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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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DOBRANSKY V ROTELIUK, 2019 ABQB 32 (BOKENFOHR J) Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Court considered an Application by the Defendant/Applicant, Roteliuk, to dismiss an Action commenced by her late father, the Plaintiff/Respondent, Dobransky. Dobransky filed the Action following a dispute between he and Roteliuk regarding a parcel of land. Dobransky had transferred ownership of the land to himself and to Roteliuk as joint tenants in 1984, but then took steps in 2007 to sever the joint tenancy and declare that Roteliuk held the land in trust for Dobransky. Roteliuk responded by seeking a declaration that the land transfer was an *inter vivos* gift to her including an irrevocable right of survivorship.

An Order was granted by a Justice in 2010 severing the joint tenancy and directing the issues in dispute regarding the land to litigation. Dobransky filed a Statement of Claim in July of 2010 and Roteliuk filed a Statement of Defence in October of 2010. Roteliuk was questioned in October of 2011 but no further Questioning had occurred and no Affidavits of Records were filed or exchanged.

The Court Order severing the joint tenancy was never successfully registered at Land Titles despite several attempts. However, in September of 2014, the Executor of Dobransky's Estate filed a Caveat claiming an interest in the land following his death. In August 2017, Roteliuk brought this Application to dismiss Dobransky's Action for delay and to discharge the Caveat. In January of 2018, the Executor of Dobransky's Estate also brought an Application

to dismiss the Application for delay and to enforce the unregistered Court Order.

The Court started by confirming that the delay Rules, like all of the Rules, must be interpreted in the context of Rule 1.2, which states that the purpose of the Rules is to provide a fair, timely, and cost-effective way to resolve claims. The Court then considered whether Dobransky's Action could be dismissed for long delay pursuant to Rule 4.33.

The Court confirmed that Rule 4.33 is mandatory in nature: an Action will be dismissed if three years have passed without a significant advance in the Action. Making this determination requires a "functional approach" whereby the Court evaluates the substance of a step taken by the parties to determine whether it significantly advanced an Action. The Court ruled that three years or more had passed since the last significant advance in the Action. The last significant advance in the Action was the Questioning of Roteliuk in October of 2011. The subsequent activities on the file including unsuccessful attempts to file a Court Order, the filing of a Caveat to preserve an interest, changes in counsel, and fruitless settlement negotiations did not significantly advance the Action in the view of the Court.

The Court also considered whether the Action could be dismissed under Rule 4.31 in case that its analysis of Rule 4.33 was incorrect. The Court has discretion to dismiss an Action under Rule 4.33 if the delay caused significant prejudice to a party. The Court then assessed the six factors articulated in the leading case of *Humphreys v Trebilcock*, 2017 ABCA 116.

The delay in this case was clearly unreasonable. The Action was commenced in 2010 with the Questioning of only one party completed and the other party now dead. Clearly this delay qualified as "inordinate" and no reasonable excuse had been provided for it. As such, there was a presumption of prejudice. On this point the Court added that, despite the presumption of prejudice, there was also tangible evidence that Roteliuk had suffered prejudice as a result of the delay. The Plaintiff had not been questioned and was now dead.

The Court ruled that the Action could also be dismissed for delay pursuant to Rule 4.31. Bokenfohr J. concluded by assessing the fate of a Counterclaim within the Action. The Court noted that Rules 4.31 and 4.33 are silent about Counterclaims. Therefore, the Court's inherent jurisdiction is engaged giving the Court the discretion as to the appropriate remedy. As the Counterclaim stemmed from the same factual matrix, and given the delay on both sides, Bokenfohr J. ruled that the Counterclaim was also dismissed.

The parties were directed to provide written submissions on Costs within 30 days if they could not agree.

TRADEMARK CALGARY HOLDINGS INC V HUB OIL COMPANY LTD, 2019 ABQB 42 (LABRENZ J)
Rules 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) and 4.33 (Dismissal for Long Delay)

The Defendant/Applicant applied for dismissal of the Action under Rule 4.31. The Statement of Claim was amended on November 30, 2001 and alleged that the Plaintiff/Respondent was the owner of a parcel of land in Calgary adjoining the Applicant's land to the south, and that as a result of an explosion in 1999, the Respondent's facilities released contaminants onto the Applicant's land.

Since 2005, both parties agreed that several steps occurred which significantly advanced the Action, including Questioning, fulfilling Undertakings, filing an Expert report, and the matter proceeded to an unsuccessful mediation. The Applicant referred to *Humphreys v Trebilcock*, 2017 ABCA 116 (*"Humphreys"*) and argued that the Respondent failed to advance the Action along the litigation spectrum between 2001 and the present to the extent that a litigant acting reasonably would have attained. The Applicant also relied on the presumption of prejudice based on what it claimed was an inordinate and inexcusable amount of time.

The Court considered the Court of Appeal's decision in *Ravvin Holdings Ltd v Ghitter*, 2008 ABCA 208, and noted that a finding that a delay was inordinate and inexcusable was *prima facie* evidence of *serious* prejudice, as opposed

to Rule 4.3(2)'s current wording of *significant* prejudice. However, the Court held that the difference in wording was not crucial for the purposes of its Decision.

The Respondent argued that the case was a "documents" case as opposed to a "witness memory" case, but did not place specific evidence before the Court as to how it intended to advance the Action, despite giving a comprehensive overview of the Action.

The Respondent further suggested that the Applicant had acquiesced to the delay, relying on *Goldring v Blue Cross Life Insurance Company of Canada*, 2017 ABQB 618 (*"Goldring"*), but the Court noted that in *Goldring*, Master Robertson held that the concept of a "waiver" does not apply to Rule 4.31. The Court found that the facts in *Goldring* were dissimilar to the present case, and would not rely on the case in its Decision.

The Respondent also stated that after checking with the Trial Coordinator, it found that a five day Trial was available as early as June of the present year. The Appellant did not agree that a five day Trial would be sufficient, and the parties had yet to agree on the witnesses to be called. The Court found that even if the Trial proceeded in June of the present year, the Applicant would by that point have waited 17 years and 5 months for a short five day Trial. The Court held that this was not reasonable by any measure.

The Respondent had also suggested that Rule 4.33 meant that Plaintiffs are permitted to go three full years without doing a single thing. The Court found that this argument fundamentally misconstrues the purpose of Rule 4.33, which requires the Court to dismiss an Action if more than three years have passed without a significant advancement in the Action. The Court also found that the Respondent's suggestion was contrary to Rule 1.2, which obliges parties to openly communicate, and promotes the timely and cost effective resolution of claims. The Court additionally found that the Respondent's suggestion was also contrary to Rule 4.2, which requires that the parties act in a manner that furthers the purpose and intention of the Rules.

Finally, the Court applied the six part test as set out in *Humphreys*, and was satisfied that the Applicant had made out a case of significant litigation prejudice. The Court also found that the Respondent had failed to meet its onus to rebut the presumption under Rule 4.31(2).

The Court additionally held that Rule 4.31 would not permit the Court to find that the Applicant had acquiesced to the delay merely through its silence. Further, the Court found that a recent letter from the Applicant requesting an Agreed Statement of Facts was merely an indication of Trial readiness and was not a waiver of the delay. The Court dismissed the Respondent's Action as a result of the significant prejudice suffered by the Applicant. The Court also held that even if it had erred regarding the significant prejudice, it would have dismissed the Action in any event due to the inordinate delay of 17 years.

HARUN-AR-RASHID V ROYAL CANADIAN MOUNTED POLICE (RCMP), 2019 ABQB 54 (MANDZIUK J)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order), 6.9 (How the Court Considers Applications), 7.2 (Application for Judgment), 7.3 (Summary Judgment), 7.4 (Proceedings After Summary Judgment Against Party), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff brought an Action against 12 Defendants. Seven of the Defendants applied to strike the Statement of Claim pursuant to Rule 3.68; five of them further applied for Summary Dismissal pursuant to Rules 7.2-7.4; three of them further applied for Security for Costs pursuant to Rules 4.22 and 4.23; and one Defendant applied for dismissal of the proceeding pursuant to Rule 1.4(2)(a).

While the seven Defendants filed written Briefs, the Plaintiff failed to appreciate that he had to provide materials in advance of the Application and that the Application would deal with all of the Defendants. In addition, the Plaintiff advised that he resided in British Columbia. In light of all of this, and having regard to Rule 1.2, Justice Mandziuk exercised discretion to proceed with

the Application "by a process involving documents only" pursuant to Rule 6.9(1)(c).

Ultimately, Mandziuk J. allowed the Application to strike the Statement of Claim as it did not disclose a reasonable claim and parts of it were an abuse of the Court's processes. As such, the Application was decided under Rule 3.68 and Mandziuk J. did not address arguments relating to the other remedies sought by the Defendants.

Mandziuk J. held that there are two branches to Rule 3.68: 3.68(2)(b), which considers that the litigation is futile, and 3.68(2)(c-d), which considers that the litigation is abusive. The first branch centres on the question of whether the Action has "a reasonable prospect of success", and the second focuses "impropriety and abuse of process", which includes vexations litigation. Justice Mandziuk noted that in considering a Rule 3.68 Application, there is a presumption that the facts pleaded by the Plaintiff are true. However, the facts pleaded may be rejected, for example when they are "'patently ridiculous or incapable of being proven'…'bald allegations'…conclusory statements…" "[or] run contrary to a legal presumption."

Mandziuk J. also held that where the parties cannot be identified, the pleadings may be struck.

His Lordship further held that that an abuse of process may be found where pleadings are deficient, include bald allegations and incomplete claims, and allegations are not supported by evidence.

In the end, Mandziuk J. maintained that the Statement of Claim should be struck under Rule 3.68. At minimum, His Lordship held that the Plaintiff's litigation exhibited two indicia of abusive litigation, each of which constituted a separated basis for striking out the Statement of Claim: "1) hopeless proceedings, and 2) unsubstantiated allegations of conspiracy, fraud and misconduct".

Considering Rules 10.29 and 10.33, Mandziuk J. held that a successful litigant is presumptively due Costs, which may be varied "depending on the circumstances of the litigation, degree of success, and the conduct of parties," noting that elevated Costs are an effective tool to discourage abusive litigation. Concluding that the Plaintiff's claims were hopeless, and vexatious and abusive in many respects, Mandziuk J. awarded the Defendants elevated Costs.

THE SEMEX ALLIANCE V HI TECH DAIRY EQUIPMENTS INC, 2019 ABQB 70 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 3.30 (Defendant's Options), 11.31 (Setting Aside Service) and 13.6 (Pleadings: General Requirements)

The Defendants applied for a Stay of proceedings on the basis that the Alberta Court of Queen's Bench did not have jurisdiction over the dispute, or, alternatively, that was not the convenient forum. The Defendants alternatively applied for an Order directing the Plaintiff to amend its Statement of Claim to omit the lengthy quotations of the agreements at issue which were quoted.

The Plaintiff argued that the Defendants had attorned to the jurisdiction of the Alberta Court of Queen's Bench by delivering a Statement of Defence which addressed the merits of the claim, as well as by bringing the present Application which included seeking a declaration from the Court. The Plaintiff relied on Rules 3.30 and 11.31 for these assertions. Master Robertson noted that Rule 3.30, which sets out Defendants' options for dealing with a claim, allows a Defendant to "do one *or more* of three things, including applying to set aside service under [R]ule 11.31" [emphasis in original]. Master Robertson acknowledged that an Application under Rule 11.31 could only be made before the Defendant files a Statement of Defence, and that such an Application is not an acknowledgement of jurisdiction of the Court.

However, Master Robertson held that any principle which provides that a Defendant attorns to the jurisdiction by delivering a Statement of Defence which touches on matters other than jurisdiction, is "due for re-consideration". Master Robertson noted that this principle is at odds with the foundational Rule 1.2 as it potentially requires Defendants to defend twice (first on jurisdiction, and, if unsuccessful, on the merits). Master Robertson also noted that discouraging the filing of a full defence to

the claim does not facilitate identifying the real issues in dispute.

Despite finding that the Defendants had not attorned to the jurisdiction of the Alberta Court of Queen's Bench, Master Robertson found that the Alberta Court of Queen's Bench did have jurisdiction, and that the Action should not be stayed on account of there being a more convenient forum.

Regarding the Application to require the Plaintiff to amend the Statement of Claim, Master Robertson noted that the boundary between evidence and facts can be inexact, but that the pleading of contractual provisions from the agreement sued upon is distinct from pleading quotations from communication between the parties. Master Robertson noted that "[q]uoting the relevant passages from an agreement in a contract breach case is generally a good practice provided that the quoting is not excessive". Master Robertson noted that Rule 13.6 requires a Statement of Claim to be succinct, and that the Statement of Claim in the present Application had more quotations than were probably necessary. However, Master Robertson held that the quotations did not make the claim difficult to follow, and did not require interference by the Court. The Applications were dismissed.

MARTIN V WALSH, 2019 ABQB 71 (MILLER J)
Rules 1.2 (Purpose and Intention of These Rules), 5.36 (Objection to Expert's Report), 5.37 (Questioning Experts before Trial), 5.38 (Continuing Obligation on Expert), 5.39 (Use of Expert's Report at Trial Without Expert) and 13.6 (Pleadings: General Requirements)

The Action was under Case Management by Justice Miller. In 2017, His Lordship had considered an Application by the Plaintiff for a Jury Trial and declined to make a definitive ruling. While the case at that time was too complex to proceed by way of Jury Trial, Justice Miller noted that "'complex litigation' can be streamlined and thereby make complex trials amenable for a jury." Specifically, Rules 5.36 to 5.39 respecting experts and their reports were identified to assist with simplifying the expert evidence.

At the time of the subject Application, Justice Miller was asked to reconsider the Plaintiff's request for a Jury Trial. The Plaintiff had not attempted to simplify expert evidence through resort to Rules 5.36 to 5.39, but instead brought a request for a procedural Order directing a conference among competing expert witnesses so as to narrow and clarify the issues in dispute. Such an Order was purportedly available under the Federal Rules of Court, and, it was argued, could be invoked through the discretion inherent in the Foundational Rules. The Court declined to order the conference of experts, and given the failure to simplify the case as previously suggested by the Court, the Application for a Jury Trial was also dismissed.

The Plaintiff also sought leave to allow substantial changes to the Amended Amended Statement of Claim. The Defendants had raised several arguments against amendment, the most general of which alleged a failure to adhere to Rules 1.2 and 13.6(1)(a) requiring succinctness in pleadings. The Court found sufficient succinctness and dismissed this argument.

The Defendants further argued that the amendments were either hopeless or seriously prejudicial, and therefore were established exceptions to the otherwise low threshold for permitting amendments. The Court did not agree that the amendments were hopeless, and held that any prejudice was compensable in Costs. However, the Court did exercise its general discretion to disallow inappropriate amendments. Specifically, the Court disallowed certain portions of the proposed amendments as either inflammatory, statements of expert opinion, legal argument, prejudicial, or improper references to a settlement that had been reached on a Pierringer basis.

Lastly, the Defendants argued that removal of the offensive amendments would leave a nonsensical pleading, and that it would be inappropriate for the Court to redraft the document so as to save it. The Court did not find merit in this concern, as Justice Miller did not propose to redraft the pleadings, but rather provided general guidelines for the Plaintiff to make corrections. Justice Miller therefore allowed some of the amendments to the Plaintiff's Amended Amended Statement of Claim.

SONG V FONG, 2019 ABQB 119 (MAH J)
Rules 1.2 (Purpose and Intention of These Rules) and 4.31 (Court Options to Deal with Delay)

The Defendant appealed the Decision of a Master which dismissed the Defendant's Application to strike the Action for inordinate delay pursuant to Rule 4.31. The Action pertained to events which transpired between June 2004 and October 2006, and the Action was commenced in November 2009. Affidavits of Records had been exchanged, and the Defendant's records had been produced. Plaintiffs' counsel had sought dates for Questioning in January 2015, but received no response. In September 2016 a Notice of Appointment for Questioning was served, and a standstill agreement entered in October 2016.

Justice Mah noted that the standard of review on all issues on appeal from the Master was correctness.

Mah J. rejected the argument that the Defendant had caused or contributed to the delay in contravention of its obligations under Rule 1.2 by failing to respond to the request to schedule Questioning, noting that there was no evidence that the Defendant's failure to respond was anything more than mere inadvertence. Justice Mah held that the Defendant's failure to respond did not amount to stall or delay tactics. Mah J. found that the delay by the Plaintiffs in the Action was both inordinate and inexcusable. As such, the presumption of significant prejudice created by Rule 4.31(2) was engaged.

Mah J. held that the standard of proof for determining whether the Plaintiff had rebutted the presumption of prejudice was on a balance of probabilities, which had overtaken the previous standard of there being a "legitimate doubt" as to whether there was significant prejudice per *Humphreys v Trebilcock*, 2017 ABCA 116. Justice Mah found that there were documentary gaps in the record which would have to be filled with witness testimony and that the Defendant's memory had lapsed concerning several material events. Further, Mah J. noted that the memory of material witnesses was likely to have faded and that if Questioning were to occur it would be 13 to 15 years after the events at issue had taken place. Justice Mah held that significant prejudice to the Defendant had been established independently of the presumption created in Rule 4.31(2). Mah J. allowed the Appeal and dismissed the Plaintiff's claim.

CALLIDUS CAPITAL CORPORATION V BAUMANN, 2019 ABQB 120 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of these Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 5.6 (Form and Contents of Affidavit of Records), 5.17 (People Who May Be Questioned), 6.6 (Response and Reply to Application) and 13.7 (Pleadings: Other Requirements)

The Plaintiff sued the Defendant for defamation. This Decision was in respect of the Plaintiff's Application to amend its Amended Statement of Claim. The Defendant argued that the Application constituted an abuse of process because the Plaintiff was relying on evidence it had available to it when it first applied to amend its Statement of Claim, and because the Application was simply a re-argument of its previous Application to amend its Statement of Claim which was only partially successful. Master Robertson disagreed and allowed the Application. In coming to this conclusion, Master Robertson considered in turn various concerns raised about the parties' procedural conduct.

Master Robertson considered the Defendant's complaint that the Plaintiff had filed two last-minute Affidavits. Master Robertson noted that last-minute changes to evidence should generally not be the norm, but that they may be required at times. Pursuant to Rule 6.6(3), in determining whether an Affidavit filed without reasonable notice may be relied upon, the Court should consider whether the Affidavit provides new information not previously known to the Plaintiff. Here, the information in the last-minute Affidavit contained information that was previously known to the parties, and as such, Master Robertson held that it was appropriate to consider both Affidavits.

Master Robertson also considered the Plaintiff's complaints that it had been unable to examine the Defendant due to the Defendant's numerous objections. The Master noted that the test to determine whether a question is proper is

whether it is "relevant and material". Rule 5.17 allows parties to ask questions about relevant and material information, and Rule 5.6 requires that Affidavits of Records disclose all relevant and material information. Even if a question is not directly tied to a particular statement in a pleading, that does not necessarily make it improper - rather, there must be a "proper basis for the question given the dispute".

Next, Master Robertson considered the Plaintiff's proposed amendments which detailed communications that were allegedly made after the claim was served. Master Robertson emphasized that it is not unusual to amend a pleading to ensure it "properly asserts the related facts that it learns along the way." After obtaining more information at Questioning, the Plaintiff sought to plead specific facts, and in so doing, was ensuring compliance with Rule 13.7(f) which requires that a pleading asserting defamation include particulars.

Master Robertson also commented that the Defendant had argued, in reliance on Rule 13.7(f), that any questions about un-particularized acts of defamation were not relevant and material to the Action. Master Robertson found this argument absurd: the Plaintiff sought to particularize its Amended Statement of Claim through its proposed addition of examples of defamatory communications, and to find that these additions were not appropriately within the scope of the Action would be to force independent litigation in respect of each specific incident of defamation, which inefficiency would be clearly offside Rule 1.2.

Lastly, Master Robertson considered the fact that the Plaintiff had additionally claimed against the Defendant in Ontario. The Ontario claim included several other Defendants, but also included allegations of defamation. The Defendant argued that the amendments were duplicitous to the allegations in the Ontario Action, and were therefore hopeless and an abuse of process, contrary to Rule 3.68(2)(d). Master Robertson noted that this argument addressed the entire claim, and not just the amendments, and that if the Defendant wished to argue that the dispute should be argued only within the Ontario proceedings.

Master Robertson allowed the Plaintiff's Application and directed that the proposed Amended Amended Statement of Claim be filed within one week of his Order being entered.

FRASER V JEFFRIES, 2019 ABQB 145 (MANDZIUK J) Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 6.14 (Appeal from Master's Judgment or Order), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs appealed a Master's Decision in which the Plaintiffs' Action was dismissed for long delay under Rule 4.31 and Costs were awarded against the Plaintiffs (the "Underlying Action"). The Master had found that Rule 4.33 was not applicable. Justice Mandziuk noted that the standard of review for an Appeal from a Master to a Justice, pursuant to Rule 6.14, is correctness on all issues and, therefore, the Appeal Court is entitled to conduct a de novo analysis of the matter.

In the Underlying Action, the personal Plaintiff alleged that the Defendant had injured the Plaintiff's finger by striking him with hockey stick during a recreational hockey game in January of 2011. The Statement of Claim had been filed in 2012. Various proceedings occurred up until April 4, 2016, but, between this date and the Application that gave rise to the Defendant's Application under Rule 4.31, nothing had happened on the file. Mandziuk J. noted that the Rules that deal with litigation delay must be interpreted and applied in light of Rule 1.2, the foundational rule requiring that litigants "facilitate the quickest means of resolving the claim at the least expense".

Justice Mandziuk reviewed the applicable factors outlined in *Humphreys v Trebilcock*, 2017 ABCA 116 and noted that the delay in this instance was inordinate but justifiable. The Plaintiff's explanation for the delay was short and simple: The inordinate delay had occurred because the Plaintiff's original lawyer became ill and had to take some time off. The file was transitioned to a new lawyer who acted swiftly and sent a form of litigation plan to Defendant's counsel.

When agreement to that plan was not forthcoming, the Plaintiff's counsel promptly brought an Application that was within the spirit and intent of the Rules, as set out in Rule 1.2. This evidence was not before the Master.

Justice Mandziuk concluded that, in light of this evidence, the delay was not inexcusable and therefore allowed the Appeal. Mandziuk J. reviewed the Rules 10.29, 10.31 and 10.33 pertaining to Costs and found that, though a successful party is entitled to Costs under Rule 10.29, the Court has an overarching discretion in awarding Costs after applying the factors set out in Rule 10.33.

Mandziuk J. found that the successful Appeal was significantly tied to the excusable nature of the delay which had come from new evidence that was not before the Master. His Lordship therefore, notwithstanding the Plaintiff's success, declined to order Costs to the Plaintiff.

994552 NWT LTD V BOWERS, 2019 ABQB 195 (LABRENZ J)
Rules 1.2 (Purpose and Intention of these Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.2 (When Something is Relevant and Material), 8.4 (Trial Date: Scheduled by Court Clerk) and 10.52 (Declaration of Civil Contempt)

The Appellant, 994552 NWT Ltd.'s Action related to the misappropriation of approximately $2,000,000 by one of the Respondents. The Respondents applied to dismiss the Action pursuant to Rule 4.33 and alternatively, Rule 4.31. At first instance, the presiding Master held that three years had passed without the occurrence of a significant advance and dismissed the Action pursuant to Rule 4.33(2), without considering the Respondents' alternative arguments relating to dismissal pursuant to Rule 4.31. The Appellant appealed that Decision.

On Appeal, Justice Labrenz reviewed the steps that had occurred in the Action. It had been commenced in 2008, and Questioning had occurred between October 2012 and June 2013. By the end of July 2013, two of the Respondents provided answers to Undertakings, and other Respondents provided answers to Written Interrogatories. Two of the Respondents, however, failed to provide answers to Undertakings, which failure continued even in spite of a Court Order to do so.

In March 2015, a Consent Order was filed to remove three parties' Answers to Written Interrogatories from the Court record, as they had been mistakenly filed in 2013; the Order was consented to in 2013, but not filed until 2015. In July 2016, several Notices to Admit Facts were served on the Respondents, but many of them "did not seek any new admissions". The Respondents provided their responses along with a letter advising that they were providing the responses without prejudice to their ability to apply to dismiss the Action for long delay. The Appellant then served a Request to Schedule Trial Date on the Respondents pursuant to Rule 8.4. Justice Labrenz noted that this was "somewhat significant" as the Appellant was prepared for Trial, and the only unfulfilled obligation prior to Trial was the Respondents' responsibility to provide answers to Undertakings.

Justice Labrenz explained that under Rule 4.33(2), a Judge is obligated to conclude that the Action should be dismissed when three years have passed without a significant advance in the litigation – the Rule is not discretionary, but mandatory. The Court should use a "functional approach" to determine whether a litigation step has significantly advanced the Action, by considering the nature, value, and quality of the step, its genuineness, its timing, and sometimes its outcome.

Justice Labrenz explained that the Master had correctly noted that "an advance in an action against one, if it advances the action as a whole, is an advance against all". However, His Lordship was concerned by the fact that two of the Respondents had failed to provide Undertaking responses, despite a Court Order that they do so. His Lordship therefore considered whether their failure to provide Undertaking answers removed their ability to bring an Application under Rules 4.33 and 4.31, even though – as their counsel emphasized – they had not been found in contempt of Court under Rule 10.52 for failing to provide the undertaking answers.

His Lordship explained that in his view, "a person in breach of a Court Order to do something that, if completed, would count as a significant advance, cannot rely on Rule 4.33". Although Rule 4.33 does not provide the Court with discretion not to dismiss an Action when there has been delay beyond the exceptions set out in the Rule, it must also be read in accordance with Rule 1.2, which provides that one of the purposes of the Rules is to "provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost efficient way", and to "communicate honestly, openly and in a timely way".

As such, Justice Labrenz held that the Respondents could not argue that their agreement to provide Undertaking responses did not significantly advance the Action, and held that the unfulfilled Undertaking responses would have constituted a significant advance. His Lordship found that the Undertaking responses would have helped to clarify or narrow the issues, and possibly would have moved the parties towards resolution. Justice Labrenz also noted that since the Respondent had agreed to provide the Undertakings, she must have been satisfied that the records sought were relevant and material to the Action. Because Rule 5.2 states that a record is relevant and material where it could "significantly help determine one or more of the issues raised in the pleadings", this also supported the significance of the Undertakings.

Justice Labrenz next considered whether the Action should be dismissed for delay pursuant to Rule 4.31. The Respondents argued that in assessing overall delay, the Court should look back to 2004 when the funds began to be misappropriated, and not 2008 when the Statement of Claim was filed. The Respondents also argued that the Court must consider the six questions set out by the Court of Appeal in *Humphreys v Trebilcock*, 2017 ABCA 116, where an Application to dismiss for delay is advanced pursuant to Rule 4.31. They also emphasized that where fraud has been alleged the Action should be pursued faster.

Justice Labrenz held that the delay was not inordinate in the circumstances. Although the Action had been ongoing for 8.5 years, His Lordship noted the "theme in Alberta law that a useful starting point is ten years where an action is not yet on the eve of trial". Justice Labrenz also held that the Respondents had contributed to the delay by failing to provide their Undertaking responses in a timely manner. Additionally, while the matter was ongoing, steps had been taken in criminal proceedings against the Respondents which were "inextricably linked factually such that they were significantly advancing the action". The Appeal was therefore allowed.

ALGHAZAWI V ALBERTA, 2019 ABQB 208 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of these Rules), 4.28 (Confidentiality of Formal Offer to Settle) and 4.33 (Dismissal for Long Delay)

The Action was commenced in late 2013, arising out of an assault at the Calgary Remand Centre. An Application to dismiss the Action for long delay pursuant to Rule 4.33 was brought in mid-2018. The Court noted that in the three years preceding the Application "three events which, either individually or collectively, are in contention to count as a significant advance: 1. A detailed settlement proposal with accompanying formal offer; 2. Further production of records; and, 3. An amendment to add a party."

The Court first considered the extent to which the settlement offer moved the Action forward. While acknowledging that Rule 4.28 prohibits disclosure of a Formal Offer to the Court prior to either the offer's acceptance or the Action's disposition, it was nonetheless observed that the offer quantified damages far below the amount claimed, and presented as genuine. In fact, the Formal Offer referenced some of the newly produced documents, which the Plaintiff argued to be materially supportive of his claim.

Taking direction from recent precedent, Master Schlosser sought to "view the whole picture" that had transpired in the three years period preceding the Application. Colourfully, Master Schlosser referred to the recent trend away from viewing Rule 4.33 as a "drop dead rule", and rather as a "zombie killer". In result, the Court held that the Formal Offer and document production advanced the Action collectively even if they failed to do so individually.

In fact, Master Schlosser suggested that the purposive approach to the Rules set out in Rule 1.2 would discourage rewarding the Applicant for failing to provide a considered response to the Formal Offer.

Though it was unnecessary to consider the addition of parties, the Court indicated that adding a party to an Action "should almost always count as a significant advance". Master Schlosser also took occasion to remark that the use of placeholder parties such as "John Doe", and the substitution of new parties in their stead, was an anachronistic exercise. The Application was dismissed.

WARREN V WARREN, 2019 ABCA 20 (WAKELING JA)
Rules 1.2 (Purpose and Intention of These Rules), 14.24 (Filing Factums – Fast Track Appeals), 14.27 (Filing Extracts of Key Evidence), 14.30 (Filing Books of Authorities), 14.37 (Single Appeal Judges), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

The Applicant, Derek Lee Warren, sought an Order restoring his Fast-Track Appeal. The Applicant had failed to file a Factum within 20 days of filing his Notice of Appeal in accordance with Rule 14.24(1)(a)(I,) resulting in the Appeal being struck as directed by Rule 14.24(1).

Wakeling J.A. listed the Rules applicable to this Application without providing a detailed analysis of each of them, which are as follows: Rules 14.24(1), 14.27(3), 14.30(2), 14.37(1) and 14.65(2).

Wakeling J.A. stated the general rule is that an Appeal may be restored if it is in the interest of justice to do so. Wakeling J.A. then referred to the following factors that should be weighed in order to make this determination:

(a) Is there a reason to conclude that the Applicant, at any time after filing the Notice of Appeal, did not intend to prosecute the Appeal?

(b) Has the Applicant provided an explanation for the deficiency that prompted the Registrar to strike the Appeal? If so, is the explanation consistent with an intention on the part of the Appellant to advance the Appeal?

(c) Has the Applicant moved with sufficient expedition to cure the defect, taking into account the nature of the defect?

(d) Are there arguable grounds in support of an Appeal? Is the likelihood of success high enough to conclude that it is not a frivolous Appeal?

(e) Will the restoration of the Appeal cause the Respondent any prejudice? If so, is it appropriate to require the Respondent to endure this prejudice?

Wakeling J.A. then applied these factors to the facts of the case. The Applicant's intention to appeal was constant and an explanation for the failure to file was provided. The Applicant's lawyer left for vacation without regard for the filing deadlines. However, the Applicant's response to the struck Appeal was unacceptably dilatory. The Applicant waited two weeks to file a remedial Application which was rejected as non-compliant with the Rules. It was three weeks before a compliant Application was filed. The Court stated that a Registrar's striking certificate connotes an emergency that should be dealt with immediately and that didn't happen in this case.

Wakeling J.A. ruled that the Appeal was not frivolous; however, Wakeling J.A. also ruled that the Applicant's non-compliant conduct prejudiced the Respondent. Wakeling J.A. described the prejudice as "nonlitigation prejudice" as an Order restoring the Appeal would deprive the Respondent of her legitimate expectation that the Applicant prosecute his Appeal within the mandated timelines. As Rule 1.2 states, the purpose of the Rules to provide timely and cost-effective means of resolving disputes.

Wakeling J.A. closed by stating that, even if the Applicant had met all five elements of the test for restoring an Appeal, the Court would have still declined to exercise its discretion to restore the Appeal. The Applicant had not discharged his obligation of payment under the Order being appealed. Therefore, the Court did not see fit to exercise its discretion

to forgive the Applicant's non-compliance with filing deadlines when he is also failing to comply with a Court Order. The Application to restore the Appeal was denied.

LAY V LAY, 2019 ABCA 21 (ROWBOTHAM, WAKELING AND CRIGHTON JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 10.33 (Court Considerations in Making Costs Award)

The parties to this Action, Terry Lay and Bradley Lay, are brothers. Terry Lay and his wife (collectively, the "Appellants") and Bradley Lay and his wife (collectively, the "Respondents") were the only shareholders in Steep Rock Construction Materials Ltd. ("Steep Rock"). The Respondents were responsible for the day-to-day management of Steep Rock while the Appellants were mostly silent investors. In the underlying Action, the Case Management Judge ("CMJ") found that the Action was barred under the *Limitations Act*, RSA 2000, c L-12, or, in the alternative, the Appellants' claim was extinguished by a mutual release.

On Appeal, the Appellants applied to introduce new evidence and appealed the Decision of the CMJ both in regards to Summary Dismissal of the underlying Action and the associated award of Costs. The Appellants contended that the new evidence raised a reasonable apprehension of bias on the part of the CMJ because the Judge's daughter had obtained employment at the firm which represented the Respondents during the time that the CMJ's decision on Summary Dismissal was on reserve and before Costs had been determined.

The Court of Appeal reviewed the relevant jurisprudence and confirmed that Canada has many large law firms and that it is not uncommon for a Judges' children to become lawyers. A rule that would bar Judges from hearing any case where counsel is from the same law firm as the Judge's close relative would be unworkable: *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 176. Further, in a Concurring Judgment, Wakeling J.A. noted that the delay caused by a withdrawal at this stage would be extensive, may unnecessarily increase the workload of other Judges, and would be contrary to the foundational Rules of 1.2.

The Majority of the Court of Appeal noted that following the initial decision of the CMJ, the Respondents sought double Costs for all steps taken after the provision of a Formal Offer to Settle. The CMJ had considered the factors in Rule 10.33(1) and noted that the allegation of fraud was a significant factor that affected His Lordship's decision on a multiplier. The CMJ had awarded party and party Costs based on Schedule C, Column 5, with a multiplier of three. He also ordered Double Costs for all steps taken after the Formal Offer to Settle.

The Majority of the Court of Appeal agreed and concluded that the Appellants were unsuccessful in a substantial fraud claim seeking over $2 million. In the end, the Court of Appeal gave considerable deference to the Costs decision of the CMJ and found that the CMJ had exercised His Lordship's discretion to award a multiple of Costs against the Appellants consistently with the multiples awarded against them for other Applications in the proceedings. As such, the Appeal was dismissed.

WEIR-JONES TECHNICAL SERVICES INCORPORATED V PUROLATOR COURIER LTD, 2019 ABCA 49 (FRASER, WATSON, SLATTER, WAKELING AND STREKAF JJA)
Rules 1.2 (Purpose and Intention of These Rules), 6.11 (Evidence at Application Hearings), 7.1 (Resolving Claims Without Full Trial), 7.3 (Summary Judgment) and 8.17 (Proving Facts)

The Plaintiff/Appellant, Weir-Jones Technical Services Incorporated ("Weir-Jones"), appealed the Summary Dismissal of its claim on the basis that it was not brought within the limitation period. Weir-Jones had provided services to the Defendants, Purolator Courier Ltd., Purolator Inc. and Purolator Freight (collectively, "Purolator"), under several agreements starting in January 2008. Weir-Jones alleged that there were also relevant verbal agreements in place. The Union, on behalf of Weir-Jones, filed grievances in 2008 and 2009. Those were heard in arbitration and ultimately reached settlement in 2015. Weir-Jones also commenced the underlying Action in 2011, alleging breaches of contract that were not covered by the grievances and ensuing arbitration. Subsequently, Purolator successfully applied for Summary Judgment to dismiss

Weir-Jones's claim on the basis of the expiration of the applicable limitation period (the "Underlying Action").

Shelley J. of the Alberta Court of Queen's Bench had granted the Application and concluded that there was no standstill agreement and that Weir-Jones was aware of the alleged breaches of contract more than two years before commencing the Underlying Action. In reaching that decision, Justice Shelley stated that Summary Judgment was no longer determined on the basis of triable issues. Instead, the question was whether there is an issue of merit that requires a Trial or, conversely, whether the defence is so strong that it is highly likely to succeed.

The Court of Appeal heard the Appeal of Weir-Jones with a five member panel (majority decision per Slatter J.A. and concurring reasons per Wakeling J.A.). The Court of Appeal cited the language of Rules 7.1 and 7.3 and recognized that the "more proportionate, timely and affordable procedures" of Summary Judgment should be increasingly used, and emphasized the importance of proportionality, which is also an underlying principle to the foundational Rule 1.2. The Court noted that Rules 6.11(1), 8.17, and 7.3 specifically enable fact finding in Chambers Applications including (with permission) by hearing oral testimony.

The Court of Appeal cited the language of Rule 7.3, which provides that a party may apply for Summary Judgment if "(a) there is no defence to a claim or part of it; (b) there is no merit to a claim or part of it; …", and stated that "[t]he key issue is the approach to be taken in determining the absence of a defence to, or 'merit' in a claim."

The Court recognized the different approaches taken in cases including *Can v Calgary Police Service*, 2014 ABCA 322 and *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125, and stated that the divergence was a result of the paradigm shift in the wake of the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7 (*"Hryniak"*). Since *Hryniak*, Summary Judgment was no longer limited to cases in which the moving party meets a "very high standard of proof" with descriptors such as "unassailable", "beyond doubt", "plain and obvious", et cetera. The presumption that all matters ought to be referred to Trial, which is a process that is too expensive for many litigants, is unrealistic and should end. The "more proportionate, timely and affordable procedures" of Summary Judgment should be increasingly used. The Court emphasized the importance of proportionality, which is also an underlying principle to the Rules.

The majority of the Court of Appeal Panel found that the solution to Summary Judgment Applications must be found in "first principles, including: the principles behind the modern law of summary judgment, the principles behind the modern law of proof, the principles behind the type of record to be used in summary dispositions, and principles of fairness." At paragraph 47, the Court of Appeal summarized its principles-based approach to Rule 7.3 Summary Judgment Applications and stated that the key considerations are:

"a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute."

The Court stated that the principled base analysis does not need to occur sequentially or in any particular order, and that a Court may determine that Summary Judgment is appropriate at any stage of the analysis.

Using this analysis, the Court of Appeal found that Weir-Jones had failed to show any reviewable errors in Justice Shelley's fact finding or the inferences drawn from the record. The Court found that there were no errors that would have affected the outcome of the case. Both the majority Court of Appeal Panel and concurring Judgment of Wakeling J.A. found that Weir-Jones's claim was limitations-barred and, therefore, the Appeal was dismissed.

DELVER V GLADUE, 2019 ABCA 54 (O'FERRALL, CRIGHTON AND STREKAF JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

The Defendant appealed the Chambers Judge's Order which had dismissed the Defendant's Application to dismiss the Action for long delay under Rule 4.33. The Chambers Judge found that two things occurred during the alleged three year delay which significantly advanced the Action: the parties had discussions regarding the scheduling of a Trial of an issue, and Plaintiffs' counsel provided a without prejudice letter indicating a willingness to recommend a settlement offer of a particular value to their client. The Chambers Judge found these steps to be reasonable efforts to ensure a timely resolution to the litigation, which would have significantly advanced the Action had they been successful.

The majority of the Court of Appeal Panel held that the interpretation of the Rules raises questions of mixed fact and law, reviewable for correctness, however, that a deferential standard is appropriate where the decision arises from a consideration of the evidence as a whole, as opposed to the articulation and application of the correct test.

Both the majority and dissent confirmed that the proper test on a 4.33 Application is the functional test which requires a contextual and purposive assessment of whether there has been "a significant advance in (the) action" within a 3 year period. The majority found that the Chambers Judge articulated the correct test, but erred in its application. The majority noted that although the outcome of any step is not determinative of whether a significant advance has occurred, the process must still produce a significant advance. The majority found that there was no evidence that the steps which occurred resulted in new information being discovered, the narrowing of issues, or the clarification of issued, and therefore allowed the Appeal. The Action was struck.

In dissent, Justice O'Ferrall stated that it was unfair to punish the Plaintiff for taking "meaningful, genuine, and consistent steps" to further the Action where the Defendant rejected all proposed advancements. Justice O'Ferrall noted that Defendants are obliged by Rule 1.2 to not engage in stalling or delay tactics, and that the Defendant cannot have the matter struck for delay where the Defendant has failed to meet their obligations under Rule 1.2. Justice O'Ferrall stated that the purpose of Rule 4.33 was to strike Actions which had "truly died" and that purpose was not met through the striking of the present Action as the Plaintiff was able to demonstrate continual attempts to move the matter forward. Justice O'Ferrall would have dismissed the Appeal.

ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY V SCHUSTER, 2019 ABCA 64 (MCDONALD, WAKELING AND PENTELECHUK JJA)
Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)

The Court heard an Appeal of the Decision of a Chambers Judge upholding a Master's Decisions to dismiss the Plaintiff's Application for Summary Judgment against one of the Defendants, Schuster, and the Defendants' Application to strike the Plaintiff's claim for long delay pursuant to Rule 4.33.

The Court considered the test for Summary Judgment. Despite noting that at that time, there were two lines of authority for the test for Summary Judgment in Alberta, the Court held that under either approach, the Appeal concerning Summary Judgment should be dismissed, given that a fair decision on the facts and the law could not be made on the record before the Court. Further, the Court noted that the Chambers Judge was owed deference, and since the Chambers Judge did not make a reviewable error, the Appeal on Summary Judgment should be dismissed.

The Court then turned to the Application pursuant to Rule 4.33. The relevant question was whether a partial discontinuance of the Action against five Defendants was a step that significantly advanced the Action. In context, the discontinuances arose because of a Notice to Admit whereby it was admitted that any of the impugned Actions and communications were all carried out by one of the Defendants alone, Schuster. Accordingly, discontinuances were negotiated such that the only remaining Defendants were Schuster and his professional corporation.

In light of this context, the Court held that the discontinuances advanced the Action as "[t]he number of defendants was reduced and issues were narrowed. Unquestionably, the necessary trial time is also reduced. Schuster has not demonstrated any reviewable error and this appeal is also dismissed."

As such, the Court also dismissed the Defendants' Appeal with respect to the Application under Rule 4.33, and in doing so, considered the fundamental principles of the Rules as set out in Rule 1.2.

PARK AVENUE FLOORING INC V ELLISDON CONSTRUCTION SERVICES INC, 2019 ABQB 73 (MASTER ROBERTSON)
Rules 1.4 (Procedural Orders) and 13.18 (Types of Affidavit)

Park Avenue Flooring Inc. ("Park Avenue") had previously sued EllisDon Construction Services Inc. ("EllisDon") and was partially successful at Trial, resulting in a Judgment and an award of Costs in favour of Park Avenue.

After the Trial, EllisDon paid the funds owing into Court, but also brought an Application to interplead the amount owing due to another claim to the money at issue by the Sovereign General Insurance Company ("Sovereign"). At issue was whether Sovereign had a right to some of the funds in Park Avenue's Judgment.

Master Robertson noted that the matter was complicated by the fact that there were no pleadings between Park Avenue and Sovereign, and that the "issues" argued before the Master had grown over the course of cross-examination and the parties' Applications. The parties had run into difficulties at cross-examination on their Affidavits, as to what issues and documents were "relevant and material".

Additionally, the matter was confused because Sovereign's corporate representative had only answered questions within his direct knowledge. However, Master Robertson also noted that Rule 13.18(3) requires that an Affidavit in support of an Application that may dispose of all or part of a claim be sworn on the basis of the personal knowledge of the person swearing the Affidavit. It was clear that what Sovereign was asking for – the funds at issue being paid out of Court – would resolve, finally, the issues between the parties.

Rather than making a finding, Master Robertson offered a number of "observations and recommendations pursuant to Rule 1.4(2)(g)" to assist the parties in reaching a resolution. The Master also provided the parties with specific directions in response to questions "summarized" in one of the parties' Applications.

VIALLON V BUMPER DEVELOPMENT CORPORATION LTD, 2019 ABQB 52 (MASTER PROWSE)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 11.25 (Real and Substantial Connection) and 11.27 (Validating Service)

The Plaintiffs had not obtained an Order for service *ex juris* before serving one of the Defendants outside of Canada, as required by Rule 11.25(2)(c), and therefore sought to do so retroactively.

Master Prowse first noted that the Court is permitted to grant retroactive Orders pursuant to Rule 1.5, which allows parties to apply to the Court to cure a contravention, non-compliance, or irregularity where doing so will not cause irreparable harm to any party. The Master then explained that a number of factors were present which favoured the granting of the Order sought, including: (1) that the Order would have been granted if it had been sought in advance of service, as there was a real and substantial connection to Alberta; (2) the Defendant would not suffer irreparable harm due to the granting of the retroactive Order; and (3) that the Action had effectively been "frozen" against the Defendant in question until service could be properly effected.

Ultimately, Master Prowse declined to grant the Order sought, reasoning that existing case law "does not favour granting retroactive orders where a commencement document is served, without permission, outside of Canada". The Master explained that Rule 11.27, which allows for the validation of improper service, has been narrowly read as not supporting retroactive Orders validating service *ex juris*.

Master Prowse took note that in 2012, the legislature had modified Rule 11.27 to add subsection (4), which allows a Plaintiff to validate service outside of Canada where a different method of service was used than that set out in an Order for service *ex juris*. In spite of this amendment, where no Order for service *ex juris* is obtained in advance, an Order to retroactively allow and validate service *ex juris* cannot be obtained, even by operation of Rule 11.27(4). Master Prowse held that "Much clearer language would be required" for the Rule to permit Orders retroactively validating service *ex juris*, where no Order was obtained in advance of service. As such, the Plaintiffs' Application was dismissed.

LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2019 ABQB 12 (JONES J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance before the Court), 3.68 (Court Options to Deal with Significant Deficiencies) and 14.5 (Appeals Only With Permission)

During a case management meeting Jones J. invited submissions from the parties regarding whether the conduct of the Applicant, Laird, was abusive and vexatious, and whether there should be restrictions on Laird's access to Court functions.

In the circumstances, Jones J. declared Laird a vexatious litigant and provided some conditions as part of that declaration. One of those conditions was that if Laird were granted leave to Appeal by a single appeal Judge, Laird may be required to apply for permission for leave to Appeal under Rule 14.5(1)(j). Further, Jones J. held that Laird was prohibited from acting as an agent, next friend or McKenzie Friend pursuant to Rules 2.22 and 2.23.

Finally, Jones J. evaluated whether Laird's conduct of the Action warranted taking steps to limit or end the Action as an abuse of process, including pursuant to Rule 3.68. His Lordship held that striking out the Action was a measure proportionate to Laird's misconduct given the many indicia of abusive litigation present. Accordingly, Jones J. struck each of the Actions commenced by Laird in respect of the Respondents.

SPECIAL AREAS BOARD V ATCO POWER CANADA LTD, 2018 ABQB 1035 (SLAWINSKY J)
Rule 3.15 (Originating Application for Judicial Review)

ATCO sought to strike an Application by the Special Areas Board for Judicial Review of a Decision by the Central Alberta Regional Assessment Review Board. ATCO claimed the Application was out of time. The Application for Judicial Review was filed and served 61 days after the date of the Decision, and 57 days after the notice of Decision was provided and received by email.

Both Rule 3.15 and section 470 of the *MGA Municipal Government Act*, RSA 2000, c M-26 (the *"MGA"*) reference the time for bringing an Application for Judicial Review in relation to the "date of the decision." Because of this, Her Ladyship considered the effect of that language being used both in the *MGA* and Rule 3.15(2).

In respect of the Rules, *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29 at para 27 provides that "…[u]nless there is a clear and stated obligation to provide notice of a decision, the six-month limitation runs from the date of the decision…"

Slawinsky J. noted that the period of time provided in section 470 of the *MGA* is much shorter than the six month filing deadline prescribed by Rule 3.15. However, apart from the time limit for commencing an Application, Her Ladyship confirmed that the Rules on the conduct of Judicial Review Applications govern the procedure for the review of Assessment Review Board decisions. Then Slawinsky J. noted that there is a presumption that the Legislature "understood the effect of using 'date of the decision' in both the *MGA* and the Rules," and that the requirement for notice of a Decision of the Assessment Review Board, pursuant to section 469 of the *MGA*, is relevant in determining the start of a limitation period. Further, Slawinsky J. found that the Legislature could have used language other than "date of the decision," as in other limitation sections in the *MGA*, but chose not to.

Finally, Slawinsky J. remarked that the Assessment Review Board's Decision contained a notation remarking that the Decision could be appealed through an Application for Judicial Review to be filed and served "within 60 days of being notified of the decision." Based on this, Her Ladyship concluded that by using the phrase "date of the decision," the Legislature intended to shorten the time for commencing Judicial Review, but did not intend a different meaning than that implied by Rule 3.15(2). Accordingly, Slawinsky J. held that section 470 of the *MGA* prescribes a limitation period that starts on the date the notice of the Assessment Review Board's Decision is given, not on the date of the Decision itself.

Accordingly, the Application for Judicial Review was filed and served in time, and ATCO's Application was dismissed.

AQUATECH V ALBERTA (MINISTER OF ENVIRONMENT AND PARKS), 2019 ABQB 62 (DEWIT J)
Rule 3.15 (Originating Application for Judicial Review)

The Respondent, Alberta's Minister of Environment and Parks ("AEP"), had issued a Request for Proposals (the "RFP") in order to award a contract for the operation, monitoring, and servicing of water and wastewater facilities in the Kananaskis region. Among the tender offers received were those of the legacy service provider, Aquatech Canadian Water Service Inc. ("Aquatech"), as well as H20 Innovations Inc. ("H20"). AEP accepted the tender offer of H20. Pursuant to Rule 3.15, Aquatech sought Judicial Review of AEP's decision. Aquatech alleged that H20's tender offer should have been rejected because H20 had not satisfied a mandatory term of the RFP, as H20 had failed to provide the names of five certified operators who would perform the day-to-day services.

deWit J. first considered whether AEP's decision could be subject to Judicial Review, i.e. whether the RFP was the exercise of public authority or a private matter. His Lordship reviewed each of the several considerations set out in *Air Canada v Toronto Port Authority*, 2011 FCA 347: the character of the matter for which review is sought; the nature of the decision-maker and its responsibilities; the extent to which a decision is founded in and shaped by law as opposed to private discretion; the body's relationship to other statutory schemes or other parts of government; the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity; the suitability of public law for remedies; the existence of compulsory power; and whether the matter was of an exceptional quality having attained a serious public dimension.

deWit J. ultimately held that AEP's decision was subject to Judicial Review, though the considerations opposing Judicial Review were many. Among them were the generally private nature of contracting, AEP's private discretion in the matter (as distinct from a circumstance where a

public entity is acting as an administrative body), and Aquatech's sophistication which reduced the unfairness of denying a public law override of the RFP's limitation on damages. There was also some discussion of AEP's involvement having been on the Alberta Parks side of the Ministry, as opposed to the Alberta Environment side, presumably relevant insofar as Alberta Parks is service-provision focussed (i.e. private in nature) whereas Alberta Environment is policy focussed (i.e. public in nature).

Considerations in favour of Judicial Review included the broad public impact of the management of expansive water treatment facilities, including the relevance of environmental and public safety considerations; the fact that AEP was acting as agent for the Crown (and therefore owed a duty of fairness and transparency); and the limitation of AEP's discretion by procurement protocols established in trade agreements.

Once engaged in the Judicial Review analysis, deWit J. sought to determine whether the H20 proposal was non-compliant. Ultimately, the RFP was interpreted as requiring a commitment to retain five certified operators, but that the provision of specific names was optional. H20 had committed to retain qualified operators, so the H20 bid was compliant. Alternatively, the Court was prepared to hold that the RFP provided AEP with the authority to waive any minor or inconsequential noncompliance, and that any noncompliance in the circumstances was minor or inconsequential.

Aquatech's application for Judicial Review was dismissed.

BRODYLO FARMS LTD V CALGARY (CITY), 2019 ABQB 123 (SULLIVAN J)
Rule 3.15 (Originating Application for Judicial Review)

The Applicants filed an Originating Application for an Order quashing a City of Calgary bylaw which adopted a proposed Area Structure Plan for the proposed community of Providence.

One of the issues the Court was required to resolve was the applicable time limit for filing an Originating Application for this relief. Section 537 of the *Municipal Government Act*, RSA 2000, c M-26 (*"MGA"*) sets a 60 day time limit for Applications declaring a bylaw to be invalid. However, Rule 3.15(2) sets a 6 month timeline for Applications for Judicial Review. This Application was filed more than 60 days but less than 6 months after the impugned bylaw was passed.

The Court clarified that the procedural grounds for Judicial Review fall outside of section 537 of the *MGA*. In this case, some of the arguments raised by the Applicants related to allegations of an apprehension of bias which the Court ruled were not barred by the time limit in section 537. The Court ruled that the remaining grounds raised in the Application were in fact barred by the *MGA*.

The Application was granted. Sullivan J. concluded that the Council's interpretation of the *MGA*, and therefore its passing of the Bylaw, was patently unreasonable in the circumstances. The parties were then invited to speak to Costs within 60 days if they could not agree.

DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2019 ABQB 58 (MASTER ROBERTSON)
Rules 3.39 (Judgment for Debt or Liquidated Demand), 3.40 (Continuation of Action Following Judgment), 3.65 (Permission of Court to Amend Before or After Close of Pleadings), 3.74 Adding, Removing or Substituting Parties After Close of Pleadings), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Plaintiff applied to amend its Statement of Claim to add two new Defendants and to add claims of misrepresentation, fraudulent conveyance, and piercing the corporate veil as against those Defendants. The Statement of Claim originated as seeking to enforce a corporate guarantee given by the Defendant, Primewest Capital Corp. ("Primewest"). The Plaintiff obtained a Consent Judgment against Primewest in 2012, and the Action continued against Primewest's sole corporate shareholder Bar-N Ghost Pine Ranch Ltd. ("Bar-N"). The Plaintiff alleged that in attempting to enforce the Consent Judgment, it was discovered that Primewest was an empty shell, whose assets were transferred to another related company and ultimately

sold. The proposed amendments in effect sought to follow the assets (or their value) which Primewest owned when it gave the corporate guarantee. The proposed Defendants were a related corporation to Primewest and Bar-N, as well as the sole director of all of these corporations, Greg Noval ("Mr. Noval").

Master Robertson noted that the classic rule for amendments sets a low bar, which are subject to the four major exceptions outlined in *Dow Chemical Canada Inc v Nova Chemicals*, 2010 ABQB 524: where the amendments are i) prejudicial not compensable in Costs, ii) hopeless, iii) limitations barred, or iv) brought in bad faith for not having been plead in the first instance. The Defendants asserted that all four exceptions applied.

The proposed Defendants argued that substantial prejudice would result because they may have defended differently and provided different evidence had they known Judgment was being sought against the proposed Defendants in the first instance, but they had now been deprived of that opportunity. Master Robertson dismissed these arguments on the basis that the proposed Defendants had full knowledge of the original claim and were intimately involved in conducting the defence of the original Action. Master Robertson also noted that the substantial passage of time can give rise to the presumption of prejudice, however, the passage of time in this case and the nature of the amendments did not create that presumption here.

The proposed Defendants asserted that the amendments were hopeless because a creditor is prohibited from pursing a principal if they have first taken Judgment against the agent. Master Robertson noted that this was the case at common law, though noted that the concerns which gave rise to the principle "seem more theoretical than real in today's world, and in light of [R]ules 3.39 and 3.40…", as Rule 3.39 permits a Plaintiff to enter Default Judgment against a Defendant who has failed to enter a Defence or Demand for Notice, and Rule 3.40 permits the Plaintiff to continue the Action against any remaining Defendant. These Rules therefore created the possibility for multiple Judgments in potentially varying amounts (as contractual interest would cease as against the defaulting Defendant but not the others) for the same debt. Notwithstanding this, Master Robertson held that the common law continued to apply such that a creditor who has taken Judgment against an agent is prohibited from subsequently advancing a claim against the undisclosed principal. Master Robertson noted however, that this did not prohibit claims relating to lifting the corporate veil or claims relating to a party having specifically assuming the debt the Plaintiff sought Judgment over.

Master Robertson found that the Plaintiff, or its counsel, had knowledge of the material facts relating to the claims for misrepresentation and fraudulent conveyance at the very latest when it took enforcement steps against Primewest in 2012. Accordingly, these claims were limitations barred. Master Robertson held that section 6 of the *Limitations Act*, RSA 2000, c L-12 was inapplicable to the proposed amendments as the proposed new Defendants must be shown to have sufficient knowledge of the added claim. Master Robertson pointed out that if the proposed amended claims were really mere attempts to apply the Judgment in the original claim against the proposed Defendants, the correct procedure was to apply to set the original Judgment aside, but here, the Plaintiff was attempting to re-define the claim and "paste it onto enforcement proceedings". As for the claims of lifting the corporate veil and assumption of liabilities however, new evidence had come to light during the enforcement proceedings which suggested that those claims had merit and the material information was discovered within the 2 year limitation period.

Master Robertson found that there was no evidence of bad faith in the Plaintiff's proposed amendments, as the allegations had evolved as further information was obtained (as opposed to being "a military about-face"). Master Robertson also noted that the evidence presented regarding the allegations of fraud did not meet the heightened evidentiary threshold required to amend to allege fraud. Moreover, the proposed amendments did not provide particulars of the fraud as required by Rule 13.7, and thus, were offside of the technical requirements of the Rules.

Master Robertson allowed the amendments to the extent they related to claims for lifting the corporate veil and

that the original debt had been assumed by the other corporations, as well as claims for punitive and aggravated damages, but allowed for the Plaintiff to provide a revised Amended Statement of Claim which was not intertwined with the disallowed amendments relating to misrepresentation and fraud. Master Robertson noted that per Rule 13.6 a pleading is required to be succinct, and that "the thrust of a claim gets lost when too much detail is recited".

CARBONE V BURNETT, 2019 ABQB 98 (HOLLINS J)
Rules 3.62 (Amending Pleadings) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff, Carbone, applied to amend her pleadings in regards to two Actions filed against two lawyers, McMahon and Burnett. The lawyers had defended a medical malpractice suit filed by Carbone. After the medical malpractice suit was dismissed, Carbone filed an individual claim against each of McMahon and Burnett, essentially alleging that they had conducted the prior litigation in a malicious matter. McMahon and Burnett cross-applied to strike both Statements of Claim pursuant to Rule 3.68.

The Court confirmed that Rule 3.68 allows the Court to strike a claim or any part of a claim if: the pleading discloses no reasonable claim; is frivolous, irrelevant or improper; or constitutes an abuse of process. Furthermore, the Court confirmed that the threshold for striking pleadings is high. It must be established that the claims are "bound to fail."

Hollins J. ruled that both of the Plaintiff's Statements of Claim failed all three grounds set out in Rule 3.68. The Plaintiff's claims included numerous allegations of misconduct against McMahon and Burnett but no facts that would support an independent cause of action. Moreover, the Court ruled that attempts to re-litigate settled matters in a manner that arguably goes beyond *res judicata* and into vexatious litigation, and could be considered an abuse of process.

Despite these determinations, Hollins J. did canvass the Rules governing amending pleadings. Under Rule 3.62(1)(b), proposed amendments are generally allowed unless: the amendment would cause serious prejudice not compensable in Costs; the amendment requested is hopeless (in other words, would have been struck if pleaded originally); the amendment is sought after the expiry of the applicable limitation period; or there is an element of bad faith associated with the Plaintiff's failure to plead the amendments requested at the first instance.

The Plaintiff's proposed amendments consisted of three types of claims: malicious conduct of the Defendants in the previous Action, breach of privacy, and defamation. Hollins J. denied all of the proposed amendments primarily on the basis that they were hopeless; they would have been struck under Rule 3.68 even if they had been pled in the first instance. The Court also noted that the Rules require that the particulars of claims for defamation and conspiracy be included in a Statement of Claim, yet the Plaintiff provided no factual basis for her claim of defamation.

The Plaintiff's Application to amend was dismissed and both of her Statements of Claim against the Defendants were struck.

LABONTE V ALBERTA HEALTH SERVICES, 2019 ABQB 41 (THOMAS J)
Rule 3.68 (Court Options To Deal with Significant Deficiencies)

The self-represented Plaintiff initiated two Actions (the "Actions") which were each identified by the Court Clerks as an Apparently Vexatious Application or Proceeding ("AVAP") pursuant to Civil Practice Note No. 7 ("Practice Note 7"). Practice Note 7 sets out a "show cause" procedure where the Court may identify an Action as an AVAP, and issue a written Decision which identifies the apparent defect(s) which may be a basis to strike an Action under Rule 3.68. The party who filed the AVAP then has 14 days within which to file and serve written submissions up to ten pages in length which demonstrates why the AVAP is a legitimate Action which should be permitted to continue.

One Action at issue advanced the bare allegation of an attempted murder apparently conducted by two undercover

Edmonton Police Officers, and sought $10,000,000 in general damages ("EPS Action"). The second Action alleged that the Plaintiff was being held and forcibly medicated by Alberta Health Services against his will, and without legal authority ("AHS Action"). The AHS Action attached a "fee schedule" which purported to set out a unilateral contract where the Plaintiff charged fees for any apparent transgressions, ranging from $2,000,000 to $10,000,000 per transgression.

Justice Thomas found that both Actions demonstrated indicia of abusive or vexatious litigation, including that they lacked any alleged facts to support bare allegations, were incoherent, and appeared to be predicated on Organized Pseudolegal Commercial Arguments as set out in *Meads v Meads*, 2012 ABQB 571, including apparent attempts at intimidation through the attaching of the "fee schedule". Justice Thomas held that the Actions were AVAPs, ordered an immediate Stay in the Actions, and directed that the Actions be subject to the show cause procedure set out by Practice Note 7.

WILCOX V ALBERTA, 2019 ABQB 60 (HENDERSON J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

On January 18, 2019, Wayne Wilcox ("Mr. Wilcox"), a person detained in the Edmonton Remand Centre ("ERC"), filed a document titled "Originating Application for a Writ of *Habeas Corpus Ad Subjiciedum"* (the "Originating Application"). The Originating Application was grounded in the argument that, since his admittance into ERC, Mr. Wilcox had been held in administrative segregation. Mr. Wilcox asserted that this status caused his liberties to be further restricted at ERC from that of the other ERC inmates.

The Originating Application made considerable allegations against the ERC and its operators, but failed to attach a supporting Affidavit. Justice Henderson emphasized the importance and requirement of the Court to give priority to any application for *habeas corpus*, given the unique status of this remedy in the UK common law tradition as a swift, summary mechanism by which to evaluate the alleged illegality of a detention. Henderson J. reviewed the applicable Rule 3.68 and the implications of Civil Practice Note No. 7, a document-based "show cause" process ("The Procedure"), by which to evaluate whether Mr. Wilcox's Originating Application should be struck out per Rule 3.68.

The Procedure, as outlined by Justice Henderson, permits a document-only "show cause" mechanism where a Court filing may be reviewed per Rule 3.68 to evaluate whether that filing constitutes an "Apparently Vexatious Application or Proceeding" ("AVAP") as that term is defined in Civil Practice Note No. 7. Henderson J. explained that if a pleading is determined to be an AVAP the Court issues a first written Decision that identifies the apparent defect(s) which may be a basis to apply Rule 3.68 and strike out the AVAP filing. The party who filed the AVAP is then given an opportunity to, within 14 days, provide the Court with a written submission to demonstrate why the AVAP is a legitimate Action and should be permitted to continue.

Justice Henderson reviewed the facts surrounding the Originating Application and concluded that the Originating Application did not appear to identify a deprivation of liberty that is subject to review by *habeas corpus*, and therefore should be struck per Rule 3.68 as a hopeless proceeding. Additionally, His Lordship found that the Originating Application was not supported by any evidence as Mr. Wilcox failed to file an Affidavit.

Justice Henderson concluded by finding that the Originating Application appeared to be futile and an abuse of Court processes. Accordingly, Henderson J. provided Mr. Wilcox with 14 days to prepare a written submission, per Civil Practice Note No. 7.

BILEY V SHERWOOD FORD SALES LIMITED, 2019 ABQB 95 (KENDELL J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 14.5 (Appeals Only with Permission)

The Defendant, Sherwood Ford Sales Limited, brought an Application for an Order declaring the Plaintiff a vexatious litigant, striking the Action, striking two related Actions brought by the Plaintiff against the Defendant, and restricting the Plaintiff from further Court access.

The Court first engaged the retrospective inquiry as to whether the Plaintiff was a vexatious litigant. Various indicia of abusive litigation were reviewed, with multiple indicia identified as extant, leading the Court to conclude that the Plaintiff was a vexatious litigant. With abuse established, the Court then considered whether the Plaintiff's several claims against the Defendant should be struck pursuant to Rule 3.68. Specific reference was made to Rule 3.68(2) subsections (c) and (d), concerned with the striking of a claim where a commencement document or pleading is "frivolous, irrelevant or improper" or "an abuse of process", respectively. The Court held that regardless of any merit which may have been attributable to the Plaintiff's actions, striking out those Actions was fair and just "since the manner in which he has conducted himself means striking out his litigation is a proportionate response to [his] court misconduct."

The Court then engaged the prospective inquiry regarding further Court access. In the circumstances, the Court was inclined to impose broad restrictions on the Plaintiff. The resulting Order required that the Plaintiff seek leave for any further access before the Provincial Court of Alberta, the Court of Queen's Bench of Alberta, and the Alberta Court of Appeal. It was acknowledged that such an Order was redundant with respect to the Court of Appeal, given Rule 14.5(1)(j) requiring that any litigant declared vexatious in the Court appealed from must obtain permission before filing an Appeal. However, in the interest of assisting the Plaintiff with making informed and focussed Applications for leave, the Court's Order, inclusive of detailed instructions regarding the leave process, covered all Courts.

MIKKELSEN V TRUMAN DEVELOPMENT CORPORATION, 2019 ABQB 112 (WOOLLEY J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Respondent Plaintiff had initiated two Actions in respect of two different joint venture agreements, which were defined by Woolley J. as the "Langdon JVA" and the "Chestermere JVA". After determinations were made in a different Action regarding the Langdon JVA, the Appellant applied to strike portions of the Respondent's Statement of Claim on the basis of issue estoppel.

The Appellant's Application to strike portions of the Statement of Claim had been dismissed by a Master. The Master had also permitted the Respondent to amend his Statement of Claim to incorporate facts included in his Statement of Defence to Counterclaim. The Appellant did not appeal the portion of the Master's Decision permitting the Respondent's amendments, but sought to strike those portions of the Amended Statement of Claim that would be invalid if his issue estoppel argument succeeded.

Woolley J. first explained that the standard of review from a Master's decision is correctness. The issue was whether the Master correctly held portions of the Plaintiff's Statement of Claim should not be struck as an abuse of process pursuant to Rule 3.68(2)(d). Her Ladyship reviewed the test for issue estoppel and then noted that the doctrine of abuse of process prevents claims from being re-litigated even where issue estoppel cannot be established, but where "allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice". To strike portions of a pleading under Rule 3.68(2)(d), it must be "beyond doubt" and "plain and obvious" that the claim will fail.

Here, both Actions were started "almost contemporaneously", and so there could be no suggestion that the portions of the claim at issue were added in order to re-litigate a question that had already been before the Court. That being said, Woolley J. noted it was not impossible for the issues to still be duplicative and constitute an abuse of process. Her Ladyship was "troubled" by the Plaintiff's pursuit of claims that appeared to have little likelihood of success given the outcome of the other Action, but ultimately could not say that the claim would plainly and obviously fail, even if it appeared very unlikely to succeed.

As such, the Appeal was dismissed. While Woolley J. held that Costs of the Application should be in the cause, Her Ladyship noted her "considerable sympathy" for the Appellant's Application and noted that the harm that

would be caused to the Appellant if the claim proceeded but ultimately failed could be addressed through elevated Costs.

BRITISH COLUMBIA (ATTORNEY GENERAL) V ALBERTA (ATTORNEY GENERAL), 2019 ABQB 121 (HALL J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff, Attorney General of British Columbia ("AGBC"), commenced this Action against the Defendant, Alberta (Attorney General) ("AGAB"), seeking a declaration that a piece of Alberta legislation, the *"Preserving Canada's Economic Prosperity Act*, SA P21.5" (the "Act"), was unconstitutional and of no force and effect.

The AGAB filed an Application to strike the Action pursuant to Rule 3.68, arguing that the Action was premature, and the Act had not yet come into force. Therefore, the Defendant, AGAB, argued that the Court had no jurisdiction to consider the viability of the Act.

Hall J. agreed with these arguments made by the AGAB. His Lordship confirmed that the Court may only grant declaratory relief "when the dispute before the court is real and not theoretical." His Lordship ruled that this Action was premature because the Act it impugned was not yet in force but stated that the Action could be recommenced if the Government of Alberta did in fact proclaim the Act in force.

The Application was granted and the parties were invited to speak to Costs at a later date if they could not agree.

BISSKY V MACLEOD, 2019 ABQB 127 (ROOKE ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders) and 13.7 (Pleadings: Other Requirements)

The Court's Complex Litigant Management Counsel drew to the Court's attention the Defamation Action brought by Stephanie Bissky (the "Plaintiff") noting it as an Apparently Vexatious Application or Proceeding ("AVAP"). The Court had designated Rooke A.C.J., per paragraph 5 of Civil Practice Note No. 7, to review AVAPs.

Associate Chief Justice Rooke reviewed the Statement of Claim and noted: (1) that the claim for $5 million in damages was excessive, and not substantiated in any manner by the Statement of Claim; (2) the Statement of Claim did not conform to requirement in Rule 13.7(f) that "[a] pleading must giver particulars of ... defamation"; and (3) the allegations documented in the Statement of Claim appeared to be bald allegations which did not provide an adequate basis on which the Defendant may respond.

On this basis, His Lordship concluded that the Action should be subject to a "show cause" document-based Rule 3.68 review of the Action per Civil Practice Note No. 7 (the "Procedure"). The Procedure permits a Court to evaluate whether an AVAP is unmeritorious, has no prospect of success, or is otherwise abusive and vexatious. Rooke A.C.J. noted that the Plaintiff is given an opportunity to, within 14 days, provide the Court, and serve on the other parties, a written submission that responds to and demonstrates why the AVAP is a legitimate Action and should be permitted to continue.

Further, Associate Chief Justice Rooke found it appropriate that the Plaintiff be made subject of interim Court access restrictions, per Civil Practice Note No. 7, para 7(a). His Lordship ordered that the Court prepare and serve the Interim Court Access Restriction Order and noted that the Plaintiff's approval as to the form of the Order be dispensed with, as per Rule 9.4(2)(c).

BILEY V INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 210, 2019 ABQB 130 (THOMAS J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Court's Complex Litigant Management Counsel drew to Justice Thomas' attention the Action brought by the Plaintiff, Jonathan Karl Wayne Biley ("Mr. Biley"), naming the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, Local 210

(the "Union") and Her Majesty the Queen in Right of the Province of Alberta ("Alberta"), collectively, as the "Defendants" (the "Union Lawsuit").

The Court noted the Union Lawsuit as an Apparently Vexatious Application or Proceeding ("AVAP"). The Court had designated Justice Thomas to review AVAPs. Justice Thomas found that Mr. Biley's allegations were extensive and could be summarized as allegations that: 1) the Union had improperly refused to admit him as a member during his informal employment with the Union; and 2) he had been subject to sexual harassment, discrimination, improper criticism, and bullying.

After reviewing the Union Lawsuit Statement of Claim, Thomas J. was able to conclude that it did exhibit indicia that it was a hopeless and an abusive proceeding. This conclusion included the issue that Mr. Biley made many complaints about events under human rights legislation which could not form the basis of a Claim in tort. His Lordship found that the Action should be subject to a "show cause" document-based Rule 3.68 review per Civil Practice Note No. 7 (the "Procedure").

The Procedure permits a Court to evaluate whether an AVAP is unmeritorious, has no prospect of success, or is otherwise abusive and vexatious. Justice Thomas noted that the Plaintiff was given an opportunity to provide the Court and serve on the other parties, within 14 days, a written submission that responds to and demonstrates why the AVAP is a legitimate Action and should be permitted to continue.

Further, Thomas J. noted that after receipt of Mr. Biley's written submission and the Defendants' written replies, if any, the Court would render its final Decision on whether the Union Lawsuit should be struck out in whole or in part, per Rule 3.68.

RUDICHUK V GENESIS LAND DEVELOPMENT CORP, 2019 ABQB 132 (MARRIOTT J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 6.14 (Appeal from Master's Judgment or Order) and 13.8 (Pleadings: Other Contents)

The Defendant brought an Application to strike the Plaintiffs' Statement of Claim under Rule 3.68(2)(b) on the basis that the Plaintiffs disclosed no reasonable claim. Master Hanebury had dismissed the Application and the Defendants now appealed the decision of Master Hanebury.

Marriott J. noted that under Rule 6.14, Appeals from Master's Decisions are conducted *de novo* and the standard of review is correctness.

The Court noted that Rules 3.68(1)(a) and (2)(b) provide that all or part of a claim may be struck out where it discloses no reasonable cause of Action. As established by the Supreme Court of Canada, a Court should only strike a claim if it is plain and obvious that the pleading discloses no reasonable cause of Action. So long as the Plaintiffs have some chance of success and the claim is arguable, then the Court should allow the matter to proceed to Trial. Also, it is not determinative that the law has not yet recognized a particular claim and Courts should err on the side of permitting a novel, but arguable claim to proceed to Trial.

In applying the test for striking pleadings, the Court may examine a number of factors, including the clarity of the factual pleadings and the existence of case law discussing similar causes of Action. The Court must also assume that the facts as pleaded are true.

The Statement of Claim alleged that the Defendant was negligent and as an alternative pleading, that the Defendant tortiously induced a breach of contract. The Court noted that alternative pleadings are permitted under Rule 13.8. In analyzing the claim, Her Ladyship found that the Statement of Claim disclosed a reasonable cause of action and should not be struck. The Defendants' Appeal of the Master's Decision was dismissed.

FATH V QUADRANT CONSTRUCTION LTD, 2019 ABQB 151 (MASTER SCHLOSSER)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendant renovated the Plaintiff's home pursuant to a construction contract containing a mandatory arbitration clause. Construction deficiencies were discovered in January of 2014 as a result of inspection by an expert. In March of 2014, the Defendant denied responsibility for the deficiencies.

The Plaintiff filed a Statement of Claim on May 2, 2014, but never filed a Notice to Arbitrate. The Defendant filed a Statement of Defence in June of 2014, specifically raising the mandatory arbitration clause as a defence to the Action. The Defendant did not, however, bring an Application for a stay of the Action (pursuant to section 7(1) of the *Arbitration Act*, RSA 2000 c A-43 (the *"Arbitration Act"*)) until April of 2016, just outside of two years following the Defendant's denial of responsibility.

In considering the Application, the Court first acknowledged that section 7(1) of the *Arbitration Act* directs a stay of Court proceedings where the parties have agreed to arbitrate, subject to the exceptions listed in section 7(2). Master Schlosser reasoned that as the limitation period had expired and arbitration had not been commenced, the remedy in play was not merely a stay under the *Arbitration Act*, but rather, the striking of the Statement of Claim pursuant to Rule 3.68 on the ground of limitation. As such, the true issue was whether the section 7(2) exceptions circumscribed strict application of the limitation period.

Though mindful of the unsettled state of the law on this point, Master Schlosser was prepared to consider the section 7(2) exceptions post-limitation. The Court went on to find as fact that the Application had been brought with undue delay (section 7(2)((d)) of the *Arbitration Act*, and that the matter was fit for Summary Judgment (section 7(2)((e)) of the *Arbitration Act* pursuant to Rule 7.3. Accordingly, the Court refused to stay the Action.

In the event that a proper interpretation of the *Arbitration Act* precluded reliance on section 7(2) post-limitation, forcing the Court's loss of jurisdiction over arbitration, Master Schlosser nonetheless held that the Court retained jurisdiction over the Action. Master Schlosser found that the Defendant, through its conduct, waived its right at law or in equity to rely on the arbitration clause, or otherwise attorned to the jurisdiction of the Court.

The Application was dismissed. On account of the unsettled state of the law, each party was to bear its own Costs.

UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2019 ABQB 155 (ROOKE ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

Counsel for Canadian Natural Resources Limited ("CNRL") and Steve Laut ("Laut") sent a letter to the Court (the "Letter") indicating that the Statement of Claim (the "Claim") filed by Gideon Ubah ("Ubah") may be an Apparently Vexatious Application or Proceeding ("AVAP"), and therefore a potential candidate for review by Civil Practice Note No. 7 in accordance with Rule 3.68 (the "Procedure").

The Letter enclosed Court documents showing that the Statement of Claim had the same subject matter as several prior lawsuits filed by Ubah in the Provincial Court of Alberta (the "PC Actions"). Rooke A.C.J. was designated to receive and review AVAPs identified by parties that relate to litigation in the Calgary judicial district. Associate Chief Justice Rooke reviewed the Statement of Claim and found that the allegations made in the PC Actions were the same or similar to those found in the Statement of Claim.

His Lordship noted that Ubah's Statement of Claim appeared to be an abuse of Court processes, and stayed the claim until further notice. Associate Chief Justice Rooke applied the Procedure to the now confirmed AVAP and, in light of Mr. Ubah's involvement in abusive litigation, re-litigation of issues, and conducting duplicative proceedings, concluded that it was appropriate that Mr. Ubah be made

subject to interim Court access restrictions, per Civil Practice Note No. 7, para 7(a). Mr. Ubah's approval of the form of Order from the Court was dispensed with, per Rule 9.4(2)(c).

WILCOX V ALBERTA, 2019 ABQB 201 (THOMAS J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant, who had been detained at the Edmonton Remand Centre, filed an Originating Application for a writ of *habeas corpus*. Justice Thomas first noted that Courts are required to place special priority on *habeas corpus* Applications and to immediately review and evaluate their substance.

In this case, Henderson J. had initially reviewed the Applicant's Originating Application and concluded that it was vexatious and an abuse of process. He therefore implemented Civil Practice Note No. 7 (formerly the Accelerated Habeas Corpus Review Procedure), which is a "document-based 'show cause' procedure" to evaluate whether the Application should be struck pursuant to Rule 3.68 for disclosing no reasonable claim or for being an abuse of process. Pursuant to Civil Practice Note No. 7, the Applicant was given 14 days to submit a written submission, and did so. The Respondent then filed a written reply, and a Hearing was scheduled.

At the Hearing, the Applicant's counsel argued that the Court had "no jurisdiction to initiate a Rule 3.68 procedure" on its own, without another party bringing an Application. Thomas J. disagreed, holding that "there is no statutory requirement" that the process must be initiated by Application. In doing so, His Lordship referred to previous case law holding that the Court has the authority to "evaluate apparently defective pleadings on its own motion", and emphasized the Court's inherent jurisdiction to "terminate abusive and futile litigation".

Next, Thomas J. reviewed the Applicant's Originating Application and Affidavit. His Lordship held that the Applicant had "not identified any deprivation of liberty that is subject to potential review by habeas corpus"; sought an "impossible remedy" that was a collateral attack on previous Court decisions; and that the Applicant's pleadings failed to explain why the Applicant believed his incarceration was arbitrary, procedurally unfair, or otherwise unlawful. His Lordship concluded that the Application was vexatious, and an abuse of process.

The Applicant's counsel also argued that Civil Practice Note No. 7 is unfair to lawyers, because it does not provide for advanced notice to be given when the Court proceeds with the Civil Practice Note No. 7 process. Thomas J. disagreed with this argument and emphasized that lawyers are "responsible for what they file with the Court", and the Civil Practice Note No. 7 process should not come as a surprise.

With respect to Costs, Thomas J. noted that "abuse of *habeas corpus* is a very serious form of litigation misconduct given its disruptive effect on Court function". Given that the Applicant's pleadings were vexatious and an abuse of process, he rejected the Applicant's submissions that reduced Costs should be awarded, and instead ordered that the Applicant pay $1,500.00 in Costs to the Respondent.

LEMAY V STEELE, 2019 ABQB 202 (MICHALYSHYN J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Michalyshyn J. reviewed three Statements of Claim filed by the Plaintiff, Lemay, after being alerted that the claims were Apparently Vexatious Applications or Proceedings ("AVAPs"). Civil Practice Note No. 7 allows the Court to review an AVAP and determine whether it is unmeritorious and has no prospect of success, or is otherwise abusive and vexatious as per Rule 3.68. If any of these criteria are met, the Court will issue a decision identifying the apparent defects which could allow the Court to strike the filing under Rule 3.68. The filing party then has an opportunity to submit written submissions within 14 days to explain why the filing is legitimate and should be maintained.

The Court found that all three of the Statements of Claims filed by Lemay exhibited defects demonstrating abusive or vexatious litigation. None of the three claims contained any

particulars of the breaches alleged by Lemay; they simply contained "bald allegations" of "breach of contract" or "theft of services." Michalyshyn J. confirmed that neither Courts nor litigants are obliged to respond to an Action or an Application where the facts and issues are not identified or discernable.

Michalyshyn J. then stayed the Statements of Claim and invited written submissions from both Lemay and the Defendants named in the Statements of Claim. Following receipt and review of the written submissions, the Court would then determine whether all or any of the Statements of Claim will be struck pursuant to Rule 3.68.

LKD V ALBERTA (CHILD, YOUTH AND FAMILY ENHANCEMENT ACT, DIRECTOR), 2019 ABCA 51 (PAPERNY, VELDHUIS AND HUGHES JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 14.92 (Authority of the Registrar)

The Appellant's child was apprehended by the Director under the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12. Several parties brought private guardianship applications in relation to the child. The Appellant brought a claim for damages against the Director alleging wrongful conduct.

The Director applied to strike the Action as being frivolous, irrelevant, or improper under Rule 3.68(2)(c). The Chambers Judge found that the Appellant's complaint was in contradiction to the findings of fact made in the guardianship Trial. The Chambers Judge concluded that the Action was improper and frivolous and the Appellant's Statement of Claim was struck as a result.

The Appeal was then brought to the attention of the Court for summary determination pursuant to Rule 14.92 in consultation with the Case Management Officer. The Court of Appeal considered the Appellant's grounds of appeal and dismissed the Appellant's Appeal.

TERRIGNO V LITZIUS, 2019 ABCA 100 (MCDONALD, PENTELECHUK AND FEEHAN JJA)
Rule 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings)

The Appellants, Antonietta Terrigno ("Ms. Terrigno") and her son Mike Terrigno ("Mr. Terrigno"), appealed the Chambers Judge's dismissal of their Application to substitute Mr. Terrigno as the Plaintiff to an existing Action pursuant to Rule 3.74 of the Rules.

In the underlying Action, Ms. Terrigno had obtained a Judgment against the Respondent, Tibor Peter Uhrik ("Mr. Uhrik"), in the Provincial Court of Alberta for $29,305.00. Prior to that Judgment being granted, Mr. Uhrik conveyed his interest in his condominium to the Respondent, Lieselotte Litzius ("Ms. Litzius"). Subsequently, Ms. Terrigno commenced the underlying Action in the Court of Queen's Bench of Alberta suing Mr. Uhrik and Ms. Litzius under the *Fraudulent Preferences Act*, RSA 2000, c F-24 and the *Statute of 13 Elizabeth* for having conveyed his interest in the condominium property to Ms. Litzius and thereby attempting to defeat Ms. Terrigno's claim as a creditor.

Ms. Terrigno submitted that she wished to have her son substituted as Plaintiff in the underlying Action because it had become difficult for her to prosecute the Action herself; English was her second language and she lived a good part of the year in Arizona. The Respondents opposed the Application, arguing that the assignments were not effective because they were not absolute or, alternatively, they were done in furtherance of champerty and maintenance, which is generally not prohibited.

The Chambers Judge discussed the difference in wording between rules 3.74(1)(a) and 3.74(1)(b) and noted that rule 3.74(1)(b) applies only to Applications to substitute parties other than a Plaintiff, whereas Rule 3.74(1)(a) relates to adding or substituting a Plaintiff. The Chambers Judge indicated, notwithstanding the low bar for substitution, that the behavior of Mr. Terrigno during the proceedings warranted dismissing the underlying Application. This behaviour was exemplified by an instance

during cross-examination via Skype when Mr. Terrigno's talking in the background resulted in a rescheduling of the examination. Additionally, Mr. Terrigno's email correspondence during the proceedings was described by the Chambers Judge as "[engaging] in improper and abusive communication of a type that would likely see a lawyer reported to the Law Society".

The Court of Appeal noted that, notwithstanding the low bar for substitution, the wording of Rule 3.74(2)(a) is permissive and accordingly, the Chambers Judge is awarded discretion as to whether or not to grant the Application. On appeal, that discretion is afforded a high degree of deference where the exercise of that discretion is not based upon an erroneous principle: *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 36. As such, the Court found that appellate intervention was not warranted, and dismissed the Appeal.

JAGER ESTATE V DEADMAN, 2019 ABCA 99 (KHULLAR JA) Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs – Appeals)

The Applicants, the Deadmans, applied for a Stay of a Decision by the Alberta Court of Queen's Bench which found that the Alberta Court had jurisdiction over this Action which had been filed by the Respondents, the Jagers, following a dispute over investments made in Mexico. The Deadmans were residents of Mexico and appealed the Alberta Court Queen's Bench Decision. The Jagers cross-applied for Security for Costs.

After granting the Deadmans' Application for a Stay, the Court considered the Jagers' Application for Security for Costs. Khullar J.A. confirmed the applicable Rules. Rule 14.67 allows a single Appeal Judge to order Security for Costs and deems an Appeal abandoned where a party does not post Security for Costs when ordered. Rule 4.22 lists the considerations for Security for Costs including a Respondent's ability to pay a Costs award and the enforceability of a Costs award in Alberta.

The Court noted that it is unusual for a Plaintiff to apply for Security for Costs though it is permitted. Where the Plaintiff has applied for Security for Costs, the Plaintiff bears the onus of showing that the requirements have been met. Khullar J.A. ruled that the requirements had not been met in this case. The Jagers did not show that the Deadmans were unlikely to pay a future Costs award. The evidence was that the Deadmans had already paid the Costs awarded by the lower Court and were now appealing that ruling. Moreover, the Court rejected the Jagers' argument that the Deadmans had no assets in Alberta. It was the Jagers who chose Alberta as the jurisdiction for this Action. If they were concerned about the enforceability of a Costs order, they could have chosen another jurisdiction.

The Deadmans' Application for a Stay was granted, and the Jagers' Application for Security for Costs was dismissed.

PARKER V PARKER, 2019 ABCA 114 (GRECKOL JA) Rules 4.22 (Consideration for Security for Costs), 4.28 (Confidentiality of Formal Offer to Settle), 4.33 (Dismissal for Long Delay), 14.42 (Applications to Court of Appeal Panels), 14.45 (Application to Admit New Evidence) and 14.67 (Security for Costs)

The Respondent ("Mr. Parker") applied for an Order for Security for Costs against the Appellant ("Ms. Parker") under Rule 4.22 in advance of Ms. Parker's Appeal. Additionally, Mr. Parker sought that if Ms. Parker failed to pay the Costs by a set date, her Appeal should be struck. Further, Mr. Parker also applied to have parts of Ms. Parker's Factum struck for referring to without prejudice communications under Rule 4.28 and for containing fresh evidence which did not conform with Rules 14.42 and 14.45.

Mr. Parker deposed that Ms. Parker was judgment-proof and had refused to pay any of the previous Costs awarded against her. She had also previously provided financial statements which indicated that she had no exigible assets. Mr. Parker further argued that, in the past year, property belonging to Ms. Parker was transferred to a numbered corporation and thus evaded previous Costs Orders.

Greckol J.A. noted that Rule 14.67(1) permits a single Appeal Judge to order Security for Costs pursuant to Part

4, Division 4 of the Rules. After reviewing the factors for consideration under Rule 4.22, Greckol J.A. found that it was appropriate to require that Security for Costs be posted before the Appeal could proceed given that: (1) it was unlikely that Mr. Parker would be able to recover any of his Costs on Appeal if he was successful unless security was posted; (2) the Appeal was not so meritorious as to make an order for Security for Costs inappropriate; and (3) while Ms. Parker asserted that she would be unable to continue her Appeal if Security for Costs was awarded against her, there was no sworn evidence to support that assertion.

Turning to the issue of striking portions of the Ms. Parker's Factum, Justice Greckol noted that paragraphs of Ms. Parker's Factum did contain information about without prejudice communications that took place during the litigation. Rule 4.28 prohibits sharing information about Formal Offers until either the offer is accepted or a Court has decided the claim. Her Ladyship found that neither a single Judge, nor a full panel, has the power to create exceptions to Rule 4.28. Accordingly, Her Ladyship directed that these paragraphs be struck.

Mr. Parker also argued that parts of the Factum argued that Mr. Parker's Actions should be dismissed for long delay pursuant to Rule 4.33, which was a new argument not before the Trial Judge. Greckol J.A. held that it would be for the Appeal panel to determine if new arguments made on Appeal should be struck.

Justice Greckol also noted that some paragraphs of Ms. Parker's Factum referred to new evidence on Appeal for which no Application had been made. Accordingly, Her Ladyship directed that these paragraphs also be struck. Justice Greckol concluded that the panel that would hear Appeal shall deal with the Costs of the Application.

APPLEBY V SMALLWOOD, 2019 ABQB 114 (BURNS J)
Rules 4.29 (Cost Consequences of Formal Offer to Settle), 10.31 (Court-Ordered Costs Award), 10.32 (Costs in Class Proceeding), 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Defendants, as successful parties in the underlying Action, sought enhanced Costs plus double Costs under Rule 4.29 or in the alternative sought Costs as a percentage of solicitor and client Costs. The Plaintiffs disputed double Costs on the basis that the offer made was not genuine and the Defendants did not beat the Formal Offer.

Rule 10.31 permits the Court to order reasonable and proper Costs after considering the factors in Rule 10.33. In addition, Rule 10.32 sets out factors related to the conduct of the parties that the Court may consider. Burns J. found that the Court has a broad discretion but overall the Costs award must be reasonable.

The Court found that the Trial was not long or complex, and that the litigation was efficiently managed. Both parties were well represented and conducted themselves as they should in the litigation.

In reviewing the case law, the Court noted that in some circumstances, Courts may award Costs beyond Schedule C fees. These circumstances included (a) the importance of the outcome for the parties; (b) whether the successful party incurred significant liability to retain legal counsel; (c) exceptional circumstances; (d) whether the successful party needed to defend her reputation or standing; or (e) whether the issues were complex. Based on these factors, the Court held that Schedule C Costs were not sufficient, and awarded enhanced Costs of double Column 1. Furthermore, the Court found that the Costs Schedule is out of date in terms of value and Costs and should be adjusted for inflation. As such, the Court added a 46.60% gross-up applied to reasonable fees in 2018.

Finally, Burns J. found that the Formal Offer was not genuine and was instead a no-risk litigation strategy. On that basis, Burns J. did not award double Costs.

SCOTT & ASSOCIATES ENGINEERING LTD V GHOST PINE WINDFARM LP, 2019 ABCA 2 (SCHUTZ, CRIGHTON AND STREKAF JJA)
Rule 4.29 (Costs Consequences of Formal Offer to Settle)

The Appellant, Scott, appealed a Decision by a Justice to dismiss its claims against the Respondents for breach of confidence and unjust enrichment only. In addition, Scott also appealed the lower Court's award of Costs against it.

The Panel dismissed the Appeal on the merits in its entirety. However, the Panel did partially grant Scott's Appeal with regards to Costs. The Panel noted that Rule 4.29 entitles a successful party to double Costs following a Formal Offer to Settle; however, it was apparent that the Trial Court inadvertently granted double Costs for steps taken prior to service of the Formal Offer in this case. Therefore, the Costs Appeal was granted insofar as was necessary correct this error.

PORTER V ANYTIME CUSTOM MECHANICAL LTD, 2018 ABQB 1058 (MASTER SMART)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicants applied for dismissal of the Action for long delay pursuant to Rules 4.31 and 4.33. The Action was commenced on June 25, 2007. The long delay Application was set down on March 24, 2017.

On February 24, 2012, the Applicant applied for an Order allowing one of the Applicants to take carriage of the file on behalf of the other Applicant. The Application was dismissed. The Court found that this Application, whether it was successful or not, did nothing to advance to Action.

The Court also found that a related Action was inextricably linked to the present Action, and as such conducted the long delay analysis as though the two Actions were inextricably linked. The issue then, was whether the related Action had been significantly advanced within the relevant three year period.

Ultimately, the Court found that an Application for the preservation of funds and an unsuccessful contempt Application in the related Action did nothing to advance the related Action. Consequently, the Court dismissed the present Action and the Counterclaim in the present Action on the basis of Rule 4.33. The Court held that it was not necessary to consider Rule 4.31 in this matter.

TRADEMARK CALGARY HOLDINGS INC V HUB OIL COMPANY LTD, 2019 ABQB 49 (LABRENZ J)
Rule 4.31 (Application to Deal with Delay)

The Defendant had successfully applied for dismissal of the Action for delay pursuant to Rule 4.31. Dismissal was granted in an oral judgment, with Justice Labrenz reserving jurisdiction to issue written reasons with non-substantive revisions. Those reasons were released as *Trademark Calgary Holdings Inc v Hub Oil Company Ltd*, 2019 ABQB 42.

In the course of providing written reasons, Justice Labrenz became aware that a Master's Decision relied upon in argument, *Nova Pole International Inc v Permasteel Construction Ltd*, 2017 ABQB 521 (*"Nova Pole"*), had been overturned on Appeal to Justice Ross. As such, Justice Labrenz provided Supplemental Reasons to address the development.

In the Supplemental Reasons, Justice Labrenz considered the reliance by the Plaintiff, as well as the Court in *Nova Pole, on Ravvin Holdings Ltd v Ghitter*, 2008 ABCA 208 (*"Ravvin"*). In *Ravvin*, it had been accepted that the presumption of prejudice as a result of delay could be rebutted by raising a legitimate doubt as to the existence of serious prejudice. His Lordship acknowledged Justice Ross' decision that this proposition in *Ravvin* was no longer good law, on account of more recent appellate authority withheld that the presumption of prejudice was only rebutted with proof on a balance of probabilities that significant prejudice had not been suffered. However, Justice Labrenz was clear that neither his analysis nor conclusions in the instant case were affected by the development, as the Plaintiff had failed to raise any doubt as to whether prejudice had been incurred by the Defendant.

MA V KWAN, 2019 ABQB 89 (POELMAN J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff, Ma, commenced the Action seeking relief from oppression pertaining to the operation of a business jointly owned by the parties. The Defendant, Kwan, applied to have the Action dismissed for long delay pursuant to Rule 4.33, filing an initial Application on June 14, 2017, and a subsequent 4.33 Application on October 5, 2018. Both Applications were heard together. Master Prowse held that the first 4.33 Application must fail because only 2 years and 9 months had elapsed between the date the first Application was filed and the last step which advanced the Action, which Master Prowse held to be the sale of the business at issue. Master Prowse held that the second 4.33 Application must fail because the time which had elapsed after the filing of the first 4.33 Application is considered to be institutional delay and cannot be counted against the Respondent to a 4.33 Application. Kwan appealed both rulings.

Justice Poelman confirmed that all issues on Appeal from a Master to a Justice are reviewed on a standard of correctness. Poelman J. also confirmed that the analysis on a 4.33 Application is based on the functional approach which examines substance over form. The functional approach is concerned with the substantive effect on the litigation of the step taken considering the step's nature, value, importance, and quality. Justice Poelman also noted that regard must be had to the pleadings to consider what issues are relevant to the lawsuit to determine whether a particular step has advanced the matter toward resolving some or all of those issues.

Justice Poelman found that the sale of the business resolved issues in the Action pertaining to the day-to-day operation of the business, and narrowed the possible remedies to be the award of monetary damages. Justice Poelman therefore held that the first 4.33 Application must fail as less than 3 years had passed between the sale of the business and the filing of the Application. The Appeal on this ground was dismissed.

Justice Poelman noted that the "filing of a dismissal for long delay application crystalizes the rights of the parties as the date of filing" and that the material date for the running of time is the date the Application was filed, not heard. Kwan argued that the reasoning and approach from Rule 4.31 cases should apply, which use the date the Application was heard, not filed, as the relevant date, noting that the Respondent had obtained a Consent Order after the first Application was filed, demonstrating they continued to attempt to push the Action forward. Justice Poelman found that the mere obtaining of the Consent Order did not demonstrate an "unequivocal intention to prosecute the oppression application", noting that the steps which the Order directed were not actually taken. Further, Justice Poelman held that the test and principles from Rule 4.31 cases were inapplicable to a 4.33 Application, as the consideration in a 4.31 Application is overall delay in the prosecution of an Action, as opposed to a single continuous period of inaction. Poelman J. thus held that the time which elapsed after filing of the first Application could not be counted against the Respondent to the Application. The Appeal on this ground was therefore dismissed.

ALDERSON V THE WAWANESA LIFE INSURANCE COMPANY, 2019 ABQB 96 (MASTER MASON)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff's claim, which alleged wrongful dismissal, denial of disability coverage, and breach of contract, was initiated on March 1, 2012. After a period of delay, the Defendants (who were the Plaintiff's insurer, former employer, and former employer's parent company) applied to dismiss the Action for long delay pursuant to Rule 4.33, or alternatively pursuant to Rule 4.31.

After reviewing the chronology of the Action, Master Mason noted that if three or more years go by with no "significant advance" in the Action, the Court must dismiss the Action pursuant to Rule 4.33(2), unless certain exceptions to the Rule are engaged. Master Mason also noted that the Rule does not provide the Court with discretion; it is mandatory that the Action be dismissed if the conditions of the Rule are met. The strength of the claim, reason for the delay, and

sympathy for the Plaintiff are not factors in the analysis. Ultimately, the Plaintiff is the party responsible for moving his or her claim forward in a timely manner.

The Court should employ a functional approach in determining whether an activity constitutes a "significant advance" that meaningfully brings the litigation forward. In doing so, the Court should consider the "nature, value, importance and quality of the activity", with a focus on the step's substance and effect, and not just its form. Even if a step is required by the Rules, a functional analysis should still be employed to determine whether the step constitutes a "significant advance". Similarly, precedent cases that have found a particular step to be a "significant advance" are not determinative; the analysis should be made within the context of the Action.

The key issue in this case was whether the delivery of Undertaking responses by the corporate representative of two of the Defendants in July 2015 constituted a "significant advance". Master Mason noted that Undertaking responses often advance the Action, in particular where they contain information that was previously unknown to the other party. However, Undertakings that are "merely perfunctory or where nothing hinges on them", may not. Similarly, Undertaking responses that do not address an issue in the dispute; do not "significantly help determine one or more of the issues raised in the pleadings"; do not ascertain further evidence in respect of issues in the pleadings; or undertakings that are incomplete or contain "non-answers", are not likely to significantly advance an Action.

Master Mason reviewed the Undertaking responses at issue, and held that they did not "significantly advance" the Action. A number of the Plaintiff's Undertaking requests had been refused and were never followed up on, and the answers that were provided "add[ed] little if anything to the information already provided at questioning". As such, they did not meaningfully move the litigation forward.

The Action was dismissed pursuant to Rule 4.33(2). Given this result, there was no need for Master Mason to address Rule 4.31.

CWC WELL SERVICES CORP V OPTION INDUSTRIES INC, 2019 ABQB 108 (HALL J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The underlying Action on an Appeal from the Decision of Master Prowse initially involved the Plaintiff, CWC Well Services Inc. ("CWC"), and the Defendants, Maple Leaf Consulting Inc. ("MLC") and Everett M. Gusek ("Gusek") (collectively, the "Defendants").

The Plaintiff alleged that, due to the Defendants' faulty design, a CWC drilling rig collapsed in a windstorm. The Defendants denied the allegations and argued that the collapse occurred due to faulty or improper installation or use of the drilling rig by the Plaintiff. The Defendants brought an Application before Master Prowse to dismiss the Action under Rule 4.33 for delay in prosecution of more than 3 years, and, in the alternative, under Rule 4.31 for inordinate, inexcusable and prejudicial delay (the "Application"). Master Prowse dismissed the Application on both grounds and the Defendants appealed that Decision.

On Appeal, Hall J. noted that the standard of review on an Appeal from the Decision of a Master is correctness and that the Appeal is *de novo*, meaning an Appeal on the record, unless new evidence is provided, which none was. CWC, in the Application and on Appeal, acknowledged that there was a period of delay of some 4 years where CWC did nothing to advance the underlying Action after being provided with the Defendants' Affidavits of Records. However, following the delay, the Defendants had consented to a Litigation Plan. The Litigation Plan was signed by both counsel and was filed with the Court.

Subsequently, Counsel for CWC agreed to a number of adjournments requested by the Defendants. Justice Hall noted that none of these Adjournments occurred at the request of the Plaintiff but rather, Plaintiff's counsel granted them as a matter of courtesy. Justice Hall found that the signing of the Litigation Plan, which entailed agreement to proceed as scheduled therein, constituted proceedings taken since the delay which warranted the Action proceeding pursuant to Rule 4.33(2)(b).

Turning to Rule 4.31, Hall J. found that there had been inordinate and inexcusable delay, however, there is a rebuttable presumption under this Rule. His Lordship found that CWC had rebutted the presumption of prejudice as: a) the lawsuit is about whether the design of the drilling rig was negligent and the design documents continue to be in existence, and b) the only missing documents, which the Defendants claim to be prejudiced by, were lost by the Defendants themselves.

Accordingly, Justice Hall dismissed the Appeal.

PAUL RAINS DESIGN BUILD LTD V CHOMA, 2019 ABQB 187 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 6.3 (Applications Generally)

The several groups of Applicants sought to dismiss two related Actions for delay. The time since commencement of the Actions had spanned nearly 10 years, though in the three years preceding the Application, there had been "continued questioning, document production, an expert attendance and answers to undertakings."

The several groups of Applicants each filed their supporting materials well after having filed their Applications. Relying on Rule 6.3(3) for the proposition that an Application is perfected only once supporting materials are filed, the Respondents argued that the three-year retrospective search for a significant advance should commence from the later filing of the supporting materials, rather than the earlier filing of the Applications. While the Court suggested that this argument may have weight in circumstances where supporting evidence was surprising or unexpected, Master Schlosser was ultimately prepared to hold that the various activities being proposed by the Respondents as significant advances, when viewed collectively under the functional approach, constituted a significant advance. Therefore, there was no need to analyze any particular activity in declining to dismiss the Actions for delay pursuant to Rule 4.33.

Master Schlosser then considered whether dismissal of the Actions was appropriate under Rule 4.31, following the well settled six-part test in *Humphreys v Trebilcock*, 2017 ABCA 116. The first element was satisfied as the Actions had not been advanced to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review. The second element was also satisfied, as the delay had been inordinate. However, the third element was not made out, as the inordinate delay was excusable, if only barely excusable, on the ground that the Respondent was essentially Trial-ready, and the Applicants had consistently delayed in completing discovery. Accordingly, Master Schlosser was not prepared to dismiss the Actions pursuant to Rule 4.31.

In concluding, Master Schlosser suggested terms of a procedural Order that would ensure timely prosecution. Master Schlosser also remarked that the matter appeared suited for summary disposition.

SHAMROCK MAINTENANCE & HOTSPOT SERVICES LTD (SHAMROCK MAINTENANCE & AUTOBODY) V FINNING INTERNATIONAL INC (FINNING CANADA), 2019 ABQB 7 (MASTER SMART)
Rules 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)

The Applicants applied to dismiss the Action for long delay pursuant to Rule 4.33. Alternatively, they sought partial Summary Judgment pursuant to Rule 7.3 respecting portions of the claim against it, which it argued were time-barred by operation of the *Limitations Act*, RSA 2000, c L-12.

The Action was commenced in June 2011 and amended in January 2012. The Applicants argued that no significant advances had occurred in the Action since June 25, 2013, when a Supplemental Affidavit of Records was filed. The Respondent argued that the Action was significantly advanced in January 2015, when it provided an index of invoices (the "Index") to the Applicants, and October 2015, when additional Supplemental Affidavits of Records were filed.

Master Smart first noted that the Court should take a "functional approach" to determining whether a significant advance has occurred. In assessing whether the provision

of the Index constituted a significant advance, the Master noted that the it was not prepared with the assistance of an expert, and while it could be of assistance in providing a concise summary of documents, "no settlement discussions or questioning took place so its value in those respects might be said to have yet to materialize". However, the Supplemental Affidavit of Records filed in October 2015 contained relevant and material records and addressed important outstanding issues in the Action, especially when it was assessed in conjunction with the Index. As such, Master Smart concluded that the provision of the additional Supplementary Affidavit of Records significant advanced the Action, and the Application pursuant to Rule 4.33 was dismissed.

With respect to the issue of limitations, the Applicants argued that the limitation period had expired respecting outstanding balances on 95 of the 103 invoices in issue. The invoices stated that they were due 30 days from their date, and while the Respondent argued that it had an implied arrangement allowing late payment, it furnished no evidence to support its position. Master Smart agreed and dismissed the Respondent's claims with respect to 95 of the 103 invoices it furnished, but did not dismiss the Action as a whole. Given the parties' mixed success, the Master held that they should bare their own Costs.

KIRKNESS V EMBERLEY, 2019 ABQB 159 (LEMA J)
Rule 4.33 (Dismissal for Long Delay)

The Defendant brought an Application under Rule 4.33 to dismiss the Action for delay, alleging that more than three years had passed since the last significant step taken in the Action.

The Court first reviewed case law outlining the principles for applying Rule 4.33. The Plaintiff bears the ultimate responsibility for prosecuting the claim in a timely manner. The Defendant cannot purposively obstruct, stall, or delay the Action. Any three-year period of inactivity will require dismissal of the Action, subject only to an exception where the moving party has participated in steps after the three year period expires. The Rule is mandatory and does not allow for the exercise of discretion.

In analyzing Rule 4.33, it is implied that the time between issuance and service of a Statement of Claim does not count when measuring the period of inactivity. The Rule goes further to provide that once a Statement of Claim is served, the "significant advance" clock is on hold until a defence is filed or one year elapses, whichever is shorter.

In the present case, the Statement of Claim was filed on October 30, 2014, and served on December 7, 2014. The Court held that this time did not count towards the "significant advance" clock. The Defendant had not filed a Statement of Defence, meaning that a full year after service of the Statement of Claim is factored out, bringing the relevant start date of the three year period to December 7, 2015.

The measure of the drop-dead analysis starts from the date that the Application is filed, being November 30, 2018 in this case. Consequently, the Rule 4.33 Application was seven days short of the full three years. Additionally, the Court held that disclosures made by the Plaintiff in 2015 and the Defendant in 2017 would constitute a significant advance of the Action.

The Court dismissed the Defendant's Application both because of the significant advances that occurred in 2015 and 2017, and determined that the drop-dead Application was premature.

THIESSEN V CORBIELL, 2019 ABCA 56 (VELDHUIS, GRECKOL AND PENTELECHUK JJA)
Rule 4.33 (Dismissal for Long Delay)

The Respondent was involved in two motor vehicle accidents in 2007, and brought two separate Actions against the Appellants in respect of each accident.

The Appellants had successfully applied to dismiss the Actions for long delay before a Master, pursuant to Rule 4.33, but the Respondent was then successful in restoring the Actions on appeal to a Chambers Judge, who held that the parties' "efforts to consolidate the actions for trial" had significantly advanced the Actions. The Appellants appealed the matter to the Court of Appeal, arguing that

the Chambers Judge erred in restoring the Actions. In particular, the Appellants argued that the Chambers Judge failed to apply the "functional approach" in holding that the Action had been significantly advanced.

The Court of Appeal first noted that a Chambers Judge's Decision regarding whether an Action has been significantly advance in the Action under Rule 4.33 is entitled to deference. It then noted that there is "no hard and fast rule" about what constitutes a significant advance for the purposes of Rule 4.33, given the fact-specific nature of the question. However, the "functional approach" to answering the question requires that the Chambers Judge assess whether a step has moved the Action forward in a meaningful way, "considering its nature, value, importance and quality", along with the "genuineness and the timing of the step".

The Court of Appeal found that the Chambers Judge's decision disclosed a palpable and overriding error. There was a period of three years – between August 6, 2014, and August 11, 2017 – in which "nothing happened …. to move this [A]ction along". Although the parties had agreed to schedule a mediation, which ultimately did not proceed, doing so did not narrow issues, result in meaningful negotiations, or move the parties towards resolution. As such, the Appeal was allowed.

1218388 ALBERTA LTD V REIFEL COOKE GROUP LIMITED, 2019 ABQB 76 (GROSSE J)
Rules 5.2 (When Something is Relevant and Material), 5.3 (Modification or Waiver of this Part), 5.6 (Form and Content of Affidavit of Records), 5.17 (People Who May be Questioned) and 5.18 (Persons Providing Services to Corporation)

Grosse J. heard the Appeal of Master Farrington's Decision, whereby Master Farrington granted the Respondent's Application to question representatives of Shelby Engineering Ltd. ("Shelby") pursuant to Rule 5.18, and denied the Appellant's application to compel answers to certain Undertakings. Shelby was not a party to the proceedings, but rather was the Appellant's consultant.

Grosse J. considered Rule 5.18 and ultimately disagreed with Master Farrington's conclusion that the Respondent had satisfied the test set out in Rule 5.18 based on the facts. In particular, Her Ladyship considered the fact that the Respondent could obtain the information it required by way of undertakings and noted that the Rules contemplate direct questioning of the Shelby representatives "as the exception or the backstop only."

Her Ladyship further commented on the nature of Rule 5.18 as follows:

> Rule 5.18 is not a third party discovery rule. In Alberta, we do not have pre-trial discovery of mere witnesses. Parties are generally limited to questioning other parties prior to trial. Rules like 5.17(1)(b) and 5.18 are in place in recognition of the fact that a corporation only acts and speaks through people, and often, relevant and material information of a corporation will be spread across multiple people. Rule 5.18 applies only to corporate parties.

Grosse J. also maintained that "the nature of the information sought and the nature of the relationship between the corporate party litigant and the service provider vis à vis that information" will be important considerations in determining whether Rules 5.18(1)(b) and (c) are satisfied. Her Ladyship maintained that reliance on a consultant does not necessarily satisfy the requirements of Rule 5.18.

Justice Grosse then considered the nature of the Undertakings at issue. Some of the Undertakings requested the disclosure of certain documents; at issue was whether the records requested were under the Respondent's control. In that context, Grosse J. considered Rule 5.6, which requires that all relevant and material records that "are or have been under the party's control" be included in a party's Affidavit of Records. Grosse J. also considered Rule 5.2 in the context of some other Undertakings relating to the production of records which "could reasonably be expected to significantly determine one or more of [the] issues." Finally, Grosse J. ordered that the Appellant would

be responsible for reasonable fees and disbursements incurred in retrieving and producing certain of the documents requested, pursuant to Rule 5.3.

PEPPLER ESTATE V LEE, 2019 ABQB 144 (TOPOLNISKI J)
Rules 5.31 (Use of Transcript and Answers to Written Questions) and 8.14 (Unavailable or Unwilling Witness)

The Plaintiff claimed against the Defendant doctor for medical negligence causing paraplegia. During the course of the litigation, the Plaintiff passed away and the Action was continued by his Estate. At Trial, the Plaintiff Estate sought to introduce a partially redacted transcript from the deceased's Questioning pursuant to Rule 8.14, and the Defendant sought to read in passages of his own Questioning transcript for context, pursuant to Rule 5.31.

In respect of the Plaintiff's Questioning transcript, Topolniski J. explained that under Rule 8.14, a Judge may allow a party to read in Questioning evidence if the person questioned has died or is otherwise unavailable, to the extent that the evidence would be admissible if it were given in Court. Pursuant to Rule 8.14(2), a Judge must first consider (a) the general principle that evidence should be provided orally in Court, (b) the thoroughness of the Questioning, and (c) any other appropriate factor, before determining that the evidence should be read in. Pursuant to Rule 8.14(3), permission to read in the evidence may only be granted where the facts ascertained through questioning are "important aspects of the party's case, those facts cannot be proved any other way, and permission is restricted to the portions of the questioning related to those important facts". Topolniski J. further explained that Rule 8.14 balances the interest of both parties and is analogous to the principled exception to the hearsay rule, which allows for hearsay evidence to be admitted at Trial where it is both "necessary" and "reliable". The Rule overrides the requirement to carry out such an analysis where a witness has been questioned but is no longer able to attend Trial because they have died.

Topolniski J. considered the principle of orality and noted that it was necessarily impacted by the deceased's death, which prevented him from giving oral evidence in Court. Her Ladyship observed that the evidence was given under oath, that the witness was "skillfully questioned", and held that even though his credibility could not be "further probed by cross-examination, that does not weigh against admitting the evidence". Topolniski J. also noted that while the deceased's recall was at times "foggy", vague, and inconsistent, those factors impacted the weight given to the evidence rather than its admissibility. Lastly, Her Ladyship held that there were no other factors weighing against admitting the evidence, and therefore allowed its admittance.

With respect to the Defendant's request to read in pages from his Questioning transcript pursuant to Rule 5.31, Topolniski J. explained that the purpose of the Rule is to "ensure the Court is not misled by reading isolated parts of the transcript". Her Ladyship noted that case law interpreting the old Rule 214(4) remains good law. As case law has held, the Rule exists to allow a witness to clarify a passage that may have been taken out of context, or may otherwise be misleading. The test is whether the supplemental read-in is connected with the passages read-in by the opposing party. Her Ladyship noted that "connectedness" to a read-in does not necessarily require adjacency. Rather, the Court should assess whether the proposed supplemental read-in "add[s] the rest of a specific answer" or clarifies a passage taken out of context, in the interest of fairness and having the entire answer of the witness before the Court. Topolniski J. admitted most of the Defendant's proposed read-ins.

BRENENSTUHL V CALDWELL, 2019 ABQB 210 (SHELLEY J)
Rules 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Experts' Reports) and 5.38 (Continuing Obligation on Expert)

During the Trial of this matter, the Plaintiffs objected to the admission of two expert opinions from the Defendants' expert witnesses. First, the Plaintiffs objected to an expert opinion from an expert qualified as a cardiologist in relation to a theory of causation not initially contained in his expert report or rebuttal report. Second, the Plaintiffs objected to evidence regarding turn-around time of a report ordered by a nephrologist.

The Plaintiffs relied on Rules 5.34, 5.35, and 5.38, which expressly deal with requirements in relation to experts' reports, namely, service of experts' reports, sequence of exchange of experts' reports, and the continuing obligation on experts.

The Plaintiffs argued that the cardiologist's theory on causation did not comply with Rule 5.38, which requires that changes in an expert's opinion must be disclosed in writing and immediately served on the other parties. Justice Shelley agreed with the Plaintiffs' interpretation of Rule 5.38: the cardiologist had 12 years to think about the issue of causation, and therefore his development of a new theory on the eve of Trial required more than a vague email sent five days before the Trial commenced. At a minimum, the email ought to have advised that the reason for the change in opinion was that the expert was going to advance a new theory of causation contrary to his prior written opinions. Justice Shelley concluded that permitting this evidence would be prejudicial to the Plaintiffs.

The Plaintiffs similarly objected to the evidence regarding turn-around time of a report on the basis that the expert's rebuttal report did not comment on the issue and that the evidence was unnecessary since other experts already commented on the issue. Justice Shelley held that introducing this evidence would not prejudice the Plaintiffs for two reasons: (i) the issue regarding the turn-around time of the report was a live issue and the Plaintiffs' experts had provided their opinion on it, and (ii) the question objected to was in relation to the expert's personal experience of the turn-around time for receiving such reports while practising as a nephrologist in Alberta in 2000. Therefore, he was not providing a late expert opinion but rather was giving fact evidence. Justice Shelley found that this evidence was factual and not opinion evidence, and concluded that the evidence was admissible.

MELIN V MELIN, 2018 ABQB 1056 (FEEHAN J)
Rule 5.41 (Medical Examinations)

The Applicant, Dale Melin ("Dale") sought, among other remedies, to terminate his son, Brad Melin's ("Brad"), appointment as Attorney for him pursuant to an Enduring Power of Attorney and to remove Brad's role as a director and officer with signing authority of the corporation 324153 Alberta Ltd ("324"). Brad cross-applied seeking, among other remedies, an Order directing that Dale attend for a complete geriatric mental assessment to determine his capacity to make determinations with respect to his legal and business affairs.

Dale was 74 years old with prevailing medical issues. He owned and operated 324 as a franchise auto body shop, CARSTAR, in Leduc, Alberta. Brad had worked for 324 for approximately 20 years. Justice Feehan reviewed the factual and procedural history between the parties and noted that Brad, while holding Power of Attorney for Dale, had acted in ways which constituted oppression, unfairness and unfair disregard for Dale's interests.

Nonetheless, Brad argued that the Court has jurisdiction to order a capacity assessment under various legislation and specifically pursuant to Rule 5.41. Dale argued responsively that the Court does not have jurisdiction to order a capacity assessment under any of those provisions and that the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 provides the only mechanism by which the Court may order a person to undergo a capacity assessment.

In assessing these arguments, Feehan J. found that, pursuant to Rule 5.41(2)(a) and Rule 5.41(4) respectively and on Application, the Court may "in an action in which the mental...condition of a person is at issue...order that a person submit to a mental...medical examination", and if the Plaintiff in an Action has been the subject of a medical examination by a health care professional of his choice, "the Court may order that the plaintiff be the subject of a medical examination by one or more health professionals of the defendant's choice".

Justice Feehan determined that an adult is presumed to have the capacity to make decisions until the contrary is determined. While His Lordship accepted that there are varying levels of capacity, it is not necessary for the donor of a Power of Attorney to be capable of otherwise managing his or her property and affairs on a regular basis in order to have the capacity to make or revoke a Power of

Attorney. What is required is that the donor understands the nature and effect of their actions to effect or revoke that document.

Justice Feehan concluded by finding that the Court does have authority and jurisdiction to issue a capacity assessment pursuant to various Acts, including Rule 5.41, and has inherent jurisdiction and *parens patriae* jurisdiction. Notwithstanding the foregoing, His Lordship found that, under the circumstances, the Court should not and would not exercise its jurisdiction to order a capacity assessment of Dale at this time.

MCELHONE V INDUS SCHOOL, 2019 ABCA 97 (ROWBOTHAM, STREKAF AND ANTONIO JJA)
Rules 5.41 (Medical Examination), 5.42 (Options During Medical Examination) and 5.44 (Conduct of Examination)

The Court of Appeal addressed the test to be applied under Rule 5.44(5) which permits the Court, on application, to impose limits on an examination by a health care professional.

The Action related to a claim by the minor Plaintiff/Respondent for damages arising from permanent physical injury which included loss of vocational potential, general shock and nervous upset. Defendants/Appellants sought an Order under Rule 5.41 requiring the minor Respondent to undergo a vocational assessment with a psychologist. A psychologist is a health care professional as defined by the Rules. The Respondent opposed the Application. The Chambers Judge granted the Order requiring the minor Respondent to attend for an examination but imposed restrictions on: the length of the examination (7 hours), the length of the interview the psychologist could conduct on the minor Respondent (1 hour), on certain questions the psychologist proposed to ask, and on the number of tests which could be conducted. The Chambers Judge further ordered that there could be no standard psychological tests unless agreed to by the Respondent.

The Court of Appeal noted that a basic principle underlying the analysis was that "Courts should be able to rely on the professional integrity and responsibilities of health care professionals, absent evidence which should override such trust".

The Court of Appeal held that the appropriate standard the party seeking to limit the examination had to meet, was demonstrating "a compelling reason for limiting the test". The Panel noted that a compelling reason could include, but was not limited to, risk of injury. This burden is both legal and evidential and is borne by the party seeking to limit the examination.

A compelling reason to limit the examination will exist if the reason for limiting the examination "(a) significantly overrides the objectives of full pre-trial discovery, and (b) does not unfairly prevent the [party seeking the examination] from responding to the claim".

In the present case, the Court of Appeal found that the Respondent failed to present the required evidence to demonstrate a compelling reason to limit the examination, relying solely on the cross-examination transcript of the psychologist which itself did not set out any compelling reason to limit the examination. The Respondent argued that the psychologist was equivocal about whether they would ask the minor a certain question, which indicated this information was therefore unnecessary and intrusive. The Panel noted that the Court must rely on the health care professional's expertise and judgment as to whether the information is necessary.

The Court of Appeal noted that Rule 5.42 provides for other mechanisms for a party to protect themselves when undergoing an examination, outside of seeking limits to an examination. Those mechanisms include including nominating their own health care professional to be present, videotaping and/or making a word-for-word recording of the examination.

The Appeal was allowed.

GREENIDGE V ALLSTATE INSURANCE COMPANY, 2019 ABCA 52 (COSTIGAN, SCHUTZ AND CRIGHTON JJA)
Rule 5.42 (Options during Medical Examination)

The Appellant was injured in an automobile accident, and sought coverage under her automobile insurance policy. The Respondent insurer made some initial payments, but later denied coverage after the Appellant refused to attend any medical examination which was not video recorded. The Appellant brought suit against the insurer, arguing that discontinuation of coverage was a breach of the insurance contract.

At issue was the term of the insurance contract providing that the Appellant "afford to a duly qualified medical practitioner named by the Insurer an opportunity to examine the [Insured]". The Trial Judge found for the Respondent, deciding that the insurance contract provided the Respondent with the right to choose the medical practitioner, and did not provide the Appellant with the right to mandate the medical practitioner's manner of conducting the examination. Moreover, the Trial Judge held that Rule 5.42(1)(b)'s authorization of video recording was not incorporated into the insurance contract by reference, and ought not to be read into the contract.

The Court of Appeal agreed with the Trial Judge and dismissed the Appeal.

INTELLIVIEW TECHNOLOGIES INC V BADAWY, 2019 ABCA 66 (VELDHUIS JA)
Rules 6.9 (How the Court Considers Applications) and 14.5 (Appeals Only with Permission)

The Applicant sought permission to appeal a Chambers Justice's Decision declaring him to be a vexatious litigant. The Applicant raised several procedural concerns with the Respondent's materials and asked for sanctions against the Respondent, including concerns with formatting requirements and that the materials were not filed in time. The Justice was not convinced that any irregularities, if they existed, prejudiced the Applicant, and refused to sanction the Respondent.

Under Rule 14.5, the general test for permission to Appeal as set out in *Thompson v Procrane Inc (Sterling Crane)*, 2016 ABCA 71, considers whether (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. When an Applicant seeks to appeal a vexatious litigant Order, the most important consideration is whether the proposed Appeal raises a serious issue of general importance with a reasonable chance of success.

The Applicant asserted that the Application to have him declared a vexatious litigant was improperly motivated and intended to interfere with an existing Appeal. The Court found that nothing in the evidence supported the Applicant's assertion. The Court further rejected the Applicant's arguments regarding the lower Court's failure to abide by the rules of natural justice.

In response to the Applicant's claim that the Respondent's materials were not served on time, the Chambers Justice found that the materials were served on time, but offered the Applicant the opportunity to proceed by way of written submissions if he was not prepared to proceed with oral arguments. The Court of Appeal found that the Chamber Justice's discretion to proceed on the basis of written submissions alone was within the Justice's discretion under Rule 6.9(1)(c).

The Court dismissed the Applicant's Application for permission to Appeal.

PRESTIGE GRANITE & MARBLE INC V MAILLOT HOMES INC, 2018 ABQB 1040 (HOLLINS J)
Rules 6.14 (Appeal from Master's Judgment or Order), 7.3 (Summary Judgment) and 10.33 (Court Considerations in Making Costs Awards)

This was an Appeal of a Master's Decision which had granted partial Summary Judgment to the Defendant, Maillot, for a portion of fees due under a construction contract with the Plaintiff, Prestige.

The Court began by clarifying the standard of review for an Appeal of a Master's Decision. Hollins J. acknowledged that these Appeals are commonly described as Appeals *de novo*. However, Hollins J. noted that this cannot be entirely correct given that Rule 6.14(3) clearly describes an Appeal from a Master as an Appeal "on the record." Moreover, treating Appeals from Masters as appeals *de novo* relieves litigants of their duty to put their "best foot forward" in a Summary Judgment Application. Litigants can simply use the initial Application as a trial run to have the Master identify potential flaws in argument that can then be fixed on Appeal, which Hollins J. deemed was not appropriate. However, Hollins J. interpreted the authorities as saying that a true appeal "on the record" will be the exception as opposed to the rule because the threshold for introducing new evidence is so low; it need only be relevant and material.

The Court then addressed the threshold for Summary Judgment noting that it will be appropriate where the Court can make a fair and just determination on the merits through a process that: (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.

In this case, Hollins J. ruled that Summary Judgment was not appropriate in the circumstances. The factual disputes between the parties were completely irreconcilable and a Trial was warranted to examine these positions through witness testimony.

The Court granted the Appeal and directed the matter to Trial. On the issue of Costs, the Court noted there have been instances where a successful Appellant has been denied a full Costs award where the Appellant relied on new evidence in the Appeal that was not put before the Master. Hollins J. specifically confirmed that Rule 10.33(2) provides multiple considerations for Costs including whether there has been unnecessary delay in the Action. However, Hollins J. did not find this to have occurred in this case. Therefore, Hollins J. did not disturb the Costs award given by the Master and awarded no Costs on the Appeal.

FIRST NATIONAL FINANCIAL GP CORPORATION V CUTLER, 2019 ABQB 33 (EAMON J)
Rules 6.46 (Referee's Report), 10.26 (Appeal to Judge) and 10.34 (Court-Ordered Assessment of Costs)

Justice Eamon provided His Lordship's reasons in the first of three related Appeals by the Plaintiff, First National Financial GP Corporation ("First National"), under Rule 10.26. First National appealed the Assessment Officer's disallowance of certain disbursements and other charges in the First National's Costs claims in foreclosure Actions brought against the Defendant, Brendan Cutler ("Mr. Cutler").

The Foreclosure Fee and Disbursement Guideline (the "Guidelines") provide fixed amounts for certain routine disbursements and other charges in foreclosure Actions. First National claimed that the Assessment Officer failed to utilize the Guidelines in her assessment. The matter was initially referred by Justice Wilson to Master Farrington as Referee as defined in Rule 6.46. Master Farrington provided recommendations in two reports provided to the Court pursuant to Rule 6.46 (the "Reports"). In the Reports, Master Farrington recommended that some of the Assessment Officer's assessments be varied to align with the Guidelines. On Appeal, First National requested that Justice Eamon adopt the Reports of Master Farrington and allow the Appeal.

At issue on Appeal was: (1) the meaning of the Guidelines; and (2) the impact of the Guidelines on the Assessment Officer's discretion. In dealing with certain procedural issues, Eamon J. noted that many matters are routinely adjourned from a busy morning chambers list and the Judge adjourning the matter is seldom seized of that matter. As such, Justice Eamon found that Justice Wilson was not seized with the matter. Additionally, Eamon J. found that Rule 6.46 permits the Court to determine whether to adopt reports provided under Rule 6.46 and the Court is thereby not bound by the conclusions of the Reports.

Justice Eamon explained that, generally, the Assessment Officer has discretion under the Rules to make an assessment and that an Assessment Officer's discretion

should not be fettered unless a Master or Judge making the relevant Foreclosure Order specifically directs that the Guidelines apply pursuant to Rule 10.34(1).

Nonetheless, Justice Eamon found that the assessments must be reasonably conducted by the Assessment Officer. Specifically, Eamon J. noted that the Guidelines are relevant to the assessment task in two ways: (1) they reflect the appropriate means of conducting the assessment; and (2) they provide relevant evidence which must be considered by the Assessment Officer. Justice Eamon concluded that, at the very least, the Guidelines should have been considered by Assessment Officer and, in light of this conclusion, Justice Eamon remitted certain charges for redetermination.

MONTAGUE V PELLETIER, 2018 ABQB 1047 (CAMPBELL J)
Rule 7.3 (Summary Judgment)

The Plaintiff applied for certification of his Action as a class proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5 (the "CPA"). The Action alleged that the directors of the plaintiff's former employer were liable for unpaid wages to employees. The Defendants both cross-applied for Summary Dismissal of the Action pursuant to Rule 7.3 on the basis that it was time barred under the *Limitations Act*, RSA 2000, c L-12 and under the limitation set out in subsection 119(4) of the Alberta Business Corporations Act, RSA 2000 c B-9.

The Court held that the Action could not be dismissed on a summary basis, and that it should be certified as a class proceeding under the CPA.

With respect to the issue of Summary Dismissal, Justice Campbell first noted that under Rule 7.3(1)(b), Summary Dismissal should be granted where there is no "merit" to the Action. An Action has no "merit" where there is no genuine issue requiring a Trial, because the Judge can determine the issues justly and fairly on a summary basis, or where a defence is so compelling that its likelihood of success is very high. In making its decision, the Court should consider whether it is able to make a determination that is fair and just to all parties on the existing record.

A Trial may be preferred where "there is a reasonable expectation that a better evidentiary record will be created by a trial", in particular where facts are in dispute and issues of credibility cannot be determined summarily. Although the onus is on the Applicant to demonstrate that there is no genuine issue requiring a Trial, the Respondent is expected put its best foot forward or risk dismissal.

In assessing the defences raised by the Defendants, Justice Campbell noted that the Defendants' evidence conflicted at times, and that credibility was a "central issue" in the Action. Campbell J. also found that the legal issues before the Court, including whether one of the Defendants had resigned as a director, and whether he had then become a *de facto* director, required a "contextual and fact-driven inquiry" and the weighing of evidence.

Justice Campbell concluded that a fair and just determination of the issues could not be made on the existing record, and therefore dismissed the Defendants' Applications for Summary Dismissal. Her Ladyship went on to grant the Plaintiff's Application to certify the Action as a class proceeding pursuant to the *CPA*. Costs were awarded to the Plaintiff in accordance with Column 5 of Schedule C.

O'BRIEN V AKITA DRILLING LTD, 2018 ABQB 1062 (MASTER BIRKETT)
Rule 7.3 (Summary Judgment)

The Plaintiff sought Summary Judgment of the entirety of a wrongful dismissal Action. The Defendant asserted the Plaintiff was dismissed for just cause arising out of the Plaintiff's dereliction of duties, attendance issues, and violations of the Defendant's workplace violence policy, including through threatening conduct.

Master Birkett affirmed that Summary Judgment is available where the trier of fact is able to make the necessary findings of fact, and apply the law to the facts on the existing record, and where the process is a proportionate, more expeditious and less expensive means to achieve a just result.

After reviewing the seven Affidavits filed by the parties, transcripts of cross examination, and transcripts from

Questioning, Master Birkett found that the record did not allow for a fair and just determination of the circumstances and conduct underlying the Plaintiff's dismissal. The Plaintiff's Application for Summary Judgment was dismissed.

ROBERTS V EDMONTON NORTHLANDS, 2019 ABQB 9 (NEILSON J)
Rule 7.3 (Summary Judgment)

The Defendants applied for partial Summary Judgment pursuant to Rule 7.3(1)(b), on the basis that some of the Plaintiffs' claims lacked merit. In particular, the Defendants sought to dismiss the Plaintiffs' defamation claim and a constructive dismissal claim advanced by one of the Plaintiffs, Janet A. Roberts.

As background, the Defendants had dismissed their cashiers without cause. The Plaintiffs were some of these cashiers. Upon termination, the Defendants circulated communications internally and externally alleging that some of the cashiers engaged in theft, with the result that they were all let go and were to be replaced by an automated system. Importantly, the Defendants did not identify which of the cashiers engaged in theft. In support of this position, the Defendants eluded to audits, though none of those audits referred to theft by the cashiers generally or the Plaintiffs specifically.

Neilson J. reviewed the case law on Summary Judgment and found that there are conflicting cases on the required standard of proof for Summary Judgment. However, His Lordship found that regardless of the test to be applied, the Defendants failed to prove that the claims at issue had no merit. Further, Neilson J. held that there were issues of fact and credibility that could not be resolved summarily. As such, upon canvassing the claims and possible defences at issue, Neilson J. ultimately denied the Application for partial Summary Judgment.

His Lordship awarded a single set of Costs for the Application under Column 5 of Schedule C along with reasonable disbursements.

O'CHIESE ENERGY LIMITED PARTNERSHIP V BELLATRIX EXPLORATION LTD, 2019 ABQB 53 (MASTER FARRINGTON)
Rule 7.3 (Summary Judgment)

This Decision was heard prior to *Weir-Jones Technical Services v Purolator Courier Ltd.*, 2019 ABCA 49.

The Applicant applied for Summary Judgment pursuant to Rule 7.3. The issue was whether the Respondent had an arguable claim to a 15% working interest in the dispute facilities that should survive a Summary Dismissal Application.

Master Farrington considered the fact that there was a divergence from the Court of Appeal as to the standard of proof necessary in Summary Judgment Applications. The Master found that in *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125, the standard of proof was on a balance of probabilities. However, in *Rotzang v CIBC World Markets Inc.*, 2018 ABCA 153 and *Whissel Contracting Ltd. v Calgary (City)*, 2018 ABCA 204, the Court of Appeal held that the standard of proof required that the moving party's position be unassailable or so compelling that its likelihood of success if very high and the non-moving party's likelihood of success is very low. Master Farrington held that his conclusion would be the same regardless of which standard of proof he applied.

Master Farrington first commented on which standard of proof he thought should apply in Summary Judgment Applications. The Master observed that if we assume that the hypothetical case was a close one, where probable success would be narrow for either party, then that hypothetical case would be decided on a balance of probabilities. Being successful on a balance of probabilities does not mean that the successful party would be successful each time the hypnotical case was decided, but rather that the successful party would only win slightly more than half of the time. This is the case since the judicial system is not a perfect one, and different Judges would not reach the same conclusion every time.

Master Farrington found that the balance of probabilities standard was not one that should be applied, since the

purpose of Summary Judgment Applications is to predict the final result of an Action, and decide when a Trial is not appropriate. Given this purpose, the Master suggested that the "unassailable" standard best captures the nature and purpose of a Summary Judgment Application.

The Master also observed that deciding Summary Judgment applications at narrow levels of proof inevitably leads to more Appeals of Summary Judgment Decisions that are potentially tangential to the ultimate resolution of the Action because the cases are less predictable at that level of confidence, and also contrary to the principles set out in *Hryniak v Mauldin*, 2014 SCC 7.

In analyzing the facts, Master Farrington was of the view that the agreements in question did not go so far as to atomically provide the Respondent with a 15% working interest carved out of the Applicant's partial working interest in the facilities. The Master was satisfied that the record was sufficient to deal with the disputed facilities issue. The Master also noted that sometimes, partial Summary Judgment does not simplify the issues if the litigation remains complex. However, in the present case, the Master was satisfied that the issues were sufficiently discrete such that partial Summary Dismissal was appropriate and helpful.

The Summary Judgment Application was granted with respect to the claim of the Respondent in the 15% working interest in the dispute facilities.

BF V BF, 2019 ABQB 102 (LEE J)
Rule 7.3 (Summary Judgment)

The Defendant applied for Summarily Dismissal of the Action in which the Plaintiff alleged that three pieces of farm equipment which were registered solely in the Defendant's name were intended to be gifted to the parties' jointly by their late father. The Plaintiff's only evidence beyond his own assertions was that of a handwriting expert which concluded that the late father's signature on the transfer agreements pertaining to the equipment at issue was not genuine. The Defendant presented cheques and records of payment contemporaneous with the transfer agreements matching the values set out in the transfer agreements dating back to 1997, in addition to his own evidence and evidence from the parties' siblings and mother all stating they had no knowledge of the agreement alleged by the Plaintiff.

Justice Lee confirmed that the test for Summary Judgment is set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (*"Weir-Jones"*), where the moving party must demonstrate that there is "no real issue" requiring Trial, while the non moving party need only demonstrate that the record, facts, or law before the Court discloses that the moving party has failed to establish that there was no real issue requiring Trial. Justice Lee noted that there was some evidence which supported the Plaintiff's case, however, that *Weir-Jones* confirms that "the mere presence of some conflicting evidence on the record does not preclude summary disposition" and that what matters is that the Judge is "confident" that the matter can be fairly resolved on the existing record.

Justice Lee found that there was no merit to the claim, as the bulk of the evidence supported the Defendant's position that the equipment was sold to him by his late father. Justice Lee also noted that given the available evidence, even if the Plaintiff had established that the transfer agreements were invalid, the farm equipment would revert to the parties' mother as part of the late father's Estate, and therefore, in no circumstances would the Plaintiff have a claim to the equipment.

The Application for Summary Dismissal was granted.

ALLNUT V HUDSONS SOUTH COMMON LTD, 2019 ABQB 143 (MASTER SMART)
Rule 7.3 (Summary Judgment)

The Plaintiff, Allnut, sued the Defendant, Hudsons, after he was assaulted in a bar operated by Hudsons. The Action was filed pursuant to the *Occupiers' Liability Act*, RSA 2000 c O-4. Allnut applied for Summary Judgment against Hudsons and Hudsons applied for Summary Dismissal against Allnut.

Master Smart reviewed the principles governing Summary Judgment pursuant to Rule 7.3. Summary Judgment will be appropriate when there is no genuine issue for Trial. This will be the case when the process: allows the Judge to make the necessary findings of fact; allows the Judge to apply the law to the facts; and where it is a proportionate, more expeditious and less expensive means to achieve a just result.

Master Smart quoted from *Weir-Jones Technical Services Incorporated v Purolator Ltd.*, 2019 ABCA 49 to summarize the procedural approach for evaluating these three requirements. It is possible for a Judge to make the necessary findings of fact even where the facts are in dispute. Provided the existing record is sufficient for the Judge to make inferences where necessary and to make findings of fact, Summary Judgment may be appropriate. If the Judge cannot make the necessary findings of fact, this is an indication that there is a genuine issue requiring a Trial. Where the facts are sufficiently determinable (as required by the first part of test), applying the law to those facts essentially comes down to a question of law. Therefore, where the facts are sufficiently determinable based on the existing record, or where the case turns on the interpretation of documents, the second part of the test will also generally be met.

Finally, the analysis of whether disposition of a case on a summary basis is a "proportionate, more expeditious and less expensive means to achieve a just result" involves making a final "check" that Summary Judgment (as opposed to a Trial) will not pose any substantive or procedural injustice to either party. The Court always has the discretion to send a matter to Trial even if Summary Judgment might also be possible, but this discretion should not be used to postpone resolution of a dispute when it is possible.

Applying these principles to the facts, Master Smart ruled that Summary Judgment was not appropriate in this case. There was insufficient evidence before the Court to show that Allnut's assaulter was so intoxicated that he presented a "foreseeable risk" to Hudsons' patrons. Moreover, Master Smart stated that evidence of this sort could still be obtained. However, Master Smart also confirmed that a failure to establish Summary Judgment does not necessarily mean that Summary Dismissal is appropriate. And in this case, Master Smart ruled that Summary Dismissal was not appropriate. Hudsons had tendered evidence that it had proper procedures in place for dealing with intoxicated customers; however, there was no evidence before the Court to show that these procedures were actually being followed when Allnut was assaulted.

Both Applications were dismissed with the parties bearing their own Costs.

HPWC 9707 110 STREET LIMITED PARTNERSHIP V FUNDS ADMINISTRATIVE SERVICE INC, 2019 ABQB 167 (FEEHAN J)
Rule 7.3 (Summary Judgment)

The Plaintiff landlord applied for Summary Judgment in respect of its claim for unpaid rent against the Defendant tenant, as well as Summary Dismissal of the claims against it in the Defendant's Counterclaim, both pursuant to Rule 7.3. The Defendant opposed the Applications.

Justice Feehan first explained that Rule 7.3(1) allows a party to apply for summary disposition if there is no defence or merit to a claim or part of a claim, or where the only real issue is the amount to be awarded. Additionally, pursuant to Rule 7.3(3), the Court may dismiss or grant Judgment with respect to a claim or part of a claim, determine the amount to be awarded, or refer part of a claim to Trial or determination by a referee.

His Lordship noted that a five-member panel of the Court of Appeal recently reviewed the law of Summary Judgment in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (*"Weir-Jones"*). Justice Feehan explained that the *Weir-Jones* case confirms the importance of summary disposition as "a proportionate, more expeditious and less expensive means to achieve a just result", which is appropriate where a motions Judge is able to make determinations on the merits based on the record before it. As the Court held in *Weir-Jones*, a case is ideally suited for summary disposition where facts are

"not seriously in dispute and the real question is how the law applies to the facts". That being said, Courts are also able to go slightly further in hearing matters summarily by making findings from the record and drawing necessary inferences. If a fact has no impact on the outcome of the case, then the fact that it may be disputed will not impact the Court's ability to make a summary determination.

Justice Feehan also emphasized that, as explained by the Court of Appeal in *Weir-Jones*, both parties must "put their best foot forward" at a summary disposition Application. The Court should ask whether it is possible to fairly resolve the dispute summarily, and determine whether the moving party has met its burden to show that there is no genuine issue requiring Trial. At a threshold level, "the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication". The presiding Judge must "be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute".

In this case, the record was fulsome, and Justice Feehan was not concerned that determining the issues on a summary basis would cause substantive or procedural injustice to the parties. The facts were not seriously in dispute and therefore the case was "ideally suited for summary disposition". His Lordship determined that the Defendant had breached its lease and was owed damages, but also held that the Defendant was entitled to a set-off against some of the Plaintiff's damages for "inconveniences and defaults" by the Plaintiff, to be determined by agreement between the parties, or if they could not agree, by the Court or a referee.

Costs were awarded to the Plaintiff in accordance with Schedule "C", but Justice Feehan also held that "[C]osts with respect to set-off are reserved until determination of set-off".

JACKLE V CHEVALLIER GEO-CON LTD, 2019 ABQB 190 (SULYMA J)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavits)

The dispute arose after the death of one shareholder of a heavy equipment corporation. The corporation's unanimous shareholder's agreement ("USA") required that the corporation repurchase a deceased owner's shares, in "an amount equal to the amount received by the [c]orporation on the insurance held by it on the life of the deceased [s]hareholder." Following the shareholder's death, the corporation received payment under two separate insurance policies. Those funds were forwarded to the Estate as taxable dividends, though an election could have been made to provide non-taxable dividends, as the corporation's receipt of the insurance proceeds had increased the capital dividend account.

The Plaintiff/Respondent brought a claim for breach of the USA, or in the alternative, oppression of the deceased shareholder's interests. The Defendants/Applicants denied that the USA required the corporation's director to pay insurance proceeds as a non-taxable dividend, and further denied that there could be a reasonable expectation that the corporation pay insurance proceeds as a non-taxable dividend, as the corporation was duty-bound "to preserve the benefit of the increase to the [capital dividend account] for the [c]orporation". A Counterclaim was filed for the amount paid under the second insurance policy, arguing that the payment had been made upon erroneous legal advice. The Defendants/Applicants brought an Application under Rule 7.3 for Summary Dismissal of the Statement of Claim, and Summary Judgment of the Counterclaim.

Justice Sulyma first considered the admissibility of hearsay statements within the parties' Affidavit evidence, in light of Rule 13.18 which precludes final determination based on hearsay. While the Court noted that hearsay evidence may be admissible in responding to an Application for final determination, the Court declined to consider the hearsay advanced by any party.

Her Ladyship then considered summary disposition of the claims pursuant to Rule 7.3. While the parties were in substantial agreement on the relevant law, the Alberta Court of Appeal clarified that law subsequent to the Application but prior to Judgment, in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 (*"Weir-Jones"*). The principles relied upon by the parties were not disturbed by *Weir-Jones*, and that case was not cited.

In reviewing the factual record with respect to the Claim, Justice Sulyma held that the evidence of various parties, and a weighing of various parties' credibility, would be necessary to "make fact findings on representations that relate to advice on the use of insurance proceeds, the payment of such from the [capital dividend account], and the tax free benefit to the estate of the deceased shareholder." As such, Justice Sulyma resolved that Her Ladyship could not make the necessary findings of fact, and moreover, that the evidence was not of the kind that would permit fair and just summary determination.

In reviewing the factual record with respect to the Counterclaim, Justice Sulyma was again not able to make necessary findings of fact, as various parties' representations would need to be ascertained to decide whether an honest belief in a mistake of fact resulted from erroneous legal advice.

The Application for Summary Dismissal of the Statement of Claim and Summary Judgment of the Counterclaim was dismissed.

1680961 ALBERTA LTD V TIRECRAFT WESTERN CANADA LTD, 2019 ABQB 198 (MASTER PROWSE)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiffs applied for Summary Judgment of its claim against the Defendant for unpaid invoices. The Defendants alleged set-off and filed a Counterclaim. The Defendants argued that the accounting records exhibited to the Plaintiffs' Affidavit were hearsay and accordingly, were inadmissible for the purposes of a Summary Judgment Application per Rule 13.18. Master Prowse found that the accounting records met the business records exception to the hearsay rule, and were therefore admissible.

The Defendants also argued that the accounting records were not clear as to which of the Plaintiffs the debt was owed. Master Prowse found that this was not a legitimate defence as all of the companies to which the debt could be owed were parties to the Action, and the debt could be owed to no other entities.

Lastly, the Defendants asserted that they were entitled to set-off due to breaches of their contractual rights, and that it would be unfair to grant Summary Judgment in the Plaintiffs' Action without accounting for the damages claim set out in the Counterclaim. The Defendants' Affidavit however, appended no contract or any corroborating evidence to support the claim that there was a contractual obligation which was breached. Master Prowse noted that a self-serving Affidavit was insufficient to create a triable issue on the claim for set-off. Master Prowse further held that the Judgment would not be stayed pending the outcome of the Counterclaim as 4 years had elapsed from the date the Counterclaim was filed and the Defendant (Plaintiff by Counterclaim) had not sworn an Affidavit of Records nor completed Questioning.

The Application for Summary Judgment was granted.

ABB INC V THURBER, 2019 ABQB 203 (WOOLLEY J)
Rule 7.5 (Application for Judgment by Way of Summary Trial)

The Plaintiff, ABB Inc. ("ABB"), applied for a Summary Trial in relation to the liability of the Defendants, Pronghorn Controls Ltd. ("Pronghorn") and Messrs. Thurber, Bredy, Byron, Franklin, Hicks, Gomez and Szondi (collectively, the "Individual Defendants"). The Defendants all agreed that liability could be properly determined through the Rule 7.5 Summary Trial process; however, they requested that, in the event any of the Defendants were found liable to the Plaintiff, damages be determined through the ordinary Trial process.

The events giving rise to this litigation occurred when the Individual Defendants were unhappy with aspects of

their employment at ABB. The evidence before the Court was unclear with respect to how much coordination and discussion occurred between the Individual Defendants and their decision to leave ABB. The Individual Defendants had left their employment with ABB, *en masse*, for employment with Pronghorn. Following the exodus of its employees, ABB was forced to shut down its operations in the region.

Woolley J. noted that the parties had agreed that the question of liability could be properly determined through the Rule 7.5 process and commended them for doing so. Justice Woolley highlighted that Summary Trial is appropriate where factual questions can be properly resolved through the Summary Trial procedure, and where doing so would not be unjust. Woolley J. found that, in this instance, the factual issues raised by the case could be properly resolved by way of Affidavits and the record before the Court.

After reviewing the record before the Court, Woolley J. found that it was Pronghorn who was approached by the Individual Defendants and not the other way around. Her Ladyship noted that there was no evidence to suggest that Pronghorn had offered the Individual Defendants incentive payments or gifts to encourage them to leave their existing employment. Pronghorn only offered the Individual Defendants jobs and the mere act of doing so did not constitute an inducement for another party to breach its contract.

Justice Woolley noted further that the Individual Defendants did not actually have a contract with ABB but were the subject of a collective agreement. Even so, Her Ladyship found that, if the Individual Defendants did have contractual obligations with ABB, the breach of those obligations would have been limited to the Individual Defendants' failure to give reasonable notice.

Accordingly, Justice Woolley dismissed ABB's Statement of Claim in its entirety.

FORT MCKAY MÉTIS COMMUNITY ASSOCIATION V MORIN, 2019 ABQB 185 (MAH J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant applied to set aside a Noting in Default. The Defendant was served with a Statement of Claim alleging defamation on September 11, 2018. Prior to the expiry of the time to file the Statement of Defence, Plaintiffs' counsel wrote to the Defendant advising her of the consequences of failing to file a Statement of Defence within the timelines prescribed in the Rules, and extended the time for the Defendant to file a Statement of Defence until October 5, 2018, despite not being asked to do so. The Defendant nonetheless failed to file a Statement of Defence, and did not retain counsel until sometime after October 16, 2018. The Defendant testified that she was aware that she was being sued civilly for damages for defamation and had 20 days to file a Statement of Defence, and that she had taken certain steps to obtain information or access the funds to be able to retain a lawyer, though did not attend any consultations or meetings with Legal Aid. The Defendant retained counsel and brought the Application to set aside the Noting in Default within one month of being noted in default.

Justice Mah noted that the test for setting aside a Noting in Default under Rule 9.15 is ultimately rooted in fairness guided by three factors: 1) whether the default is explainable; 2) whether the set-aside Application is made in a timely manner; and 3) whether there is a meritorious defence in the sense of a triable issue of fact or law.

Justice Mah found that the default was not explainable as the Defendant clearly understood that she was being sued civilly for damages for defamation and had to respond within a prescribed time yet failed to do so. Justice Mah also noted that there was no material change in circumstances for the Defendant before and after she retained counsel which would explain or excuse why counsel was not retained earlier.

Justice Mah found that the Application to set aside the Noting in Default was brought in a timely manner, being

within one month of having been noted in default.

Justice Mah further found that the Defendant had failed to demonstrate an arguable defence on the merits of the claim. The claim against the Defendant was based on the Defendant having filmed and posted a video of an individual making defamatory comments about the Plaintiffs and publishing that via her Facebook page. The Defendant argued that the statements were true and therefore not defamatory. Justice Mah noted that the only evidence put forward by the Defendant to support this defence were the original statements made in the video along with the Defendant's sworn statement that she believed them to be true. Justice Mah noted that in a defamation claim, the onus is on the Defendant to prove on a balance of probabilities the truth or falsity of a statement, and that subjective belief – no matter how sincere – is not sufficient. Accordingly, Justice Mah held that there was no arguable defence to the merits of the claim.

With no explanation for the default, and no arguable defence to the merits of the claim, Justice Mah dismissed the Defendant's Application to set aside the Noting in Default.

KHAN V PAUL A KAZAKOFF PROFESSIONAL CORPORATION, 2019 ABQB 168 (WOOLLEY J)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.5 (Retainer Agreements), 10.7 (Contingency Fee Agreement Requirements) and 10.18 (Reference to Court)

The Applicant, Ila Khan ("Ms. Khan"), brought an Application for a review of the charges of her lawyer, Paul A. Kazakoff ("Mr. Kazakoff"), to a Review Officer who referred the issue to the Court for a determination pursuant to Rule 10.18(1). Ms. Khan agreed to sell 80 acres of land in Rocky View, Alberta (the "Property") to a third party. The Property sale was completed and Mr. Kazakoff claimed that he had provided legal services to Ms. Khan in relation to the sale of the Property and was therefore entitled to 5% of the purchase price as a fee for those services based on an oral agreement between the parties (the "Payment").

Ms. Khan and Mr. Kazakoff did not have a written agreement in relation to the Payment. Nonetheless, Mr. Kazakoff asked the Court to find that an agreement did exist and that it ought to be enforced pursuant to Rule 10.2. Mr. Kazakoff argued that it was a percentage fee or commission agreement as contemplated by Rule 10.5 which met the standard of reasonableness imposed by Rule 10.2. These arguments were preceded, prior to being abandoned by Mr. Kazakoff, by the arguments that the Payment was an enforceable contingency agreement under Rule 10.7 or one that could be rendered enforceable by virtue of Rule 10.7(8). The matter was made all the more complicated by the fact that Ms. Khan was an elderly women (85) who saw Mr. Kazakoff as a trusted legal advisor and friend, so much so that Mr. Kazakoff was made the sole beneficiary in her will.

Justice Woolley reviewed the relevant jurisprudence and noted that in assessing an Application under Rule 10.2 a Judge must: (1) apply the criteria listed and provide an explanation as to how they influenced the decision; (2) ensure that those who are obliged to pay for legal services are treated reasonably, taking into account all the circumstances; and (3) that the lawyer who charged the fee bears the burden of persuading the review officer that the amount charged is appropriate.

Woolley J. found that Mr. Kazakoff provided no corroborating evidence in relation to the existence of an agreement for the Payment. Her Ladyship noted that not only was there no written agreement but there was no record of any discussion between Ms. Khan and Mr. Kazakoff about the Payment: the only evidence before the Court as to the existence of an agreement was Mr. Kazakoff's testimony to that effect. Her Ladyship further noted, *inter alia*, that Mr. Kazakoff did not provide the same level of services that would have been provided by a realtor and that, on prior occasions when Mr. Kazakoff had acted for Ms. Khan, of which there were many, each agreement had been in writing.

As such, Justice Woolley dismissed Mr. Kazakoff's claim to any portion of the Payment, granted Ms. Khan's Application, and ordered that Mr. Kazakoff repay the entirety of the Payment with interest and Costs.

LISING V SMITH, 2018 ABQB 1061 (SHELLEY J)
Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges) and 10.24 (Reviewing Lawyer's Charges: Incomplete Services and Particular Events)

The Respondents had retained the Appellant lawyer to assist in an immigration matter. An invoice was issued on October 3, 2017, prior to the commencement of legal services. The services ultimately provided were of minimal value, and ceased altogether in June of 2018, when the Appellant was suspended from the practice of law. Subsequently, the Respondents filed for a Review of the October 3, 2017 invoice. The Review Officer significantly reduced both the legal fees and disbursements that had been charged.

Upon appeal of the Review Officer's decision, the Appellant argued that Rule 10.10(2) precluded a review of lawyer's charges "if 6 months has passed after the date on which the account was sent to the client." While 6 months had passed since dispatch of the October 3, 2017 invoice, the Court declined to accept this argument for several reasons. First, it was not in keeping with the intention of Rule 10.10, which assumes that invoices will be advanced after services are rendered. At the time of the Review in this case, the invoice may have been stale, but legal services had been provided in recent months. Second, the Court identified the applicability of Rule 10.24, which allows for a review of lawyer's charges without reference to a time limitation where a lawyer is suspended (among other potential reasons). Moreover, as a general comment, the Court acknowledged the Law Society of Alberta's *Code of Conduct* provisions addressing lawyer's charges as an aid in interpreting the review process Rules, and in particular, the *Code of Conduct's* expectation of fair and reasonable charges, disclosed in a timely fashion.

In addition, the Appellant argued that the Review Officer did not have a sufficient understanding of the immigration process to rule on the reasonableness of associated legal charges. The Court rejected this argument as there was no complexity to be misunderstood – the evidence established only the partial completion of standard immigration forms that had been provided by the Respondents.

Lastly, the Appellant argued that the Review Officer failed to give effect to the retainer agreement in place. However, the Appellant had not provided the retainer agreement to the Review Officer, despite instructions on the Appointment Notice to do so, and despite the warning on the Appointment Notice of forfeited rights if the retainer agreement was not provided. In any event, the Court found that the Review Officer had discretion to consider a fee unreasonable even if it had been in compliance with the retainer agreement.

HOOPP REALTY INC V AG CLARK HOLDINGS LTD, 2019 ABQB 140 (GILL J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in making Costs Award)

The Applicants, A.G. Clark Holdings Ltd. and Giebelhaus Developments Ltd., carrying on business in partnership with others as Clark Builders (collectively, "Clark Builders"), made an Application for an Order granting Costs in favour of Clark Builders as against the Respondent, HOOPP Realty Inc. ("HOOPP").

The dispute between the parties had a lengthy history dating back to 2002 when HOOPP commenced the Action. Of importance to the Application, Clark Builders had never filed a Statement of Defence or formally participated in the Action. The parties had entered into tolling agreements while they attempted to reach a resolution. During this time, Clark Builders retained various experts to comment on the issues raised against it.

In 2012, Clark Builders applied to strike the Action. That Application was dismissed; however, it was referred back to the Court of Queen's Bench by the Court of Appeal, and after a re-hearing of the matter, the Application to strike was granted. This ruling was upheld on Appeal and leave to Appeal was denied by the Supreme Court.

Contested Bills of Costs were presented and partially paid. However, HOOPP refused to pay the expert costs incurred by Clark Builders which gave rise to this Application. HOOPP argued that these expert costs were incurred before Clark Builders had defended against the Action or

otherwise participated in any formal way, and therefore these Costs are not recoverable pursuant to Rules 10.31 and 10.33. The Court disagreed. Gill J. reiterated that the Court may order a party to pay the reasonable and proper Costs that another party incurred to file an Application or to participate in an Application, proceeding or Action. This may be done after considering the factors listed in Rule 10.33. Clark Builders was forced to participate in the Action after it was named in a Statement of Claim. The fact that it did not file a Statement of Defence did not detract from this. In fact, Clark Builders succeeded in having the entire Action dismissed which was analogous to being successful at Trial.

The Application was granted with Costs.

HKH V JDH, 2019 ABQB 163 (KUBIK J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Plaintiff sought enhanced Costs following a five day custody, parenting, and child support Trial. The separation and divorce was high conflict and the Defendant was self-represented. The child at the centre of the dispute had medical concerns which were the subject of dispute during the Trial. The Defendant refused to admit the child's medical condition or treatment needs, instead demanding the attendance of medical witnesses at Trial. The Defendant also advanced the position of joint custody and shared parenting time despite that position not being found to be reasonable given evidence of domestic violence against the Plaintiff and one of the children, and further aggressive behaviour during supervised access visits. The Defendant also failed to make proper financial disclosure.

Justice Kubik noted that the presumptive position is that the successful party is entitled to their Costs. The issues in dispute in this Application related to whether the Plaintiff was entitled to enhanced Costs, and how the costs of counsel for the child ought to be paid.

Justice Kubik noted that Rule 10.33 requires the Court to consider the degree of success of the parties, importance of the issue, complexity of the Action, and party conduct which tended to shorten the Action. Regarding enhanced Costs, Kubik J. noted that the relevant considerations from Rule 10.33(2) included conduct which unnecessarily lengthened or delayed an Action, a party's refusal to admit anything which should have been admitted, whether any proceeding or step was improper or not in compliance with the Rules, and whether a party has engaged in misconduct.

Justice Kubik noted that although the Defendant was self-represented, self-representation does not empower the litigant to unnecessarily use Court resources to advance unmeritorious positions. The Defendant's failure to make proper admissions regarding the child's medical needs unnecessarily lengthened the Trial, and was not reasonable. Further, the Defendant's position seeking joint custody and equally shared parenting time was unsupported by the evidence or law. Lastly, the Defendant failed to comply with the rules regarding financial disclosure, further adding to the length of the Trial and complexity of the matter. Justice Kubik found that enhanced Costs were appropriate in the circumstances, awarding Costs on the next higher column of Schedule C.

Justice Kubik found that there was no reason to depart from the previously ordered cost split regarding counsel for the child. However, Justice Kubik did find that the costs incurred by counsel for the child as a result of taxation initiated and pursued by the Defendant were solely attributable to the Defendant's conduct, for which the Defendant would be solely responsible.

The Plaintiff's Application for enhanced Costs was granted.

IMPERIAL FINISHING LTD V MODERNO HOMES INC, 2019 ABQB 64 (LABRENZ J)
Rule 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 13.18 (Types of Affidavit)

By a previous Order of Justice Dilts, the Defendants were found to be in Contempt of Court, and were given 30 days to purge the Contempt by paying security into Court. The Defendants failed to do so, and so the Plaintiffs applied to strike the Amended Statement of Defence and Counterclaim

filed by the Defendants, and to enter Judgment in the amounts sought by the Amended Statement of Claim.

Labrenz J. held that the previous Order of Justice Dilts signified that the Court had already concluded beyond a reasonable doubt that each of the Defendants were aware of the clear and unequivocal Order requiring funds be paid into Court, that the failure to pay the funds into Court was intentioned, and that the failure to make payment was not reasonably excused. Labrenz J. accepted that an Order to pay security into Court was not an Order to "pay money" and did not fall into the exception for Contempt of Court under Rule 10.52(3)(a).

The Court then considered the appropriate response for the Contempt of the Defendants and considered Rule 10.53. In doing so, the Court noted that the remedies set out in Rule 10.53 are not exhaustive, and the Court may substitute remedies where appropriate. While striking out pleadings is a drastic procedure, there are two circumstances where such a remedy may be appropriate: (1) where the breach of a Court Order prevents the party from defending an Action; or (2) where the breach constitutes a flouting or flaunting of a judicial Order and demonstrates a persistent failure to obey.

The Court was also presented with some conflicting evidence, and opted not to consider the conflicting evidence due to the unresolved credibility issues. In citing Rule 13.18, Labrenz J. commented that the Rule also operates to prohibit the use of hearsay evidence concerning the conflicting evidence at issue.

When considering the entirety of the evidence in the context of the history of the litigation, it seemed that the Defendant had offered security to the Plaintiff in an attempt to persuade the Plaintiff to forego registration of a lien, which the Plaintiff accepted. Given the history of the proceedings, the Court held that it was appropriate to strike the Amended Statement of Defence and also strike the Counterclaim of one of the Defendants.

STONEY TRIBAL COUNCIL V ENCANA CORPORATION, 2019 ABCA 90 (SCHUTZ, STREKAF AND PENTELECHUK JJA)
Rule 13.6 (Pleadings: General Requirements)

The subject of this Appeal was a Case Management Judge's Order allowing the Appellants, Stony Tribal Council et. al., to amend their Statement of Claim to include a claim of unjust enrichment against the Respondent, Encana Corporation. More specifically, the Appellants objected to a condition attached to the Order granting the amendment. The Order added that the effective date of the unjust enrichment claim for limitations purposes would be September 21, 2012 when a response to a Demand for Particulars was provided, and not September 28, 2001, the date of the previously Amended Statement of Claim adding the Respondent's corporate predecessor as a party. This disparity in timing was impactful because the claim was in regards to oil and gas payments.

The Appellants argued that a claimant is only required to plead facts, not causes of action and that the original 2001 Statement of Claim included the essential elements of unjust enrichment. Therefore, the claim for unjust enrichment should be effective circa September 2001. The Respondent argued that the Case Management Judge had the discretion to grant an amendment to a pleading and should be afforded considerable deference on Appeal.

The Court of Appeal Panel confirmed that the applicable Rule is 13.6(2)(a) which requires that a pleading state the facts on which a party relies, but not the evidence by which the facts are to be proved. The Panel then ruled that the original 2001 Statement of Claim should be interpreted as alleging that the Respondent was enriched by the removal of valuable oil and gas to the corresponding detriment of the Appellant. In short, the elements of unjust enrichment had been previously pled.

As a result, the Panel ruled that there was no reasonable basis for the Case Management Judge to use September 2012 for limitations purposes because the unjust enrichment claim was already adequately pled in the 2001

Amended Statement of Claim. The Appeal was allowed and the Order of the Case Management Judge was amended to delete the condition regarding effective dates.

HEATHER V NENSHI, 2019 ABCA 116 (MCDONALD, GRECKOL AND PENTELECHUK JJA)
Rule 14.4 (Right to Appeal)

The Appellant was a mayoral candidate for the City of Calgary (the "City") in the 2017 election. He appealed an Order of a Chambers Justice which had dismissed his Fiat Application authorizing him to bring Judicial Review for an Order of *quo warranto*, raising the issues of whether the election was "conducted according to law".

Counsel for the City did not take a position on the substantive grounds of Appeal but suggested that a preliminary issue was raised by Rule 14.4(2), which provides that no Appeal is allowed to the Court of Appeal from the dismissal of an Application made without notice to a Court of Queen's Bench Justice. The Court found that the Appellant's Appeal had been brought with notice, since Mayor Nenshi and the City were served.

Despite not relying on Rule 14.4(2) to dismiss the Appeal, the Court of Appeal dismissed the Appeal after considering the substantive grounds of Appeal raised by the Appellant.

SCARLETT V WANG, 2019 ABCA 72 (WAKELING JA)
Rules 14.5 (Appeals Only with Permission), 14.48 (Stay Pending Appeal) and 14.65 (Restoring Appeals)

The Applicant/Appellant applied to restore an Appeal which was struck on July 23, 2018 for failure to file the Appeal record, and was deemed abandoned on January 24, 2019. The Appeal was of an Order of a Justice of the Court of Queen's Bench, hearing an Appeal of a Residential Tenancy Dispute Officer's Order.

Justice Wakeling noted that the test to restore an Appeal under Rule 14.65 requires answering 5 questions: 1) whether the Applicant demonstrated an unwavering intention to prosecute the Appeal between the date the last step in the Appeal was taken and the date it was struck; 2) whether there is an explanation for the failure to meet the Appeal timelines; 3) whether the Applicant moved quickly to cure the defect; 4) whether the Appeal has any prospects of success or is frivolous or hopeless; and 5) whether the restoration of the Appeal will cause the Respondent an unacceptable degree of prejudice. Justice Wakeling noted that the obligation on the Applicant to restore an Appeal deemed abandoned is onerous and "will seldom be discharged".

Justice Wakeling found that the Applicant did not meet any of the tests required, as no evidence was put forward to demonstrate an unwavering intention to prosecute the Appeal, nor to provide extenuating circumstances as to why the timelines were not met. Further, Justice Wakeling held that the Appeal was hopeless as it was barred by the *Residential Tenancy Dispute Resolution Service Regulation*, AR 98/2006 which states that a "decision of the Court of Queen's Bench is final and cannot be further appealed". Wakeling J.A. also noted that the Appeal concerned an amount less than $25,000, and thus required leave to appeal pursuant to Rule 14.5, which had not been granted. Justice Wakeling also found that the Respondents had complied with the initial Order and were entitled to assume the dispute was over.

The Applicant had also sought a Stay pending the Appeal under Rule 14.48, however, Justice Wakeling noted that there was no Appeal (as it had been deemed abandoned), and that the Order sought to be stayed did not require anyone to do or refrain from doing anything, and thus, there was nothing to Stay.

The Application was dismissed.

BEAZER V TOLLESTRUP, 2019 ABCA 101 (HUGHES JA)
Rule 14.5 (Appeals Only with Permission)

The Applicants sought permission to appeal a Costs Decision. If permission to appeal was granted, the Applicants would then argue that the Trial Judge's Decision should be set aside and the Court should grant the Applicants' Costs on a solicitor-client full indemnity basis.

Rule 14.5(1)(e) requires permission to appeal a decision as to Costs only. Prior jurisprudence held that permission to appeal Costs Orders should be granted sparingly. The reason for this was to bring finality to Costs Orders and to conserve the Court of Appeal's time by screening out hopeless Appeals on the issue of Costs alone.

Hughes J.A. confirmed that the test for permission to appeal a Costs award established under the former appellate Rules continues to apply: (i) the Applicant must identify a good, arguable case having enough merit to warrant scrutiny by the Court; (ii) the issues must be important, both to the parties and in general; (iii) the Appeal must have practical utility; and (iv) the Court should consider the effect of delay in proceedings caused by the Appeal.

Hughes J.A. held that the Trial Judge's reasons indicated that he did not view the actions of the Respondent as constituting misconduct that might attract solicitor-client Costs, and that this finding was entitled to deference and showed no reviewable error. Hughes J.A. also found that the Trial Judge proceeded reasonably in finding that the Applicants were not entitled to solicitor-client Costs as contemplated by previously executed mortgage documents, and was also reasonable in applying the usual rule of awarding the successful party Costs on a party and party basis.

Hughes J.A. found that the Applicants had not demonstrated that the proposed Costs Appeal had any arguable merit, and dismissed the Application.

LUX V LUX, 2019 ABCA 95 (KHULLAR JA)
Rules 14.15 (Ordering the Appeal Record), 14.16 (Filing the Appeal Record – Standard Appeals) and 14.47 (Application to Restore an Appeal)

The Applicant sought to restore an Appeal from a Trial Decision dealing with matrimonial property and spousal support. Preparation of the Appeal Record had properly been commenced within 10 days of the filing of the Notice of Appeal in compliance with Rule 14.15. The Applicant, however, failed to file the Appeal Record within four months of the filing of the Notice of Appeal pursuant to Rule 14.16, and the Appeal was struck as a result. Five and a half months after the Appeal was struck, the Applicant applied to restore the Appeal.

The Court first set out the five factors to be considered in restoration of an Appeal, and proceeded to consider each factor in turn. First, with respect to the "timely intention to proceed with an appeal" factor, Justice Khullar considered the Applicant's financial limitations in compiling the Appeal Record, and the Applicant's misguided efforts in transferring the Action to Edmonton, in contrast to the Respondent's emphasis on the incomplete state of the Appeal Record at the time of the Application's hearing, some 10 months after the filing of the Notice of Appeal. Justice Khullar concluded that the Applicant demonstrated a timely intention to proceed with the Appeal.

Second, with respect to the "explanation for delay" factor, Justice Khullar again considered the Applicant's financial hardship, along with his family circumstances, but held that the Appeal Record was prepared in a leisurely fashion, inconsistent with a serious intention to proceed with the Appeal.

Third, with respect to the "reasonable promptness" factor, Justice Khullar considered the filing of the restoration Application late in the six month time period prescribed under Rule 14.47. While such delay was found to be relevant to the intention to proceed with an Appeal, and moreover militated against a finding of "reasonable promptness", Justice Khullar held that the delay in filing the Application was not dispositive of the success of the Application.

Fourth, with respect to the "potential prejudice" factor, Justice Khullar considered the delay caused by the Appeal in the Respondent's use of funds flowing from the Judgment at Trial. Justice Khullar held that restoration would cause further delay, and therefore some prejudice, but not enough prejudice for this factor to be of significant weight.

Fifth, with respect to the "arguable" factor, Justice Khullar considered the Applicant's intent to contest findings of fact, and the challenge that would present by operation of the relevant standard of review. However, the Court also noted that the Applicant need only show that the Appeal

is not "absolutely hopeless or frivolous", and held that the Applicant was successful in satisfying this low bar.

The Application to restore the Appeal was granted, though with imposition of certain deadlines for filing the Appeal Record and Factums. Khullar J.A. directed that should the Applicant fail to meet these deadlines, the Appeal was to be automatically struck.

MYLONAS V KADMAN, 2019 ABCA 39 (VELDHUIS JA) Rules 14.16 (Filing the Appeal Record – Standard Appeals), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

The Applicants applied to restore an Appeal pursuant to Rule 14.47. The Appeal had been struck after the Applicants failed to file their Appeal Record in time, pursuant to Rule 14.16; and was then deemed abandoned pursuant to Rule 14.65(3), as an Application to restore the Appeal was not filed, served, and granted within three months of the Appeal being struck.

Veldhuis J.A. first noted that whether an Appeal has been struck or abandoned, the test for restoring an Appeal requires a consideration of the same factors: (1) whether the Applicant intended to proceed with the Appeal in time; (2) the Applicant's explanation for the defect or delay; (3) whether the Applicant "moved with reasonable promptness" to cure the defect and restore the Appeal; (4) whether the Appeal has arguable merit; and (5) whether the Respondents have suffered prejudice, including due to the length of the delay. Ultimately, the decision is a discretionary one where "no one factor is determinative", and the Court should consider whether all factors together support restoring the Appeal in the interest of justice. However, once an Appeal has not only been struck but also abandoned, the threshold for its restoration is higher.

While Veldhuis J.A. accepted that the Applicants intended to proceed with their Appeal, Her Ladyship held that the other factors did not support its restoration. The Applicants' materials did not refer to a specific error made by the Justice below, their explanation for why they had failed to file their materials in time was not satisfactory, and it was not evident that they had moved with reasonable promptness to cure the defect. Additionally, the overall length of the delay led Her Ladyship "to infer that the [R]espondents have suffered prejudice as a result." As such, the Application to restore the Appeal was dismissed.

VANMAELE V FELTHAM, 2019 ABCA 45 (WATSON JA) Rules 14.16 (Filing the Appeal Record – Standard Appeals), Rule 14.45 (Application to Admit New Evidence) and 14.64 (Failure to Meet Deadlines)

The Applicant, Vanmaele, applied for a Stay of Enforcement of an Order requiring him to vacate property. Vanmaele applied for the Stay pending his Appeal of the Order.

The Court granted Vanmaele the requested Stay and briefly summarized some of the Rules governing Appeals given that Vanmaele was a self-represented litigant and may not have been aware of the process generally. Watson J.A. confirmed that Vanmaele's Appeal would be struck automatically if he had not filed his Appeal Record within four months of filing his Notice of Appeal as stipulated in Rules 14.64 and 14.16(3). Watson J.A. further clarified that if Vanmaele sought to introduce new evidence on the Appeal, he was required to file and serve on the other parties a Notice of Motion seeking to introduce that new evidence, which must be described by properly constituted Affidavits or Statutory Declarations under Rule 14.45.

The Application was granted with no mention of Costs.

JONSSON V LYMER, 2019 ABCA 113 (GRECKOL JA) Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

This was an Application by the National Self-Represented Litigants Project (the "NSRLP") for leave to intervene in an Appeal regarding the Court of Queen's Bench process and test for restricting a litigant's access to the Courts.

Greckol J.A. confirmed that Rules 14.37 and 14.58 allow a single Appellate Judge to permit a party to intervene in an Appeal and to impose conditions on the intervention. Greckol J.A. then confirmed that the Court must assess

whether the proposed intervenor has an interest in the subject matter of the Appeal by assessing: (a) whether the intervenor will be directly and significantly affected by the Appeal's outcome, and (b) if the intervenor will provide some expertise or fresh perspective on the subject matter that will be helpful in resolving the Appeal.

The Court ruled that the NSRLP met both criteria. Its mandate is to further the interests of self-represented litigants and it had conducted numerous studies regarding self-represented litigants in the legal system. Therefore, Greckol J.A. ruled that the NSRLP would be affected by the outcome of the Appeal and that it would bring "an important and distinct perspective to some of the issues" in the Appeal.

The Court noted, however, that there was a concern that allowing NSRLP to intervene would result in new evidence being presented that was not part of the existing record, namely, empirical studies conducted or commissioned by the NSRLP. However, Greckol J.A. ruled that whether or not such new evidence would be admitted should be left to the Appeal Panel to decide.

The Application for leave to intervene was granted.

NORTHERN SUNRISE COUNTY V VIRGINIA HILLS OIL CORP, 2019 ABCA 61 (BIELBY, VELDHUIS AND STREKAF JJA)
Rule 14.74 (Application to Dismiss an Appeal)

Three municipalities appealed an Order made in a bankruptcy and insolvency Action, arguing that they should have been granted priority for tax arrears when the insolvent corporation's assets were distributed. Pursuant to that Order, the Receiver had distributed the insolvent corporation's funds to its secured creditors. The Appellants had not advanced claims as secured creditors within the receivership or bankruptcy, and therefore did not receive funds.

The Respondents (the Receiver and a secured creditor of the insolvent corporation) argued that (1) the Appeal was moot because the insolvent corporation's funds had already been distributed, and (2) that the Appeal was an abuse of process, because the Appellants had failed to attend the hearing at which the distribution Order was made, despite having been given notice (and in fact had been directed to the proposed paragraph included in the Order that they sought to Appeal).

With respect to mootness, the Respondents acknowledged that they should have attended and advanced their position at the hearing, but they argued that the Appeal was "a live controversy and of public importance" which should be heard. The Court of Appeal held that the mere fact that the insolvent corporation's assets had been distributed did not render the Appeal moot.

The Court then considered whether the Appeal constituted an abuse of process, and should therefore be struck pursuant to Rule 14.74(f). It noted, quoting from the Supreme Court of Canada in *Toronto (City) v CUPE, Local 799*, 2003 SCC 63, that the doctrine of abuse of process engages the Courts' inherent power to "prevent the misuse of its procedure, in a way that would be manifestly unfair … or would … bring the administration of justice into disrepute."

The Court decided that the doctrine of *res judicata* did not apply because the parties were not attempting to re-litigate an issue which was the subject of a final decision. While the Order was "final", it contained a right of appeal. Additionally, the Court determined that the Appellants were not estopped from bringing their Appeal, despite having previously advised the Receiver that they would not be making secured claims within the receivership. Although the Court was "troubled" by the Appellants' failure to attend at the initial hearing and found their explanation for not attending "unsatisfactory", it held that the Appeal was not an abuse of process and should not be struck.

The Court of Appeal went on to consider the merits of the Appeal, ultimately determining that the Appeal should be dismissed.