JSS BARRISTERS

RULES

JANUARY 2020

Jensen Shawa Solomon Duguid Hawkes LLP

Volume 2 Issue 16

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

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

1.1
- GOLDSTICK ESTATES (RE), 2019 ABCA 508

1.2
- CUSTOM METAL INSTALLATIONS LTD V WINSPIA WINDOWS (CANADA) INC, 2019 ABQB 732
- TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885
- XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898
- WESLEY V ALBERTA, 2019 ABQB 925
- WOODBRIDGE HOMES INC. V ANDREWS 2019 ABQB 968
- YEHYA V LAS PALMAS ESTATE HOMES LTD, 2019 ABQB 981
- FRASER V JEFFRIES, 2019 ABCA 368
- GOLDSTICK ESTATES (RE), 2019 ABCA 508

1.4
- HAMM V ATTORNEY GENERAL (CANADA), 2019 ABCA 391

2.10
- WESLEY V ALBERTA, 2019 ABQB 925
- WILCOX V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2019 ABCA 385

3.15
- EKSTEEN V UNIVERSITY OF CALGARY, 2019 ABQB 881
- QUAYE V LAW SOCIETY OF ALBERTA, 2019 ABQB 916
- PETER V PUBLIC HEALTH APPEAL BOARD OF ALBERTA, 2019 ABQB 989

3.16
- PETER V PUBLIC HEALTH APPEAL BOARD OF ALBERTA, 2019 ABQB 989

3.22
- EASTERN IRRIGATION DISTRICT V IRRIGATION COUNCIL APPEAL PANEL, 2019 ABQB 809

3.65
- TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885

3.66
- TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885

3.68
- SIMON V CANADA (ATTORNEY GENERAL), 2019 ABQB 750
- FEENEY V CALGARY (POLICE SERVICE), 2019 ABQB 751
- ALBERTA (JUSTICE AND SOLICITOR GENERAL) V BASSETT, 2019 ABQB 759
- WU V CANADA (ATTORNEY GENERAL), 2019 ABQB 796
- MCLEOD V ALBERTA, 2019 ABQB 812
- SMITH V EDMONTON PUBLIC SCHOOL BOARD, 2019 ABQB 825
- SHARIFI-ZANJANI V MACEWAN UNIVERSITY, 2019 ABQB 845
- BELCZOWSKI V REID, 2019 ABQB 847
- FREEMAN V KOOIMAN, 2019 ABQB 857
- EKSTEEN V UNIVERSITY OF CALGARY, 2019 ABQB 881
- FORT MCKAY METIS COMMUNITY ASSOCIATION V METIS NATION OF ALBERTA ASSOCIATION, 2019 ABQB 892
- AIYISA V KASIM ET AL, 2019 ABQB 893

3.68	• QUAYE V LAW SOCIETY OF ALBERTA, 2019 ABQB 916
	• LAM V UNIVERSITY OF CALGARY, 2019 ABQB 923
	• TR V KT, 2019 ABQB 927
	• ON-SITE SOLUTIONS INC V PEDDLE, 2019 ABQB 935
	• SHARIFI-ZANJANI V MACEWAN UNIVERSITY, 2019 ABQB 936
	• RAVENBERG SCHEELAR V MILNE, 2019 ABCA 383
3.72	• ANOKHINA V BANOVIC, 2019 ABQB 774
	• MEYER V ALTEX ENERGY LTD, 2019 ABQB 787
	• FACTORS WESTERN INC V DCR INC, 2019 ABQB 971
3.74	• CONDOMINIUM CORPORATION NO 022 5899 V 499430 ALBERTA LTD, 2019 ABQB 905
	• WESLEY V ALBERTA, 2019 ABQB 925
3.75	• WESLEY V ALBERTA, 2019 ABQB 925

4.2	• FRASER V JEFFRIES, 2019 ABCA 368
4.14	• GOLDSTICK ESTATES (RE), 2019 ABCA 508
4.22	• RANCHER CONSTRUCTION LTD V SCOTT CONSTRUCTION (ALBERTA) LTD, 2019 ABQB 775
	• FREEMAN V KOOIMAN, 2019 ABQB 857
	• NICHOLSON-PHILLIPS V SHELL CANADA LIMITED, 2019 ABQB 929
	• BIDELL EQUIPMENT V CALIBER MIDSTREAM, 2019 ABCA 387
	• GOLDSTICK ESTATES (RE), 2019 ABCA 508
4.23	• GOLDSTICK ESTATES (RE), 2019 ABCA 508
4.24	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 756
4.28	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898
4.29	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 756
	• EDMONTON (POLICE SERVICE) V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2019 ABQB 864
	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898
4.31	• SONG V ALBERTA, 2019 ABQB 789
	• ALDERSON V WAWANESA LIFE INSURANCE COMPANY, 2019 ABQB 894
	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898
	• SMALE V JOOZDANI, 2019 ABQB 909
	• SCHEERSCHMIDT V CHRAPKO-DEIB, 2019 ABQB 928
	• NICHOLSON-PHILLIPS V SHELL CANADA LIMITED, 2019 ABQB 929
	• MID-WEST DESIGN & CONSTRUCTION LTD V JAYCO BUILDERS INC, 2019 ABQB 945
	• FRASER V JEFFRIES, 2019 ABCA 368
4.33	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 756
	• ALDERSON V WAWANESA LIFE INSURANCE COMPANY, 2019 ABQB 894
	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898
	• SCHEERSCHMIDT V CHRAPKO-DEIB, 2019 ABQB 928
	• MID-WEST DESIGN & CONSTRUCTION LTD V JAYCO BUILDERS INC, 2019 ABQB 945
4.34	• BENTLEY V HOOTON, 2019 ABQB 822
	• MARINO (RE), 2019 ABQB 903

5.13	• BEHM V HANSEN, 2019 ABQB 813

5.29	• ALDERSON V WAWANESA LIFE INSURANCE COMPANY, 2019 ABQB 894
5.30	• ANOKHINA V BANOVIC, 2019 ABQB 774
5.31	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898
	• PROLINE PIPE EQUIPMENT INC V PROVINCIAL RENTALS LTD, 2019 ABQB 983

6.3	• DGS V HAS, 2019 ABQB 887
6.8	• 102 STREET DEVELOPMENTS LTD V DERK'S FORMALS LTD, 2019 ABQB 781
6.11	• PROLINE PIPE EQUIPMENT INC V PROVINCIAL RENTALS LTD, 2019 ABQB 983
6.14	• 102 STREET DEVELOPMENTS LTD V DERK'S FORMALS LTD, 2019 ABQB 781
	• MID-WEST DESIGN & CONSTRUCTION LTD V JAYCO BUILDERS INC, 2019 ABQB 945

7.1	• BOOTH V CHRISTENSEN, 2019 ABQB 878
7.2	• ALBERTA (JUSTICE AND SOLICITOR GENERAL) V BASSETT, 2019 ABQB 759
7.3	• FEENEY V CALGARY (POLICE SERVICE), 2019 ABQB 751
	• 102 STREET DEVELOPMENTS LTD V DERK'S FORMALS LTD, 2019 ABQB 781
	• BENTLEY V HOOTON, 2019 ABQB 822
	• BARCLAY V KODIAK HEATING & AIR CONDITIONING LTD, 2019 ABQB 850
	• FREEMAN V KOOIMAN, 2019 ABQB 857
	• MUTH ESTATE, 2019 ABQB 922
	• LAM V UNIVERSITY OF CALGARY, 2019 ABQB 923
	• PROLINE PIPE EQUIPMENT INC V PROVINCIAL RENTALS LTD, 2019 ABQB 983
	• SCHERLE V TREADZ AUTO GROUP INC., 2019 ABQB 987
	• RAVENBERG SCHEELAR V MILNE, 2019 ABCA 383
7.5	• FACTORS WESTERN INC V DCR INC, 2019 ABQB 971
7.8	• FACTORS WESTERN INC V DCR INC, 2019 ABQB 971

8.10	• BEHM V HANSEN, 2019 ABQB 813
8.16	• ANDERSON V HARARI, 2019 ABQB 745

9.2	• JANITEN V MORAN, 2019 ABCA 380
9.4	• SMITH V EDMONTON PUBLIC SCHOOL BOARD, 2019 ABQB 825
	• BELCZOWSKI V REID, 2019 ABQB 847
	• AIYISA V KASIM ET AL, 2019 ABQB 893
	• QUAYE V LAW SOCIETY OF ALBERTA, 2019 ABQB 916
	• SHARIFI-ZANJANI V MACEWAN UNIVERSITY, 2019 ABQB 936
	• JANITEN V MORAN, 2019 ABCA 380
9.13	• BEHM V HANSEN, 2019 ABQB 813
	• WOODBRIDGE HOMES INC. V ANDREWS 2019 ABQB 968
	• CZ V RB, 2019 ABCA 445
9.15	• CUSTOM METAL INSTALLATIONS LTD V WINSPIA WINDOWS (CANADA) INC, 2019 ABQB 732
	• BOOTH V CHRISTENSEN, 2019 ABQB 878
	• ESPENILLA V AYUPAN, 2019 ABCA 493
9.16	• BOOTH V CHRISTENSEN, 2019 ABQB 878

10.10	• RATH AND COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2019 ABQB 949
10.13	• RATH AND COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2019 ABQB 949
10.29	• ESTATE OF MONTGOMERY, 2019 ABQB 833
	• REMINGTON DEVELOPMENT CORPORATION V ENMAX POWER CORPORATION, 2019 ABQB 901
	• RD V LWD, 2019 ABQB 966
	• WOODBRIDGE HOMES INC. V ANDREWS 2019 ABQB 968
	• YEHYA V LAS PALMAS ESTATE HOMES LTD, 2019 ABQB 981
10.30	• WOODBRIDGE HOMES INC. V ANDREWS 2019 ABQB 968
10.31	• ESTATE OF MONTGOMERY, 2019 ABQB 833
	• EDMONTON (POLICE SERVICE) V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2019 ABQB 864
	• TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885
	• RD V LWD, 2019 ABQB 966
	• WOODBRIDGE HOMES INC. V ANDREWS 2019 ABQB 968
10.33	• HOSKINS V HOSKINS 2019 ABQB 777
	• ESTATE OF MONTGOMERY, 2019 ABQB 833
	• EDMONTON (POLICE SERVICE) V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2019 ABQB 864
	• HICKAWAY V RIDDELL KURCZABA ARCHITECTURE ENGINEERING INTERIOR DESIGN LTD, 2019 ABQB 874
	• TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885
	• CORMIER V CORMIER, 2019 ABQB 930
	• RD V LWD, 2019 ABQB 966
	• GOLDSTICK ESTATES (RE), 2019 ABCA 508
10.41	• REMINGTON DEVELOPMENT CORPORATION V ENMAX POWER CORPORATION, 2019 ABQB 901
10.48	• XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 756
10.49	• ESTATE OF MONTGOMERY, 2019 ABQB 833
10.51	• B(RM) V B(DT), 2019 ABQB 826
10.52	• B(RM) V B(DT), 2019 ABQB 826
10.53	• B(RM) V B(DT), 2019 ABQB 826

11.25	• DEADMAN V JAGER ESTATE, 2019 ABCA 481

12.36	• VLN V SRN, 2019 ABQB 849
12.44	• DGS V HAS, 2019 ABQB 887
12.59	• BALISKY V BALISKY, 2019 ABCA 404
12.70	• BOOTH V CHRISTENSEN, 2019 ABQB 878

13.5	• QUAYE V LAW SOCIETY OF ALBERTA, 2019 ABQB 916
	• RATH AND COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2019 ABQB 949
	• PETER V PUBLIC HEALTH APPEAL BOARD OF ALBERTA, 2019 ABQB 989
13.6	• TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885
	• CAMPBELL V PARADISE PETROLEUMS LTD, 2019 ABCA 410
	• WANG V ALBERTA (JUSTICE), 2019 ABCA 507

13.7	• SIMON V CANADA (ATTORNEY GENERAL), 2019 ABQB 750
	• SHARIFI-ZANJANI V MACEWAN UNIVERSITY, 2019 ABQB 845
	• TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885
	• CAMPBELL V PARADISE PETROLEUMS LTD, 2019 ABCA 410
13.18	• BEHM V HANSEN, 2019 ABQB 813
	• CONDOMINIUM CORPORATION NO. 042 5177 V KUZIO, 2019 ABQB 814
	• FROM ESTATE, 2019 ABQB 988
	• FRASER V JEFFRIES, 2019 ABCA 368
13.25	• JANITEN V MORAN, 2019 ABCA 380

14.2	• WILCOX V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2019 ABCA 385
14.4	• BALISKY V BALISKY, 2019 ABCA 404
14.5	• LOKULI V SUPERIOR GENERAL PARTNER INC, 2019 ABCA 446
14.8	• BOKENFOHR V CLAUGHTON, 2019 ABCA 382
	• BALISKY V BALISKY, 2019 ABCA 404
	• AE V ALBERTA (CHILD WELFARE), 2019 ABCA 435
	• FROMHOLD V LACOMBE (COUNTY OF), 2019 ABCA 472
14.12	• CONDOMINIUM CORPORATION NO 022 5899 V 499430 ALBERTA LTD, 2019 ABQB 905
	• RMB V DTB, 2019 ABCA 487
14.18	• BOKENFOHR V CLAUGHTON, 2019 ABCA 382
14.25	• RMB V DTB, 2019 ABCA 487
14.27	• BOKENFOHR V CLAUGHTON, 2019 ABCA 382
14.37	• WILCOX V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2019 ABCA 385
	• HAMM V ATTORNEY GENERAL (CANADA), 2019 ABCA 391
	• JH V ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL), 2019 ABCA 420
	• AE V ALBERTA (CHILD WELFARE), 2019 ABCA 435
	• FROMHOLD V LACOMBE (COUNTY OF), 2019 ABCA 472
	• RMB V DTB, 2019 ABCA 487
14.51	• FROMHOLD V LACOMBE (COUNTY OF), 2019 ABCA 472
14.58	• JH V ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL), 2019 ABCA 420
14.59	• WOODBRIDGE HOMES INC. V ANDREWS 2019 ABQB 968
14.67	• BIDELL EQUIPMENT V CALIBER MIDSTREAM, 2019 ABCA 387
14.73	• BOKENFOHR V CLAUGHTON, 2019 ABCA 382
	• HAMM V ATTORNEY GENERAL (CANADA), 2019 ABCA 391
14.74	• SUN V CHARTERED PROFESSIONAL ACCOUNTANTS OF ALBERTA, 2019 ABCA 495
14.81	• ESPENILLA V AYUPAN, 2019 ABCA 493
14.88	• ESTATE OF MONTGOMERY, 2019 ABQB 833
	• YEHYA V LAS PALMAS ESTATE HOMES LTD, 2019 ABQB 981

15.1	• WESLEY V ALBERTA, 2019 ABQB 925
15.2	• WESLEY V ALBERTA, 2019 ABQB 925
15.6	• WESLEY V ALBERTA, 2019 ABQB 925

SCHEDULE C	• YEHYA V LAS PALMAS ESTATE HOMES LTD, 2019 ABQB 981

GOLDSTICK ESTATES (RE), 2019 ABCA 508 (SLATTER, VELDHUIS AND STREKAF JJA)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules), 4.14 (Authority of Case Management Judge), 4.22 (Considerations for Security for Costs Order) 4.23 (Contents of Security for Costs Order) and 10.33 (Court Considerations in Making Costs Awards)

The Court of Appeal considered two Appeals arising from Case Management Orders made during the contested administration of two estates. The Appellant, who was self-represented, raised several issues in both Appeals. Each issue was addressed by the Court in turn.

One issue raised by the Appellant was the Case Management Judge's Decision to award solicitor and own client Costs to the Respondents. The Court of Appeal noted that Costs are discretionary and subject to deference, but also explained that an appellate Court may change a Costs award where there was an unreasonable exercise of discretion, palpable error of fact, or error of law. The Court then explained that solicitor and client Costs are usually only awarded when a party has engaged in outrageous or reprehensible conduct during the litigation, and are only awarded in rare circumstances. It held that while the Appellant had used "extravagant language" from time to time and imposed substantial Costs on the estates and other parties, solicitor and own client Costs were not proper in the circumstances. Rather, enhanced Costs were warranted.

The Court of Appeal further explained that pursuant to Rules 1.2(4) and 10.33(1)(c) and (d), a Costs award should be proportional to the size of the estate and interests involved. The Court should consider issues like whether the steps taken in the Action were reasonable and whether second counsel was required. Additionally, pursuant to Rule 10.33(2)(c), where parties to an Action have similar interests but have separate counsel, the Court should consider whether multiple sets of Costs should be awarded, in particular where Costs are to be paid out of the residue of an estate. The Court ultimately ordered that the Appellant pay $150,000 plus reasonable disbursements and GST to the Respondents.

Another issue raised by the Appellant was whether he should have been denied leave to bring a further Application to remove and replace the executrix until he complied with conditions, including the payment of Costs accrued during the proceedings (which amounted to approximately $340,000). The Court of Appeal noted that pursuant to Rule 4.14(1), Case Management Judges have wide discretion to specify how Applications may be brought, including by imposing conditions precedent to any procedural step. However, it also noted that the Order had the same effect as an Order for Security for Costs in an unreasonable amount. The Court explained that the factors to be considered in awarding security for Costs are set out at Rule 4.22. The Rule reflects the principle that Orders for Security for Costs should reflect the nature of the issues and the parties' means. The Court also explained that Security for Costs is forward-looking. As such, making payment of Costs a condition for proceeding with further Applications "amount[ed] to changing the rules after the fact". The Court determined that the payment condition could not be supported, as it amounted to an unreasonable Security for Costs Order. Instead, it ordered that the Appellant post $10,000 as Security for Costs before he could argue the new Application, or it would be deemed dismissed pursuant to Rule 4.23(1).

Another issue raised by the Appellant was his treatment as a self-represented litigant, because he was held "to the same standards as counsel". The Court noted that, in accordance with Rule 1.1(2), the Rules apply equally to all parties, whether they are represented by counsel or not. The Court found that the Appellant's new evidence about the treatment of self-represented litigants was irrelevant and inadmissible, and that he had not demonstrated any procedural unfairness.

CUSTOM METAL INSTALLATIONS LTD V WINSPIA WINDOWS (CANADA) INC, 2019 ABQB 732 (MAHONEY J)
Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Appellant and Defendant by Counterclaim appealed a Master's Order dismissing an Application to vary a Consent Order. The Appellant originally applied under Rule 9.15 to

vary the terms of a Consent Order to change dates which had been specified for Questioning. The parties had initially entered the Consent Order which set specific timelines for the Appellant to provide producible records, pay Security for Costs, and appear for Questioning, failing which its Statement of Defence to Counterclaim would be struck without further Order. The Appellant produced its records and posted Security for Costs, but failed to attend for Questioning. The Appellant indicated that it was under the impression that the dates for Questioning in the Consent Order were tentative and would be re-scheduled for a later date.

The Master dismissed the Application, having determined that the Appellant was bound by the conduct of its counsel who signed the Consent Order, and that the Consent Order could not be varied unless there was common or unilateral mistake, misrepresentation, fraud, or unilateral mistake where the opposing party was aware of the mistaken understanding - none of which were established. The Master noted that the Appellant had a demonstrated history of failure to abide by Court imposed timelines which resulted in its Statement of Claim being struck, and thus the Appellant ought to have been aware of the consequences of failure to abide by Court imposed timelines.

Mahoney J. stated that Rule 9.15 provides the Court with the discretion to vary or set aside the terms of the Consent Order, and that the Rule should be interpreted and applied to give effect to the purpose of the Rules provided by Rule 1.2, which is to ensure that matters are determined on their merits in a timely, efficient, cost-effective, and fair manner. Mahoney J. held that the Master applied the correct test for variance of a Consent Order. However, Justice Mahoney found that there was conflicting Affidavit evidence regarding the understanding of the parties and their counsel as to whether the dates in the Consent Order were tentative or final. Justice Mahoney held that it would be unfair to make findings of credibility on the Affidavit evidence which had not been tested by cross-examination. Mahoney J. allowed the Appeal on this basis.

Justice Mahoney further commented that there was evidence which disclosed that the failure to attend for Questioning on the dates specified was not a deliberate or careless act, but was rather based on a misunderstanding as to the date for Questioning. Mahoney J. held that clients may be responsible for the acts or omissions of their lawyers, but that the rigid application of that principle to the facts of this case would be unfair. Given the underlying principle that cases should be resolved on their merits so far as possible, Mahoney held that the Appeal should be allowed, and the Appellant's Statement of Defence to Counterclaim restored.

TIGER CALCIUM SERVICES INC V SAZWAN, 2019 ABQB 885 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 3.65 (Permission of Court to Amend Before or After Close of Pleadings), 3.66 (Costs for Amendment to Pleading), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Plaintiffs sought to amend its Statement of Claim to, among other things "add particulars and elaborate on prior claims" including allegations of misrepresentation and fraud. The Defendants opposed the Application. The Application was granted as against one Defendant and dismissed as against another.

Her Ladyship cited Rule 3.65 which gives the Court a broad discretion to allow amendments and noted the "classic rule" that all amendments ought to be allowed unless doing so (i) causes serious prejudice to another party; (ii) is hopeless; (iii) seeks to add a new party or cause of action; or (iv) there is an element of bad faith.

Rules 13.6 and 13.7 provide that a pleading must give particulars of fraud and misrepresentation when these allegations are included in the pleading. Further, the Court noted that when proposed amendments raise new allegations of fraud, the evidentiary threshold is significantly elevated. Citing *Canadian Natural Resources Ltd v Arcelormittal Tubular Products Roman SA*, 2013 ABCA 87, Her Ladyship confirmed that a party proposing an amendment alleging fraud must show "'good ground' or 'exceptional circumstances' for such amendments and

that 'good ground' cannot be shown without 'significant evidence'". The Court found the Plaintiffs provided significant evidence (in the form of an Affidavit) in support of the proposed amendments related to one of the Defendants. However, the Affidavit contained hearsay evidence related to another Defendant and the Court found that this did not meet the threshold established by the case law.

One of the Defendants argued the Application to amend should be dismissed based on delay — stating that the Plaintiffs' failure to diligently pursue allegations of fraud triggered the Court's jurisdiction under Rule 1.2. The Court found no delay and dismissed the Defendant's Application to dismiss the Action on those grounds.

The Court concluded by considering Costs awards that arise as a result of amendments to pleadings under Rule 3.66, and the general Costs Rules — Rule 10.31 and 10.33. In awarding Costs against the Plaintiffs, the Court observed that leading up to this Application, the Plaintiffs had prepared and provided numerous versions of the lengthy amended Statement of Claim to the Defendants. The Court also noted that some Defendants were represented by the same counsel. Therefore, Her Ladyship did not award a separate set of Costs for each version of the amended Statement of Claim reviewed, nor for multiple Defendants who were represented by the same counsel.

XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 898 (EAMON J)
Rules 1.2 (Purpose and Intention of These Rules), 4.28 (Confidentiality of Formal Offer to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.31 (Use of Transcript and Answers to Written Questions)

The Plaintiffs appealed a Decision of Master Robertson to dismiss the two underlying Actions for delay pursuant to Rule 4.31. The underlying Actions had been ongoing for 12 years. The Plaintiffs argued that one of the Defendants had destroyed certain electronic records belonging to the Plaintiffs such that the delay that resulted was not inordinate. The Defendants argued that the delay was not due to the alleged destruction of documents, that the delay was inordinate and inexcusable, that they had been prejudiced by the delay, and that the Actions should be dismissed under Rule 4.31 or 4.33.

One of the Defendants had been questioned about the destruction of electronic records in one of the underlying Actions, but the Plaintiffs argued that according to Rule 5.31, the Defendants could not rely on the transcript of the pre-Trial Questioning of one of the Defendants in the other underlying Action. Justice Eamon agreed and did not consider the contents of the transcript of the Questioning.

Justice Eamon noted that Rules 4.31 and 4.33 must be interpreted and applied in the light of Rule 1.2. He explained that if a delay was found to be "inordinate and inexcusable" then it would create a presumption of "significant prejudice" under Rule 4.31(2). "Significant prejudice" is a precondition for dismissal under Rule 4.31. Justice Eamon found that there was inordinate and inexcusable delay that caused significant prejudice under Rule 4.31. In analyzing the application of Rule 4.33, Justice Eamon stated that the period of delay must be determined from the date the Applications were filed, and not when they were heard, citing the relevant case law.

Regarding Costs, Master Robertson had found that the Defendants' Formal Offers were genuine offers pursuant to Rule 4.29 and confirmed that Rule 4.28, with a few exceptions, allows parties to serve Formal Offers any time after a Statement of Claim has been filed. Master Robertson had awarded double Schedule C Costs from the date of the service of the Defendants' first set of Formal Offers, and 80% of solicitor-client Costs to one group of Defendants and 100% of solicitor-client Costs of another group of Defendants from the date of service of the second set of Formal Offers.

On Appeal, the Plaintiffs submitted that the offers were not genuine Formal Offers, that the Master should not have awarded double Schedule C Costs, and that they were not guilty of misconduct that would justify awarding solicitor-client Costs to the Defendants. Justice Eamon agreed with Master Robertson and found that the Formal Offers were genuine offers and that the Plaintiffs did not discharge their

burden to prove special circumstances under Rule 4.29. He also found that the Plaintiffs committed serious ligation misconduct so as to justify an award of solicitor-client Costs, however, Justice Eamon found that Master Robertson overstated the impact of misconduct of one group of Defendants and had understated it for the other. Justice Eamon varied the Costs award to give each Defendant group 80% of their solicitor-clients Costs for some time after the second set of Formal Offers, and awarded double Schedule C Costs after the date of service of the first set of Formal Offers, except for one Defendant for whom double Costs were awarded after the second set of Formal Offers.

The Appeal of the Master's Decision was dismissed.

WESLEY V ALBERTA, 2019 ABQB 925 (NEUFELD J)
Rules 1.2 (Purpose and Intention of These Rules), 2.10 (Intervenor Status), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 3.75 (Adding, Removing or Substituting Parties to Originating Application), 15.1 (Definitions), 15.2 (New Rules Apply to Existing Proceedings) and 15.6 (Resolution of Difficulty or Doubt)

In 2003, the Stoney Nakoda Nations commenced an Action against the governments of Alberta and Canada seeking a declaration of Aboriginal title and rights to a large area of land in southern Alberta. In 2018, two members of the Blackfoot Confederacy brought Applications to join the Action as Defendants.

As pleadings had closed, the addition of the Applicants as Defendants was considered pursuant to Rule 3.74. The Case Management Justice noted the threshold requirement in Rule 3.74 that an Application to add a Defendant must be brought by a party to the Action. As the Applicants were not parties to the Action, the Court dismissed the Applications on that ground.

In arguing against a strict interpretation of Rule 3.74, the Applicants requested that the Court invoke its broad discretion pursuant to Rule 1.2 and section 8 of the *Judicature Act*, 2000 c J-2. The Court did not find it appropriate to exercise discretion to override the clear language of Rule 3.74. The relevant language in Rule 3.74 was described as deliberate, and notably distinct from the language of Rule 3.75 governing the addition of parties to an Application for Judicial Review.

The Court went on to hold that it would be inappropriate to exercise discretion in favour of the Applicants, reasoning that the interests of justice would not be served by adding the proposed Defendants while pre-Trial activities were well underway. Rather, the Court suggested that the appropriate mechanism for the Applicants to pursue involvement in the Action was through an Application for intervener status pursuant to Rule 2.10.

Lastly, the Court addressed the Applicants' reliance on former Rule 38, which was in force at the commencement of the Action, and would have permitted the Applicants' standing to apply for addition as Defendants. While Rule 15.2 provides that the current Rules apply to all existing proceedings, with "existing proceedings" defined in Rule 15.1 as proceedings commenced but not concluded under the former Rules, Rule 15.6 permits recourse to a former Rule to relieve difficulty or doubt arising on account of the transitional Rules. The Court was not satisfied that it was proper to override Rule 3.74, noting that such an override should be a rare exception, especially as the current Rules have now been in force for nearly a decade.

WOODBRIDGE HOMES INC V ANDREWS 2019 ABQB 968 (MANDZIUK J)
Rules 1.2 (Purpose and Intention of These Rules), 9.13 (Re-Opening Case), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award may be Made), 10.31 (Court-Ordered Costs Award) and 14.59 (Formal Offers to Settle)

Justice Mandziuk dealt with a hearing on Costs arising from His Lordship's Decision in *Woodbridge Homes Inc v Andrews*, 2019 ABQB 585 (the "Decision"). The parties sought a ruling as to Costs and interest to be applied to the Decision. Justice Mandziuk had granted the Plaintiff Judgment against the Defendant in the amount of $46,490.60. While His Lordship did not expressly award statutory Judgment interest in the Decision, Justice Mandziuk did rule that the parties would each bear their

own Costs, except for $1,000 that was to be paid to the Defendant by the Plaintiff due to late document disclosure.

A few weeks before the Trial of the Action, the Defendant provided a *Calderbank* Offer to the Plaintiff in the amount of $50,000. The Plaintiff argued that this was irrelevant as Justice Mandziuk was *functus officio* with respect to the issue of Costs because the Appeal period had expired and a determination on Costs was already rendered in the Decision. Mandziuk J. addressed the concerns raised as to whether the Decision rendered His Lordship *functus officio* on the issues of interest and Costs. Specifically, His Lordship addressed whether the existence of the *Calderbank* Offer allowed the Court to revisit an earlier direction as to Costs.

Justice Mandziuk reviewed Rule 9.13 which allows a Judge broad discretion to vary a Judgment until the Judgment is entered and, as such, the Court is not *functus officio* in these circumstances. Turning to the *Calderbank* Offer, His Lordship noted the broad discretion given to the Court on the issue of Costs under Rules 10.29, 10.30, and 10.31. Justice Mandziuk found that while *Calderbank* Offers are persuasive and consistent with the Foundational Rule 1.2, they are not binding in the same manner as Formal Offers made under Rule 14.59.

Justice Mandziuk awarded interest pursuant to the *Judgment Interest Act*, RSA 2000 c J-1 and re-affirmed that there would be no Costs awarded given the mixed success of the parties at Trial. His Lordship's discretion was informed, but not fettered, by the existence of a *Calderbank* Offer.

YEHYA V LAS PALMAS ESTATE HOMES LTD, 2019 ABQB 981 (MANDERSCHEID J)
Rules 1.2 (Purpose and Intention of These Rules), 10.29 (General Rule for Payment of Litigation Costs), 14.88 (Cost Awards) and Schedule C

This Decision dealt with the parties' entitlements to Costs following the Court of Appeal's reversal of Manderscheid J.'s Decision dismissing the Defendant's Application to set aside Default Judgment.

The Plaintiffs had obtained Default Judgment against two Defendants on December 14, 2016, two days after the individual Defendant (the "Defendant") had declared bankruptcy. The Defendant was discharged from bankruptcy in September 2017, and applied, initially unsuccessfully, to set aside the Default Judgment against him in October 2017. In May 2019, the Court of Appeal reversed the Decision of the lower Court and set aside the Default Judgment against the Defendant, but did not speak to Costs. Thereafter, the Defendant filed and served an Appointment for Assessment of Costs arising from the Appeal on the Plaintiffs. He sought Costs of the Appeal, netted off against the Costs he owed to the Plaintiffs in respect of their noting him in default. In response, the Plaintiffs argued that the most cost-effective and efficient way to address the Defendant's Costs, in accordance with Rule 1.2, was to direct that they be payable in the cause as there was a good chance the Defendant would not be successful should the matter proceed to Trial.

Manderscheid J. noted that Rule 14.88 creates a presumption that the successful party is entitled to the Costs of the Appeal, pursuant to Part 10, Division 2, and Schedule C of the Rules. Consequently, His Lordship held that the Defendant was entitled to Costs of the Appeal. His Lordship also held that the Defendant's Costs should be payable forthwith, in accordance with Rule 10.29(1).

The Plaintiffs also sought payment of thrown away Costs to account for the steps they had taken in the period between the Default Judgment and the Defendant's Appeal. Manderscheid J. agreed that they were appropriate in respect of the steps taken by the Plaintiffs prior to the Appeal as a result of the Defendant's failure to file a Statement of Defence, which were now "wasted". His Lordship ordered that they be paid in accordance with Column 4 of Schedule C, and that they also be payable forthwith pursuant to Rule 10.29(1).

FRASER V JEFFRIES, 2019 ABCA 368 (HUGHES, PENTELECHUK AND FEEHAN JJA)
Rules 1.2 (Purpose and Intention of These Rules), 4.2 (Responsibility of Parties to Manage Litigation - What the Responsibility Includes), 4.31 (Application to Deal with Delay) and 13.18 (Types of Affidavit)

The Defendant/Appellant ("Mr. Jeffries") successfully applied before a Master to dismiss the underlying Action for delay pursuant to Rule 4.31 (the "Action"). The Plaintiff/Respondent, ("Mr. Fraser") successfully appealed to a Chambers Judge to restore the Action. Mr. Jeffries appealed that Decision to the Alberta Court of Appeal (the "Court").

In the Action, Mr. Fraser sued Mr. Jeffries for damages for an injury he suffered during a hockey game in Fort McMurray in January of 2011. The Chambers Judge found inordinate delay in Mr. Fraser's prosecution of the Action under Rule 4.31; however, the Chambers Judge concluded that Mr. Fraser had met his burden of establishing an excuse for the delay: his prior counsel's illness.

As part of his Appeal to the Chambers Judge, Mr. Fraser's second lawyer, Mr. Jang, swore an Affidavit on personal knowledge (on which he was never cross-examined) outlining some details about the illness of Mr. Fraser's previous counsel (the "Jang Affidavit"). On Appeal, Mr. Jeffries challenged the Chambers Judge's reliance on the Jang Affidavit arguing that it was based on hearsay and therefore did not comply with Rule 13.18(2), requiring that information based on information and belief include the source of the information.

On Appeal, the Court found that it was satisfied that no error in law or principle had been demonstrated in how the Chambers Judge assessed and weighed the evidence in the Jang Affidavit. The Court found that: (1) the Jang Affidavit was based on personal knowledge and not hearsay given that the two lawyers worked together in a small firm; and (2) while noting the evidence regarding the first lawyer's illness was not detailed, the Chambers Judge nonetheless concluded that it satisfied Mr. Fraser's onus of establishing a reasonable excuse for the delay.

The Court further noted that Rule 1.2 imposes obligations on all parties to advance the Action and emphasized that Rule 4.2(b) also places responsibility on both parties to respond, "in a substantive way and within a reasonable time to any proposal for the conduct of an action." The Court found that Mr. Jeffries also did not press the pace of the Action, which further strengthened the Chambers Judge's Decision.

Finally, the Court noted that Rule 4.31 requires significant prejudice arising from any delay before an Action will be struck and that, because the delay was excusable, Mr. Jeffries could not rely on the rebuttable presumption that he experienced significant prejudice. The onus remained with Mr. Jeffries to establish prejudice, which he failed to do. Accordingly, the Court found that the Chambers Judge made no error in finding a reasonable excuse for the delay and dismissed the Appeal.

HAMM V ATTORNEY GENERAL (CANADA), 2019 ABCA 391 (FEEHAN JA)
Rules 1.4 (Procedural Orders), 14.37 (Single Appeal Judges) and 14.73 (Procedural Powers)

Mr. Hamm, Mr. Keepness, and Mr. Tobin (the "Plaintiffs") filed an Amended Statement of Claim against the Defendant ("Canada") alleging that while inmates at the Edmonton Institution, they were placed in administrative segregation for 43 days in violation of various freedoms under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") (collectively, the "Underlying Action"). In the Courts below, the Plaintiffs applied, unsuccessfully, to a Master and the Chambers Judge (on Appeal) for an Order striking Canada's Statement of Defence and granting Summary Judgment. The Plaintiffs appealed the Decision of the Chambers Judge, upholding the Master's Decision (the "Appeal").

Summary Judgment had already been granted to class members represented in two related class actions brought before the Ontario Superior Court of Justice ("ONSC"): *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888 and *Reddock v Canada (Attorney General)*, 2019 ONSC 5053 (the "Class Actions"). Canada had appealed both

Class Actions decisions which also addressed the conditions of administrative segregation, the effects of prolonged segregation, and alleged breaches of the *Charter*. In the Appeal, Canada argued that the Plaintiffs were also class members of either, or both, of the Class Actions. Canada sought, pursuant to Rule 1.4(2)(h), an adjournment of the Appeal: (1) pending a determination of its own stay Application of the Underlying Action (the "Stay Application "); (2) if the Stay Application was granted, a further adjournment pending final disposition of the Class Actions; or (3) alternatively, requiring that the Plaintiffs obtain leave to opt out of the Class Actions.

Justice Feehan noted His Lordship's jurisdiction under Rule 14.37(1) as a single Appel Judge to hear and decide any Application incidental to an Appeal. Feehan J.A. further noted, under Rule 14.73, that in addition to the powers provided for in other Rules a single Appeal Judge may adjourn any Appeal or matter, with or without conditions. After reviewing the relevant jurisprudence, Justice Feehan found that while there is a rebuttable presumption of prejudice from delay in Fast Track Appeals, an Appeal may be adjourned where there is considerable danger of prejudice or conflicting decisions and where the least harm will be done by not making a final decision.

Justice Feehan found that the Stay Application was due to be heard in Master's Chambers on November 18, 2019 and that the Appeal was to be heard on November 25, 2019. His Lordship concluded by finding that, since there was only a single week between the Application and the Appeal, it would be wise not to prejudge the Stay Application. Accordingly, His Lordship adjourned the Appeal until after a final determination of Canada's Stay Application.

WILCOX V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2019 ABCA 385 (FEEHAN JA)
Rules 2.10 (Intervenor Status), 14.2 (Application of General Rules) and 14.37 (Single Appeal Judges)

The Applicant sought permission to intervene in an Appeal pursuant to Rules 2.10, 14.2(1) and 14.37(2), which the Court noted were the relevant Rules on the Application. The Appeal concerned a *habeas corpus* Application made by an inmate concerning conditions of incarceration upon being placed within a correctional institution. The Applicant was a not for profit society comprised of lawyers, articling students, and law students who provide legal advice, representation, and advocacy for incarcerated individuals. The Applicant argued that it had broad experience and expertise in the areas of law engaged by the Appeal, and would not raise new issues on the Appeal.

The Respondent argued that the Application was brought only 13 days before the hearing and that created insurmountable problems for the remaining parties to respond and adequately prepare for oral argument.

Justice Feehan confirmed that the test for granting leave to intervene is a two step process which requires the Applicant to demonstrate: (1) either that they will be directly and significantly affected by the outcome of the Appeal, or that they have special expertise or perspective relating to the subject matter of the Appeal that will assist the Court in its deliberations, and (2) that they have a fresh perspective on the subject matter that will be helpful in resolving the Appeal. Feehan J.A. also endorsed the additional factors to be considered as set out by the Court of Appeal in *Pedersen v Alberta*, 2008 ABCA 192.

Justice Feehan found that the Applicants would be specially affected by the outcome of the Appeal as it would have a significant effect on its ability to achieve its mandate. Feehan J.A. found that the Applicant had special expertise or insight regarding the issues before the Court, and that their arguments would not merely repeat those of the Appellant. Justice Feehan also found that despite the short timeline, the Respondent would have an opportunity to reply to the Applicant's submissions, such that there would be no prejudice or delay. The grounds on which the Applicant sought leave to intervene on were questions of a legal nature which would not risk transforming the Court into a political arena.

The Application for permission to intervene was granted with conditions.

EKSTEEN V UNIVERSITY OF CALGARY, 2019 ABQB 881 (ASHCROFT J)
Rules 3.15 (Originating Application for Judicial Review) and Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Dr. Eksteen filed an Originating Application seeking Judicial Review of the University of Calgary's decision which resulted in the termination of his employment. In response, the University of Calgary made an Application to strike the Originating Application under Rule 3.68.

Justice Ashcroft applied the test from *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 where it the Court noted that "judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character." Upon review of the circumstance, Justice Ashcroft found that the University of Calgary's impugned decisions did not meet this test and were matters of private law and contract. As a result, Justice Ashcroft struck Dr. Eksteen's Originating Application pursuant to Rule 3.68.

QUAYE V LAW SOCIETY OF ALBERTA, 2019 ABQB 916 (ROOKE ACJ)
Rules 3.15 (Originating Application for Judicial Review), 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders) and 13.5 (Variation of Time Periods)

The Plaintiff filed an Originating Application for Judicial Review of the decision of the Law Society of Alberta's Appeal Committee in addition to two other Applications. Associate Chief Justice Rooke considered the Originating Application under Civil Practice Note No. 7 ("CPN7") which deals with Actions that could be considered an Apparently Vexatious Application or Proceeding ("AVAP").

The Respondents argued that the Originating Application should be reviewed under CPN7 in part because the Originating Application was not filed within six months after the date of the decision as required by Rule 3.15.

His Lordship confirmed that the Originating Application was out of time because, while Rule 13.5 provides the Court with the ability to extend a time period specified in the Rules, Rule 3.15 prohibits such extension for Applications for Judicial Review. Furthermore, His Lordship found that the Originating Application provided no basis for Judicial Review, appeared to be hopeless and abuse of Court processes because it sought impossible or disproportionate remedies, and identified issues regarding standing of the Applicant.

Pursuant to CPN7, Associate Chief Justice Rooke ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. His Lordship noted that pursuant to Rule 9.4, the Plaintiff's approval of the Interim Order was not required.

PETER V PUBLIC HEALTH APPEAL BOARD OF ALBERTA, 2019 ABQB 989 (GRAESSER J)
Rules 3.15 (Originating Application for Judicial Review), 3.16 (Originating Application for Judicial Review: Habeas Corpus) and 13.5 (Variation of Time Periods)

The Court dismissed an Originating Application for Judicial Review because the Applicant had filed it beyond the six-month period set out in Rule 3.15. As the Originating Application was not a *habeas corpus* Application (to which Rule 3.16 would apply), the Court was bound by the time period set out in Rule 3.15. Furthermore, Rule 3.15 specifically prohibited the Court from using its discretion under Rule 13.5 to extend the time period for filing, and therefore the Application was struck.

EASTERN IRRIGATION DISTRICT V IRRIGATION COUNCIL APPEAL PANEL, 2019 ABQB 809 (KUBIK J)
Rule 3.22 (Evidence on Judicial Review)

The Applicants brought an Originating Application for Judicial Review. The Applicants filed an Affidavit together with their Originating Application. At the Judicial Review hearing, the Respondents objected to the admissibility of the Affidavit, relying on Rule 3.22 which limits the evidence to be heard at an Application for Judicial Review to: i) the

certified record of the proceedings, ii) the transcript of any Questioning which was permitted under Rule 3.21, iii) any evidence permitted under another Rule or enactment, and iv) such other evidence permitted by the Court.

Justice Kubik confirmed that new evidence is only permitted to be admitted in Judicial Review proceedings in limited circumstances, including to establish bias or breach of procedural fairness, to address issues of standing, or where the tribunal whose decision is under review has failed to provide an adequate record of its proceedings.

Justice Kubik found that the certified record of proceedings had been provided and that it did not contain any gaps which would require the Court to exercise its discretion to allow additional evidence to supplement the record. Justice Kubik also noted there was no allegation of bias. As such, Justice Kubik held that there was no basis to admit the Affidavit, and deemed it inadmissible in the proceedings.

SIMON V CANADA (ATTORNEY GENERAL), 2019 ABQB 750 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 13.7 (Pleadings: Other Requirements)

Upon receipt of a Statement of Claim, Court personnel identified that the Action presented as a possible Apparently Vexatious Application or Proceeding, engaging Civil Practice Note No. 7.

In reviewing the Statement of Claim, Associate Chief Justice Nielsen noted: i) the issues raised in the Statement of Claim had been the subject of repeated, unsuccessful litigation in other Courts; ii) the Statement of Claim constituted a collateral attack on the decisions of other Courts; iii) by proceeding to commence litigation in the Court of Queen's Bench of Alberta, the Plaintiff was forum shopping; iv) the Statement of Claim requested remedies and relief that were disproportionate, excessive, or impossible, rendering the Action hopeless and an abuse of process; v) the Statement of Claim was inadequately and improperly pleaded, including a failure to plead fraud and misrepresentation with sufficient particularity to meet the requirements of Rule 13.7; and vi) other Courts had declared the Plaintiff a vexatious litigant.

Given the seriousness of the foregoing concerns, His Lordship stated that the Statement of Claim could be set aside under Rule 3.68 without a full show-cause document-based review. However, as the Plaintiff alleged in the Statement of Claim that he had previously been denied sufficient opportunity to advance his position in writing before other Courts, Associate Chief Justice Nielsen advanced to the second stage of review contemplated in Civil Practice Note No. 7, being an exchange of brief written submissions. In directing summary procedures, His Lordship raised several questions requiring the Plaintiff's specific response.

FEENEY V CALGARY (POLICE SERVICE), 2019 ABQB 751 (MASTER PROWSE)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendants applied to strike the Statement of Claim pursuant to Rule 3.68 or alternatively, to summarily dismiss the Statement of Claim pursuant to Rule 7.3.

The Master granted Summary Judgment as the Plaintiff had failed to establish that the common law test for malicious prosecution had been met. Specifically, given that the Plaintiff had sworn an Affidavit containing information that he had served in Afghanistan when in fact he had not, the Plaintiff failed to establish a lack of reasonable and probable grounds for the commencement of perjury proceedings against him. Accordingly, the Plaintiff's Statement of Claim was demonstratively "without merit" pursuant to Rule 7.3.

ALBERTA (JUSTICE AND SOLICITOR GENERAL) V BASSETT, 2019 ABQB 759 (LABRENZ J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.2 (Application for Judgment)

An investigation resulted in criminal charges against Bassett for trafficking drugs. The police also seized an amount of cash. An *ex parte* civil restraint Order

was granted against Bassett and his partner Andrus to restrain cash which had been seized during the criminal investigation. Bassett and Andrus made an Application to revoke the civil restraint Order (the "Revocation Application"). In response, the Minister of Justice and Solicitor General for Alberta (the "Minister") applied to have the Revocation Application struck or stayed pursuant to Rule 3.68. The Minister also sought Summary Judgment under Rule 7.2.

Justice Labrenz assessed the Revocation Application by Bassett separately from the Revocation Application by Andrus. The *Canadian Charter of Rights and Freedoms* (the "*Charter*") issues Bassett had raised were previously decided against him in his criminal trial. The Court found that Bassett's Revocation Application was an abuse of process and the Court struck the Application under Rule 3.68(1)(d). As Bassett has no further argument available, Justice Labrenz also issued Summary Judgment against Bassett pursuant to Rule 7.2.

Justice Labrenz next considered Andrus' Revocation Application. Andrus retained both an independent claim to money and an independent privacy right to assert against the search. As section 8 of the *Charter* protects the privacy of individuals, and not the privacy of places or things, the Court determined that Andrus could raise her own *Charter* issue in the civil proceedings. Justice Labrenz refused to strike the Revocation Application under Rule 3.68 as against Andrus. The Court then turned to whether Summary Judgment should be granted against Andrus. Justice Labrenz found there were genuine, triable issues raised by Andrus' *Charter* challenge which had not been previously raised. Therefore, Justice Labrenz determined that the issues had merit and that Summary Judgment would not be appropriate. The Court dismissed the Minister's Application for Summary Judgment against Andrus.

WU V CANADA (ATTORNEY GENERAL), 2019 ABQB 796 (OUELLETTE J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Wu was an inmate of a minimum-security federal penitentiary in Manitoba. Fellow inmates complained that Wu was seeking them out for predatory relationships. Following an investigation, the warden in Manitoba moved Wu involuntarily from the minimum-security penitentiary in Manitoba to the medium-security federal penitentiary in Bowden, Alberta. Wu filed a *habeus corpus* Application disputing the deprivation of his residual liberty.

The Court reviewed Wu's *habeus corpus* Application under Civil Practice Note 7 and Rule 3.68 in order to determine whether to dismiss Wu's Application. The Court found that Wu had not meet the test for *habeus corpus* in his Application, namely that he did not assert a basis for why the transfer was unreasonable and procedurally unfair, and further that Wu had improperly claimed damages. Following the procedure set out in Civil Practice Note 7, the Court identified apparent issues with the Application and gave Wu 14 days to provide a written response to the issues raised by the Court. The Court held that if Wu failed to provide a written response, then a decision would be issued to strike the Application pursuant to Rule 3.68.

MCLEOD V ALBERTA, 2019 ABQB 812 (HOPKINS J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Respondent driver examiner was subject to a one-year licence suspension imposed by the Transportation Safety Board. Rather than proceed to Judicial Review, the Respondent brought an Action in negligence and misfeasance in public office for damages against Her Majesty the Queen in Right of Alberta. The Applicant sought to strike the Respondent's Statement of Claim pursuant to Rule 3.68 based on abuse of process, collateral attack, and issue estoppel.

The Court was satisfied that the doctrine of issue estoppel was engaged, first noting that the decision of the

Transportation Safety Board met the threshold requirement of a prior judicial determination. Justice Hopkins then proceeded to consider the overlap in the issue before the Transportation Safety Board and the Court, the fact that the parties to the proceedings were the same, and the fact that the decision of the Transportation Safety Board would be final, before exercising discretion to strike the Statement of Claim, holding that administrative proceedings were available to fully and fairly adjudicate the allegations raised. Accordingly, the Court deemed it unnecessary to consider the grounds of collateral attack and abuse of process.

SMITH V EDMONTON PUBLIC SCHOOL BOARD, 2019 ABQB 825 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

A Statement of Claim filed by the Plaintiff was brought to the attention of the Court engaging Civil Practice Note No. 7 and a review of the Action as a possible Apparently Vexatious Application or Proceeding ("AVAP").

In reviewing the Statement of Claim, Associate Chief Justice Nielsen noted: (1) bald or declaratory allegations which did not appear to provide a basis for a meaningful response; (2) requests for disproportionate remedies; and (3) requests for impossible remedies, namely: "A formal apology from the Edmonton Public School Board" and "Formal documentation ensuring the Edmonton Public School Board take full responsibility for the Plaintiff's children's formal education."

His Lordship concluded that the Statement of Claim exhibited indicia of an AVAP, and therefore should be subject to the show cause, document-based review contemplated in Civil Practice Note No. 7. As such, the Action was stayed pending a final decision on whether the Statement of Claim should be struck out pursuant to Rule 3.68, which would follow a brief window of opportunity for the Plaintiff to respond to the deficiencies identified by the Court. His Lordship concluded by noting that the Court would prepare and serve the interim Order staying the Action and that the Plaintiff's approval of that Order was not required, pursuant to Rule 9.4(2)(c).

SHARIFI-ZANJANI V MACEWAN UNIVERSITY, 2019 ABQB 845 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 13.7 (Pleadings: Other Requirements)

The Plaintiff filed a Statement of Claim alleging defamation. Court personnel identified that the Action presented as a possible Apparently Vexatious Application or Proceeding, engaging Civil Practice Note No. 7 ("CPN7").

In reviewing the Statement of Claim, Associate Chief Justice Nielsen noted a failure to plead defamation with sufficient particularity to meet the requirements of Rule 13.7. In fact, His Lordship observed that "the Statement of Claim does not indicate what was published, how it was published, where it was published, when it was published, and very importantly, who made and/or published the allegedly defamatory statements." Moreover, the Plaintiff sought remedies that were excessive, impossible, or disproportionate.

Associate Chief Justice Nielsen concluded that the Statement of Claim should be subjected to a show-cause document-based review under Rule 3.68 and CPN7. In directing summary procedures, Associate Chief Justice Nielsen raised several questions requiring the Plaintiff's specific response.

BELCZOWSKI V REID, 2019 ABQB 847 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

Associate Chief Justice Nielsen determined that the Statement of Claim filed in the Action was an Apparently Vexatious Application or Proceeding because the Plaintiff had made bald, unsupported allegations and had requested excessive, impossible or disproportionate remedies, including relief pursuant to the *Canadian Charter of Rights and Freedoms* for which the Statement of Claim contained no factual foundation.

Associate Chief Justice Nielsen struck the Statement of Claim under Rule 3.68 and directed the Court to prepare and serve the Order without the Plaintiff's approval pursuant to Rule 9.4.

FREEMAN V KOOIMAN, 2019 ABQB 857 (MASTER MASON)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The employer in a wrongful termination dispute was successful upon Application for Summary Dismissal, prompting the Plaintiff employee to commence an Action alleging professional negligence against his lawyer. The Plaintiff employee and Defendant lawyer each brought multiple Applications, including competing Applications for Summary Judgment and Summary Dismissal. Master Mason found that the dispute was not appropriate for summary determination pursuant to Rule 7.3, as the issues raised were subject to competing evidence that could not be fairly and justly resolved on the existing record. The Applications for Summary Judgment and Summary Dismissal were dismissed.

The Master then considered the parties' alternative Applications. The Plaintiff sought to strike the Statement of Defence pursuant to Rule 3.68, but as no defect was observed on the face of the Statement of Defence, the Court dismissed that Application. The Defendant sought an Order for Security for Costs, satisfying the Court that the Rule 4.22 considerations favoured such an Order. As the Plaintiff was not able to meet the shifting evidentiary burden, the Court granted the Defendant's Application, directing that Costs be posted on dismissal of the Action without further Order.

FORT MCKAY METIS COMMUNITY ASSOCIATION V METIS NATION OF ALBERTA ASSOCIATION, 2019 ABQB 892 (GATES J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Fort McKay Metis Community Association ("FMMCA") and the Metis Nation of Alberta Association Local Council #63 Fort McKay ("Local Council") brought an Originating Application for a Declaration from the Court that they were the authorized legal entity to represent their members during development consultation in the Fort McKay area. The Metis Nation of Alberta Association ("MNAA") brought an Application to strike the Originating Application pursuant to Rule 3.68.

The Originating Application sought a Declaration for the right to represent the Metis community members during any consultation, not just a specific one. As such, the Court found the breadth of the Application to be contrary to the framework from *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73. The duty to consult is fact specific for each circumstance and its form cannot be predetermined. In the alternative, Justice Gates considered whether this case was appropriate for declaratory relief and applied the test from *Ewert v Canada*, 2018 SCC 30, being that: (1) the Court must have jurisdiction to hear the issue; (2) the dispute is real and not theoretical; (3) the party raising the issue has a genuine interest in its resolution; (4) the Respondent has an interest in opposing the remedy sought, and (5) there is a practical utility to the declaration to settle a live controversy.

As the Originating Application was too broad and not specific to a certain duty to consult, Justice Gates found the Originating Application was theoretical or hypothetical and did not settle a live controversy at the time of the hearing. Further, the Crown was the party interested in opposing the remedy sought but was not a named party. Justice Gates noted that the test under Rule 3.68 is whether the claim has no reasonable prospect of success, that this test is a stringent one, and an Applicant's claim should be given a broad interpretation. Justice Gates found that the Originating Application disclosed no reasonable claim and should be struck under Rule 3.68(2)(b).

AIYISA V KASIM ET AL, 2019 ABQB 893 (ROOKE ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Rooke as an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Rooke ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" why the AVAP should not be struck pursuant to Rule 3.68.

Associate Chief Justice Rooke also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

LAM V UNIVERSITY OF CALGARY, 2019 ABQB 923 (MASTER SUMMERS)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff had sued his employer and three individual employees for various causes of action included wrongful dismissal, and claimed against his Union for "wrongs" alleged regarding its representation of him in the grievance and arbitration process. The Union applied to strike the Plaintiff's Statement of Claim against it pursuant to Rule 3.68. Alternatively, it sought to dismiss the Statement of Claim summarily pursuant to Rule 7.3

At the hearing, the Union's counsel conceded that not all of the Plaintiff's claims were "capable of being struck under Rule 3.68". This was because parts of the Statement of Claim were not frivolous, irrelevant or improper contrary to Rule 3.68(2)(c), and did not fail to disclose a reasonable claim contrary to Rule 3.68(2)(b). That being said, the Plaintiff maintained that the claims relating to conspiracy and intentional infliction of distress could be struck out in accordance with Rule 3.68, and asserted that the entire Action could be summarily dismissed pursuant to Rule 7.3.

Master Summers considered the Plaintiff's claims, and determined that the Action against the Union should be dismissed summarily pursuant to Rule 7.3. In doing so, the Master reviewed the leading case in Alberta respecting Summary Dismissal, *Weir-Jones Technical Services Inc v Purolator Courier Ltd.*, 2019 ABCA 49; noted that the necessary findings of fact could be made on the record; and found that the facts demonstrated that there was no genuine issue requiring a Trial or issue of credibility. As such, the Action against the Union could justly and fairly be dismissed on a summary basis. The Master did not make a determination with respect to Rule 3.68.

TR V KT, 2019 ABQB 927 (MASTER PROWSE)
Rules 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff ("TR") alleged that she was sexually assaulted by the Defendant ("KT"). Criminal charges for the alleged sexual assault (the "Criminal Charges") were ultimately stayed due to a delay in prosecution which arose because KT was not arrested for over 3 years after the arrest warrant was issued, notwithstanding that his address had remained unchanged.

In the Statement of Claim for the underlying civil proceeding (the "Claim"), TR sued KT for damages but also sued the investigating Detective and the Chief of Police (collectively, the "CPS"). The CPS applied to strike the Claim against it pursuant to Rule 3.68 on the basis that the Claim disclosed no reasonable claim against the CPS.

Master Prowse reviewed the facts of the Claim and noted particularly that the Claim alleged: (1) the Criminal Charges against KT were stayed due to the negligence of the CPS in not diligently pursuing the arrest of KT, and TR suffered damages in that regard; (2) that TR underwent what turned out to be an unnecessary and intrusive physical examination at the Sheldon Chumir Centre, and suffered psychological injuries due to the emotional trauma upon hearing that the charges against KT had been stayed; and (3) assault and battery by the CPS Defendants.

Master Prowse also reviewed the relevant jurisprudence on civil claims brought by private citizens against public bodies, including the police, and noted that they typically fail on the basis that the public body does not owe a private duty of care to the injured party. Master Prowse found, however, that the Claim should proceed to Trial unless the CPS Defendants could demonstrate that case law already existed which showed that the Claim was untenable. Master Prowse found that the CPS had not provided any such case law. The Claim in negligence was considered novel and was allowed to proceed to Trial.

Turning to the issue of assault and battery, Master Prowse found that the Claim stated, among other things, that CPS

members requested that a sexual assault kit be performed and samples be collected, but those samples were never utilized in the prosecution of KT. Accordingly, the Claim alleged that the CPS officers fraudulently obtained the consent of TR to perform this intrusive procedure, since they had no intention of using the results for the prosecution of KT. Master Prowse concluded, among other things, that common sense dictated that the CPS officers who accompanied TR to the Sheldon Chumir Centre would not, at that time, have known that a decision would be made later to not send the kit for testing. Master Prowse noted that it is hardly in the interest of sexual assault victims generally to seek to impose liability on the police for obtaining sexual assault kits, as opposed to not obtaining sexual assault kits. Accordingly, Master Prowse found that there were insufficient facts pleaded to support the claim against the CPS for assault and battery and struck those allegations from the Claim.

ON-SITE SOLUTIONS INC V PEDDLE, 2019 ABQB 935 (MASTER ROBERTSON)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendant brought an Application to amend a Counterclaim. The Plaintiff brought a cross-Application for an Order striking the Counterclaim on the grounds that it disclosed no reasonable cause of action pursuant to Rule 3.68.

Master Robertson found that an Application to amend should be heard and decided before an Application to strike or dismiss under Rule 3.68. The Plaintiffs argued that the proposed amendments were hopeless. Master Robertson, following the "classic rule" in *Balm v 3512061 Canada Ltd.*, 2003 ABCA 98, allowed the amendments, and granted the Defendant's Application.

The Counterclaim asserted that the original Statement of Claim was vexatious, frivolous, without merit and amounted to conduct that was oppressive. The amendments to the Counterclaim added details about the Plaintiff's actions and conduct. Master Robertson dismissed the Plaintiff's Application to strike the Counterclaim.

SHARIFI-ZANJANI V MACEWAN UNIVERSITY, 2019 ABQB 936 (NIELSEN ACJ)
Rules 3.68 (Court Options to deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

Associate Chief Justice Nielsen also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

RAVENBERG SCHEELAR V MILNE, 2019 ABCA 383 (MARTIN, KHULLAR AND ANTONIO JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Appellant had applied to strike the Respondents' Statement of Claim (the "Claim") pursuant to Rule 3.68(2), and to dismiss the Claim pursuant to Rule 7.3. The Appellant had been successful in Masters Chambers, but that Decision was overturned by a Justice. The Appellant then appealed the Decision not to strike the Claim (but not the Decision respecting summarily dismissing the Claim) to the Court of Appeal.

The Claim related to alleged breaches of duty of care by the Appellant. The Appellant argued that he owed no duty of care; that the Action was an attempt to rectify a custody, support and property agreement that had been the subject of previous Court proceedings; and that the Claim should be struck as an improper collateral attack on a previous Court Decision.

The Court upheld the Decision below, found that there was not "no chance of success", and that it was possible for a duty of care to be owed to the Plaintiffs. As such the Appeal was dismissed.

ANOKHINA V BANOVIC, 2019 ABQB 774 (LEMA J)
Rules 3.72 (Consolidation or Separation of Claims and Actions) and 5.30 (Undertakings)

The Applicant applied to consolidate a matrimonial property Action (involving her former spouse) (the "MP Action") and an unjust enrichment Action (against her former spouse's children) (the "UE Action"). The Applicant also sought the production of Undertakings requested in the UE Action which were given during Questioning and only objected to afterwards. The Applicant was the Plaintiff in both Actions. The UE Action related to a property which the former spouse had initially owned jointly with his children and which was subsequently transferred to the children solely. The Applicant argued that the proceeds of that property, and the various transactions between the Defendants to each Action, would be at issue in the MP Action. The UE Action was almost ready for Trial, while the MP Action was not.

Justice Lema noted that consolidation of Actions is governed by Rule 3.72, and that the ultimate purpose of consolidation is to enhance the administration of justice. Lema J. noted that the factors which must be assessed in determining whether the administration of justice would be enhanced by consolidation are: i) whether there are common claims, disputes, and relationships between the parties; ii) whether consolidation will save time and resources in pre-Trial procedures; iii) whether time at Trial will be reduced; iv) whether one party will be seriously prejudiced by having two Trials together; v) whether one Action is at a more advanced stage than the other; and vi) whether consolidation will delay the Trial of one Action which will cause serious prejudice to one party.

Lema J. found that consolidation was not warranted in this case on account of: i) there being little overlap between the Actions (the only common issue being contributions to the subject property while the former spouse was on title, in contrast to many other distinct issues within each Action); ii) the only common party to the Actions was the Applicant; iii) the Actions were at materially different levels of preparedness for Trial; iv) there was no possibility of inconsistent verdicts as the outcome of the UE Action would be binding on the Applicant in the MP Action regardless of the outcome.

On the Application requiring the provision of Undertaking responses, Lema J. noted that an Undertaking to provide information under Rule 5.30 is binding subject only to relief from the Court where: i) the Undertaking was given inadvertently; ii) the Undertaking should not have been given; or iii) that the other side has not been prejudiced or the Applicant has offered to repair the prejudice. Lema J. noted that the Respondents did not make out the exceptions to having to provide the responses to a number of Undertakings, and thus the Respondents were required to provide responses according to the terms of the Undertakings (i.e. withholding only privileged information). Justice Lema held that the Undertakings that had been taken under advisement did not have to be answered where subsequently objected to.

The Application to consolidate was dismissed, while the Application to compel Undertaking responses was granted.

MEYER V ALTEX ENERGY LTD, 2019 ABQB 787 (WOOLLEY J)
Rule 3.72 (Consolidation or Separation of Claims and Actions)

Woolley J. considered two Applications: an Application to consolidate two Actions and an Application to use the transcripts from one Action in the other.

The Court noted that Rule 3.72 allows the Court to consolidate two or more Actions or claims, among other things. The Court then referred to the factors to be considered when applying Rule 3.72, as set out in *Mikiskew Cree First Nation v Canada*, 1998 ABQB 675: (1) whether there are common claims, disputes and relationships between the parties; (2) whether consolidation will save time and resources in pre-Trial procedures; (3) whether time at Trial will be reduced; (4) whether one party will be seriously prejudiced by having two Trials heard together; (5) whether one Action is at a more advanced stage than the other; and (6) whether consolidation will delay the Trial of one Action which will cause serious prejudice to one party.

Woolley J. distilled the issue before her Ladyship to a consideration of whether consolidating the two Actions would enhance the administration of justice considering the factors noted above and any other relevant circumstances. The Court also noted that the burden for showing that consolidation is appropriate is on the Applicant and that the standard is on a balance of probabilities.

Woolley J. concluded that consolidation was appropriate in the circumstances. The two Actions related to the same factual matrix and amounted to essentially a single claim, and that the Counterclaims in response to the Statements of Claim were also largely identical.

The Application was granted. The issue regarding the use of transcripts was dispensed with as a result.

FACTORS WESTERN INC V DCR INC, 2019 ABQB 971 (YAMAUCHI J)
Rules 3.72 (Consolidation or Separation of Claims and Actions), 7.5 (Application for Judgment by way of Summary Trial) and 7.8 (Objection to Application for Judgment by way of Summary Trial)

Three Actions were brought to resolve a construction dispute between a property owner, a general contractor, an assignee of the general contractor's outstanding account payable by the property owner, and an unpaid subcontractor which had filed a lien. The within Application followed the assignee's unsuccessful Application for Summary Judgment, during which Application the presiding Master suggested that the Actions be tried consecutively, pursuant to Rule 3.72, either on a traditional or summary basis. The parties thereafter sought Judgment by way of Summary Trial, pursuant to Rule 7.5.

Justice Yamauchi considered the suitability of resolution by Summary Trial, reviewing the factors compiled in case authority, as well as the guidance offered in Rule 7.8 pertaining to circumstances in which a party may object to use of the Summary Trial procedure. His Lordship concluded that Summary Trial was appropriate in the circumstances, and Yamauchi J. then ruled on the scope of the assignment of debt, the effect of the assignment on the application of builders' lien legislation, and the parties' respective entitlements thereunder.

CONDOMINIUM CORPORATION NO 022 5899 V 499430 ALBERTA LTD, 2019 ABQB 905 (LEMA J)
Rules 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings) and 14.12 (Contents and Format of Notices of Appeal and Cross Appeal)

Justice Lema considered an Appeal of a Consent Order granted by a Master concerning two Actions regarding unpaid-contributions brought by a condominium corporation against certain of its unit holders. The parties bringing the Appeal were the corporate developer, a corporate unit holder, and the individual behind both corporations (the "Appellants"). None of the Appellants were parties to the present Action. The Appellants had, however, commenced separate proceedings, alleging that they, or some of them, were the rightful board members for the condominium corporation, and were invalidly removed by the Defendants in this Action. The issue before Justice Lema was whether the Appellants, as non-parties, had standing to Appeal the Consent Order.

Justice Lema applied the test set out in *Peavine Métis Settlement v Whitehead*, 2015 ABCA 366 ("*Peavine*") for allowing a non-party to Action standing to appeal. In *Peavine*, Justice Wakeling noted that Rule 14.12(2) supported the proposition that persons who are parties to the proceedings are entitled to Appeal, and went on to hold that the general rule was that a non-party cannot appeal. This general rule is subject to three exceptions: 1) where the Order requires a person to do or refrain from doing anything; 2) where the Order directly affects an important interest of the non-party; or 3) where the party seeking to appeal could have been a party in the proceedings at first instance.

Justice Lema found that the Order under appeal did not require the Appellants to do or refrain from doing anything. Justice Lema also considered whether the corporate unit holder had an interest in the unpaid condominium contributions of the condominium corporation and determined that it did not, and therefore, the Order did not affect an interest of the Appellants.

Regarding the third possible exception, Justice Lema considered whether the Appellants could have been added as a party under Rule 3.74. Lema J. considered the factors identified in the *Alberta Civil Procedure Handbook*, Stevenson & Côté, Juriliber, 2019 at p 3-181 for the addition of parties, and noted that there was no compelling basis to add any of the Appellants to the Action, as the Appellants were "true bystanders".

Justice Lema rejected the Appellants' assertion that they had standing by virtue of being served with the Applications that gave rise to the Consent Order, regarding that service as "courtesy service" only. Justice Lema also rejected the Appellants' arguments that they had standing by virtue of being the rightful member(s) of the condominium corporation's board of directors. Lema J. noted that this was a contested issue, which was subject to separate proceedings. Until a determination had been made on that contested issue, Lema J. noted that only those persons appearing on the condominium sheet registered at Land Titles had authority to act on behalf of the condominium corporation.

The Appeal was dismissed with Costs.

RANCHER CONSTRUCTION LTD V SCOTT CONSTRUCTION (ALBERTA) LTD, 2019 ABQB 775 (KENNY J)
Rule 4.22 (Considerations for Security for Costs Order)

The Plaintiff in this builders' lien Action applied for Judgment, or alternatively, to have the matter set for Trial. The Defendant cross-applied for Security for Costs. The Statement of Claim was filed in January 2016, and the parties had exchanged Affidavits of Records and participated in Questioning. The shareholders of the Plaintiff had moved to British Columbia in June of 2017.

The Plaintiff asserted that the Defendant breached its disclosure obligations set out in Part 5 of the Rules by failing to disclose all relevant and material records, and that the produced documents do not support their defence. The Plaintiff asserted that these deficiencies entitled the Plaintiff to Judgment. Kenny J. held that the matter should be set for Trial, and that the consequences of inadequate and late disclosure should be left up to the Trial Judge.

In its Application for Security for Costs, the Defendant requested that $48,000 be posted as security, which included Costs for steps which had been taken prior to the date of the Application, and estimated Costs for expert fees. The Defendant acknowledged that it had not contacted an expert nor received any quotes. Kenny J. first assessed the quantum of potential Security for Costs, and then addressed whether such security was warranted pursuant to the factors set out in Rule 4.22. Kenny J. disallowed any Costs for steps already taken or disbursements already paid, noting that such items are not generally allowed in an Order requiring Security for Costs. Kenny J. also disallowed any Costs associated with an expert as the need for one had not been demonstrated, nor had an estimate of the likely Costs. Kenny J. also noted that the matter was a builders' lien Action, which are to be conducted in a summary fashion and expeditiously, which warranted a lesser security amount. Justice Kenny also considered the Defendant's delays in disclosure as relevant to awarding a lesser security amount. Kenny J. determined $10,200 would be the appropriate quantum if security was warranted.

Applying the factors for Security for Costs set out by Rule 4.22, Kenny J. noted that the Plaintiff had a bank account but no other assets in Alberta which weighed in favour of an award for Security for Costs. Justice Kenny found that the merits of the Action could not be assessed and as such were a neutral factor. She also noted that the prejudicial effect of requiring Security for Costs was a neutral factor as the Defendant had waited two years after the Statement of Claim was filed to bring the Application and the Plaintiff had incurred substantial Costs to date, however, the quantum of the security would not prejudice the Plaintiff's ability to continue the Action. Kenny J. found that factors which weighed against the requirement of posting Security for Costs were the fact that the Defendant failed to demonstrate that the Plaintiff would be unable to pay a Costs award, and the fact that the Defendant delayed bringing the Application for so long, while simultaneously delaying the matter by providing a "sparse" Affidavit of Records. Kenny J. determined that Security for Costs was not appropriate in the circumstances and dismissed the Application.

The Application for Judgment was dismissed, the Application to set the matter for Trial was granted, and the cross-Application for Security for Costs was dismissed.

NICHOLSON-PHILLIPS V SHELL CANADA LIMITED, 2019 ABQB 929 (MASTER PROWSE)
Rules 4.22 (Considerations for Security for Costs Order) and 4.31 (Application to Deal with Delay)

The Defendant to a wrongful dismissal Action commenced in 2007 sought dismissal of the Action for prejudicial delay pursuant to Rule 4.31. Master Prowse applied the test set out in *Humphreys v Trebilcock*, 2017 ABCA 116, finding that the Plaintiff failed to advance the Action at the pace of a litigant acting reasonably, and that the delay was both inordinate and inexcusable.

Upon consideration of prejudice, Master Prowse distinguished between the Plaintiff's claim for lost income, which would not be significantly prejudiced by stale memories, and the Plaintiff's claim for general and aggravated damages, which would be significantly prejudiced by stale memories. With respect to the claim for lost income, Master Prowse found that the Plaintiff rebutted the presumption of significant prejudice, and declined to grant dismissal. Conversely, with respect to the claims for general and aggravated damages, Master Prowse found that the delay significantly prejudiced the Defendant's ability to defend and that there was no compelling reason not to grant dismissal, and the claims for general and aggravated damages were dismissed.

The Defendant also brought an Application for Security for Costs pursuant to Rule 4.22. Master Prowse declined to grant Security for Costs as the Plaintiff had been terminated without notice, and the Defendant did not allege cause, so it was likely that the Plaintiff was entitled to some damages against which the Defendant could set-off an award of Costs.

BIDELL EQUIPMENT V CALIBER MIDSTREAM, 2019 ABCA 387 (STREKAF JA)
Rules 4.22 (Considerations For Security For Costs Order) and 14.67 (Security For Costs)

The Respondent/Applicant applied for Security for Judgment and Security for Costs of the Appeal brought by the Appellant/Respondent. The Respondent had obtained Judgment against the Appellant, who appealed without applying for a stay pending the Appeal. The Appellant was a Delaware Corporation with head offices in Colorado, which did not appear to have any assets in Alberta. The Appellant did not make any payments towards the Judgment and contested enforcement proceedings brought in Colorado alleging improper procedures followed in the Alberta Courts, and asserting *forum non conveniens* arguments. The Respondent applied for an Order requiring the Appellant to post Security for Judgment (in the amount of $11.7 million) and Security for Costs of the Appeal (in the amount of $150,000).

Strekaf J.A. noted that Security for Judgment pending Appeal is an extraordinary remedy which will only be granted in exceptional circumstances, such as where there is evidence that an Appellant will improperly attempt to shield their assets. Strekaf J.A. noted that there was no evidence that this was the case, and accordingly declined to grant an Order for Security for Judgment.

Justice Strekaf noted that Security for Costs pending Appeal may be ordered pursuant to Rules 4.22 and 14.67(1). The test for granting an Order for Security for Costs pending Appeal is whether the Court considers it just and reasonable to do so, taking into account (i) whether it is likely that the Applicant for Security for Costs would be able to enforce an Order or Judgment against assets in Alberta; (ii) the ability of the Respondent to the Application to pay the Costs award: (iii) the merits of the Appeal; (iv) whether an Order to give security would unduly prejudice the Appellant's ability to continue the Appeal; and (v) any other matter the Court considers appropriate.

Strekaf J.A. found that the Respondent would not likely be able to enforce any Costs award against assets in Alberta,

and that the Appellant was a large commercial entity that would be able to pay the Costs award, and which would not be unduly prejudiced by the requirement to post Security for Costs. Justice Strekaf found that the Appeal itself was not frivolous. The amount of Costs sought by the Appellant was not challenged. Considering the totality of the circumstances, Justice Strekaf found that Security for Costs was appropriate and granted the Order requiring the Appellant to post Security for Costs within 30 days, failing which the Appeal would be struck.

The Application was allowed in part.

XPRESS LUBE & CAR WASH LTD V GILL, 2019 ABQB 756 (MASTER ROBERTSON)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 4.33 (Dismissal for Long Delay) and 10.48 (Recovery of Goods and Services Tax)

In a Decision regarding the proper award of Costs, Master Robertson awarded the Defendants elevated Costs. The Plaintiff's Actions had previously been dismissed due to delay. The Defendants sought elevated Costs due in part to the manner in which litigation had been conducted (including significant delay), and they sought double Costs for steps taken after they had served two Formal Offers to Settle. The Court found that the Plaintiff had caused deliberate delay, as on two separate occasions the Plaintiff did not take a step until the eve the three year drop dead date under Rule 4.33.

While the Plaintiff argued that the Formal Offers made pursuant to Rule 4.24 were insincere, the Court disagreed and found that the Formal Offers were legitimate attempts at compromise, and otherwise complied with Rule 4.29.

In concluding, Master Robertson reminded counsel of Rule 10.48 which allowed the Defendants to recover an additional amount as Goods and Services Tax on portions of the Costs award.

EDMONTON (POLICE SERVICE) V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2019 ABQB 864 (GRAESSER J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In this Decision regarding the proper award of Costs to a self-represented litigant, Justice Graesser used his discretion and awarded the victorious party 1/3 of Schedule C Costs, plus reasonable disbursements and GST.

The successful self-represented litigant sought, among other things, double Costs under Rule 4.29 because the opposing party had failed to better his offer of settlement. The losing party relied upon Rule 10.31(5) to argue that the Court should order no more than fraction of Schedule C Costs, if such Costs were appropriate at all, taking into consideration the Costs principles in Rule 10.33.

The Court found it would be rare for Costs in favour of a self-represented litigant to exceed those in Schedule C and found it "difficult if not impossible" to reconcile case law with a self-represented litigant being awarded double Costs under Rule 4.29 or enhanced Costs except in exceptional circumstances. The Court did not award the self-represented litigant double Schedule C Costs.

SONG V ALBERTA, 2019ABQB 789 (MASTER SCHLOSSER)
Rule 4.31 (Application to Deal with Delay)

An Application was brought to dismiss the Action for long delay pursuant to Rule 4.31. Master Schlosser canvassed the jurisprudence regarding Rule 4.31, and noted that the Court should weigh a number of factors including: the complexity of the lawsuit, the number of parties, the steps taken and the relevant time limits under the Rules for those steps, whether there have been long gaps in the progress of the Action, the Defendants' involvement in the delay, and whether the case is more of a "documents case" or a "memories case". Master Schlosser noted that the Plaintiff should not be held responsible for periods attributed to institutional delay and the Court should be alive to whether

the time limits for certain steps have changed under the Rules during the lawsuit. Master Schlosser also noted that certain "coarse filters" can be used to assess delay in the first instance. An Action that is 10 years old may be beyond its "best before date" as a general rule; however, the analysis under Rule 4.31 is not a bright line test, and is rather a nuanced analysis.

The Action was 13 years old, but Master Schlosser distinguished it from a number of other decided cases. Master Schlosser noted that, unlike some other cases of that duration, the Action was nearly ready for Trial, and all that remained to be done was mandatory Joint Dispute Resolution and the Defendant's response to the Plaintiff's expert reports. Considering all of the circumstances, Master Schlosser concluded that while the delay was inordinate, it was not inexcusable. The Court held that this was "borderline" case and the default position for such cases should be to let them proceed. Individual incidents of delay within the Action could be dealt with by the Trial Judge with Costs awards.

The Application was dismissed.

ALDERSON V WAWANESA LIFE INSURANCE COMPANY, 2019 ABQB 894 (NATION J)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.29 (Acknowledgment of Corporate Witness's Evidence)

The Plaintiff appealed the Decision of a Master which had granted the Defendant's Application to strike out the Plaintiff's Action (the "Action") under Rule 4.33(2) given that no steps had been taken for over three years. On Appeal, the Defendant argued that should the Court reverse the Master's Decision, the Action should still be dismissed under Rule 4.31.

Justice Nation noted that the standard of review for the Decision of a Master is correctness. Nation J. reviewed the applicable jurisprudence on the term "significant advance" in Rule 4.33 and noted that a response to an Undertaking is usually seen as a step that materially advances the Action. Nation J. reviewed the quality of the Undertakings and concluded that the Defendant's responses did materially advance the Action. Justice Nation also reviewed a particular response to an Undertaking under Rule 5.29. Justice Nation disagreed with the Defendant's argument that their non-responsive answer did not significantly advance the Action. Her Ladyship found it difficult to accept the argument that a "non-response" to a legitimate inquiry could mean that the Undertaking was perfunctory. Accordingly, Her Ladyship set aside the Order of the Master which had dismissed the Action under Rule 4.33.

Justice Nation considered the Application brought pursuant to Rule 4.31 and applied the facts to the six factors found in the seminal case of *Humphreys v Trebilcock*, 2017 ABCA 116. Her Ladyship found that while there was an "inordinate and inexcusable" delay, the Defendant had failed to demonstrate that the delay had caused significant prejudice. Accordingly, Justice Nation allowed the Appeal and the Action was not struck for delay.

SMALE V JOOZDANI, 2019 ABQB 909 (MASTER PROWSE)
Rule 4.31 (Application to Deal with Delay)

The Defendants to a debt Action commenced in 2011 sought dismissal of the Action for prejudicial delay pursuant to Rule 4.31. Master Prowse applied the test set out in *Humphreys v Trebilcock*, 2017 ABCA 116, finding in turn that the Plaintiffs failed to advance the Action at the pace of a litigant acting reasonably; the delay was inordinate; the inordinate delay was inexcusable; the presumption of significant prejudice was not rebutted; and finally, that there was no compelling reason not to dismiss the Action. The Action was dismissed for delay, conditional on the concurrent dismissal of the Counterclaim.

SCHEERSCHMIDT V CHRAPKO-DEIB, 2019 ABQB 928 (MASTER SUMMERS)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicant brought an Application to dismiss the Action for delay pursuant to rule 4.31, and alternatively, pursuant to Rule 4.33

The Master found that, while the Defendant took no steps to initiate Questioning of one of the Plaintiffs, the Plaintiffs provided a weak excuse that the individual could not be questioned as he was in a nursing home and his son, who had power of attorney, would not cooperate in producing him. Despite this, Master Summers found that the Defendant proved that she suffered nonlitigation prejudice in the form of significant economic losses as a result of the delay, and granted the Application for dismissal of the Action pursuant to Rule 4.31.

Master Summers dismissed the Action pursuant to Rule 4.31, and discharged a certificate of *lis pendens* registered by the Plaintiff against title to a house of which the Defendant was the registered owner.

The Master briefly addressed Rule 4.33, finding that it was not applicable, as three years had not passed since the last Questioning in the matter and the date that the Defendant had filed its Application for dismissal.

MID-WEST DESIGN & CONSTRUCTION LTD V JAYCO BUILDERS INC, 2019 ABQB 945 (HARTIGAN J)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 6.14 (Appeal from Master's Judgment or Order)

The Defendant appealed a Master's Decision dismissing its Application to have the Action dismissed for delay pursuant to Rule 4.31. The Master had found that, whether or not there was inordinate or inexcusable delay, any presumption of significant prejudice resulting from delay had been rebutted by the Plaintiff.

Hartigan J. first noted that the Defendant had filed new evidence on Appeal which spoke to the issue of prejudice, and found that the evidence was admissible pursuant to Rule 6.14(3) as it was relevant and material. However, His Lordship also noted that an analysis of whether there was delay must be conducted prior to determining whether or not the delay has resulted in significant prejudice, as the issues of delay and significant prejudice are causally linked.

Hartigan J. then reviewed the history of the Action along with the six questions set out by the Court of Appeal in *Humphreys v Trebilcock*, 2017 ABCA 116. His Lordship found that while the Action had initially advanced steadily, there was then a 22 month period of inactivity. At one point, the Defendant had applied to dismiss the Action for delay pursuant to Rule 4.33, without success. Given the 22 month period of delay, Hartigan J. determined that there was "unnecessary delay" between May 2016 and May 2018. However, His Lordship did not find the delay to be inordinate in the context of the entire length of the Action and the non-response of the Respondent. As such, there was no presumption of significant prejudice under Rule 4.31(2).

Finally, His Lordship turned to whether the Defendant had demonstrated significant prejudice as a result of delay, and considered the Defendant's new evidence filed on Appeal. The new Affidavit described "general or expected prejudice visited upon a defendant involved in lengthy litigation", but not a particular or unique prejudice. The Defendant also argued that some records had been lost or were never produced by the Plaintiff. The Plaintiff, on the other hand, insisted that it had produced all relevant and material records to the Action. His Lordship therefore concluded that there had not been non-litigation prejudice, and that it could not be determined whether the Defendant had suffered litigation prejudice. As such, the Defendant had failed to prove there had been significant prejudice resulting from delay, and the Appeal was dismissed.

BENTLEY V HOOTON, 2019 ABQB 822 (MASTER MASON)
Rules 4.34 (Stay of Proceedings on Transfer or Transmission of Interest) and 7.3 (Summary Judgment)

Master Mason considered whether the Applicant, Ms. Bentley, was entitled to Judgment against two of the Respondents, Mr. Hooton and Mr. Schmidt, for fraud. Ms. Bentley provided a loan to Mr. Hooton, Mr. Schmidt, and the other Respondent, Mrs. Schmidt. The loan was secured by a mortgage against the home of Mr. and Mrs. Schmidt. Following default, Ms. Bentley sought foreclosure for the loan balance. However, the mortgage was declared

invalid when it was determined that Mrs. Schmidt had no knowledge of the loan and her signature had been forged on the mortgage documents.

The issue before Master Mason was whether Ms. Bentley, who had no knowledge of the fraud, could get Judgment against Mr. Hooton and Mr. Schmidt who perpetrated the fraud.

As a preliminary matter, Master Mason considered Rule 4.34 which stays an Action on the death of a Defendant. The Court was advised that Mr. Hooton had passed away. Master Mason ruled that Ms. Bentley's Statement of Claim and Mr. Schmidt's Third Party Claim against Mr. Hooton could proceed because the only evidence of his death were statements in Mr. Schmidt's Affidavit. If confirmation of Mr. Hooton's death could be made, his estate could seek to set Judgments against him aside. Mr. Hooton had not defended the claims against him even prior to his death.

Master Mason then considered Ms. Bentley's Application for Summary Judgment against Mr. Schmidt for the loan balance. Master Mason noted that Summary Judgment is appropriate when the record is sufficient to decide a matter fairly and justly. That was the case in this instance. The Court of Queen's Bench had previously found that Mr. Schmidt was involved in the fraud, and the Court of Appeal went so far as to find that he forged his wife's signature on the documents.

Master Mason awarded both Ms. Bentley and Mr. Schmidt Judgment against Mr. Hooton in default of a defence. Master Mason also granted Judgment against Mr. Schmidt in favour of Ms. Bentley.

MARINO (RE), 2019 ABQB 903 (MASTER PROWSE)
Rule 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

Mr. and Ms. Marino were spouses involved in matrimonial litigation, including competing claims under the *Matrimonial Property Act*, RSA 2000, c M-8 (the "*MPA*"). Mr. Marino was also an undischarged bankrupt under the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (the "*BIA*"). Ms. Marino had filed a Statement of Claim for divorce and division of matrimonial property and sought an unequal division of matrimonial property in her favour under the *MPA* (the "Claim").

Master Prowse noted that Ms. Marino's Claim against Mr. Marino's property was stayed pursuant to Rule 4.34(1) which states that, if at any time in an Action prior to Judgment, the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the Action is stayed until an Order to continue the Action by or against the other person has been obtained (the "Stay").

Master Prowse reviewed the relevant provisions of the *MPA* to determine whether Ms. Marino's Claim was provable in bankruptcy and therefore releasable from the Stay. Master Prowse concluded that it was not and accordingly refused to lift the Stay. Given this conclusion under Rule 4.34(1), Master Prowse did not need to consider whether the Claim was also stayed pursuant to the *BIA*.

BEHM V HANSEN, 2019 ABQB 813 (LEMA J)
Rules 5.13 (Obtaining Records from Others), 8.10 (Order of Presentation), 9.13 (Re-opening Case) and 13.18 (Types of Affidavit)

The Applicant, a mother in a family Trial, applied to adjourn the Trial in order to seek information from the father and a third party relevant to the father's potential interest in a business. The father had provided evidence at Trial about his "limited employment" by the business, but the mother was advised by a third party during Trial that he may actually own the business. The father's income and assets were material issues in the Trial.

The mother invoked Rule 9.13 to require the father to disclose additional information about his connection with the company, and also sought an Order pursuant to Rule 5.13 directing a third party, who apparently was the sole shareholder of the company, to provide banking and other records related to the issue.

The father objected to a further adjournment, arguing that the mother's Affidavit in support of her Application contained hearsay (namely, that the third party had advised her that the husband was an owner of the business). He further argued that pursuant to Rule 8.10(1)(d), where a Defendant's evidence has concluded, the Plaintiff may adduce evidence, but that the evidence the mother wished to adduce was hearsay which could not be admitted. The mother countered that, pursuant to Rule 13.18, an Affidavit may be sworn on the basis of information and belief, if the source of the information is sworn to in the Affidavit and if the Affidavit is not in support of "final" relief. The Court accepted the mother's arguments that since she was not seeking final relief, she was entitled to rely on information and belief pursuant to Rule 13.18.

The Court also held that Rule 9.13 did not apply to the situation, because it addresses circumstances where an Order or Judgment exists, but has not yet been filed. In this case, since the Trial was still ongoing, it was not necessary for the Rule to be invoked. Since the mother first learned of the father's connection to the company during the Trial, and the father could not point to any reason that the mother should have known about it earlier, Lema J. adjourned the remainder of the Trial to assess the father's connection to the company.

With respect to the mother's Application for the production of third-party records respecting the company, Lema J. explained that the Court must consider the relevance and materiality of the proposed third-party records, although "relevance and materiality need not be guaranteed for records to be directed to be produced by non-parties". The question is rather whether the documents or information sought may relate to matters in issue in the Action. Lema J. held that reasonable question did exist about the father's involvement with the company, and ordered that the third party provide banking and other records to the mother within 30 days.

PROLINE PIPE EQUIPMENT INC V PROVINCIAL RENTALS LTD, 2019 ABQB 983 (ACKERL J)
Rules 5.31 (Use of Transcript and Answers to Written Questions), 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Court dismissed the Plaintiff's Application for Summary Judgment because the Plaintiff was unable to show, pursuant to Rule 7.3, that there was no defence to the claim or part of it, or that the only real issue was the amount to be awarded.

Justice Ackerl found much of the Plaintiff's evidence to be inadmissible, as key portions came from the transcripts of the Part 5 Questioning of two individuals. Pursuant to Rule 6.11, the Court could only consider the answers from Part 5 Questioning if those answers could be used under Rule 5.31. The Court found that, according to Rule 5.31, each individual's answers at Questioning could only be used as against themselves. The answers from Part 5 Questioning were not admissible in the Summary Judgment Application against the Defendant company.

Justice Ackerl found that he could not fairly resolve the dispute on a summary basis and denied the Application.

DGS V HAS, 2019 ABQB 887 (LEMA J)
Rules 6.3 (Applications Generally) and 12.44 (Application Within Course of Proceeding)

The Applicant applied for a declaration that her adult child was a "child of the marriage" and hence that the Respondent was required to pay child support. During oral argument, the Applicant also requested that she receive security for the child-support arrears owed to her by the Respondent. As this request for security was not included in the Notice of Application, the Respondent opposed that relief for lack of notice.

A Notice of Application must state the remedy claimed or sought, pursuant to Rule 6.3(2). Rule 12.44 requires that a family law Application be made in accordance with Rule 6.3. Citing the Applicant's contravention of Rule 6.3, the Court declined to hear the Applicant's plea for security.

102 STREET DEVELOPMENTS LTD V DERK'S FORMALS LTD, 2019 ABQB 781 (NEILSON J)
Rules 6.8 (Questioning Witness Before Hearing), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff commenced three Actions, which were later consolidated into one Action, relating to its purchase of commercial land from the Defendant. The Plaintiff alleged that the land was contaminated by the chemicals used by a previous tenant. After the Plaintiff applied to amend its pleadings, one of the Defendants applied for Summary Judgment in Masters Chambers. The amendments were allowed, and the Application for Summary Judgment was dismissed. The Defendant appealed the Order dismissing the Summary Judgment Application.

After filing its Notice of Appeal, the Defendant filed further evidence pursuant to Rule 6.8, including the transcript from one witness's Questioning, two Affidavits, and an expert report. Neilson J. noted that while an Appeal from a Master's Decision is on the record before the Master, additional evidence may be considered on the Appeal pursuant to Rule 6.14(3).

His Lordship then noted that the question on Appeal is whether the Master was correct, and that pursuant to Rule 7.3(1)(b), Summary Judgment may be granted where there is no merit to a claim or part of it. In assessing whether a claim has "merit", the Court must consider whether there is a "real issue" to be determined. The onus is on the party moving for Summary Judgment to demonstrate, on a balance of probabilities, that there is "no real issue" for Trial. The Court must also be satisfied that Summary Judgment is a suitable method for assessing the issues and achieving a just result in the circumstances.

Justice Neilson held that the matter could not be dismissed summarily, as there was a basis to conclude that there was a proximate relationship between the Plaintiff and Defendant, and because the evidence on the issue of reliance was conflicting. As such, the Court was not satisfied that there were no real issues between the parties. The Plaintiff was awarded its Costs of the Appeal and the original Summary Judgment Application before the Master.

BOOTH V CHRISTENSEN, 2019 ABQB 878 (FETH J)
Rules 7.1 (Application to Resolve Particular Questions or Issues), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 9.16 (By Whom Applications are to be Decided) and 12.70 (Powers of Court on Appeal)

The Plaintiff in a personal injury Action sought determination of an issue in advance of Trial, pursuant to Rule 7.1. Specifically, the Court was asked to decide whether the Action was *res judicata*, given that a Default Judgment for property damage, arising from the same facts, was obtained in the Provincial Court of Alberta. The parties agreed to sever the issue of *res judicata*, and the Court proceeded to review the issues of cause of action estoppel and merger, ultimately finding that these doctrines were engaged, but exercising discretion in not applying them.

In an alternative line of argument, the Court was asked to either set aside the Default Judgment or to read into the Default Judgment an implied term preserving the Plaintiff's ability to pursue personal injury damages. Rule 9.15 gives the Court the authority to set aside or vary a Judgment subject to Rule 9.16, which provides that such authority can only be exercised by the Judge or Master who granted the original Judgment unless the Court otherwise directs. "Judgment" is a defined term meaning "a judgment of the Court", wherein "Court" is in turn defined as the Court of Queen's Bench of Alberta. As the original Judgment was made by a Provincial Court Judge, Justice Feth held that in the absence of specific authority, such as the authority provided for an Appeal under the *Family Law Act*, RSA 2003, c F-4.5, pursuant to Rule 12.70, His Lordship had no jurisdiction to set aside the Default Judgment. Moreover, Justice Feth declined to read in an implied term inconsistent with the otherwise unequivocal wording of the Default Judgment.

BARCLAY V KODIAK HEATING & AIR CONDITIONING LTD, 2019 ABQB 850 (NIXON J)
Rule 7.3 (Summary Judgment)

The Plaintiff in the underlying Action ("Ms. Barclay") appealed the Decision of the Provincial Court Trial Judge dismissing her claim in negligence against the Defendant Kodiak Heating & Air Conditioning Ltd. ("Kodiak") (collectively, the "Claim"). The Trial Judge found that there was no merit to the Claim. In particular, the Trial Judge held that Ms. Barclay did not specify a cause of action in the pleadings, and the facts did not suggest one. The Trial Judge concluded by finding that a fair and just adjudication of the Claim was to summarily dismiss the Action by Ms. Barclay against Kodiak pursuant to Rule 7.3.

Nixon J. noted that in making their decision, the Trial Judge can only consider the evidence before it and that it would be an error of law for that Court to make a decision that is based on alleged facts that are not in evidence. Justice Nixon reviewed Ms. Barclay's pleadings and Affidavits that were before the Trial Judge and found that they did not raise particulars of any negligence or breach of contract. His Lordship found that the pleadings only stated that Kodiak was bound by an alleged warranty that was not in evidence. Accordingly, Justice Nixon concluded that the factual record before the Trial Judge was sufficient to allow her to summarily dismiss the Claim. In this regard, His Lordship found that there was no palpable and overriding error in respect of the Trial Judge's assessment of the factual record before the Court and therefore dismissed the Appeal.

MUTH ESTATE, 2019 ABQB 922 (LITTLE J)
Rule 7.3 (Summary Judgment)

The Plaintiff/Applicant was the executor in an estate who claimed indemnification from the beneficiaries for the estate's tax liability after the estate's tax assessment exceeded the holdback the executor retained. The Plaintiff applied for Summary Judgment to determine all issues in the Action. The Applicant's counsel was ill the day of the hearing, so the parties proceeded on the basis of their written submissions only.

Justice Little noted that the test for Summary Judgment set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 ("*Weir-Jones*") sets out four key considerations as to whether the procedure and outcome will be just, appropriate, and reasonable. The considerations are: a) whether there are uncertainties in the facts, the record, or the law which reveal a genuine issue regarding a Trial; b) whether the moving party met the burden to show that there is no genuine issue requiring a Trial; c) whether the responding party put its best foot forward to demonstrate from the record that there is a genuine issue requiring a Trial; and d) whether the state of the record is such that the presiding Judge is prepared to exercise their discretion to summarily resolve the dispute.

The Respondents asserted that there were uncertainties in the law such that the proper application of the law to the facts required a Trial. Justice Little held that uncertainties in the law referred to in the *Weir-Jones* test only refers to cases which are heavily evidence-based precedent setting cases or where there are larger public policy issues at play. The simple disagreement between the parties over the law where it is not trite does not disqualify a case from Summary Judgment.

Little J. found that there was a genuine issue regarding whether the Applicant had exercised her duties with reasonable care and diligence such that she should not bear the consequences of failing to retain a sufficient holdback for taxes. As such, Little J. held that the Applicant did not meet her burden of demonstrating there was no genuine issue requiring a Trial or that there was no merit to the defence.

Justice Little found that the record was clear, the litigation itself was old (having been commenced in 2014), and that the amounts at issue were small. Little J. further found that the parties had demonstrated that they did not wish to proceed to Trial in a related litigation because they resolved that case through a settlement. Little J. noted that despite the Applicant not demonstrating that there was no merit to the Respondents' defence, neither was there a genuine factual issue requiring Trial as the Respondents asserted. Little J. was inclined to summarily dismiss the Action, however, determined that Rule 7.3 did not specifically

authorize that remedy where the Defendant did not specifically apply for it. Little J. commented that the Court may have the inherent jurisdiction to summarily dismiss an Action in the absence of that remedy being applied for, however, in the absence of submissions from the parties on that point, Justice Little did not exercise that jurisdiction.

The Application for Summary Judgment was dismissed.

SCHERLE V TREADZ AUTO GROUP INC., 2019 ABQB 987 (CAMPBELL J)
Rule 7.3 (Summary Judgment)

Andrea Scherle and Stacy Rachkewich (the "Plaintiffs") alleged that they and others suffered financial loss and damages arising out of their dealings with the Defendant, Treadz Auto Group Inc. ("Treadz"). Treadz operated a used car dealership in Calgary, Alberta. The Plaintiffs alleged that their damages were due to the actions and/or inactions of the following Defendants: Treadz and its principal, Sean O'Brien (collectively, the "Treadz Defendants"); Her Majesty the Queen in Right of Alberta as represented by the Ministry of Service Alberta ("Service Alberta"); and the Alberta Motor Vehicle Industry Council ("AMVIC").

Both Service Alberta and AMVIC brought Summary Dismissal Applications pursuant to Rule 7.3. Justice Campbell thoroughly reviewed the relevant jurisprudence on Summary Judgment and the law on negligence claims brought against public bodies. Campbell J. noted that there were no evidentiary gaps or material facts in dispute and that the existing record was sufficient to allow an adjudication of the issues between the Plaintiffs, AMVIC, and Service Alberta that was fair and just to the parties. Justice Campbell found that Service Alberta and AMVIC had satisfied their burden of demonstrating, on a balance of probabilities, that there was no merit to the Plaintiffs' claim against them as neither body owed a private law duty of care to the Plaintiffs. Further, the Plaintiffs had not demonstrated that there was a genuine issue requiring Trial.

Justice Campbell also addressed the Plaintiffs' Application under the *Class Proceedings Act*, SA, 2003, c C-16.5 (the "*CPA*") to certify the Action. Campbell J. concluded that the Plaintiffs had met all of the requirements of section 5(1) of the *CPA* in respect of the Action as against the Treadz Defendants and certified the class proceeding on that basis. Justice Campbell noted that, had viable claims against either AMVIC or Service Alberta been grounded, then the Plaintiffs would have also met all of the requirements of section 5(1) and the Action would have been certified as a class proceeding accordingly. Therefore, Justice Campbell granted AMVIC's and Service Alberta's Summary Dismissal Applications and certified the Action as against the Treadz Defendants alone as a class proceeding.

ANDERSON V HARARI, 2019 ABQB 745 (ANDERSON J)
Rule 8.16 (Number of Experts)

In a personal injury Trial, Anderson J. heard evidence from two experts regarding causation and the treatment of ankle injuries. Her Ladyship was "mindful of Rule 8.16(1)", which states that no more than one expert is permitted to give opinion evidence on one subject unless the Court otherwise permits, and noted that there are "strong policy reasons" for limiting the number of experts. However, Anderson J. held that hearing from both sets of witnesses was appropriate, as the Court would benefit from receiving the evidence of multiple experts with "varying specialities," and while there was some duplication of evidence, it was not abusive or excessive.

JANITEN V MORAN, 2019 ABCA 380 (MCDONALD, VELDHUIS AND CRIGHTON JJA)
Rules 9.2 (Preparation of Judgments and Orders), 9.4 (Signing Judgments and Orders) and 13.25 (Use of Filed Affidavits)

The Appellant mother, Holly-Lyn Janiten (the "Mother") appealed an Order (the "Vacating Order") granted to the Respondent father, Jeffrey Douglas Moran (the "Father") which had vacated two prior Orders that the Mother had obtained pertaining to child support (the "Prior Orders"). The Vacating Order vacated both Prior Orders, significantly reduced the child support arrears owed to the Mother, and reduced the Father's monthly support for 2018 and 2019 based on the Father's evidence provided on his Application for the Vacating Order (the "Application").

The Mother had failed to provide an Affidavit for the Application and the Chambers Judge maintained that since the Mother had filed nothing with respect to the Application, she did not have any evidence before the Court.

On Appeal, McDonald J.A., speaking for a unanimous Court, noted that Rule 13.25 expressly states "… a party may use and refer to any affidavit filed in the action." Accordingly, the Court found that the Chambers Judge had erred by refusing to look at the Mother's Affidavits filed earlier in the Action.

The Court concluded by allowing the Appeal, setting aside the Vacating Order, and substantively reinstating the Prior Orders. The Court also awarded Costs in the amount of $5,000 inclusive of disbursements to the Mother and invoked Rules 9.4(2)(c) and 9.2(2)(d) pertaining to preparation of and approval of the Order.

CZ V RB, 2019 ABCA 445 (VELDHUIS, PENTELECHUK AND FEEHAN JJA)
Rule 9.13 (Re-opening Case)

The Plaintiff appealed the Decision of a Chambers Judge and concurrently brought an Application under Rule 9.13 to allow the Court to hear more evidence. The Chambers Judge dismissed the post-hearing Application.

The Court of Appeal considered Rule 9.13 and found that it should be used sparingly. The Court noted that the Rule was not an opportunity for a party to advance an argument that it had not advanced before. It was also not intended to be used to fix evidentiary gaps, and the Court referred to the four-part test for admitting new evidence on Application.

The Court of Appeal found that the Chambers Judge was correct in dismissing the Application, that there was no misapprehension of the evidence, and that there was no reasonable apprehension of bias. The Appeal was dismissed.

ESPENILLA V AYUPAN, 2019 ABCA 493 (SLATTER JA)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 14.81 (Service of Appeal Documents)

The Respondent filed for divorce, noted the Applicant in default, and obtained a desk divorce Judgment in the Court of Queen's Bench. The Applicant retained counsel and discovered that the desk divorce Judgment had been issued. The Applicant then made an Application to extend the time to appeal the Judgment and for directions on service.

Justice Slatter directed the Applicant to serve the Respondent at the address for service in the Court of Queen's Bench as that address continues to be the address for service in the Court of Appeal until it is changed, pursuant to Rule 14.81(1). The Court also advised that it would also be prudent to serve the Respondent via email.

Justice Slatter then advised that it would be most effective if, rather than appeal the desk divorce, the Applicant made an Application to have the Noting in Default set aside under Rule 9.15. His Lordship adjourned the Application to extend the time to appeal *sine die* and directed that the Applicant file an Application to set aside the Noting in Default and serve it on the Respondent by ordinary mail and by email.

RATH AND COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2019 ABQB 949 (MASTER PROWSE)
Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.13 (Appointment for Review) and 13.5 (Variation of Time Periods)

The Applicants, Rath and Company Barristers and Solicitors ("Rath Law"), brought an Application to set aside an appointment obtained by its client, Sturgeon Lake Cree Nation ("SLCN"), for a review of their retainer agreement and accounts for Rath Law's services rendered. SLNC had obtained an appointment from the Review Officer on August 7, 2018, within the six-month requirement set out in Rule 10.10 (the "Appointment"), but did not serve

the Appointment on opposing counsel until December 24, 2018 (outside of the six-month period). Master Prowse noted that while Rule 10.13(4) requires that a client or lawyer who obtains an appointment date for review must serve the opposing party "10 days or more before the appointment date," that date is not an override of the overarching six-month deadline pursuant to Rule 10.10.

Master Prowse concluded that, pursuant to Rule 10.10, the Appointment must be obtained and served within the six-month period. Accordingly, since SLCN failed to do so, Master Prowse set aside that Appointment, subject to SLCN's (presently adjourned) Application under Rule 13.5 to extend the six-month period. Master Prowse specifically emphasized that while some may find this decision harsh and lacking in flexibility, there is no flexibility under Rule 10.10 which states that a lawyer's charges may not be reviewed if six months have passed after the date on which the account was sent to the client. Master Prowse noted that there is flexibility under Rule 13.5, which states that the Court may extend the six-month time limit contained in Rule 10.10, but that matter was not before Master Prowse.

ESTATE OF MONTGOMERY, 2019 ABQB 833 (NIXON J) Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.49 (Penalty for Contravening Rules) and 14.88 (Cost Awards)

In October of 2018, Justice Nixon gave oral reasons for Judgment at a Special Chambers hearing (the "Hearing") concerning the estate of Dorothy Montgomery (the "Estate"). The personal representatives of the Estate were Cecil Allan Myram ("Allan"), Donald John Montgomery ("Donald"), and Neil Montgomery ("Neil") with the focal point of the underlying litigation being the validity of a transfer of land by the deceased to Neil (the "Estate Litigation").

The Hearing involved, among other things, enforcement proceedings initiated by Neil against Allan and Donald personally for a previous Costs award (the "Enforcement Proceedings"). In general, Allan and Donald were successful in the Hearing, and were presumptively entitled to Costs pursuant to Rule 10.29. Allan and Donald sought solicitor-client Costs in both their personal capacities and as personal representatives of the Estate. Allan and Donald also sought penalty Costs pursuant to Rule 10.49(1).

Justice Nixon noted that under the *Surrogate Rules*, AR 130/1995 (the "*Surrogate Rules*") the Court may order Costs to be paid from the estate or by any person who is a party to an Application. In addition, the *Surrogate Rules* state that the Rules apply if the matter is not otherwise dealt with under the *Surrogate Rules*. Nixon J. reviewed the applicable Rules on Costs, noting that a Trial Judge has wide discretion pursuant to Rule 10.31, and should utilize the considerations enumerated in Rule 10.33.

Justice Nixon reviewed the vast procedural history between the parties and concluded that while Neil's conduct was at times blameworthy and required deterrence, he did not act in a manner that would be described as reprehensible, scandalous, or outrageous. Justice Nixon found that while there was no basis for the Enforcement Proceedings initiated by Neil, he did raise legal arguments justifying his actions that needed to be addressed. In addition, Justice Nixon noted that personal representatives do not expect that by accepting an appointment they might find themselves out of pocket, or even that there is a risk that that might happen. On this basis, Justice Nixon was satisfied that the Enforcement Proceedings justified enhanced Costs but not solicitor-client Costs.

Justice Nixon found that it would not be fair or equitable to have Allan and Donald left out of pocket for the legal fees that were necessary to discharge the Enforcement Proceedings and regain what was already theirs. His Lordship noted that, as individuals, they were implicated by the very nature of their role as personal representatives, and justice could only be done if they were indemnified for the Costs they incurred. Accordingly, Justice Nixon awarded Allan and Donald 75% of their Costs in their personal capacity and ordered that the remaining Costs could be recovered from the Estate in priority to all other claims.

REMINGTON DEVELOPMENT CORPORATION V ENMAX POWER CORPORATION, 2019 ABQB 901 (MASTER ROBERTSON)
Rules 10.29 (General Rules for Payment of Litigation Costs) and 10.41 (Assessment Officers Decision)

After Master Robertson dismissed the Plaintiff's Application to amend its Amended Statement of Claim, the parties were unable to agree on Costs. As such, they re-appeared before the Master for a Costs determination.

The Defendant, who was the successful party, sought Costs "payable forthwith and in any event of the cause". Master Robertson noted that this meant the Defendant had simply sought standard Costs, as Costs are always payable forthwith unless the Court states otherwise. The Plaintiff argued that Costs should be set at $2,000 plus reasonable disbursements "payable at the end of the case", but its arguments were rejected by the Master.

Master Robertson explained that pursuant to Rule 10.29, the successful party to an Application is generally entitled to Costs against the unsuccessful party, subject to the Court's discretion, an Assessment Officer's discretion under Rule 10.41 (which entitles the Assessment Officer to assess whether Costs are "reasonable and proper"), and certain rules which speak to Costs in particular circumstances. Since there had been no *Calderbank* Offer or other circumstances suggesting that elevated Costs were appropriate, the Defendant was entitled to its Costs, which are always payable forthwith pursuant to Rule 10.29(1).

RD V LWD, 2019 ABQB 966 (HO J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This Decision dealt with the parties' entitlement to Costs following the reasons for Decision respecting retroactive and ongoing child and spousal support and the division of matrimonial property.

Ho J. noted that the parties agreed that Costs should be awarded in accordance with Column 4 of Schedule C, but could not agree as to which one was the "successful party". Pursuant to Rule 10.29, the successful party is entitled to a Costs award against the unsuccessful party, subject to the Court's overall discretion under Rule 10.31. Her Ladyship noted that in family matters, Costs are generally not awarded by issue; instead, success "means substantial success, not absolute success". After reviewing her Decision and the parties' written submissions, Ho J. concluded that while the father had been successful on some issues, the mother was the substantially successful party.

Although Ho J. determined that the mother had been substantially successful, Her Ladyship noted that under Rule 10.33, several factors may be considered in awarding Costs, including whether either party unnecessarily delayed or lengthened the Action, refused to admit something that should have been admitted, or any other matter relevant to the issue of Costs. Ho J. noted that the mother had argued against the father's claimed exemption, even though his evidence was "particularly clear and overwhelmingly convincing". Additionally, prior to Trial, the mother withdrew several requests for relief, which the father had already spent time and effort preparing for. The father had also served Formal Offers on the mother, although Ho J. was not prepared to conclude that he had "beaten" them at Trial.

Ho J. ultimately exercised her discretion under Rule 10.31 to award $85,000 in Costs payable by the father to the mother, rather than the $129,907.03 sought by the mother.

HOSKINS V HOSKINS 2019 ABQB 777 (FRIESEN J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Hoskins' obtained a Judgment of divorce. The matter before Friesen J. was to determine the Costs award as a result of that divorce proceeding. Following the Judgment of divorce, Mr. Hoskins' counsel submitted a Bill of Costs for $35,500 under Column 5 of Schedule "C". In determining the appropriate Costs award, Justice Friesen considered the factors enumerated in Rule 10.33, specifically: (a) the result of the Action and relative degree of success of each party; (b) the amount claimed and amount recovered; and (c) the conduct of a any party that shortened the Action.

Success was divided at Trial, but Mr. Hoskins experienced greater success by a wide margin. The Court found that counsel for Mr. Hoskins had assisted the Court in narrowing the issues. Considering the factors, the Court awarded Costs to Mr. Hoskins in the amount of $25,000.

HICKAWAY V RIDDELL KURCZABA ARCHITECTURE ENGINEERING INTERIOR DESIGN LTD, 2019 ABQB 874 (EIDSVIK J)
Rule 10.33 (Court Considerations in Making Costs Award)

Justice Eidsvik released additional reasons on Costs following a finding of wrongful dismissal against the employer Defendant/Plaintiff by Counterclaim. The Plaintiff employee was successful in his claim, and was presumptively entitled to receive Costs at Column 2, but sought enhanced Costs under Column 4.

Rule 10.33(2) sets out relevant factors for to the Court's consideration in deciding whether to vary the amount of a Costs award. Justice Eidsvik considered the Defendant employer's conduct during the litigation, and found that Column 3 costs would recognize the additional resources expended to address the Defendant's combative behaviour which unnecessarily prolonged the Action.

CORMIER V CORMIER, 2019 ABQB 930 (FRIESEN J)
Rule 10.33 (Court Considerations in Making Costs Award)

This was a Decision regarding Costs. The Court considered the factors listed in Rule 10.33. In this case, the unsuccessful party did not sign a transfer of land despite being legally obligated to do so, and forced the successful party to resort to a time-consuming and expensive Court proceeding in order to ensure that a land sale went through. While the Court determined that the successful party should be awarded Costs, Friesen J. held that the circumstances of this case did not warrant the solicitor-client costs sought by the successful party.

B(RM) V B(DT), 2019 ABQB 826 (INGLIS J)
Rules 10.51 (Order to Appear), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

In a contentious family matter, the parties had appeared before the Court on at least 19 occasions to determine parenting and financial issues, and continued to disagree about finances. Their Case Management Justice ordered a Summary Trial to proceed on an expedited basis.

Although the Summary Trial dealt mostly with custody and parenting issues, the mother also sought an Order holding the father, who had admitted under Oath to violating five previous parenting Orders, in contempt of Court. The mother sought a fine of $5,000 for each parenting Order that the father breached.

Inglis J. explained that deliberate failure to obey a Court Order "strikes at the very heart of the administration of justice", and that the father's failure to abide by the Court's Orders was both damaging to his family, as it resulted in protracted litigation, and to the Court system. Inglis J. further explained that civil contempt is governed by Rules 10.51 to 10.53, and that while the Court has inherent power to convict a party of contempt of Court, it should only do so if there is "an urgent and imperative to act immediately".

Her Ladyship noted that, although it may appear that the Court does not have the discretion to Order that a fine paid by the contemnor be payable to the opposing party, there is precedent in Alberta for such fines. Moreover, the Court has broad discretion to impose a remedy or punishment in the face of contempt of Court. As such, Inglis J. held that it was possible to direct any fine for contempt by the father to be payable either to the mother, or to the Court. However, Her Ladyship also explained that in the context of family law proceedings, the Court should consider the best interest of the children in assessing whether a punishment for contempt of Court is appropriate.

Inglis J. ultimately directed one $5,000 fine payable to the Court for the five Orders. However, Her Ladyship also put

the father on notice that "further contempt may well result in far more serious consequences", including potential jail time.

In respect of Costs, Inglis J. noted that full indemnity Costs or enhanced Costs may be imposed where a party is in contempt of Court, because the contempt may have resulted in wasted time and resources, and to express the Courts' disapproval of the contempt. In this case, additional Court intervention was required as a result of the father's refusal to abide by the Court Orders. As such, while Inglis J. did not award full indemnity Costs to the mother, Her Ladyship awarded Costs at a rate of double Column 3 Costs.

DEADMAN V JAGER ESTATE, 2019 ABCA 481 (GRECKOL, STREKAF AND KHULLAR JJA)
Rule 11.25 (Real and Substantial Connection)

Jager Estate (the "Estate") brought an Action against the Deadmans. The Estate filed the Statement of Claim in Alberta. The Deadmans were permanent residents of Mexico. The Statement of Claim concerned monetary arrangements and loans from John Jager ("Jager") to the Deadmans prior to Jager's death. The Estate asserted that Alberta was the proper jurisdiction, whereas the Deadmans argued that the *forum conveniens* for part, if not all, of the Statement of Claim was Mexico. The Chambers Justice determined that the entirety of the Statement of Claim had a real and substantial connection to Alberta and dismissed the Deadmans' Application to set aside service.

In considering the standard of review, the Court of Appeal acknowledged that the legal tests for *jurisdiction simpliciter* and *forum non conveniens* are questions of law. The determination of either is a question of mixed law and fact which will be accorded deference. The Court noted that the analysis of jurisdiction simpliciter is informed by the existence or nonexistence of presumptive connecting factors enumerated in Rule 11.25(3). The Deadmans had signed promissory notes which stated that Alberta would take jurisdiction over disputes, and thus, the Estate established at least one presumptive connecting factor. Citing *Club Resorts Ltd v Van Breda*, 2012 SCC 17, the Court found that it would be inefficient to divide the claim, and therefore Alberta was presumptively the jurisdiction simpliciter. The Deadmans failed to satisfy their burden to rebut the presumption.

The Court of Appeal then considered whether it should decline jurisdiction due to the principles of *forum non conveniens*. The Court refused to disturb the findings of the Chambers Justice and found that Mexico would not be a more convenient forum. The Court dismissed the Appeal.

VLN V SRN, 2019 ABQB 849 (LEMA J)
Rule 12.36 (Advance Payment of Costs)

VLN sought an Order under Rule 12.36 for advance Costs from her ex-husband so that she could continue in the divorce proceedings between the parties. VLN had been a stay-at-home mother during the marriage and had only worked part-time following the separation. VLN was also the primary caregiver for the remaining child of the marriage. VLN's legal Costs had already totaled over $100,000.

The Court noted that the test under Rule 12.36 requires that each Applicant file an Affidavit which evidences that they do not have sufficient resources to pay for their part of the litigation. The Court found that there was no requirement to show that the Applicant's position had merit, but that if there was such a requirement, the very existence of a matrimonial property dispute showed sufficient merit to award advance Costs under Rule 12.36. The Court awarded VLN $60,000 in advance Costs to proceed to Trial as she evidenced a demonstrated need.

BALISKY V BALISKY, 2019 ABCA 404 (FEEHAN JA)
Rules 12.59 (Appeal from Divorce Judgment), 14.4 (Right to Appeal) and 14.8 (Filing a Notice of Appeal)

The Applicant sought an extension of time to Appeal an Order respecting divorce and division of matrimonial property, as she had not filed a Notice of Appeal as required by Rule 14.8 within the 30 days contemplated in Rules 12.59(b), 14.4(5)(b), 14.8(2)(a)(iii), and Section 21 of the *Divorce Act*, RSC 1985, c 3. Justice Feehan proceeded through the analysis for extension of time to Appeal, as set out in *Cairns v Cairns*, [1931] 4 DLR 819, and ultimately

exercised discretion to grant the extension of time. Chief among His Lordship's considerations was the Applicant's medical conditions, found to constitute a special circumstance excusing the Applicant's delay, as well as the absence of serious prejudice to the Respondent.

CAMPBELL V PARADISE PETROLEUMS LTD, 2019 ABCA 410 (WATSON, VELDHUIS AND CRIGHTON JJA)
Rules 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Appellant challenged an Order of a Chambers Judge directing that funds be set aside from the proceeds of a transaction between the Appellant and a third party. The Chambers Judge was satisfied that there was a reasonable likelihood that the money from the transaction would be dissipated while the Respondents were seeking payment for assets they had sold to the Appellant. While the Appellant took the position that a valid purchase and sale agreement had not been formed, the Chambers Judge found part performance.

On Appeal, the Appellants argued that part performance was not properly pleaded under Rule 13.6(3)(i) which states that a pleading "must also include a statement of any matter on which a party intends to rely that may take another party by surprise" including "performance." The Court of Appeal dismissed the Appeal, finding that there was no element of "surprise." It also compared Rule 13.6 with Rule 13.7 which lists the topics for which pleadings "must give particulars," surprise or not, and noted that Rule 13.7 did not include "part performance."

WANG V ALBERTA (JUSTICE), 2019 ABCA 507 (ROWBOTHAM, VELDHUIS AND KHULLAR JJA)
Rule 13.6 (Pleadings: General Requirements)

The Appellant appealed an Order summarily dismissing his Action as having been brought after the expiry after the applicable limitation period. The Appellant also made submissions requesting the Court of Appeal to overturn an Order which set aside the Noting in Default of the Respondent. Despite no formal Appeal being made of the latter Order, no objection was made to the Court of Appeal ruling on the Appellant's submissions in respect of it in the interests of completeness and finality.

The Appellant initially commenced the claim against the "Ministry of Justice Department Alberta" and attempted to serve the Statement of Claim by registered mail sent to the Minister's office. When no Statement of Defence was filed, the Respondent was noted in default. The Appellant amended the Statement of Claim to name the correct legal entity "Her Majesty the Queen in Right of Alberta" and served the Respondent. The Master permitted setting aside the Noting in Default, which Order was upheld by the presiding Chambers Judge. The Court of Appeal found that there was no error made by the Chambers Judge as the "Ministry of Justice Department Alberta" is not an entity capable of being sued and the Appellant did not serve the Statement of Claim in accordance with the *Proceedings Against the Crown Act*, RSA 2000, c P-25. The Appeal on this ground was dismissed.

Regarding the Appeal of the Order summarily dismissing the Appellant's Statement of Claim, the Court of Appeal found that the Defendant/Respondent had pleaded the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*") in its Application for Summary Dismissal, however, had failed to plead the *Limitations Act* in its Statement of Defence. The panel noted that section 3(1) of the *Limitations Act* requires the Defendant to plead the *Limitations Act* as a defence to be able to rely on it, and that Rule 13.6(3)(q) states that a pleading must include a limitation period if the party intends to rely on it. The panel also noted that "pleading" is a defined term in the Appendix of the Rules which includes a Statement of Defence but does not include an Application. The Court of Appeal held that the pleading referred to in section 3(1) of the *Limitations Act* refers to a Statement of Defence. The panel held that reference to the *Limitations Act* in the Application did not constitute pleading the *Limitations Act* as a defence. As such, the Appeal of the Order summarily dismissing the Appellant's Statement of Claim was allowed.

CONDOMINIUM CORPORATION NO. 042 5177 V KUZIO, 2019 ABQB 814 (RENKE J)
Rule 13.18 (Types of Affidavit)

The Applicant condominium corporation applied for an interim injunction enjoining numerous Respondent unit owners from offering short-term accommodations in their units. One of the issues to be decided was the weight to be given to an Affidavit relied upon by the Applicant. The Affidavit attested to complaints received from tenants who did not swear their own Affidavits.

The Court confirmed that hearsay evidence can be relied upon in an Application for interim relief and that the Rules allow for hearsay evidence to be included in an Affidavit in support for interim relief as long as the source of the information is disclosed as per Rule 13.18(1)(b) and 13.18(2), and the deponent swears to his/her belief in its truth.

The Affidavit evidence was allowed. The sources of the information included in the Affidavit were disclosed and the Court found that it was credible enough to rely on.

FROM ESTATE, 2019 ABQB 988 (GOSS J)
Rule 13.18 (Types of Affidavit)

An Action for formal proof of a will was brought by one of the testator's two surviving adult children as sole personal representative and beneficiary. The other surviving adult child challenged the validity of the will on the basis of testamentary capacity.

In resolving the validity of the will on a summary basis, Justice Goss considered admissibility of the parties' Affidavit evidence. Her Ladyship, noting that the Rules apply in surrogate matters where not otherwise provided for in the *Surrogate Rules* AR 130/1995, referred to the requirement in Rule 13.18 that Affidavit evidence in support of a dispositive Application must be sworn on the basis of personal knowledge. However, given that the mental state of the testator was in issue, the Court held that hearsay evidence on the state of mind of the testator was admissible, citing with approval *Sweetnam v Lesage*, 2016 ONSC 4058: "[d]eclarations of intention or state of mind by testators stand on a special footing. Courts have traditionally taken a more liberal stance in will cases and have admitted a testator's post-testamentary statement of memory or belief to establish antecedent facts."

Ultimately, the will was determined to be invalid.

LOKULI V SUPERIOR GENERAL PARTNER INC, 2019 ABCA 446 (CRIGHTON JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant sought leave to Appeal the dismissal of his Application to restore an Appeal which had been deemed abandoned for failing to meet filing deadlines. The Appeal concerned the dismissal of an Application to extend the time to Appeal the Order of a Master.

Pursuant to Rule 14.5, permission to Appeal a Decision to a full panel of the Court of Appeal may be granted where the Decision at issue: a) raises a question of general importance which on its own deserves panel review; b) rests on a reviewable and material issue of law worthy of panel review; c) involves the unreasonable exercise of discretion which had a meaningful effect on the outcome of the Decision and the outcome is worthy of panel review; or d) rests on a palpable and overriding error of important facts affecting the Order made and the Order is worthy of panel review. Justice Crighton noted that permission to Appeal is rarely granted where the Decision under Appeal is discretionary, and particularly where timing or logistics are at issue. Justice Crighton further noted that the reiteration of initial submissions or re-arguing the interpretation of the record does not justify a full panel review.

For the first time in the proceedings, the Applicant raised the issue of a language barrier, arguing that because the materials and his submissions were in English, he could not adequately advance his position in his Application to restore his Appeal. Justice Crighton permitted the Applicant to make oral submissions on the leave Application in French, but found that there was no material difference between the arguments advanced in French, and those initially presented in English in the Application to restore the Appeal.

Justice Crighton also noted that the Applicant asserted that an error in law was made, warranting the consideration of a full panel, but the Applicant was unable to state what that error was.

Justice Crighton found that there were no issues of general importance arising from the circumstances in which the Applicant asserted a material breach of his employment contract, but the record disclosed that the one year term of the contract had expired according to its terms and was not renewed.

Lastly, Justice Crighton noted that the Applicant's demonstrated litigation history was that of missing filing deadlines and failing to pay Court mandated Costs awards, and that there was nothing to indicate that conduct would change.

The Application for leave to Appeal was dismissed.

BOKENFOHR V CLAUGHTON, 2019 ABCA 382 (ROWBOTHAM JA)
Rules 14.8 (Filing a Notice of Appeal), 14.18 (Contents of Appeal Record - Standard Appeals), 14.27 (Filing Extracts of Key Evidence) and 14.73 (Procedural Powers)

The Applicant, Bokenfohr, applied for relief after her Appeal of a Case Management Decision was struck for failure to file the Appeal Record. Bokenfohr filed the Notice of Appeal of the Decision in time; however, she failed to appreciate the expedited timelines for filing the Appeal Record in a Fast Track Appeal.

Bokenfohr filed a second Appeal of the same Decision after the Case Management Justice issued a Variation Order. Bokenfohr argued that the appeal period was unclear because of the Variation Order. Rowbotham J.A. disagreed and confirmed that the Variation Order did not change the operation of Rule 14.8 in this case. The appeal period commenced on the date of the initial Reasons for Decision of the Case Management Justice, following which Bokenfohr had one month to file an Appeal, which she did. Rowbotham J.A. further clarified that the normal practice for dealing with revisions or variations to a Judgment is to amend the Notice of Appeal unless the grounds of Appeal stem solely from the amended reasons, which was not the case here.

However, the Court noted its discretion under Rule 14.73(b) to cure a contravention of procedure. The factors to be considered include the reason for the delay, whether the Applicant has shown an intention to proceed with the Appeal, whether there is prejudice to the Respondent, and whether the Appeal has merit. Rowbotham J.A. concluded that these factors weighed in favour of exercising the Court's discretion. Ms. Bokenfohr had shown a continuous interest in pursuing her Appeal, and the delay only occurred because she had misapprehended the filing deadlines. Moreover, Rowbotham J.A. was satisfied that the Appeal raised arguable issues. Therefore, the Court ordered that the Appeal be restored.

Rowbotham J.A. concluded by stating that the Appeal Record should contain "any prior order, reference to which is required to resolve the appeal" as per Rule 14.18(1)(c)(iv), and the Extracts of Key Evidence should only include the materials required to resolve the issues on Appeal as per Rule 14.27(1).

AE V ALBERTA (CHILD WELFARE), 2019 ABCA 435 (ANTONIO JA)
Rules 14.8 (Filing A Notice Of Appeal) and 14.37 (Single Appeal Judges)

The Applicant applied to extend the time to file a Notice of Appeal. The Applicant's Action had been struck pursuant to Rule 4.33 by a Master. The Applicant appealed that Decision to a Justice of the Court of Queen's Bench, but that Appeal was struck by the Special Chambers clerk's office after the Applicant failed to comply with Civil Practice Note 2. The Applicant then applied to a Justice in Chambers to restore the Appeal. That Application was dismissed in written reasons dated May 30, 2019. The Order formalizing the Chambers Justice's Judgment was served on the Applicant on August 9, 2019. On September 6, 2019, the Applicant sought to Appeal the Chambers Justice's Order dismissing the Application to restore the Appeal of the 4.33 Application. The Case Management

Officer of the Court of Appeal informed the Applicant that the deadline for appealing the Chambers Judge's order was June 30, 2019.

Justice Antonio confirmed that Applicants seeking an extension of time must establish: i) they had a bona fide intention to appeal while the right existed, and special circumstances which would justify or excuse the failure to appeal in time; ii) an explanation for the delay, and that the Respondent was not seriously prejudiced by the delay such that it would be unjust to disturb the Judgment; iii) the Applicant has not taken the benefits of the Judgment under Appeal; iv) the Appeal would have a reasonable chance of success if allowed to proceed. Justice Antonio also noted that the Court retains the discretion to extend the time to appeal even where these factors have not been met if it is in the interests of justice.

The Respondents did not contest that the Applicant possessed a bona fide intention to Appeal, and that the Applicant did not take the benefits of the Judgment under Appeal (the first and third factors). The Applicant asserted that the reason for the delay was erroneous legal advice that the time to Appeal under Rule 14.8 ran from the date of service of the Order under Appeal (August 9, 2019), not from the date of pronouncement of the reasons (May 30, 2019). Justice Antonio noted that misunderstanding of the Rules or procedure does not constitute special circumstances that reasonably explain a delay, but the Court of Appeal has been prepared to accept failures to understand a technical rule.

Regarding the fourth factor, the reasonable chances of success, Justice Antonio confirmed that the failure to establish this factor "strongly suggests that time to file an [A]ppeal should not be extended". Justice Antonio noted that the Applicant did not allege any error in the Chambers Justice's statement of the law or analysis regarding the restoration Application, instead, the Applicant re-argued the merits of the underlying Rule 4.33 Application. Justice Antonio noted that the Applicant had failed to establish an error by the Chambers Justice such that the Appeal had a reasonable chance of success.

Justice Antonio considered the overall circumstances of the case (including the period of inactivity giving rise to the delay Application) and concluded that it would not be in the interests of justice to grant an extension of time to file an Appeal. The Application was dismissed.

FROMHOLD V LACOMBE (COUNTY OF), 2019 ABCA 472 (VELDHUIS JA)
Rules 14.8 (Filing a Notice of Appeal), 14.37 (Single Appeal Judges) and 14.51 (Applications Without Oral Argument)

The Applicant sought an extension of time to file an Appeal pursuant to Rule 14.37. The parties agreed to have the matter decided based on the filed written materials only pursuant to Rule 14.51.

The Applicant filed his Appeal more than three months after an Enforcement Order was pronounced but within a month of the date the Order was filed. He asserted he had filed in time, but Justice Veldhuis disagreed. Her Ladyship noted that pursuant to Rule 14.8, the Applicant had one month from the date the Order was made (not filed) to file his Appeal. Justice Veldhuis held that misunderstanding a Rule is generally not a sufficient explanation that justifies granting an extension.

The Application was dismissed.

RMB V DTB, 2019 ABCA 487 (SCHUTZ JA)
Rules 14.12 (Contents and Format of Notices of Appeal and Cross Appeal), 14.25 (Contents of Factums) and 14.37 (Single Appeal Judges)

The Appellant applied to a single Appeal Judge to amend their Notice of Appeal pursuant to Rule 14.37. Schutz J.A. noted that a Notice of Appeal may be amended if the amendments do not enlarge the original scope of Appeal. Schutz J.A. also noted that Rule 14.12(2)(f) states that a Notice of Appeal must contain the relief claimed, and Rule 14.25(1) provides that a Factum must contain the grounds of Appeal and the relief sought. Justice Schutz determined that the amendments sought did not enlarge the scope of the Appeal, were related to the relief sought, and brought

the Notice of Appeal into compliance with Rule 14.12(2)(f). The amendments to the Notice of Appeal were allowed.

JH V ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL), 2019 ABCA 420 (ANTONIO JA)
Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

The Applicants, the Legal Aid Society of Alberta ("LASA"), Calgary Legal Guidance ("CLG") and the Canadian Civil Liberties Association ("CCLA") each applied pursuant to Rule 14.58 for permission to intervene on the Appeal. The Appeal concerned various provisions of the *Mental Health Act*, RSA 2000, c M-13 (the "*Mental Health Act*"), and whether or not they contravened sections of the *Canadian Charter of Rights and Freedoms*. The Appellant (Respondent to the Applications to intervene) opposed the Applications of CLG and CCLA but did not oppose LASA's Application. Justice Antonio found the LASA met the test for intervention and allowed their Application.

Justice Antonio applied the assessment criteria identified in *Styles v Canadian Association of Counsel to Employers*, 2016 ABCA 218. Justice Antonio also noted that the participation of the proposed intervenor at the Trial level was not determinative of the Application: that the proposed intervenor needs to apply anew, and that the intervenor's role at Trial can be a favourable factor after considering: a) the role taken by the intervenors at the Trial level; b) whether the submissions of the intervenors were necessary or helpful in informing the Decision being reviewed; c) whether the issues on appeal are the same as in the Court below, or whether the issues as framed on appeal could continue to impact the Applicant's interests; and d) whether the particular perspectives of the Applicants could continue to inform the discussion as now framed on appeal.

CLG was an intervenor at the Trial level, who described its perspective as being valuable and unique to the Court given its experience providing legal services and advocacy on behalf of clients who were frequently subject to the impugned provisions of the *Mental Health Act*. Justice Antonio noted that despite CLG not being directly affected by the Appeal, this consideration was only one factor among many, noting that part of the assessment for granting leave to intervene was asking whether the intervenor "has some special expertise or insight". Justice Antonio found that CLG's role in the community provided it unique knowledge and insight which would be of assistance to the Court. Justice Antonio also found that CLG's prior status as intervenor at Trial favoured its Application and noted that the risk of additional delay or overlap of submissions could be managed through the imposition of conditions. Justice Antonio found that there would be no realistic possibility of prejudice to the parties flowing from CLG's intervention. Accordingly, CLG's Application for intervenor status was granted.

CCLA indicated its submissions would focus on high level and conceptual questions regarding the constitutionality of detention powers granted by the state. Justice Antonio found that these submissions could do more to obscure the issues than to illuminate the answers and found that the high level and philosophical nature of the proposed submissions would be of assistance if the issues concerned the development of the common law, but because the issues were around the constitutionality of legislation, the proposed submissions risked turning the Courtroom into a legislative arena. Justice Antonio found that CCLA's topics exceeded the scope of the Appeal, which was impermissible without leave of the Court. Accordingly, CCLA's Application for intervenor status was denied.

SUN V CHARTERED PROFESSIONAL ACCOUNTANTS OF ALBERTA, 2019 ABCA 495 (COSTIGAN, GRECKOL AND PENTELECHUK JJA)
Rule 14.74 (Application to Dismiss an Appeal)

The Respondent in the Appeal applied under Rule 14.74 for a dismissal of the Appeal on the basis that the Court did not have jurisdiction to hear the Appeal. The Court noted that there was no right of Appeal unless provided for by legislation. After reviewing the relevant legislation, the Court determined that it did not have jurisdiction to hear the Appeal and granted the Respondent's Application to dismiss the Appeal.