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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.

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

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ENCHINO V MUNRO, 2015 ABQB 35 (VEIT J)
Rules 1.2 (Purpose and Intention of These Rules) and 10.31 (Court-Ordered Costs Award) and Schedule C

The Defendants were successful in responding to an Application under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, wherein the Plaintiffs argued that the Defendants had acted wrongfully. The Court held that such a declaration would have to wait until the bankruptcy proceedings concluded. The Defendants sought accelerated Costs for their success in the Application. The Plaintiffs argued that no Costs should be awarded because a novel point of law was applied or, alternatively, that Costs should be awarded based on Column 1 of Schedule C.

Justice Veit noted that the Court did not make a finding on the merits with respect to serious wrongdoing. Justice Veit referred to the foundational principles in Rule 1.2 which established that issues, including Costs, should be resolved fairly, justly and in an expeditious manner. Veit J. held that there were no unusual circumstances to warrant the Court declining to follow the usual rule of awarding Costs to the winner. Justice Veit awarded Costs on Column 3 of Schedule C based upon the amount claimed in the Statement of Claim.

LOPUSHINSKY ESTATE (RE), 2015 ABQB 63 (ACTON J)
Rules 1.2 (Purpose and Intention of These Rules), 6.11 (Evidence at Application Hearings), 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)

This was an Application by an executor to pass the accounts of her father's estate. The Application was supported by three of the executor's siblings but vigorously opposed by her brother, who opposed her administration of the estate throughout her attempts to perform her duties as executor. Because there was contradictory Affidavit evidence, Acton J. exercised the authority granted in Rule 6.11(1)(g) to hear *viva voce* evidence. Justice Acton accepted the accounts in their entirety and held that no further accounting was required to be made to the estate; all other matters incidental to the administration of the estate were disposed of. Finally, Acton J. considered the executor's request for Costs. Justice Acton commented that the brother's conduct throughout the legal proceedings was improper. He used the legal proceedings to punish his sister for the perceived wrongs done to him after both his brother and father died. As a result, Acton J. awarded Costs on a solicitor and own client full indemnity basis, as against the brother personally.

LC V ALBERTA, 2015 ABQB 84 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules), 4.16 (Dispute Resolution Processes) and 10.31 (Court-Ordered Costs Award) and Schedule C

Plaintiffs' counsel, Robert Lee, in his personal capacity, sought enhanced Costs for having to prepare for an abandoned Application brought by the Government Defendants. The Defendants originally sought an Order for enhanced Costs from Mr. Lee in his personal capacity for allegations he made against Government employees in a number of proposed amendments to the Statement of Claim.

Graesser J. noted that Item 7(3) of Schedule C allows 50% Costs for abandoned Applications. His Lordship stated that the threshold for applying Item 7(3) of Schedule C is that the Application be in keeping with Rule 1.2: that it is *bona fide* and not frivolous or vexatious. Justice Graesser noted that Schedule C is the norm in Costs awards, although the Court can depart from this in appropriate circumstances, pursuant to Rules 10.31(3) and 10.31(1). Graesser J. considered whether the Defendants' Application to seek Costs from Mr. Lee personally was reasonably justified. The Court reviewed correspondence between the parties, including an offer of compromise from the Defendants which was rejected by the Plaintiffs. The Court noted that offers of compromise are to be encouraged under Rule 4.16(1), which Rule makes good faith participation in a dispute resolution process mandatory unless waived by the Court. The Court was satisfied that the Defendants' Application was brought for a valid purpose, and Mr. Lee's Application for enhanced Costs was dismissed.

DAVENPORT HOMES LTD V CASSIN, 2015 ABQB 138 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 4.4 (Standard Case Obligations), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff appealed the decisions of a Master striking its Action against the Defendants for inordinate delay under Rule 4.31, and discharging a Builder's Lien and *Certificate of Lis Pendens* filed against the Defendants' home in respect of the Action. The Plaintiff commenced the Action in 2004 claiming that the Defendants were indebted to the Plaintiff for the construction of their house. The Defendants counterclaimed for overpayments and construction defects. The Defendants argued that the last significant advance in the Action occurred in 2009 when the Plaintiff's corporate representative was questioned, while the Plaintiff argued that the last significant advance was in 2013 when the Plaintiff provided Undertaking Responses and applied for a Litigation Plan.

Justice Shelley noted that the Rules provide for two ways in which an Action can be dismissed for delay: Rule 4.31 permits the Court to dismiss an Action on a discretionary basis if, in the Court's determination, the delay has resulted in significant prejudice to a party; and, Rule 4.33 allows an Action to be struck if more than three years have passed since there has been any significant advance. Justice Shelley observed that, although the language of Rule 4.31 suggests that the Court may use its discretion which usually implies some deference, the standard of review on an Appeal is correctness. Further, while Rule 4.31(2) creates a presumption of serious prejudice, it does not shift the overall burden of proof, and an Applicant must still establish a likelihood of serious prejudice before the Action will be struck. To rebut the presumption, there must be evidence that at least raises a legitimate doubt about the existence of serious prejudice.

Shelley J. briefly considered Rule 1.2(2) which stresses the importance of quick and timely resolution "as soon as practicable", at the "least expense". Justice Shelley observed that Rules 4.31 and 4.33 are examples of these foundational principles.

Shelley J. concluded that the Plaintiff's delay was both inordinate and inexcusable. The Plaintiff did not lead any evidence to rebut the presumption of prejudice under the Rules. In fact, the Plaintiff's own answers to Undertakings raised the problem of documents that could not be found and fading memories. Justice Shelley held that the Defendants had established "significant prejudice" warranting dismissal of the Action under Rule 4.31. This prejudice could not be cured by procedural Orders under

Rule 4.31(1)(b). As a result, Shelley J. determined that the Master was correct to dismiss the Action under Rule 4.31, and it was therefore irrelevant whether the answers to Undertakings significantly advanced the Action. The Appeal was dismissed.

TURNER V BELL MOBILITY INC, 2015 ABQB 169 (ROOKE ACJ)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 4.33 (Dismissal for Long Delay)

The Plaintiff class brought a Class Proceeding against several national wireless services providers ("Defendants"), alleging that they wrongfully collected "system access fees" from their Canadian customers. The Defendants were also facing related Class Proceedings in Saskatchewan and other Canadian Provinces commenced by some of the same putative class members.

The Defendants sought to strike the Alberta Class Proceeding or permanently stay it under Rule 3.68, asserting that it was an abuse of process for multiple identical Actions to take place in different jurisdictions. They argued that a multiplicity of Actions in different jurisdictions could lead to inconsistent results, and jurisdictional comity required that the Courts respect the other jurisdictions' law and processes.

Associate Chief Justice Rooke stated that the Defendants' characterization of the law under Rule 3.68 is accurate and applicable outside of the Class Proceedings context. However, the law must be applied "through the lens of" Class Proceedings, especially in the context of multi-jurisdictional Class Proceedings. The Saskatchewan Action and the Alberta Action differed fundamentally. Rooke A.C.J. held that the multiplicity of Proceedings was justifiable, and the Alberta Action had a legitimate purpose because it sought to deal with a different national Class. There was, therefore, little chance of inconsistent results which would undermine the credibility of the judicial process.

Rooke A.C.J. also commented that Rule 1.2, while establishing important foundational principles, added nothing of substance to the Defendants' arguments. The Defendants' Application was dismissed.

KLIMEK V KLIMEK, 2015 ABQB 188 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules) and 1.3 (General Authority of the Court to Provide Remedies)

During an Application regarding support obligations, the parties reached an agreement and entered a Consent Order before Graesser J. A form of Order was subsequently prepared which one party would not sign. The Applicant brought this Application to settle the terms of the interim Order. Graesser J. observed that the Foundational Rules promote the resolution of disputes by the parties themselves through Rule 1.2(2)(c), and facilitate the quickest means of resolving the dispute at the least expense through Rule 1.3(a). Graesser J. cited Rule 1.2(4), and commented that the Foundational Rules also require the Court to consider proportionality in granting remedies or imposing sanctions. Forcing the parties to go to Trial to determine whether or not a binding settlement was reached would be entirely disproportionate and would act as a huge disincentive to future settlement. There was no suggestion of any misrepresentation, fraud, duress or undue influence. Buyer's remorse did not qualify as a reason to upset an otherwise valid settlement. In the result, Graesser J. settled and signed the form of Order, and the Applicant was awarded Costs.

WILDEMAN V WILDEMAN, 2015 ABQB 195 (SCHUTZ J)
Rules 1.2 (Purpose and Intention of These Rules), 9.12 (Correcting Mistakes or Errors) and 9.13 (Re-Opening Case)

The Applicant in this Family Law matter applied to vary a previous Decision of Schutz J., alleging that Schutz J. had erred in calculating the Applicant's Guideline income. Schutz J. noted that Judges are provided with a narrow scope to correct mistakes or errors in a Judgment, as set out in Rule 9.12. However, Superior Court Justices also possess the inherent jurisdiction to vary Decisions prior to entry. Justice Schutz noted that this inherent jurisdiction was relied on prior to the current Rules coming into force. The inherent jurisdiction is now expressly set out in Rule 9.13, and Her Ladyship noted that this Rule gives the Court

legislated authority to vary decisions before entry. Further, the Rule provides broad authority to the Court to vary a decision in accordance with Rule 1.2 and the Foundational Rules.

Schutz J. stated that the correct test for varying a Decision under Rule 9.13 was set out in *Lewis Estates Communities Inc v Brownlee LLP*, 2013 ABQB 731, where the Court noted:

> [T]he evidence and law put before the Court ought to make an applicant's case so compelling that the likelihood that it has correctly identified an error is very high. This is, I note, essentially the test for obtaining summary judgment.

With respect to admissibility of new evidence under Rule 9.13, Justice Schutz noted that Rule 9.13(b) expressly allows the Court to hear more evidence and change its Decision if there is a good reason to do so. However, the Court noted that Rule 9.13 is not a vehicle for seeking reconsideration of a Judgment and that an unsuccessful litigant's remedy in such a case lies only in an Appeal. The Court stated that generally the test for admissibility under Rule 9.13 is that the Applicant must show that the new evidence was not available at the time of the hearing and that the new evidence would be likely to change the result. After reviewing the new evidence, Schutz J. determined that this was an appropriate case to vary Her Ladyship's earlier Decision.

DEJANOVIC V AXA PACIFIC INSURANCE COMPANY, 2015 ABQB 200 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of These Rules), 4.32 (Agreement About Delay), 4.33 (Dismissal for Long Delay) and 13.6 (Pleadings: General Requirements)

The Defendant insurer brought an Application to strike for long delay. The Plaintiff had started four separate Actions relating to two separate motor vehicle accidents. Two of the Actions involved the Plaintiff's Section B insurer. The main negligence Actions proceeded through the normal litigation steps, but the Claims against the Section B insurer did not advance after the Affidavits of Records were delivered. The central issue in this case was whether the four related Actions were so closely linked that an advance in one Action represented an advance in the other. Master Schlosser observed that allowing delay without seeking an agreement or a Court Order was risky and should be condemned. Rules 4.32 and 4.33 were the instruments of such condemnation.

Master Schlosser cited *Angevine v Blue Range Resource Corp*, 2007 ABQB 443 for the applicable test to assess if a related Action is "inextricably linked" to the primary Action:

(1) Are the two actions inextricably linked in the sense that the result in the related action would be "legally or factually determinative" of the issues in the primary action?

(2) Will the issue determined in the related action be "relevant and binding" in the primary action?

(3) Does the related action materially advance the primary action?

(4) Could the decision in the related action be a "barrier in law" to the Court's adjudicating the primary action?

Master Schlosser noted that to apply the principles, it was necessary to examine the Pleadings. Master Schlosser stated that while drafting their Pleadings, the parties should be mindful of their obligations under Rule 1.2(3) to identify and narrow the issues in the lawsuit, and to include only those matters which would defeat the Claim or raise a Defence as stipulated under Rule 13.6. Master Schlosser held that the central issues appeared to be identical in all four Actions. While the extent of injuries and determination of causation was not "automatically transferable" from one Action to another, it would certainly go a long way towards a global resolution of the lawsuits. Master Schlosser noted that doubts as to whether there has been a significant advance ought to be resolved in favour of the Respondent. Master Schlosser further stated that a strike for delay is the "capital punishment" of a civil Action, but before the Court "puts on its black hat" to terminate an Action, it should have no reasonable doubts about whether the Action has advanced. The Defendant's Applications were dismissed.

KAHLON V CHEECHAM, 2015 ABQB 203 (MASTER MASON) Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal With Significant Deficiencies), 4.31 (Application to Deal With Delay), 4.33 (Dismissal for Long Delay), 5.5 (When Affidavit of Records Must be Served), 5.6 (Form and Contents of Affidavit of Records), 5.12 (Penalty for Not Serving Affidavit of Records), 5.15 (Admissions of Authenticity of Records), 5.16 (Undisclosed Records Not to be Used Without Permission) and 6.38 (Requiring Attendance for Questioning)

The Defendants in a motor vehicle lawsuit applied to dismiss the Action for delay pursuant to Rules 4.31 and 4.33. The Applications were filed on August 18, 2014 and September 23, 2014, respectively. The Plaintiff argued that service of his sworn Affidavit of Records on September 2, 2011 constituted a significant advance in the Action. The Defendants argued that this was a meaningless step because the Plaintiff previously submitted an unsworn draft Affidavit of Records on July 29, 2011, which was identical to the sworn version.

After numerous letters over the years and failed attempts at scheduling Questioning, the Plaintiff finally served an appointment for Questioning returnable August 22, 2014, which was received by Defendants' counsel on August 1, 2014. Defendants' counsel advised that she would not be producing the Defendant, Mr. Cheecham, for Questioning because she would be bringing an Application to dismiss pursuant to Rule 4.31 or 4.33. The Plaintiff then filed and served a Notice to Admit Facts on August 12, 2014 and brought an Application to compel Mr. Cheecham to attend Questioning pursuant to Rule 6.38. Master Mason heard the Rule 6.38 Application and ordered Mr. Cheecham to attend Questioning on August 27, 2014 without prejudice to the Defendants' Rule 4.31 Application. The Defendants served a Statement of Objection to the Notice to Admit Facts on August 29, 2014, stating that it was only served after notice of their intention to bring the Applications for delay. Both delay Applications were adjourned to a Special Application before Master Mason.

Master Mason noted that a completed procedural step required by the Rules always qualifies as a material advance and, here, the procedural step was the service of an Affidavit of Records, as required by Rule 5.5. Rule 5.6 required the Affidavit of Records to be in Form 26 which contemplates it being sworn or affirmed. A sworn Affidavit of Records confirms that the litigant has disclosed all relevant and material records, which gives rise to the presumption that they are authentic admissions by the provider, pursuant to Rule 5.15. Any records not disclosed in the sworn Affidavit of Records may only be used in evidence thereafter if in accordance with Rule 5.16. Additionally, the failure of a party to comply with Rule 5.5 exposes it to penalty Costs, per Rule 5.12(1)(a), or a striking of the pleadings, per Rule 3.68(4)(b). A consideration of these Rules relating to service of a sworn Affidavit of Records emphasizes its importance in the litigation process. Accordingly, Master Mason held that service of the unsworn Affidavit of Records did not complete the procedural step in Rule 5.5. The Defendants had put the Plaintiff on notice that they insisted on strict compliance with Rule 5.5, so the Plaintiff provided a draft version, likely to avoid a penalty Costs Application. The sworn version was provided within a reasonable period of time in the circumstances. This was not done last minute to stop the tolling of the three-year period, nor did the Plaintiff deliberately drag out the process in providing the sworn Affidavit of Records so as to cause delay. As Questioning was completed within the three-year window, Master Mason dismissed the Application for long delay under Rule 4.33.

Master Mason then considered inordinate and inexcusable delay causing prejudice under Rule 4.31. It was held that an inordinate delay had occurred as nothing significant took place between service of the sworn Affidavit of Records on September 2, 2011 and the Rule 4.31 Application on August 18, 2014. Most of this delay was unexplained and inexcusable. However, the evidence of Mr. Cheecham given at Questioning raised a legitimate doubt about the existence of significant prejudice to the Defendants by the delay. As such, the Rule 4.31 Application was also dismissed.

ROYAL BANK OF CANADA V ONDRIK, 2015 ABQB 70 (LEE J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), 10.15 (Retainer Agreement Confidentiality) and 10.44 (Appeal to Judge)

The Appellant ("Ondrik") appealed a Review Officer's Assessment of the Bill of Costs arising out of a foreclosure Action. Ondrik served Royal Bank of Canada ("RBC") with the record of proceedings pursuant to Rule 10.44(4), but did not file and serve any further written argument. RBC applied to the Court for advice and direction. The Notice of Appeal stated that Ondrik would be filing written argument in support of the Appeal. RBC argued that by not filing written argument, Ondrik effectively reversed the onus onto RBC to file written argument first. Ondrik cross-applied to have the Appeal adjourned to special chambers, with the corresponding filing and submission deadlines. One of the grounds of Appeal raised by Ondrik was that an award of Solicitor-Client Costs would be a windfall to RBC, as opposed to true indemnity: RBC's counsel confirmed that RBC had not yet been billed in the matter, and RBC had not disclosed the retainer agreement. RBC argued that the retainer agreement was confidential pursuant to Rule 10.15 and the Review Officer's determination was only an evaluation of whether the fees were reasonable. RBC argued further that the Bill of Costs was reasonable because it accorded with the services performed under the appropriate column of Schedule C for the foreclosure Action.

Lee J. confirmed that the Court's powers under Rules 1.3 and 1.4 to remedy any procedural problems applied to Rule 10.44(4), and that the Court could order a matter to be heard in Special Chambers with appropriate written submissions. Given the grounds of Appeal raised by Ondrik, Justice Lee concluded that the matter should be dealt with in Special Chambers.

Justice Lee noted that, with respect to written arguments, Rule 10.44 requires an Appellant to file and serve Form 46 on the Respondent, but the form itself does not require the Appellant to set out its grounds of Appeal. Lee J. observed that Rules 10.44(4) and 10.44(5) appear to have some gaps because Form 46 does not require written argument or setting out the grounds of Appeal. Ondrik had complied with all but Rule 10.44(4)(c) which required the filing and service of any further written argument. Lee J. stated that Rule 10.44(5) requires a Respondent to file and serve written argument within 10 days after receiving service of Form 46. Justice Lee directed the matter to be heard in Special Chambers in order to resolve the ambiguity in the Rule.

NAFIE V BADAWY, 2015 ABCA 36 (ROWBOTHAM, O'FERRALL AND VELDHUIS JJA)
Rules 1.3 (General Authority of the Court to Provide Remedies), 4.14 (Authority of Case Management Judge), 6.3 (Applications Generally), 11.30 (Proving Service of Documents), 13.1 (When One Judge May Act in Place of or Replace Another) and 14.73 (Procedural Powers)

The Appellant husband and Respondent wife had married in Egypt in 2000. After their wedding they lived in Canada and Saudi Arabia as a married couple for more than a decade before the wife sought and was granted a divorce in Alberta. The husband appealed, claiming that the Chambers Judge erred in law in concluding that Alberta Courts had jurisdiction to grant the Divorce. He sought to have the wife's Statement of Claim for Divorce set aside.

The Court of Appeal determined that it had jurisdiction to set aside the Statement of Claim for Divorce. However, the Court noted that setting aside the Statement of Claim for Divorce and Division of Matrimonial Property would also lead to setting aside associated Interlocutory Orders. The Court stated that, on these unique facts, it would take the extraordinary approach of exercising its inherent *parens patriae* and *nunc pro tunc* jurisdiction to give effect to a select number of the Interlocutory Orders as of the date they were made. In discussing its jurisdiction, the Court cited the *Judicature Act*, RSA 2000, c J-2 as well as Rules 1.3 and 14.73, and noted that courts have the inherent jurisdiction to control their own processes.

The Court considered some of the procedural difficulties within the Action. With respect to some of the problems with the service of documents, the Court cited Rule 6.3(3) and stated that:

> Procedural rules governing service are not a sword to be used to stall proceedings or alter the priority in which applications are heard. They are a shield to ensure fairness.

The Court noted that in this case, Affidavits of Service and proof of service under Rule 11.30 were used inconsistently, and the parties disputed service even where Affidavits of Service existed. The Court continued that it was simply impossible in some instances to determine from the record whether all or part of a document was served, and whether it was served within the required time period. The Court stated that parties are responsible for service and proof of it. Rule 11.30(1) clearly provided that an Application should be adjourned if proof was lacking and service was challenged.

The Court noted that the parties had leveraged delays in Case Management in order to gain an advantage. Before the first case management meeting, the husband had removed a jointly owned vehicle, thereby stranding the wife and the children. He then insisted that the wife was required to adhere to Rule 4.14(2) which stipulated that such matters should be addressed before a Case Management Judge. The wife secured the return of the car through an Order outside of Case Management. The Court of Appeal observed that, pursuant to Rule 4.14(2), the Case Management Judge "must hear every application filed with respect to the action …". However, the Court held that the Order for the return of the vehicle was reasonable pursuant to Rule 13.1 which allows any Judge to act when another is unavailable.

The Court granted the husband's Appeal, setting aside the Statement of Claim for divorce on the basis that the wife was not ordinarily resident in Alberta for at least one year before the Statement of Claim was filed. However, the Court noted that a fresh Claim may be appropriate in the circumstances.

TALISMAN ENERGY CANADA V DIRECT ENERGY MARKETING LIMITED (CENTRICA ENERGY), 2015 ABQB 13 (MASTER PROWSE)
Rules 1.4 (Procedural Orders), 7.3 (Summary Judgment) and 13.5 (Variation of Time Periods)

The Defendants sought an Order from the Court extending the time for filing their Statement of Defence until after their Summary Dismissal Application had been heard and determined. The Court considered whether the Defendant should be obliged to file a Statement of Defence prior to the hearing of the Summary Dismissal Application if the Plaintiff insists on receiving a Statement of Defence.

Master Prowse noted that, while the predecessor to Rule 7.3 specifically addressed the need to file a Statement of Defence prior to applying for Summary Dismissal, Rule 7.3 does not contain any such requirement. Master Prowse noted further that generally, when a party seeks Summary Judgment, it is appropriate to hold off following normal pre-trial steps in the litigation. Pursuant to Rule 1.4(2)(h) and Rule 13.5(2)(a), the Court has authority to extend the time for a Defendant to file a Statement of Defence.

After reviewing the facts and addressing the concerns raised by each of the parties, Master Prowse directed that the Defendants file their Summary Dismissal Application on or before January 30, 2015, but that they were not required to file a Statement of Defence until after that Application had been determined.

EQUITABLE BANK (EQUITABLE TRUST COMPANY) V AVISON, 2015 ABQB 109 (MASTER SCHULZ)
Rules 1.4 (Procedural Orders), 9.35 (Checking Calculations: Assessment of Costs and Corrections), 10.26 (Appeal to Judge), 10.36 (Assessment of Bill of Costs), 10.37 (Appointment for Assessment), 10.38 (Assessment Officer's Authority) and 10.41 (Assessment Officer's Decision)

The Plaintiff was unopposed in a foreclosure matter and the Court ordered that Costs be assessed pursuant to Rule 10.37. A Bill of Costs was submitted to an Assessment Officer, and the Assessment Officer requested more

information from the Plaintiff. The Plaintiff took issue with the Assessment Officer's requests, and applied to the Court for direction pursuant to Rule 9.35(4). During the initial assessment of Costs, the Plaintiff argued that the Assessment Officer did not have the authority to reduce the fees claimed on the Bill of Costs because the Defendant was to receive no money for the sale of his house. The Court observed that, under Rule 10.36, the Assessment Officer must only approve the proposed Costs without change if both parties consent. Master Schulz reviewed Rule 10.38 and cautioned that the production of records or information to an Assessment Officer is instrumental to their function, and important for litigation to proceed smoothly and efficiently. The Court also advised that Costs associated with a property manager should not be included as a disbursement in the Bill of Costs, but that the property manager should submit their own Affidavit pursuant to Rule 10.41.

Master Schulz addressed this matter as an Application pursuant to Rule 9.35, since a decision by the Assessment Officer had not been finalized. Master Schulz noted that, if the Assessment Officer had finally decided the issue of Costs, Rule 10.26 would have allowed the Plaintiff to appeal the Assessment before a Justice. Master Schulz stated that if the interpretation of the Rules was incorrect, the Court could nevertheless provide Advice and Directions pursuant to Rule 1.4. Master Schulz ordered the Plaintiff to submit further Affidavit evidence before deciding what level of Costs was appropriate. Master Schulz advised Counsel to provide invoices in Affidavit form so that they would be evidence before the Court should an Appeal under Rule 10.26 be required.

KEEF V PETERS, 2015 ABCA 16 (BROWN JA)
Rules 1.4 (Procedural Orders), 13.5 (Variation of Time Periods), 14.23 (Filing Factums - Standard Appeals) and 14.24 (Filing Factums - Fast Track Appeals)

The Applicant appealed an Order of a Chambers Judge which related principally to the Applicant's access to his child. The Application was dismissed in its entirety, with Costs. The Order also eliminated telephone access and restricted the Applicant from bringing further Applications in relation to the child. The Registrar struck the Applicant's Appeal for failure to file the Appeal Records in time. The Appeal was subsequently restored, but the Applicant failed to file his Factum in time. The Applicant applied for an indefinite extension of time to file his Factum, and to stay one of the provisions of the Order under Appeal.

Brown J.A. observed that, while an Appellant must file his or her factum on time or the Registrar will strike the Appeal pursuant to Rules 14.23(1) and 14.24(1), the Court, following Rules 1.4(2)(h) and 13.5(2), retains discretion to extend time periods specified in the Rules. The pertinent factors to consider in deciding whether to do so are: (1) the reason for the delay; (2) the prospects of moving ahead with the Appeal; (3) the prejudice to the other party; and (4) the potential merits of the Appeal. The Applicant had suffered injuries from a car accident which explained the delay. As to the prospects for moving the Appeal ahead, this was not the first time the Applicant had failed to meet a deadline. Justice Brown noted that delays in Appeals of access decisions are incompatible with the child's best interests, which relates to prejudice. Further, the Appeal had very little prospect of success, as Appeals from custody and access decisions based on an assessment of the best interests of the child face a highly deferential standard of review. Balancing the delay already caused in the Appeal, the anticipated future delay, the reasons for the delay, the interests of the child in a speedy resolution, and the merits of the proposed Appeal, Brown J.A. declined to grant an extension of time. In the result, the Application was dismissed and the Appeal was struck.

SOBEYS WEST INC V EDMONTON (CITY), 2015 ABCA 32 (SLATTER JA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 1.8 (Interpretation Act), 3.9 (Service of Originating Application and Evidence), 6.4 (Applications Without Notice), 13.3 (Counting Days), 14.29 (Format of Extracts of Key Evidence), 14.40 (Applications to Single Appeal Judges), 14.41 (Responses to Applications to Single Appeal Judges) and 14.44 (Application for Permission to Appeal)

The Plaintiffs sought Leave to Appeal a Decision of the Edmonton Sub-Divisional and Development Appeal Board which granted the Respondent liquor stores a development permit subject to some special rules. During the course of preparing for the Appeal, the parties sought the Court's direction with respect to some of the new Appeal Rules. Justice Slatter explained that the panel that hears the Appeal will decide what evidence it is prepared to hear. Under Rule 14.29, any additional extracts of key evidence must have a detailed table of contents identifying each document.

His Lordship also provided the parties with directions with respect to the issue of the filing deadlines under the Rules: with respect to Applications to single Justices of Appeal, the applicable Rules are Rules 6.4, 14.40(2), 14.41 and 14.44. Under Rule 14.44, an Application for Permission to Appeal must be filed within the applicable time limit. Rule 14.40(2) requires the Applicant to file and serve its materials 10 days before the hearing, and 14.41 requires a Respondent to file and serve its materials 5 days before the hearing. The Court then applied the "Counting Days" method under Rule 13.3 and the accompanying Information Note, and specified the deadlines for both the Applicant and the Respondent in this case.

The Court further noted that Rule 1.8(b) provides that s. 22 of the *Interpretation Act*, RSA 2000, c I-8 does not apply to the Rules of Court. Failure to meet the deadline under Rule 14.40(20) and 14.41 could have various consequences, including the presumption that no Costs are available for a late step under Rule 14.90(1)(a)(i). Under Rule 1.5(4), late filings by a Respondent will not be allowed to prejudice an Applicant. Justice Slatter also stated that the presiding Justice may decline to set down a matter that has missed a deadline, and may strike an Appeal or Application in extreme cases of missed deadlines.

Slatter J.A. concluded that the Plaintiff had met the test for leave to Appeal with respect to some of the issues raised, and the Application was allowed to that extent.

OOMMEN V RAMJOHN, 2015 ABCA 34 (VELDHUIS JA)
Rules 2.14 (Self-Appointed Litigation Representatives) and 2.22 (Self-Represented Litigants)

The Applicant, Mr. Oommen, was a co-executor of the deceased Mr. Chapman's will, which had received neither probate nor administration. Prior to Mr. Chapman's death, he obtained Judgment in a civil Action against the Respondent. The Applicant sought to enforce the Judgment on behalf of the estate against the Respondent. The Applicant appointed himself the estate's Litigation Representative pursuant to Rule 2.14.

Justice Veldhuis noted that any individual may represent themselves in an Action pursuant to Rule 2.22. Her Ladyship went on to note, however, that an estate is not an individual in the context of Rule 2.14, as it is a separate legal entity. Justice Velhuis noted that Rule 2.14(1) expressly refers to an "individual or estate", which reinforces that the two concepts are distinct.

The Court held that an estate requires legal representation to appear in Court and, under Section 106(1) of the *Legal Profession Act*, RSA 2000, c L-8, only a member of the Law Society of Alberta can act as a Litigation Representative on behalf of an estate before the Court. The Applicant was authorized to direct the litigation or retain Counsel on behalf of the estate, but the Applicant could not appear in Court on behalf of the estate. Justice Veldhuis dismissed the Applicant's motion to represent the estate.

908077 ALBERTA LTD (ESCAPE & RELAX) V 1313608 ALBERTA LTD, 2015 ABCA 117 (SLATTER JA)
Rule 2.22 (Self-Represented Litigants)

The Respondent, 908077 Alberta Ltd., sought a ruling as to whether the corporate Appellant, 1313608 Alberta Ltd., could be represented on the Appeal by its directors who were not members of the Law Society of Alberta. The underlying litigation arose from a landlord and tenant dispute. The Order under Appeal held that the corporate Appellant could not be represented by its non-lawyer directors. Justice Slatter stated that Rule 2.2 provides that an "individual" may be self-represented in the Superior Courts. The relevant legislation and authorities established that other types of litigants in civil cases, including corporations, must be represented by counsel. Accordingly, Slatter J.A. held that 1313608 Alberta Ltd. was required to obtain counsel, failing which the Appeal would be deemed to be abandoned.

CHAPMAN ESTATE V RAMJOHN, 2015 ABCA 58 (VELDHUIS JA)
Rule 2.23 (Assistance Before the Court)

Mr. Oommen was the co-executor and co-beneficiary under the deceased, Mr. Chapman's, Will. Mr. Chapman was successful in a Civil Action prior to his death, and Mr. Oommen had a Power of Attorney and was in control of that litigation as the self-appointed Litigation Representative. Following Mr. Chapman's death, Mr. Oommen continued to appear in Court on behalf of the Estate in an attempt to enforce the Judgment.

The Court of Queen's Bench held that the *Legal Profession Act*, RSA 2000, c L-8 prevented Mr. Oommen from appearing in Court on behalf of the estate and issued an Order to that effect. Mr. Oommen appealed the Order, and appeared before Veldhuis J.A. seeking the right to appear on behalf of the estate in the Court of Appeal. Veldhuis J.A. dismissed the Application: *Oommen v Ramjohn*, 2015 ABCA 34. Mr. Oommen applied for permission to Appeal the Decision to a Panel of the Court of Appeal.

Justice Veldhuis reviewed the applicable legislation and concluded that there was no authority for the proposition that Mr. Oommen could act for the estate in Court. Veldhuis J.A. noted that "Rule 2.23 of the *Rules of Court* allows a court to grant permission to a person to assist a litigant, but this appointment cannot conflict with s. 106(1) of the *Legal Profession Act*" and concluded that "[t]he law is clear that Mr. Oommen cannot act for this estate in court." Veldhuis J.A. dismissed Mr. Oommen's Application.

GEOPHYSICAL SERVICE INCORPORATED V DEVON ARL CORPORATION, 2015 ABQB 137 (MASTER HANEBURY)
Rules 3.12 (Application of Statement of Claim Rules to Originating Applications) and 7.3 (Summary Judgment)

The Defendant, Devon, applied to Summarily Dismiss the Plaintiff's Claim. The question at issue in this Application was whether Devon was required to file a Statement of Defence prior to its Summary Judgment Application being heard.

Master Hanebury noted that the language of Rule 7.3 no longer required the filing of a Statement of Defence prior to making a Summary Judgment Application. Master Hanebury observed that the thrust of Devon's Application for Summary Dismissal was founded on the *Limitations Act*, RSA 2000, c L-12. The Court cited *Makowichuk v Makowichuk*, 2013 ABCA 439 for the proposition that a Defence under the *Limitations Act* is only available to a Defendant if expressly pleaded. Devon argued that this interpretation could not be correct because, if so, an Originating Application could never be dismissed as a result of a limitations argument (since there was no Statement of Defence). Master Hanebury rejected this argument, noting that the Court has discretion to deem an Originating Notice to be a Statement of Claim and require the filing of a Statement of Defence pursuant to Rule 3.12. In the result, Master Hanebury ordered that Devon file a Statement of Defence before proceeding with its Summary Judgment Application.

AL-GHAMDI V PEACE COUNTRY HEALTH REGION, 2015 ABQB 155 (TOPOLNISKI J)
Rules 3.15 (Originating Application for Judicial Review) and 3.21 (Limit on Questioning)

The Plaintiff doctor applied for Judicial Review of a decision by the Alberta Human Rights Commission (AHRC) who had dismissed his complaints against the Defendant health region. The Plaintiff also applied for an Order allowing him to question witnesses to obtain a transcript for use at the Hearing, pursuant to Rule 3.21; however, the written submissions filed in advance of the Hearing did not address this issue. The Plaintiff also sought to introduce *viva voce* evidence and filed nine Affidavits immediately before the Hearing. Justice Topolniski refused the Plaintiff's request to adduce *viva voce* evidence and held that the Affidavits were inadmissible.

Justice Topolniski dismissed the Plaintiff's Application for Judicial Review as the AHRC decision met the standard of reasonableness, there was no reasonable apprehension of bias and the procedure by AHRC was fair.

HAYMOUR V ACIELO, 2015 ABQB 44 (SULYMA J)
Rules 3.31 (Statement of Defence), 3.57 (Contents of Counterclaim) and 7.3 (Summary Judgment)

The Plaintiff by Counterclaim sought to amend their Counterclaim to add an additional Defendant by Counterclaim. The proposed Defendant by Counterclaim brought an Application to summarily dismiss the Action against it on the basis that the Action was barred pursuant to the provisions of the *Limitations Act*, RSA 2000, c L-12. The Court observed that the Defendant by Counterclaim's submissions for Summary Judgment relied on Rule 7.3 and the recent approach to Summary Judgment set out by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Sulyma J. noted that Rule 3.57(c) requires a Counterclaim be filed and served within the same time limit set out for a Statement of Defence under Rule 3.31(3). Therefore, the 20 days for filing and service under Rule 3.31(3)(a) was added to the two year limitation period. The Plaintiff by Counterclaim did not provide notice of the Claim within the limitation period. Summary Judgment was granted, and the Action against the proposed Defendant by Counterclaim was dismissed.

1021018 ALBERTA LTD V BAZINET, 2015 ABQB 151 (SCHUTZ J)
Rules 3.61 (Request for Particulars), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Plaintiff sought damages for lost business revenue which the Plaintiff alleged was due to the Defendants' use of the Plaintiff's confidential and proprietary information. The parties applied for the Court's directions with respect to what use could be made of certain "with prejudice" communications, and also what further particulars, if any, the Plaintiff was required to supply to the Defendant prior to Questioning.

With respect to the "with prejudice" communications, Justice Schutz determined that, notwithstanding that the correspondence in question was marked "with prejudice", the letters were nonetheless protected by settlement privilege, and ordered that they be expunged from the Court's record. Schutz J. then considered the Request for Particulars made by the Defendant pursuant to Rule 3.61. Her Ladyship stated that the Rules permit a litigant to request particulars through Rule 3.61. The Plaintiff had provided some responses however the Defendant alleged that the responses were incomplete and, in some cases, inappropriate, and that the Pleadings did not satisfy Rules 13.6 and 13.7. Schutz J. noted that responding to a request for particulars with statements to the effect that "the Defendant knows" is inappropriate. The Court also noted that statements such as "includes but not limited to" may also be inappropriate in response to a Request for Particulars.

Justice Schutz reviewed Rules 13.6 and 13.7 and held that, pursuant to Rule 13.7, the Pleadings were deficient as further particulars were required with respect to allegations relating to breach of trust and defamation. Breach of trust must be specifically pleaded (pursuant to Rule 13.6), and particulars are required when breach of trust is alleged, pursuant to Rule 13.7. With respect to the defamation allegations, Schutz J. adopted the Court's statements in *Arcelormittal Tubular Products Roman SA v Canadian Natural Resources Ltd*, 2013 ABQB 578:

> Defamation pleadings must contain the details of the publication including the words published by the defendant, the time, place and manner of publication, and to whom the publication was made…

Finally, Schutz J. determined that the Plaintiff had not sufficiently particularized other aspects of its Pleadings, such as trade secrets which were allegedly misused by the Defendant. In the result, Justice Schutz ordered further particulars be provided by the Plaintiff.

POFF V GREAT NORTHERN DATA SUPPLIES (AB) LTD, 2015 ABQB 173 (SCHUTZ J)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings) and 6.14 (Appeal From Master's Judgment or Order)

The Plaintiff sued for damages relating to losses incurred while collecting long term disability. The Plaintiff alleged that incorrect salary information was given to the insurer. Great Northern Data Supply Co Ltd ("NewCo") was allegedly the administrator of the long term disability benefit plan. A Master allowed the Plaintiff's Application to amend their Statement of Claim pursuant to Rules 3.62 and 6.74 to add NewCo. The Master reserved NewCo's right to raise a limitations defence, but NewCo appealed the Master's Order pursuant to Rule 6.14. It argued that the Master erred in permitting the amendment, regardless of the right to raise a limitations defence because: the Plaintiff failed to establish that the added Claim was related to the original Pleading; and the Plaintiff had had sufficient knowledge of the additional Claim within the limitation period.

On Appeal, Justice Schutz, after considering the provisions of Rule 6.14(3), allowed the Plaintiff to tender new Affidavit evidence because it was relevant and material, but allowed NewCo to file a responding Affidavit. Justice Schutz observed that nothing turned on the new evidence.

With respect to the amendment, Justice Schutz noted that Rule 3.65 grants considerable discretion to allow amendments after Pleadings close, but there are exceptions, such as those expressly provided for in Rule 3.74(3): a party should not be added if doing so would cause prejudice to a party which could not be remedied by a costs award, an adjournment or the imposition of terms. The non-compensable prejudice is not limited to a party's ability to defend its case. As the limitation period had already expired, Schutz J. considered whether the added Claim was related to the conduct, transaction or events in the original Pleading, such that NewCo was not entitled to immunity from liability. Justice Schutz noted that "related to" has a very broad meaning, and held that the Plaintiff had met the onus of relating the added Claim to the conduct alleged in the original Pleadings.

Justice Schutz upheld the amendment to the Statement of Claim, but removed the proviso for NewCo to be able to raise a limitations defence. Schutz J. held that this qualification was incorrect due to s.6 of the *Limitations Act*, RSA 2000, c L-12. The Appeal was dismissed.

DOW CHEMICAL CANADA INC V NOVA CHEMICALS CORPORATION, 2015 ABQB 2 (WITTMANN CJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 5.2 (When Something is Relevant and Material), 5.10 (Subsequent Disclosure of Records), 5.11 (Order for Record to be Produced) and 6.11 (Evidence at Application Hearings)

The Plaintiffs brought two Applications to: (i) direct the Defendant to produce documents; and (ii) strike the Defendant's defence for failure to comply with Orders. The underlying dispute pertained to production and operation issues relating to two ethylene plants owned by the Defendant, and one plant jointly owned by both parties.

The documents which the Plaintiff sought to have the Defendant produce included records about the productive capability to optimize ethylene production of one of the plants, conversion of the Plaintiff's ethylene and spreadsheets calculating daily distribution of ethylene. Chief Justice Wittmann stated that Rule 5.2 is applicable to both production of records and Questioning, with relevance being primarily determined by reference to the Pleadings, and materiality by whether information can assist in proving a fact in issue. Wittmann C.J. was not satisfied that additional relevant and material records existed or, if they did exist, that they had been withheld by the Defendant.

The Court then addressed the Application to Strike for the failure to produce relevant and material documents in a timely manner as ordered in the Case Management Orders. His Lordship noted that the Application was governed specifically by Rules 3.68(4)(b)(ii) and (iii).

Under Rule 3.68(4)(b), the Applicant needed to prove that the Defendant failed to do an act it was required to do without sufficient cause. The Defendant argued it had diligently complied with its duty to disclose its records and, for any records not disclosed in a timely manner, there was sufficient cause. Both parties agreed that all the materials before the Court could be considered for this Application. The Plaintiff identified a number of records which were not produced, but it did not identify whether any of those documents were relevant and material to the issues. The Plaintiff did not cross-examine the Defendant's Affiants after the Defendant filed three Affidavits in opposition to the Application to Strike, but the Plaintiff then attempted to impugn the evidence contained in the Affidavits. The Court exercised its discretion to discount the evidence relied on by the Plaintiff. Under the circumstances, both Applications were dismissed.

LAROUCHE V COURT OF QUEEN'S BENCH OF ALBERTA, 2015 ABQB 25 (WATSON JA (EX OFFICIO))
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment), 15.2 (New Rules Apply to Existing Proceedings) and 15.6 (Resolution of Difficulty or Doubt)

The Applicant, Larouche, filed an Originating Notice on April 18, 2006 seeking a declaration that the former Chief Justice of the Alberta Court of Queen's Bench made an unlawful administrative decision by setting a pre-condition for scheduling bail release hearings. The release condition set by the Chief Justice was that no accused's motion for bail would be set on the hearing list until the accused arranged with Crown Counsel to have all of their other outstanding warrants also set down to be heard either in advance of or at the same time as the requested bail hearing. The Applicant asserted that this direction was contrary to the *Canadian Charter of Rights and Freedoms*, was *ultra vires* or was otherwise contrary to law. The impugned direction was repealed by the Court in February 2014. The Crown, as Respondent, cross-applied under Rule 7.3 to summarily dismiss the Claim on the basis that the underlying Originating Application was moot.

As a preliminary matter, Watson J.A. noted that, by operation of Rule 15.2, the Applicant's Originating Notice under the former Rules was automatically transformed into an Originating Application under Division 2, Part 3 of the current Rules. However, neither party raised the issues of delay or procedural defect, so Justice Watson did not need Rule 15.6 to rectify any process.

Watson J.A. stated that, from a "process perspective", Summary Judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record. His Lordship went on to note that, from a "substantive prospective", Summary Judgment would only be granted if there was no merit to the Claim. Combining these two elements, Watson J.A. stated that a case will be found to have merit where there is a genuine dispute over a potentially decisive material fact that cannot be summarily found against the non-moving party, on the particular record revealed in a "fair and just process". The Court also

cautioned that the merit analysis under Rule 7.3 should not be confused with the analysis undertaken under Rule 3.68, as the underlying focus of the two Rules is distinct. Watson J.A. held that the Application was moot. Accordingly, the Originating Application of the Applicant was dismissed.

JACKSON V JACKSON 3 FARMS LTD, 2015 ABQB 46 (MASTER SCHLOSSER)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff was a creditor and shareholder of the Defendant Corporation. The Plaintiff brought an oppression Application under the Alberta *Business Corporations Act*, RSA 2000, c B-9, seeking repayment of his debt.

Master Schlosser cited *Larouche v Court of Queen's Bench of Alberta*, 2015 ABQB 25, for the applicable test under Rule 7.3, noting that, from a "process perspective", Summary Judgment can be given if a disposition that is fair and just to both parties can be made on the existing record. From a "substantive perspective" Summary Judgment may be granted if there is no merit to the Claim. The concept of merit in a Summary Judgment context is to be distinguished from the test for striking out Pleadings under Rule 3.68. The Application was dismissed as there was "too great a factual separation" between the two sides with respect to the terms of the agreement between the parties.

EDMONTON (CITY) V LAFARGE CANADA INC, 2015 ABQB 56 (DARIO J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Respondent (Lafarge) entered into a contract with the Applicant (the City) to supply storm sewer pipe. A contractual dispute arose, and Lafarge commenced an Action against the City for breach of contract. The City argued that the contract was subject to mandatory arbitration proceedings, and that Lafarge had failed to commence such proceedings in a timely manner; thus, pursuant to the *Arbitration Act*, RSA 2000 c A-43 (the Act), the limitation period had expired. Essentially, the City's position was that the Claim could not proceed in Court as a result of the arbitration clause, and could no longer proceed by way of arbitration since the limitation period for commencing arbitration had expired: the Claim was dead.

Dario J. noted that Section 7 of the Act required the Court to stay a Court proceeding where the parties had agreed to submit to arbitration, unless one of the exceptions set out in section 7(2) of the Act applied. The Court reviewed the facts and relevant case law and determined that none of the exceptions applied. The Court also referred to *HOOPP Realty Inc v AG Clark Holdings Ltd*, 2014 ABCA 20, wherein the Court of Appeal held that, if the parties did not commence arbitration within the limitation period, the Court's supervisory role was over, and the Court therefore would not evaluate the circumstances in section 7(2) of the Act. The Action would be struck, pursuant to Rule 3.68, since it was statute barred. Justice Dario noted that Rule 3.68 permits a Court to strike a Claim or stay proceedings where the Court has no jurisdiction. Further, Rule 3.68 was the successor to former Rule 129 which required that an Action be struck or dismissed where the parties agreed to mandatory arbitration.

Dario J. held that the supervisory role of the Court was over, and that the Action should be struck pursuant to Rule 3.68.

JONES V FORT SASKATCHEWAN (CITY), 2015 ABQB 194 (MASTER SMART)
Rule 3.68 (Court Options to Deal With Significant Deficiencies)

The Plaintiff sued various Defendants, including the City of Fort Saskatchewan, in regard to issues arising from the operation of loud motorcycles around the City. The Plaintiff sought damages of approximately $850,000 as well as various Orders to compel the parties to respond to the perceived motorcycle issues. The Defendants brought an Application to strike the Plaintiff's Claim, arguing that it disclosed no reasonable cause of action, was frivolous, irrelevant or improper and that it constituted an abuse of process.

Master Smart cited *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 for the applicable test in an Application to strike: a Claim will be struck where it is "plain and

obvious", assuming the stated facts to be true, that there is no reasonable cause of action disclosed and that the Claim has no reasonable prospect of success. Master Smart noted that no evidence may be submitted on an Application made under Rule 3.68(2)(b), and applied the test to strike to each of the various allegations. Master Smart observed that the "greatest challenge" facing the Plaintiff was a lack of any facts which tied any of the alleged breaches or misconduct to the Plaintiff personally. Master Smart struck the entirety of the Plaintiff's Claim, noting that there was "no prospect" that the Claim could be salvaged by way of a further amendment.

STOUT V TRACK, 2015 ABCA 10 (ROWBOTHAM, WAKELING JJA AND SULYMA J (AD HOC))
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff commenced an Action against his former girlfriend alleging malicious prosecution. He complained that comments made to police resulted in criminal charges being laid against him. The Defendant applied for an Order pursuant to Rule 3.68 directing that the Plaintiff's Claim be struck, and an Order pursuant to Rule 7.3 granting Summary Judgment. In dismissing the Action, the Chambers Judge applied the former test for Summary Judgment, which asked whether there was a "genuine issue for trial". The Majority of the Court of Appeal opined that, where the former test for Summary Judgment is met, it would follow that the more recent test under Rule 7.3 would also be met.

Wakeling J.A., concurring in the result, reviewed the leading authorities, including *Hyrniak v Mauldin*, 2014 SCC 7, and stated that Summary Judgment is appropriate if the non-moving party's position is without merit. The position is without merit if there is a high likelihood that the moving party's position will prevail. Wakeling J.A. concurred that the Defendant had reasonable and probable grounds for complaining to the police given the circumstances. Accordingly, the Appeal was dismissed.

776826 ALBERTA LTD V OSTROWERCHA, 2015 ABCA 49 (PAPERNY, WATSON AND BROWN JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff was seriously injured after being run over by an unknown vehicle at the Defendants' race track in Nisku, Alberta. The Defendants had applied under Rule 7.3 for Summary Judgment, dismissing the Plaintiff's Action. The Chambers Judge held that there was evidence that the Defendants occupied the property and that the Plaintiff was a visitor there, but was not persuaded that the Summary Judgment procedure could fairly and justly resolve issues of material fact, even if genuine. The Summary Dismissal Application was not granted, and the Defendants appealed.

The Court of Appeal observed that, in practical terms, Appeals from denials of Summary Judgment will be difficult to establish due to the discretion used by the Chambers Judge. Summary Judgment can be given if a disposition that is fair and just to both parties can be made on the existing record. From a substantive prospective, Summary Judgment can be granted if there is no merit to the Claim. The Court clarified that no merit means that, even assuming the accuracy of the position of the non-moving party, that the position has no merit in law or in fact. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case. The concept of merit in this respect is to be distinguished from the test for striking out Pleadings under Rule 3.68 which involves deciding whether there is any reasonable prospect that the Claim will succeed, erring on the side of generosity and permitting novel claims to proceed. The Court found no abuse of discretion, or palpable and overriding error in the decision of the Chambers Judge to decline to adjudicate on the basis of the evidence before the Court. In the result, the Appeal was dismissed.

CUMMINGS V STEINKE & COMPANY REALTY LTD, 2015 ABCA 55 (WATSON, ROWBOTHAM AND MCDONALD JJA)
Rule 3.77 (Subsequent Encumbrancers Not Parties in Foreclosure Action)

Sale proceeds from a foreclosure proceeding were paid into Court. The Defendants appealed an Order directing that money held in Court be paid out to the Respondent, Cummings, who claimed entitlement to a debt pursuant to a promissory note and had registered an encumbrance against the foreclosed lands. The real issue on Appeal was whether Cummings' Claim was defeated by the provisions of the *Limitations Act*, RSA 2000, c L-12 at the date that the Plaintiff commenced foreclosure proceedings. When the Plaintiff, who was the first mortgagee, commenced foreclosure proceedings, it did not name Cummings as a subsequent encumbrancer, pursuant to Rule 3.77. The expectation was that once foreclosure was complete, if there was a surplus of funds after payment of the mortgage, the other claimants, including Cummings, would be required to prove their Claims.

The Court stated that, if foreclosure proceedings have been commenced prior to the expiry of the limitations period for the subsequent encumbrancer to have commenced its own proceeding, the subsequent encumbrancer may then "ride the coattails" of the foreclosure Action. The Court held that the foreclosure Action was commenced in time, and there was no need for Cummings to have commenced his own Action. The Appeal was dismissed.

WILLARD V COMPTON PETROLEUM CORPORATION, 2015 ABQB 8 (MASTER HANEBURY)
Rules 4.22 (Considerations for Security for Costs Order), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 4.34 (Stay of Proceedings on Transfer or Transmission of Interest), 10.47 (Liability of Litigation Representative for Costs) and 13.18 (Types of Affidavits)

The Plaintiff passed away in 2012, seven years after commencing an Action alleging breach of a lease agreement and damage to property upon which the Plaintiff operated a thoroughbred stable. As a result of the Plaintiff's death and the transfer of interest to his sister, the Action was subject to a Stay of Proceedings under Rule 4.34. The Defendant, Compton, filed a motion to dismiss the Claim under both Rule 4.31 and Rule 4.33. The Application was adjourned. The Plaintiff's sister then applied to the Court to continue the Action as the Litigation Representative under Rule 4.34. The Defendant subsequently filed an Application for Security for Costs pursuant to Rule 4.22. All of the Applications were heard jointly.

Shortly before his death, the Plaintiff and Compton discussed settlement. Compton's evidence was that a property inspection did not take place, but the Plaintiff's sister deposed that a property inspection occurred, though she did not suggest that she was in attendance. The Plaintiff's sister's evidence was not accepted by Master Hanebury because the Affidavit was not based on personal knowledge and no source of the information was provided, as required pursuant to Rule 13.18.

Master Hanebury considered whether a party could apply to dismiss the Action under Rule 4.33 after the Action had been stayed as a result of Rule 4.34. Compton argued that it could apply for dismissal for long delay under Rule 4.33 despite the Action being stayed by the operation of Rule 4.34. Master Hanebury did not find the argument persuasive, stating that Rule 4.33 was not engaged in this case and the only Application which could be made was under Rule 4.31 for long delay. Master Hanebury stated that the test for Rule 4.31 required that, in order to dismiss for delay, the Court must determine whether the delay was inordinate; whether the delay was inexcusable; and, assuming the prior criteria are met, whether the presumption of serious prejudice was met. The delay is measured from the last thing that materially advanced the Action. Master Hanebury observed that nothing had materially advanced the Action since 2007, and found the delay both inordinate and inexcusable. However, Compton could not show that it had been significantly prejudiced, so the Application under Rule 4.31 was dismissed.

Master Hanebury noted that Litigation Representatives for a Plaintiff are liable to pay Costs under Rule 10.47. In considering whether the Plaintiff's Representative should provide Security for Costs, Master Hanebury observed that

the Plaintiff's company was struck in 1991 and that the Plaintiff's estate had no assets.

The Court held that the Applications under Rule 4.31 and Rule 4.33 were dismissed, the Stay of Proceedings under Rule 4.34 was lifted and Security for Costs was ordered in the amount of $15,800.

PARKLAND INDUSTRIES LTD V PARKLAND FUEL CORPORATION, 2015 ABQB 10 (MASTER HANEBURY)
Rule 4.22 (Security for Costs)

In an Action for breach of contract, the Plaintiff and Defendant by Counterclaim, Parkland Industries Ltd. ("PIL"), brought an Application for Security for Costs against the Defendants, who were also Plaintiffs by Counterclaim, 897728 Alberta Ltd. ("897") and Michael O'Brien. Master Hanebury noted that Rule 4.22 provides that Security for Costs can be sought from both Plaintiffs and Defendants. Master Hanebury further stated that Security for Costs is designed to protect a party from another who wants to "gamble and collect" if it wins, but not pay if it loses. However, this interest must be balanced against Costs that may unfairly impede access to justice for the other party. The test involves two stages: first, the Court reviews each of the factors set out in Rule 4.22; if those factors indicate that Security for Costs should be granted, the Court will then determine whether it is just and reasonable to grant the Order. The overall burden of proof is on the Applicant, and remains on the Applicant even if the Respondents fail to demonstrate that they have assets in Alberta.

Turning to the specific factors under Rule 4.22, Master Hanebury found that the evidence established that PIL would be unable to enforce a Costs Order against 897 or Mr. O'Brien. Reviewing the merits of the main Action, Master Hanebury concluded that the Action as a whole must be evaluated, including both the Claim and the Counterclaim. Master Hanebury found some merits to both the main Claim and Counterclaim. The Court considered whether an Order to post Security for Costs would unduly prejudice 897 or Mr. O'Brien's ability to continue the Action, and whether it was just and reasonable to order Security for Costs in the circumstances. Master Hanebury considered the principles pertaining to Security for Costs in relation to a Counterclaim, concluding that Security for Costs would not be ordered where the Counterclaim is essentially defensive to the Claim. Master Hanebury stated that it would defy the principles of fairness and justice to require a Defendant to post Security for Costs in order to defend itself. Master Hanebury held that the parties had provided insufficient evidence for the Court to undertake a detailed assessment of the merits of the Counterclaim, and PIL had not satisfied the overall burden of proof required to establish that Security for Costs were required. The Application was dismissed.

SNIHUR V GRACE, 2015 ABQB 7 (VEIT J)
Rule 4.24 (Formal Offers to Settle) and Schedule C

The Plaintiff sued Her Majesty the Queen in Right of Alberta (the "Alberta Government"), the Edmonton Police Service and various individuals for damages resulting from alleged false arrest and false imprisonment. One of the successful Defendants, the Alberta Government, sought $67,000 in costs for a Trial which was approximately two weeks long. The Plaintiff contested a number of items in the Bill of Costs.

The Alberta Government had made Formal Offers to the Plaintiff to waive Costs and to pay the Plaintiff either $1 or $1,000. The Court held these were genuine offers of settlement which would normally entitle the Defendant to double Costs because the Court's Decision was more favourable to the Defendant. However, the Formal Offers were uncertain because they incorporated a requirement to reach a separate agreement concerning settlement. Therefore, the Formal Offers were invalid pursuant to Rule 4.24(2).

There was a dispute as to which column of Schedule C the Costs should be based on. Justice Veit stated that s. 1(3)(b) of Schedule C determined the appropriate column of Schedule C depending on the amount pleaded as against that Defendant. The Plaintiff claimed $125,000 as against two Defendants, but failed to particularize how much she was claiming against the Alberta Government. Therefore,

the Defendant argued that Costs should be awarded pursuant to Column 2. The Plaintiff argued that the Alberta Government should have assumed that she was claiming a maximum of $50,000 against it, and thus Column 1 applied. The Court agreed with the Alberta Government as there was no basis on which it could have inferred a maximum claim of $50,000 against it. The Defendant argued further that it was entitled to a second counsel fee, but the Court denied the request on the basis that this was not an important case for the Alberta Government and not complex. Ultimately, the Costs sought by the Alberta Government were reduced by at least $45,200 to account for the deduction of double Costs and second counsel fee.

SPARTEK SYSTEMS INC V BROWN, 2015 ABQB 190 (ROSS J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.30 (When Costs Awards Can be Made), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff, Spartek, was successful as against the individual Defendants, Brown, Matthews, Holt, and the Third Party, Claveria. In the Trial Decision, Justice Ross also found that a corporate Defendant, Petroniks, was also a party to civil conspiracy. Another corporate Defendant, 1133098 Alberta Ltd. ("113"), was not directly liable for conspiracy, and was successful in counterclaiming against Spartek. However, 113 was found to be a mere alter ego to Brown, and the corporate veil between the two was pierced. Two other Defendants, Hartwell and Real Time Measurements Inc. ("RTM"), were not liable for conspiracy.

The parties applied for Costs following the issuance of the Trial Decision. Ross J. stated that the Court has the discretion to issue Orders for Costs pursuant to Rules 10.30(1), 10.31 and 10.33. The Court specifically noted that some of the Defendants were not represented by legal counsel at Trial. Justice Ross noted that under Rule 10.31(5), a self-represented litigant may receive Costs in some circumstances, but generally self-represented litigants should not receive Costs because the ordinary objective of indemnification for legal costs is not served.

The Court first considered Costs payable to Spartek from Brown, Matthews, 113, and Petroniks. Spartek was entitled to Costs against these unsuccessful Defendants under the default regime. Moreover, pursuant to Rule 10.31(3)(b), the Court could order a multiple of Schedule C Costs. Rule 10.33(2) lists a set of factors that the Court may consider in deciding whether to impose such an amount. Here, the Court considered the conduct of the parties impacting the length of the Action, the denial or refusal to admit facts that should have been admitted and whether the parties engaged in misconduct. The Court found that Brown and Matthews extended the length of the Trial, Brown refused to admit documents that were proven at Trial and Matthews engaged in misconduct by altering evidence. The Court also considered the nature and complexity of the Action. The Action was complex and difficult, and created extraordinary challenges for Spartek's counsel. It is rare for a Plaintiff to establish civil conspiracy, and some increase in the usual scale for Costs may be justified. Ross J. further noted that an award of fees under Schedule C does not fully compensate a successful party for actual legal costs. The Trial was lengthened, and Spartek suffered the disadvantage of having to bear the difference between fees under the Schedule and actual legal costs. The Court ordered double Column 5 Costs plus disbursements against Brown, 113, Matthews and Petroniks.

The Court then considered Costs payable by Spartek to the successful Defendants. The Court declined to award Costs to 113 despite its success, because it was an alter ego to Brown and shared the same counsel. On the other hand, RTM was a public company that was not involved in the conspiracy. RTM was entitled to Costs as a successful party for the period of time in which it was jointly represented by the same counsel as Matthews. Because of the joint representation, the amounts recoverable by RTM were reduced by 50%. Hartwell was another successful Defendant who was represented by counsel and did not fall within the exceptions to the general rule that successful parties are entitled to Costs. The Court noted that Hartwell filed two Formal Offers of settlement which were not accepted by Spartek. As such, Hartwell was awarded double Column 5 Costs pursuant to Rule 4.29. Finally, the Court awarded disbursements only to Holt.

The Court then turned to the issue of whether a Sanderson or Bullock Order should be issued between the Defendants. A Sanderson or Bullock Order would result in an unsuccessful Defendant being liable to pay a successful Defendant's Costs. The Court issued two Orders in favour of Spartek: a Sanderson Order against Brown and Matthews to pay directly to RTM the Costs payable by Spartek, and a Bullock Order against Brown and Matthews with respect to the Costs payable to Hartwell. The Bullock Order was a single Column 5 amount because Brown and Matthews were not responsible for Spartek's liability for Double Costs. No Bullock or Sanderson Order was awarded with respect to the Costs awarded to Holt.

Finally, with respect to Third Party Costs, the Court noted that all Third Party Claims other than the Claim against Claveria were made against the Defendants, and all Trial issues proceeded together. As such, Hartwell and Holt, both successful Defendants and Third Parties, were not entitled to recover more than one set of Costs for the Trial. Holt was not awarded Third Party Costs. Hartwell was awarded Costs for defending the Third Party Claim as against RTM and Matthews jointly, and Costs as against Brown and 113 jointly with respect to pre-Trial steps that related exclusively to the defence of the Third Party Claim by Brown and 113. Claveria was awarded single Column 5 Costs for defending the Third Party Claim during the period that he was represented by counsel, and disbursements for the time he was self-represented, payable by Brown, Matthews, 113 and RTM. RTM was awarded a Sanderson Order as against Brown, 113 and Matthews for Third Party Costs payable to Claveria, and a Bullock Order against Brown, 113 and Matthews for Third Party Costs payable to Hartwell.

EQUITABLE TRUST COMPANY V LOUGHEED BLOCK INC, 2015 ABCA 37 (HUNT, BERGER JJA AND NATION J (AD HOC))
Rule 4.29 (Costs Consequences of Formal Offer to Settle)

The unsuccessful Appellant, Krayzel Corporation ("Krayzel"), disputed the Costs provisions of a form of Order drafted by the Respondent, Equitable Trust Company ("Equitable"). The form of Order included enhanced Costs pursuant to Rule 4.29. Krayzel argued that the calculation of Costs was flawed as Equitable's Formal Offer to Settle was not capable of being accepted independently by Krayzel, because it was contingent upon all Appellants accepting it.

The Court agreed with Krayzel since it could not unilaterally accept an Offer contingent on the consent of others. Therefore, the Formal Offer to Settle was not a true Offer of compromise contemplated by the Rules. The Court directed that the form of Order be revised.

JDC CONTRACTING LTD V MOOSE MOUNTAIN EQUIPMENT INC, 2015 ABQB 98 (GATES J)
Rules 4.31 (Application to Deal With Delay), 4.33 (Dismissal for Long Delay) and 8.5 (Trial Date: Scheduled by Judge)

The Plaintiff commenced an Action against the Defendant on March 29, 2005 claiming money for a series of unpaid invoices relating to alleged extra work completed for the Defendant. The Plaintiff filed an Application pursuant to Rule 8.5 to set the matter down for Trial. The Defendant brought a Cross-Application to dismiss the Action for long delay pursuant to Rule 4.33 or, in the alternative, under Rule 4.31, on July 11, 2014. A number of procedural steps were taken in the Action with the last substantial procedure being the delivery of Undertaking Responses on July 22, 2014.

Justice Gates noted that it is well established that a Response to Undertaking can be a thing that materially advanced an Action, but there are exceptions. When an Undertaking Response is merely perfunctory and nothing hinges on the response, it will not materially advance the Action. Justice Gates noted some examples of things which would not advance the Action, such as perfunctory Undertaking Responses which include information that could have easily been obtained, or "clean up" Undertakings where a party simply confirms their memory on a point. His Lordship observed that the Court will consider the significance of the Undertaking Response in the overall context of the litigation. Gates J. held that the Undertaking Responses in this matter were material since they narrowed the issues in the litigation and tested the

credibility of one of the witnesses. The Application under Rule 4.33 was dismissed.

Justice Gates went on to dismiss the Application under Rule 4.31 as no serious prejudice was caused by the delay. Justice Gates did, however, make an Order pursuant to Rule 4.31(1)(b) setting down a procedure to get the Action to Trial as quickly as possible. In light of this procedural Order under Rule 4.31(1)(b), there was no need to consider the Plaintiff's Rule 8.5 Application.

HUMPHREYS V HANNE, 2015 ABQB 143 (MICHALYSHYN J) Rule 4.33 (Dismissal for Long Delay)

The Defendant ("Trebilcock") applied to dismiss the Action against him for long delay. Although other Co-Defendants had been examined within the three year period, nothing had occurred with respect to the Claim against Trebilcock during that time. The issue became whether or not the Action as a whole must be advanced, or whether it must be advanced as against each Defendant.

Michalyshyn J. reviewed *Apex Land Corp v Heikkila*, 2011 ABCA 87 ("Heikkila") which considered former Rule 244.1 (now Rule 4.33). The Court held that a proper interpretation of Rule 4.33 is that a "thing" need only materially advance the Action as a whole, not for a specific Defendant. Although Heikkila was decided pursuant to the old Rules, the Court stated that it clearly applies to Rule 4.33. Trebilcock's Application was dismissed.

WEAVER V CHERNIAWSKY, 2015 ABQB 157 (SHELLEY J) Rules 4.33 (Dismissal for Long Delay), 5.5 (When Affidavit of Records Must be Served) and 5.10 (Subsequent Disclosure of Records)

The Defendants appealed the decision of a Master who refused to strike the Action for long delay under Rule 4.33. The Master held that an agreement to mediate made between parties within the three year drop-dead period significantly advanced the Action. Shelley J. reviewed the fundamental principles underlying Rule 4.33, and summarized the factors to be considered in a Rule 4.33 Application. Justice Shelley noted that a functional approach to such Applications is appropriate in light of the culture shift outlined in *Hryniak v Mauldin*, 2014 SCC 7. Her Ladyship held that an agreement to pursue alternative dispute resolution (ADR) may advance an Action, but only if there is an actual, realistic attempt by both parties to act on that agreement. The parties did not attempt to act on the agreement to pursue ADR in this case, and therefore it did not significantly advance the Action. Likewise, correspondence between the parties did not significantly advance the Action.

Shelley J. also considered whether the Plaintiff's disclosure of a note under Rule 5.10 materially advanced the Action. Justice Shelley stated that, although Rule 5.10 provides that a party must give notice of new documents found, production of records is a continuing obligation and not a mandatory step that constituted a "thing" which advanced the Action. Rule 5.10 provides for a continuing obligation, rather than discrete procedural steps which reset the clock every time a new document is disclosed. Serving an Amended Affidavit of Records following the provisions in Rule 5.5 is a continuation of the obligations under Rule 5.10(a), and not a new and discrete step required by the Rules. Justice Shelley granted the Appeal and dismissed the Action for long delay.

LETHBRIDGE INDUSTRIES LTD V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 179 (JONES J) Rules 4.36 (Discontinuance of Claim) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Parties sought direction from the Court as to Costs arising out of an Application for Judicial Review of a Decision of the Alberta Human Rights Tribunal. The Respondent argued that the Costs award should be reduced to reflect an independent wrongful dismissal Action commenced by the Applicant which was subsequently abandoned. Jones J. reviewed Rule 4.36, stating that a Plaintiff who discontinues an Action is normally made to pay the Defendant's taxed Costs. However, there may be circumstances justifying a Discontinuance without Costs. Without knowing the circumstances of that Action, the Court declined to reduce the Costs award associated with the Tribunal's Decision. The Respondent also argued

that obtaining a significant reduction in the amount of damages payable should be reflected in the Costs. Jones J. stated that Rule 10.33(12)(e) allows the Court to consider the apportionment of liability in exercising discretion in awarding Costs. The Court held that the Respondent was only successful in one of three main grounds of Appeal, and therefore ordered each party to bear its own Costs associated with the Judicial Review.

AUER V AUER, 2015 ABQB 67 (GATES J)
Rules 5.2 (When Something is Relevant and Material) and 12.41 (Notice to Disclose Documents)

The Applicant husband filed an Application to vary retroactive and ongoing child support on the basis of undue hardship. The Applicant also filed a Notice to Disclose, requesting the Respondent wife report certain income information contained in Form FL-17. The Respondent agreed to produce some items within a Notice to Disclose, but objected to producing all of the items on the grounds that they were not relevant or material to the Application.

Justice Gates noted that, pursuant to Rule 12.41, an Applicant may request the disclosure of documents which are relevant and material to the proceedings through a Notice to Disclose Application. The Applicant must file Form FL-17. The Court noted that Rule 5.2 of the Rules of Court provides guidance with respect to determining whether something is relevant and material. Specifically, Rule 5.2(1) provides that information is relevant and material if it can reasonably be expected to significantly help determine the issues raised in the Pleadings; or, ascertain evidence which could significantly determine the issues raised in the Pleadings. Importantly, where a Court has made a final determination relating to child support, only certain items on Form FL-17 may be requested pursuant to Rule 12.41(5).

After considering the Applicant's requested financial disclosure, Gates J. held that the Application was premature. His Lordship ordered some of the financial disclosure by the Respondent wife, but dismissed the Application.

GAW V TRISURA GUARANTEE INSURANCE COMPANY, 2015 ABQB 93 (GRAESSER J)
Rules 5.6 (Form and Content of Affidavit of Records) and 5.33 (Confidentiality and Use of Information)

The Plaintiff (Gaw) sought production of a copy of a tender that one of the Defendants (Precision) submitted to a Municipal District for paving and other roadwork in 2008. Precision resisted the Application on the basis that the tender form was irrelevant, or that it contained confidential and proprietary information. Gaw's Action was for the amount allegedly owed to his company arising out of a subcontract on the roadwork.

Justice Graesser stated that production of records is governed by Rule 5.6. A party is required to produce those records that are relevant and material to the issues in a lawsuit, subject only to a few exceptions such as privilege. Confidential or proprietary interests are not shielded from production, but in appropriate circumstances, measures can be taken to protect confidentiality while still making meaningful disclosure in litigation. While Precision argued that the tender form was confidential and proprietary, Graesser J. observed that confidentiality was not a basis to resist disclosure of otherwise relevant and material records. Records produced through the mandatory disclosure rules are protected by the implied undertaking of confidentiality, which is codified in Rule 5.33. Proprietary information is not exempted from mandatory disclosure. Here, there was no evidence that the tender form actually contained proprietary information or that Gaw could use anything in it to compete with Precision in the future. Justice Graesser ordered the production of the tender form to Gaw.

FIRST CALGARY HOLDINGS (ALB) CORPORATION V METROPOLITAN VENTURES INC, 2015 ABQB 54 (MASTER ROBERTSON)
Rules 5.15 (Admissions of Authenticity of Records), 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Plaintiff commercial landlord sued a former tenant for damages for unpaid rent, but also named additional individuals and a corporation based on allegations of conspiracy and inducement of breach of contract. The additional individuals and corporate Defendant ("Defendants") brought an Application for Summary Dismissal of the Claim against them, arguing that the only proper Defendant was the former tenant. Only the Defendants submitted Affidavit evidence to the Court for the Application, but the Court reiterated that the onus was on the Applicant in a Summary Judgment Application to establish that the record permitted a fair and just adjudication. Only once the Applicant had met this obligation did the onus shift to the Respondent.

The Plaintiff argued that the Defendants' assertions in their Affidavits could not be relied upon because they were contrary to records presumed to be admitted as authentic under Rule 5.15(2) from the Defendants' own Affidavit of Records. The records included a number of emails sent by the Defendants evidencing their involvement. The Defendants argued that the documents being presented to the Court were an attempt to prove the truth of their contents, as opposed to being presented for the limited deemed authenticity purposes of Rule 5.15. The Court noted that Rule 6.11(1)(d) permits the use of an admissible record disclosed in an Affidavit of Records, but acknowledged the distinction between deemed authenticity of a record and admissibility for the proof of its contents. Here, the records were being produced for the fact that emails were sent and received on behalf of the Defendants; the Court was not being asked to rely on the truth of the content of the records. The Plaintiff also cited Rule 6.11 to rely on the transcripts from the Defendants' Questioning, which it argued contradicted their own Affidavits.

Ultimately, the Court held that the Defendants had not met the burden for Summary Judgment, stating that the Plaintiff demonstrated inconsistencies in the Defendants' evidence, which meant that their position was not "unassailable". The Application was dismissed.

ATTILA DOGAN CONSTRUCTION V AMEC AMERICAS LIMITED, 2015 ABQB 120 (WITTMANN CJ)
Rules 5.15 (Admissions of Authenticity of Records), 5.31 (Use of Transcript and Answers to Written Questions), 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment), 10.25 (Order to Return Records) and 13.18 (Types of Affidavit)

The Plaintiff, Attila Dogan ("AD"), and the Defendant, AMEC Americas Limited ("AMEC"), were joint venture participants in an agreement to build a magnesium oxide plant with Jordan Magnesia Company Limited ("JorMag"). The project did not proceed as planned and was subsequently terminated by JorMag. The joint venture participants and JorMag submitted to arbitration, and AMEC and AD entered into an agreement on procedures regarding claims ("claims agreement") which suspended the Claims between them until their dispute with JorMag was resolved. Under the claims agreement, AMEC would be responsible for retaining outside legal counsel and experts on behalf of the joint venture, but AMEC would not be responsible for AD's share of any Judgment, Award or Costs against the joint venture. The joint venture participants settled with JorMag, agreeing to pay $41 million to JorMag and to release it from all Claims. AD subsequently commenced an Action against AMEC, claiming damages for the failure of the project. AMEC counterclaimed for expenses associated with the JorMag arbitration. In this Application, AMEC sought Summary Dismissal of AD's Claim, as well as Summary Judgment against AD on the Counterclaim. AD sought an adjournment of AMEC's Summary Judgment Applications.

With respect to the adjournment Application, Chief Justice Wittmann considered the numerous Motions in the Action, one of which was an unsuccessful Application brought by AD to compel its previous counsel to transfer the file to AD pursuant to Rule 10.25. Chief Justice Wittmann stated that AD was relying on its own delays to support its adjournment

Application. The Court rejected AD's adjournment Application and proceeded to hear AMEC's Summary Judgment Applications.

With respect to the Summary Judgment Application, Wittmann C.J. noted the applicability of Rule 7.3 and observed that there is a culture shift to broaden the use of Summary Judgment proceedings using the principle of proportionality. His Lordship observed that the leading Supreme Court decision of *Hryniak v Mauldin*, 2014 SCC 7 was adopted by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, which stated that Rule 7.3 calls for a "more holistic analysis", and the test for Summary Judgment is to "examine the record to see if a disposition that is fair and just to both parties can be made on the existing record". Courts are no longer confined to the "genuine issue for trial" test, and can grant Summary Judgment to an Applicant if the Respondent's position is without merit.

Chief Justice Wittmann stated that the principle of proportionality and the "less stringent test" for Summary Judgment do not affect the evidentiary requirements. Evidence in support of a Summary Judgment Application must comply with the requirements under the Rules. A self-serving Affidavit in the absence of detailed facts and supporting evidence is not sufficient to create a triable issue. Chief Justice Wittmann observed that the principle of proportionality encompasses more than one aspect, and can include factors such as the magnitude of the Claim and the nature of the Claim.

AMEC had filed an Affidavit in support of its Application for Summary Judgment on the Counterclaim. The affiant was not a party to, and had no personal knowledge of, some of the documents attached to the Affidavit. AD argued that these documents were inadmissible because under Rule 13.18, an Affidavit must be sworn on the basis of personal knowledge. AMEC argued that Rule 6.11 applied, which permitted a broader inclusion of evidence at Application hearings, including Affidavit evidence, transcripts, and answers to Questioning which may be read-in pursuant to Rule 5.31.

Chief Justice Wittmann considered Rules 5.15, 6.11, and 13.18, and held that under Rule 13.18, where an Application concerns disposition of some or all Claims, such as in the case of Summary Judgment Applications, the Court would require evidence to meet the standards required at Trial. The Affiant must have "personal knowledge" of his or her sworn statements. The "personal knowledge" requirement is more stringent than the "knowledge" requirement under former Rule 305(1), and would ensure that the Opposing Party would have a chance to cross-examine the Affiant. The Court held that a corporate representative can satisfy the "personal knowledge" requirement of Rule 13.18 for the corporation by becoming familiar with the corporation's business records. However, Rule 13.18 cannot be satisfied if a corporate representative relies on hearsay in support of his or her Affidavit, such as "third hand information" including conversations with other employees. To satisfy Rule 13.18, any admitted document containing hearsay must be authenticated and fall under an exception to the hearsay rule. In this case, several documents attached to the AMEC Affidavit were held inadmissible for the truth of their contents.

Despite the inadmissibility of these documents, the Court found that the existing evidence was sufficient to found AMEC's Counterclaim. AD failed to "put its best foot forward," and did not show enough merit to establish a genuine issue requiring Trial. Mere speculation that evidence might be available at Trial was held insufficient. Chief Justice Wittmann emphasized that an embedded premise in the Rules is the principle of proportionality. A fair resolution of a dispute should avoid delay and cost while preserving fairness at the same time. The Court held that AMEC was entitled to Summary Judgment for its Counterclaim against AD.

Wittmann C.J. also considered AMEC's Summary Dismissal Application against AD's Claim. His Lordship held that, where Summary Judgment is possible on the merits and has a significant potential to shorten the proceedings, it should be granted. AD's Claim was summarily dismissed. Because AMEC was the more successful party, Costs were awarded for both of its Applications.

RO V DF, 2015 ABCA 14 (WATSON JA)
Rules 5.26 (Transcript of Oral Questioning), 6.20 (Form of Questioning and Transcript), 14.15 (Ordering the Appeal Record), 14.16 (Filing the Appeal Record – Standard Appeals), 14.18 (Contents of Appeal Record – Standard Appeals), 14.21 (Format of Appeal Record – Standard Appeals) and 14.38 (Court of Appeal Panels)

The Plaintiff applied for an Order to waive the requirement to file an official transcript for her Appeal under Rules 14.16(1)(c) and 14.18(1)(d). The Plaintiff stated that medical reasons and impecuniosity prevented her from affording an official transcript. She proposed to prepare the transcripts herself based on an audio recording of the lower court Proceedings. Justice Watson noted that Rules 5.26(5), 6.20(6), 14.15(1)(b), and 14.21(2)(a) contemplated alternatives to official transcripts. However, for a third party transcript to be sufficient, it must be shown that the transcript is complete, sufficient, accurate, reliable and from a source recognized by the Court. The Court was not convinced that a self-prepared transcript would be compliant with the Rules.

The Plaintiff also asked for direction on what would constitute new evidence at the hearing of the Appeal. Watson J.A. stated that this request was premature, as it would require an Application to admit new evidence. An Application to admit new evidence could only be heard by a panel of the Court of Appeal pursuant to Rule 14.38(2)(b). The Court dismissed the Plaintiff's Application, but gave her additional time to prepare an Appeal Record and obtain transcripts in accordance with the Rules.

MUHAMMAD V CANLANKA VENTURES LTD, 2015 ABQB 145 (JONES J)
Rules 6.1 (What this Division Applies to), 6.11 (Evidence at Application Hearings), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiff sought to purchase a house owned by the Defendant. The transaction did not close, and the Plaintiff commenced a Claim against the Defendant. The Plaintiff subsequently applied for Summary Judgment for damages, and specific performance to acquire the house. As a preliminary matter, Justice Jones stated that the transcripts of Questionings on Affidavit of the parties are part of the evidence considered in the Application, and so they were admissible under Rules 7.2(a) and 6.11(1)(b). Pursuant to Rule 6.1, Rule 6.11 was applicable because this Application was not an Originating Application.

Justice Jones considered Rule 7.3, and, following the leading decisions of *Windsor v Canadian Pacific Railway*, 2014 ABCA 108, and *Hryniak v Mauldin*, 2014 SCC 7, stated Summary Judgment is appropriate if the process is a "proportionate, more expeditious and less expensive means to achieve a just result". Justice Jones noted that Summary Judgment may not be appropriate where the Court must weigh evidence to properly dispose of the Action. Justice Jones granted Summary Judgment, stating that the Defendant could not establish a defence, and the Plaintiff had met the required standard.

KARMALI V DONORWORX INC, 2015 ABQB 105 (MASTER ROBERTSON)
Rules 6.6 (Response and Reply to Application) and 7.3 (Summary Judgment)

The Defendant employer in a wrongful dismissal Action applied for Summary Dismissal on the basis that the laws of Alberta did not apply to the Action. The Plaintiff was hired in Alberta, but then was transferred to Saskatchewan and Ontario. When the matter first came before the Court, the Plaintiff asked for an adjournment in order to provide evidence. The Master who heard the Application directed that it be done by an Affidavit filed and served by a certain date, which deadline was not met. The Affidavit was subsequently sworn and filed the day before the hearing. Counsel for the Defendant took objection to the late filing of the Affidavit. Counsel for the Plaintiff acknowledged that it was late, but noted that no formal Order had been prepared setting out the deadline.

Master Robertson stated that Rule 6.6(1) provides that a Reply Affidavit must be served "a reasonable time before the Application is to be heard or considered", so the Plaintiff's Affidavit was late in any event. When an Application has been adjourned in order for the Plaintiff to

file and serve an Affidavit, it will be a rare occasion when it is appropriate to serve it only the day before the return date. Notwithstanding the delay in filing the Affidavit, the circumstances of the Application for Summary Judgment to finally terminate the Plaintiff's Claim dictated that the Plaintiff's evidence should be reviewed by the Court. The late filing and service could more appropriately be dealt with as a Costs factor. Master Robertson observed that, although some facts were in dispute, the facts and evidence relevant to the disposition of the Claim were not. The Court was therefore entitled to consider the Application for Summary Judgment.

Master Robertson reviewed and considered the Plaintiff's Affidavit. In the result, the Application was allowed and the Claim was dismissed. The Plaintiff had attorned to the Jurisdiction of the Ontario Employment Standards Regulator and accepted that the Ontario legislation applied to her Claim, and by doing so she was barred from a civil Claim for further relief.

INDARSINGH (RE), 2015 ABQB 158 (MASTER SCHLOSSER)
Rule 6.11 (Evidence at Application Hearings)

A Trustee in Bankruptcy sought to set aside an undervalue transfer pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (Act). The Bankrupt attempted to adduce unsworn opinion evidence, valuing a cabin in the Dominican Republic at $100,000; the Trustee attributed no value. With respect to unsworn opinion evidence before the Court, Master Schlosser stated that, although some informality is required under the Act, unsworn opinion evidence, or opinion evidence exhibited in an affidavit of someone other than an expert, is "inadmissible or virtually weightless". Rule 6.11 permits sworn opinion evidence in support of an Application presumably without having to prove the qualification of an expert. Ultimately, the Trustee failed to prove a transfer at undervalue, and the Application was dismissed.

FINK V TRAKWARE SYSTEMS INC, 2015 ABQB 133 (LEE J)
Rules 6.14 (Appeal From Master's Judgment or Order) and 7.3 (Summary Judgment)

The Defendants appealed a Master's Decision, wherein the Plaintiff was granted Summary Judgment against both Defendants. The Court cited Rules 6.14(3) and (4) for the proposition that an Appeal of a Master's Decision is *de novo*: the Justice may consider the record of the proceedings before the Master, but also additional evidence. The parties agreed to submit an additional Affidavit, with Questioning on that Affidavit.

Justice Lee reiterated the call for a cultural shift to emphasize the timely and affordable access to justice as set out in *Hryniak v Mauldin*, 2014 SCC 7, and that Summary Judgment can be an effective tool towards these goals. Justice Lee noted that, in determining whether the record permits a fair and just adjudication to both parties, the Court must specifically consider:

(a.) Is the record sufficient to make the necessary findings of plain and obvious facts or are the facts underlying the dispute seriously in issue?

(b.) Can the plain and obvious facts be applied to the law?

(c.) Is there any issue of merit that requires a Trial to resolve?

(d.) Is summary judgment a proportionate, more expeditious, and less expensive means to achieve a just result than going to trial in this particular case?

Justice Lee dismissed the Appeal on the basis that the record was sufficiently clear to make the necessary findings of fact, the facts could be applied to the law and there were no issues of merit that required a Trial.

WOLFE V SHAWCOR LTD, 2015 ABQB 181 (MASTER WACOWICH)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Defendants applied for Summary Judgment to dismiss the Action against them, arguing that the Action should not go to Trial because none of the Plaintiffs had a right to sue. The first Plaintiff, Proflex, was a non-entity, as it was dissolved by the Registrar and struck from the Corporate Registry two years prior to the issuance of the Statement of Claim. Master Wacowich stated that an Action commenced by a corporation that had been struck is a nullity and an abuse of process, unless that corporation revives itself. Proflex was out of time to revive itself, and therefore, did not have the right to sue. Master Wacowich held that the second Plaintiff, Composite Technologies Inc., had transferred all of its interest in the subject matter of the Claim to Proflex. The remaining Plaintiff was a shareholder and did not have a separate or distinct Claim that would give rise to a cause of Action.

Master Wacowich reviewed recent leading authorities which considered Summary Judgment including the most recent Court of Appeal decision, *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49, and stated that Summary Judgment is appropriate where there is no merit to the Claim. Master Wacowich adopted the Court of Appeal's statement that:

> … in order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the "fair and just process". The mere assertion of a position by the non-moving party in a pleading or otherwise, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case …

Master Wacowich held that there was no issue of merit that genuinely required a Trial. Master Wacowich granted the Defendant's Application, summarily dismissing the Action in its entirety.

HARDING V HUDSONS CANADIAN HOSPITALITY LTD, 2015 ABQB 38 (READ J)
Rule 7.3 (Summary Judgment)

The Plaintiff commenced an Action against the Defendant for damages arising from the Plaintiff's injuries after he was assaulted by another bar patron at the Defendant's establishment. The Defendant sought Summary Dismissal of the Plaintiff's Claim. The Court stated that Rule 7.3(1)(b) applies to Summary Judgment Applications brought by a Defendant, and the basis for consideration is whether there is any merit to the Claim or part of it. The Court stated that the older test of whether the evidence disclosed a triable issue or genuine issue for Trial is no longer applicable in Alberta. The Court held that there was no evidence to support that there was a genuine issue of merit which required resolution at a Trial. Accordingly, the Application for Summary Dismissal was granted.

KRAMER'S TECHNICAL SERVICES INC V ECO-INDUSTRIAL BUSINESS PARK INC, 2015 ABQB 59 (VEIT J)
Rule 7.3 (Summary Judgment)

The Plaintiffs commenced an Action against the Defendant seeking a Declaration that they were the legal and beneficial owners of certain scrap metal on a construction site. The Defendant, the owner of the lands where the construction site was situated, counterclaimed and applied for Summary Judgment for amounts owing under loan agreements and a rental agreement. The Defendant also sought declaratory relief to terminate a site access agreement between the parties and for the damages to be assessed by a referee. The Plaintiffs argued that Summary Judgment could not be granted because pleadings on the Counterclaim had not closed, and the context of the loan agreements made it inequitable to grant such relief.

Veit J. granted Summary Judgment on the loan and rental agreements, noting that the evidentiary record and the applicable law allowed the Court to make a determination which was fair to all parties, even at the early stages of

the Counterclaim proceedings. The agreements were clear, simple and straightforward, and the breach of the agreements was equally clear and straightforward. Her Ladyship stated that the modernized test for Summary Judgment requires that the existing evidentiary record be examined to determine if a pre-Trial disposition can be made which is fair and just to both parties. Justice Veit disagreed with the Plaintiffs' suggestion that Summary Judgment could not proceed until the pleadings were closed, observing that it was now clear that the wording of Alberta's current Rules of Court governing Summary Judgment Applications allows such Applications to be brought at any time. As to other relief sought, the damages could be determined by a referee as Rule 7.3(3)(b) made it clear that, where the only real issue to be determined is the amount of damages to be awarded, a Court can refer the matter to a referee. In the result, the Defendant's Application was granted, with Costs.

SAWYER V CANADIAN LAWYERS INSURANCE ASSOCIATION, 2015 ABQB 132 (STREKAF J)
Rule 7.3 (Summary Judgment)

The Plaintiff commenced an Action against their former lawyer for failing to file a Statement of Defence on behalf of the Plaintiff in a motor vehicle accident claim. The Plaintiff also sued the Alberta Lawyers Insurance Association ("ALIA"). The Plaintiff obtained Default Judgment as against her former counsel. ALIA applied for Summary Dismissal against the Plaintiff and was successful, and the Plaintiff appealed the Summary Dismissal finding.

Justice Strekaf cited *Hryniak v Mauldin*, 2014 SCC 7 and *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 for the test to be applied under Rule 7.3. Strekaf J. confirmed that the modern test for Summary Judgment is to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.

Strekaf J. observed that the evidence showed that the Plaintiff failed to provide notice to the insurer in the proper time stipulated under the ALIA policy, therefore barring any Claim. Justice Strekaf agreed with the Master's decision that there was no basis to provide relief from forfeiture in the circumstances. Her Ladyship dismissed the Appeal.

BECKER V CANADIAN URBAN LIMITED, 2015 ABQB 144 (MASTER PROWSE)
Rule 7.3 (Summary Judgment)

The Plaintiff tenant commenced a Claim against his landlord for, *inter alia*, overcharging and refusal to apply various rental credits. The landlord applied for Summary Judgment on the basis that the Plaintiff owed rental arrears. Master Prowse considered the recent Court of Appeal decision of *Maxwell v Wal-Mart Canada Corp*, 2014 ABCA 383, where it was noted that (emphasis in original):

> … Under the new Rule, no genuine issue for trial exists where the judge is able to make a fair and just determination on the merits without a trial, because the summary judgment process allows him or her to make the necessary findings of fact, to apply the law to those facts and is a <u>proportionate</u>, more expeditious and just means to achieve a just result. …

Master Prowse observed that the landlord had spent significant time and energy bringing detailed evidence before the Court. Master Prowse determined that a fair, just and proportionate disposition of the issues could be achieved by proceeding summarily and not continuing to Trial. Master Prowse granted Summary Judgment to the landlord for the rental arrears and possession of the property.

PANNU V URBIA VENTURE CAPITAL LTD, 2015 ABQB 150 (MASTER SCHLOSSER)
Rule 7.3 (Summary Judgment)

In a debt Action, the Plaintiff applied for Summary Judgment against one of many Defendants based on a guarantee. The Defendant argued that the guarantee was given under duress and that the Plaintiff had not established default on the principal debt.

Master Schlosser thoroughly reviewed the Alberta Courts' approach to Summary Judgment since the Supreme Court's

decision in *Hryniak v Mauldin*, 2014 SCC 7, noting that the law is now reasonably well settled. Master Schlosser also cited *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49 for a summary of approaches by the Court to such Applications. Master Schlosser approved the approach in recent Alberta authorities which articulated the test as having two parts: taking a process perspective, Summary Judgment may be granted if a disposition that is fair and just to both parties can be made on the existing record; and, from the substantive perspective, Summary Judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the Claim.

Master Schlosser held that the Plaintiff's Application failed for want of evidence. The elements of duress relied on by the Defendant occurred after the guarantees were signed, and therefore this defence was without merit. However, there was no evidence of default or any particular amount owing on the principal debt. Without proof, Summary Judgment was not available.

KLIMP V MEINEMA, 2015 ABQB 204 (MASTER SCHLOSSER)
Rule 7.3 (Summary Judgment)

The Defendants brought an Application for partial Summary Judgment pursuant to Rule 7.3, seeking to dismiss the portion of the Plaintiffs' Claim which sought specific performance.

The Plaintiffs and the Defendants had entered into an agreement with respect to an exchange of two parcels of land, and an option to purchase on a third. When the deal did not go through, the Plaintiffs sought specific performance of the transfer agreement, and placed a Caveat on the land which they claimed an interest in. Master Schlosser noted that, in order for a Caveat to be sustainable, the person claiming it must have an interest in the land. Further, in order for there to be an interest in land, the interest had to be capable of specific performance, and damages must not be an adequate remedy. In order for specific performance to be awarded, the land must be unique. A damages claim cannot support a Caveat or *lis pendens*.

The Court noted that the burden of establishing that the land is unique rests with the Plaintiffs. With respect to the test for Summary Judgment in the circumstances, the Court stated that "the threshold question is whether the applicant has shown that the respondent won't win this remedy at trial" and:

> To put it in terms of numbers, the court need be satisfied that there is an eighty percent chance (or thereabouts) that the plaintiffs won't prove an entitlement to specific performance on the balance of probabilities at trial.

Master Schlosser concluded that the Defendants had met this burden and, accordingly, allowed their Application to dismiss the portion of the Claim where the Plaintiffs sought specific performance. As a consequence, the Caveat and *lis pendens* were also discharged.

SETTLEMENT LENDERS INC V BLICHARZ, 2015 ABQB 16 (MICHALYSHYN J)
Rule 9.13 (Re-Opening Case)

Justice Michalyshyn dismissed an Application by the self-represented Defendant to open up a Default Judgment obtained by the Plaintiffs. The Defendant sought to reargue her original Application under the guise of Rule 9.13. His Lordship noted that Rule 9.13 provides that at any time before a Judgment or Order is entered, the Court may vary the Judgment or Order or, on Application hear more evidence and change or modify its Judgment or Order or reasons for it, if the Court is satisfied that there is good reason to do so. On the record and circumstances before the Court, Justice Michalyshyn held that the Defendant failed to meet the test. There was nothing in the catalogued materials that was not already before Michalyshyn J. in substance by the time of the previous hearing which was relevant or material to the Defendant's Rule 9.13 Application, or which was not simply incomprehensible. The Application was therefore dismissed.

ROCKS V IAN SAVAGE PROFESSIONAL CORPORATION, 2015 ABCA 77 (O'FERRALL JA)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review) and 14.5 (Appeals Only With Permission)

The Plaintiff sought permission to Appeal the Decision of a Review Officer before the Court of Appeal. The Plaintiff originally applied under Rule 10.9 to have his legal fees in the amount of $4,200 reviewed by a Review Officer. The Review Officer declined to adjust the Defendant lawyer's account. The Plaintiff's Appeal before a Justice of the Queen's Bench was also dismissed.

Justice O'Ferrall noted that, pursuant to Rule 14.5(1)(g), where the estimated amount of the matter at issue is less than $25,000, permission from the Court of Appeal must be obtained before an Appeal of a lower Court Decision can be filed. Permission will only be granted where the Court is satisfied that the Applicant has a reasonable prospect of success, and where the Appeal concerns an issue of law or jurisdiction that is of importance to the public. O'Ferrall J.A. held that the Plaintiff had agreed to the amount of fees charged, and the Appeal therefore had no prospect of success. The Appeal was dismissed.

ENVIRO TRACE LTD V SHEICHUK, 2015 ABQB 28 (VEIT J)
Rule 10.29 (General Rule for Payment of Litigation Costs)

The Plaintiff was successful in obtaining an interlocutory injunction against the Defendants. The Plaintiffs sought the immediate payment of Costs; the Defendants argued that Costs should be in the cause. Veit J. noted that success on an Application for an injunction is more than "mere success in establishing a holding pattern until trial" and concluded that "costs for interlocutory injunctions should generally be paid forthwith". Her Ladyship stated that awarding Costs to be payable forthwith conformed to the policy which underpinned Rule 10.29(1), which was a continuation of former Rule 607: unless otherwise ordered, Costs are payable forthwith by the unsuccessful party in all interlocutory proceedings. Veit J. awarded Costs payable forthwith to the Plaintiff.

CG V RH, 2015 ABQB 99 (DARIO J)
Rules 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 a Costs Award)

The Applicant wife was successful at Trial where the Court determined primary care of the parties' children, mobility, and child support. Both parties made submissions with respect to Costs. Dario J. noted that Rules 10.29 and 10.30 through 10.33 applied to the determination of Costs. Justice Dario considered the enumerated factors outlined in Rule 10.33 in making the Costs determination pursuant to Rule 10.31. Her Ladyship considered the Respondent husband's conduct throughout the proceedings, in addition to the complexity of the issues at Trial. The Respondent had failed to provide required disclosure and was unwilling to provide Undertakings or answers during Questioning, which required re-attendance. Further, the Respondent intentionally misled the Court and created delay to the Action. Ultimately, the Court awarded Costs to the Applicant in the amount of $60,000.

HYMANYK V HYMANYK, 2015 ABQB 72 (VEIT J)
Rule 10.31 (Court-Ordered Costs Awards)

The Applicant husband was a self-represented litigant seeking Costs for a chambers hearing. The Applicant was successful in setting a hearing date to set the division of his pension in a family law matter, but he was unsuccessful in obtaining a change to his spousal support payments. The Respondent wife argued that Costs were not appropriate for two reasons: first, the Applicant only had mixed success; and second, as a self-represented litigant he was not entitled to legal Costs.

Justice Veit considered Rule 10.31(5) and assessed whether these were "appropriate circumstances" to grant the self-represented Applicant Costs. Veit J., applying recent authority, noted that Costs are meant to achieve other purposes in addition to partial indemnity of fees. The Applicant tried on numerous occasions to settle with the Respondent, but the Respondent resisted settlement throughout. The Applicant was, therefore, a self-represented

litigant deserving of a Costs Award. Her Ladyship also concluded that the Applicant was substantially successful in his Chambers Application and awarded him Costs.

JACKSON V CANADIAN NATIONAL RAILWAY COMPANY, 2015 ABCA 89 (ROWBOTHAM JA)
Rules 10.32 (Costs in Class Proceeding), 10.33 (Court Considerations in Making Costs Award) and 14.5 (Appeals Only With Permission)

This was an Application by the Plaintiff pursuant to Rule 14.5(1) for permission to Appeal a Costs Award in a Class Action. The Chambers Judge refused to certify the class and granted the Defendants Summary Judgment, thereby dismissing the Claim, and awarded Costs on the basis of double Column 5 of Schedule C. Justice Rowbotham considered the preliminary issue of the timeliness of the Application since it was filed some nine months after pronouncement of the Costs Order. Her Ladyship stated that the new Rules require that the Application for permission to appeal be brought within one month of the pronouncement of the Decision, and the previous Rules required a Notice of Appeal to be filed within 20 days from filing, entry and service of the Order. Under either Rule, the Plaintiff's Application for permission to appeal was not filed in time, so the Applicant required permission to extend the time to file the Application.

Rowbotham J.A. approved of the test articulated in prior authorities including *Sohal v Brar*, 1998 ABCA 375. The test for extending time to file the Application for permission to appeal comprised four parts:

> (i) that there was a bona fide intention to appeal while the right to appeal existed and some special circumstance that would excuse or justify the failure to appeal; (ii) an explanation for the delay and that the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties; (iii) that the appellant has not taken the benefits of the judgment from which appeal is sought; and (iv) that the appeal would have a reasonable chance of success if allowed to proceed.

Rowbotham J.A. held that the Plaintiff did not satisfy the test for the time extension, and that permission to appeal the Costs Order would not have been granted in any event. The Plaintiff pointed to one paragraph of the reasons of the Chambers Judge which concluded that, although Rule 10.32 suggests that a certain level of restraint is important to ensure no disproportionate chill on future class litigation, the traditional Costs factors under Rule 10.33 were overwhelmingly in favour of the Respondents. Rowbotham J.A. said this was not an error in principle, and concluded that the Chambers Judge correctly determined Costs within the rubric of Rules 10.32 and 10.33. Justice Rowbotham dismissed both the Application for time extension and the Application for permission to appeal.

CORNELSON V ALLIANCE PIPELINE LTD, 2015 ABQB 152 (VERVILLE J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Plaintiff was the president and CEO of the Defendant company. He commenced an Action against his former employer claiming wrongful dismissal. Verville J. heard the Trial of the Action and issued a Memorandum of Decision in which the Plaintiff was granted damages. The parties returned to seek direction with respect to Costs.

The Defendant made an informal offer that exceeded the Plaintiff's entitlement under the Judgment, and a Formal Offer which fell just short. With respect to Costs, Verville J. observed that Rule 10.33 provided the Court considerable discretion in making a Costs award. While the Plaintiff was successful, his total entitlement was around 20% of what he claimed. Justice Verville commented that the impact offers have with respect to Costs should be measured on a continuum. Within the continuum there are oral offers, without prejudice offers, with prejudice offers, and Formal Offers made pursuant to the Rules of Court in effect at the time they are made. Where a Formal Offer pursuant to the Rules of Court is made, counsel has an obligation to advise the client that the repercussions are severe if the judgment received is less than the amount offered. With less-formal offers, the repercussions may, depending on the facts, be less serious. His Lordship stated that all forms of settlement offers are to be encouraged.

The Defendant argued that the Plaintiff should be deprived of Costs because of a without prejudice offer that had been made over 14 years before. While the Plaintiff did not accept the informal offer, Verville J. noted that the Defendant had years to formalize it but failed to do so. Verville J. noted further that Formal Offers which fall short, but are close to the Court's award, are properly considered in relation to Costs. In this case, because the Defendant's Formal Offer fell short of the Plaintiff's entitlement by about $61,000, Justice Verville concluded that the Plaintiff should be awarded 80% of his Costs and Disbursements.

ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC V AMEC AMERICAS LIMITED, 2015 ABCA 9 (CONRAD, BERGER AND SLATTER JJA)
Rules 10.36 (Assessment of Bill of Costs), 13.5 (Variation of Time Periods), 14.88 (Cost Awards) and 14.90 (Sanctions) and Schedule C

The parties applied for directions from the Court with respect to the Costs consequences of an Appeal. Notwithstanding the failure of the parties to seek directions within two months as required by Rule 14.88, the Majority of the Court of Appeal stated that the Appeal did not have the same Costs consequences as a prior Application in the Court of Queen's Bench. Justice Berger directed that the Defendant was entitled to Costs for second counsel.

Slatter J.A., dissenting, stated that it was too late for parties to seek specific directions on Costs. Although the two month limit could be relaxed under Rule 13.5(2), the parties did not provide any reason for an extension. His Lordship noted that if Costs were not agreed upon, the assessment of the precise amounts should be determined by an Assessment Officer under Rule 10.36. Slatter J.A. noted that the Costs of the Appeal should be assessed based on presumptions of Rule 14.88, subject to limitations found in Schedule C and Rule 14.90(1)(a). Justice Slatter would have dismissed the Application for further directions on Costs due to inordinate delay.

DEMB V VALHALLA GROUP LTD, 2015 ABCA 29 (PAPERNY, MCDONALD AND O'FERRALL JJA)
Rules 10.49 (Penalty for Contravening Rules), 10.50 (Costs Imposed on Lawyer), 10.51 (Order to Appear), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Plaintiffs sought to Appeal a decision by the Case Management Judge dismissing their Application to hold the Defendant in civil contempt for failing to disclose financial information. The Majority sympathized with the Plaintiffs, but noted that the Case Management Judge's Decision should be given a high level of deference. Further, the Case Management Judge's exercise of discretion was not unreasonable and no error of law was found. The Appeal was dismissed, with the parties responsible for their own Costs.

O'Ferrall J.A., concurring with the Majority, stated that while the Case Management Judge designed the Order to compel compliance rather than to punish, "there are occasions when it is appropriate to grant contempt orders that have as their object denunciation and deterrence". O'Ferrall J.A. also referred to the prescribed sanctions in Division 4 of Part 10, comprising Rules 10.49 through 10.53, where such an Order is appropriate.

GEOPHYSICAL SERVICE INCORPORATED V ARCIS SEISMIC SOLUTIONS CORP, 2015 ABQB 88 (MACLEOD J)
Rule 11.25 (Real and Substantial Connection)

The Applicant, Geophysical Service Incorporated (GSI), appealed a Master's Order dismissing their Claim against the Canada-Newfoundland and Labrador Offshore Petroleum Board (CNLOPB). The Master held that the Alberta court lacked *jurisdiction simplicter* to hear the matter and, further, the Alberta Courts ought to decline to hear the matter on the basis of *forum non conveniens*. GSI argued that the factors listed under Rule 11.25(3) are presumptive connecting factors that a Court ought to consider when assessing a real and substantial connection to the jurisdiction. CNLOPB disagreed arguing that, under Rule 11.25(3) the former "necessary and proper party" was no longer a presumptive connecting factor in light of the

Supreme Court of Canada's decision in *Club Resorts v Van Breda*, 2012 SCC 17 (*Van Breda*). CNLOPB argued that, even if Alberta has jurisdiction, the Action should be stayed pending the decision in a parallel Action in Newfoundland.

Justice MacLeod noted that *Van Breda* made it clear that service *ex juris* rules should be used as guidance in developing private international law, but they are not determinative factors on their own. His Lordship reviewed conflicting case law on whether or not the "necessary and proper party" factor was still a presumptive connecting factor for the purpose of Rule 11.25(3) in light of *Van Breda*. Justice MacLeod held that the "necessary and proper party" can still be a presumptive connecting factor in the context of an Action connected to Alberta where the other principal players are in Alberta. His Lordship noted that considerations may vary if the Action relates to matters outside of Canada. His Lordship granted the Appeal and declined to stay the Action.

ROSEBERRY V ROSEBERRY, 2015 ABQB 75 (YUNGWIRTH J)
Rule 12.41 (Notice to Disclose Documents)

The wife in a family law matter applied to vary a divorce Judgment and compel the Respondent husband to pay retroactive child support. Justice Yungwirth commented that, under Rule 12.41, the preferred approach is to file and serve a Notice to Disclose in form FL-17, before an Application to vary child support is filed. Rule 12.41(6) requires the Applicant to serve the Notice to Disclose, and any documents required to be disclosed to the other party, pursuant to subsection 21(1) or 25(4) of the *Federal Child Support Guidelines*, or 21(1) or 22(4) of the *Alberta Child Support Guidelines*, not later than one month before the Application is scheduled to be heard or considered as set out in the Notice to Disclose. Yungwirth J. held that the Respondent's conduct was blameworthy in relation to his child support obligations, and made an award for retroactive child support.

422252 ALBERTA LTD V MESSENGER, 2015 ABCA 47 (BERGER JA)
Rules 14.14 (Fast Track Appeals) and 14.47 (Application to Restore an Appeal)

The Plaintiff applied pursuant to Rule 14.47 to restore their Appeal which had been struck by the Registrar for failing to file the Appeal record by the applicable deadline. A Master and a Queen's Bench Justice had rejected the Plaintiff's Application to amend their Statement of Claim, and upon an Appeal to the Court of Appeal, the Registrar changed the status to a fast-track Appeal.

The proposed amendments were rejected by the lower Court on the basis that they would cause serious prejudice not compensable in Costs. The Court of Appeal held that the Court of Queen's Bench did not err, and held that the Registrar was not in error in characterizing the Appeal of a rejected Application for leave to amend a Pleading as a fast-track Appeal under Rule 14.14. The Plaintiff's Application for leave to restore the Appeal was dismissed.

MODRY V ALBERTA HEALTH SERVICES, 2015 ABCA 31 (BROWN JA)
Rule 14.48 (Stay Pending Appeal)

The Applicant, Alberta Health Services ("AHS"), applied for a Stay Pending an Appeal of an Order of a Chambers Judge, which granted the Plaintiff an interim mandatory injunction reinstating him as a surgeon with full pay. AHS applied to stay the portion of the Order directing that the Plaintiff be reinstated.

Brown J.A. held that the test to be applied on a Stay Application is the well-known tripartite test from *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311. An applicant must show (1) there is a serious question to be considered; (2) that irreparable harm would result if the relief is not granted; and (3) that the balance of convenience favours the applicant. Justice Brown noted that the serious question to be considered is a low threshold, and the Applicant only needed to show arguable grounds. Justice Brown also found irreparable harm to AHS, as allowing a physician with a history of performance

issues to be reinstated would create serious safety and reputation concerns for AHS. The balance of convenience also "narrowly" favored the AHS. Under the circumstances, the Stay was granted.

RICHCROOKS ENTERPRISES (2000) LTD V ARRES CAPITAL INC, 2015 ABCA 40 (MCDONALD JA)
Rule 14.48 (Stay Pending Appeal)

The Applicant, one of the Plaintiffs, Access Mortgage Investment Corporation (2004) Limited (Access Mortgage), brought an Application under Rule 14.48 for a Stay Pending an Appeal of the Order of a Justice which vacated an earlier Order of the Court of Queen's Bench. Access Mortgage and a number of other persons were investors in a syndicated loan arranged by the Defendant, Arres Capital Inc (Arres). Arres managed the collection of loan repayments but the investors determined that substantial improper deductions were made, and the investors commenced an Action against Arres to recover those funds. An Order was sought and obtained without any notice to the investors which, amongst other things, directed that remaining condominium units be sold. The issue on the Appeal was whether either of the Undertakings as to Damages were sufficient as a matter of law, given the factual matrix of the case.

Justice McDonald noted that Rule 14.48 is the successor to Rule 508 of the former Rules. The Court observed that a Stay Pending Appeal may only be granted if the Applicant satisfies the Court that: there is an arguable issue to be determined on Appeal; that the Applicant will suffer irreparable harm if the Stay is not granted; and that the balance of convenience favors the granting of the Stay. In the result, McDonald J.A. held that the Applicant satisfied the three requirements of the tripartite test, and granted an Order to stay the Court of Queen's Bench Order pending the determination of the Appeal.