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

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VANMAELE ESTATE (RE), 2018 ABQB 840 (RENKE J)
Rule 1.2 (Purpose and Intention of These Rules)

The Court addressed a series of issues in this estate matter which stemmed from an Application by the Personal Representatives to pass accounts. The Court addressed Rule 1.2 in two discrete instances throughout the lengthy Decision.

The Court ruled on the legitimacy of certain expenses claimed by the Personal Representatives, notwithstanding the fact that there had been deficiencies in the documentation regarding the expenses. The Court stated that the proportional approach encouraged by the Supreme Court of Canada, as well as Rule 1.2(2), permitted the Court to make a summary disposition on the matter notwithstanding the documentary deficiencies.

The Court also addressed whether the Respondents' legal Costs should be paid personally by the Personal Representatives, or whether they should be paid by the Estate. The Personal Representatives had made definite errors that had been proven on the record; however, the Court stated that these errors had been adequately penalized through the obligation to repay improper expenditures. Further, there was no evidence that the Respondents had communicated openly and in a timely way to facilitate a timely and cost effective resolution to the matter as required by Rule 1.2(d). Both parties "lawyered up" from the outset and the Respondents demonstrated a combative approach throughout the duration of the matter. The Court ordered the estate to pay the Respondents' Costs.

MA V KWAN, 2018 ABQB 852 (MASTER PROWSE)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

The Applicant, Kwan, made two separate Applications to dismiss for long delay in regards to the Respondent, Ma's, Action for oppression.

The parties were 50% owners of a corporation established to operate a restaurant. Ma applied to the Court for relief from oppression in regards to the corporation, and in the year following the oppression Application, Ma made a series of Applications to sell the restaurant. The final Application was filed in July of 2014 and requested the sale of the restaurant for $85,000. The Application was adjourned but the parties ultimately agreed to sell the restaurant to the bidder who had made the offer of $85,000.

Kwan filed his Application to dismiss for long delay on June 14, 2017, but it was not heard until October 10, 2018. Kwan also filed a second Application to dismiss for long delay five days before the hearing with a returnable date also of October 10, 2018. The issues before the Court were: whether there had been a significant advance of the Action in the three years prior to the first dismissal Application, and if so, whether the fact that the first dismissal Application had not yet been heard continued the clock's running such that the second dismissal Application could succeed.

In regards to the first issue, Master Prowse found that the sale of the restaurant on September 4, 2014 was a "significant advance" as required by Rule 4.33. The sale did not resolve the overall Action; however, it did narrow the issues to be determined in the Action by addressing what was to happen with the restaurant. Therefore, the first dismissal Application was premature, as a significant advance had occurred 2 years and 9 months prior.

In regards to the second issue, Master Prowse confirmed that the time that passes following a Defendant's Application to dismiss for long delay does not work against a Plaintiff, as this is properly characterized in the case law as "institutional delay." Therefore, a moving Defendant cannot strategically leave an Application to dismiss for long delay in effective abeyance by not advancing it to a hearing, and then protect against the risk that the Application is premature by simply filing a second Application closer to the hearing date. This would require a Plaintiff to expend resources to advance a claim after an Application to dismiss has been filed even though these resources would be wasted if the Action is ultimately dismissed. This is not a cost-effective or efficient method of resolving disputes as required by Rule 1.2.

Both of the Defendant's Applications for long delay were dismissed with Costs to be spoken to if the parties could not agree.

SHOEMAKER V CANADA (DRUMHELLER INSTITUTION), 2018 ABQB 851 (YAMAUCHI J)
Rules 1.2 (Purpose and Intention of These Rules), 3.16 (Originating Application for Judicial Review: Habeas Corpus), 3.68 (Court Options to Deal with Significant Deficiencies) and 10.29 (General Rule for Payment of Litigation Costs)

The Applicant applied for an Order in the nature of *habeas corpus* pursuant to Rule 3.16. The Application arose as a result of the decision by the acting warden of the medium security Drumheller Institution to reassess the Applicant and transfer him to the maximum security Edmonton Institution.

Yamauchi J. reviewed the facts leading to the Application, as well as the law of *habeas corpus*. His Lordship found that the Application was an appropriate *habeas corpus* Application for the Court to review. Accordingly, it should not be struck pursuant to Rule 3.68 or reviewed by the Court's Accelerated *Habeas Corpus* Review Procedure. However, after considering the application of the Canadian *Charter of Rights and Freedoms* in *habeas corpus* proceedings, the procedural fairness of the acting warden's decision, and the reasonableness of that decision, Justice Yamauchi found that the *habeas corpus* Application should be dismissed.

Yamauchi J. then noted that in all civil proceedings, the successful party is presumptively due Costs pursuant to Rule 10.29(1). His Lordship reviewed case law pertinent to the abuse of *habeas corpus* procedures, including *Loughlin v Her Majesty the Queen*, 2018 ABQB 45, where Shelley J. remarked that an Applicant's failure to be specific about the detention and illegality being alleged results in the failure to meet obligations arising from Rules 1.2(2)(a) and 1.2(3)(a).

Justice Yamauchi then noted that the Application at issue was problematic. Certain of the allegations in the Originating Application were contradicted by the evidence presented by the Applicant to the Court; the Applicant advanced (and then abandoned) remedies that are not available through *habeas corpus*; and the Applicant alleged that the Respondent's materials were designed to mislead the Court. Because of this, Yamauchi J. held that the Applicant's Costs should be somewhat elevated as compared to the Costs sought by the Respondent, in the amount of $1,000. Noting that the Respondent did not seek such elevated Costs, the Court simply ordered that the Applicant pay $1,000 in Costs to the Respondent.

JACOBS V MCELHANNEY LAND SURVEYS LTD, 2018 ABQB 867 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.28 (Written Questions) and 6.37 (Notice to Admit)

The Plaintiff, Jacobs, appealed a Master's Decision to grant the Application of the Defendant, McElhanney Land Surveys Ltd. ("McElhanney"), for dismissal of Jacobs' case on the basis of delay pursuant to Rule 4.33.

The key dates and facts were that Jacobs had filed an Application for Summary Judgment on July 21, 2014, returnable on July 30, 2014. The Summary Judgment Application was adjourned by a Master in order to allow McElhanney an opportunity to cross-examine Jacobs. In September and October of 2014, the parties attempted to reschedule the Summary Judgment Application as directed by the Court but were not successful. In June of 2015, Jacobs served a Notice to Admit Facts and Written Interrogatories but McElhanney did not respond. There were further attempts to reschedule the Summary Judgment Application in October of 2016 which were not successful. Finally, Jacobs filed an Application for Advice and Direction from the Court on June 14, 2017 returnable July 21, 2017. McElhanney then brought an Application for dismissal for delay which was granted on the basis that the last "significant advance" in the Action had occurred on May 14, 2014 with the filing of Jacobs' Affidavit of Records.

Jacobs appealed the Decision which granted McElhanney's Application for dismissal for delay, and on appeal Graesser J. ruled that that Jacobs had taken steps to significantly advance the Action after filing his Affidavit of Records.

Graesser J. clarified that an Application can amount to a "significant advance" for the purposes of Rule 4.33 even if it is not heard. In this case, Jacobs' Summary Judgment Application was an honest attempt to advance the Action brought in timely fashion, and if it was not adjourned on McElhanney's request, it could have disposed of the entire claim. Graesser J. ruled that the Summary Judgment Application was a significant advance using the "functional approach" advocated by the Courts. Graesser J. also ruled that the correspondence between the parties in September and October of 2014 was also a significant advance. The parties had been directed by the Court to consult each other on rescheduling. Therefore, the clock started to run for Jacobs to advance the Action on October 2, 2014 when the correspondence to reschedule to the Summary Judgment Application ceased. This meant that McElhanney's Application to dismiss for delay was premature.

The Court then considered the other activities that took place during the course of the Action to determine whether there had been further significant advances. The Court also found that the Notice to Admit Facts served by Jacobs in June of 2015 was a significant advance. Rule 6.37 sets out the circumstances when a party may refuse to reply to a Notice to Admit Facts and these did not apply to McElhanney. Therefore, McElhanney was obligated to reply or apply to set the Notice aside - it did neither. The Court ruled that Jacobs' service of Written Interrogatories was not a significant advance. The Court clarified that Rule 5.28 governing Written Questioning requires agreement by the parties to use Written Questioning and no such agreement existed between Jacobs and McElhanney. The Court agreed with the Master below that analysis of a Security for Costs Application and subsequent payment into Court does not constitute a significant advance under Rule 4.33.

Graesser J. concluded his analysis of Rule 4.33 by addressing the issue of stalling by a Defendant. The Court confirmed that it is the ultimate responsibility of the Plaintiff to advance the Action; however Rule 1.2 places responsibility on both parties to make good faith efforts to ensure an Action proceeds efficiently. In this case, the Court characterized McElhanney's conduct as an "old school defence" by making things difficult for the Plaintiff and "using the Rules of Court as a shield."

The Court then briefly addressed Rule 4.31. The Court found there had been no "inordinate and inexcusable" delay as required by the Rule. Jacobs had made significant efforts to move the Action to resolution but had been thwarted by McElhanney.

The Appeal was allowed with Costs.

UNRAU V NATIONAL DENTAL EXAMINING BOARD, 2018 ABQB 874 (ROOKE J)
Rules 1.2 (Purpose and Intention of these Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Plaintiff was a self-represented litigant that brought an Action against numerous parties. One of the Defendants was Alberta Health Services ("AHS"). AHS requested that the Court evaluate the Statement of Claim under Rule 3.68 as provided for by Civil Practice Note No. 7, also known as the "show cause" procedure (the "Show Cause Procedure").

Rooke J. noted that Canadian Courts are increasingly confronted by abusive litigation. In light of this, Courts have implemented the Show Cause Procedure in order to manage and control abusive litigants and litigation. This procedure also reflects the foundational Rules, including Rule 1.2, which provides that claims should be fairly and justly resolved in a timely and cost-effective manner. Under the Show Cause Procedure, the Court undertakes a paper only process to review potentially abusive Court filings pursuant to Rule 3.68. The Show Cause Procedure is modeled after Rule 2.1 of the *Ontario Rules of Civil Procedure*. Like in Ontario, the Show Cause Procedure is reserved for clear cases of abuse where the frivolous, vexatious, or abusive nature of the proceeding is apparent on the face of the pleading.

In applying the Show Cause Procedure to a Statement of Claim, Rooke J. held that pleadings are to be read generously to allow for drafting deficiencies. However, mere bald allegations that do not provide sufficient detail which would allow a responding party to substantively respond

are not adequate to support an action. Once a pleading is confirmed as a suitable candidate for the Show Cause Procedure, then the Court will require written submissions from the Plaintiff to "show cause" within 14 days.

Using the Show Cause Procedure, the Court concluded that the Plaintiff's Statement of Claim failed to adequately indicate the responding parties, which signifies that the document was an abuse of Court process warranting intervention. Rooke J. stayed the Action, and ordered that the Plaintiff prepare, file, and serve a written submission within 14 days pursuant to Civil Practice Note No. 7. If no written submissions were received, then the Court would proceed to render its final decision on whether the Statement of Claim should be struck. Rooke J. ordered that if the Plaintiff provided written submissions, then the Defendants would have 7 days to respond in writing. The Court dispensed with the Plaintiff's approval of the form of Order pursuant to Rule 9.4(2)(c).

MONUMENT MACHINE SHOP LTD V CALIBRE DRILLING LTD, 2018 ABQB 857 (DARIO J)
Rules 1.2 (Purpose and Intention of these Rules), 5.35 (Sequence of Exchange of Experts' Reports), 5.38 (Continuing Obligation on Expert), 8.4 (Trial Date: Scheduled by Court Clerk) and 8.5 (Trial Date: Scheduled by the Court)

The Applicant/Defendant by counterclaim, applied to adjourn a two week Trial after the Respondent/Plaintiff by counterclaim filed a surrebuttal expert report two and a half years after the rebuttal expert report had been served, and ten weeks prior to the start of Trial. The surrebuttal expert report was filed after the Defendant/Plaintiff by counterclaim had filed both a Form 37 and Form 39, attesting to their readiness for Trial. The Applicant argued that the late filing of the surrebuttal expert report was contrary to Rule 1.2(2)(d), which it contended obligated the parties to communicate honestly, openly and in a timely way. The Respondent/Plaintiff by counterclaim argued that the Rules only require the expert report and rebuttal expert report to be served within certain timeframes, and that pursuant to Rule 5.35(2)(c), a surrebuttal expert report is optional.

Dario J. held that the surrebuttal report should be struck from the Court record, but that this would not limit the expert's ability to provide some of the evidence contained in the report at Trial during testimony. Justice Dario noted that Rule 5.38 imposes the obligation on the parties to provide some of that information in any event, including clarifications around the methodology used in response to comments in the rebuttal expert report.

Dario J. noted that Rule 8.4(3)(c), which is referred to in Rule 8.5(1)(c), requires the parties requesting a Trial date through a Form 37 to certify that any expert reports have been exchanged. While the surrebuttal expert report is optional, Justice Dario held that it was included in the requirement in Rule 8.4(3)(c). Dario J. also held that the lateness of the surrebuttal expert report negated the purposes of the timeline set out in the Rules, which should not be encouraged. In all of the circumstances, Dario J. held that striking the surrebuttal expert report and denying the adjournment Application was the most expedient and fair result in the circumstances.

The Application was dismissed with Costs to be addressed at Trial.

ARBEAU V SCHULZ, 2018 ABQB 941 (LEMA J)
Rule 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.2 (When Something is Relevant and Material)

The Applicant brought an Application in morning family chambers to dismiss an unjust-enrichment Action for long delay. The Applicant argued that more than three years had elapsed and as such, the Action must be dismissed pursuant to Rule 4.33. He also argued that there had been inordinate delay under Rule 4.31.

Lema J. first discussed the concept of a "significant advance" as described by the Alberta Court of Appeal. A significant advance moves the lawsuit forward in an essential way considering the nature, value, importance and quality. The genuineness and timing of the advance in the

Action are also relevant. The analysis must focus on the substance and effect rather than the form.

The Court then set out the framework to use when considering Rule 4.33 Applications. A Court is required to dismiss an Action if three or more years have passed without a significant advance, unless that Action has been stayed or adjourned by Order, an Order has been issued setting out a suspension, the delay is provided for in a litigation plan, or an Application has been filed or proceedings taken since the delay; and the Rule 4.33 Applicant has participated in the proceedings to the extent that warrants the Action continuing.

The Action began on October 13, 2011 by Statement of Claim. On March 26, 2015, the Respondent provided her Undertaking responses. On June 17, 2015, the Applicant provided his Undertaking responses. The Respondent's position was that the Respondent's Undertaking responses was the last significant advance in the Action. Alternatively, the Applicant argued that his own Undertaking responses was the last significant advance.

The Respondent took the position that a Consent Order reducing the listing price granted on July 8, 2015, should be the starting date for measuring the three-year period. The Respondent further argued that during this three-year period, she had filed an Application seeking various relief including creation of a litigation plan, she filed and served a Notice to Disclose, the Applicant filed a response to the Notice to Disclose, the Applicant had served his Affidavit of Records, and the Applicant had served a Notice to Produce Affidavit of Records.

The Court held that the Consent Order did not constitute a significant advance in the Action. Among a list of reasons given, the Court found that the Respondent's claim was a claim for unjust enrichment. The Applicant had already admitted that the parties would share in the value of the home. Both parties agreed that the house should be listed for sale, and both parties agreed that the listing price should be reduced. The Court also noted that the Respondent later refused to co-operate with the listing and even removed the sale sign, thereby rendering the Consent Order moot. Since the parties' actions did not advance the Action, then it could not be said that the Consent Order constitutes a significant advance.

The Court then analyzed the June 17, 2015 Undertaking responses provided by the Applicant to determine whether they were relevant and material. In citing Rule 5.2(1), the Court held that materiality is determined if the record would significantly help determine one or more of the issues raised in the pleadings or ascertain evidence that could help determine one or more of the issues raised in the pleadings. After a thorough analysis of the nature of the Undertakings responses, Lema J. concluded that the information requested by the Respondent was relevant to her unjust enrichment claim. Accordingly, the responses provided by the Applicant were also relevant to the claim. Having found that the information was relevant and material, the Court then discussed whether the Undertaking information qualified as a significant advance.

In citing the Alberta Court of Appeal, Lema J. noted that a response to an Undertaking is usually a thing that materially advances the Action. However, there will be exceptions where the response is merely perfunctory and nothing hinges on the response. The perspective of the party seeking the information is also relevant. Here, the Respondent believed that the Undertakings received were relevant and material. The Court ultimately held that the Undertaking responses provided the Respondent with useful information, and therefore constituted a significant advance of the Action. Consequently, the three-year period for analyzing Rule 4.33 began on June 17, 2015.

The Court then analyzed the Applicant's June 11, 2018 response to a Notice to Disclose. The Applicant's response provided his statement of income, assets and liabilities, which provided the necessary income information should entitlement to support be found. The information sought by the Respondent was material and relevant, and consequently the information provided in the Applicant's response was also material and relevant as defined by Rule 5.2(1).

The Applicant then argued that as of June 6, 2018, the Respondent was aware of the Applicant's intent to bring

a Rule 4.33 Application. Consequently, the Applicant argued that the June 11, 2018 response was intended as a "without prejudice" step. The Court held that even though Rule 4.33's shadow was cast over the June 7, 2018 Application, the Applicant's counsel did not assert that the three-year period had already expired by then. Furthermore, the Applicant counsel's statement to the Respondent's counsel regarding his intention to bring a Rule 4.33 Application did not "freeze" matters or insulate the Applicant from his compliance with the Notice to Disclose. The onus was on the Applicant to ensure that disclosures intended to be "without prejudice" to a drop-dead Application makes that unmistakably clear. On this basis, the Court found that even if the three-year period expired before June 11, 2018, the Applicant's response to the Notice to Disclose constituted sufficient participation and revived the proceeding.

Lema J. then moved on to discuss the Rule 4.31 Application. His Lordship held that Rule 4.31 authorizes a Court to dismiss all or part of a claim if the Court determines that delay in the Action has resulted in significant prejudice to a party. If the delay is "inordinate and inexcusable", then the delay is presumed to have resulted in significant prejudice to the party that brought the Application. In addition, Rules 1.2, 4.1, and 4.2 are also noteworthy. Rule 1.2 sets out the guiding principles that claims should be fairly and justly resolved in a timely and cost-effective way, Rule 4.1 states that parties are responsible for managing their dispute, and Rule 4.2 provides that parties are required to apply to the Court for direction or case management when the complexity or nature of the Action warrants it.

The Court found that the litigation could be broken down into two phases. The first phase was from the time that the claim commenced to June of 2015, when the Applicant delivered his Undertaking response. During this phase, the Applicant did not intentionally delay the claim, but had to be pushed to complete certain steps. Until June of 2015, the Court held that there had been no inordinate delay. Although the Court recognized that Rule 4.31 requires a view of the entire Action, it is also important to distinguish between Actions where the plaintiff has done the "bare minimum" and Actions where the parties have been responsive and slowly moving through litigation.

The second phase of the litigation ran from June of 2015 to the spring of 2018. During this phase, not much had happened and the Respondent did not move the litigation forward. The question for the Court was whether the three-year period from June of 2015 to spring of 2018 constituted inordinate delay. Lema J. held that it was not necessary to delve into this discussion since even if there was inordinate delay, the Applicant has suffered no prejudice, let alone significant prejudice within the meaning of Rule 4.31.

The Court went even further and held that even if the delay was inordinate and inexcusable and the Applicant had suffered significant prejudice arising from that delay, he waived the delay by participating in the Action in June of 2018 by making disclosure. Lema J. proceeded to dismiss the Application under both Rule 4.31 and 4.33.

SMILLEY V MCMILLAN, 2018 ABQB 988 (HALL J)
Rule 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies) and 9.2 (Preparation of Judgments and Orders)

The Applicant, Thelma Smilley ("Ms. Smilley"), applied to for an Order to sever her and the Respondent, Brian McMillan ("Mr. McMillan")'s joint tenancy ownership of their home (the "Application"). Ms. Smilley and Mr. McMillan were adult interdependent partners who began their common-law relationship in 1997 and separated in early October of 2018. During their relationship, the parties purchased a residential property in Grande Prairie, Alberta (the "Property"), which they held in joint tenancy.

Ms. Smilley told Mr. McMillan in early October of 2018 that she wanted to end their relationship and had since revised her will. She then brought an Application so that no part of her estate would be left to Mr. McMillan. Mr. McMillian resisted the Application, arguing that the Court did not have the jurisdiction to grant the Order.

At issue was whether the Court had the jurisdiction to grant the requested Order of severance. Justice Hall found

that Rule 1.2 outlines that the purpose of the Rules are to provide a means by which claims can be fairly and justly resolved in a timely and cost-effective way. Hall J. emphasized that Rule 1.3 grants the Court jurisdiction to give any relief or remedy described or referred to in the *Judicature Act*, RSA 2000, c J-2 9 (the *"Judicature Act"*). Justice Hall further noted that section 8 of the *Judicature Act* grants the Court general jurisdiction to grant remedies subject to reasonable terms and conditions, so as to avoid, if possible, multiple proceedings and to ensure that all matters between the parties are completely determined.

After reviewing the relevant jurisprudence on the distinctions between joint tenancy and tenancy in common, His Lordship found that a joint tenancy may be converted to a tenancy in common by a process known as severance which can be affected both at common law and under statute. Hall J. concluded by finding that the joint tenancy was severed, and pursuant to Rule 9.2(1), directed Ms. Smilley's counsel to prepare a draft of the Order in accordance with His Lordship's reasons.

SCHELL ESTATE (RE), 2018 ABQB 991 (MANDZIUK J)
Rules 1.2 (Purpose and Intention of these Rules) and 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of the Action under Rule 7.3, arguing that the Action had no merit, no real chance of success, and that Summary Dismissal was appropriate.

Mandziuk J. stated that Rule 7.3 allows a party to apply for Summary Dismissal where there is no merit to a claim or a part of a claim. Rule 7.3 gives the Court the power to dismiss an Action where it determines that there is no need for a Trial. Mandziuk J. also kept in mind the foundational Rule 1.2, which provides that the Rules are to be interpreted purposively as a means by which claims can be fairly and justly resolved in or by a Court process in a timely and cost effective way.

The Court then noted that there appears to be a division in Alberta jurisprudence concerning the proper standard of proof for Summary Judgment and Summary Dismissal. One line of cases held that the standard of proof was "unassailable", while another line of cases held that the standard of proof was "on a balance of probabilities".

Mandziuk J. held that a fair and just determination could not be made on the merits of the Action through a summary proceeding. Regardless of which standard of proof was applied, a Trial would be necessary to determine the truth, and consequently the Application for Summary Dismissal was dismissed.

PATIL V CENOVUS ENERGY INC, 2018 ABQB 994 (ANTONIO J)
Rule 1.2 (Purpose and Intention of These Rules) and Rule 4.33 (Dismissal for Long Delay)

The Defendant applied to dismiss the Action under Rule 4.33 on the basis that three years had elapsed without a significant advance. The Plaintiff contended that three steps occurred during the three year period in question, each of which significantly advanced the Action: 1) the provision of additional documents in response to a request for same by the Defendant; 2) the Plaintiff had abandoned several damages claims; and 3) the parties had entered into a Consent Order for a case conference. The Application was originally heard by a Master who found that all three steps constituted significant advancements of the Action. The Defendant appealed. Justice Antonio noted that the standard of review on appeal from a Master to a Justice is correctness on all issues.

Justice Antonio held that Rule 4.33 must be interpreted in accordance with Rule 1.2, which "places a particular emphasis on the use of [the Rules] to conclude inactive civil litigation matters". Justice Antonio noted that, it is the Plaintiff that bears the ultimate responsibility for prosecuting its claim, and the Defendant, while not being able to purposively obstruct, stall, or delay, is never required to actively move an Action along. Justice Antonio confirmed that the test is a functional one for determining whether a significant advance in the Action had been made, which considers whether the Action has been moved closer to resolution in a meaningful way, considering the nature, quality, genuineness, timing and outcome.

Regarding the provision of documents requested by the Defendants, Justice Antonio found that the records which were provided were generally non-responsive to the requests which had been made, and constituted "peripheral information…[which] framed an uninterrupted absence of information touching the matters at the core of the claim". Assessed from a functional perspective, Justice Antonio held that the provision of documents did not significantly advance the Action.

Regarding the abandonment of claims, Justice Antonio noted that the abandonment occurred only after counsel for the Defendant requested evidence which could support them. Justice Antonio noted that, evidence of those claims ought to have been provided in the initial Affidavit of Records and Justice Antonio inferred that no such records had been disclosed, or the Plaintiff would not have needed to abandon his claims. As a result of this, Justice Antonio inferred that the claims were never capable of being supported to being with. Justice Antonio held that the abandonment if a "vacant" claim did not advance the Action.

The Plaintiff contended that the Consent Order to schedule a case conference constituted a significant advance in the Action. The Defendants asserted that, the mere agreement to participate in a Case Management Conference does not significantly advance the Action, rather it is the actual participation in the Conference which does. Justice Antonio held that entry into Case Management does not automatically constitute an advance in the Action, but rather only constitutes a different method of scheduling steps and does not relieve the Plaintiff of the obligation to move the action forward. Justice Antonio also held that the agreement to participate in a Case Management Conference did not constitute participation in the action for the purposes of the exception in Rule 4.33(2)(b), as the Defendants counsel had specifically noted that the Defendant was not waiving its ability to rely on the Rules by consenting to the Case Management Conference.

As Justice Antonio held that no significant advance had occurred in the over three year period, and granted the Appeal of the Master's Decision, dismissing the Action pursuant to Rule 4.33.

1808882 ALBERTA LTD V MODERNO VENTURES LTD, 2018 ABQB 1000 (EAMON J)
Rules 1.2 (Purpose and Intention of these Rules), 9.2 (Preparation of Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Eamon J. gave a further Costs ruling arising out of a prior Appeal of a Master's decision where His Lordship had granted partial Summary Judgment against the Respondent.

His Lordship first considered Rule 10.29, which sets out the principle that the successful party to an Application is entitled to Costs against the unsuccessful party, and that the Costs are payable forthwith notwithstanding final determination of the Application, proceeding, or Action. The Court, however, maintains discretion over the Costs award pursuant to Rule 10.31 after making the necessary considerations pursuant to Rule 10.33.

Under Rule 10.33, the Court may consider any matter related to the question of reasonable and proper Costs that the Court considers appropriate. In deciding whether to impose, deny, or vary a Costs award, the Court may consider relevant circumstances including (i) the conduct of a party that was unnecessary or delayed the Action (ii) the party's denial to admit something that should have been admitted; and (iii) whether any step in the Action was unnecessary or improper.

His Lordship held that the Appellant was substantially successful on Appeal, despite the fact that the Appellant had failed to produce adequate evidence before the Master, the Appellant was entitled to introduce new evidence on Appeal. However, the effect of doing so delayed the litigation. His Lordship also considered the Respondent's conduct, and held that the Respondent's defences were largely supposition of possible testimonies, bare denials, and unsupported self-serving evidence that fly in the face of an uncontradicted documentary record. Consequently, the Defendant bears the larger responsibly for defeating the objections under Rule 1.2 and Part 1 of the Rules.

Eamon J. assessed the Appeal Costs at 2/3 of the amounts set out in Schedule C, along with disbursements, and reminded the parties of the timelines for preparation of Orders set out in Rule 9.2.

DIRECT HORIZONTAL DRILLING INC V NORTH AMERICAN PIPELINE INC, 2018 ABQB 1006 (YUNGWIRTH J)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

The Defendant applied to dismiss the Action under Rule 4.33 on the basis that three years had elapsed without a significant advance in the Action. The parties agreed that no steps had been taken in the Action which significantly advanced it for a period of three or more years. The Plaintiff contended, however, that the filing of an Affidavit in support of a Summary Judgment Application in a separate Action (the "Other Action") constituted a significant step as the Other Action was inextricably linked to the matter before the Court. The parties first appeared before Master Shulz, who granted the Application. The Plaintiff appealed that Order to Justice Yungwirth.

The present Action and the Other Action were based on unpaid subcontract work arising from two different projects and two separate contracts. The Defendant raised identical claims for set-off in both Actions, however, only filed a Counterclaim in the present Action.

Justice Yungwirth held that there were two issues to be determined: 1) whether the two Actions were "inextricably linked"; and 2) if so, whether the filing of the Affidavit in the Other Action significantly advanced the present Action.

Justice Yungwirth considered the factors set out in *Angevine v Blue Range Resource Corporation*, 2007 ABQB 443 to determine whether the Actions were inextricably linked, which are whether: 1) the result in one Action is "legally or factually determinative" of the issues in the other Action; 2) the issues determined in one Action will be "relevant and binding" in the other; 3) one Action significantly advances the other; and 4) the Decision in one Action could be a "barrier in law" to the Court adjudicating the other. Justice Yungwirth noted that establishing one factor is not necessarily sufficient to prove an inextricable link, however, proof of all four factors is not necessary.

Justice Yungwirth found that both Actions involved the same parties, similar contracts, and identical set off claims, and that the determination of liability in one Action would "play a large role in the global resolution" of the other. Justice Yungwirth found that the determination of the central issues in either Action would have the effect of moving both Actions forward. As a result, Justice Yungwirth held that the Actions were inextricably linked.

Having found the Other Action to be inextricably linked with the present Action, Justice Yungwirth examined the Affidavit filed in the Other Action to determine whether it constituted a significant advance in the present Action. Justice Yungwirth confirmed that the analysis under Rule 4.33 is a functional one, which is to be conducted in light of the principles emphasized in Rule 1.2, which seeks to provide a fair and just resolution of claims in a timely and cost effective manner. The functional approach focusses on the substance and effect of the step taken, not its form. The genuineness and timing of the step taken are also relevant to considering whether the step significantly advanced the Action.

Yungwirth J. found that the Affidavit did not disclose materially new information beyond that which was already in the pleadings, and as such, it did not allow the Defendant the opportunity to assess the strength of its own position in light of the new information. Further, the claims and issues which linked the Actions were not mentioned in the Affidavit. Justice Yungwirth noted that when questioned on the Affidavit, Plaintiff's counsel objected to any questions relating to the Counterclaim, or any issues which may pertain to the Other Action, citing them as irrelevant. Justice Yungwirth accordingly held that the Affidavit filed in the Other Action was not a genuine step taken to significantly advance the present Action, and therefore had no such effect of significantly advancing the present Action.

The Appeal was dismissed.

ZERR V THERMAL SYSTEMS KWC LTD, 2018 ABQB 1008 (MASTER ROBERTSON)
Rule 1.2 (Purpose and Intention of These Rules)

The Plaintiffs and the Defendant each brought partial Summary Judgment Applications respecting the interpretation of a share purchase agreement. The Plaintiffs were substantially successful in advancing their interpretation of the agreement, but thereafter the Defendant argued that some of the relief that the Plaintiffs had sought at the hearing was not pleaded in their original Application.

In reviewing the scope of permissible relief, the Court cited the foundational Rule 1.2 to note that parties are required to "identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense". Each side had the opportunity to address each others' arguments, including the new relief sought, through written Briefs, and each side had the same opportunity in oral argument which stretched over two days. As such, Master Robertson held that no party would be prejudiced by the "technical defect" in the Application. However, the Master left it to the parties to decide whether any amendment to the pleadings would be required to remedy further technical defects in the pleadings going forward, with respect to the matters that were not determined at the partial Summary Judgment hearing.

PARANIUK V PIERCE, 2018 ABQB 1015 (LITTLE J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 5.12 (Penalty for not Serving Affidavit of Records), 7.3 (Application and Decision), 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 13.7 (Pleadings: Other Requirements) and 14.5 (Appeals Only with Permission)

The Decision of Justice Little arose from a two-day hearing which addressed a range of Applications by both the Plaintiff, Gregory Lincoln Paraniuk ("Mr. Paraniuk"), and the Defendants in the underlying Action (the "Action"). The Action related to accusations that certain Police Defendants had inappropriately and negligently responded to noise and threat complaints by Mr. Paraniuk, and an April of 2013 incident where Mr. Paraniuk was allegedly assaulted by an unidentified person (the "Incident").

Mr. Paraniuk's Statement of Claim (the "Claim") alleged, *inter alia*, that: (1) the Defendant, Chief Knecht, was vicariously liable for the actions of the Police Defendants, pursuant to the *Police Act*, RSA 2000, c P-17; (2) the condominium corporation and property management company were liable for the Incident; and (3) the Defendants Raelene Keefe and Paul Keefe ("the Keefes"), residents in the condominium, were parties to the Incident and had subsequently defamed Mr. Paraniuk (collectively the "Defendants"). The Claim was amended twice to add various Police Defendants and additional particulars of the events relating to the Incident (the "Amended Claim").

In late 2017 all of the Defendants applied to have the Amended Claim struck under Rules 3.68 and 7.3. The Defendants alleged that the Amended Claim did not disclose any issue or reasonable claim that required Trial, and that the Action was frivolous, vexatious, and an abuse of process. The Keefes also argued that Mr. Paraniuk's allegations of defamation did not meet the requirement for particulars under Rule 13.7. Justice Little reviewed the relevant jurisprudence on foundational Rule 1.2 and Rule 3.68. Justice Little noted that in evaluating pleadings, the Court is to accept pleaded facts as true; however, those facts must be pled clearly and, on application, the Court may reject alleged facts which are patently ridiculous or incapable of being proven.

After a comprehensive review of the factual history of the Action, Justice Little found that there was no evidence to the allegations made by Mr. Paraniuk and no question that Mr. Paraniuk's litigation activities exhibited indicia of vexatious and abusive litigation. As such Justice Little ruled, *inter alia*, that: (1) Mr. Paraniuk was a vexatious litigant, and was therefore prohibited from commencing any proceeding in the Courts of Alberta; (2) Mr. Paraniuk must apply to a single Appeal Judge for leave to commence or continue any proceeding and, even if the single Appeal Judge grants leave to commence an Appeal, Mr. Paraniuk may still be required to apply for permission to Appeal under Rule 14.5(1)(j); and (3) that the approval of the

parties as to the form and content of the foregoing Order was not required per Rule 9.4(2)(c).

An ancillary issue also arose wherein Mr. Paraniuk applied to the Court for an Order that the Defendants pay a penalty for late service of their Affidavits of Records, per Rule 5.12(1). The Defendants justified the delays on the basis that Mr. Paraniuk's pleadings were continuously evolving at the time the records were to be provided which meant that what was relevant and ought to be included in their respective records was also evolving. Justice Little agreed with the Defendants and found that no Rule 5.12 penalties should be imposed. His Lordship noted that Rule 5.12 does not mandate automatic penalty awards that Mr. Paraniuk was not prejudiced by any delays, and that Mr. Paraniuk could not complain about delays for which he was the architect. Little J. concluded by finding that the Defendants had been entirely successful in relation to all Applications heard and were presumptively due their Costs, per Rule 10.29. After referencing the leading jurisprudence on the approach to a Costs award in abusive litigation scenarios, His Lordship found that a lump sum award was appropriate and ordered Costs of $20,000.00 payable in favour of each group of Defendants.

BLACKBURN V BOUCHER, 2018 ABCA 400 (MARTIN, WATSON AND CRIGHTON JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

The Defendant/Appellant challenged the Decision of Mandziuk J. who had decided that it was not proper to dismiss two Actions by the Plaintiff/Respondent for lack of a significant advance under Rule 4.33(2). The Appellant argued that both Actions of the Respondent - one launched in November of 2013 (the "First Action") and the second in April of 2016 (the "Second Action") - were in substance the same Action. The Appellant also contended that nothing significant had happened after the Appellant filed his answers to Undertakings in September of 2014 in the First Action.

The Respondent asserted that the Second Action was intended as a substitute or cure for a defect in the First Action. It was the Respondent's position that the Second Action, which was effectively approved to go forward by a decision of Graesser J. dated May 17, 2016 (the "Graesser J. Order"), was a significant advance as it combined the First Action and Second Action together.

The Court of Appeal found that the crux of the matter was whether or not the Graesser J. Order advanced the First Action. Were that First Action to be dismissed pursuant to Rule 4.33(2) for inactivity, it would create a conundrum as to the viability of the Second Action, which, arguably, would not itself be caught by Rule 4.33(2) but might run up against a different Rule.

The Court of Appeal found that it need not tackle this interesting question because the Court was persuaded that the Graesser J. Order must be taken to be a significant advance of the First Action as found by Justice Mandziuk. The Court concluded that the Appellant's position before Mandziuk J. amounted to a collateral attack on the implicit ruling of the Graesser J. Order and that both Actions had sufficient arguable merit to proceed to a joint hearing. Had three years passed since the Graesser J. Order, the impact of Rule 4.33(2) would be implemented. However, a ruling that preserved both Actions against attack on grounds other than delay was determined to be a significant advance in the First Action. As such, it was not open to collateral attack.

The Court of Appeal concluded by dismissing the Appeal and stating that the ruling did not indefinitely preserve either Action but merely confirmed the Order of Justice Mandziuk which had not dismissed the two Actions.

FACTORS WESTERN INC V POINT DESIGN HOMES LTD, 2018 ABQB 1004 (MASTER FARRINGTON)
Rules 1.3 (General Authority of the Court to Provide Remedies), 3.72 (Consolidation or Separation of Claims and Actions) and 7.3 (Summary Judgment)

The Plaintiff, Factors Western Inc. ("Factors") made a Summary Judgment Application pursuant to Rule 7.3 in respect of a debt claim stemming from an invoice that had been assigned to it by another construction company and payable by Point Design Homes Ltd ("Point Design"). Point Design had also signed an acknowledgement that

the invoice was payable to Factors without dispute (the "Acknowledgment").

Master Farrington denied the Summary Judgment Application on the basis that there were real issues as to whether Factors had a valid contractual claim against Point Design. There was no apparent consideration for Point Design's Acknowledgement or promise to pay. Furthermore, the Acknowledgement may well raise issues of estoppel.

Master Farrington then addressed how the Action should proceed given that another related Action had been filed by Point Design (the "Lien Action"). Point Design had filed the Lien Action seeking the ability to pay lien funds into Court to protect against the possibility of having to pay for the services contemplated in the Factors invoice twice (because it was not Factors who initially issued it). The Lien Action requested that the lien fund be calculated to exclude the payment of the Factors invoice, and to give priority to Factors over other claimants.

Master Farrington stated that it would not be appropriate to consolidate the two Actions because not all of the participants in the Lien Action were participants in this Action. However, Master Farringdon confirmed that Rule 3.72 allows the Court to do various things to ensure the efficient resolution of claims including directing that one or more Actions be stayed until another is determined, or directing that two or more Actions be tried at the same time. Furthermore, Rule 1.3 empowers the Court to give a remedy regardless of whether it is specifically sought in an Action.

Master Farrington then ordered that this Action be tried consecutively and following the Lien Action, subject to the discretion of the Hearing Justice to decide how to best take evidence and whether to adopt evidence from one Action in the other Action.

The Summary Judgment Application was dismissed with Costs in the cause.

LYMER (RE), 2018 ABCA 368 (SCHUTZ J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 1.5 (Rule Contravention, Non-Compliance and Irregularities) and 14.5 (Appeals Only With Permission)

The Applicant sought permission to appeal two Orders: (1) an Order declaring the Applicant a vexatious litigant and imposing Court access restrictions (the "Vexatious Litigant Order"); and (2) a sanction Order of 30 days' imprisonment, consequent to an earlier contempt finding (the "Sanction Order") (collectively, the "Orders"). In his Memorandum of Argument, but not in his Application (filed the same day), the Applicant sought stays of both of the Orders (the "Stay Requests"). The Respondents submitted that because the Applicant failed to properly set out the Stay Requests in the Notice of Application, the Stay Requests were not properly before the Court.

Justice Schutz noted that, when dealing with the preliminary issue of the Applicant's failure to specify the Stay Requests in his Application, such irregularities are not fatal to an Application provided there is no surprise or prejudice to the responding party: Rules 1.3(2) and 1.5(4). Her Ladyship found that in this instance, there was no surprise or prejudice to the Respondents given that the Applicant's Memorandum was filed the same day as the Application, and clearly set out the Stay Requests.

Schutz J. found that the test for permission to appeal the Orders under Rule 14.5 requires that (a) there is an important question of law or precedent, (b) there is a reasonable chance of success on Appeal, and (c) the delay will not unduly hinder the progress of the Action or cause undue prejudice. Without a review of these factors, Justice Schutz found that the Applicant had met the test for permission to appeal.

Turning to the test for granting a Stay pending Appeal, Justice Schutz enumerated the threefold test, namely: (1) there is an arguable issue to be determined on Appeal; (2) the Applicant will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting a stay. The Applicant's counsel advised that he would not be pressing for a Stay of the Vexatious Litigant

Order but that if a Stay was not granted in respect of the Sanction Order, the Applicant would have no recourse for the time spent in custody if that decision was ultimately overturned on Appeal. Schutz J. agreed and noted that the Applicant had met the test for a Stay pending Appeal, and that if the Stay was not granted, the Appeal of the Sanction Order would be rendered nugatory. As such, Justice Schutz ordered that the Applicant be released from the Edmonton Remand Centre as soon as practicably possible.

REED V REED, 2018 ABQB 960 (MASTER SCHLOSSER)
Rules 1.4 (Procedural Orders), 5.31 (Use of Transcript and Answers to Written Questions) and 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of the claim on the basis that it was brought after the expiry of the limitation period, and alternatively, an Order for Security for Costs. The Plaintiff/Respondent contended that the running of the limitation period was suspended due to fraudulent concealment of a material fact.

The Defendants filed all transcripts arising out of Part 5 Questioning in support of the Application, including the transcripts of the Plaintiffs' Questioning of the Defendants. Rule 5.31 only permits the use of a transcript of Questioning under Part 5 "against a party adverse in interest". Master Schlosser noted that "[o]rdinarily you cannot use your own evidence by filing your own transcript even if your witness dies", and indicated that the purpose of the Rule is to enable Questioning which is "generally, with impunity" to allow the exploration of the case to meet. Master Schlosser held that Rule 5.31(3) does not allow "*'carte blanche'* use of your own transcript", but is rather directed at responding to competing evidence tendered by the opposing party which would be incomplete or misleading on its own. Master Schlosser accordingly held that the Defendants' own Questioning transcripts were inadmissible.

The Plaintiff/Respondent attempted to rely upon an expert report which was appended as an exhibit to his own Affidavit, as opposed to being in a Form 25. Despite the report appearing to be sworn, Master Schlosser found that it was "only an enhanced form of hearsay" and noted that the evidence would be insufficient if the Plaintiff was the Applicant. As the Respondent however, the evidence was admissible and his only burden was demonstrating that he had a reasonable case, and the evidence presented was sufficient to do so. Master Schlosser therefore dismissed the Application for Summary Dismissal.

During Questioning, the Plaintiff had acknowledged that he failed to declare the property which was the subject matter of the litigation as an asset during a recent bankruptcy which he had been discharged from. Master Schlosser found that this failure was "at best, an offence under the [*Bankruptcy and Insolvency*] Act, and, at worst, perjury, as the declaration of assets is sworn." Master Schlosser described this as a "gross abuse of the system" and a "reason to annul the discharge and to have a trustee reappointed" as the Action ought to have been vested in the trustee in bankruptcy or a creditor under section 38 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. Master Schlosser relied on Rule 1.4(2)(h) to order that the Action be stayed to allow the Court file to be provided to the bankrupt's trustee for consideration.

Master Schlosser adjourned the Application for Security for Costs, noting that there was evidence that the Plaintiff had assets and income sufficient to respond to a Costs award, even one for enhanced Costs.

INNES V FERGUSON, 2018 ABQB 959 (MASTER SCHLOSSER)
Rule 2.11 (Litigation Representative Required)

The Plaintiff, by her Litigation Representative, made an Application to add Defendants to the Action. The Application was heard more than three years after the Action had been commenced, and more than five years after the Plaintiff was alleged to have suffered the injuries claimed in the Action.

The Plaintiff argued that, as a person under a disability, the limitation period had been suspended pursuant to Section 5(1) of the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*): "The operation of the limitation periods provided by this Act is suspended during any period

of time that the claimant is a person under disability." The proposed new Defendants conceded that the Plaintiff was a person under a disability, but argued that the limitation period nonetheless ran from the time that a Litigation Representative had been appointed pursuant to Rule 2.11, which occurred more than three years prior to the Plaintiff's Application.

Master Schlosser addressed head on that the Plaintiff's position, taken to its logical conclusion, would allow indefinite suspension of a limitation period for an individual under a permanent disability. Reference was made to *Knibb v Foran*, 2013 ABQB 754, decided under the old Rules by Eidsvik J., which had accepted this logical conclusion as intended by the Legislature. Master Schlosser, though pausing to observe that the new Rules increased the authority of Litigation Representatives, ultimately found that the applicability of Section 5(1) of the *Limitations Act* did not turn on the involvement of a Litigation Representative, but rather, was exclusively concerned with a claimant's status as a person under a disability.

The Application to add Defendants was granted.

LATHAM (RE), 2018 ABQB 955 (HENDERSON 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 Applicant ("Mr. Latham") was an inmate at the Bowden Institution serving an indeterminate sentence as a dangerous offender and had a persistent history of initiating unsuccessful *habeas corpus* Applications (the "HC Applications"). Justice Henderson had previously dismissed one of Mr. Latham's HC Applications and, at the time, had invited submissions with respect to Costs. After receiving additional submissions, Henderson J. assessed Costs against Mr. Latham, and, in light of his history of misusing the *habeas corpus* process, had imposed a condition that Mr. Latham could not have access to the fee waiver program in any future HC Applications.

Due to the lengthy 20 year history of HC Applications brought by Mr. Latham, Justice Henderson concluded that it would be appropriate to investigate whether Court access restrictions should be imposed on Mr. Latham, by what is sometimes called a "Vexatious Litigant Order". After a comprehensive review of the procedural history of Mr. Latham's HC Applications, Justice Henderson ruled, under the Court's inherent authority and on His Lordship's own motion, *inter alia*, that: (1) Mr. Latham is a vexatious litigant, and is prohibited from commencing, or attempting to commence, or continuing, any Appeal, Action, Application, or proceeding in the Courts of Alberta; (2) To commence or continue an Appeal, Application, or other proceeding in the Alberta Court of Appeal, Mr. Latham must apply to a single appellate Judge for leave to commence or continue the proceeding, and if the single appellate Judge grants Mr. Latham leave to commence an Appeal, he may still be required to apply for permission to appeal under Rule 14.5(1)(j); and (3) Mr. Latham is prohibited from acting as an agent in the Courts of Alberta under Rules 2.22 and 2.23.

Justice Henderson concluded by determining that the approval of Mr. Latham as to the form and content of the above Order was not required per Rule 9.4(2)(c).

ALBERTA (JUSTICE AND ATTORNEY GENERAL) V MOHAMED, 2018 ABQB 897 (BURROWS J)
Rule 3.6 (Where an Action is Carried On)

The Minister of Justice applied *ex parte* for a Restraint Order pursuant to the *Victims Restitution and Compensation Payment Act* ("VRCPA"). The VRCPA requires that Applications for Restraint Orders be made *ex parte*.

The Application was brought in Edmonton despite the fact that Lethbridge was the Judicial Centre of the Action, being the centre where the Originating Application was filed. The Minister did not seek a direction pursuant to Rule 3.6(2) to allow the Application to be brought outside of the Action's Judicial Centre.

Justice Burrows did not dismiss the Application, notwithstanding the failure to seek the direction contemplated by Rule 3.6(2) because the issue was not raised at the time of the Application, submissions were heard, and reasons for Decision were reserved. Justice

Burrows noted that notwithstanding that no submissions had been received on why the Application was brought in Edmonton, not Lethbridge, the most likely reasons were that the Minister practices in Edmonton, and because the Application was required to be brought *ex parte*, there would be no prejudice to the Respondents. Despite those facts, Justice Burrows recommended that the direction contemplated by Rule 3.6(2) ought to be received prior to commencing Applications outside of the proper Judicial Centre notwithstanding their *ex parte* nature.

The Application was considered on its merits and denied.

CHARTERED PROFESSIONAL ACCOUNTANTS OF ALBERTA V NEILSON, 2018 ABQB 995 (EAMON J)
Rules 3.10 (Application of Part 4 and Part 5), 9.4 (Signing Judgments and Orders), 10.29 (General Rules for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant, Chartered General Accountants of Alberta ("CGAA"), sought to enforce fines that the Respondent had agreed to pay pursuant to a sanction agreement under the *Chartered Professional Accountants Act*, SA 2014, c C-102. The Respondent, who was bankrupt, argued that the fines were provable claims in bankruptcy and could not be collected outside of his bankruptcy proceedings. After deciding that the Applicant's fines were not provable claims in bankruptcy in an earlier proceeding, Justice Eamon turned to the issue of Costs.

First, although the Respondent argued that the CGAA's refusal to produce its complaint files barred it from relying on the records to prove Costs, Justice Eamon noted that pursuant to Rule 3.10, mandatory pre-hearing disclosure was not required at the hearing unless otherwise ordered.

Second, Justice Eamon considered the Applicant's argument that it incurred additional service and other expenses because the Respondent had not been cooperative and avoided service. His Lordship ordered that those disbursements be included in the Costs award, as the Respondent should have responded to his Regulator.

His Lordship then noted that pursuant to Rule 10.29, the successful party in a proceeding is generally entitled to a Costs award against the other party or parties, subject to the Court's consideration of the factors listed in Rule 10.33, and the Court's discretion pursuant to Rule 10.31. If no other considerations are present, then Costs should be awarded to the successful party even if it is not entirely successful on every issue in the Action. In this case, Justice Eamon held that the default rule should not be departed from, and awarded Costs to the Applicant pursuant to Column 2 of Schedule "C", as well as reasonable disbursements.

Justice Eamon also invoked Rule 9.4(2)(c) in the Order, such that the Respondent's approval as to the form of Order would not be required.

SILVER WILLOW WATER CO-OP LTD V VERMILLION RIVER (COUNTY), 2018 ABQB 952 (MICHALYSHYN J)
Rules 3.15 (Originating Application for Judicial Review) and Rule 13.5 (Variation of Time Periods)

This case arose from an Originating Application for Judicial Review by the Applicant/Cross-Respondent, Silver Willow Water Co-Op Ltd. ("Silver Willow"), in regards to a decision made by the County of Vermillion River. The Respondent/Cross-Applicant, Vermillion River (County) ("Vermillion River"), responded with a Cross-Application to strike or summarily dismiss the Originating Application.

Michalyshyn J. began by confirming that Rule 3.15(2) requires an Originating Application for Judicial Review to be filed within six months of the decision being challenged. The Court then briefly stated that Rule 13.5, which allows parties to extend timelines or for the Court to do the same where permissible, does not apply in this instance.

The Court determined that the Originating Application for Judicial Review was not served in time in accordance with Rules 3.15(3)(b) and (c). Those Rules require the Minister of Justice and Solicitor General or Attorney General to be served "as the circumstances require" and that all other individuals affected by the Application be served as well. The Applicants conceded that neither the Minister

of Justice and Solicitor General nor the Attorney General had been served but that the words "as the circumstances require" could be interpreted to make service on these parties optional. Michalyshyn J. disagreed with this submission, clarifying that the term "as the circumstances require" actually speaks to which of those bodies must be served; it does not make service on one or both optional.

Further, the Court rejected Silver Willow's argument that even though certain individuals affected by the Application had not been served with it, most of these individuals would have had knowledge of the Application because they are members of Silver Willow. The Court clarified that having knowledge of an Application is not the same as receiving service and furthermore, it was apparent that some affected individuals had neither received service of the Application nor did they have knowledge of it.

The Court concluded by granting the cross-Application to dismiss the Originating Application, and granted Costs to Vermillion River.

DEADMAN V JAGER ESTATE, 2018 ABQB 985 (NEILSON J) Rules 3.26 (Time for Service of Statement of Claim), 6.10 (Electronic Hearing), 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

This was an Appeal of Master's Decision to dismiss an Application to set aside service outside of Alberta. The Defendants/Appellants were served with an Amended Statement of Claim in Nova Scotia. The claim was in regards to loans and debts from the purchase of real estate in Mexico where the Defendants/Appellants resided. The Master dismissed the Application to set aside service as there was a presumptive "real and substantial connection" between the Claim and the Province of Alberta, and also allowed the Plaintiffs/Respondents to file an Amended Amended Statement of Claim.

Neilson J. held that deficiencies in a pleading governing service outside Alberta are not fatal and a Plaintiff may still amend its claim as no permission is required to do so under Rule 3.26. The Court confirmed further that Rule 11.25 allows a commencement document to be served outside of Alberta and in Canada if a "real and substantial connection" exists between Alberta and the facts on which a claim in the Action is based. Moreover, the facts in support of the claim must be disclosed in the commencement document and the document must refer to the grounds for service outside of Alberta.

In this case, the claim was clearly served within Canada and Neilson J. found that there was a "real and substantial" connection pursuant to Rule 11.25. The claim related to an Alberta contract; it was governed by Alberta law; and it related to a tort committed in Alberta. These are all factors enumerated under Rule 11.25(3) which give rise to a real and substantial connection.

The Defendants/Appellants argued that Alberta was not the appropriate jurisdiction for the Action regardless of the Court's ruling regarding service. Neilson J. confirmed an Application to set aside service is not an acknowledgement that the Court has jurisdiction over a matter as this is stipulated in Rule 11.31(2). However, Neilson J. still rejected the Defendants'/Appellants' argument that the Action should proceed in Mexico. The Defendants/Appellants had failed to show that another jurisdiction was "clearly preferable" as required by the case authorities on *forum non conveniens*. Any issues regarding applicable law between Mexico and Alberta could be overcome with the appointment of experts, and any inconvenience or expense associated with witnesses being located in Mexico could be overcome by giving testimony by electronic means as is permitted under Rule 6.10.

The Defendants'/Appellants' Application was dismissed with Costs.

RICHARDSON V RICHARDSON, 2018 ABCA 327 (SLATTER, BIELBY AND CRIGHTON JJA)
Rules 3.34 (Demand for Notice by Defendant), 3.58 (Status of Counterclaim), 4.36 (Discontinuance of Claim), 12.11 (Statement of Defence, Counterclaim and Demand for Notice), 14.18 (Contents of Appeal Record – Standard Appeals) and 14.27 (Filing Extracts of Key Evidence)

The Appellant appealed an Order granted by Justice Jerke permitting the Respondent to discontinue his matrimonial property claim. The Statement of Claim sought an Order for matrimonial property distribution in such a manner as the Court deems just and equitable. The Appellant did not file a Statement of Defence or Counterclaim, but did file a Demand for Notice. As the Action proceeded, funds were paid into Court and two disclosure Orders were made against the Respondent, with which he did not comply. The Appellant filed an Application seeking to have the Respondent held in contempt and for leave to file a Statement of Defence and Counterclaim. The Respondent then sought to discontinue his Claim. Justice Jerke had held that, pursuant to Rule 4.36, the Respondent was entitled to discontinue the claim, since there had been no abuse of process.

The Court of Appeal reviewed Rules 3.34 and 12.11 regarding the effect of a Demand for Notice and noted that if a Defendant in a family law claim does not wish to oppose the relief sought in a Statement of Claim, then a Demand for Notice is sufficient. The Court of Appeal then stated that the Statement of Claim in this case was different from an ordinary Statement of Claim because it sought relief that was beneficial to both parties.

When the Respondent indicated that he was prepared to abandon his claim, but the Appellant was not prepared to abandon her claim, the Court was required to consider whether it was appropriate to grant the Appellant permission to replace her Demand for Notice with a Statement of Defence pursuant to Rule 3.34(5). Whether a Defendant should be granted relief pursuant to Rule 3.34(5) is a discretionary Decision requiring consideration of all the circumstances, including: (i) the relief sought in the claim; (ii) the fact that the Appellant admitted the relief was appropriate; (iii) the Appellant's legitimate expectation that the matrimonial property would be divided on the basis requested by the Respondent; (iv) any delay in applying; (v) the conduct of the parties; and (vi) any prejudice that would result to either party. The Court of Appeal noted that the reasons of the Chambers Judge did not consider these factors and found that the Appellant had met the test for substituting her Demand for Notice with a Statement of Defence and Counterclaim. Accordingly, the Court allowed the Appeal.

The Court of Appeal also noted that a discontinuance of a claim can be prevented where it would be obstructive, abusive or unfair, or where there are outstanding issues between the parties, such as on the current facts where there was money paid into Court and there was an outstanding Application for contempt against the Respondent Plaintiff. The Chambers Judge dealt with the discontinuance of claim issue first, but the correct order of proceeding was to deal with the Application for contempt, then the Application to file a Defence and Counterclaim, and then the discontinuance of claim issue.

For these reasons, the Court of Appeal allowed the Appeal and permitted the Appellant to file a Statement of Defence and Counterclaim. The Respondent was permitted to discontinue his Claim, but that would not prevent the Appellant from pursuing her Counterclaim, pursuant to Rule 3.58. Finally, the Court of Appeal denied the Appellant any photocopying disbursements because she had included copies of the Chambers Briefs in the Appeal Record, in contravention of Rules 14.18 and 14.27.

LANDALE SIGNS & NEON LTD V GRENIER, 2018 ABQB 958 (MASTER SCHLOSSER)
Rules 3.37 (Application for Judgment against Defendant Noted in Default) and 10.42 (Actions within Provincial Court Jurisdiction)

The Plaintiff applied for Judgment after the Defendant had been noted in default under Rule 3.37. The Court noted that the purpose of the Application for an assessment of damages is to determine the quantum of damages, rather than the liability for damages, provided that the facts

deemed to have been admitted establish the cause of Action. A Defendant who is noted in default is deemed to have admitted the allegations of fact contained in the Statement of Claim.

The Plaintiff had claimed that the Defendant was overpaid pursuant to an employment agreement. The Court found that the Plaintiff's own evidence contradicted the claim that it made in its Statement of Claim. Consequently, the Plaintiff had failed to show that the Defendant was actually overpaid, and there was no need for the Court to weigh evidence between competing versions of events.

The Court held that it did not require a formal Cross-Application to dismiss the claim since Rule 3.37(3)(b) gives the Court the authority to make any necessary Order. On that basis, Master Schlosser dismissed the Plaintiff's claim.

The Court also awarded Costs under Column 1 of Schedule C. Master Schlosser did not reduce Costs pursuant to Rule 10.42 since the Defendant did not choose the Court of Queen's Bench forum.

STACKARD V 1256009 ALBERTA LTD, 2018 ABQB 924 (JONES J)
Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 7.3 (Summary Judgment) and 13.8 (Pleadings: Other Contents)

The Plaintiff/Applicant, Nora MacDonald Stackard ("Nora"), applied for Summary Judgment pursuant to Rules 7.3 for the return of a mortgage and its proceeds from the Defendant, 1256009 Alberta Ltd. ("125"). 125 had been controlled by the remaining Defendants, Arthur John Jerome Stackard ("Arthur") (represented in the Action by his estate), and Rosa Elena Dorath ("Rosa").

The Application followed a familial dispute between the parties. Nora was Arthur's mother (both now deceased). Nora had been living with her daughter, Deborah, in South Africa until Arthur and his brother arranged for her return to Canada to live with Arthur and his partner, Rosa. At that time, Nora's main source of income was a vendor take-back mortgage (the "Mortgage") that she had from the sale of her previous home in Calgary.

Upon Nora's return to Calgary, Nora executed a Mortgage Transfer Agreement (the "MTA") which transferred the Mortgage to the Defendant, 125, which was wholly owned by Arthur. In April of 2012, Nora sued 125, Arthur's estate, and Rosa in regards to the Mortgage and claimed, *inter alia*, that Arthur and Rosa had misappropriated the funds from the Mortgage for their own benefit. Nora requested that the Mortgage or 125's shares be transferred to her and that Judgment be entered for all funds expended for the personal benefit of Arthur and Rosa.

Jones J. confirmed that Summary Judgment is available to a litigant under Rule 7.3 where there is no genuine issue for Trial, and there will be no genuine issue for Trial where the Court can make a fair and just determination on the merits based on the existing Court record. This will be the case when the process: (1) allows the Court to make the necessary findings of fact; (2) allows the Court to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Furthermore, Jones J. noted that there is still an unresolved uncertainty with respect to the appropriate burden of proof to establish that there is no genuine issue for Trial. The recent Court of Appeal decision of *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125, states that an Applicant need only establish that there is no genuine issue based on a balance of probabilities. However, in the subsequent Decision of *Whissell Contracting Ltd v Calgary (City)*, 2018 ABCA 204, the Court of Appeal returned to its previous position that an Applicant bears the burden of showing that it is "unassailable" that no genuine issue for Trial exists.

Jones J. stated that this uncertainty has no bearing on the Court's Decision in this case, as Summary Judgment cannot be awarded based on either standard. The Court could not definitively rule on the terms of the MTA based on the existing record, which meant that it could not determine many of Nora's claims for relief.

The Court also addressed the Defendants'/Respondents' claims that Nora had improperly expanded the scope of relief in the Action by requesting relief in her Brief that had not been specifically pled. Jones J. noted the Court's ability pursuant to Rule 3.65 to amend pleadings, even during argument, provided this does not result in surprise or prejudice. In this case, the expanded relief had been duly articulated in Nora's Brief and responded to in the Defendant's Brief. Therefore, there was no surprise or prejudice.

Furthermore, the Court also addressed Nora's claim that the Defendants cannot claim benefit or entitlement under the MTA when they deny its existence in their Statement of Defence. Jones J. noted the apparent contradiction between the claims in the Statement of Defence, but referred to Rule 13.8(1)(a) which allows for alternative claims or defences to be made. Jones J. determined that he would interpret the seemingly contradictory defences as alternative arguments. The Application was dismissed.

GEOPHYSICAL SERVICE INCORPORATED V MURPHY OIL COMPANY LTD, 2018 ABCA 380 (PAPERNY, ROWBOTHAM, O'FERRALL JJA)
3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Appellant/Plaintiff appealed the Chambers Judge's Judgment which had summarily dismissed the Appellant's claim pursuant to Rule 7.3. The claim itself spanned Actions dating from 1996 to 2018. The Appellant contended that the Respondent's Affidavit was insufficient and improper basis on which to grant Summary Judgment, and that the Chambers Judge erred by relying on it. Specifically, the Appellant asserted that the Affidavit on which the Respondent relied was not made on the basis of personal knowledge in contravention of Rule 13.18(3). The Appellant characterized the Respondent's affiant as a "straw witness", as they were not personally involved in the facts or matters which formed the basis of the claim.

The majority of the Court noted that "[t]he problems of 'straw witnesses' … in [the Respondent's] evidence are precisely those that the ultimate 10-year limitation period is intended to overcome", and that the evidentiary issues faced by the Respondent were caused by the amount of time which had elapsed from the time the causes of action arose and the litigation. Further, the majority noted that most of the Chambers Judge's determinations were based on the pleadings, documentary evidence, or undisputed material facts. As a result, that ground of appeal was dismissed.

The Appellant also argued that the Chambers Judge erred by dismissing the Appellant's Action while permitting it to apply to amend the Statement of Claim. The Appellant did not plead the breach of two particular agreements, which, during oral argument, the Appellant's counsel argued had been breached, and argued that they must survive Summary Dismissal. The Appellant did not apply to amend its pleadings until six months after the Chambers Judge's Reasons for Judgment were issued. The Appellant argued that if "a pleading is summarily dismissed that could have been saved by an amendment, the [C]ourt must consider the amendment first". The majority of the Court held that this principle only applied where the amendment Application is brought concurrently with an Application to strike or dismiss a claim. This principle did not extend to "an *ad hoc* request to amend pleadings to cure a fatal defect that becomes apparent in closing argument". This ground of appeal was dismissed.

Considering the merits of the Appellant's claim, the majority noted that "the litmus test of summary judgment is whether, given the competing claims, there can be a 'fair and just determination on the merits'" which occurs where there is "no merit to a claim or part of it". The majority re-affirmed that "merit" means "proof on the balance of probabilities": *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125. The majority held that while the Respondent bore the legal burden on the Summary Dismissal Application, the Appellant bore an evidential burden to prevent the Respondent from establishing that there is no triable issue, and that they were obligated to put their best foot forward in doing so. The majority found that the Appellant had relied primarily on the pleadings and speculation about what might be proven at Trial, and that

the record did not disclose palpable or overriding error on the part of the Chambers Judge in finding that there was no evidentiary basis for suspicion, and no merit to the Claim more broadly. The Appeal was dismissed in its entirety.

CHAMPAGNE V SIDORSKY, 2018 ABCA 394 (COSTIGAN, SLATTER, O'FERRALL JJA)
Rules 3.66 (Costs), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

The Appeal Panel addressed a number of issues in this Appeal including a ruling by the Case Management Judge to award Costs to the Respondent, Sidorsky, following an Application by the Appellants, the Champagnes, to amend their Statement of Claim. The Court awarded Costs to the Respondent notwithstanding the fact that the request to amend the claim was allowed. The Court ruled that the need to amend the claim arose because one of the Appellants had drafted the initial Statement of Claim himself without using counsel, and further, the other unrelated relief sought by the Appellants in the Application regarding restrictive covenants was denied.

The Panel described the "overlapping" principles engaged on the issue of Costs. Successful parties are presumptively entitled to Costs pursuant to Rule 10.29 and special reasons are generally required to deny a successful party Costs while very special reasons are generally required to make a successful party actually pay Costs. Furthermore, a party can be denied "wasted" Costs, or Costs arising as a result of a party's own carelessness or misconduct pursuant to Rule 10.33(2). This is manifest in Rule 3.66 which states that the Costs associated with amending a pleading should be borne by the amending party except in instances where the amendment is contested, in which case Costs are in the discretion of the Court. Finally, Costs should not provide a complete indemnity.

The Appeal Panel ruled that the Appellants would likely not have been entitled to Costs if the Application had simply dealt with the request to amend the Statement of Claim. Rule 3.66 would have operated to saddle the Appellants with the Costs of the Amendment Application because it resulted from the Appellants' own carelessness. However, the fact that the Appellant had asked for other relief besides the amendments left it open to the Case Management Judge to assess Costs and award Costs to the Respondent. This was not unreasonable and was within the Case Management Judge's discretion. The Appeal was dismissed.

GAGNON V CORE REAL ESTATE GROUP, 2018 ABQB 913 (MICHALYSHYN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 10.29 (General Rule for Payment of Litigation Costs)

The Plaintiff in this Action, Jean-Marc Pierre Gagnon ("Gagnon"), had already been declared a vexatious litigant by the Court. The issue before the Court was whether several actions filed by Gagnon (the "Actions") were futile and an abuse of process. If so, the Court could consider whether to require Gagnon to show cause for continuing the Actions in accordance with Civil Practice Note No. 7, or risk dismissal of the Actions pursuant to Rule 3.68.

Michalyshyn J. confirmed that Civil Practice Note No. 7 took effect on September 4, 2018. The Practice Note allows a Court to require a litigant to provide written reasons to continue an Action if a Court finds the Action to be futile or an abuse of process.

Michalyshyn J. summarized the seven Actions that Gagnon had filed and concluded that all Actions were hopeless and an abuse of process. Justice Michalyshyn then ruled that Gagnon will be required to provide written reasons to rebut the Court's finding. Michalyshyn J. further ruled that if Gagnon failed to provide written submissions, the Defendants in the Actions would be permitted to submit written replies to Gagnon's submissions. Following that, the Court would make a final determination as to whether Gagnon's Statements of Claim in the Actions should be struck in accordance with Rule 3.68 and Civil Practice Note No. 7.

Michalyshyn J. closed by clarifying that if one or more of the Actions was eventually struck, this would not affect

a Defendant's right to Costs, as successful litigants are presumptively entitled to Costs except where the Court exercises its discretion under Rule 10.29(1).

TRANSALTA GENERATION PARTNERSHIP V BALANCING POOL, 2018 ABQB 932 (JEFFREY J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant, TransAlta Generation Partnership ("TransAlta"), was a party to a power purchase arrangement ("PPA") with Enmax Energy Corporation ("Enmax"). TransAlta made a *force majeure* claim pursuant to the PPA and the Respondent, the Balancing Pool, made certain payments to TransAlta to compensate it for the capacity payments that Enmax was relieved of paying due to the *force majeure*. The Balancing Pool then challenged the validity of the *force majeure* claim and formally disputed the claim according to the dispute resolution clauses of the PPA. TransAlta took the position that the Balancing Pool could not initiate arbitration and refused to appoint an arbitrator. Enmax took no position on the *force majeure* claim.

The Balancing Pool filed an Originating Application seeking to have the Court appoint an arbitrator, and TransAlta filed the current Application to strike the Originating Application under Rule 3.86. Justice Jeffrey cited Rule 3.68 but did not discuss the test under Rule 3.68. Instead, His Lordship reviewed the relevant legislation and the wording of the PPA and concluded that the Balancing Pool had a right to initiate the dispute resolution procedure in the PPA in the circumstances and, as a result, dismissed TransAlta's Application to strike the Balancing Pool's Originating Application pursuant to Rule 3.68.

SIGNALTA RESOURCES LIMITED V CANADIAN NATURAL RESOURCES LIMITED, 2018 ABQB 935 (EAMON J)
Rules 4.14 (Authority of Case Management Judge), 7.2 (Summary Judgment), 8.4 (Trial Date: Scheduled by Court Clerk) and 8.5 (Trial Date: Scheduled by the Court)

The Action was set for Trial. The Defendant then applied for Summary Judgment dismissing part of the Plaintiff's claim. Eamon J. first discussed Rules 8.4 and 8.5, which set out the requirements that parties must meet before setting a matter down for Trial. The parties are required to file a Form 37, but Eamon J. noted that Form 37 actually does not speak to the requirement that parties certify that all Applications have been disposed of prior to setting a matter down for Trial. If the parties are unable to certify that they have completed all required steps under Rule 8.4(3), Rules 8.4(5) and (6) provide that the Court Clerk may still set the matter down for Trial if the Court Clerk is satisfied that the parties will complete the required steps in a timely fashion.

A Justice may also set the matter down for Trial under Rule 8.5 even if the parties are lacking the certifications required under Rule 8.4(3), so long as the Justice has either waived the missing requirements, is satisfied that the requirements will be completed, or has given directions to the parties to complete the requirements.

If a Justice makes a procedural Order to the parties to complete the requirements, then the Justice may also require, as a pre-condition, that the parties self-report any failure to meet the requirements, and any failure to meet the requirements may also result in loss of the Trial date.

Eamon J. then discussed the possibility of bringing a Summary Judgment application after the parties have filed a Form 37. In citing Veit J. in a prior decision, Eamon J. noted that while Form 37 does not closely track the wording of Rule 8.4(3)(i), the substantive meaning is still that no further Applications may be brought after a Trial date has been set.

The Defendant argued that the wording in Rule 7.2 allowed them to bring a Summary Judgment Application at "any time in an action". In response, Eamon J. cited Gates J.'s prior decision, in which Gates J. had held that the language of Rule 7.2 provides that Summary Judgment remains an option at any time in a proceeding, but does not state that leave of the Court is not required to bring that Application.

Eamon J. then discussed the policy rationale behind Rule 8.4, which is to ensure that the Court's Trial capacity is efficiently used. Late pre-Trial proceedings could have the

effect of jeopardizing Trial dates and affect allocation of the Court's resources. Eamon J. also rejected the test in Ontario for bringing Applications after a Trial date is set, which required a substantial and unexpected change in circumstances. Eamon J. held that some Applications are better brought late than never, such as an Application to amend pleadings.

Eamon J. then held that even if permission was not required to bring the Summary Judgment Application, he had authority under Rule 4.14 as Case Management Judge to bar the Application. His Lordship ultimately found that granting leave to bring the Summary Judgment Application would prejudice the Plaintiff. Conversely, there would be little efficiency gained by allowing the Summary Judgment Application to proceed.

Eamon J. held that the Defendant would not be granted leave to bring the Summary Judgment Application. In the alternative, if leave was not required, then His Lordship would bar the Application in any event through his authority as Case Management Judge.

PM&C SPECIALIST CONTRACTORS INC V HORTON CBI LIMITED, 2018 ABQB 842 (MICHALYSHYN J)
Rule 4.22 (Considerations for Security for Costs Order)

The Defendant applied for additional Security for Costs following a previous Security for Costs Decision. In the previous Decision, the Court concluded that the Plaintiff would be unable to pay Costs if it was unsuccessful at Trial; considered the factors set out in Rule 4.22; and ordered the quantum of security at $780,000.00 plus GST. In this Application, the Defendant applied for security in the amount of $557,195.00 for disbursements already incurred and that would be incurred.

Michalyshyn J. first dealt with a preliminary issue regarding Practice Note 4, the Guidelines for the Use of Technology in any Civil Litigation Matter. His Lordship determined that despite a previous Decision regarding e-discovery Costs, the matter had now become complex enough such that if the Defendant decided to follow Practice Note 4, it would not be precluded from seeking Costs for that effort and expense.

Michalyshyn J. then reviewed the Defendant's Security for Costs Application and analyzed each of the claimed disbursement amounts. A significant portion of the claimed disbursements were related to e-discovery expenses. His Lordship held that it was not his role to determine if the e-discovery expenses were or were not best practice in the context of large-scale litigation. Rather, His Lordship had to decide on the record before him whether the approach taken by the Defendant was reasonable. The Court found that the Defendant adequately explained both the e-discovery services provided and the need for them. After discounting the e-discovery disbursement expense, the Court awarded the Defendant Security for Costs relating to e-discovery in the sum of $165,000.00 plus GST.

AUBIN V PETRONE, 2018 ABQB 973 (KHULLAR J)
Rules 4.24 (Formal Offers to Settle) and 4.29 (Cost Consequences of Formal Offer to Settle)

After deciding a family law Trial, Justice Khullar reserved jurisdiction to determine whether a further remedy should be awarded to the Applicant wife under the *Matrimonial Property Act*, RSA 2000, c M-8 to carry out enforcement of the Judgment arising from Trial, and to speak to Costs arising from the Trial if the parties could not agree.

Neither party was entirely successful at Trial. The husband was ordered to make payments to the wife, but the majority of his assets were tied up in a corporation. Justice Khullar first considered whether the Court should lift the corporate veil to carry out enforcement of the Judgment. Her Ladyship noted that the husband clearly controlled the corporation, and while it was incorporated for valid business reasons, it committed a number of wrongs that negatively impacted the wife and her ability to obtain her share of the matrimonial property. As such, Khullar J. lifted the corporate veil to allow the wife to register a security interest in the husband's shares in the corporation, and against a building owned by the corporation.

Next, Khullar J. considered Costs. The wife argued that she was entitled to Costs as the successful party, having obtained Judgment for spousal support which the husband had initially opposed. The husband argued that the wife

was not entitled to Costs, because the relief she received was different from what she had asked for. Justice Khullar noted that in family law matters, there are often no real "winners", but held that the wife was generally successful and entitled to a Costs award. Her Ladyship also held that the wife's draft Bill of Costs, which included fees based on Column 5, and were doubled after one of two formal offers was made, was reasonable. Justice Khullar came to this conclusion despite the husband's objection to experts' fees, which he argued were too high.

Lastly, Khullar J. considered whether the wife was entitled to double Costs pursuant to Rules 4.24 and 4.29, on the basis that the Judgment resulting from the Trial exceeded her formal offer. The husband argued that the wife's offer was uncertain and invalid, and therefore did not entitle her to double Costs. Alternatively, he argued that uncertainty constituted a "special reason" to rebut the presumption of double Costs, pursuant to Rule 4.29(4).

Her Ladyship held that the wife's offer was uncertain. It was based on the sale of certain assets, and as such the value she would have received if the offer were accepted was not entirely clear. Given that the double Costs rules are "punitive in nature and therefore demand a high degree of certainty and exactness", Khullar J. exercised her discretion pursuant to Rule 4.29(4) not to award double Costs in the circumstances.

SINGH V NOCE, 2018 ABQB 950 (FEEHAN J)
Rules 4.29 (Cost Consequences of Formal Offer to Settle), 7.3 (Application and Decision), 10.31 (Court-Ordered Costs Award), 10.34 (Court-Ordered Assessment of Costs), 10.36 (Assessment of Bill of Costs), 10.41 (Assessment Officer's Decision), 10.44 (Appeal to Judge), 10.45 (Decision of Judge) and Schedule C

The Appellant, Singh, appealed a Decision by an Assessment Officer pursuant to Rule 10.44(2). The Assessment Officer had awarded double Costs based on Column 2 of Schedule C of the Rules for steps taken after a formal offer to discontinue the Action without Costs was made concurrently with the Defendants' Statement of Defence. The Costs were awarded after Singh's claim was summarily dismissed pursuant to Rule 7.3. Singh argued that the Assessment Officer did not have jurisdiction to award double Costs as a result of the formal offer being made when the issue was not determined by a Master or Judge. He also argued that the offer of discontinuance on a without Costs basis was not a genuine offer, and so should not have attracted enhanced Costs.

In reviewing the Assessment Officer's Decision, Justice Feehan first noted that Courts may order that an Assessment Officer perform an assessment of Costs, and may give directions to that Assessment Officer, under Rule 10.34(1). Thereafter, the Assessment Officer may assess Costs in accordance with Rule 10.36(1) and (2), and Rule 10.41. Pursuant to Rule 10.41, the Assessment Officer may determine whether Costs incurred by a party are "reasonable and proper", and may decide whether an item on a Bill of Costs was "reasonably and properly incurred". Although the Assessment Officer may allow or disallow an item in a Bill of Costs, he or she is not entitled to reduce an amount provided for in Schedule C, unless the Schedule allows such a reduction or "exceptional circumstances" exist. Importantly, pursuant to Rule 10.41(3)(d), an Assessment Officer may not determine a lawyer's fees at more than the amount specified in Schedule C, unless expressly permitted by the Rules or by agreement.

Justice Feehan held that the Assessment Officer had the jurisdiction to award double Costs in the circumstances, pursuant to Rule 4.29. Rule 4.29 expressly permits double Costs being awarded if the Action that is the subject of a formal offer to settle is dismissed, unless an award is made on an indemnity basis or as a lump sum (pursuant to Rules 4.29(4)(a) and (e), and Rule 10.31(1)(b)).

However, Justice Feehan held that the Defendant's offer of discontinuance without Costs was not a genuine offer which should attract a double Costs award. His Lordship noted that offers must be genuine in accordance with the purpose of Rule 4.29, which is to encourage fair and reasonable compromise and settlement before Trial, and to prevent needless litigation. Justice Feehan also referred to five principles which may impact the genuineness of an offer: (1) whether the offer was reasonable in the circumstances;

(2) whether it includes an element of compromise; (3) whether it reasonably reflects the relative merits of the parties' positions; (4) whether it is made with a reasonable expectation of acceptance (rather than as a litigation tactic); and (5) if it is examined subjectively and objectively in the context of the surrounding circumstances. Some factors to consider, along with the above listed principles, include whether litigation activity occurred during the acceptance period, whether a limitations defence exists, and the existing evidence which would lead the offeror to conclude that there was no cause of action against it.

Justice Feehan also noted that several authorities have recognized that an offer to discontinue without Costs may be a genuine offer, even if the offer is made early on in the Action. However, His Lordship also noted that intuitively, a formal offer of discontinuance "served simultaneously with a Statement of Defence should not generally be found to be genuine", as by that date, it is usually difficult to assess litigation risks.

Justice Feehan therefore exercised authority pursuant to Rule 10.45 to vary part of the Decision of the Assessment Officer. His Lordship upheld the Assessment Officer's findings as to jurisdiction, but varied the Assessment Officer's determination on double Costs, and held that that double Costs should not have been awarded for steps taken after the expiry of the offer, as it was not a genuine offer of compromise.

PETZ V DUGUAY, 2018 ABCA 402 (MCDONALD, GRECKOL AND CRIGHTON JJA)
Rules 4.29 (Costs Consequences of Formal Offer to Settle) and 5.40 (Expert's Attendance at Trial)

The Plaintiff appealed the Trial Judge's award of damages for injuries sustained in a motor vehicle accident. On the merits, the Plaintiff challenged the Trial Judge's findings of fact regarding causation of the Plaintiff's subjective complaints. Justices McDonald and Crighton found that the Trial Judge's findings of fact were reasonable and declined to interfere. Justice Greckol would have allowed the Appeal on the merits and would have ordered a new damages assessment.

The Plaintiff also appealed the Trial Judge's Costs award. The Defendant, pursuant to Rule 4.29(2), had been granted Costs for all steps taken following the Defendant's delivery of the first of two formal offers, both more favourable to the Plaintiff than the ultimate Judgment. The Plaintiff argued that the two formal offers had not been properly served by the Defendant.

The Majority acknowledged that the Rules contemplate specific methods for service, but that in the context of formal offers, "the court is ultimately concerned with whether or not it is satisfied that the appellant received one or both of the pre-trial offers." In this case, it was clear on the record that the Plaintiff, either directly or through counsel, received both of the Defendant's formal offers. As such, the Defendant was entitled to Costs for all steps taken in the Action after the service of the first formal offer.

Notwithstanding the Defendant's award of Costs for steps taken following the Plaintiff's receipt of the first formal offer, which of course pre-dated Trial, the Plaintiff argued that she was entitled to the Costs of her experts' attendances at Trial pursuant to Rule 5.40(3). That Rule entitles a party to the Costs of an expert's attendance when the opposing party is served with a notice of intention to enter the expert's report as evidence without calling the expert as a witness, and the opposing party nonetheless requests that expert's attendance. This was the case before the Court, as the Plaintiff had served such Notices, and the Defendant requested attendance of multiple witnesses. However, given Rule 5.40's limited scope and Rule 4.29's breadth, the Majority agreed with the Trial Judge's subordination of Rule 5.40 to Rule 4.29 as a permissible exercise of discretion in keeping with the use of Costs as a disincentive to litigation.

Justice Greckol, in dissent, did not address the Plaintiff's appeal of the Costs award, as Her Ladyship would have directed that Costs be addressed upon re-assessment of damages.

CWC WELL SERVICES CORP V OPTION INDUSTRIES INC, 2018 ABQB 908 (MASTER PROWSE)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendants applied to have the Action dismissed for delay pursuant to Rule 4.33 or, alternatively, Rule 4.31. When deciding whether the Action should be dismissed pursuant to Rule 4.33, Master Prowse noted that, while there had been a three year or more delay, the Defendants consented to a litigation plan and had agreed to schedule Questioning following the delay. The litigation plan was subsequently not followed and the Questioning had been rescheduled.

On these facts, Master Prowse determined that Rule 4.33(2)(b) applied. The relevant test under Rule 4.33(2)(b) is whether the participation warrants the Action continuing, not whether there has been a significant advance in the Action. Master Prowse specifically rejected the argument that participation should not be counted where the commitment documented in the litigation plan was not fulfilled.

Master Prowse also declined to dismiss the Action pursuant to Rule 4.31. Although Master Prowse found there was inordinate and inexcusable delay because Questioning did not take place in the first seven years of the litigation, there was no significant prejudice because the critical evidence on the facts of the case was preserved in documents and drawings. Master Prowse dismissed the Application and directed the parties to revise the litigation plan and file it within 30 days.

AIRCRAFT FINANCE SERVICES INC V MILLER, 2018 ABQB 1005 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 7.3 (Summary Judgment)

In advancing the underlying Action, the Plaintiffs sought to enforce an agreement in which the Defendant was to purchase shares of the corporate Plaintiff (the "Agreement"). Before Master Robertson, the Plaintiffs requested the addition of several parties, as well as addition of causes of action to include conspiracy and fraud. The proposed Defendants did not participate in the proceedings, but the existing Defendant opposed the addition of causes of action, and brought a Cross-Application to argue that the claim should be dismissed for delay, pursuant to Rule 4.31, or dismissed summarily on the merits, pursuant to Rule 7.3.

In addressing the various Applications, the Court's analysis was first directed at dismissal for long delay pursuant to Rule 4.31. That Application was not successful, so it was also necessary to consider amendment of the claim, and then Summary Judgment subject to any successful amendments.

The allegation of fraud was of central importance for the Court's determination of each Application. In large part, this was because one of the proposed Defendants had recently confessed to fraudulently manufacturing the Agreement, and moreover, that this proposed Defendant had ties to both the existing Defendant and the other proposed Defendants.

With respect to dismissal for long delay, no particular time period was identified as dilatory, and instead the focus was on the cumulative effect of delay. The possibility that evidence of fraud had been concealed weighed heavily in the Court's reasoning, especially in the absence of strong evidence establishing inordinate and inexcusable delay.

With respect to amending the Claim, the main issue was whether amendment was statute-barred through expiration of the limitation period. The Court held that the confession of fraud by one proposed Defendant, and the potential involvement in that fraud by the other proposed Defendants, implied actual or potential fraudulent concealment, respectively. As such, the limitation period was suspended for the proposed Defendant who confessed to fraud, and determination of similar suspensions regarding the other proposed Defendants was deemed to be a matter fit for Trial. The existing Defendant's potential involvement in the conspiracy and/or fraud invoked section 6 of the *Limitations Act*, RSA 2000, c L-12, allowing addition of those causes of action against the existing Defendant, regardless of fraudulent concealment.

With respect to Summary Judgment of the amended Claim, the new allegations created a circumstance where "a party asserts certain critical facts that are difficult if not impossible for the opposing party (who has the burden of proof) to disprove, but there is some identifiable, palpable reason to believe that the party making the assertion may not be telling the truth." As such, the Court found it would be necessary to sort through the conflicting accounts by attaining *viva voce* evidence at Trial and weighing various parties' credibility.

In the result, the proposed Defendants were added to the Action, and the matter was allowed to advance, albeit with the Master reserving jurisdiction to make procedural orders remedying delay (pursuant to Rule 4.31(1)(b)).

MT INVESTMENTS INC V RAYDAN TRANSPORT LTD, 2018 ABQB 1017 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 4.34 (Stay of Proceedings on Transfer or Transmission of Interest) and 8.14 (Unavailable or Unwilling Witness)

The Applicant sought to dismiss the Action for delay pursuant to Rule 4.31. Master Schlosser noted that that the six-part analysis set out in *Humphreys v Trebilcock*, 2017 ABCA 116 (*"Humphreys"*), should be applied to determine whether the Action should continue in the face of delay under Rule 4.31. First, the Court must ask if the non-moving party failed to advance the Action to the point that a reasonable litigant should have during the same time frame. Second, it must consider whether the magnitude of delay is inordinate; and if so, consider third, whether there is a reasonable explanation for the inordinate delay. Fourth, if the delay is inordinate and inexcusable, the Court must then ask whether the delay "impaired a sufficiently important interest" or demonstrated significant prejudice to justify "overriding the non-moving party's interest in having its action adjudged by the [C]ourt". Fifth, the Court must then ask if the non-moving party has rebutted the presumption of significant prejudice created by Rule 4.31(2). Sixth, if the Applicant has met the criteria for granting relief for delay under Rule 4.31(1), the Court may consider whether a compelling reason exists not to dismiss the Action.

In weighing the above factors, Master Schlosser noted that the analysis is "nuanced" and "highly discretionary", in contrast to the "bright-line analysis" used for delay Applications brought pursuant to Rule 4.33. The Court should consider the complexity of the Action, the number of parties involved, and the steps taken in the Action. Although Rule 4.31 (unlike Rule 4.33) is concerned with overall delay rather than long gaps in the Action, the Court may also consider whether there were any long periods of inaction. The Defendant's involvement in the delay may also be a factor. However, the Master also explained that claims are more vulnerable to being struck for delay if they have been ongoing for at least ten years, in particular if questioning is incomplete and Trial is not yet scheduled. In applying *Humphreys*, Master Schlosser acknowledged that it had been six years since the Statement of Claim was issued. During that time, Questioning had occurred; Undertakings were answered; an expert report was filed; the individual Defendant had suffered a stroke requiring appointment of a litigation representative; the Action was transferred to Edmonton; and the Defendants had applied to revive the corporate Defendant. During the Application to revive the corporate Defendant, and through a subsequent Appeal of that Application, the parties had entered into a standstill agreement. Master Schlosser determined that much of the delay in the Action occurred at the Defendants' request, and some delay occurred while under a standstill agreement. As well, there may have been an automatic stay under Rule 4.34 due to the individual Defendant's incapacity after his stroke. As such, when all of the circumstances were considered, the delay was excusable. Given that the delay was excusable, the rebuttable presumption of prejudice created by Rule 4.31(2) did not arise and there was no need to address the next stages of the *Humphreys* analysis.

Master Schlosser further held that there was no "actual" prejudice arising out of the Plaintiff's delay, even though the individual Defendant no longer had capacity to testify. His loss of capacity impacted both sides. Additionally, the Plaintiff indicated that it would be willing to consent to the individual Defendant's entire Questioning transcript being read in at Trial pursuant to Rule 8.14 in place of his *viva voce* evidence, to ameliorate any prejudice. The

Master also noted, however, that such an Order would need to be made by a Judge rather than a Master, and that the Questioning transcript may not touch upon all of the issues. Nevertheless, the Defendants did not suffer significant prejudice due to the Plaintiff's delay.

Master Schlosser dismissed the Plaintiff's Application with Costs.

MCKAY V PROWSE, 2018 ABQB 975 (ROSS J)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff appealed a Master's decision dismissing his Action for long delay pursuant to Rule 4.33. The Plaintiff's Action alleged the negligence of his former solicitor in unsuccessfully establishing patent infringement through expert evidence. While that Action was ongoing in Canada, the Plaintiff was also advancing a second patent infringement action in the United States which was similar, but not identical, to the previous Canadian patent infringement Action.

In the three years prior to the filing of the Application for dismissal for long delay, the parties had clearly engaged in settlement negotiations. Additionally, the Plaintiff had filed a Supplemental Supplemental Affidavit of Records, producing various documents from the U.S. Action. Justice Ross addressed both the settlement negotiations and the document production, considering whether either constituted a "significant advance" in the Action so as to prevent its dismissal.

With respect to the sufficiency of settlement discussions as a significant advance of the Action, Justice Ross had no doubt that the negotiations were genuine, but held that something more than a mere attempt at settlement was required. Taking examples from recent case law, Justice Ross commented that a narrowing of issues through admissions, or a narrowing of settlement quantum through a process of offer and counteroffer, would be sufficient. Nothing of the sort was apparent on the facts before the Court, so no significant advance was recognized.

With respect to the sufficiency of document production, Justice Ross noted that filing an Affidavit of Records is not itself sufficient to establish a significant advance, and rather, that its sufficiency is judged by the quality of the documents in moving the parties toward resolution. In reviewing the produced documents, Justice Ross agreed with the Master that an expert report disclosed from the U.S. action had lost its relevance through extensive redaction. Several other documents relating to the U.S. action were produced without redaction, though were ultimately deemed insufficiently relevant to the issues in play in the solicitor negligence Action to constitute a significant advance.

The Appeal from the Master's decision to dismiss the Plaintiff's Action for long delay was dismissed.

BROEKER V BENNETT JONES, 2018 ABCA 414 (SLATTER, GRECKOL AND KHULLAR JJA)
Rules 4.33 (Dismissal for Long Delay) and 15.4 (Now Repealed)

The Appellant appealed an Order dismissing his Action for long delay pursuant to Rule 4.33. Because the Appellant was unable to attend at oral argument in Court, the parties agreed that the Appeal should be decided based on written arguments only.

The Court of Appeal noted that the Application to dismiss the Appellant's claim for long delay was originally denied in Master's Chambers, based on evidence that the parties had entered into a standstill agreement through email. That decision was appealed and heard by a Justice of the Court of Queen's Bench, at which time evidence was introduced denying the existence of a standstill agreement, either "in writing" as required pursuant to Rule 4.33(5), or at all. At the Court of Queen's Bench, the Appellant had also alleged that she had filed some Court documents during the three-year period, but not served them on the Respondent. However, it appeared that the documents she adduced had not actually been filed, as they contained "irregular" Clerk's stamps, and the Clerks had no record of the documents being filed. The Queen's Bench Justice therefore held that the Action was not significantly advanced for three years, and dismissed it for long delay. That decision was appealed to the Court of Appeal.

Before the Court of Appeal, the Appellant argued that the Queen's Bench Justice did not read Rule 4.33 within the broader purpose of the Rules. She also argued that Rule 4.33 was incorrectly applied retroactively. The Court of Appeal disagreed with her interpretation, and noted that Rule 4.33 was designed to "bring an end to litigation that is not being prosecuted in a timely way". Pursuant to the transitional Rule 15.4, which has since been repealed, the implementation of a three year "drop dead" period began on November 1, 2010. The Action had been ongoing for 11 years, and no steps were taken to significantly advance it between March 2012 and March 2015. As such, the Queen's Bench Justice properly dismissed the Action for long delay.

ALLAN V EPP, 2018 ABQB 933 (HUGHES J)
Rules 5.2 (When Something is Relevant and Material), 5.4 (Appointment of Corporate Representatives) and 6.14 (Appeal from Master's Judgment or Order)

This was an Appeal of Master's Decision to compel answers to questions and Undertakings refused during Questioning. The parties were engaged in litigation regarding a family business. The majority of the disputed questions and Undertakings related to the Appellant Peter Epp's ("Epp") Will, his meetings with counsel regarding estate planning, and his conversations with his common-law spouse, the Appellant Eva Allenby ("Allenby"). Some of the other disputed questions and Undertakings related to the personal finances of the corporate representative for the family business. Master Robertson ruled in his Decision that most of the disputed questions and Undertakings should be answered.

Hughes J. confirmed that the standard of review for an Appeal of a Master's decision is correctness. Her Ladyship then quoted Rule 6.14 which states that an Applicant or Respondent can appeal a Judgment or Order by a Master, and a Justice may consider the record that was before the Master as well any additional evidence the Justice deems relevant and material. Moreover, Hughes J. confirmed that questions must be answered if they are "relevant and material" as defined by Rule 5.2.

Hughes J. noted that there were a number of matters of law that were pertinent to the Appeal. First, the *Alberta Evidence Act*, RSA 2000, c A-18, attaches privilege to communications between spouses. Secondly, though the common-law "wills exception" allows for a waiver of solicitor/client privilege when a will is being challenged, Epp's will was not being challenged in this case, and though a personal representative may waive privilege over a testator's solicitor's file, this cannot be done while the testator is still alive, and Epp was still alive at the time of the Application, although lacking capacity. Thirdly, Hughes J. stated that as Rule 5.4 provides that a corporate representative's evidence is evidence given by the corporation, a corporate representative cannot be compelled to answer questions about her personal finances.

Given the principles of law stated above, Hughes J. ruled that only two of the twenty-nine outstanding questions or Undertakings should be answered, as the remainder were not relevant. Costs were awarded to the Appellants on the basis of substantial success.

GRAHAM GROUP LTD V LABAS ESTATE, 2018 ABQB 848 (MASTER SCHLOSSER)
Rules 5.17 (People Who May Be Questioned) and 5.29 (Acknowledgement of Corporate Witness's Evidence)

The Plaintiff agreed to produce several employees for Questioning. However, the parties disagreed on whether the Costs for questioning the second and subsequent employee should be paid up-front.

Master Schlosser noted that Rule 5.17(2)(b) allows for the examination of persons, including employees. Further, the questioning party must pay the Costs of Questioning the second and subsequent witnesses, unless the parties agree otherwise or the Court orders otherwise, pursuant to Rules 5.17(2)(f) and (g).

Master Schlosser maintained that producing several employees for Questioning was "very much to be encouraged". Indeed, Master Schlosser held that this could be useful for both parties, especially once the corporate

party has asserted its position on the evidence pursuant to Rule 5.29. Master Schlosser then remarked that Alberta is unique in not limiting the number of employees (past or present) that can be examined.

The case law cited by the parties failed to provide direct guidance on whether these questioning Costs were payable up-front. However, Master Schlosser found that pursuant to the Rules and the case law, the Defendant would inevitably have to pay the Costs for questioning the additional employees. Finding that Security for Costs was not required in the circumstances, Master Schlosser was reluctant to order that the Costs should be paid up-front.

SIGNALTA RESOURCES LIMITED V CANADIAN NATURAL RESOURCES LIMITED, 2018 ABQB 904 (EAMON J)
Rule 5.35 (Sequence of Exchange of Experts' Reports)

The Plaintiff, Signalta Resources Limited ("Signalta"), applied for direction in Case Management, including resolution of the objections of the Defendant, Canadian Natural Resources Limited ("CNRL"), to parts of Signalta's surrebuttal reports of their experts.

CNRL alleged that it and Signalta had exchanged primary, rebuttal and surrebuttal reports simultaneously. CNRL objected to parts of Signalta's surrebuttal reports, alleging that they provided new arguments which could and should have been included in Signalta's primary or rebuttal reports. Signalta maintained that the surrebuttal reports only addressed new issues and theories addressed in the rebuttal report.

Eamon J. considered Rule 5.35(2), concerning the content of surrebuttal reports. His Lordship reviewed the history of Rule 5.35, including the fact that the new Rules deliberately contemplate that expert reports be exchanged sequentially rather than simultaneously. Justice Eamon found that Rule 5.35(2)(c) contemplates surrebuttal reports addressing new issues, and therefore is not limited to alternative theories advanced in a rebuttal report. The Rule must not be used to split disclosure of a case or reinforce prior expert evidence. Instead, Eamon J. maintained that the Rule is "meant to avoid surprise and encourage parties to ensure that their expert has provided adequate disclosure of the substance of his or her opinion in its primary report." Further, Justice Eamon held that:

> The Rule should not be applied so rigidly as to force a party tendering a primary report to speculate about what a rebuttal report might contain, or advance excessive commentary and information simply to avoid arguments that it is case splitting. There may be a fine line between matters which are merely confirmatory and those which genuinely arise from some alternative theory or new dimension raised in the opposition's rebuttal report. It will often be helpful to inquire whether the point ought to have been anticipated by the party tendering the primary report and whether the surrebuttal is carefully focussed on providing only new evidence.

Having regard to the existence of two series of exchanges of expert reports in this case (that commencing with Signalta's primary report, and that commencing with CNRL's primary report), Justice Eamon decided to assess each of the series separately. Eamon J. provided two reasons for this. First, Signalta would go first at Trial and CNRL could seek non-suit or not call all of its evidence, meaning that Signalta might never reach the point of rebutting CNRL's experts. Second, the parties did not express that there was an agreement or expectation that the content of surrebuttal reports would be limited by that which could have been or was addressed in a rebuttal report.

Eamon J. found that both surrebuttal expert reports were reasonably responding to new issues raised in CNRL's rebuttal. Accordingly, Justice Eamon dismissed CNRL's objections.

SEWAK GILL ENTERPRISES INC V BEDAUX REAL ESTATE INC, 2018 ABQB 823 (HOLLINS J)
Rule 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Defendants/Applicants had previously applied to remove a Caveat registered by the Plaintiff against the land of one of the Defendants. In 2007, the Plaintiff

had registered the Caveat and began an Action seeking a declaration of its validity in 2008. At that time, the Defendants filed a Counterclaim for the discharge of the Caveat. The Plaintiff eventually discontinued its Action, but the corresponding Certificate of Lis Pendens ("CLP") was not discharged. Further, the Defendants did not discontinue their Counterclaim.

The Defendants then brought an Application for Costs of the Plaintiff's discontinued Claim and to discharge both the Caveat and the CLP. Master Farrington awarded Costs and discharged the CLP. However, Master Farrington did not discharge the Caveat. The Defendants appealed the portion of Master Farrington's Order declining to discharge the Caveat. Through the Appeal, the Defendants sought Summary Judgment pursuant to Rule 7.3 to discharge the Caveat, or a remedy pursuant to the *Land Titles Act*, RSA 2000, c L-4.

Hollins J. noted that although Rule 6.14(3) describes an Appeal from a Master as an appeal "on the record", the Court has described such an appeal as *de novo*. Justice Hollins traced the origin of this description to *Bahcheli v Yorkton Securities*, 2012 ABCA 166. Upon reviewing the relevant passage from that case, Justice Hollins disagreed that an Appeal from a Master's Decision is "automatically an appeal *de novo*". Instead, Justice Hollins maintained that "the low threshold for the introduction of new evidence on appeal means that a true 'appeal on the record' will be the exception rather than the rule". Justice Hollins clearly held that an Appeal from a Master's Decision is not an appeal *de novo*. That is so, even though Appellants can easily expand the record, and the standard of review is correctness, which makes Appeals from Masters' Decisions look more like *de novo* Appeals than Appeals on the record.

Her Ladyship remarked that this position is supported by the clear wording of Rule 6.14 as well as the fact that if an Appeal from a Master was truly *de novo*, that would be inconsistent with the need to consider the standard of review: the test set out in Rule 6.14, to introduce new evidence to the record before the Master; the proceedings before the Master, including an Appellant's obligation to provide the Transcript of Proceedings; and the Master's reasoning.

Hollins J. then proceeded to review whether Master Farrington's Decision not to discharge the Caveat was correct based on the evidence and arguments before Her Ladyship. Upon considering the merits of the Appeal, Justice Hollins found that the test for Summary Judgment had been satisfied and that the Caveat should be discharged, reversing Master Farrington's Decision.

E DEHR DELIVERY LTD V DEHR, 2018 ABQB 846 (SHELLEY J)
Rules 6.14 (Appeal From Master's Judgment or Order) and 7.3 (Summary Judgment)

The Applicant appealed a Master's Decision dismissing its Summary Judgment Application. The Applicant had applied for Summary Judgment seeking a declaration that it was the owner of two trucks free and clear of any encumbrance claimed by the Plaintiff. The Applicant had entered into a Purchase and Sale Agreement for the trucks dated March 25, 2014. At that time, the Plaintiff had a security interest in the trucks registered at the Personal Property Registry. The vendor of the trucks discharged those registrations on March 28, 2014, and the Applicant paid the balance of the purchase price under the Purchase and Sale Agreement to the vendor on March 29, 2014. The Master found that the acquisition of the trucks occurred on March 25, 2014, being the date of the Purchase and Sale Agreement, and that the transfer of title was therefore subject to the registered security interest of the Plaintiff.

The Applicant appealed and in doing so filed a new Affidavit under Rule 6.14(3) deposing to the intention of the parties which was stated to be that ownership of the trucks would not pass to the Applicant until the purchase price was paid in full, which did not occur until March 29, 2014.

Justice Shelley noted that Appeals from Master's Decisions are on the basis of correctness on all issues, and that the Appeal is on the record, but may also be based on evidence which is relevant and material in the opinion of the Judge hearing the Appeal. Justice Shelley found that the new Affidavit was provided in connection with the Appeal as "an attempt to plug up the holes in the evidence that the appellant had chosen to put before the Master" and that it

was entirely self-serving. Justice Shelley held that the Court was not bound to accept the Applicant's new evidence on the basis that it was not only self-serving, but that the evidence remained ambiguous with respect to the intention of the parties given the surrounding circumstances and the balance of the other evidence. Justice Shelley held that on the basis of the ambiguous evidence concerning the conduct and intention of the parties, the matter ought to proceed to Trial to assess the credibility of the various parties involved with the purchase and sale of the trucks at issue. The Appeal was therefore dismissed.

COFFEY V NINE ENERGY CANADA INC, 2018 ABQB 898 (NIXON J)
Rules 6.14 (Appeal from Master's Judgment or Order), 6.46 (Referee's Report), 7.3 (Application and Decision) and 7.5 (Application for Judgment by way of Summary Trial)

The Plaintiff appealed a Master's Decision denying Summary Judgment. The Master had held that an assessment of damages for pay in lieu of reasonable notice for wrongful dismissal could not be determined summarily, and that the employer's counterclaim was also not suitable for Summary Judgment. The Defendant cross-appealed the Master's Decision that its counterclaim was not suitable for Summary Judgment.

Justice Nixon first reviewed the Master's Decision. The Master held that partial Summary Judgment was not appropriate in the circumstances, because Masters cannot weigh evidence. The Master therefore could not determine the appropriate amount of pay in lieu of notice.

On Appeal, Justice Nixon agreed that damages for pay in lieu of notice should not be assessed summarily. First, Her Ladyship reviewed the test for Summary Judgment and noted that, since the "culture shift" in the assessing matters on a summary basis resulting from the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7, Courts in Alberta are not in agreement about the standard of proof to be met by the moving party. However, Justice Nixon found that it was unnecessary to determine the standard of proof because the Master had correctly determined that a summary decision could not be made since Masters are precluded from weighing evidence. Although Masters are entitled to make summary decisions, those decisions must be made within the Master's jurisdiction. When a Master makes a summary determination, "he is not trying the rights of parties. He is determining that there is no real issue to be tried. It is only when such a situation is found to exist that the Master is authorized to give a judgment in favour of the [P]laintiff". Nixon J. then considered whether an assessment of reasonable notice requires the weighing of evidence, and determined that it did.

Her Ladyship explained that under Rule 7.3(1)(c), Summary Judgment is available where the only real issue is the amount to be awarded, and that under Rule 7.3(3), if the only issue is the amount of the award, the Court may refer the determination to a referee pursuant to Rule 6.46 or determine the amount itself. However, Masters cannot delegate tasks to a referee that are outside their jurisdiction, and Rule 7.3 must be considered "within the context of the jurisdiction of the [M]aster". As such, Justice Nixon held that assessments of damages for pay in lieu of notice are not appropriate for Summary Judgment under Rule 7.3.

Given the importance of accessible, affordable, and timely summary procedures, Her Ladyship emphasized that parties may instead use the Summary Trial process to determine appropriate pay in lieu of notice before a Justice. Summary Trials, which are available pursuant to Rule 7.5, are appropriate where the Court is able to decide disputed questions of fact on affidavits or by other proceedings authorized at Summary Trial, and where it would not be unjust to decide the issue in such a way. In determining whether it would be unjust to proceed by Summary Trial, Courts may consider the complexity of the issues, the amounts involved, whether witnesses may need to be cross-examined in Court, whether additional evidence could be adduced through Questioning, and whether findings of credibility are required to reach a resolution. While *viva voce* evidence is not necessary to resolve all conflicting evidence, it may also be heard at Summary Trials. Taking the Summary Trial route may also be more efficient,

because it could "avoid duplicative appeal proceedings" resulting from a Master's Decision being appealed *de novo* before a Justice under Rule 6.14.

Finally, Justice Nixon also held that the Master was correct in determining that the Defendant's Counterclaim contained genuine issues requiring Trial, and that Summary Judgment was inappropriate.

FYFFE V WADHWA, 2018 ABQB 919 (DILTS J)
Rules 6.14 (Appeal from a Master's Judgment or Order) and 7.3 (Summary Judgment)

The Appellants appealed a Decision of Master Farrington dismissing the Appellant's Application for Summary Dismissal. Dilts J. noted that pursuant to Rule 6.14(3), the Court could consider new evidence that is relevant and material to the issues, despite the fact that the Appeal was an Appeal on the record. Based on that, Dilts J. allowed into evidence Questioning transcripts filed after Master Farrington's Decision, as they were relevant and material.

Justice Dilts noted that pursuant to Rule 7.3(1), a party can apply for Summary Judgment when there is no merit to a claim. Dilts J. reviewed case law in respect of Summary Judgment and Summary Dismissal.

The Appellants argued that the Application concerned a question of law and therefore Summary Dismissal should be available. Justice Dilts remarked that the Appellants had the onus of satisfying the Court that Summary Dismissal was appropriate, and ultimately, Justice Dilts found that the question to be decided was whether one of the Appellants owed a duty of care to the Respondent. This was a genuine issue to be tried and determined through examinations. As such, Dilts J. dismissed the Appeal.

FITZPATRICK V COLLEGE OF PHYSICAL THERAPISTS OF ALBERTA, 2018 ABQB 989 (HOLLINS J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiffs had been the subject of disciplinary proceedings before the College of Physical Therapists of Alberta, and subsequently challenged the results of those proceedings with Appeals twice rising to the Alberta Court of Appeal. In addition, the Plaintiffs commenced the within Action alleging wrongful conduct by the several parties involved in investigation and hearing of the disciplinary charges. The Defendants brought an Application for Summary Judgment before a Master, which was partly successful. The Defendants that remained in the Action appealed the Master's Order in pursuit of expanding the award of Summary Judgment.

Before reviewing the merits of the Appeal, the Court distinguished standard of review from the evidentiary basis of appeal. Justice Hollins was careful to clarify that an Appeal from a Master is in fact an Appeal on the record, and not an Appeal *de novo*, despite the conflation caused by allowance in Rule 6.14(3) for consideration of additional evidence. Mindful that the low threshold for introduction of additional evidence often causes analyses to tend toward that of an appeal *de novo*, the Court stated that a Master's reasoning must be reviewed for correctness, which is a different endeavour than adjudicating the matter afresh.

Upon review of the merits of the Appeal, the Court moved to grant the Summary Judgment and dismiss the Action, relying primarily on the expiration of the limitation period, and in the alternative, on the absence of evidence establishing a triable issue. Justice Hollins remarked that the Alberta Court of Appeal has yet to settle the standard for Summary Judgment derived from Rule 7.3, as inconsistently set out in *Whissell Contracting Ltd. v Calgary (City)*, 2018 ABCA 204 which provides that moving party's position must be unassailable, and *Stefanyk v Sobeys Capital Inc.*, 2018 ABCA 125 which provides that the moving party must prove its case on a balance of probabilities.

Justice Hollins commented that while Her Ladyship would have preferred, on the strength of a clear and complete record, to apply the civil standard, it was prudent in the face of jurisprudential uncertainty to apply the more exacting standard.

VALAYATI V CHEEMA, 2018 ABQB 1014 (MCCARTHY J)
Rules 6.14 (Appeal From a Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff, Valayati, appealed a Master's Decision which summarily dismissed the Plaintiff's claims against the Defendants, Rehman and Shahzad. The other Defendant, Cheema, cross-appealed the Master's Decision denying his Application to summarily dismiss the Plaintiff's claims against Cheema.

The Plaintiff had listed a home for sale at a price below market or assessed value. The Defendant real estate agent, Cheema, reviewed the property with the Plaintiff and advised that because of required repairs that the Plaintiff could not complete, the property should be listed at a depressed value. The property was subsequently purchased by the Defendants, Rehman and Shahzad. However, unbeknownst to the Plaintiff, Rehman and Shahzad had an exclusivity agreement with Cheema whereby Cheema would act solely on their behalf in a real estate transaction. Rehman and Shahzad failed to close the transaction because they could not secure proper financing. Cheema then offered to purchase the property himself for $450,000. The Plaintiff accepted this offer and signed an acknowledgement stating that she was aware that Cheema was not acting for her and he owed her no fiduciary duties.

The Plaintiff closed the transaction for the property with the intention of suing Cheema after its completion. After taking possession, Cheema listed the property for $589,000, well above the initial list price he had suggested to the Plaintiff. The Plaintiff then commenced the Action against Cheema, Rehman, Shahzad, as well as the lawyer who completed the transaction for Cheema. The lawyer was not involved in this Application. Master Mason had summarily dismissed the claims against Rehman and Shahzad but determined that Summary Dismissal could not be granted to Cheema.

McCarthy J. confirmed the standard of review of an Appeal of a Master's Decision pursuant to Rule 6.14 is correctness. It is an *appeal de novo*. McCarthy J. then summarized the law governing Summary Judgment under Rule 7.3. Summary Dismissal is appropriate when there is no genuine issue for Trial and the Court can reach a fair and just determination on the merits based on the existing record. The moving party applying for Summary Dismissal bears the burden of proving there is no genuine issue for Trial, and this requires more than simply raising a doubt. Conversely, a Plaintiff can resist a Summary Dismissal motion by showing that: the Applicant has not proven there is no genuine issue for Trial; that Summary Dismissal is not just or appropriate based on the facts and record; or that the material facts cannot be determined on the existing record or they reasonably warrant a Trial.

McCarthy J. also confirmed that there is ambiguity regarding the standard of proof for showing there is no genuine issue for Trial. There are authorities stating that the standard of proof is that the moving party must show that its case is "unassailable" and also that the moving party need only show a lack of merit on a balance of probabilities. Applying these principles to the facts, McCarthy J. decided to uphold Master Mason's ruling. There were enough indicia of a fiduciary relationship between the Plaintiff and Cheema, and there were sufficient issues with the enforceability of the acknowledgement that the Plaintiff's claims for breach of fiduciary duty and fraudulent misrepresentation should go forward.

However, the same could not be said about the Plaintiff's claim of a conspiracy between Cheema, Rehman, and Shahzad. There was no evidence that Rehman or Shahzad knew that the initial list price was below market value or that the property would eventually be sold to Cheema immediately after the sale.

The Appeal and the cross-Appeal were both dismissed and the parties were directed to speak to Costs if they could not agree.

SWAT CONSULTING LTD V CANADIAN WESTERN BANK, 2018 ABQB 875 (MASTER PROWSE)
Rule 6.8 (Questioning Witness Before Hearing) and 7.3 (Summary Judgment)

The Plaintiff, SWAT Consulting Inc. ("SWAT") provided remediation services to Anterra Energy Inc. ("Anterra")

in respect of oil spills. Anterra claimed coverage from its insurance provider, the Defendant, Energy Insurance Group Ltd. ("Energy Insurance"). Anterra received payment from Energy Insurance in accordance with its insurance coverage. SWAT's invoices were taken into consideration in Energy Insurance's calculation of payment to Anterra. Anterra deposited the money it received from Energy Insurance into its bank account at the Defendant, Canadian Western Bank ("CWB"). CWB applied these proceeds against loans owing to it.

SWAT never received payment for its remediation services. Anterra then filed for protection under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36. As such, SWAT claimed payment for its services to Anterra from Energy Insurance, or repayment from CWB, for knowingly assisting in a breach of trust.

Each of Energy Insurance and CWB applied for Summary Dismissal of SWAT's claims.

Among other things, in the circumstances, Master Prowse considered whether the insurance policy between Anterra and Energy Insurance created a purpose trust. In that context, SWAT argued that one reason for Trial was to uncover evidence of the existence of such a trust. Master Prowse found that it was not necessary to wait until Trial to engage this issue. As such, Master Prowse noted that SWAT could have cross examined Anterra's principal about the existence of trust terms as between Energy Insurance and Anterra, pursuant to Rule 6.8. Similarly, Master Prowse noted that SWAT could have cross-examined CWB's deponent pursuant to Rule 6.8. However, no such cross-examinations took place. SWAT maintained that cross-examining Anterra's principal would not have been fruitful in the absence of documents and the related challenge of accessing Anterra's documents. Master Prowse rejected this as an excuse, stating that it would actually be preferable to obtain Anterra's documents for the Summary Dismissal. Master Prowse noted that Rule 6.8 allows cross–examination, whereas if SWAT called Anterra's principal at Trial it would likely be restricted to examining Anterra's principal in direct examination.

In the end, Master Prowse held that Trial was not necessary and that Energy Insurance and CWB had met the onus of establishing that SWAT did not have a claim against them. Accordingly, Master Prowse dismissed SWAT's claims pursuant to Rule 7.3.

MOSS V SUN LIFE ASSURANCE COMPANY OF CANADA, 2018 ABQB 953 (DUNLOP J)
Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment), 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)

The Applicant had previously applied for Summary Judgment under Rules 7.2 and 7.3. That Application was dismissed on November 16, 2016. On December 12, 2017, the Applicant applied for Summary Trial of an issue, which she argued would dispose of the litigation entirely. The Court agreed and allowed the matter to proceed by Summary Trial.

The Respondent's Extracts of Key Evidence and Relevant Documents were not filed until the commencement of the hearing. Pursuant to Rule 7.6, the Respondent must file all evidence it intends to rely on at least 10 days prior to the date of the Summary Trial Application. Rule 7.8(2) further requires a Respondent who objects to the Summary Trial procedure to file its evidence at least 5 days before the Application.

The Court discussed the Summary Trial process, and held that Rules 7.5 through 7.11 permit, but do not require, a single step Summary Trial process. Here, both parties could have initiated a bifurcated process, which would have clarified the procedural issues regarding the evidence ahead of the actual Summary Trial hearing.

A Summary Trial should be ordered if disputed questions of fact can be determined on Affidavits or other evidence available in the Summary Trial process, and if it would not be unjust to decide the issues in a Summary Trial.

The Respondent argued that Summary Trial was inappropriate because the Application was not being brought in a parallel Action, and because the Summary Trial would not necessarily end the litigation. The Court found, based on the facts, that after the Summary Trial, a full Trial would be either avoided or shortened, and that it was practical, economical, and efficient approach to managing the litigation. On that basis, the Court granted the Application for Summary Trial.

OMNUS INVESTMENTS LTD V RETHINK AND DIVERSIFY SECURITIES INC, 2018 ABQB 868 (MASTER BIRKETT)
Rule 7.3 (Summary Judgment)

In the summer of 2016, the Plaintiff, Omnus Investments Ltd ("Omnus") and the Defendant, Rethink and Diversity Securities Inc. ("R&D") agreed that Omnus would sell all or substantially all of its assets to R&D (the "APA"). The initial closing date of the APA was November 30, 2016. For various reasons, the APA did not close on November 30 but the parties continued to work towards closing following that date. On the eve of closing in January 2017, and without warning, R&D provided notice to Omnus that it was terminating the APA on the basis that closing had not occurred at the prescribed time.

In response, Omnus and its shareholders commenced the within Action and in accordance with Rule 7.3, filed an Application for Summary Judgment. Master Birkett noted that the overarching question to be decided was whether R&D was entitled to terminate the APA between the parties prior to the revised closing date. Master Birkett examined the existing record before the Court to see if a disposition that was fair and just to both parties could be made on that record and concluded that the case was appropriate for Summary Judgment.

Master Birkett reviewed the relevant jurisprudence and determined that R&D was estopped from relying on the termination clause as the reason for not completing the transaction on the basis that closing had not occurred on or before November 30, 2016. As such, Master Birkett granted Omnus' Application for Summary Judgment and awarded $434,500 plus interest in accordance with the APA.

KARAGIC V RAJAN, 2018 ABQB 910 (KIRKER J)
Rule 7.3 (Application and Decision)

The Applicant, Rajan, sought Summary Dismissal of the Action brought against her by Karagic. Karagic had claimed against Rajan, a medical doctor, in defamation, after Rajan provided a referral letter to Karagic's former wife which stated that Karagic had sexually assaulted his child, which referred the child to the ER for further assessment (the "Letter").

Rajan argued that the Claim should be summarily dismissed on the basis that the allegations in the Letter were subject to qualified privilege, since she was professionally obligated to report the allegations. Karagic acknowledged that the Letter would normally be subject to qualified privilege, but argued that it was not in this case due to the definitive nature of the language used in the Letter (which characterized her suspicion that the child had been abused as an "established fact"), and because the Letter was given to Karagic's former wife, who Rajan knew would rely on the Letter during Karagic's custody Trial to Karagic's detriment.

After reviewing the facts along with the test for defamation and the defence of qualified privilege, Justice Kirker noted that pursuant to Rule 7.3(1), an Action may be dismissed summarily where "there is no merit to a claim or part of it". Rajan argued that there was no merit to Karagic's claim because the matter could be fairly and justly determined summarily on the existing record, and as such did not genuinely require a Trial. However, Justice Kirker concluded that the Application should be dismissed, as Rajan had not established that Karagic's position was unassailable, or that her likelihood of success at Trial was very high. Although there was no question that Rajan had an obligation to refer the child for further assessment, "there is a wide gulf between words that convey that a child *has been* sexually abused and words that convey a concern that such *may be, but is not necessarily* the case." Rajan's arguments that she prepared the Letter in good faith and without intending that it be used by others outside of the ER referral similarly could not be decided summarily, as they required an assessment of credibility that could not be fairly and justly done without a Trial.

CORREA V 368753 ALBERTA LTD, 2018 ABQB 938 (BERNETTE HO J)
Rule 7.3 (Summary Judgment)

The Defendants, 368753 Alberta Ltd. ("368"), and Capital Leasing Investment Corp. ("Capital") appealed the decision of Master Farrington dismissing the Defendants' application for partial Summary Dismissal against the Plaintiff, Juan Correa (the "Plaintiff").

In 2004, the Plaintiff had entered into a joint venture agreement (50/50) with a third party for the purchase of certain industrial lands located in Calgary (the "Lands") through the third party's company 368. To finance his portion of the purchase price, the Plaintiff obtained a mortgage from Capital (the "368 Mortgage"). The Plaintiff executed a personal guarantee in respect of the 368 Mortgage (the "Guarantee"). In May of 2005, Capital purchased the third party's 50% interest in 368. A series of actions were subsequently commenced in relation to the financial obligations owing on the 368 Mortgage, Guarantee, and subsequent arrangements between the now joint venture partners.

In March of 2018, Master Farrington provided oral reasons for dismissing the entirety of the Plaintiff's and Defendants' Applications essentially finding that there was too much conflicting evidence for the matter to be resolved in a summary fashion. Master Farrington reviewed the evidence and concluded there were significant differences in the numbers Capital alleged were owed under the 368 Mortgage and the Guarantee and therefore declined to grant the Application for Summary Dismissal.

On Appeal, after a review of the relevant jurisprudence and procedural history, Justice Bernette Ho agreed with Master Farrington that the case was not suitable to be resolved in a summary fashion. Bernette Ho J. determined that: (1) there were significant questions around whether and to what extent the Plaintiff remained liable under the 368 Mortgage and Guarantee; (2) *viva voce* testimony would be required to resolve the issues between the parties, as there were significant credibility issues and conflicting versions of events; (3) There were legal issues which could not be determined in a summary fashion, especially without a determination of material facts; and (4) even if Her Ladyship were in a position to find liability on a narrow issue, Bernette Ho J. did not believe that doing so would significantly advance the underlying Action.

Justice Bernette Ho concluded by finding that because the matter had already been set down for a three-week Trial, and that significant Trial time would be saved by finding liability on one small issue, it would therefore not be efficient from a judicial economy perspective to split the issues and the Trial Judge should be given the opportunity to hear and determine the entirety of the matter.

CANADIAN NATURAL RESOURCES V ASHLAND INC, 2018 ABQB 1042 (MASTER PROWSE)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Defendant, Occidental Petroleum Corporation ("Occidental"), brought an Application for Summary Dismissal and a determination that Occidental was entitled to immunity from the Plaintiff, Canadian Natural Resources ("CNRL")'s Claim pursuant to the *Limitations Act*, RSA 2000, c L?12 (the "Act").

For a number of years CNRL was searching for the successors-in-interest to two separate 16% interests in an oil and gas joint venture so that CNRL could bill each of the successors for 16% of the remediation costs which were being incurred by CNRL as operator (the "Remediation Costs"). One 16% interest was initially owned by McWood Corporation ("McWood") and ultimately, over 50 years and various parties, transferred to Occidental (the "McWood Interest"). CNRL finally located and commenced the underlying Action against Occidental in 2014 as the successor-in-interest to the McWood Interest.

Occidental argued that CNRL had information that would have quickly identified Occidental's role as successor-in-interest to the McWood Interest back in March of 2009 and, had CNRL acted with reasonable diligence, it would have been able to commence its Action then. CNRL objected to Occidental's assertion and argued that

Occidental's deponent, who provided evidence as to the events in question, did not have personal knowledge of the events provided for in the sworn Affidavit (the "OC Affidavit"). CNRL relied on Rule 13.18(3) which requires that an Affidavit is used in support of an Application that may dispose of all or part of a claim must be sworn on the basis of the personal knowledge of the person swearing the Affidavit.

Master Prowse reviewed the history between the parties and the requirements of Rule 13.18 pertaining to the necessary form of Affidavit evidence. Master Prowse noted that while Occidental's deponent was not personally involved, given that a number of the relevant events occurred over 50 years ago, the facts in issue in the underlying Action were confirmed by the OC Affidavit and on cross-examination of CNRL's deponent. As such Master Prowse found CNRL's objection was without merit. Master Prowse concluded that CNRL's claim against Occidental was summarily dismissed with respect to any monthly invoices for the remediation costs issued before the limitation period had expired.

APPLEBY V SMALLWOOD, 2018 ABQB 894 (BURNS J)
Rule 8.14 (Unavailable of Unwilling Witness)

The Plaintiffs sought a declaration that certain public lands had been dedicated for public use as a highway. One of the Plaintiffs, James Santrock, passed away before the Trial. Mr. Santrock's estate did not continue his participation in the litigation, so at the time of Trial neither Mr. Santrock nor his estate were parties.

The other Plaintiffs sought to have certain evidence from Mr. Santrock's Part 5 Questioning admitted at Trial pursuant to Rule 8.14. The Defendants argued that Rule 8.14 does not apply when the evidence was created while the witness was a party but is no longer a party at Trial. Justice Burns reviewed Rule 8.14 and confirmed that the Rule applies when a person who has been questioned under Part 5 is dead, but does not require the person who is dead to be a current party to the litigation. Burns J. admitted the portions of the evidence submitted by the Plaintiffs that contained facts which the Court ruled could not be proven in any other manner, but refused to admit the portions which could be proven another way or which were not related to important aspects of the Plaintiffs' case. The Decision did not provide details or excerpts of the evidence at issue.

JLL V JLC, 2018 ABQB 838 (GROSSE J)
Rule 9.12 (Correcting Mistakes or Errors)

The Appellant, JLL, (the "Mother") appealed two decisions of the Provincial Court of Alberta (the "Appeals") which had included amendments made to a previous Order by the Honourable Judge Shaw (the "Shaw Order"). The Appeals arose in the context of a dispute between the Mother and her parents (the "Grandparents"). The dispute related to the Mother's daughter, (the "Child"), and the extent to which the Grandparents could have contact with her.

The Shaw Order initially included five paragraphs, and the Court, of its own motion, added two additional paragraphs by way of an amendment (the "Shaw Amendments"). The Mother, having already appealed the Shaw Order, which was dismissed by Justice MacLeod, now appealed the Shaw Amendments. Her grounds of appeal included, *inter alia*, that Judge Shaw should not have amended the Shaw Order without notice to counsel, and counsel should be entitled to notice if a Judge is going to change the terms of an Order.

Grosse J. noted that the standard of review in this case awarded the first instance Judge a high degree of deference, though an error in principle or an unreasonable exercise of judicial discretion would warrant intervention. Justice Grosse found that making the Shaw Amendments without notice to counsel did not amount to an error in principle, an unreasonable exercise of discretion, or an otherwise reversible error. The provisions added to the Shaw Order came directly, almost word for word, from the decision of Judge Shaw. There was therefore no prejudice to either party, nor any surprise. Justice Grosse found that, given the previous appeal of the Shaw Order, the Mother was not permitted to re-argue the merits of the provisions in question.

Grosse J. determined that Rule 9.12, commonly known as the "slip rule", did not expressly cover this situation,

because Rule 9.12 contemplates an Application by one of the parties and not an amendment from the Court. Nonetheless, Justice Grosse emphasized that while there is generally no power of the Court to amend an entered Order or Judgment, exceptions exist where there has been a clerical error in "drawing it up" or where there has been an error in expressing the manifest intention of the Court. Justice Grosse determined that the Shaw Amendments fell within these exceptions and therefore dismissed the Appeals.

PINTER V PINTER, 2018 ABQB 943 (KHULLAR J)
9.13 (Re-opening Case) and 10.29 (General Rule for Payment of Litigation Costs)

The Applicant/Plaintiff applied to re-open the case following a matrimonial property Trial and after Reasons for Judgment had been provided, but prior to the formal Judgment being entered. The Plaintiff also sought Costs for the Trial.

Under Rule 9.13, the Court retains jurisdiction to vary its Judgment so long as the formal Judgment has not been entered. Rule 9.13 allows the Court to hear more evidence and vary its Judgment if "there is good reason to do so".

The Plaintiff sought to adduce further evidence pertaining to the valuation of a Dungeons and Dragons figurine collection (the "Collection"). Neither party adduced evidence regarding the value of the Collection at Trial. The Plaintiff's Application to re-open the case was in response to the Defendant's failure to abide by the Reasons for Judgment which required him to produce the Collection to be divided between the Parties. The Plaintiff adduced evidence demonstrating that the Collection was insured for $20,000-$25,000 in the early 1980s. The Defendant asserted that the Collection had no value, without providing evidence. Justice Khullar set the value of the Collection at $35,000 presuming its increase in value over time.

Justice Khullar found that the Plaintiff was substantially successful at Trial, and that pursuant to Rule 10.29, the successful party is presumptively entitled to Costs. Justice Khullar set the amount of Costs at a reduced amount from the Plaintiff's Bill of Costs, however noting that there was mixed success on certain issues, and that the Plaintiff's conduct had "contributed to how this litigation [...] unfolded". The Application was granted.

EASY LOAN CORPORATION ET AL V BASE MORTGAGE & INVESTMENTS LTD ET AL, 2018 ABQB 979 (ROMAINE J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

Two Defendants in a receivership Action applied to vary an Order pursuant to Rule 9.15(4)(a) and (c), asserting that new evidence had arisen after the Order was made, and alternatively, that the Court ought to use its discretion to vary the Order on grounds it considered just.

Justice Romaine found that all of the evidence adduced by the Applicants had been in existence since the receivership proceedings began, and that even if that was not the case, the evidence relied upon by the Applicants would not have changed the Order in any event. Justice Romaine also noted that the Applicants asserted that the evidence was not new so much as their former counsel was unable to obtain the proper documents nor properly explain the history of the debtor companies to the Court. Justice Romaine held that even if there was any foundation to those assertions, the remedy would not lie with Rule 9.15.

The Applicants also asserted that the Court ought to use its discretion to re-open the Decision because the original Decision misconstrued material evidence or misapplied the law. Justice Romaine held that the Court was "clearly functus unless the grounds set out in Rule 9.15 [...] mandate relief...". The Application was dismissed.

LYMER (RE), 2018 ABQB 859 (LEE J)
Rules 9.4 (Signing Judgments and Orders), 10.53 (Punishment for Civil Contempt of Court), 10.55 (Inherent Jurisdiction) and 14.5 (Appeals Only with Permission)

Lymer was an undischarged, second-time bankrupt who had previously been found to be in contempt of Court for failing to follow Court orders. He had also been sharply criticized throughout his bankruptcy proceedings for failing to disclose records. Lymer's creditors sought a term of

incarceration for his contempt of Court, a declaration that Lymer was a vexatious litigant, as well as a number of other Orders.

Lee J. first noted that Lymer's counsel had challenged whether he was the appropriate decision-maker to determine whether Court restrictions should be imposed, since he had previously imposed Court access restrictions on Lymer which had been overturned on Appeal. Justice Lee held that there was no reasonable apprehension of bias in respect of his decision making, and found that the Application to impose Court access restrictions was not *res judicata*. Next, His Lordship noted that Court access restrictions may be warranted where any "indicia" of abusive litigation conduct are present, including: the use of Court processes to engage in illegal activities; "judge shopping"; an expressed intention to engage in further abuse of the Court's processes; minimization or dismissal of litigation defects or abuse, on the basis that the litigant is self-represented; or the use of "proxy actors to circumvent Court Orders", access restrictions, or to "impede litigation or improperly communicate with the Court". Lee J. emphasized that the presence of multiple indicia should favour Court intervention, but the presence of even one factor could warrant investigation into whether restrictions should be imposed. Courts may refer to external evidence in determining whether access restrictions should be imposed, including the litigant's "entire public dispute history", and activities inside and outside of the Courtroom. The Court's approach should be "prospective, rather than punitive".

Lee J. then reviewed Lymer's activity and highlighted a number of instances of litigation misconduct, including "judge shopping", "collateral attacks", the initiation of unnecessary applications within his bankruptcy proceedings and initiation of other legal actions outside of it, "persistent and unsuccessful appeals", and Lymer's failure to pay Cost awards. Lymer's statements also indicated that he would continue these activities in the future.

Lee J. concluded that Lymer was a vexatious litigant who should be subject to Court access restrictions. Among other things, His Lordship ordered that Lymer could only commence or continue proceedings with leave from the Court upon Application, and could only commence an Appeal by obtaining permission pursuant to Rule 14.5(1)(j). His Lordship also held that Lymer would not be required to approve the form and content of the Order declaring him a vexatious litigant and imposing access restrictions pursuant to Rule 9.4(2)(c).

With respect to sanctions for Lymer's contempt of Court, Lee J. explained that contempt sanctions have two objectives: to enforce the Court's processes, and to maintain the "dignity and respect of the Courts". Although a number of sanctions for contempt of Court are set out in Rule 10.53, the Court maintains its inherent jurisdiction to control its processes pursuant to Rule 10.55. As such, it may use its discretion to impose sanctions, but should consider a number of factors in determining which sanctions are appropriate, including "the proportionality of the sentence to the wrongdoing", the presence or absence of mitigating or aggravating factors, the goals of deterrence and denunciation, the "reasonableness of a fine or incarceration", and "the similarity of sentences in like circumstances". Justice Lee noted that no mitigating factors were present, except for the fact that Lymer had purged some of his contempt. Instead, a number of aggravating factors existed, including the fact that Lymer's contempt took place over many years and was "knowing, willful and deliberate".

With respect to the other Orders sought by Lymer's creditors, Justice Lee determined that they should be addressed by the Registrar in Bankruptcy. Given that Lymer's creditors had been partially successful in their Application, His Lordship requested written submissions to determine whether Lymer should be ordered to pay Costs, and the amount of Costs that may be appropriate.

SCOTIA MORTGAGE CORPORATION V LANDRY, 2018 ABQB 951 (THOMAS J)
Rules 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only With Permission)

In October of 2018 the Alberta Court of Queen's Bench received an annotated copy of an Order granted by Master Smart in June of 2018 (the "Annotated Order"). The

Annotated Order was for the foreclosure of a residential property formerly owned by Vanessa Landry ("Ms. Landry"), declaring that Scotia Mortgage Corporation ("Scotia") take immediate title; however, the Annotated Order had various hand written annotations and additions.

Justice Thomas, in an earlier decision, concluded that the Annotated Order was an attempt by Ms. Landry to execute an Organized Pseudolegal Commercial Argument ("OPCA") which would have the effect of making Ms. Landry's debt disappear. Thomas J. emphasized that all OPCAs are an abuse of Court processes and found that Ms. Landry's submission of the Annotated Order was a basis on which to investigate whether the Court should impose a Vexatious Litigant Order. On investigation, Thomas J. found that the Annotated Order was an attempt to implement a dubious concept often referred to as the "Strawman Theory". The Strawman Theory holds that individuals have two aspects, a physical flesh and blood body, and an associated immaterial legal doppelganger. Thomas J. emphasized that this theory has been universally rejected by Canadian Courts and, citing the Newfoundland Court of Appeal, found that anyone who even uses the Strawman Theory in Court is presumed to act in bad faith, and for a "vexatious and abusive" ulterior purpose: *Fiander v Mills*, 2015 NLCA 31.

Justice Thomas concluded that Ms. Landry was acting in bad faith and should be subject to a Vexatious Litigant Order. Further, Justice Thomas found that it was not Ms. Landry who was the directing mind behind the provision of the Annotated Order but a Mr. Dean Christopher Clifford ("Mr. Clifford") and his company 4240944 Manitoba Limited.

After a review of the history of the parties and their relationship, Thomas J. ruled, *inter alia*, that Ms. Landry, Mr. Clifford, and 4240944 Manitoba Limited: (1) are vexatious litigants, and are prohibited from commencing, or attempting to commence, or continuing, any Appeal, Action, Application, or proceeding in the Courts of Alberta; (2) must apply to a single appellate Judge for leave to commence or continue any proceeding, and if the single appellate Judge grants them leave to commence an Appeal, they may still be required to apply for permission to Appeal under Rule 14.5(1)(j); and (3) that the approval of the parties as to the form and content of the foregoing Order was not required per Rule 9.4(2)(c).

Justice Thomas concluded by finding that Annotated Order be placed in the Court file but only for the purposes of providing evidence of Ms. Landry and Mr. Clifford's OPCA activities, and that the Annotated Order was of no effect on the litigation beyond the negative implications that flow from the attempt to abuse the Court's processes.

MCALLISTER V CALGARY (CITY), 2018 ABQB 999 (KUBIK J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May be Made) and 10.33 (Court Considerations in Making Costs Award)

Justice Kubik provided a decision with respect to Costs arising from the Trial of *McAllister v Calgary (City)*, 2018 ABQB 480 (the "Underlying Action"). The Underlying Action was with respect to liability only and, at the time, damages had neither been settled nor determined (the "Liability Trial").

The Defendant, the City of Calgary, argued that until the Plaintiff, Mr. McAllister's damages were settled or assessed it was premature to determine the Plaintiff's entitlement to Costs. Mr. McAllister argued that he was successful on the issue of liability, following a week-long Trial, and should be entitled to an award of Costs with respect to the Liability Trial.

Kubik J. reviewed the laws governing Costs, and specifically Rules 10.29(1) and 10.30(1) which provide respectively that a successful party is entitled to Costs and that a Costs award may be made in respect of Trials and all other matters in an Action, after Judgment or a final Order has been entered. Justice Kubik concluded that it was not premature to award Costs with respect to the Liability Trial.

Kubik J. further assessed that Costs should be calculated under Column 3 of Schedule C of the Rules (the "Costs Schedule"), and took into account the factors set out in Rule 10.33. Kubik J. noted that the Costs Schedule is

grossly out of date in terms of value and the conduct of the parties in relation to the litigation. While finding no misconduct during the Liability Trial, it was Her Ladyship's view that the Costs Schedule should be "grossed-up to reflect a true monetary value" of litigation. In that regard, Her Ladyship found evidence before the Court indicating a rate of inflation of 46.60% since the commencement of the Action. Accordingly, a 46.60% gross-up was applied to approximate the reasonable Costs in 2018 for the steps taken to bring the matter to Trial.

PERTH CONSTRUCTION LTD V MEARS CANADA CORP, 2018 ABCA 349 (O'FERRALL, CRIGHTON AND KHULLAR JJA)
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 14.5 (Appeals Only With Permission)

This case involved an Appeal of a Decision made regarding Costs. The Appellant, Perth Construction Ltd., successfully obtained permission to appeal the sole issue of Costs as required by Rule 14.5(1)(e). The issue on Appeal was whether Costs should be awarded to the "net successful party" even if liability has been apportioned on a 50/50 basis.

The Appellant held a contract to construct a water and sewer pipeline and hired the Respondent, Mears Canada Corp., to bore and install a portion of the pipeline. There were deficiencies in the work done by the Respondent and the Appellant sued the Respondent for breach of contract, claiming the costs of rectifying the deficiencies. The Appellant also did not pay the Respondent. Therefore, the Respondent counterclaimed for payment of the amount owed under its contract with the Appellant.

At Trial, the Trial Judge ruled that the Appellant and the Respondent were jointly liable for the faulty pipeline. The Trial Judge ruled that the problems arose from both the Appellant's negligence in designing the pipeline and the Respondent's negligence in constructing it. As a result, the Appellant was awarded 50% of the costs to fix the pipeline plus interest, while the Respondent was awarded the amount due under its contract with the Appellant, plus interest. In the end, the Appellant received an award of $107,284 over and above what the Trial Judge awarded to the Respondent. Nevertheless, the Trial Judge ruled that no Costs would be awarded given that liability had been apportioned equally and given that the Respondent's counterclaim was awarded in full (and was not really contested to begin with). The Appellant took issue with this ruling on Appeal.

The Court of Appeal noted that a Trial Judge has broad discretion when awarding Costs but it must exercise this discretion judiciously. The general rule, as described in Rule 10.29, is that a successful party is entitled to its Costs and that these Costs may be awarded against the unsuccessful party subject to the Court's discretion as described in Rule 10.31. The factors that may guide the exercise of the Court's discretion are listed in Rule 10.33 and include: the result of the action and the degree of success of each party; the amount claimed and the amount recovered; and the apportionment of liability.

The Court of Appeal ruled that these factors favoured upholding the Trial Judge's Decision not to award Costs to either party. The Appellant's claim was only partially successful as it was only awarded 50% of the damages it claimed, while the Respondent's counterclaim was granted in full. Further, the apportionment of liability was equal as between the parties. The Appeal was dismissed.

PALMER V ACCIONA INFRASTRUCTURES CANADA INC, 2018 ABQB 833 (ASHCROFT J)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

This was a Costs Application following a previous Decision of Ashcroft J. The Plaintiff had been successful in one part of his claim, and unsuccessful in another. Damages were awarded in favour of the Plaintiff, although less than the amount claimed. The Plaintiff argued that he should be entitled to full Costs payable pursuant to Column 3 of Schedule C, as well as expert fees, second counsel fees, and enhanced Costs on parts of the tariff.
Ashcroft J. noted that "[t]he usual rule is that costs are

payable by the unsuccessful party to the successful party on a party-party basis." Ashcroft J. cited Rules 10.31 and 10.33 which sets out certain factors that the Court may consider when awarding Costs, including the result of the Action, the degree of success of each party, the amount claimed and the amount recovered, and the conduct of a party that tended to shorten or delay the Action.

Ashcroft J. held that the issues on which the Plaintiff was successful were not minor issues in the Trial, and the issues on which the Plaintiff was not successful were intermingled with the other issues. On this basis, the Court allowed party-party Costs under Column 3 of Schedule C, reasonable disbursements, and second counsel fees.

With respect to expert fees, the Court instead awarded costs to the Defendant, finding that the expert expenses by the Plaintiff were disproportionate to the strength of the claim that he made. The Court ordered that the Plaintiff pay Costs to the Defendant associated with the Trial time dedicated to the experts, being one half of the amount claimed by the Defendant for expert fees. The Defendant was also entitled to its interpretation service fees, and was allowed to claim second counsel fees in relation to the Trial time of the Defendant's experts.

SHEHU V IQBAL, 2018 ABQB 862 (TOPOLNISKI J) Rules 10.31 (Court Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.49 (Penalty for Contravening Rules) and 10.50 (Costs Imposed on Lawyer)

In an earlier Hearing, Justice Topolniski granted the Defendants' Application to set aside the Default Judgment. The parties then appeared before Topolniski J. to make submissions on Costs. The Defendants sought Costs against the Plaintiff and his lawyer, jointly and severally, on a solicitor and own client indemnity basis. The Plaintiff sought his thrown away Costs of entering the Default Judgment and filing a Writ, or alternatively, that no Costs be paid by or to any party.

As noted by Justice Topolniski, this case was "an illustration of ineffective, costly and frustrating litigation". There were multiple proceedings, both *ex parte* and with notice, requiring a Costs determination. Before awarding Costs for the various steps, Topolniski J. surveyed the relevant law on Costs. Her Ladyship first noted that usually the successful party is entitled to Costs, subject to the Court's discretion. Rule 10.33 sets out the considerations for Courts when making Costs awards. Topolniski J. stated that the Rules permit the Court to order full indemnity Costs as per Rule 10.31(1)(b)(i). Courts will only depart from ordering party and party Costs in exceptional and unique circumstances. Her Ladyship then cited a recent Alberta Court of Appeal authority, *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2018 ABCA 110, regarding the difference between solicitor-client Costs, which means full indemnity Costs for all legal fees and disbursements reasonably incurred, and solicitor and own client Costs, which include services requested by the client that go beyond reasonable fees and disbursements, which are only justified in the most exceptional circumstances.

Finally, Rule 10.49 permits the Court to order a party or a lawyer to pay a penalty for contravening the Rules, and Rule 10.50 provides authority to award Costs against a lawyer personally. As set out by the Supreme Court of Canada in *Director of Criminal and Penal Prosecutions v Jodoin*, 2017 SCC 26, the threshold for awarding Costs against a lawyer personally is high and the Court's power to do so much be exercised with restraint and caution.

Justice Topolniski then reviewed the circumstances of the various proceedings at issue in detail, noting various contraventions of the Rules. Her Ladyship was specifically concerned with instances where the Plaintiff's counsel failed to fulfil the duty of disclosure and utmost good faith required during *ex parte* Applications. Where Plaintiff's counsel had failed to fulfil his duties and therefore misled the Court, Topolniski J. ordered solicitor-client Costs against the Plaintiff and his lawyer, jointly and severally.

ZHANG V ALLAN, 2018 ABQB 1016 (MASTER SCHLOSSER)
Rules 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 13.48 (When Money May Be Paid Into Court)

This was an Application by the Applicants/Defendants, Allan and Gladue, to set aside a Notice to Vacate. The Notice to Vacate was given following an Order by the Residential Tenancy Dispute Resolution Service ("RTDRS") for rent in arrears. The Defendants attempted to make a payment against the arrears as ordered; however, the Respondent landlord refused to accept it and served the Notice to Vacate.

The Court confirmed that refusal by a landlord to accept payment in accordance with an RTDRS Order is not only a disobedience, but it may also be contempt of Court under Rule 10.52. This avails the remedies listed under Rule 10.53 to address contempt including imprisonment, fines, or Costs awards.

The Court stated that the Respondent landlord's refusal to accept payment in accordance with the RTDRS Order was unacceptable; however, Rule 13.48 allows money to be paid into Court in accordance with a Judgment or Order. The Respondents were then directed by the Court to pay the arrears as required by the RTDRS Order into Court in satisfaction of the Order.

The Notice to Vacate was set aside and the Applicants/Defendants were awarded their reasonable Costs.

JAPAN CANADA OIL SANDS LIMITED V TOYO ENGINEERING CANADA LTD, 2018 ABQB 844 (ROMAINE J)
Rule 13.18 (Types of Affidavit)

Japan Canada Oil Sands Limited ("JACOS"), as owner, and Toyo Engineering Canada Ltd ("Toyo"), as contractor, were parties to an engineering, procurement, and construction agreement (the "EPC Agreement"). A number of disputes arose in connection with the EPC Agreement, which eventually resulted in both parties initiating arbitrations (the "Arbitrations"). One of the Arbitrations was domestic while the other was international. The purpose of the Application and Cross-Application (the "Applications") was to determine which of the two Arbitrations should continue (with the other Arbitration stayed), or whether both should continue in a consolidated form.

The Applications focussed predominantly on the *International Commercial Arbitration Act*, RSA 2000, c I-5 and the *Arbitration Act*, RSA 2000, c A-43 (collectively, the "Acts"). As a preliminary matter, Justice Romaine addressed the issue of two specific affidavits (the "Affidavits"). Justice Romaine noted that the Affidavits indicated that the legal assistants who swore the Affidavits had personal knowledge of the matters deposed to except where otherwise stated to be based on information and belief. The Affidavits stated that the affiants were "informed" by counsel to JACOS that certain correspondence and agreements had been sent by JACOS and thus, they served as vehicles for the entry of documentation that, on its face, were not in dispute among the parties.

Toyo, in challenging the validity of the Affidavits, relied on Rule 13.18(3), which states that if an Affidavit is used in support of an Application that may dispose of all or part of a claim, the Affidavit must be sworn on the basis of the personal knowledge of the person swearing the Affidavit. Toyo noted that Rule 13.18 incorporates the principle that an Application for a final determination of a party's rights cannot be supported by hearsay. Toyo submitted that Rule 13.18(3) should be applicable as the Applications sought a final determination of rights respecting the arbitral proceedings agreed to by the parties.

Romaine J. disagreed with Toyo's argument and determined that the Applications did not qualify as applications "disposing of all or part of a claim". Her Ladyship found that the Applications sought procedural direction from the

Court and did not seek a determination on the Claims or any substantive rights therein. Justice Romaine concluded that, after an extensive review of the relevant provisions of and jurisprudence interpreting the Acts, the Arbitrations should be consolidated and should proceed as an international arbitration governed by the UNCITRAL Rules.

MALIG V KAUR, 2018 ABCA 435 (GRECKOL JA)
Rule 14.5 (Appeals Only with Permission)

The Plaintiff was awarded damages after being attacked by a dog in the backyard of a home rented out by the Defendant under occupier's liability. The Plaintiff applied for pre-judgment interest on the damages award, which the Trial Judge denied on the basis of the length of time that it took to prosecute the Action.

Both parties applied for permission to Appeal under Rule 14.5(1)(g), which governs Appeals of Decisions where the amount in controversy is less than $25,000. The Plaintiff sought permission to Appeal the denial of pre-judgment interest, while the Defendant sought both an extension of time and permission to Appeal the merits of the Decision finding her liable.

The test for permission to Appeal under Rule 14.5(1)(g) was stated in *Willier v McGurk* (2015 ABCA 299), and requires a reasonable prospect of success on Appeal having regard to the applicable standard of review; and an issue of law or jurisdiction of importance to the public.

On this basis, the Court found that Her Ladyship's review of the Trial Judge's Decision did not reveal an extricable legal error on the question of the Defendant's liability as an occupier. Additionally, the Appeal that the Defendant sought to raise did not raise an issue of law that is of general importance to the public. The Court denied the Defendant's Application for leave to Appeal, but granted the Defendant's Application for an extension of time.

The Court also granted leave for the Plaintiff's Appeal on two pre-determined questions, being (i) whether the Trial Judge erred in her interpretation of s. 2 of the *Judgment Interest Act*, RSA 2000, C J-1, and whether the Trial Judge erred in denying an award of pre-judgment interest without hearing submissions.