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

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ALBERTA HEALTH SERVICES V WANG, 2018 ABCA 60 (SLATTER JA)
Rules 1.1 (What These Rules Do), 9.2 (Preparation of Judgments and Orders), 9.5 (Entry of Judgments and Orders), 13.5 (Variation of Time Periods), 14.36 (Case Management Officers), 14.39 (Case Management Officers) and 14.77 (Preparation and Signature of Judgments and Orders)

The Applicants, Ms. Xiaoli Wang and Mr. Daiming Li applied for a review of the Court of Appeal's Case Management Officer's Decision which allowed the filing of two Orders without the Applicants' approval of the form of the Orders. The first Order granted the Applicants an extension of time to appeal Decisions from the Court of Queen's Bench (the "First Order"). The second Order concerned an Appeal by the Applicants of the First Order where they sought to widen the scope of the allowed Appeal (the "Second Order"). While the Applicants were the successful parties in respect of the First Order, the Respondent was the successful party in respect of the Second Order.

Slatter J.A. noted that pursuant to Rule 14.36(3), a single Judge of the Court of Appeal may review a Case Management Officer's Decision. His Lordship noted that, although the Applicants were the successful parties in respect of the First Order, they failed to draft the Order within 10 days, pursuant to Rule 9.2(1). Accordingly, the Respondent drafted the First Order pursuant to Rule 9.2(2)(a), and submitted it to the Applicants for review. The Applicants did not respond within the ten days prescribed by the Rules, so under Rule 9.2(2)(c), the Respondent was entitled to enter the First Order without further notice to the Applicants. Consequently, Slatter J.A. found that the Case Management Officer did not err in filing the First Order.

As the successful party in respect of the Second Order, the Respondent prepared a draft Second Order and sent it

to the Applicants within the 10 day period prescribed by Rule 9.2(1). However, the Applicants failed to respond, so again the Respondent was entitled to file the Second Order pursuant to Rule 9.2(2)(c). Contrary to Rules 9.5(2) and 14.77, both Orders at issue were not entered within the three month time limit. Slatter J.A. found that the Applicants were at least partly responsible for the delay in finalizing the Orders. Given that the Case Management Officer could extend time limits set out in the Rules pursuant to Rule 13.5, Slatter J.A. held that the Case Management Officer did not err in extending the filing time.

Slatter J.A. noted that the late entry of the Orders did not comply with the additional requirement set out in Rule 9.5(2), whereby the Respondent should have provided notice of the late entry to the Applicants. The non-compliance was due to an administrative error: the Applicants were not copied on the Respondent's correspondence to the Court to file the Orders. Slatter J.A. noted that in accordance with Rule 14.39, Applications to Case Management Officers are supposed to be informal. Accordingly, if the administrative error had not been made, there would have been sufficient notice to the Applicants. In addition, both Orders formed the basis of the ultimate Appeal at issue, so it was necessary for them to be entered. Slatter J.A. also found that there was no resulting prejudice to the Applicants. Finally, although the Applicants were self-represented, Slatter J.A. held that further to Rule 1.1(2), all litigants must familiarize themselves with the Rules and comply with them.

The Application was dismissed.

LOUGHLIN V HER MAJESTY THE QUEEN, 2018 ABQB 45 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant, a prison inmate, was unsuccessful in his *Habeas Corpus* Application. Shelley J. noted that making meritless *Habeas Corpus* Applications was both an abuse of limited Court resources pursuant to Rule 1.2 and an abuse of the *Habeas Corpus* remedy. Justice Shelley held that the Court has a broad discretion to order Costs under Rule 10.31. Pursuant to Rule 10.33, this discretion is influenced by the character of the Action, success of the parties, and the conduct of those involved.

The Applicant was entirely unsuccessful in his Application. Justice Shelley stated that Rule 10.29(1) presumptively grants Costs to the successful party in a civil Action. The aggravating circumstances in this Application warranted an elevated costs award against the Applicant pursuant to Rule 10.31. The Court ordered that the Applicant pay $2,000 in Costs.

ALLAN V EPP, 2018 ABQB 85 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records), 5.25 (Appropriate Questions and Objections) and 5.33 (Confidentiality and Use of Information)

In an Action involving an oppression claim and a claim for wrongful dismissal, both parties applied for Orders directing that certain questions and Undertakings from Questioning be answered. Master Robertson stated that in such an Application the Court's role was to determine what is "relevant and material" under Rules 5.2 and 5.6, not to grant final relief or make findings of fact. Master Robertson confirmed that the Pleadings are the starting point to determine whether a document is relevant and material under Rules 5.2 and 5.6.

The Plaintiff's counsel raised some objections under Rule 5.25(2)(d), arguing that some of the questions had already been "asked and answered". Master Robertson explained that the correct approach when determining the validity of an objection under this Rule involves a consideration of the abuse resulting from "re-hashing" questions that have been asked and answered. Sometimes re-asking a question is appropriate, but where it is not, the question becomes time-wasting, pointless, and a direct violation of Rule 1.2.

Master Robertson rejected the argument that some Undertakings were being sought for an improper or

collateral purpose and noted that, as provided in Rule 5.33, any information or record obtained in the course of litigation cannot be used for any other purpose. Master Robertson noted that a breach of an Undertaking, such as the deemed Undertaking in Rule 5.33, is contempt.

Master Robertson considered the relevance and materiality of each of the specific questions in dispute and decided each separately.

MORIN V EDMONTON (CITY), 2018 ABQB 104 (MANDZIUK J)
Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Appellants, the Morins appealed a Decision of the Provincial Court in which the Application to set aside a Default Judgment and permit them to file a Dispute Note despite being Noted in Default was dismissed. Pursuant to Section 51 of the *Provincial Court Act*, RSA 2000, c P-31, the Appeal was heard on the existing record as neither party applied to have the Appeal heard *de novo*.

The Provincial Court Judge had applied the test to set aside a Default Judgment which requires the applicant demonstrate 1) an arguable defence; 2) that he did not deliberately let Judgment go by default and has some excuse for the default, such as illness or a solicitor's inadvertence; and 3) after learning of the Default Judgment, the applicant moved promptly to open it up. The Provincial Court Judge found that the Appellants had met the second and third branches of the test, however, the Appellants had failed to produce any evidence in support of their proposed defence, and thus, failed to demonstrate any arguable defence as required by step one of the test.

Justice Mandziuk, following a consideration of the applicable standard of review on the Appeal, found that the record did not disclose that the Provincial Court Judge misunderstood the evidence, drew erroneous conclusions from that evidence, or that there was any "flaw, fallacy, or mistake" in the Decision. Justice Mandziuk held that the Provincial Court Judge's reliance on *Hryniak v Mauldin*, 2014 SCC 7, did not disclose an error, as the Decision was used for the "general proposition" regarding the need to expeditiously resolve disputes, which was in accordance with the principles in Rule 1.2. The Appeal was dismissed.

TEMPLANZA V FORD, 2018 ABQB 168 (NEUFELD J)
Rules 1.2 (Purpose and Intention of These Rules), 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court) and 7.3 (Summary Judgment)

After an unsuccessful attempt to purchase a condominium in the late 1990s, the Respondent, Rosalind Templanza ("Templanza") commenced a number of Claims against the Applicants, who were lawyers and law firms in Calgary who had acted either for or against Templanza in her condominium purchase dispute. While the Claims against the various Applicants differed, Templanza's underlying assertion against all of them was that they engaged in a fraudulent conspiracy to "steal" the condominium from her.

The Applicants each applied to Summarily Dismiss Templanza's Claims against them, on the basis that they had no merit, pursuant to Rule 7.3.

Neufeld J. noted that in a Summary Judgment Application, the Court should assess whether it is able to fairly and justly make a summary determination on the merits. A Court will be able to do so where the Judge or Master is able to make the necessary findings of fact, and apply the law to the facts to reach a conclusion, without requiring *viva voce* evidence. In such cases, there is no need to "test" the non-moving party's evidence through a Trial, because the case can properly be dismissed without doing so. Additionally, the party resisting Summary Judgment must put their best foot forward, rather than relying on "vague assertions" or self-serving Affidavit evidence that is unsupported by other evidence.

Justice Neufeld also emphasized that, under Rule 1.2, the Rules are meant to facilitate a just and fair resolution of Claims "in a timely and cost-effective way". Pursuant to Rule 1.2(3), this is not a mere objective, but an obligation of the parties.

His Lordship held that the Claims could be dismissed summarily. The facts on the records were sufficient to establish that there was no prospect for success. In respect of the Applicant lawyers who had acted for Parties adverse in interest to Templanza, the Court found that there was no duty of care between them and Templanza; no privity of contract; and that the Claims were time barred pursuant to the *Limitations Act*, RSA 2000, c L-12. In respect of the Applicant lawyers who had acted for Templanza during the failed real estate transaction, Neufeld J. held that a contractual and professional duty of care did exist, but that any claims that may have existed against those Applicants were limitations barred.

The Applicants sought to have Templanza declared a vexatious litigant, pursuant to ss. 23 to 23.1 of the *Judicature Act*, RSA 2000, c J-2. Justice Neufeld noted that such an Order may be granted where the "Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner". His Lordship noted that the Judicature Act contains a non-exclusive list of seven examples of vexatious proceedings at s. 23(3).

Neufeld J. assessed Templanza's activities, and declared her to be a vexatious litigant. His Lordship concluded that restricting her Court access was appropriate, and ordered that Templanza be prohibited from filing documents and materials on her own behalf. His Lordship also directed that Templanza was required to obtain Leave prior to commencing or continuing any Action, Application, Appeal or proceeding. Further, any Application by Templanza for Leave would only be accepted if she was represented by a member of the Law Society of Alberta in good standing.

Neufeld J. noted that Templanza had acted as a Court representative for other individuals. Since there is no constitutional right to act as a Court representative, it was also appropriate to restrict her from acting as a litigation representative. Justice Neufeld also ordered that Templanza was prohibited from acting as an agent, next friend, or representative of another person pursuant to Rules 2.22 and 2.23.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2018 ABQB 213 (THOMAS J)
Rules 1.2 (Purpose and Intention of These Rules), 10.28 (Definition of "Party"), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May be Made), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

After an unsuccessful Application to be added as a party to an ongoing Action and ultimately receive assets from a trust, the Applicant, Mr. Maurice had solicitor client Costs awarded against him. At a subsequent Application, the Applicant was declared a vexatious litigant and the Applicant's lawyer, Ms. Kennedy, also had Costs awarded against her personally. The Court directed that the Parties provide written submissions on the scope of the Costs awarded in two of the Applications.

Justice Thomas referred to Rule 1.2, noting the ability of the Court of enforce the Rules through remedies and sanctions. Thomas J. considered Rule 10.30, and held that the Court "retains the jurisdiction to provide the parties with direction in respect of the costs" for the previous proceedings. Rule 10.33 sets out a number of considerations that the Court may consider when making a discretionary Costs award, including considering whether a party has engaged in misconduct.

Thomas J. held that the considerations for making Costs awards pursuant to Rule 10.31 "dovetail" with Rule 1.2(4). In discussing the ability of the Court to award Costs to the Respondents, who were ordered by the Court to file a brief in response to the Applicant's Application thereby incurring additional costs, Justice Thomas referred to Rule 10.28, which states that the recoverable Costs of litigation extend to any person "filing or participating" in a proceeding. As such, the Respondents were entitled to a Costs award.

Justice Thomas ordered party and party Costs against Ms. Kennedy for the initial unsuccessful Application, and ordered solicitor and client Costs against both Ms. Kennedy and Mr. Maurice for the subsequent hearing where the Applicant was declared a vexatious litigant.

DELVER V GLADUE, 2018 ABQB 226 (CLACKSON J) Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes) and 4.33 (Dismissal for Long Delay)

The Plaintiff appealed the Decision of a Master which dismissed the Plaintiff's Action under Rule 4.33. Clackson J. referred to recent authority which set out the functional analysis that should take place in determining if an Action has been "substantially advanced" in order to avoid dismissal under Rule 4.33. The functional test requires the Court to view the "whole picture of what transpired in the three year period" prior to the Application. In this case, the Plaintiff was a passenger in a vehicle driven by the Defendant and there were live issues as to whether the owner of the vehicle had consented to the Defendant driving the vehicle. If the vehicle was operated with the consent of the registered owner then the insurer of the owner would be liable. If not, then the Motor Vehicle Accident Claim Fund (the "Accident Fund") would be liable.

Justice Clackson noted that Rules 1.2(1), 4.1 and 4.2(b) exhort all parties to attend to their litigation in a timely and cost-effective way. In 2013 and 2014 respectively, the Plaintiff's counsel had proposed a Trial of the discrete issue of consent and additionally proposed to settle the matter for a specific quantum. Responses to these proposals were received from the Accident Fund as late as January of 2015. While neither proposal was successful, Clackson J. determined that either proposal, on acceptance, would have advanced the litigation. Clackson J. concluded that the settlement discussions and the issue resolution proposal occurred within the three years preceding the Application and, therefore, the Action should not have been dismissed. The Appeal was granted and the Master's Order was vacated.

KARAS V MONGEON, 2018 ABQB 149 (YUNGWIRTH J) Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 1.6 (Changes to These Rules), 3.2 (How to Start an Action), 3.27 (Extension of Time for Service), 4.10 (Assistance by the Court) and 12.16 (Starting Proceedings under *Family Law Act*)

In a family law Action for unjust enrichment, the Plaintiff, Karas, sought an Order extending time to serve a Statement of Claim. Karas had filed a Statement of Claim seeking unjust enrichment, which was in the correct form but mistakenly not served (the "Statement of Claim"), and two property Claims (the "Claims") asserting essentially the same rights, filed in form FL-10 (which is intended for Actions commenced under the *Family Law Act*, SA 2003, c F-4.5) and assigned the same Court Action number as the Statement of Claim. The Claims were served in time, but the Statement of Claim was not.

Justice Yungwirth noted that Rule 3.27 provides the Court with discretion to grant an extension, and that such discretion only arises when the Plaintiff brings themselves within one of the exceptions set out in the Rule. His Lordship held that the Plaintiff's case did fall within the exception set out under Rule 3.27(1)(a) as the Defendant, Mongeon had caused the Plaintiff's lawyer to reasonably believe that she had been served because counsel responded to both Claims in an Affidavit, consented to the scheduling of family Chambers to address the Claims, and did not take issue with the fact that the Claims were filed in Form FL-10.

In the alternative, Justice Yungwirth found that the Plaintiff's Statement of Claim could be corrected pursuant to Rule 3.2(6), which allows for an Action that was started in an incorrect form, to continue in a different form. Pursuant to Rule 12.16, proceedings under the *Family Law Act* must be started in Form FL-10. However, Karas' claim was for unjust enrichment, which is not governed by the Family Law Act. Rule 3.2(6) permitted the continuation of the Action which was incorrectly commenced through Claim Form FL-10 by way of Statement of Claim. His Lordship,

referring to prior authority, noted that Rule 3.2 and its predecessor was "intended to ensure that "the form of the application is no impediment to the relief applied for"". The Plaintiff's Application was granted.

Yungwirth J. directed that the Parties schedule a case conference pursuant to Rule 4.10 if they could not settle the Action within 90 days.

BUSINESS DEVELOPMENT BANK OF CANADA V 1959980 ALBERTA INC, 2018 ABQB 189 (MASTER BIRKETT)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court) and 10.29 (General Rule for Payment of Litigation Costs)

The individual Defendant, Sekhon applied to strike the Third Party Statement of Defence of the Third Party Respondent corporation, Tots and Bellies Inc. ("Tots and Bellies"), on the basis that it was drafted and filed by a non-lawyer. One of the individual Third Party Defendants, Sushil Ayri ("Ayri") drafted and filed the Third Party Defence at the request of Tots and Bellies' director, Ruby Carino ("Carino"). Carino was also named as a Third Party Defendant.

Master Birkett considered Rules 2.22 and 2.23, section 106(1) of the *Legal Profession Act*, RSA 2000, c L-8, and leading Alberta Court of Appeal authority for the proposition that a corporation cannot be represented in Court by an individual other than a member of the Law Society of Alberta. Accordingly, Master Birkett struck Tots and Bellies' Defence and directed that Tots and Bellies was required to retain a lawyer and file a new Third Party Statement of Defence within 45 days from the date of the Decision. Master Birkett noted that Rule 10.29 provided that the successful party to an Application is entitled to their Costs, but ordered that the Applicant and Respondent would bear their own Costs for the Application as Ayri and Carino were not aware that Tots and Bellies had to be represented by a lawyer.

BARON REAL ESTATE INVESTMENT LTD V EDMONTON (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2018 ABCA 67 (WAKELING JA)
Rules 2.27 (Retaining Lawyer for Limited Purposes), 2.29 (Withdrawal of Lawyer of Record) and 13.5 (Variation of Time Periods)

Baron Real Estate Investment Ltd. ("Baron") sought permission to Appeal the Edmonton Subdivision and Development Appeal Board's Decision which upheld a development permit granted to the Faith Fellowship Church of God. Wakeling J.A. dismissed the Application on the basis that the questions of law on Appeal were not of sufficient importance, and the Appeal did not have a "reasonable chance of success".

Wakeling J.A. also commented on an "unsatisfactory" aspect of the Application, which resulted in Baron having no counsel appear on its behalf at the Application. At the initial hearing date, new counsel had appeared on behalf of Baron, advised the Court that he had just been retained on a limited basis, and sought an adjournment so that he could review the file and prepare for the Application. Justice Wakeling noted that Baron's counsel acted appropriately in advising the Court that he had been retained on a limited basis. Although Rule 2.27(1) only requires such notice if a lawyer is retained by a self-represented litigant or is the lawyer of record, it was still appropriate for counsel to inform the Court of his or her limited role. Baron's counsel requested that the proceedings be adjourned for four weeks, but due to the time constraints, the Application was adjourned to be heard the following day. Baron's new counsel did not appear the following day. Instead, he wrote to the Court to advise that he had withdrawn as lawyer of record.

Wakeling J.A. stated that Rule 2.29 provides an "unambiguous protocol" which should be followed to withdraw as lawyer of record: lawyers must file a Notice of Withdrawal, serve it on the other parties, and file an Affidavit of Service. The withdrawal will then take effect 10 days after the Affidavit of Service is filed.

Justice Wakeling emphasized that if the limited nature of a lawyer's retainer prevents him or her from acting if an adjournment is not granted, he or she must request permission to withdraw as a lawyer of record, effective immediately. The Court may abridge the timelines set out in Rule 2.29 pursuant to Rule 13.5(2). Had Baron's counsel taken this course of action, he could have been relieved from the duty to appear at the Application.

The Application for permission to appeal was denied.

GRANDE PRAIRIE (COUNTY NO 1) V HILDEBRAND, 2018 ABCA 53 (BERGER, WATSON AND MCDONALD JJA)
Rules 2.29 (Withdrawal of Lawyer of Record) and 3.12 (Application of Statement of Claim Rules to Originating Applications)

The County of Grande Prairie had placed a Caveat on the Appellant, Hildebrand's property in support of a stop order it issued respecting construction on the property. After it was served with a Notice to Take Proceedings on the Caveat, the County filed an Originating Application in respect of its stop order and Caveat. The Appellant then applied for an Order holding the County, and certain individuals, in contempt of Court. He also sought an Order postponing the registration of the Caveat on his property, directing the County to provide him with a development permit pursuant to a decision of the Subdivision Development Appeal Board ("SDAB"), and to apply the Statement of Claim Rules to the Originating Application, pursuant to Rule 3.12. The Case Management Judge dismissed the Appellant's Application, granted leave to the Appellant's lawyer of record to withdraw from the record by serving a notice as required by Rule 2.29, and made other procedural directions.

The Appellant, as a self-represented party argued that the Case Management Judge's Orders should be re-heard or overturned, because the County had willfully distorted his permit renewal Application. The Appellant believed this to be the case because he had originally received a permit from the County respecting the construction, but his permit renewal Application was denied by the County.

In reviewing each issue on Appeal, the Court noted that the Case Management Judge refused to apply Rule 3.12, to "direct that all or any rules applying to an action started by statement of claim apply to the action started by Originating Application". Although the Appellant sought to invoke Rule 3.12 to file a Counterclaim against the County, the Case Management Judge had held that expanding the Caveat proceedings in that way would "in effect, unwind the case back to its original point after more than three and a half years".

The Court emphasized that the Case Management Judge's Decision was an exercise of discretion, which was entitled to deference. The Court, referring to recent Supreme Court of Canada jurisprudence explained that the Court should only intervene in a Chambers Judge's discretion where "the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice". The Court dismissed the Appeal and stated that the Case Management Judge had given sufficient weight to relevant considerations, and there was no basis to override the Decision below.

ALBERTA (MINISTER OF JUSTICE) V ZERVOS, 2018 ABQB 154 (BURROWS J)
Rules 3.2 (How to Start an Action) and 6.3 (Applications Generally)

The Alberta Minister of Justice (the "Applicant") applied ex parte in regular chambers for the restraint of $28,000 in cash that had been obtained in the course of an arrest for a drug offence. The Application was made pursuant to the *Victims Restitution and Compensation Payment Act*, RSA 2001, c V-3.5 ("VRCPA") without first filing a commencement pleading, and was supported with an unfiled Affidavit.

Burrows J. had raised the concern that the *ex parte* Application was not properly before the Court, as no commencement document had been filed. Justice Burrows referred to Rule 3.2(3)(b) which provides that a commencement document is required to be filed for an Action related to an enactment unless that enactment

provides a procedure for commencing the Action without a commencement document. The *VRCPA* provided no such procedure; therefore, Burrows J. held that an Originating Application was required in this case. The Applicant subsequently filed an Originating Application and returned before Burrows J. seeking the Restraint Order.

Justice Burrows noted that complying with Rule 3.2(3)(b) as well as the *VRCPA* could be "awkward" since an Application under the *VRCPA* requires the Court to set the date, place and time of a disposal hearing in a Restraint Order. However, Rule 6.3(2)(a) states that an Originating Application in the form set out in Schedule A of the Rules of Court must be used unless the Court otherwise permits. The prescribed form (Form 5) requires the date, time and place of the Application to be set by the Applicant. Burrows J. stated that this apparent inconsistency could be resolved by a Judge's Fiat if necessary.

His Lordship ultimately held that it was not evident that a Restraint Order was required, and dismissed the Application.

SOBEY'S CAPITAL INCORPORATED V GULF & PACIFIC EQUITIES CORP, 2018 ABQB 151 (FEEHAN J)
Rules 3.3 (Determining the Appropriate Judicial Centre), 3.5 (Transfer of Action) and 4.14 (Authority of Case Management Judge)

Gulf & Pacific Equities Corp., one of a number of Defendants, applied before Feehan J. as the Case Management Justice, to have the Action transferred from Calgary to Edmonton pursuant to Rules 3.5 and 4.14. No Affidavit was filed in support of the Application. The Plaintiff resisted the Application on the grounds that the Applicant had not put forward the required evidence; the Parties had an agreement that no steps would be taken in the Action without reasonable notice; and that the Plaintiff might bring an Application for Summary Judgment, which would be more conveniently brought in Calgary.

Justice Feehan, referring to *Regular v Regular*, 2016 ABQB 570 ("*Regular*"), stated that the test for transferring an action is whether the balance of convenience favors transferring the action. The factors to be considered when assessing the balance of convenience are:

(a) the number of parties or witnesses in each judicial centre;

(b) the nature of the issues in the lawsuit;

(c) the relationship between the parties in respect of those issues;

(d) the parties' respective financial resources;

(e) the stage of proceedings;

(f) the convenience of location for pre-trial motions; and

(g) the location of relevant assets.

The latter two factors are relevant but of lesser weight. Feehan J. noted that there are two procedures that may be used to transfer an action from one judicial centre to another. A defendant may apply for a Declaration that the action was not commenced in the correct judicial centre in compliance with Rule 3.3 and then, once the Declaration is received, apply to have the action transferred to the judicial centre in which it should have been commenced. Alternatively, an applicant may apply to have an action transferred pursuant to Rule 3.5 because the balance of convenience favors a different judicial centre. When the application is made under Rule 3.5, the onus is on the applicant to prove that the balance of convenience favors transferring the action.

Justice Feehan applied the factors set out in *Regular* and observed that neither party submitted evidence regarding the location of witnesses, the location of assets, or the Parties' financial positions. As a result, Feehan J. decided the Application based on the number of Parties in the Action, the nature of the issues, the relationship between the Parties, the stage of the proceedings, and the convenience of the location for pre-Trial motions. Feehan J. held that the balance of convenience favored transferring

the Action from Calgary to Edmonton. His Lordship noted that four related matters were commenced in Edmonton. As such, the Action would be case managed together in Edmonton and would proceed to Trial together to be heard by the same Trial Judge.

AB V ALBERTA (PERSONS WITH DEVELOPMENTAL DISABILITIES CENTRAL REGION), 2018 ABQB 181 (RENKE J)
Rules 3.22 (Evidence on Judicial Review), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

AB applied for Judicial Review of a Decision of the Persons with Developmental Disabilities Appeal Panel ("Panel"). The Applicant was an individual eligible to receive certain services provided by the Persons with Developmental Disabilities Program. These services were arranged through a Family Managed Services Agreement ("FMSA") entered into by her guardian.

The Applicant's guardian became aware that an individual who was caring for the Applicant and whom the Applicant was living with had had sexual assault charges filed against him in respect of another individual being cared for in the same home. As a result of these charges, the Persons with Developmental Disabilities Central Region ("Region") informed the guardian that the FMSA would be terminated. The guardian was not told by the Region that she had a right to Appeal the Decision to terminate the FMSA; she learned of the right of Appeal independently, at which point she filed an Appeal of the Decision. The Panel dismissed the Appeal for lack of jurisdiction but did not consider the guardian's written submissions on the point. The guardian sought Judicial Review alleging a breach of procedural fairness, and argued that the Decision was unreasonable.

Renke J. considered whether an Affidavit provided by the guardian was admissible under Rule 3.22. This Affidavit contained the written submissions on the jurisdictional issue which had not been considered by the Panel. The Court noted that had the submissions been properly received and considered, they would have formed part of the certified record of the Judicial Review proceedings, and would have been admitted under Rule 3.22(a). Further, the Affidavit contained relevant evidence in respect of the Applicant's arguments regarding a breach of procedural fairness, which Renke J. noted is admissible evidence on Judicial Review. Justice Renke also noted that neither the Region nor the Panel made any objection to the Affidavit. For all of these reasons, the Affidavit was admitted.

Justice Renke held that the Panel's dismissal of the Appeal was unreasonable and was a breach of procedural fairness. Renke J. directed the Panel to hear the Appeal on the merits.

Renke J. noted that Costs are discretionary, which discretion is guided by Rules 10.29(1), 10.31 and 10.33. The Applicant was presumptively entitled to Costs pursuant to Rules 10.29 and 10.33, but Costs are rarely awarded against a tribunal unless the decision involved not just mere error but misconduct that could be described as flagrant, inexcusable, indefensible or incomprehensible. Justice Renke held that this case did not rise to such an extreme and awarded no Costs against the Panel. However, Justice Renke noted that the Central Region's conduct in the litigation, in particular a late jurisdictional objection which was later withdrawn, attracted additional Costs due to the delay and expense it caused the Applicant per Rule 10.33(2). The Court increased the amount payable for the Applicant's written brief by $1,000, and otherwise ordered scheduled Costs on Column 1.

HOOKENSON V ALBERTA, 2018 ABQB 198 (GATES J)
Rule 3.22 (Evidence on Judicial Review)

Hookenson applied for Judicial Review of a Decision of the Chair of the Criminal Injuries Review Board (the "Board") which upheld a Decision refusing Hookenson benefits under the Victims of Crime Financial Benefits Program.

Gates J. addressed an objection made by the Respondent, Her Majesty the Queen in Right of Alberta, to Hookenson's Affidavit which contained new evidence in support of the Application. The Respondent argued that the Court's receipt of new affidavit evidence did not meet one of

the exceptions set out in Rule 3.22. Justice Gates noted that Rule 3.22 allows the Court to consider: the record of proceedings under review; a transcript of questioning; anything permitted by any other Rule or an enactment; and any other evidence permitted by the Court. Gates J. referred to recent jurisprudence and confirmed that there are three exceptions to the general rule that new evidence is not permitted on a Judicial Review hearing: (i) where new evidence is permitted in order to establish a breach of natural justice not apparent on the record; (ii) to provide background information in order to establish standing; and (iii) if no transcript of the proceeding in issue exists.

Hookenson had conceded in the course of argument that the Affidavit was not properly before the Court. Justice Gates therefore gave the Affidavit no weight, and dismissed the Application.

DAY V SWINDELLS, 2018 ABQB 34 (MASTER MASON)
Rule 3.27 (Extension of Time for Service)

The Plaintiff applied to extend the time for service of the Statement of Claim in a personal injury Action. Master Mason noted that Rule 3.27 allows the Court to extend time for service if a defendant leads a plaintiff or a plaintiff's lawyer to believe that liability is not contested or that a time limit will not be relied on.

Master Mason noted that the Defendant led Plaintiff's counsel to believe that the time limit for service would not be relied upon. Nearly two months after the expiry of the limitations date for service of the Statement of Claim, the Defendant's insurance adjuster contacted Plaintiff's counsel requesting additional records in order to "reach a fair settlement". Master Mason noted that the Court had inferred a standstill agreement in similar circumstances, and concluded that it was reasonable for Plaintiff's counsel to "rely on the belief that the time limit related to service of the claim would not be relied on".

Master Mason clarified that the decision to extend time under Rule 3.27 is discretionary. The Court can assess prejudice in the circumstances of each case. In this case, the Plaintiff had filed a Statement of Claim and provided a copy to the Defendant's insurance adjuster shortly after filing. As such, Master Mason found no evidence of prejudice arising from an extension of time. The Application to extend time for service was granted.

ROBERTS V SAFADI, 2018 ABQB 165 (MANDZIUK J)
Rules 3.37 (Application for Judgment against Defendant Noted in Default) and 13.6 (Pleadings: General Requirements)

The Plaintiff's Statement of Claim alleged that he was assaulted by the individual Defendant, and that he suffered serious injuries as a result. None of the Defendants responded to the Claim, and they were noted in default. The Court directed that a hearing be held to assess the quantum of damages.

Justice Mandziuk reviewed Rule 3.37 which allows for a Plaintiff to apply for Judgment in respect of a Claim where Default Judgment had not been entered, if one or more Defendant has been noted in default.

Mandziuk J. considered whether the Plaintiff could be awarded more than the Plaintiff had claimed as general damages in the Statement of Claim. Mandziuk J. noted that the pleadings define the parameters of the Court's jurisdiction, and that Rule 13.5(2)(c) requires that pleadings "set out relevant matters" including the amount and type of damages, cost, and interest claimed. However, Courts have allowed for pleadings to be implicitly amended when a cause of action "gives rise to an argument that was not raised in the pleadings". Justice Mandziuk, referring to Alberta appellate authority, acknowledged that the prayer for relief is not a ceiling and has little legal status. As such, His Lordship granted Judgment and assessed the Plaintiff's damages claim in a higher amount than that claimed in the Statement of Claim.

623455 ALBERTA LTD V THE PARTNERSHIP OF JACKIE HANDEREK & FORESTER AND SHAWN D HAGEN, 2018 ABQB 86 (RENKE J)
Rules 3.59 (Claiming Set-Off), 6.11 (Evidence at Application Hearings), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff, Vortec Electric ("Vortec") commenced an Action for professional negligence against its former lawyers (the "Defendants") for failing to properly protect its interests in litigation arising from an alleged breach of contract (the "Underlying Claim"). GTK Electric Controls Ltd ("GTK") had sued Vortec for breach of contract in the Underlying Claim and Vortec retained the Defendants to act as defence counsel. GTK was subsequently granted Summary Judgment against Vortec (the "Underlying Decision").

Vortec claimed the Defendants had failed to advance an available set-off claim or Counterclaim at the outset of the Underlying Claim under Rule 3.59, which, through the operation of the doctrines of *res judicata* or issue estoppel, precluded Vortec's subsequent claim against GTK. Additionally, Vortec submitted that the Defendants had failed to appeal the Summary Judgment Decision in the Underlying Claim in accordance with Rule 6.14.

Renke J. found that there was substantial evidence to suggest that, in the circumstances, set-off would have been appropriate and available under Rule 3.59. His Lordship further determined that there was no evidence to suggest the Defendants had even contemplated an Appeal under Rule 6.14, let alone advised their client of its capacity to do so. Renke J. concluded that the Defendants had failed to meet the standard of care owed to Vortec, caused Vortec to lose its set-off Claim, and that Vortec suffered a loss of $126,494.92 as a result. Vortec was granted Judgment against the Defendants and was awarded Costs.

Justice Renke also addressed the issue of the Defendants' reliance on unfiled Affidavits, and noted that Affidavits not filed at the time of an Application can be relied upon pursuant to Rule 6.11(2) so long as they are filed as soon as practicable after the hearing.

CURRIE V CRAIG, 2018 ABQB 46 (HUNT MCDONALD J)
Rule 3.62 (Amending Pleadings)

The Appellant, the Craig Family (the "Craigs"), appealed a Master's Decision which allowed the Respondent, Dan Currie ("Mr. Currie"), to amend his Pleadings. The original Claim for foreclosure on a mortgage was initiated by Mr. Currie in 2011. Mr. Currie was successful at the foreclosure hearing in 2014 but the Craigs successfully appealed that Decision in 2016. Mr. Currie subsequently applied to amend his Pleadings in 2017 to include an additional claim under a promissory note signed between the parties (the "Replacement Note"). The Craigs argued that the requested amendments were limitations barred by s. 3 of the *Limitations Act*, RSA 2000, c L-12 (the "*Act*").

Justice Hunt McDonald noted that after Pleadings have closed a party may amend its Pleadings so long as the amendments comply with Rule 3.62(1)(b). It is well established that judicial discretion to allow amendments should be applied generously regardless of how late, or how carelessly the request is made. One of the exceptions to this low threshold is when the proposed amendments seek to add a new cause of action after the expiry of a limitation period under the *Act*.

Hunt McDonald J., referring to leading authority, found that the Court has several options when an amendment is sought with extant limitations issues: (1) find that the limitation period has not expired and allow the amendment; (2) rule the limitation period has expired and then consider s. 6(2)(b) of the *Act* which discusses for when an amendment can be made beyond the limitation period; or (3) find that because of uncertainty in the evidence, the amendments should be allowed subject to the determination of the limitation issue at Trial.

Justice Hunt McDonald found that s. 3(1)(a)(iii) of the *Act* considers situations where knowledge of a loss is not sufficient to immediately warrant bringing a proceeding. Her Ladyship determined that the claim under the Replacement Note was not "warranted" until after the Decision in 2016 allowing for the discharge of the original mortgage. Hunt McDonald J. concluded that the amendments under s. 6(2)

(b) of the *Act* should still be allowed as the mortgage and Replacement Note were so closely related as to allow for the amendment under s. 6(2)(b) of the *Act*. The Appeal was dismissed.

BIOCOMPOSITES GROUP INC V 0975138 BC LTD (DH MANUFACTURING), 2018 ABQB 63 (KHULLAR J)
Rules 3.62 (Amending Pleadings), 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Plaintiff, Biocomposites Group Inc. ("BCG") sued the Defendant, 0975138 BC Ltd ("DH Manufacturing") in part, for the ownership of certain electrical panels and a dust collector installed in an industrial building in Drayton Valley (the "Assets"). BCG applied for Summary Judgment under Rule 7.3 and a declaration that BCG was the owner of the Assets. In the alternative, BCG argued that DH Manufacturing should be required to post Security for Costs under Rule 4.22. DH Manufacturing brought a Cross-Application requesting it be granted leave to amend its Statement of Defence in accordance with Rule 3.62.

Khullar J. found that there was, at the heart of the litigation, a dispute about BCG's conduct and the intentions of the affiant, Daniel Madlung, while he had been a director and shareholder of both DH Manufacturing and BCG. Her Ladyship found that, with respect to the balance of the litigation, the same issues regarding Mr. Madlung's credibility would likely also arise at Trial. Justice Khullar determined that severing the issues dealing with the ownership of the Assets prior to the determination of Mr. Madlung's credibility would be inappropriate.

While declining to grant Summary Judgment, Justice Khullar acknowledged that it was a "close call" and that in the circumstances it was appropriate to order DH Manufacturing pay Security for Costs under Rule 4.22. Justice Khullar concluded that once DH Manufacturing paid its Security for Costs it was granted leave to amend its Statement of Defence in the form noted in their Application.

WEIR-JONES V CANADA COUNCIL OF TEAMSTERS, 2018 ABQB 14 (MASTER SMART)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendant union applied to have the Plaintiffs' Claim struck out pursuant to Rule 3.68 or, alternatively, summarily dismissed pursuant to Rule 7.3. The Plaintiffs claimed the Defendant breached its duty of fair representation under the *Canada Labour Code*, RSC 1985, c L-2 (the "Code"). The Plaintiffs also claimed that the Defendant owed them a fiduciary duty to fairly represent them and in breaching its duty under the Code it also breached its fiduciary duty. The Plaintiffs claimed punitive or exemplary damages.

The dispute had already been the subject of proceedings before the Canada Industrial Relations Board (the "CIRB"). Master Smart determined that the CIRB, not the Court, had jurisdiction over the Claim and that a re-litigation of the matter before the Court was an abuse of process. As a result, Master Smart struck the Claim pursuant to Rules 3.68(1)(a), 3.68(2)(a) and 3.68(2)(d). As a result of the Decision to strike the Claim, the Court declined to consider whether the Claim should be summarily dismissed.

BRUEN V UNIVERSITY OF CALGARY, 2018 ABQB 26 (SHELLEY J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 8.20 (Application for Dismissal at Close of Plaintiff's Case)

The Plaintiff professors commenced an Action seeking damages for negligence against the University of Calgary and two of its administrators. Prior to the Trial in December of 2017, one of the Plaintiffs discontinued his Action against the Defendants. At Trial, after the remaining Plaintiff closed his case, the Defendants applied for a non-suit.

Justice Shelley explained that the applicable test for a non-suit Application is set out in Rule 8.20: the Defendant may request that the Action be dismissed at the close of the Plaintiff's case, "on the ground that no case has been

made, without being asked to elect whether evidence will be called". A non-suit Application will be successful where "the plaintiff fails to provide any legal or evidentiary basis on which the lawsuit can succeed".

The Plaintiff argued that the test should parallel the test for a motion to strike under Rule 3.68. The Court noted that the Court of Appeal in *Capital Estate Planning Corp v Lynch*, 2011 ABCA 224 rephrased the test and clarified that "a non-suit application will fail if the plaintiff has adduced some evidence on each of the essential elements of the claim". Credibility should not be assessed, and evidence should not be weighed; the Court must assume that the Plaintiff's evidence is true.

Justice Shelley granted the non-suit Application on the basis that Plaintiff's Claim was time-barred pursuant to the *Limitations Act*, RSA 2000, c L-12. Shelley J. noted that the Plaintiff had failed to provide evidence of a duty of care, or that a standard of care was breached by the University. Further, the Plaintiff's evidence respecting damages was "at best speculative", and was not established by the evidence.

THOMPSON V ALTALINK MANAGEMENT LTD, 2018 ABQB 36 (BAST J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Parties brought Cross-Applications requesting the Court's determination of whether, *inter alia*, an Appeal was statute barred under the *Surface Rights Act*, RSA 2000 c s-24 (the "Act") and whether there was a right of appeal from the Decision of a reconsideration panel. Justice Bast considered Rule 3.68, and stated that the Rule provides that a commencement document may be set aside where the Court has no jurisdiction or where it constitutes an abuse of process.

Allan Thompson ("Thompson"), the owner of the lands in dispute, applied for an Order extending the time for the filing of his Appeal of a Decision of the Surface Rights Board (the "Board"). The Respondent, AltaLink Management Ltd. ("AltaLink") argued that the Court lacked the jurisdiction to hear Thompson's Appeal because it was filed out of time and the Court has no jurisdiction to extend the time for filing.

Bast J. noted that s. 26 of the Act provides that an Appeal of the Board's Decision in this context must be filed within 30 days. The Appeal was not filed in time. Referring to recent leading authority, Bast J. noted that the Court "cannot amend a time limit in a statute by shortening or extending it, unless a statute gives that power". As such, Justice Bast dismissed Thompson's Application to extend the time for filing the Appeal, and AltaLink's Application to strike Thompson's Appeal under Rule 3.68 was granted.

OUELLETTE V LAW SOCIETY OF ALBERTA, 2018 ABQB 52 (MASTER ROBERTSON)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendant Law Society of Alberta applied to strike the Claim of the Respondents, a former member of the Law Society who had been disbarred ("Ouellette Senior"), and his son ("Ouellette Junior").

Ouellette Senior alleged bias in several Law Society disciplinary hearings, including the 2016 hearing that resulted in his disbarment and argued that he had a right under Section 7 of the Charter to claim damages. The Law Society in turn argued that Ouellette's Claim was an abuse of process and a collateral attack on the outcome of the Law Society's disciplinary processes; further, the Respondents' Claim should be struck pursuant to Rule 3.68(2)(b) as it disclosed no reasonable claim which would justify the damages sought by the Respondents. The Law Society submitted that if there was bias in the Law Society disciplinary hearing as alleged, the proper remedy was to appeal those decisions according to the process set out by the legislation. With regard to the Claim by Ouellette Junior for damages stemming from lack of parenting as a result of the disciplinary proceedings against his father, the Law Society argued that this claim was too remote and that the Law Society owed no duty of care.

Master Robertson accepted the arguments of the Law Society and, referring to Supreme Court authority, held that an award of damages is not the correct approach to remedy a Charter violation stemming from actions by a regulatory body. Rather, the proper remedy is to set the matter right. Additionally, the correct approach for seeking a remedy for alleged bias by a regulatory body is through the appeal route set out in the legislation. Further, it was impossible to seek damages for a lawyer's disbarment in the absence of a determination that the disbarment was invalid. As such, Master Robertson held that the Respondents' Pleading disclosed no reasonable claim in law and was struck.

CHEVRON CANADA RESOURCES V CANADA (EXECUTIVE DIRECTOR OF INDIAN OIL AND GAS CANADA), 2018 ABQB 48 (ROMAINE J)
Rule 3.72 (Consolidation or Separations of Claims and Actions)

The Plaintiffs ("Chevron") entered into an oil and gas lease with the Defendant Crown pursuant to which Chevron was required to pay royalties to the Defendant Crown for the benefit of the Defendants Ermineskin Indian Band ("Ermineskin"), Louis Bull Indian Band ("Louis Bull"), Montana Indian Band ("Montana"), and Samson Indian Band ("Samson")(collectively the "Bands"). Chevron alleged it had made various overpayments on the lease and brought a Claim for unjust enrichment against the Defendants jointly and severally for the net overpayment ("Chevron Claim"). Louis Bull, Montana, and Samson counterclaimed, asserting both that the lease was invalid and that Chevron had underpaid on the lease ("Counterclaims").

In 2005, due to related Federal Court and other pending proceedings, Romaine J. had ordered a stay of the Counterclaims on the basis that it would be an abuse of the Court's process to allow the "duplicative and contrary allegations" against the Crown to continue. Samson applied to stay the Trial of the Chevron Claim pursuant to Rule 3.72 pending final judgment in the related proceedings.

Romaine J. stated that the remedy under Rule 3.72 is discretionary and must be exercised in accordance with established principles. The first question under Rule 3.72 is whether the issues in the two Actions are substantially the same or inextricably related. If so, the party seeking the Stay must establish both that continuing the Claim would be unjust because it would be oppressive, vexatious, or otherwise an abuse of the Court's powers and that the Stay will not cause an injustice to the opposing party. When considering these questions, the Court should be mindful of efficient dispute resolution and efficient use of the Court's and the parties' resources.

Justice Romaine concluded that the stay of the Counterclaims would not prejudice Samson in its defence of the Chevron Claim. However, a stay of the Chevron Claim would cause prejudice to Chevron due to delay. The Federal Court Actions had been proceeding for over 20 years, and would take years more to resolve. The risks of further delay included the death of witnesses, fading of memories, retirement of counsel, and significant lost opportunity costs. For these reasons, Romaine J. denied Samson's Application for a stay of the Trial.

ROMAN V OMASTA, 2018 ABCA 121 (WAKELING JA)
Rules 4.10 (Assistance by the Court) and 14.17 (Filing the Appeal Record – Fast Track Appeals)

The Appellant, Ms. Roman, applied to restore her Appeal, which was struck for failure to file the Appeal Record within one month as required by Rule 14.17. Wakeling J.A., referring to recent appellate authority, noted that an Appeal may be restored if "it is in the interest of justice to do so", and set out the criteria which a party must meet:

1. Is there any reason to conclude that the applicant, at any time after filing the notice of appeal, did not intend to prosecute the appeal? …

2. Has the applicant provided an explanation for the deficiency that prompted the Registrar to strike the appeal? If so, is the explanation consistent with an intention on the part of the applicant to advance the appeal?

3. Has the applicant moved with sufficient expedition to cure the defect, taking into account the nature of the defect?

4. Are there arguable grounds in support of an appeal? Is the likelihood of success high enough to conclude that it is not a frivolous appeal? …

5. Will restoration of the appeal cause the respondent any prejudice? If so, is it appropriate to require the respondent to endure this prejudice?

Justice Wakeling noted that the Appellant had not filed an Affidavit stating that her intention to Appeal never waivered. His Lordship stated that all Applicants who seek to have an Appeal restored should file such an Affidavit. Further, Wakeling J.A. observed that when the Appeal was struck the Appellant's counsel did not move with sufficient expediency to cure the defect.

For these reasons, Wakeling J.A. declined to restore the Appeal and dismissed the Application. Justice Wakeling further advised that if the Appellant intended to commence a new Action, she should consider seeking the Court's assistance pursuant to Rule 4.10.

LIU V CALGARY CHINATOWN DEVELOPMENT FOUNDATION, 2018 ABCA 4 (VELDHUIS JA)
Rules 4.22 (Considerations for Security for Costs Order), 14.16 (Filing the Appeal Record – Standard Appeals), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines), 14.65 (Restoring Appeals) and 14.67 (Security for Costs)

The Applicants, Liu and others, applied to restore an Appeal which had been struck for failure to file the Appeal record. The Respondent Cross-applied for Security for Costs of the Appeal.

Veldhuis J.A. noted that the Application was filed within the six-month time frame mandated by Rule 14.47, and the test for restoring an Appeal is whether it is in the interests of justice to restore it. Further, in applying this test, the following factors may be considered:

(a) whether the applicant intended in time to proceed with the appeal;

(b) the applicant's explanation for the defect or delay that caused the appeal to be struck or deemed abandoned;

(c) whether the applicant moved with reasonable promptness to cure the defect and have the appeal restored;

(d) whether the appeal has arguable merit; and

(e) whether the respondents have suffered any prejudice (including taking into consideration the length of the delay).

Veldhuis J.A. noted that the cause of the failure to file in time appeared to be a technical error by Appellant's counsel, and that a mere slip or inadvertence on the part of counsel will generally not prevent restoration of an Appeal. Once the Appellants learned that the Appeal had been struck, they moved promptly. The Court noted that the Appellants appeared to intend to move forward with the Appeal and that they had been working to resolve the dispute with the Respondent. Finally, the Court noted that the Appeal had arguable merit.

The Respondent argued that it would suffer prejudice if the Appeal proceeded given that it was a non-profit organization, that it was staffed by volunteers, and that there were outstanding Costs from the Action in the Court of Queen's Bench.

Justice Veldhuis noted that a single Justice of Appeal was capable of awarding Security for Costs pursuant to Rules 14.67 and 4.22, and that Security for Costs is a discretionary remedy that involves the balancing of the right of the Appellant to legal process with the right of the Respondent to economic security. Justice Veldhuis set out the test for awarding Security for Costs as:

(a) whether it is likely that the applicant for an order will be able to enforce an order or judgment against assets in Alberta;

(b) the ability of the respondent to pay the costs award;

(c) the merits of action;

(d) whether an order to give security for costs would unduly prejudice the respondent's ability to continue the action; and

(e) any other matter the court considers appropriate.

Justice Veldhuis held that the Respondent had satisfied the test for Security for Costs. Further, the Respondent's defence had succeeded before the Master and the Chambers Justice and had arguable merit. Veldhuis J.A. noted that the Appellants had little financial means, and that Security for Costs may prejudice their ability to continue the Action, but Appellants' counsel was acting *pro bono*.

The Applications to restore the Appeal and for Security for Costs were granted.

SKOLNEY V NISHA, 2018 ABCA 78 (GRECKOL JA)
Rules 4.22 (Considerations for Security for Costs Order), 14.48 (Stay Pending Appeal), 14.67 (Security for Costs) and 14.68 (No Stay of Enforcement)

Mr. Skolney ("Skolney") and Ms. Nisha ("Nisha"), entered into a Prenuptial Agreement prior to their marriage (the "Agreement"). After their divorce, the Agreement was the subject of a Trial where the Judge agreed with Skolney that the Agreement was valid and enforceable. Nisha appealed the Decision and Skolney applied for Security for Costs at the Court of Appeal. Nisha opposed the Security for Costs Application and cross-applied for a Stay of Execution of the underlying Trial Judgment and the Costs awarded therein.

Greckol J.A. stated that a single Appeal Judge may award Security for Costs in accordance with Rule 14.67(1) and Rule 4.22. Rule 4.22 requires the Court to consider, among other things: whether it is likely the Applicant will be able to enforce an Order or Judgment against assets in Alberta; the ability of the Respondent to pay the costs award; the merits of the underlying Action; and whether the payment of a costs award would unduly prejudice the Respondent's ability to continue the Action. Justice Greckol noted that concerns regarding a party's ability to pay costs coupled with modest prospects of success on appeal have been sufficient to justify granting an Application for Security for Costs.

Greckol J.A. considered each of the factors as they related to the facts at issue, and concluded that it was not proven that Nisha's debts exceeded her assets or that she would be unable to pay the Costs of an Appeal if unsuccessful. On this basis, Her Ladyship declined to grant Skolney's Application for Security for Costs.

Nisha cross-appealed for a Stay of Execution of the $118,402.78 Judgment awarded against her at Trial. Greckol J.A. stated that Rule 14.68 provides that filing an appeal does not stay enforcement of the decision under appeal unless otherwise ordered under Rule 14.48. Under these Rules, Justice Greckol noted that, to obtain a Stay pending Appeal, Nisha was required to establish that her Appeal raised an arguable issue or that she would suffer irreparable harm if the Stay was not granted. Greckol J.A. found that Nisha would suffer irreparable harm if the Stay was not granted. In particular, Nisha's right to access the Court process and appeal the underlying Judgment would be compromised. Additionally, Her Ladyship observed that it was not certain that Nisha's Appeal had no reasonable possibility of success. Justice Greckol concluded that, given the large disparity of resources between the two parties, the balance of convenience favored granting a Stay. Nisha's Cross-Application was granted.

LOTOSKI V LOTOSKI, 2018 ABCA 103 (STREKAF JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Applicant, Marla Lotoski sought an Order requiring the Respondent, Robert Lotoski to pay Security for Costs prior to the Respondent's Appeal regarding a child support matter. The Respondent had been required by Court Order

in 2013 to pay child support arrears to the Applicant in the amount of $126,195.68. The Respondent applied in 2017 to vary the 2013 Order, to have arrears determined, and to stay the sale of the Respondent's property pending that determination. That Application was dismissed and the Respondent appealed.

Strekaf J.A. confirmed that Rule 14.67(1) allows an appellate Judge to order payment of Security for Costs in accordance with Part 4, Division 4 of the Rules of Court. Strekaf J.A. considered Rule 4.22 which states that the Court may order a party to provide Security for Costs where it is just and reasonable, and after considering all of the following factors:

1. The likelihood that the Applicant will be able to enforce an Order or Judgment against assets in Alberta;

2. The Respondent's ability to pay a Costs award;

3. The merits of the Action in which the Application is filed;

4. Whether the Respondent would be unduly prejudiced by a Security for Costs Order; and

5. Any other matter the Court considers appropriate.

Justice Strekaf concluded that these factors favoured granting Security for Costs to the Applicant as it was unlikely that the Applicant would successfully recover a Costs award given the Respondent's history of non-payment in the past. Moreover, Justice Strekaf found that the Appeal appeared to lack merit. Finally, an Order for Security for Costs would not unduly prejudice the Respondent's ability to pursue his Appeal. The Respondent was shown to have a significant equity stake in a farm that could be used to post the security.

Strekaf J.A. granted the Application and required that $20,000.00 be posted as security within two months, failing which the Appeal would be deemed abandoned without further Order.

CHARTERED PROFESSIONAL ACCOUNTANTS OF ALBERTA V NEILSON, 2018 ABQB 170 (EAMON J)
Rules 4.29 (Cost Consequences of Formal Offer to Settle) and 10.29 (General Rule for Payment of Litigation Costs)

The Applicant Chartered Professional Accountants of Alberta applied to enforce portions of a sanction agreement which arose from the Respondent's professional misconduct as a certified general accountant. The sanction agreement imposed fines and costs on the Respondent, Neilson, and was made during the Respondent's bankruptcy. Notably, the fines and costs were awarded pursuant to a regulatory regime. As such, the Rules of Court did not apply.

In assessing whether the costs and fines were provable claims under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Eamon J. considered the separate cost regime governed by the Rules of Court. Eamon J. noted that such costs are "well defined and predictable". For example, it is probable that costs will be awarded pursuant to Rule 10.29 following the litigation; and Rule 4.29 dictates costs in light of a formal offer to settle. As such, the costs would qualify as provable claims. Justice Eamon held further that the Applicant was entitled to a money Judgment against the Respondent for the fines. The Application was granted.

IVKOVIC V TINGLE MERRETT LLP, 2018 ABQB 29 (MASTER MASON)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 8.7 (Confirmation of Trial Date)

The Plaintiff sued multiple Defendants for breach of contract involving the sale of a residential lot. One of the Defendants, Amden, applied for dismissal of the Action under Rules 4.31 and 4.33.

The parties submitted a Form 37, Request to Schedule a Trial Date on August 28, 2015, less than three years before Amden's Application. Amden argued that the Request to Schedule a Trial Date was not a significant advance in the Action because the trial dates were cancelled by the Court when the parties failed to file a Form 39, Confirmation of Readiness for Trial. Master Mason employed a functional

approach and determined that the filing of a Form 37 was a significant advance in the Action because it required the parties to consider the issues in the litigation and the evidence necessary to establish their respective positions. Master Mason dismissed the Application for Dismissal for long delay pursuant to Rule 4.33.

When considering Amden's Application for Dismissal for delay pursuant to Rule 4.31, Master Mason noted that although given the nature of the particular Action taking over five years to reach the current point was excessive, Amden had contributed to the delay. Furthermore, Amden did not provide evidence of prejudice so the presumption of prejudice was rebutted. Further, Amden had confirmed that the matter was ready for Trial, and document production and Questioning was complete. Finally, Amden's affiant in a prior Summary Judgment Application confirmed in Questioning that records upon which the claims revolved were still available, and that his memory of the facts had not been "negatively impacted by the passage of time". Master Mason dismissed the Application to dismiss for delay pursuant to Rule 4.31.

PRESTON V BENT DEVELOPMENTS CO LIMITED, 2018 ABQB 89 (MASTER HANEBURY)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.2 (When Something is Relevant and Material)

The Defendants applied to dismiss the Plaintiff's Action under Rule 4.33 or alternatively, under Rule 4.31. Master Hanebury reviewed the timeline of events leading up to the Defendants' Application and considered the relevance of Rule 4.33 to the Application. Rule 4.33 provides that if three or more years have passed without a significant advance in the action, the Court must dismiss the action as against the applicant. The Plaintiff resisted the Application by relying on three steps that they argued had significantly advanced the Action: the Questioning by the Plaintiff of one of the Defendants on their Affidavit in response to an Application of the Plaintiff's that was never heard; the answers to Undertakings that arose from that same Questioning on the Defendant's Affidavit; and a Third Party Claim filed by one Defendant against the other Defendants.

Master Hanebury thoroughly reviewed the authorities which considered Rule 4.33, including authorities which held that the filing of pleadings, as well as conducting Questioning will generally be considered to significantly advance an Action. Master Hanebury also cited authorities which held that the Court should examine whether the answers to undertakings meet the test similar to that set out in Rule 5.2 for relevance and materiality in order to determine if the answers to Undertakings significantly advanced the Action.

Master Hanebury determined that, because the Questioning on the Affidavit and the Answers to Undertakings were completed in contemplation of an Application that was never heard, these steps did not significantly advance the Action. Master Hanebury also concluded that because the Third Party Claim that had been filed was for contribution and indemnity, and did not name new parties or make independent claims, that step did not significantly advance the Action. Master Hanebury granted the Defendants' Application under Rule 4.33 and dismissed the Plaintiff's Action. Master Hanebury held that the Application did not need to be considered under Rule 4.31, as the Action had already been dismissed pursuant to Rule 4.33.

FISH V BOYD, 2018 ABQB 190 (MASTER SCHULZ)
Rule 4.31 (Application to Deal with Delay)

The Plaintiff, Fish alleged that he was injured by members of the Edmonton Police Service during his arrest on Whyte Avenue during the 2006 playoff run by the Edmonton Oilers. The Plaintiff applied to set deadlines to move the case to resolution and the Defendants cross-applied to dismiss the Claim pursuant to Rule 4.31.

Master Schulz considered Rule 4.31 and the six part test as set out by the Court of Appeal in *Humphreys v Trebilcock*, 2017 ABCA 116:

> First, has the non-moving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?

Second, is the shortfall or differential of such a magnitude to qualify as inordinate?

Third, if the delay is inordinate has the non-moving party provided an explanation for the delay? If so, does it justify inordinate delay?

Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the non-moving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?

Fifth, if the moving party relies on the presumption of significant prejudice created by Rule 4.31(2), has the non-moving party rebutted the presumption of significant prejudice?

Sixth, if the moving party has met the criteria for granting relief under Rule 4.31(1), is there a compelling reason not to dismiss the non-moving party's action? This question must be posed because of the verb "may" in Rule 4.31(1).

Master Schulz applied the six part test and concluded that there was inordinate and inexcusable delay. However, Master Schulz found that the Defendants had delayed scheduling Questioning by refusing to attend Questioning until the conclusion of the disciplinary proceedings before the Edmonton Police Service Professional Standards Branch. While Master Schultz noted that Plaintiff's counsel should have taken steps to apply to the Court to deal with the Defendants' delay sooner, the Defendants failed to demonstrate resulting prejudice in order to dismiss the Claim.

Master Schulz determined that the Claim was essentially ready for Trial, with some assistance from the Court in setting deadlines, and declined to dismiss the Claim. Master Schulz made a procedural Order pursuant to Rule 4.31(1)(b), and dismissed the Defendants' Application.

CINCIRUK V MLAZGAR, 2018 ABQB 234 (ROOKE ACJ)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 14.65 (Restoring Appeals)

The Action involved three personal injury claims that were commenced by Mr. Cinciruk in 2003 and 2004. The Defendants sought to dismiss the actions for delay or long delay, pursuant to Rules 4.31 and 4.33. The Plaintiff was self-represented and caused many of the delays in the Action.

Associate Chief Justice Rooke considered Rule 4.31 and noted that the Rule allows the Court to dismiss all or any part of a Claim if the delay has resulted in "significant prejudice to a party". Under Rule 4.31(2), the Court's finding that a delay was "inordinate and inexcusable" creates a presumption that the delay has resulted in significant prejudice.

Rooke A.C.J. noted that, despite the Plaintiff having potentially meritorious arguments, there was inordinate and inexcusable delay and the prejudice to the Defendants was therefore presumed. The presumption was not rebutted. Associate Chief Justice Rooke dismissed the Plaintiff's Claim pursuant to Rule 4.31.

ENVACON INC V 829693 ALBERTA LTD, 2018 ABCA 82 (WATSON JA)
Rules 5.5 (When Affidavit of Records Must be Served), 5.6 (Form and Content of Affidavit of Records), 5.7 (Producible Records), 5.8 (Records for Which There is an Objection to Produce), 5.9 (Who Makes Affidavit of Records), 5.10 (Subsequent Disclosure of Records), 5.11 (Order for Record to be Produced) and 14.48 (Stay Pending Appeal)

Envacon Inc. ("Envacon") commenced an Action against 829693 Alberta Ltd. ("829") in relation to a commercial tenancy dispute. The Case Management Justice granted a Consent Order for the production of certain financial documents by 829 pursuant to Rules 5.10 and 5.11. When 829 failed to comply with the Order, the Case Management Justice found 829 in contempt, gave 829 the opportunity to purge its contempt, provided a deadline for 829 to purge its contempt, and ruled that Envacon was

entitled to solicitor-client Costs for steps taken to obtain the financial documents. 829 appealed, and obtained a Stay of enforcement of the whole of the Case Management Justice's Contempt Order pending the outcome of the Appeal.

Despite the Stay, and in contemplation of meeting the deadline to purge its contempt, 829's counsel proceeded to prepare the financial documents, and in doing so, accidentally sent the documents to counsel for Envacon. Envacon applied to the Court of Appeal to use the financial documents which had been accidentally sent to them.

829 argued that it was not required to produce the documents at all, but Watson J.A. observed that such an argument hinged on whether the financial records were subject to privilege. The Court noted that if the documents were not privileged, they were "material for the purposes of the litigation in front of the Court of Queen's Bench" and "would then normally be discoverable and would not be subject to some sort of resistance on the part of 829".

Justice Watson differentiated the concepts of creating documents for the dominant purposes of litigation as opposed to creating documents for the purposes of the Rules of Court, for example creating materials to comply with the affidavit of records under Rules 5.5 to 5.11. His Lordship dismissed Envacon's Application to use the financial documents sent to them in error.

LYMER V JONSSON, 2018 ABCA 36 (ROWBOTHAM, VELDHUIS AND WAKELING JJA)
Rules 5.6 (Form and Contents of Affidavit of Records), 5.8 (Records for Which there is an Objection to Produce), 5.28 (Written Questions), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 14.88 (Cost Awards)

In a bankruptcy Action, the Registrar in Bankruptcy (the "Registrar") held the Appellant, Neil Lymer, in contempt of Court for failing to comply with two Orders to disclose documents after being given the chance to purge his contempt by filing more detailed Affidavits of Records and responding to written questions pursuant to Rule 5.28. In coming to its Decision, the Registrar provided a detailed list of reasons that the Appellant's Affidavits of Records were insufficient.

A Single Appeal Judge upheld the Registrar's Decision, and the Appellant appealed that Decision on three grounds: (1) that the finding of contempt was not based on proper evidence, (2) that the "contempt power" should be used sparingly, and (3) that the Registrar should not have considered an Affidavit that was filed in the Action, but not as part of the Application to have the Appellant's contempt purged.

The Court of Appeal noted that pursuant to Rule 10.52 and 10.53, the Court should use a "bifurcated process" in assessing whether or not a party is in contempt, by determining whether there is liability, and then considering whether a defence exists. It is difficult to revisit a finding of liability for contempt, except in exceptional circumstances.

Regarding the first ground of Appeal, the Court reviewed the Registrar's Decision and found no palpable or overriding errors. The Court held that the Registrar's Decision was reasonable, and that the Registrar did not err in holding that the Appellant's claims for privilege over certain records were insufficiently vague. The Court noted that "privilege belongs to the client", and that a party objecting to the production of a record is still required to identify the record pursuant to Rule 5.8. Respecting the argument that contempt should be used sparingly, the Court noted that the Appellant had failed to disclose his records for many years, had changed his story over that period of time, and had been given many opportunities to provide further and better Affidavits of Records. Third, regarding the Appellant's argument that the Registrar should not have considered certain evidence because it was not filed in support of the Appellant's Application to purge his contempt, the Court of Appeal held that the Affidavit in question was part of the procedure that the Registrar had previously ordered, and so it was rightly considered by the Court below. The Appeal was dismissed.

The Court applied the default rule that Costs should be awarded against the unsuccessful party, pursuant to Rule 14.88.

KOZAK ESTATE (RE), 2018 ABQB 185 (RENKE J)
Rule 5.31 (Use of Transcript and Answers to Written Questions)

In an estate Action, the Applicant, Krezanoski sought to have two Wills declared invalid on the basis that they were the product of undue influence exerted by the executrix and beneficiary, Maryann Seafoot ("Maryann").

Renke J. noted that Maryann was questioned in December 2015, and that portions of her Questioning were read-in at the Hearing. Justice Renke commented that pursuant to Rule 5.31, a party may read in portions of evidence from a Questioning transcript "as against a party adverse in interest". Read-in evidence should be considered with, and treated in the same manner, as any other evidence, in light of the burden of proof. The Court is not bound to accept or follow read-in evidence any more than it must accept other evidence. Additionally, read-in evidence may support favourable or unfavourable inferences. The burden is on the party reading-in the evidence to show that the evidence supports his or her position.

Justice Renke reviewed the evidence, including the read-in evidence, and concluded that Maryann unduly influenced the deceased, and that the Wills were the result of her undue influence. His Lordship held that the Wills were therefore invalid and granted the Application.

GUSTAFSON (RE), 2018 ABQB 77 (REGISTRAR SCHLOSSER)
Rules 6.11 (Evidence at Application Hearings) and 13.29 (Certified Copies of Original Records)

The Bankrupt, Mr. Gustafson paid out three credit cards in the three months prior to his Bankruptcy Proposal to creditors. The Applicant, the bankruptcy trustee for Mr. Gustafson, applied to set aside the credit card payments on the basis that they were preferences. In considering the proper form of evidence for the Application, the Court held that Rule 6.11 governed, and that affidavit evidence was generally the form of evidence for chambers applications. The Court held further that Rule 13.29(3) permits entering a certified copy of an original record as evidence of the procedural steps taken in an action.

Based on the Rules of Court and the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, the Court noted that forms under the *Bankruptcy and Insolvency Act* are relied upon in bankruptcy court as proof of the truth of the contents. The Court accepted the bankruptcy forms as evidence of the bankruptcy proceedings and further treated the Trustee's report as though it was affidavit evidence. Registrar Schlosser set aside the credit card payments, and held that the funds were payable to the Trustee for the benefit of the Estate.

LEE V HACHE, 2018 ABQB 88 (MASTER SMART)
Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Defendant made an Application to strike out the Plaintiff's Amended Amended Statement of Claim by way of Summary Judgment. The Plaintiff had claimed against the Defendant for negligence, misfeasance in public office and malicious prosecution. The Plaintiff was an inmate in the Bowden Institution, and the Defendant was a nurse working there at the time. Master Smart considered the authorities surrounding Summary Judgment, and cited Rule 7.3(1)(b) which provides that a Court can order Summary Judgment and dismiss one or more claims in the Action where there is no merit to a claim or part of it.

While Master Smart noted that some of the affidavit evidence of the Plaintiff and the Defendant were conflicting, much of the Plaintiff's evidence consisted of bald allegations and denials, and much of it was irrelevant, incoherent, inadmissible, and carried little weight. Master Smart determined that the Plaintiff's Claim could be struck pursuant to Rule 7.2 and 7.3, as the Claim had no merit, the Plaintiff had failed to establish that he had suffered any damage arising out of the incident, and the Amended Amended Statement of Claim did not disclose a valid cause of action. The Application for Summary Judgment was granted.

With respect to Costs, Master Smart referred to Rule 10.29(1) which provides that the successful party to an application is presumptively due their costs. The Plaintiff disputed the amount that the Defendant claimed in Costs, but Master Smart determined that the amount of Costs sought by the Defendant were appropriate given that the Court may make a costs award under Rule 10.31 after considering the factors set out in Rule 10.33. Master Smart noted that Rule 10.33 provides that the Court may consider the conduct and character of the parties involved. Master Smart determined that the Plaintiff had not acted in good faith and that his litigation conduct was questionable. Master Smart awarded Schedule C Costs to the Defendant.

MUSLIM COUNSEL OF CALGARY V MOURRA, 2018 ABQB 118 (NIXON J)
Rule 7.3 (Summary Judgment)

After obtaining an interim Restraining Order, the Applicant, the Muslim Counsel of Calgary, applied for the review of the interim Order and sought a permanent Restraining Order against the Respondent, Mourra. Nixon J. noted that the Application referenced Rule 7.3 as well as the *Judicature Act*, RSA 2000, c J-2 as authority for granting a permanent Injunction. His Lordship stated that Rule 7.3 applies "in respect of all or part of a claim". Since the term "claim" is defined to "include a matter where a plaintiff seeks a remedy", the Application fit within the scope of Rule 7.3.

Nixon J. considered prior leading authorities which related to Rule 7.3 and determined that the matter could be disposed of summarily on the existing record before the Court. Along with the powers granted by the *Judicature Act*, the Court had the necessary legal foundation to grant a permanent Injunction, and therefore a permanent Restraining Order. Justice Nixon considered the test to grant a permanent Injunction and held that the Applicant met the test. Therefore, the Application for the permanent Restraining Order against the Respondent was granted.

WASYLYNUK V BOUMA, 2018 ABQB 159 (NIELSEN J)
Rule 7.3 (Summary Judgment)

The parties to the Action each applied for Summary Judgment regarding the validity of several testamentary documents including beneficiary designations, Wills, and a deed of gift, all executed by the deceased testator. The Case Management Judge had directed that the Defendants' Summary Judgment Application proceed and that the Judge hearing the Application was entitled to either declare the validity of the instruments at issue, or direct that their validity be determined at Trial. The Plaintiff's Application for Summary Judgment was adjourned *sine die*.

Justice Nielsen confirmed that for Summary Judgment to be appropriate, the existing record must enable a disposition that is fair and just to the parties, recognizing that the process should be proportional to the dispute. Justice Nielsen summarized the circumstances in which Summary Judgment will be appropriate as follows: the process will 1) allow the Judge to make the necessary findings of fact; 2) allow the application of the law to the facts; and 3) be proportionate, more expeditious and less expensive means to achieve a just result. The moving party must establish that there is no issue regarding a potentially decisive and material fact which cannot be found against the non-moving party on the basis of a fair and just summary process. The mere assertion by the non-moving party that further evidence could be presented at Trial is not sufficient to resist a Summary Judgment Application.

Extensive documentary evidence was put before the Court including several Affidavits, the transcripts of examinations from several further witnesses, and two Expert Reports.

Justice Nielsen held that the case was appropriate for a Summary determination, noting that the facts were not complex and the law concerning the validity of the instruments at issue was clear. Justice Nielsen also found that the Plaintiff had the opportunity to, and did, make best efforts to establish an evidentiary foundation upon which to challenge the validity of the various instruments. Notwithstanding those efforts, Justice Nielsen held that

there was insufficient evidence to support the Plaintiff's claims and it was not likely that a Trial of the matter would furnish further evidence. The Defendants' Application for Summary Judgment was granted.

ENVIRONMENTAL REFUELING SYSTEMS INC V DOUGAN SENIOR, 2018 ABQB 208 (BELZIL J)
Rules 7.3 (Summary Judgment) and 9.24 (Fraudulent Preferences and Fraudulent Conveyances)

The Plaintiff, Environmental Refuelling Systems ("ERS"), applied for Summary Judgment against the Defendants respecting an outstanding account owing for fuel delivered by ERS to the Defendants. ERS also sought to set aside a number of real property conveyances which it alleged were fraudulent (the "Fraudulent Conveyance Applications") pursuant to Rule 9.24.

The Application engaged issues related to the business relationship between Allan George Dougan Senior ("Dougan Senior") and his son Allan George Dougan Junior ("Dougan Junior"). Belzil J. determined, pursuant to Rule 7.3, that there was no issue of merit that genuinely required a Trial against Dougan Senior and that ERS' claim could be determined summarily against him. ERS alleged that Dougan Junior was jointly and severally liable for the debt of his father on the basis that he was Dougan Senior's partner within the meaning of the *Partnership Act*, RSA 2000, c P-3, or in the alternative, that Dougan Junior was liable as an agent for Dougan Senior. Belzil J. held that there was no evidence to support a partnership agreement between Dougan Senior and Dougan Junior and that ERS' assertions fell short of the type of evidence required to establish an agency relationship. On this evidentiary record, Justice Belzil determined that a full Trial would be required to determine the legal business relationship between Dougan Senior and Dougan Junior.

Justice Belzil reviewed Rule 9.24 and noted that in order to establish a claim under the *Statute of Elizabeth or Fraudulent Preferences Act*, RSA 2000, c F-24 there must be a conveyance of real or personal property; for no or nominal consideration; with intent to defraud, delay, or hinder creditors; the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and the conveyance must have had the intended effect.

In applying the above factors, Belzil J. found that the impugned conveyances were extremely suspicious, amounting to badges of fraud, and that the Defendants had failed to adduce any evidence to rebut the *prima facie* case of a fraudulent conveyance. Justice Belzil concluded that the Defendants had attempted to deceive the Court and interfere with the administration of justice. Justice Belzil declared the conveyances to be fraudulent and void.

CHATEAUVERT V CHATEAUVERT, 2018 ABQB 2 (MOREAU CJ)
Rule 8.15 (Notice of Persons not Intended to be Called as Witnesses)

The Plaintiff commenced an Action for fraudulent and negligent misrepresentation in relation to the value of shares her ex-husband held at the time of divorce proceedings. The Plaintiff claimed for 50% of the value of the shares, which was ultimately granted. The issue at Trial was whether the Defendant ex-husband knew about an impending share sale at the time of the divorce.

The Plaintiff argued that the Court should draw an adverse inference because the Defendant failed to call certain witnesses at the Trial. The Plaintiff ex-wife claimed these witnesses could shed light on whether the Defendant knew about the impending share sale.

In considering whether to draw an adverse inference by the absence of the witnesses, Chief Justice Moreau cited the four-part test under former Rule 296.1 established by former Chief Justice Wittmann in *Howard v Sandau*, 2008 ABQB 34, which required consideration of:

1. Does the witness have material evidence to give?

2. Is the witness the best source of the evidence?

3. Is the witness equally available to both parties? and

4. Is there a legitimate explanation for the witness's failure to attend?

The Court noted that no notice had been served by the Defendant under Rule 8.15, and the Defendant therefore presumptively bore the risk of not calling these witnesses. However, the Court noted that one of the witnesses had filed an Affidavit which became an agreed exhibit at Trial, which neither party referred to for their case. The fact the witness had sworn an Affidavit entitled the Plaintiff the right to cross-examine him on it, which she did not do. Chief Justice Moreau found that the Plaintiff had failed to avail herself of certain mechanisms available to her in the discovery process to ascertain what the accounting firm knew and when.

As a result, Moreau C.J. declined to draw an adverse inference from the Defendant ex-husband not calling these witnesses. In the result, Moreau C.J. held that the Defendant was liable for negligent misrepresentation and the Plaintiff was entitled to 50% of the Defendant's shares.

ROYAL BANK OF CANADA V REID-BUILT HOMES LTD, 2018 ABQB 124 (GRAESSER J)
Rules 9.12 (Correcting Mistakes or Errors), 9.13 (Re–Opening Case) and 9.14 (Further or Other Order after Judgment or Order Entered)

The Applicants were creditors of the Defendants, Reid-Built Homes Ltd. and affiliated companies who had been placed into receivership. One of the Applicants, the City of Edmonton ("Edmonton") applied to vary charging provisions in a Receivership Order. The Receiver objected to the Application, arguing that, among other things Edmonton was out of time to make the Application, as it was not made during the initial Receivership Order hearing, or during the comeback Application. Justice Graesser considered Rules 9.12, 9.13 and 9.14 which provide that a Court may correct a mistake or error in a Judgment or Order arising from an accident, slip or omission, or may vary the Judgment or Order if the Court is satisfied there is good reason to do so.

Graesser J. considered the leading jurisprudence, and determined that the Court had the authority to revisit the Receivership Order in appropriate circumstances. Graesser J. also noted that there is authority which provides that comeback Applications should be made in a timely manner, as parties may take positions in reliance on the original Order and it might be unfair to vary the provisions of a Receivership Order to the detriment of a relying party. Graesser J. noted, however, that Edmonton was seeking clarification on whether its priority position was affected by the Receivership Order, but not necessarily looking for a variation of the Order. It was likely that there would be further Applications to vary the Receivership Order as the matter progressed, and, there was no apparent prejudice to the Receiver. As such, Justice Graesser considered Edmonton's Application on it's merits and determined that Edmonton's security should not be subordinate to the Receiver's charge and borrowing power.

STRINGAM DENECKY LLP V SUN MEDIA CORPORATION, 2018 ABQB 122 (BROWNE J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court-Ordered Costs Award)

Following the Defendant Appellants' Appeal of a Master's Decision related to the disclosure of the identity of a journalist's source in a defamation Action, which Appeal was granted, the Parties sought directions on Costs.

The Respondent law firm submitted that Costs should be in the cause because the issue of journalist-source privilege was an important one to be considered by the Court as there was little Alberta case law. Further, the Respondent argued that although Justice Browne found that the identity of the Appellant's source was not relevant and material at this stage, it may become relevant and material at or prior to Trial.

Justice Browne confirmed that Rule 10.29 provides the default Rule regarding Costs, which is that the unsuccessful party must pay Costs forthwith. Rule 10.29 is subject to the Court's discretion to award a reasonable and proper Costs award under Rule 10.31. Justice Browne held that the issue on the Appeal primarily concerned the relevance

and materiality of the source, not the application of journalist-source privilege and so rejected the Respondent's position on that point. Justice Browne held further that it was irrelevant whether the Appellant's source could become relevant at a later date. The question was irrelevant when it was posed, and at the time of the Appeal. Accordingly, Justice Browne held that there was no basis to depart from the default principles set out in Rule 10.29.

The Respondent was directed to pay the Appellant's party-and-party Costs, including disbursements, however, Justice Browne reduced the amount payable for printing and printing-related charges by one-half.

1314058 ALBERTA LTD V ALBERS, 2018 ABQB 171 (HOLLINS J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff was successful in their Claim and was awarded Judgment in the amount of $3,703. As the successful party, the Plaintiff applied for Costs. The Defendants argued that the Costs should account for the Plaintiff's minimal recovery.

Hollins J. noted that Costs are discretionary, and Rule 10.29 provides that the successful party is entitled to Costs. Further, Rule 10.33 sets out the factors that the Court may consider in exercising that discretion. Justice Hollins held that under Rule 10.33(1)(a), given the low value of the Judgment, a lump sum of $5,000 for Costs under Rule 10.31(1)(b)(ii) was appropriate. This award reflected the fact that the Plaintiff was successful, and that the amount recovered and the amounts at issue were "disproportionately low when compared to the costs of proceeding".

JSV V CGR, 2018 ABQB 247 (HOPKINS J)
Rule 10.33 (Court Considerations in Making Costs Award)

Following a child custody Trial, the parties sought directions with respect to Costs. The mother, JSV, sought enhanced or indemnity Costs against the father, CGR, who was unsuccessful at Trial. Prior to the Trial, CGR was the primary caregiver to the children. CGR raised sexual abuse allegations against JSV resulting in Child & Family Services involvement, JSV being arrested and charged (although those charges ultimately were not pursued), and JSV's access having to be supervised. At Trial, the allegations raised against JSV were found to be "unreliable, unsubstantiated, and false". Over the course of the litigation, CGR was found in contempt for failing to follow interim parenting Orders, delaying preparation of a Practice Note 8 Report and failing to pay his one half share of the Report, failing to provide Undertakings given at Questioning, and failing to provide relevant and material records until the day of Trial. Following Trial, Justice Hopkins awarded JSV sole custody, and imposed supervised access on CGR.

Justice Hopkins acknowledged that the Court has previously awarded enhanced costs and has denied full indemnity costs in child custody disputes, however, His Lordship noted that those cases turn on their own facts. Hopkins J. noted that costs may be awarded on 3 bases: "party and party" where costs are based on Schedule C or a multiple thereof, "solicitor client" where indemnity is awarded for those costs which are "essential to and arising within the four corners of the litigation", and "solicitor and own client" which are complete indemnity costs and can include payment for services not strictly essential to the conduct of the litigation. Hopkins J. noted that the phrase "indemnity basis" should be preferred to "solicitor and his own client" to avoid the confusion which persists surrounding the latter two forms of costs awards.

Justice Hopkins noted that departing from party and party costs should only done be in rare and exceptional circumstances, where a litigant's conduct is "reprehensible, scandalous or outrageous", and further noted that Alberta Courts have held that complete indemnity or solicitor and own client costs should be reserved for the most exceptional cases. Hopkins J. found that CGR had willfully and deliberately disregarded the Court's Orders, and "took a contemptuous approach to [the] litigation", in addition to having made severely stigmatizing allegations of reprehensible conduct which were found to have been made

in malice. Justice Hopkins held that solicitor client Costs were appropriate in the circumstances, and that CGR's impecuniosity was not relevant to his liability for Costs.

NOWACZYNSKI V STEWART, 2018 ABQB 12 (KHULLAR J)
Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Applicant, Stewart, asked the Court to find the Respondent, Nowaczynski, in contempt of court for the breach of two Orders relating to child support.
Justice Khullar laid out the three elements of civil contempt which must be established beyond a reasonable doubt:

1. The order that is alleged to have been breached must state clearly and unequivocally what should and should not be done.

2. The party alleged to have breached the order must have actual knowledge of the court order.

3. The party alleged to have breached the order must have intentionally done the act that the order prohibits or failed to do the act which the order requires, without adequate excuse — it is not necessary to prove an intention to breach the order itself.

Justice Khullar noted that the Court's power to find a party in contempt is discretionary, and hearsay is not admissible because contempt is in the nature of a final order. The use of contempt to obtain compliance with Orders should be applied only with caution "and with great restraint".

Khullar J. found that the Respondent had no knowledge of an Order relating to dispersing funds from the sale of his house, and as such the application for contempt on those grounds was dismissed. Justice Khullar also found that the Respondent had provided the Applicant with information relating to the sale of his home that complied in substance with the requirement for an accounting of proceeds under the terms of one of the Orders. As such, the Application for contempt was dismissed.

However, the Court noted that the Respondent had not complied with the terms of an Order to provide information about his employment to the Applicant. Justice Khullar therefore set a date for the provision of the information, failing which the Respondent was required to attend in Court to show cause why he should not be found in contempt.

NUTBROWN V CORBIELL, 2018 ABCA 107 (VELDHUIS JA)
Rules 12.36 (Advance Payment of Costs) and 14.5 (Appeals Only With Permission)

The Applicant, Ms. Nutbrown claimed unjust enrichment and sought the determination of parenting rights. The Chambers Judge denied her Application for advance payment of Costs on the basis that the Applicant's annual earnings of $85,000 did not render her impecunious, her Claim faced significant challenges, and that the circumstances of the case were not exceptional. Ms. Nutbrown sought permission to Appeal the Chambers Judge's Decision.

Justice Veldhuis confirmed the test for permission to Appeal requires that the Applicant demonstrate: i) a good arguable case with sufficient merit to warrant the scrutiny of the Court of Appeal; ii) issues of importance to the parties and in general; iii) practical utility of the Appeal; and iv) that no delay in proceedings will be caused by the costs Appeal.

Veldhuis J.A. considered the factors as applied to the facts and held that the Chambers Judge's finding that the Applicant had sufficient resources to carry on the litigation was supported by the evidence and disclosed no reviewable error. Further, the finding that the case was not an exceptional one warranting an Order for Advance Costs was within the Chambers Judge's discretion to determine, and so did not warrant the intervention of the Court of Appeal. The Application for permission to Appeal was denied.

FISHER V MERCIER, 2018 ABQB 224 (ROSS J)
Rule 12.40 (Written Interrogatories)

The parties in a family law matter sought additional directions with respect to Written Interrogatories previously ordered by Justice Ross. The self-represented Defendant, Ms. Mercier ("Mercier"), provided 710 questions. The Plaintiff, Mr. Fisher ("Fisher"), argued that an upper limit be imposed on the number of questions Mercier was permitted to pose in the Written Interrogatories.

Ross J. noted that the previous Order did not stipulate an upper limit of questions; however, Rule 12.40 allows a party in a family matter to file a Notice to Reply to Written Interrogatories while setting out a maximum of 30 "numbered and succinct" questions to be answered. Justice Ross held that Mercier was required to submit a revised list of no more than 60 questions to be answered by Fisher. Ross J. doubled the number of permissible questions under Rule 12.40 in order to account for Mercier's concerns regarding the number of Affidavits filed by Fisher which, Mercier contended, raised a large number of issues to be addressed.

RE GAUTHIER, 2018 ABCA 14 (WAKELING JA)
Rules 13.4 (Counting Months and Years), 14.5 (Appeals Only with Permission), 14.8 (Filing a Notice of Appeal) and 14.44 (Application for Permission to Appeal)

The Applicant sought permission to appeal an Order of the Court of Queen's Bench which had declared him a vexatious litigant. Wakeling J.A. cited Rule 14.5(1)(j), which provides that permission to appeal to the Court of Appeal is required for any person who has been declared a vexatious litigant in the Court appealed from. The Applicant therefore required permission to appeal the vexatious litigant Order. Wakeling J.A. indicated a number of reasons for the dismissal of the Applicant's Application, including: Rule 14.5(4) provides that no appeal is allowed under Rule 14.5(1)(j) from any Order which has denied the vexatious litigant permission to institute or continue proceedings; Rule 14.8(2)(a)(iii) provides that the Appellant must file three copies of the Notice of Appeal with the Registrar of the Court of Appeal within one month after the date of the decision being appealed; Rule 14.8(3) states that where permission to appeal is required, an Application for permission to appeal must be filed within the time period set out in Rule 14.8(1)(2)(a); and, Rule 14.44(1)(a) states that the Application for permission to appeal must be filed and served and must be returnable within the periods specified in any enactment or in the Rules.

Wakeling J.A. considered Rules 14.5, 14.8 and 14.44 together with Rule 13.4(1), which sets out how months and years are counted under the Rules, and determined that the Applicant had missed the deadline to file his Application for permission to appeal by a large margin. The Applicant was not able to show any special circumstances that would justify an extension of the deadline for filing his Application. Wakeling J.A. denied the Applicant's Application for permission to appeal the vexatious litigant Order.

BOVEN V WICKETT, 2018 ABCA 90 (WAKELING JA)
Rules 13.4 (Counting Months and Years), 13.5 (Variation of Time Periods), 14.8 (Filing a Notice of Appeal) and 14.11 (How to Start a Cross Appeal)

Boven applied for permission to file a Cross Appeal nearly four months after the time period prescribed in Rule 14.11 had expired. Wickett had appealed a Trial Decision, but the Appeal was struck for want of prosecution one day after Boven applied to cross-appeal.

Justice Wakeling noted that Rule 14.11 states that "[a] respondent who contends that the decision of the court appealed from should be varied must, within the time for filing an appeal or within 10 days of service of the notice of appeal, whichever is later ... file with the Registrar ... a notice of cross appeal". His Lordship noted that the date of Decision is the start date for measuring the time for filing an Appeal pursuant to Rule 14.8(1), and the end date for filing the Appeal was delineated by Rules 13.4(1), 14.8(2)(iii) and the *Interpretation Act*, RSA 2000, c 1-8, s 22(1). As such, the start date for Boven to file a Cross Appeal was September 26, 2017 and the end date was October 5, 2017 pursuant to Rule 14.11.

Wakeling J.A. noted that Rule 13.5(2) permits the Court to extend a time period that is specified in the Rules. His Lordship explained the "second window" concept, emphasizing that the Court's jurisdiction should be exercised in exceptional circumstances, and provided the factors which inform the Court's consideration of whether an extension should be granted for filing an Appeal or Cross-Appeal.

Wakeling J.A. reviewed the factors in the "second window" concept as applied to the facts and concluded that Boven's Application did not meet the conditions for extending time to file a Cross Appeal. The Application was therefore dismissed.

DBF V BF, 2018 ABCA 108 (MCDONALD, VELDHUIS AND GRECKOL JJA)
Rules 13.5 (Variation of Time Periods) and 14.88 (Cost Awards)

The Respondent and Cross Appellant ("BF") sought a ruling on Costs in an Appeal by Ms. F ("DBF") following a Trial in which DBF sought *inter alia*, sole custody of the parties' only child and permission to relocate to Turkey with the child (the "Underlying Appeal"). The Trial Judge denied the mobility Application, and DBF appealed the Trial Judge's Decision. BF cross-appealed on the issue of set-off. DBF was partly successful on her Appeal, and BF's Cross-Appeal was dismissed.

The Court noted that, as a preliminary matter, the Costs Ruling was sought more than two months after the Decision on the Underlying Appeal. Rule 14.88 requires that any request for a specific direction as to costs must be made within two months of the pronouncement of the Decision. The Court noted that the two-month limit can be relaxed under Rule 13.5(2). In this case, given the complexity of the issues involved in settling the formal Order for the Underlying Appeal and Cross-Appeal, the Court held that the two-month time limit should be relaxed.

Pursuant to Rule 14.88, the successful party on Appeal is presumptively entitled to Costs. The Court summarized that the main issue in awarding Costs was whether one party was "substantially successful" on appeal or, alternatively, whether there was divided success and no Costs should be awarded. The Court emphasized that success in family matters means substantial success and not absolute success. The Court noted that Costs of an appeal are not to be awarded on an issue-by-issue basis, but rather on the basis of substantial success. The Court found that there was mixed success for each party, and so each party was ordered to bear their own Costs.

INLAND FINANCIAL INC V GUAPO, 2018 ABQB 162 (MASTER SCHLOSSER)
Rule 13.6 (Pleadings: General Requirements)

In a case involving a mortgage fraud, the property at issue was a residence jointly owned by a husband and wife. The couple's son, who lived in the basement, had the same name as his father, and he arranged for a mortgage in his father's name. The son persuaded his mother to sign the mortgage, and the mother and son executed a statutory declaration that they were the owners of the property and it was their principal residence. The property was subsequently mortgaged 12 times over in the same fashion in ever-increasing amounts. The mortgage went into default, and the Plaintiff mortgagee, Inland Financial, applied for Foreclosure, and in the alternative, for Judgment *in personam*. The husband and wife cross-applied to have the Action dismissed against them.

One of the bases of the dismissal Application was whether the *Dower Act*, RSA 2000, c D-15 could be used to invalidate Inland's mortgage, as the father had not given consent to the mortgage disposition. Master Schlosser noted that this reading of the *Dower Act* would result in, ironically, the perfection of a fraud. Master Schlosser also noted that reliance on the *Dower Act* had not been pled, which was likely to result in surprise to the Plaintiff and therefore a contravention of Rule 13.6. The Case Management Judge had attempted to point the Defendants toward an amendment to cure the imperfection, but as of the date of the Applications, no such amendment had been made. The Plaintiff had admitted that it was

not in fact surprised by the reliance on the *Dower Act*. Master Schlosser noted that the Court could make a "housekeeping" amendment to the Pleadings to permit this portion of the Application to go ahead.

The Court granted the Plaintiff Judgment *in personam* against the son, discharged the mortgage, and dismissed the Plaintiff's claims as against the mother and father.

CHINESE BENEVOLENT ASSOCIATION OF EDMONTON V CHINATOWN MULTILEVEL CARE FOUNDATION, 2018 ABQB 8 (MOREAU CJ)
Rule 13.18 (Types of Affidavit)

The Plaintiffs sought a Declaration that new bylaws adopted by the Defendants were invalid, and that the Defendants' old bylaws should continue. They also sought a determination respecting membership of one of the Defendants, the Chinatown Multilevel Care Foundation ("CMLCF"), and an Order requiring the CMLCF to hold an annual general meeting and elect a new Board of Directors.

Chief Justice Moreau considered whether there was a requirement that an Affidavit that was sworn by one of the Plaintiffs be based on the Affiant's personal knowledge. Her Ladyship noted that Rule 13.18(3) requires that Affidavits used in support of Applications that may dispose of all or part of a Claim must be sworn on the basis of the Affiant's personal knowledge. The Defendants argued that the Plaintiffs sought an Order that was "final in nature", but much of the Affidavit in question had been sworn on the basis of belief. Further, other individuals who had personal knowledge of the bylaws and memberships at issue did not swear Affidavits. The Plaintiffs argued that the Defendants had also relied on an Affidavit that was sworn based on belief, and not personal knowledge. However, it was executed by the Affiant as an officer of CMLCF, and not in her personal capacity.

Moreau C.J. held that both parties had primarily relied on documentary evidence rather than personal knowledge, and that Plaintiffs' Affidavit evidence reflected the information found in the documents, as well as the evidence of the Defendants' witness. As such, Her Ladyship concluded that, in the circumstances, weight should be given to the Plaintiffs' Affidavit evidence.

The Plaintiffs' Application for declaratory and ancillary relief was dismissed on other grounds.

JCC V NNC, 2018 ABCA 115 (SCHUTZ, GRECKOL AND CRIGHTON JJA)
Rule 13.18 (Types of Affidavit)

This family law matter concerned the potential fathers of three children who had refused to consent to DNA testing in order to definitively prove the children's paternity. After the two potential fathers refused to provide DNA samples, the Appellant, JCC, who previously believed he was the father of two of the three children, applied for a Declaration under the *Family Law Act*, SA 2003, c F-4.5 that the other two men were the childrens' biological fathers, and sought Orders for child support. He also sought a grant of permission to obtain DNA tests from the two men, to determine whether they were the biological fathers of the two children. The Appellant's Application was denied, partly on the basis that he relied on hearsay evidence in his Affidavit. JCC appealed.

On Appeal, the Appellant argued, among other things, that his hearsay Affidavit evidence should have been admitted pursuant to Rule 13.18(1)(b), which allows for an Affidavit to be sworn on the basis of belief. The Court of Appeal held that the Appellant's Affidavit was admissible "for the purposes of providing some evidence" of the biological relationships. The Court also considered the fact that the other two men did not produce evidence to the contrary. The Court concluded that, on balance, social policy interests favour a process that reveals paternity, rather than obscures it. The Court granted the Appeal and ordered that the Appellant had permission to obtain the DNA tests so that the tests could be admitted into evidence. If the potential fathers continued to refuse their consent, the Appellant could seek a parentage Order based on an adverse inference.

CCS CORPORATION V SECURE ENERGY SERVICES, 2018 ABCA 120 (MCDONALD, GRECKOL AND CRIGHTON JJA)
Rules 14.1 (Definitions) and 14.4 (Right to Appeal)

The Appellant, CCS Corporation ("CCS") appealed an Order which summarily dismissed all but one of its Claims as against Pembina Pipelines Corporation. The Appellant sought a Declaration that the Case Management Judge's findings did not bind it. The Respondents raised, as a preliminary issue, the Court's jurisdiction to hear the Appeal.

The Court considered Rule 14.4(1) which provides that an Appeal is in respect of the whole or any part of a Decision. The Court noted that Rule 14.1(1)(f) sets out the definition of "Decision" as including a "judgment, order, decision, verdict, direction, determination or award and, where the context requires, includes the verdict or finding of a jury". Based on that definition, the Court found that what the Appellant sought did not fit within the definition of a "Decision"; further, such a Declaration raised the issues of *res judicata* and issue estoppel. Accordingly, the Court held that it did not have jurisdiction to hear the Appeal.

CLARK V PEZZENTE, 2018 ABCA 76 (MARTIN, O'FERRALL AND STREKAF JJA)
Rules 14.5 (Appeals Only With Permission) and 14.37 (Single Appeal Judges)

The Applicant, Clark, sought permission to appeal a vexatious litigant Order made against him by Justice Veldhuis in Chambers. Veldhuis J.A. referred the Application to a panel of the Court of Appeal for determination.

The Court stated that the general test for permission to appeal under Rule 14.5 is relevant to permission to appeal Orders granted under section 23.1 of the *Judicature Act*, RSA 2000, c J-2 (the "*Act*"). The factors applicable to all Applications for permission to appeal are whether: there is an important question of law; there is a reasonable chance of success on appeal; and, any delay will not unduly hinder progress of the Action or cause undue prejudice. The Court noted that when considering whether to grant permission to appeal from an Order granted under section 23.1 of the *Act*, "the most important consideration is whether the appeal raises a serious issue of general importance with a reasonable chance of success". Other considerations include the standard of review on the Appeal, whether there are conflicting Decisions related to the same issue, and whether there is a possible error of law, unreasonably exercised discretion, misapprehension of important facts, or other reasons why a full panel of the Court of Appeal should review the Order.

The Court held that Veldhuis J.A. applied the correct legal test. The Applicant did not demonstrate an arguable case that Justice Veldhuis had made any error of law, exercised discretion unreasonably, or that the Decision was unreasonable. Further, the proposed Appeal did not raise a serious issue of general importance with a reasonable chance of success, and in any case the Decision to grant the Order was subject to a reasonableness standard of review. The Court dismissed the Application.

KOSTIC V CIBC TRUST CORPORATION, 2018 ABCA 64 (O'FERRALL JA)
Rule 14.37 (Single Appeal Judges)

Ms. Kostic filed an Originating Application seeking indemnity from CIBC Trust Corporation ("CIBC") for her legal fees in related Actions in which she was a Defendant. Associate Chief Justice Rooke, in Case Management, granted Kostic's Originating Application and found that CIBC was liable to pay defence costs for Kostic in one related Action, and possibly others on further Application ("Rooke Order").

CIBC appealed Rooke A.C.J.'s Decision, and sought a Stay of the Rooke Order and a direction expediting the Appeal. Kostic cross-appealed and sought declaratory relief, specifically declarations that CIBC: was under an immediate and ongoing requirement to fund her reasonable defence costs and legal costs for the underlying Appeal; was required to pay her legal fees in connection with a related Action; and pay her legal fees in connection with a separate

Appeal ("Declaratory Relief"). Kostic also sought directions regarding her selection of counsel and the processing of statements of account. Finally, Kostic opposed CIBC's Application for an expedited Appeal.

Justice O'Ferrall stated that the bulk of the declaratory relief sought by Kostic was not "incidental to an appeal" as required by Rule 14.37 and, as a result, His Lordship dismissed many of Kostic's Applications. O'Ferrall J.A. stated that the Court had jurisdiction to hear Kostic's Applications for legal costs for responding to CIBC's Application for a Stay of the Rooke Order and for an expedited Appeal, Kostic's Application regarding Costs of the Appeal and Kostic's opposition to an expedited Hearing of the Appeal.

After considering the tripartite test for a Stay, O'Ferrall J.A. granted CIBC a Stay as well as an expedited hearing of the Appeal. Justice O'Ferrall ordered that the Costs of the various Applications and responses would be in the cause.

ST PAUL-BUTLER V LEDUC (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2018 ABCA 3 (WAKELING JA)
Rule 14.40 (Applications to Single Appeal Judges)

The Applicant sought leave to Appeal a decision of the Respondent Subdivision and Development Appeal Board under section 688 of the *Municipal Government Act*, RSA 2000, c M-26. The Applicant filed an Affidavit in support of his Application which exhibited several instruments which affected the title to his property and were at issue in the underlying dispute. The Respondent Appeal Board challenged the admissibility of the Applicant's Affidavit.

Justice Wakeling noted that Rule 14.40 permits an Applicant to file an Affidavit in support of an Application for permission to Appeal. Wakeling J.A. noted that an Applicant may do so where either the Appeal alleges the impugned Decision was biased or breached the rules of natural justice, or the Applicant relies on the Affidavit to argue that the question of law at issue is "important to the applicant or other segments of the community".

Justice Wakeling found that the instruments exhibited in the Applicant's Affidavit were common to a large number of lots besides the Applicant's. As such, other land owners would be interested in the resolution of the legal questions engaged by the Applicant's Appeal. The Applicant's Affidavit therefore fell within the second permissible category of Affidavits on Applications for leave to appeal. The Court granted the Application for leave to appeal.

ENVACON INC V 829693 ALBERTA LTD, 2018 ABCA 18 (GRECKOL JA)
Rule 14.48 (Stay Pending Appeal)

829693 Alberta Ltd. ("829") was found in Contempt of Court by the Case Management Judge for failing to produce unconsolidated financial statements which 829 asserted were either non-existent or lost. 829 was ordered to pay the Respondent's solicitor-client Costs, and to create or re-create the unconsolidated financial statements to purge the Contempt, failing which its Pleadings would be struck. 829 appealed the Case Management Judge's Order, and sought a Stay of the enforcement of the Order pending the Appeal pursuant to Rule 14.48.

829 argued that there were serious issues on appeal, that a failure to grant the Stay would result in irreparable harm, and the balance of convenience favoured granting the Stay.

Justice Greckol noted that Envacon Inc. conceded that the issues on appeal were not frivolous, and held that 829 would suffer irreparable harm. Greckol J.A. considered the balance of convenience and held that the only inconvenience which Envacon Inc. would suffer if a Stay was granted was a delay of a few months to enforce the Costs award and receive the documents or obtain a default Judgment. Greckol J.A. held that 829 would suffer far greater inconvenience if the Stay was not granted. Therefore, the balance of convenience favoured a Stay. The Application for a Stay of the Case Management Judge's Order pending Appeal was granted.

PERCY V VALUE CREATION INC, 2018 ABCA 50 (GRECKOL JA)
Rule 14.48 (Stay Pending Appeal)

The Plaintiff land owners, the Percys sought Leave to Appeal a Decision of the Alberta Energy Regulator ("AER") which involved the hearing of an Application ("Hearing") to amend an approval which was originally granted by the AER in 2005 ("2005 Decision"). The Percys applied for a Stay of the AER's 2005 Decision, pending their Application for leave to appeal.

The Percys were granted standing at the Hearing, and had requested that the AER either reconsider the 2005 Decision, or adjourn the Hearing and expand its scope to include consideration of the economic impact of the amendments. The AER decided not to expand the scope of the Hearing and declined to adjourn it, but did receive submissions from the parties as to whether to reconsider the 2005 Decision ("Initial Ruling"). The Percys filed for Leave to Appeal the Initial Ruling. Two days before the hearing of the Stay Application, the AER determined that it would not be reconsidering the 2005 Decision ("Subsequent Ruling"). The Percys adjourned their Application for Leave to Appeal the Initial Ruling so that it could be heard with their anticipated Application for Leave to Appeal the Subsequent Ruling, which had not yet been filed. The Percys maintained their Application for a Stay of the Initial Ruling pending the awaiting Applications for leave to appeal.

Justice Greckol expressed doubt as to whether Rule 14.48 provides the Court with the authority to Stay a Decision when an Appeal had not yet been filed. Without determining the issue, Justice Greckol noted that the Percys had not yet provided arguments on the merits of their leave Applications as the Subsequent Ruling by the AER had only just been received. Without being able to present those arguments, the Percys could not demonstrate that they were raising arguable issues on Appeal, and thus could not meet the first branch of the tripartite test. Additionally, Justice Greckol noted that the AER's Decisions with respect to its own process are entitled to deference. As a result, Justice Greckol found that a Stay was not warranted.

The Application for a Stay pending Appeal was dismissed.