Appellant's bankruptcy trustee. At the Appeal of Master Schlosser's Decision, the Appellant attempted to submit irregular and unorthodox documents, including a number of Organized Pseudolegal Commercial Arguments documents. The Appellant had also demanded that Michalyshyn J. produce His Lordship's "oath of office" to establish His Lordship's authority. Michalyshyn J. dismissed the Appeal, and further requested that the Appellant and the Respondent make submissions and enter evidence as to whether the Appellant should be subject to Court access restrictions, and if so, what form those restrictions should take.

Michalyshyn J. held that Court access restrictions were appropriate given the Appellant's history of abusive litigation conduct. He declared that the Appellant was a vexatious litigant, and among other things, ordered that the Appellant would need leave to commence or continue an Appeal. If an Appeal Judge grants leave to commence an Appeal, then the Appellant may be required to apply for permission to appeal under Rule 14.5(1)(j). In preparing the Order, the Court also dispensed with Rule 9.4(2)(c), which otherwise would have required the Appellant's approval of the Order.

DOBRANSKY V ROTELIUK, 2018 ABQB 660 (BOKENFOHR J)
Rules 9.6 (Effective Date of Judgments and Orders) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicant, Brenda Cameron ("Cameron") applied as representative of the estate of William Dobransky ("Dobransky") to rectify the title to a parcel of land to finally give effect to an Order pronounced in 2010. The Order mandated that the Respondent, Marjorie Roteliuk, be listed as a tenant in common of the parcel of land with Dobransky, rather than joint tenant. However, the Land Titles Office refused to register the Order. Cameron argued that the Order should be given effect, despite the fact that it had not been registered at the Land Titles Office. Conversely, the Respondent maintained that the Order failed to sever the joint tenancy.

Bokenfohr J. referred to Rule 9.6, pursuant to which every Order comes into effect on the date of pronouncement. The Order provided for immediate severance of the joint tenancy and was not appealed. Bokenfohr J. maintained that the non-registration of the Order by the Land Titles Office did not change the effect of the Order, which ought to have been "obeyed and respected". Justice Bokenfohr also held that the reasons for the non-registration of the Order by the Registrar were not determinative as the Registrar's administrative act was insufficient to defeat a Court Order.

Further, though the Applicant argued that the Order was flawed because it failed to fix the proportionate interests of the parties as tenants in common, Bokenfohr J. maintained that it was reasonable to infer that the Order intended each of the parties to have an undivided one-half interest in the parcel of land. Accordingly, Justice Bokenfohr maintained that the Order had the effect of severing the joint tenancy.

Next Bokenfohr J. considered whether to exercise discretion to rectify title by directing the Land Titles Office to give effect to the Order. Justice Bokenfohr held that it was appropriate to exercise such discretion.

Finally, the Respondent argued that the Order should be set aside pursuant to Rule 9.15(4). However, as the Respondent only made this argument in additional written submissions requested by the Court, Bokenfohr J. held that the submissions were not "properly before the Court" and there was no Application before Her Ladyship in respect of the application of this Rule. Further, as the issue of whether Rule 9.15(4) applied was not fully argued, Justice Bokenfohr made no determination as to whether it applied. However, Bokenfohr J. noted that in the circumstances, even if the Rule were engaged, Her Ladyship would not set aside or vary the Order. Ultimately, Justice Bokenfohr directed that title in respect of the parcel of land be rectified.

FJN V JK, 2018 ABQB 641 (MOEN J)
Rule 9.13 (Re-Opening Case)

The Reasons of Justice Moen initially arose from a family law Trial conducted in 2018 primarily dealing with the issue of child support (the "Initial Reasons"). Moen J. issued a Corrigendum with respect to some of the issues within the Initial Reasons, claiming them to be "unclear and contradictory". Justice Moen chose to provide supplementary reasons, particularly in regards to the issues of guardianship and ongoing reporting requirements, noting that these issues required a more fulsome explanation (the "Supplementary Reasons").

Justice Moen noted that Rule 9.13(a) allows for a Justice, before a judgment or order is entered, to vary the judgment or order. Citing Justice Shelley in *Paniccia Estate v Toal*, 2012 ABQB 11, Moen J. outlined the potential benefits of judicial intervention after the reasons have been issued but before the Judgment Roll has been filed. Such benefits include, *inter alia*: (1) an otherwise unnecessary and costly appeal may be averted; (2) if a party does conclude that an appeal is warranted, then the appellate Court has the benefit of a more fully developed consideration of the facts and law; and (3) an incorrect statement of law can be corrected that might otherwise confuse future judicial analysis and inappropriately bind lower Courts.

In this instance, Her Ladyship had not addressed the ongoing reporting requirements in the Initial Reasons and found that such reporting requirements are essential to any order of the Court with respect to child support. Justice Moen concluded by: correcting the Initial Reasons to account for minor discrepancies and errors; more fulsomely addressing the issue of guardianship; and giving direction for the annual reporting of income.

TYCHON (RE), 2018 ABQB 668 (MASTER SCHLOSSER)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Trustee applied for Costs against the Superintendent of Bankruptcy, after it was required to attend before the Registrar in respect of a taxation issue that was moot. The Superintendent of Bankruptcy issued a Comment Letter in response to the Trustee forwarding its final statement of receipt and disbursements to the Superintendent's office. The Comment Letter asked the Trustee to proceed to taxation and present the Comment Letter to the Registrar, but acknowledged the issue of taxation was essentially moot as the Trustee's fees had been taxed through an Order issued by Master Birkett. The request by the Superintendent of Bankruptcy and the operation of the *Bankruptcy and Insolvency General Rules, CRC*, c 368 compelled the Trustee to return to Court, though the issue of taxation had already been decided.

Among other things, the Trustee argued that since the Superintendent of Bankruptcy requested that the Comment Letter be put before the Registrar, even though the taxation issue was moot, the Trustee wanted an opportunity to answer the Comment Letter as a matter of natural justice. Master Schlosser, acting as Registrar, noted that the Rules apply where the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 does not provide for the resolution of procedural issues. Referring to Rule 9.15, Master Schlosser remarked that this matter could have been put back before Master Birkett if the Superintendent of Bankruptcy wanted a further adjustment to the Trustee's account. Master Schlosser noted that reopening the matter would be counterproductive and was not the relief sought by the Superintendent of Bankruptcy. Noting that the

Superintendent exercises a regulatory role in light of which the Court should not award Costs unless there is bad faith or improper purpose, Master Schlosser held that each party should bear its own Costs.

WEST V LOGIE FAMILY LAW, 2018 ABCA 255 (PAPERNY, MCDONALD AND STREKAF JJA)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges) and 13.5 (Variation of Time Periods)

The Appellant appealed the Decision of the Chambers Judge to uphold the Master's Fiat which granted the Respondent an extension of time to review the Appellant's accounts beyond the six months prescribed by the Rules, which the Respondent obtained ex parte. The Court noted that the relevant Rules in the circumstances are Rules 10.9, 10.10 and 13.5.

The Court maintained that the Chambers Judge correctly identified the applicable case law and that *Samson Cree Nation v O'Reilly & Associés*, 2014 ABCA 268 (*"Samson"*) sets out the six factors to be considered in extending time. However, the Chambers Judge incorrectly characterized the threshold that must be met to allow an extension of time for the review of a lawyer's accounts as very low. Specifically, the Chambers Judge stated: "[a]s long as there is some evidence that a client, in good faith, seeks an independent review of their legal fees, the fiat ought to be granted".

The Court remarked that Rule 10.10 provides for a six month limit as a balance of the "client's right to review a legal account against the lawyer's right to have an account reviewed promptly". The threshold set by the Chambers Judge ignored this balance. Further, the Court held that the test set out by the Chambers Judge did not give effect to the limitation in Rule 10.10. The Court also found that the Chambers Judge did not address four of the six factors set out in *Samson*. Given this, and that the Chambers Judge made a palpable and overriding error on the facts, the Court held that it could not conclude that the Chambers Judge exercised discretion reasonably. As such, the Court granted the Appeal and set aside the Fiat granted by the Master.

The Court provided advice to counsel acting for individuals, in light of the fact that Respondent did not promptly seek taxation of the lawyer's accounts. The Court noted that when acting for individuals in particular, counsel "might consider advising their clients in writing that they have the right pursuant to the Rules to review a retainer agreement and the lawyer's charges". The Court suggested counsel could do so in the retainer agreement or a letter provided to the client at the same time as the retainer agreement, including the wording of Rules 10.9 and 10.10, and noting that it is difficult to obtain an extension of time beyond the time prescribed in Rule 10.10.

Finally, the Court held that it might not be appropriate to extend the deadline set out in Rule 10.10(2) through an ex parte fiat. Instead, Masters should direct those seeking such a Fiat to "give notice to the opposing lawyer/law firm or client, to provide an evidentiary basis for the requested extension and consider whether an order rather than a fiat should be granted if the test is met".

GRESL V CARGYLE, 2018 ABQB 535 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision awarded following the conclusion of a Trial and oral reasons provided by Jones J. The parties had formerly been Adult Interdependent Partners and the Trial was to resolve a dispute between the parties as to appropriate compensation following the end of that relationship. At Trial, the Defendant/Plaintiff by Counterclaim, Cargyle, was largely successful in obtaining the support she sought though the dollar figure was less than what Cargyle had formally requested. Cargyle sought two times the Costs recommended by Column 2 of Schedule C of the Rules on the basis that she was largely successful at Trial, the matter was complex, and that all relief awarded by the Court was awarded to Cargyle notwithstanding the fact that Gresl, the Plaintiff/Defendant by Counterclaim, actually initiated the Action.

The Court summarized Cargyle's arguments for double Costs. Rule 10.29 provides that, generally, a successful

party is entitled to Costs from an unsuccessful party subject to the Court's discretion. Cargyle argued further that Rule 10.31(1) allows the Court to order Gresl to pay: the reasonable and proper Costs incurred by Cargyle to participate in the Action; any amount the Court considers appropriate instead of or in addition to assessed Costs; or some combination of the two. Rule 10.31(3) allows for reasonable and proper Costs to be awarded without reference to Schedule C of the Rules. Further, Rule 10.33 identifies specific factors that may be considered by the Court in addition to any other factors the Court deems relevant to making a Costs award.

The Court decided there was no basis to award double Costs to Cargyle. However, the Court ruled that Gresl's conduct and lack of credibility throughout the proceedings did warrant an increased Costs award. The Court ultimately awarded Costs of $22,375.

THOMPSON V ALTALINK MANAGEMENT LTD, 2018 ABQB 547 (BAST J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court-Ordered Costs Award)

The Applicant applied for Costs against the Respondent following a successful Application to strike the Respondent's Appeal under Rule 3.68. The Respondent cross-applied for Costs against the Applicant.

The Court first noted that since the Appeal arose pursuant to a compensation Order under the *Surface Rights Act*, RSA 2000, c S-24, Costs must be determined under the Rules. The Court held that Rule 10.29 provides that the successful party to an application is entitled to Costs against the unsuccessful party, payable forthwith, subject to the Court's general discretion under Rule 10.31. As a general rule, a successful party cannot be denied Costs, much less be ordered to pay Costs unless there are exceptional circumstances.

Since the Respondent did not Appeal the Court's Decision in the Application to strike the Appeal, the Court held that the Respondent could not now advance an argument as though he were successful on Appeal. Bast J. found that there was no reason to depart from the ordinary Rules governing Costs, and ordered Costs against the Respondent.

ATHABASCA MINERALS INC V SYNCRUDE CANADA LTD, 2018 ABQB 551 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

After Syncrude Canada Ltd. ("Syncrude") unsuccessfully applied for several forms of pre-judgment relief, the parties appeared before Jones J. to speak to Costs.

Athabasca Minerals Inc ("AMI") argued that it should be granted enhanced Costs forthwith. It emphasized that pursuant to Rule 10.33, Costs are discretionary and the actual legal bill of the successful party may be considered in determining the appropriate Costs award. As well, Costs may be used to sanction unreasonable or vexatious litigation conduct, or conduct that tended to increase time and expense. AMI further argued that Syncrude's Applications were brought as a tactic to "avoid the orderly administration of justice by means of a trial", because the Orders sought by Syncrude would have prevented AMI from pursuing its debt Claim against Syncrude. It emphasized that the Applications took seven days of Court time and required a large volume of materials. It also referenced several decisions which had held that a Costs award should indemnify the successful party for about 40% to 50% of their actual legal fees. Lastly, AMI argued that inflation should be considered in making any Costs award.

Conversely, Syncrude argued that Costs should be in the cause based on Column 5 of Schedule C, without any multipliers, and that multipliers of Column amounts in Schedule C are not the rule, but the exception. It also argued that it should not be ordered to pay Costs forthwith.

Jones J. considered the factors in Rule 10.33, and concluded that Syncrude should pay enhanced Costs in the form 45% of the reasonable legal fees actually incurred by AMI, plus disbursements – without reference to the standard amounts set out in Schedule C. In coming to that

conclusion, Jones J. noted that he was permitted to make a Costs award without reference to Schedule C pursuant to Rule 10.31(3)(a). His Lordship noted that where legal issues are complex and parties are sophisticated, the line items set out in Schedule C do not necessarily correspond with the value of work performed. As such, where the volume of materials adduced or the complexity of the litigation is the reason for an award of enhanced Costs, it is often not very helpful to increase the amount of Costs by "mak[ing] artificial and arbitrary adjustments to Schedule C amounts". However, adjusting Schedule C amounts may be appropriate to account for egregious conduct in the litigation. Additionally, Schedule C should still be considered in order to perform a "reality check" on an award of Costs.

Jones J. further held that Costs should be payable forthwith, as set out in Rule 10.29(1). His Lordship noted that the onus is on the losing party to demonstrate why Costs should instead be payable in the cause, and that Syncrude had not justified departure from the rule. Jones J. further noted that given the apparent disparity between Syncrude and AMI's financial resources, it could "invite misuse of the prejudgment relief process" if Costs were not made payable forthwith. Lastly, Jones J. also noted that it is not appropriate to account for inflation absent extraordinary circumstances. If Courts accounted for inflation on a case by case basis, it could lead to inconsistent results. In any event, inflation was already accounted for because the Costs award made was based on a percentage of fees incurred.

ALDRED ESTATE (RE), 2018 ABQB 600 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The testator's wife ("Mrs. Aldred"), a beneficiary under the will, sought various forms of relief from the Court, including an Order for maintenance and support (the "Omnibus Application"). Prior to the hearing of the Omnibus Application, Mrs. Aldred brought an Application before the Case Management Judge seeking the production of certain records in the custody of Bennett Jones LLP (the "Records Application"), which the personal representatives resisted based on privilege. Following the Records Application, Mrs. Aldred sought solicitor-client Costs from the estate, and the personal representatives sought an Order that no Costs be awarded to Mrs. Aldred.

Mrs. Aldred relied on Rules 10.29 and 10.31, arguing that she was successful in the Records Application and was therefore entitled to Costs. Justice Jones stated that the Records Application Decision ordered limited and controlled production, not wholesale release of the requested records, and, based on this limited success, declined to grant Costs to Mrs. Aldred at this time. Jones J. noted that Rule 10.33(1)(g) takes on added significance in estate litigation because such cases often involve consideration of other matters, including public policy arguments and whether the applicant is exercising a statutory right, not listed in Rule 10.33(1).

Finally, Justice Jones held that the personal representatives had a duty to assert solicitor-client privilege and ordered that they were entitled to full reimbursement from the estate for their reasonable legal Costs in the Records Application, subject to taxation. Jones J. also held that Bennett Jones LLP was entitled to be reimbursed by the estate for reasonable costs associated with record production arising from the Decision in the Records Application.

CANADIAN CENTRE FOR BIO-ETHICAL REFORM V GRANDE PRAIRIE (CITY), 2018 ABCA 254 (BERGER, COSTIGAN, SLATTER JJA)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and 14.88 (Cost Awards)

The parties applied to the Court for direction regarding Costs following the failure of an Appeal by the Appellant, Canadian Centre for Bio-Ethical Reform. The successful Respondent, Grande Prairie (City), argued that it was entitled to Costs on the same scale as awarded at Trial pursuant to Rule 14.88, which states that a successful party on Appeal is entitled to Costs against an unsuccessful party unless otherwise ordered. The Respondent argued

further that it should be entitled to Costs assessed on Columns 5 of Schedule C of the Rules because the Appeal raised issues of significant complexity and importance. Rule 10.33 outlines the factors that a Court may consider in making a Costs award, including the complexity of the Action. The Appellant argued that because no monetary sum was in issue, the presumptive Costs award is based on Column 1 of Schedule C. However, because of the public importance of the constitutional issues raised, no Costs should be awarded.

The Panel confirmed that a successful party in litigation is presumptively entitled to a Costs award pursuant to Rules 10.29 and 14.88. There can be an exception where the litigation has a public interest component or where access to justice is an issue; however, there is no blanket public interest exception to the general rule that the successful party is entitled to Costs. Further, the Panel stated that the financial wherewithal of a losing party is generally not a factor in determining Costs. A losing party can be exempted from paying Costs on the grounds of public interest but only where the party has no private interest in the Action. In this case, the Appellant had a definite private interest in the matters in issue – its right to advertise its cause in public.

In response to the Respondent's arguments, the Panel found that the Appeal did raise issues that were complex, but they were not new or without precedent in jurisprudence. Furthermore, the complexity of the issues needs to be balanced against the public interest in resolving Canadian *Charter of Rights and Freedom* issues. The Panel closed by stating that a Costs award is discretionary and requires the Court to balance the competing interests of the parties. The Panel then ruled that Costs in this case would be awarded on the same scale as Trial, following the usual convention.

REMINGTON V CRYSTAL CREEK HOMES INC 2018 ABQB 644 (JONES J)
Rule 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making a Costs Award)

The Court made a ruling on Costs following a previous Decision that the Court had rendered. The previous Decision was a dispute over the use of an easement, and thus there was no monetary amount claimed by either party. The Applicant noted that since no monetary amount was claimed or recovered, Column 1 of Schedule C costs would usually apply. However, the Applicant also noted that it is appropriate to award costs above Column 1 where the outcome is of particular importance to the parties. The Applicant then argued that the factors in Rule 10.33(1) support an increased Costs award, because the issues were complex, were of importance to the common law generally, and each party had filed four written briefs. The Applicant also claimed that his legal fees were $108,000, which was much higher than the $6,300 that he would be entitled to under Column 1 of Schedule C.

The Court reiterated the Court of Appeal's comments in *Hill v Hill*, 2013 ABCA 313, which held that in considering Rule 10.31, "Schedule C is a purely-optional rubber stamp for a Judge, who may use it or not, or amend it, as he sees fit." The Court held that this situation was one that justified the exercise of the discretion to award Costs based on a percentage of fees actually incurred. The discretion is conferred by Rule 10.31(3)(a), with reference to the factors outlined in Rule 10.33(1) and by the jurisprudence that considers those Rules.

The Court awarded the Applicant 40% of the fees that he actually incurred, along with disbursements and other charges as claimed by the Applicant.

ENVACON INC V 829693 ALBERTA LTD, 2018 ABCA 313 (WATSON, ROWBOTHAM AND SCHUTZ JJA)
Rule 10.52 (Declaration of Civil Contempt)

The Appellant, 829693 Alberta Ltd. ("829"), challenged the Case Management Justice's finding of contempt pursuant to Rule 10.52 for 829's failure to produce financial statements in accordance with three production orders. 829 also challenged the Case Management Justice's choice of remedy in striking 829's pleadings and awarding full indemnity Costs against it.

The Respondent, Envacon Inc. ("Envacon") had leased a portion of a building owned by 829 and, for a time, the parties also shared a computer server. In 2011,

Envacon terminated the lease and commenced an Action alleging the lease was invalid, and 829 counter-claimed seeking damages alleging missing equipment and files. Over the course of the litigation, three Orders to produce information pertaining to 829's financial statements (two for "financial statements" and one for "unconsolidated financial statements") were granted (the "POs"). The Case Management Justice found 829 in contempt for failing to produce any of the requested financial statements and gave 829 an opportunity to purge its contempt by granting it a further extension to produce the unconsolidated financial statements requested in Production Order 3 ("PO 3"), failing which 829's pleadings would be struck. The Case Management Justice also ordered Costs on a full indemnity basis for all Court Actions related to obtaining the financial records.

On Appeal, 829 argued that the Case Management Justice erred by, *inter alia*: (i) holding it in contempt for failing to create records that never existed or requiring it to recreate records using information that could not be located; and (ii) imposing unreasonable penalties. The Court of Appeal noted that the a finding of civil contempt requires proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has notice. A review of the jurisprudence requires three elements to be proven: (i) the order must state clearly and unequivocally what should be done (or not done); (ii) the alleged contemnor must have actual notice of the order; and (iii) the alleged contemnor must have intentionally failed to do the act compelled by the order.

The Court emphasized that in cases where there is no element of public defiance, civil contempt should be seen primarily as coercive rather than punitive. The Court concluded that there was no contempt of POs 1 and 2 because there was some uncertainty as to whether Envacon was required to produce unconsolidated financial statements and, therefore, these Orders did not meet the requirement of a "clear order". The Court was satisfied that PO 3 was clear in its requirement to produce unconsolidated financial statements. Accordingly, the Case Management Justice's remedy should have been coercive and not punitive in order to bring about compliance.

Therefore, the Court concluded that it was appropriate to set aside the striking of 829's pleadings and varied the penalty imposed. The Court found that Envacon was entitled to Costs on a full indemnity basis for only those steps taken in relation to securing compliance with PO 3.

BAINS V KAUR, 2018 ABQB 624 (LEMA J)
Rules 11.27 (Validating Service), 11.28 (Substitutional Service), 11.30 (Proving Service of Documents), 11.31 (Setting Aside Service), 12.55 (Service of Documents), and 12.57 (Proof of Service)

The Defendant in a divorce Action applied for an Order dismissing the Statement of Claim, asserting that service was defective (the "Service Application") or alternatively transferring the Action from Alberta to Ontario (the "Transfer Application"). Justice Lema heard the Applications in Family Chambers and, at the close of submissions, asked counsel for the parties to provide written submissions.

In considering the Service Application, Justice Lema noted that, in lieu of the personal service required by Rule 12.55, the Plaintiff had: (i) failed to obtain an Order for substitutional service (under Rule 11.28); (ii) sent the Statement of Claim by registered mail to the wrong address; (iii) failed to file an Affidavit of Service (under Rule 11.30); (iv) not complied with Rule 12.57, which mandates that absent a Court Order the Affidavit of Service include a picture of the person served with a Statement of Claim for divorce; and (v) failed to apply to the Court for an Order validating service (under Rule 11.27).

Notwithstanding the above transgressions, Lema J. emphasized that, pursuant to Rule 11.31(1), no challenge to service can be made after filing a Statement of Defence. Justice Lema noted that the Defendant's Application to challenge service was filed twelve days after she had filed her Statement of Defence. While neither party had addressed Rule 11.31(1), Justice Lema concluded that even if inclined to dismiss the Statement of Claim on the basis of defective service, the Court was barred from doing so under Rule 11.31(1).

Turning to the issue of the Transfer Application, Lema J. engaged various rules under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) and corresponding jurisprudence surrounding transfer applications in divorce proceedings involving children. Justice Lema concluded that, given the circumstances, the divorce proceeding underway in Alberta should in fact be transferred to Ontario.

WINCOTT V WINCOTT, 2018 ABQB 550 (BURROWS J)
Rule 12.36 (Advance Payment of Costs)

The Applicant made an Application for an Order that her ex-husband provide updated financial disclosure and pay $20,000 in advance Costs, pursuant to Rule 12.36.

Burrows J. explained that a Court should consider several factors in deciding whether to order advance Costs under Rule 12.36, including that advance Costs should only be ordered where (a) the party seeking the order is impecunious such that he or she would not be able to proceed with the case without the order; (b) the party seeking the order has demonstrated sufficient merit on a *prima facie* basis; and (c) the Court is satisfied that special circumstances exist to warrant the extraordinary power of ordering Costs in advance.

Burrows J. found that the Applicant was impecunious, as her only source of income was spousal support from the Respondent. His Lordship also found that on its face, there was a real issue as to whether the Applicant was entitled to any further division of matrimonial property or additional spousal support. As such, there was *prima facie* sufficient merit to her claim. Lastly, Burrows J. found that there were special circumstances to warrant advance Costs, because the Applicant had frustrated the progress of the Action on several occasions, and had paid Costs as a result. The Applicant's own actions had caused her to be unable to continue the litigation, but Burrows J. determined that justice required that the litigation be concluded, and the Applicant required payment of advance Costs so that this could be achieved.

Burrows J. ordered the Respondent to pay advance Costs to the Applicant. It was also ordered that should the Applicant be required to repay the Respondent after Trial, the Respondents' obligation to pay spousal support would be reduced by half until the amount of the advance Costs was repaid.

MACIBORSKI V MACIBORSKI, 2018 ABCA 297 (WATSON, SLATTER AND BIELBY JJA)
Rules 12.48 (Availability of Application for Summary Judgment) and 12.49 (Evidence in Summary Trials)

The Appellant father appealed the Decision of Gill J. in which His Lordship declined to alter a Consent Order previously granted by Ross J. pertaining to child and spousal support payments (the "Consent Order"). The Consent Order directed the Appellant to pay to the Respondent mother what was described as "uncharacterized payments in the sum of $5,000" on the first day of each month of January, February, March, and April 2018 (the "Uncharacterized Payments"). The Consent Order additionally provided that the Consent Order was to be reviewed on March 6, 2018, part way through the term of the Uncharacterized Payments.

The Appellant argued that additional evidence needed to be considered when classifying the Uncharacterized Payments. The Majority determined that what Gill J. did, in declining to alter the Consent Order, was uphold the Consent Order of Ross J. which, by its terms, applied for four months as indicated. The payment schedule of the Consent Order had not yet concluded when Gill J. opined on the issue. The Majority found that nothing in the Consent Order impacted the ability of a future Trial Judge to consider the Uncharacterized Payments when making an overall assessment on support payments, and that it was at the future evidential hearing where the parties would have a fair opportunity to provide evidence for a proper Decision.

The Majority emphasized that while Rules 12.48 and 12.49 allow for Summary Trials, the Rules do not allow Summary Judgment on child and spousal support. The Majority noted that the Supreme Court of Canada has repeatedly directed that judicial exercises of discretion in family law matters are entitled to deference from the Alberta Court of Appeal. The Majority concluded by stating that it was not

appropriate for the Court of Appeal to express an opinion about the merits of the evidence in this case, and the Court of Queen's Bench was better equipped and jurisdictionally empowered to adjudicate family law cases on contradictory evidence.

MARTINEZ V CHAFFIN, 2018 ABCA 244 (VELDHUIS JJA)
Rules 13.32 (Fees and Allowances), 14.16 (Filing the Appeal Record – Standard Appeals) and 14.47 (Application to Restore an Appeal)

The Applicant sought to restore an Appeal that had been struck, and to extend the six-month time limit to restore the Appeal. The Applicant had originally filed his Notice of Appeal on June 20, 2017. Pursuant to Rule 14.16, he was then required to file his Appeal record by October 20, 2017. When he did not acquire transcripts by that date, the Applicant applied to the Court of Appeal to suspend the deadline. That Application was denied, and the Applicant's Appeal was later struck for failure to file an Appeal record.

The Applicant later applied to restore the Appeal, but did not do so in compliance with Rule 14.47, which requires that an Appeal be filed, served, and returnable within six months of the Appeal being struck. While the Applicant had filed his Application to restore the Appeal in time, it was not scheduled to be heard until more than six months had passed from the time that his Appeal was struck, and the Appeal was therefore deemed abandoned. The Applicant then applied to extend the six-month time period to restore the Appeal.

Veldhuis J.A. explained that the considerations for restoring an abandoned Appeal, and for extending the time period to apply to restore an abandoned Appeal are similar, and include: (a) whether the applicant intended to proceed with the appeal in time; (b) the applicant's explanation for the defect or delay; (c) whether the applicant moved with "reasonable promptness" to remedy the defect and restore the appeal; (d) whether there was arguable merit to the appeal; and (e) whether the respondents suffered prejudice. Her Ladyship further explained that the factors should be addressed together as a whole, in order "to determine whether it would be in the interest of justice to restore the appeal". The decision is discretionary, and no one factor is determinative. However, if an appeal has been deemed to be abandoned, the threshold to restore the appeal or grant an extension is higher.

Veldhuis J.A. noted that the Applicant had not acted with reasonable promptness to cure the defect that caused his Appeal to be struck (and in fact still had not obtained the required transcripts), and that the Applicant's explanation for the delay was "insufficient and not borne out by the materials he presented". The Applicant had argued that he should not have to pay for transcript services because he had a fee waiver in place, but Veldhuis J.A. noted that pursuant to Rule 13.32, fees are waived in accordance with the guidelines set out in Ministerial Order 18/2015 which does not apply to transcript fees. Most importantly, Her Ladyship determined that the Applicant had not demonstrated that his Appeal showed any arguable merit. As such, it was not in the interest of justice to restore the Appeal. The Applications were dismissed.

YASSA V PARKER, 2018 ABCA 247 (WAKELING JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant sought permission to appeal a Costs award granted to the Respondent. Justice Wakeling held that Rule 14.5 governed the granting of such permission. Wakeling J.A. noted that permission to appeal Costs awards should be granted rarely, as the Court of Appeal's role is to review questions of law, and new questions of law arise infrequently in Costs disputes. Accordingly, to proceed to a full panel hearing, Justice Wakeling maintained that the Applicant must show that the alleged error being appealed is a:

> "...question of law, the resolution of which is important to the practice...the applicant has a strong case... and that an appeal will not unduly hinder the progress of the action ... or that the costs order is clearly wrong and must, under all the circumstances, be set aside."

The Applicant failed to meet the requirements of this test. Wakeling J.A. held that the Applicant failed to show that: there was a "sufficiently strong case" and that the award was "erroneous in principle" or "clearly wrong"; and that

the issues involved would allow the Court to "provide direction on the law regarding costs", broadly. Finally, Justice Wakeling maintained that allowing the Appeal to proceed would not be in the best interests of the parties as it would introduce delay and postpone finality between the parties. Accordingly, Wakeling J.A. denied the Application for permission to Appeal the Costs award.

MARTINEZ V CHAFFIN, 2018 ABCA 276 (VELDHUIS JA)
Rule 14.5 (Appeals Only With Permission)

In an earlier Decision, Veldhuis J.A. dismissed the Applicant's Application to restore his Appeal (the "Restoration Decision"). The Applicant applied for permission to appeal the Restoration Decision pursuant to Rule 14.5. Justice Veldhuis reviewed existing case law and stated that an application for permission to appeal is not a re-hearing. In order to be granted permission to appeal, an applicant must show that there is a serious question of general importance, an error of law, jurisdiction or principle, that discretion was exercised unreasonably, or that the initial Decision was based on a misapprehension of facts. Veldhuis J.A. reviewed the Applicant's materials and found there was no basis for granting permission to appeal. The Application was dismissed.

ALBERTA TREASURY BRANCHES V EXALL ENERGY CORPORATION, 2018 ABCA 268 (VELDHUIS JA)
Rules 14.8 (Filing a Notice of Appeal), 14.38 (Court of Appeal Panels) and 14.74 (Application to Dismiss an Appeal)

The Applicants sought to strike two Notices of Appeal filed by the Respondent, which arose out of restructuring proceedings.

As background, the Applicants shared an interest in certain resources with a party over which a receiver had been appointed. The Respondent was a creditor whose lien claims had been ordered to only be paid in part during the receivership proceedings. The Decision respecting the Respondent's lien claims was made orally on September 8, 2017, and the written Decision was provided on November 30, 2017. However, an Order was not signed on that date. The Respondent filed its first Notice of Appeal on January 2, 2018.

The Applicants argued that the first Notice of Appeal was filed out of time, because it was not filed within 10 days as required by s. 31 of the *Bankruptcy and Insolvency General Rules*, CRC c 368 (the *"BIA Rules"*), or within one month of the written Decision as required by Rule 14.8 of the Rules. The Applicants argued that the Notice of Appeal should have been filed within 10 days of the oral Decision on September 8, 2017. Alternatively, they argued that the Appeal period should have begun no later than November 30, 2017, when the written Decision was issued.

Veldhuis J.A. held that the shorter time period to file a Notice of Appeal required by the *BIA Rules* applied, as the Notice of Appeal clearly related to the distribution of assets as a result of a receivership. The truncated time period in the BIA Rules assists in avoided delay in restructuring proceedings. Her Ladyship also held that the Appeal period began on November 30, 2017 when the written Decision was issued, despite the fact that a final Order had not been signed on that date. The Order was only delayed so specific numbers could be decided upon, and it did not differ substantively from the Justice's written reasons.

The Respondent had also filed a second Notice of Appeal on April 9, 2018, in respect of an Order that was made on March 29, 2018. The Applicants sought to dismiss the second Notice of Appeal on the basis that it was an abuse of process and based on the merits of the Appeal. Veldhuis J.A. noted that applications to dismiss an Appeal on its merits, or as an abuse of process, must be heard by a full Court of Appeal panel, not a single Appeal Justice, pursuant to Rules 14.38(2)(a) and 14.74. Her Ladyship also noted that while she has no authority to strike the second Notice of Appeal, it appeared to be ill-advised.

As such, the first Notice of Appeal was struck, but the second Notice of Appeal was not.

DL POLLOCK PROFESSIONAL CORPORATION V BLICHARZ, 2018 ABCA 252 (BERGER JA)
Rules 14.8 (Filing a Notice of Appeal) and 14.73 (Procedural Powers)

The Applicant sought an extension of time to appeal certain Judgments and Orders. Berger J.A. noted that in the circumstances, Rule 14.8(2)(iii) applied, such that a Notice of Appeal must be filed and served within one month after the date of a decision. Justice Berger then noted that the factors set out in *Cairns v Cairns*, 1931 CanLII 471 (AB CA) (*"Cairns"*) guide the Court's discretion in such cases.

The Court had considered the factors in *Cairns*, and the Applicant failed to meet four of the factors. As such, Justice Berger did not grant the Application for an extension of time to appeal.

The Applicant also sought a Stay of a separate Order, pending its Appeal. The Respondent resisted the Stay, arguing that the Appeal had no merit and should be dismissed pursuant to Rule 14.73(d).

Berger J.A. reviewed the transcript of the lower Court proceedings and concluded that the Applicant was "denied the opportunity to meaningfully address the Court". His Lordship then remarked that "Orders made in violation of natural justice are invalid notwithstanding that there may be no prejudice to the party who was not heard". While Berger J.A. alluded to the fact that there is a limited exception to this rule of natural justice, His Lordship held that it did not apply in the circumstances. Accordingly, Justice Berger granted the Application for the Stay.

MCMULLEN V NORTON ROSE FULLBRIGHT CANADA LLP, 2018 ABCA 299 (O'FERRALL JA)
Rules 14.13 (Standard Appeals), 14.14 (Fast Track Appeals), 14.23 (Failure to Meet Deadlines), 14.24 (Filing Factums – Fast Track Appeals), 14.33 (Scheduling Standard Appeals) and 14.34 (Scheduling Fast Track Appeals)

The Applicant appealed an interlocutory Decision by a Chambers Justice in the Court of Queen's Bench. Since the Decision being appealed was an interlocutory Decision, it should have proceeded as a Fast Track Appeal. Rules 14.13 and 14.14 provide for two types of Appeals: Fast Track Appeals and Standard Appeals. The deadlines for Fast Track Appeals are set out in Rule 14.24, whereas the deadlines for Standard Appeals are set out in Rule 14.23. Additionally, Standard Appeals must be scheduled not later than 20 days after the deadline for the filing of the last factum pursuant to Rule 14.33, whereas Fast Track Appeals are scheduled after the Appellant's factum has been filed pursuant to Rule 14.34.

Due to an error by the Applicant in drafting the Notice of Appeal, the Appeal was not classified as a Fast Track Appeal and was instead classified as a Standard Appeal. However, the Respondents were under the assumption that the Appeal was proceeding as a Fast Track Appeal. After the filing deadline passed for filing a factum under the Fast Track Appeal deadlines, the Respondent wrote a letter to the Case Management Officer requesting that the Appeal be struck pursuant to Rule 14.24(1). The Case Management Officer responded and advised that the Appeal was proceeding as a Standard Appeal, and no deadlines had been missed.

The Applicant then filed a pre-emptive Application to have the Court deny the Respondents' request that the Appeal be struck, despite the fact that the Case Management Officer had already denied that request. The Applicant also applied to prevent a re-classification of the Appeal as a Fast Track Appeal, and further applied for a declaration that the Respondents had abused the process by waiting until the Fast Track Appeal deadline had passed before applying to re-classify the Appeal.

O'Ferrall J.A. ultimately re-classified the Appeal as a Fast Track Appeal, but also ordered that the Appeal would not be struck for failing to meet the Fast Track Appeal deadline to file a factum pursuant to Rule 14.34. The Court also allowed the factums to be 30 pages, instead of the 12 pages that would be allowed by a Fast Track Appeal.

SANTORO V BANK OF MONTREAL, 2018 ABCA 264 (SCHUTZ JA)
Rule 14.48 (Stay Pending Appeal)

The Applicant, Santoro, applied to the Court of Appeal for a Stay pending the Appeal of an Order granted by the Chambers Justice. A Master had granted an Order of foreclosure on the Applicant's home as well as an Order dismissing the Applicant's Application to file a Counterclaim. The Chambers Justice dismissed the Applicant's Appeals of both Orders.

The Respondent, Bank of Montreal, opposed the Application on the basis that the dismissal of the Applicant's Stay Application by the Court of Queen's Bench is a procedural bar to applying for the same relief from the Court of Appeal and also on the basis that the Applicant had not met the legal test for a Stay.

The Court stated that Rule 14.48 is a "full answer" to the Respondent's first contention. Rule 14.48 states that a Stay Application can be made to a single Appeal Judge regardless of whether a previous Application has been made to a lower Court, and regardless of whether a previous Application was successful. The Court then stated the three-part test for obtaining a stay. The Court is to consider: (i) whether there is a serious question to be determined in the sense of a claim that is not frivolous or vexatious; (ii) whether the applicant would suffer irreparable harm if the stay is refused; and (iii) an assessment of the balance of convenience based on which party would suffer the most harm from the granting or refusal of a stay. The Court also clarified that a stay may be granted even where the test is not satisfied if "exceptional circumstances" exist. Applying the three-part test, the Court found that the first element was met; the Applicant's claim on appeal was not frivolous or vexatious. The Applicant's claim that the granting of an Order while she was not present was improper did have some legal authority underpinning it. Moreover, the Respondent's claim that it was entitled to remedies beyond the land securing the debt was questionable.

However, the Court was less convinced that the Applicant would suffer irreparable harm if the Respondent was permitted to demand possession of the Applicant's home. The Court stated that it was likely that any harm suffered by the Applicant would be compensable in damages. Nevertheless, the Court ruled that in the circumstances, a stay was warranted provided that the Applicant continuously complied with conditions including making regular mortgage payments to the Respondent. The Application was granted.

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