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

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DELORME V CANADA (ATTORNEY GENERAL), 2015 ABQB 240 (GERMAIN J)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

Pursuant to Rule 4.33, the Defendants brought an Application to dismiss the Plaintiff's Claim for long delay. The sole issue in the Application was whether or not an Order resolving conflict of interest issues in the Action constituted a step that "significantly advanced" the Action. Germain J. exhaustively reviewed prior jurisprudence setting out what constitutes a step that significantly advances an Action.

Germain J. noted that Rule 4.33 ought to be interpreted with regard to Rule 1.2 to expeditiously move claims forward. Germain J. also noted that a functional analysis ought to be used when assessing if a step materially advanced an Action. A Court ought to "focus on its function, not whether an act fits into a defined category of activities". Germain J. also noted that, if there is ambiguity about whether or not a step materially advanced an Action, the interpretation more favourable to preserving the right to litigate should be adopted.

When analyzing the Order in question, Germain J. noted that it advanced the litigation because it "clarified and cleared up energy-wasting conflict resolution problems". The Order would also allow the more timely flow of documents between the parties, and thus, materially advance the Action. Justice Germain dismissed the Defendants' Application.

RO-DAR CONTRACTING LTD V VERBEEK SAND & GRAVEL INC, 2015 ABQB 300 (JONES J)
Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 3.31 (Statement of Defence), 4.33 (Dismissal for Long Delay), 5.6 (Form and Contents of Affidavit of Records), 5.10 (Subsequent Disclosure of Records), 5.14 (Inspection and Copying of Records), 6.14 (Appeal from Master's Judgment or Order) and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Defendants unsuccessfully applied to dismiss the Action against them for long delay pursuant to Rule 4.33. The Defendants argued before the Master that the last thing done to significantly advance the Action was compliance with a prior Order to compel them to answer refusals during Questioning on October 4, 2010. They argued that the Plaintiff's October 30, 2013 Supplemental Affidavit of Records did not materially advance the Action because those documents had either already been produced or had been provided in settlement discussions. The Plaintiff argued, *inter alia*, that its Supplemental Affidavit of Record satisfied an ongoing obligation to provide a further Affidavit of Records as new material emerged, pursuant to Rule 5.10. The Master agreed that the Supplemental Affidavit of Records was a significant advance in the Action, dismissing the Application. The Defendants appealed the Master's Decision. The Appeal centred on whether the settlement correspondence and Supplemental Affidavit of Records materially advanced the Action.

Justice Jones considered the context of the case in light of Rule 4.33 and the transitional Rule 15.4. His Lordship observed that the main changes from the old Rules to the new Rules were the reduction in length of the delay from five to three years and that the question is now whether a thing has been done to "materially advance" the Action, as opposed to whether there has been any "significant advance" in the Action. However, Jones J. noted that the general principles continue to apply. The Supplemental Affidavit of Records was provided before Rule 4.33 came into force, when Rule 15.4 applied. Justice Jones therefore applied the guidelines set out in *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259,

to determine the relevant period of alleged inactivity, and stated that:

> …proceedings should be examined from the date of the Application to dismiss for delay, which is February 24, 2014. Under Rule 4.33, this Court will consider whether at any time prior to February 24, 2014, there has been a gap of three or more years where there has been no significant advance in the Action.

The parties agreed that compliance with the Order on October 4, 2010 was a step that significantly advanced the Action (the Defendants argued this was the last significant advance). Therefore, the applicable period was from October 4, 2010 to February 24, 2014. Justice Jones accepted that privileged settlement correspondence could be relied on in response to an Application under Rule 4.33. With respect to the Supplemental Affidavit of Records, which was missing the Schedule 1 documents due to inadvertence, Justice Jones observed that Rule 5.6 requires that an Affidavit or Records is to be in Form 26, which includes the schedules. The Defendants did not alert the Plaintiffs, or request to inspect or receive a copy of the records, which they could have done pursuant to Rule 5.14.

Justice Jones assessed whether the settlement correspondence and Supplemental Affidavit of Records materially advanced the Action, noting that this required a functional analysis which considers the overall purpose of the Rules, as set out in Rule 1.7. Justice Jones noted that the application of the "drop dead" Rule should consider the "cultural shift" advocated by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7. Further, Rule 1.2 provides that disputes should be resolved in a fair, just and efficient "Court process"; a Trial is not the only Court process. In light of these principles, Justice Jones considered the applicable question to be whether the parties' actions "analysed individually, cumulatively and collectively, significantly advance resolution of the Action".

Jones J. held that, in the circumstances, the settlement correspondence did not accomplish much to clarify the issues or significantly advance the Action towards resolution. Justice Jones noted that the issue of whether an Action may be advanced through a party's compliance with Rule 5.10 and the ongoing obligations of production requires a factual inquiry. Because the documents produced in the Supplemental Affidavit of Records were already in the Appellants' possession, the Supplemental Affidavit of Records did not significantly advance the Action. Justice Jones commented that filing a Statement of Defence within 20 days, as required by Rule 3.31(3)(a), or appealing a Master's Order within 10 days, as required by Rule 6.14, are examples of steps that are of more significance than the requirement of Rule 5.10 to produce additional records at some undetermined time in the future. Accordingly, the Defendants' Appeal was allowed, and the Action was dismissed.

CHAMPAGNE V SIDORSKY, 2015 ABQB 305 (JONES J)
Rules 1.2 (Purpose and Intention of These 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 13.6 (Pleadings: General Requirements)

The underlying dispute related to the Defendant's alleged breach of a restrictive covenant, to which he agreed when purchasing land from the Plaintiffs. The Plaintiffs applied for leave to amend the original Statement of Claim and an Order directing the Registrar to register the restrictive covenant on title. Justice Jones considered only those issues concerning the amendment Application. A number of proposed amendments were non-contentious as they addressed the technical requirements of Part 13, Division 3 of the Rules. Other proposed amendments, which were opposed by the Defendant, altered the remedies claimed and arguably added new Claims. Justice Jones noted that the Plaintiff was initially self-represented, so the original Statement of Claim failed to meet the requirements of Rule 13.6(1)(a) and contravened Rule 13.6(2)(a), as the Claim blended facts, evidence and argument.

Justice Jones cited the general principle, essentially codified in Rule 3.74(3), that an amendment should be allowed no matter how careless or late, unless there is prejudice. This general principle is subject to four main exceptions: (i) the amendment would cause prejudice, not

compensable in costs; (ii) the amendment fails to raise a triable issue; (iii) the amendment seeks to add a new party past the limitation period, and without permission by statute; and (iv) the failure to plead the amendment in the first place entails bad faith. These considerations are to be made in light of Rules 1.2(2)(a) and (b) regarding identifying the real issues in dispute and efficiency in resolving a Claim.

Justice Jones reviewed the proposed amendments and noted that, since pleadings had closed, Rule 3.62(1)(b)(ii) and 3.65(1) applied. One of the main arguments by the Defendant was that some proposed amendments added claims which were past the limitation period which were not saved by Section 6 of the *Limitations Act*, RSA 2000, c L-12. The Plaintiffs argued that the proposed amendments either did not actually raise a new claim, or they related to the initial claim, thereby satisfying Section 6 of the *Limitations Act*. Justice Jones noted that even if the requirements of Section 6 of the *Limitations Act* are satisfied, the Court retains discretion not to allow the amendment if it were to cause serious prejudice to the other party. Jones J. held that the proposed amendments did not prejudice the Defendant in a way that was not compensable through a costs award; rather, they allowed the parties to be able to better resolve the issues between them. More evidence was needed to conclusively determine if the proposed amendments were past the limitation period, but in any event, Justice Jones held that Section 6 of the *Limitations Act* would apply to save them. The amendments were allowed.

ALBERTA (MINISTER OF JUSTICE) V WILLIS, 2015 ABQB 328 (SCHUTZ J)

Rules 1.2 (Purpose and Intention of These Rules), 3.13 (Originating Application Evidence (Other Than Judicial Review)), 5.1 (Purpose of This Part), 5.2 (When Something is Relevant and Material), 5.25 (Appropriate Questions and Objections), 6.3 (Applications Generally), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application) and 6.38 (Requiring Attendance For Questioning)

The Solicitor General for Alberta (the "Minister") applied for an Order compelling the Respondent, Willis, to answer questions regarding a property disposal matter, pursuant to the Rules and Section 52(2) of the Victims Restitution and Compensation Payment Act, SA 2001, c V-3.5 ("VRCPA"). The Respondent cross-applied to challenge the constitutionality of Section 52(2) of the VRCPA. The Respondent's husband was driving her vehicle when he was arrested for illegal activity, and the vehicle was seized. The Respondent filed an Affidavit in which she claimed an interest in the restrained vehicle, and stated that she did not know her husband was driving the vehicle when he was arrested. The Minister cross-examined the Respondent on her Affidavit and she refused to answer eight questions. The Minister subsequently filed an Application to compel her to answer the questions. The Respondent then filed an additional Affidavit and a Notice of Constitutional Question.

The Minister submitted that the constitutional question need not be determined because the applicable Rules were a complete answer to the Respondent's objection to the Minister's questions pursuant to Rules 3.13, 5.2, 5.25, 6.3, 6.7 and 6.38. The Court disagreed with this position, as the Minister's authority to examine the Respondent in the first place arose from the VRPCA. The first issue for the Court was to decide if Section 52(2) of the VRPCA was overly broad, and secondly, whether the Respondent should be compelled to answer the Minister's questions.

In assessing the scope of the impugned provision, the Court noted that the VRCPA provides that the Rules and laws of evidence apply. Rules 5.1 and 5.2 provide that evidence may be obtained in order to define the issues. The Rules encourage early disclosure of information, and state that such information is relevant and material if it assists in determining the issues or ascertaining evidence which will assist in determining the issues. As such, the impugned provision is not overly broad: it is governed by the legal parameters of relevance and materiality as set out in the Rules.

With respect to compelling answers to the questions posed to the Respondent, the Minister submitted that the questions were relevant and material, and within the scope of Rules 5.2(1) and 5.25(1). The Respondent acknowledged that the answers could reasonably be

expected to significantly help to determine the issues, and that the onus was on her to provide evidence of her proprietary interest in the vehicle and absence of knowledge that her husband was using it for illegal activity. Justice Schutz agreed with the Respondent, yet noted that there were other consequences the Respondent might face if she refused to answer the questions. The Minister's Application to compel answers was dismissed.

PHILLIPS V WHYEW, 2015 ABQB 365 (PENTELECHUK J)
Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay), 15.4 (Dismissal for Long Delay: Bridging Provision) and 15.6 (Resolution of Difficulty or Doubt)

The Plaintiffs in two separate Actions appealed the Decision of a Master dismissing their Actions for long delay pursuant Rule 4.33. In both Actions, the last step taken was service of a Notice of Appointment for Questioning before November 1, 2013. The Defendants filed their Applications to dismiss the Actions for long delay on November 1, 2013 which was the date that Rule 4.33 came into force, and the period for dismissal for long delay was set at three years. Both Plaintiffs conceded that the mere service of an Appointment for Questioning does not materially advance the Action, but argued that they should be able to continue their Actions because service of an Appointment for Questioning before November 1, 2013 engages the exceptions under Rule 4.33(1)(c) or (d) which avoids the application of Rule 4.33 and 15.4.

Pentelechuk J. considered whether service of an Appointment for Questioning fell within the exceptions in Rule 4.33, noting that Rule 4.33(1)(c) contemplates that, due to unique circumstances, it may not be appropriate to advance the Action within the three year period. Her Ladyship held that the words “written proposal” in Rule 4.33(1)(c) should be given their plain and ordinary meaning which did not include an Appointment for Questioning. Pentelechuk J. observed that, the Defendants were not given two months to respond to the Appointments for Questioning as required under Rule 4.33(1)(c) since the Appointments were served less than two weeks prior to the three year period coming into effect. Accordingly, the exception in Rule 4.33(1)(c) did not apply. Additionally, Justice Pentelechuk held that the exception in Rule 4.33(1)(d) did not apply since the Defendants' did not “participate” in the litigation after filing their Rule 4.33 Application. Her Ladyship opined that the exception under Rule 4.33(1)(d) refers to the situation where the Plaintiff files an Application or takes proceedings in which a Defendant participates; the Court may then refuse to dismiss the Action notwithstanding that three or more years have passed since the last significant advance in the Action.

The Plaintiff argued that if none of the enumerated exceptions under Rule 4.33 applied, then transitional Rule 15.6 should save the Actions. They maintained that the five year period in transitional Rule 15.4 should apply instead of Rule 4.33. Pentelechuk J. dismissed this argument, noting that the Plaintiffs had plenty of time to order their affairs to avoid the absolute and mandatory nature of the Rule. In addition, Pentelechuk J. held that delay is contrary to all of the foundational principles in the Rules, including Rule 1.2; as such, it would be inappropriate to continue an Action which was over 10 years old, and which had not been diligently pursued. The Appeal was dismissed.

SCHULTE V ALBERTA (APPEALS COMMISSION FOR WORKERS' COMPENSATION BOARD), 2015 ABCA 148 (VELDHUIS JA)
Rules 1.2 (Purpose and Intention of These Rules) and 14.8 (Filing a Notice of Appeal)

The Applicant sought an extension of time to Appeal an Order which dismissed his Application for Judicial Review. The Order was filed and entered on October 24, 2012, and served on the Applicant on October 5, 2012. The time extension Application was filed March 25, 2015.
The Court noted that the Applicant must show:

1. That there was a bona fide intention to appeal while the right to appeal existed and that there was some special circumstance that would excuse or justify the failure to appeal;

2. 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;

3. That he has not taken the benefits of the judgment from which appeal is sought; and

4. That the appeal would have a reasonable chance of success if allowed to proceed.

Justice Veldhuis noted that, generally, all four of the criteria must be satisfied, although the Court may exercise its discretion to grant an extension where there are unique and special circumstances, and it is in the interests of justice to do so. In this case, Justice Veldhuis held that there was no reasonable explanation for the delay of two and a half years in filing the Appeal. The Court rejected the Appellant's argument that the delay was due to Rule 1.2 of the Alberta Rules of Court which obliges the parties to resolve their dispute using the quickest means and least possible expense, and encourages the parties to communicate openly. Instead of filing an Appeal within the deadline, the Applicant chose to request reconsiderations from various levels of Tribunal Decisions. The Court noted that, even if there was some evidence of confusion on the Applicant's part, misunderstanding a pertinent Rule or procedure does not constitute a special circumstance which would reasonably explain such a delay in filing, particularly in the absence of due diligence. The Application to extend time was dismissed.

CANADIAN IMPERIAL BANK OF COMMERCE V ANDROSOFF, 2015 ABQB 215 (MASTER ROBERTSON)
Rules 1.4 (Procedural Orders), 4.31 (Application to Deal With Delay), 6.21 (Preserving Evidence for Future Use), and 7.1 (Application to Resolve Particular Questions or Issues)

This was an Application pursuant to Rule 4.31(1) to dismiss the Action on the grounds of delay. The Plaintiff had two distinct claims, one in debt and the other alleging the fraudulent conveyance of lands. One of the Defendants was an elderly man who died before any Questioning was done, though the elderly man's counsel had been asking to move the case along because of the Defendant's age and condition. Master Robertson observed that the nature of the fraudulent conveyance Claim was one where credibility was central to its resolution.

The Statement of Defence of the deceased Defendant largely paralleled the Statement of Defence of the Applicant, who was the son of the deceased. Master Robertson noted that Rule 6.21 authorizes the Court to order Questioning to preserve evidence where "there is the likelihood that the person might die before being required to give evidence". The evidence of the deceased Defendant was important, perhaps critical. The Applicant lost the ability to have his father give evidence because of the Plaintiff's delay and failure to respond to correspondence. Finally, the Plaintiff cancelled Questioning at least twice because its representative was not available, though it was not necessary to have the Plaintiff's litigation representative present.

Master Robertson held that, in the circumstances of the case, it was necessary to dismiss the fraudulent preference claim. The Applicant was self-represented and, because he was not a lawyer, was not permitted to represent his father's estate. Invoking Rules 1.4 and 7.1(3), Master Robertson also dismissed the Claim as against the estate, rather than forcing the estate to bring an Application to achieve an Order where the result would be a foregone conclusion.

BOARDWALK GENERAL PARTNERSHIP V MONTOUR, 2015 ABQB 242 (MASTER SCHLOSSER)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 9.14 (Further or Other Order After Judgment or Order Entered), 9.15 (Setting Aside, Varying and Discharging Judgments), 9.16 (By Whom Applications are to be Decided) and 9.17 (Enforcement: Orders for Payment and Judgments for Payment into Court)

The Plaintiff landlord applied to the Residential Tenancy Dispute Resolution Service when the Defendant tenants failed to pay their rent. The Residential Tenancy Board granted a Consent Order ("RTDRS Order") that the next rent payment had to be made by a certain date, and the

Order was converted into a Court Order. The tenants failed to appeal the Residential Tenancy Order. Two of the tenants received funds from Government agencies, and they missed their Court ordered rent payment when the agency failed to provide the required funds. The landlord evicted the tenants who then applied to return to the premises. The landlord resisted the Application, arguing that the tenants had not properly applied to appeal the Order and could not seek the relief requested.

Master Schlosser noted that Rule 9.17 allowed the RTDRS Order to be filed in the Court of Queen's Bench for enforcement purposes. Master Schlosser then canvassed a variety of methods to grant the tenants standing to seek the requested relief under the *Judicature Act*, RSA 2000, c J-2 and the *Civil Enforcement Act*, RSA 2000, c C-15, and observed that Rules 9.14, 9.15 and 9.16 allow the Court to deal with Orders, but the Rules would have limited applicability in the circumstances.

Master Schlosser stated further that Rule 1.5 allows a Court to cure irregularities in commencement documents and other pleadings, if there is no prejudice. The focus under Rule 1.5 is on substance and not form. Master Schlosser noted that the Application could have been treated as a Notice of Appeal seeking a variation of the prior RTDRS Order. This amendment could be made to the Pleadings document under Rule 1.5 with only minor changes required, and no prejudice would result.

CONDOMINIUM CORPORATION NO 0524877 V BONNER, 2015 ABQB 309 (MASTER SCHLOSSER)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 9.12 (Correcting Mistakes or Errors), 9.13 (Re-opening a Case) and 13.6 (Pleadings: General Requirements)

Master Schlosser dismissed the Defendant's Counterclaim in a prior decision (2015 ABQB 263), and the Defendant subsequently applied to correct the reasons before the Order was signed, pursuant to Rule 9.12. The Defendant argued that the condominium's rental regulations, which were the source of the dispute, were still "in play" which meant that there was a continuing cause of action sufficient to save the Defendant's Counterclaim from a limitations defence. Master Schlosser noted that the Defendant was essentially trying to re-argue a portion of the earlier Application and Rule 9.12 is typically reserved for a narrow range of situations in which there is an error in the signed Judgment or Order. The exception exists under the Rules because a Court would otherwise by *functus officio*, and an Appeal would then be necessary.

Master Schlosser continued that the Defendant was really looking for a variation under Rule 9.13. Although there is broad power of review under Rule 9.13, the threshold is high. An Applicant needs to show a high likelihood of error, however, Rule 9.13 remains discretionary.

Master Schlosser held that the Defendant's claim for a declaration with respect to the legalities of the rental regulations was still alive even though his claim for damages was over. Although the *Limitations Act*, RSA 2000, c L-12 was not specifically pleaded in the Counterclaim as it should have been, pursuant to Rule 13.6, it was an "irregularity without any identifiable prejudice" under Rule 1.5. Master Schlosser varied the prior dismissal of the Defendant's Counterclaim, and ordered that the Defendant was entitled to a Declaration that the rental regulations were of no force and effect. The other claims in the Counterclaim were dismissed.

1469753 ALBERTA LTD (ROYAL SERVICES) V LUXEN, 2015 ABQB 282 (PENTELECHUK J)
Rules 2.5 (Actions by and Against Sole Proprietors), 5.35 (Sequence of Exchange of Experts' Reports) and 5.36 (Objection to Expert's Report)

The Plaintiff, Royal Services, sued for unpaid invoices which were charged for labour and materials associated with renovations to the home of the Defendants. The Defendants Counterclaimed, complaining that work was incomplete and that the Plaintiffs were negligent when installing an in-floor heating system.

The Defendants argued that there was no privity of contract between themselves and the numbered company. Justice Pentelechuk noted that Rule 2.5 allows an Action to be

brought by the trade name of a business carried on by a sole proprietor. Further, the Defendant has the option to serve a Notice requiring the business to disclose the legal name of the person carrying on the business.

The Plaintiff sought to dispute the admissibility of the Defendant's Expert's Report. The Court held that the Plaintiff's objections to the expert were inappropriate, as they failed to serve a Notice of Objection in accordance with Rule 5.36. The Court noted that this Rule prevents objections regarding the admissibility of an Expert's Report at Trial unless reasonable notice of the objection is given. Further, the Court stated that Rule 5.36, alongside Rule 5.35, obliges service of an objection to an Expert's Report in advance of Trial to prevent surprise and unnecessary adjournments.

The Court held that each party was liable to the other, and ordered that the Defendants could set off the amounts.

DC (RE), 2015 ABQB 369 (GATES J)
Rules 2.11 (Litigation Representative Required) and 12.6 (Exception to Rule 2.11(a))

The Public Guardian brought an Application under the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 to vary a guardianship Order for a represented adult.

Justice Gates considered whether the represented adult required a Litigation Representative as part of the legal proceedings, relating to a guardianship Order pursuant to Rule 2.11. Justice Gates held that Rule 2.11 is qualified by 12.6. Gates J. observed that a person requiring a Litigation Representative is not considered to be participating in a dispute merely because they are the subject of a dispute or served with notice of a dispute. Justice Gates held that a represented adult did not require a Litigation Representative to make submissions with respect to their guardianship Order, as their role was limited to expressing their interest and wishes in the proceedings. Gates J. granted the Public Guardian sole guardianship for one year, and directed that the represented adult's parents should be consulted at the end of the period to ascertain if they would be willing to assume guardianship.

LANDMASS DIRTWORX LTD V PRAIRIE MOUNTAIN CONSTRUCTION (2010) INC, 2015 ABQB 362 (GRAESSER J)
Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

The Defendants applied to open up a Default Judgment made against them. Citing Rule 9.16, the Defendants asked that the matter be adjourned so that it could be heard by the Judge who granted the Order for Judgment. Justice Graesser declined to adjourn, stating that it was unnecessary since the Judge who granted the Order had not heard any evidence.

Graesser J. held that a combination of Rules 2.22, 2.23 and the *Legal Profession Act*, R.S.A. 2000, c L-8 barred Ms. Schultz, an officer of the Plaintiff Corporation, from representing the company at Trial. Justice Graesser concluded that only a student-at-law or a lawyer could represent a corporation.

Justice Graesser stated that the Defendants could open up a Default Judgment pursuant to Rule 9.15(3) if they could show a reasonable explanation for failing to file a Defence, had acted promptly in applying to set aside the Default Judgment, and had a good defence on the merits. Graesser J. held that the Defendants did not meet the legal test because they conceded that they were liable to some extent. The Application was dismissed, and the Defendants were invited to reapply with appropriate evidence.

F PRINS POTATOES LTD V AGRICULTURE FINANCIAL SERVICES CORPORATION, 2015 ABQB 335 (MAHONEY J)
Rules 3.15 (Originating Application for Judicial Review), 3.22 (Evidence on Judicial Review) and 13.5 (Variation of Time Periods)

The Plaintiffs were denied an insurance claim by their insurer, Agriculture Financial Services Corporation ("AFSC"), for losses in relation to its crop production. The Plaintiffs appealed to the AFSC Appeal Committee ("Committee"), but that Appeal was denied. The Plaintiffs

then applied to the Court to set aside the Decision of the Committee, and for the Court to consider the Plaintiffs' sworn Affidavit that was not before the Committee when it heard the Appeal.

The Plaintiff filed for Judicial Review six months after the Committee provided reasons, on June 3, 2013, but did not serve the Defendants until February 3, 2014. The Court first considered whether the Judicial Review Application was barred by Rule 3.15(2) because it was not served within six months of the date of the Committee's Decision. Rule 3.15 excludes the ability for the Court to extend the time period under Rule 13.5. The Plaintiffs admitted they did not comply with the time frame stipulated in Rule 3.15 to file and serve the Application, but argued that the Court should exercise its discretion to proceed with the Application because it was filed, but just not served in time. Justice Mahoney noted that the timelines in Rule 3.15 are to be strictly enforced and, therefore, dismissed the Application.

Justice Mahoney considered whether the Plaintiffs' Affidavit was admissible, and whether the Committee's Decision was reasonable. His Lordship observed that Rule 3.15(5) contemplates the filing of Affidavit evidence, but this Rule is to be read in conjunction with the evidence requirements for Judicial Review set out in Rule 3.22. The general rule is that the Court is restricted to the record that was before the Tribunal being appealed from, and that additional Affidavits are exceptional. Here, the Affidavit challenged the Committee's findings of fact and attempted to enter new evidence that was available to the Applicant at the time of the Appeal. As such, the Affidavit was inadmissible. Mahoney J. held that the reasons provided by the Committee were reasonable.

RP V ALBERTA (DIRECTOR OF CHILD, YOUTH AND FAMILY ENHANCEMENT), 2015 ABCA 171 (MARTIN, WATSON AND BIELBY JJA)
Rule 3.24 (Additional Remedies on Judicial Review)

The Plaintiff foster parents successfully sought Judicial Review of a decision by the Director of Child Services to remove a four-year-old-child from their foster home in which she had resided since shortly after birth, and to place her with her maternal grandmother.

A Justice of the Court of Queen's Bench granted Judicial Review and set aside the decision by the Director, referring the matter back to Child Services for further consideration. The Justice also made collateral Orders under Rule 3.24(2)(c) for an assessment report of the child and directions to the Director to apply deference to the Appeal Panel's findings of fact and reasoning. The Director maintained the same decision even after reconsideration. On Appeal, the Court again directed the matter back to the Director for reconsideration and dismissed the Appeal.

ALBERTA V ALTRIA GROUP, INC, 2015 ABQB 390 (STREKAF J)
Rules 3.25 (Contents of Statement of Claim), 3.61 (Request for Particulars), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Province of Alberta commenced an Action against several tobacco companies, claiming damages for the costs associated with "tobacco related wrongs" as defined in the *Crown's Right of Recovery Act*, SA 2009, c C-35. The Defendants applied to compel the Crown to provide further particulars of the claims; cumulatively, the Defendants made over 13,000 individual requests for particulars. The Defendants had not yet filed Statements of Defence. The Crown refused to provide further particulars, arguing that the Defendants were merely trying to delay proceedings.

Justice Strekaf considered the Rules relating to requesting particulars. Her Ladyship noted that Rule 3.61(1) permits the Defendants to serve a request for particulars on the Plaintiff, and Rules 3.25 and 13.6 set out the general requirements for Pleadings. Justice Strekaf outlined the general test for ordering Particulars, noting that Pleadings must be succinct but must disclose enough information so that the Defendant understands the case it must meet. Strekaf J. stated that, without the Defendants filing any substantive Affidavits, they had to show that the Crown's Statement of Claim was defective on its face, and that the allegations were too general or vague and that the "need for particulars was evident". The underlying principle for a

request for particulars is that each party is entitled to know the case against them. Particulars help ensure the litigation is fair, open and without surprise, and they help narrow the scope of the issues within the Action.

Strekaf J. considered each category of particulars requested. Upon review, Justice Strekaf held that the majority of facts in the Claim were sufficient to allow the Defendants to defend, or that the requested particulars sought evidence rather than facts. One exception was particulars regarding alleged misrepresentations by the Defendant tobacco companies. Justice Strekaf stated that Rules 13.6 and 13.7 require a certain degree of particularity for claims of misrepresentation. Because the basis for the claims by the Crown originated from Statute, the Crown did not need to formalistically plead every element of the tort: the Crown only needed to establish a duty and a breach of that duty. Strekaf J. held that only some particulars were required, specifically those relating to allegations against the Defendants as a group, allegations relating to relationships of agency and claims in misrepresentation.

ARSENAULT V AUBIN, 2015 ABQB 311 (MASTER SCHLOSSER)
Rules 3.27 (Extension of Time for Service), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.31 (Setting Aside Service)

The Defendant was involved in a car accident in 2006 when he was drunk and driving a stolen truck. After serving a short time in prison, he led the life of a drifter, living on the street. The Plaintiff was the other driver involved in the accident, and sued the Defendant for his property damage. When the Defendant could not be found, the Plaintiff applied for an Order for substitutional service by publishing in the Grande Prairie Daily Herald-Tribune. Some years later, the Defendant re-emerged, looking to make a fresh start. He was surprised to find that there was a Judgment against him. He applied to set aside the substitutional service of the Statement of Claim and the Judgment. Master Schlosser found that it was clear that the Defendant had not received notice of the Claim against him, and accordingly, set aside service of the Statement of Claim pursuant to Rule 11.31(1), and also set aside the Judgment pursuant to Rule 9.15.

The Plaintiff brought a Cross-Application to renew the Statement of Claim pursuant to Rule 3.27(1)(b). Master Schlosser noted that in deciding whether to exercise discretion under this Rule, regard must be had of the policy considerations in the *Limitations Act*, RSA 2000, c L-12 and any prejudice arising as a result of the expiration of a particular limitation period. Master Schlosser reviewed the applicable case law and listed the five elements that a Court should consider in order to grant an extension of time for service:

1. The Court should only extend the time for service where there is no prejudice to the defendant;

2. The plaintiff bears the onus of proving that the defendant would not be prejudiced by the extension;

3. The defendant has at least an evidentiary obligation to provide some details of prejudice which would flow from an extension of the time for service;

4. The defendant cannot create prejudice by failing to do something that it reasonably could have or ought to have done.

5. The prejudice must have been caused by the delay.

The Court found that all the Defendant could say with respect to prejudice was that he had been deprived of an early opportunity to consider a consumer proposal or a bankruptcy. In the Court's view, this was not enough. Accordingly, Master Schlosser renewed the Statement of Claim for a period of three months for service.

MCGOWAN V LANG, 2015 ABCA 217 (BERGER, MCDONALD AND BROWN JJA)
Rule 3.27 (Extension of Time for Service)

The Plaintiff served a Statement of Claim related to a motor vehicle accident on the Defendant's insurance adjuster, but failed to serve it on the Defendant within the one year expiration period. The Master granted an extension of time to serve the Statement of Claim pursuant to Rule 3.27(1)(c). The Master's Order was overturned by a Chambers Judge on Appeal. The Plaintiff then appealed to the Court of Appeal.

The Court of Appeal acknowledged that Rule 3.27(1)(c) requires a two-step process. First, special or extraordinary circumstances must exist as a result of the Defendant's conduct or from the conduct of a third party. The special or extraordinary circumstances must be connected to the lack of service. Second, the Court must consider if it is appropriate to exercise its discretion to extend time for service, giving consideration to limitations legislation and prejudice to the innocent party. The Court concluded that Rule 3.27 should not be used to extend periods for service where the failure to serve is caused by Plaintiff's inadvertence, even where no prejudice to the Defendant is demonstrated. The Court also found that no special or extraordinary circumstances existed in this case. The Appeal was dismissed.

CIBC MORTGAGES INC V FASAMI, 2015 ABQB 286 (MASTER SCHLOSSER)
Rules 3.37 (Applications for Judgment Against Defendant Noted in Default), 6.5 (Notice of Application in Foreclosure Action) and 13.18 (Types of Affidavit)

The Defendants owned a series of condominiums in an apartment complex. The condominiums were demolished due to structural defects. The Plaintiff mortgagee sued for damages equal to the amount left owing under the mortgage for breach of a covenant to repair, and for the tort of waste. The Defendants did not defend and were noted in default. The Plaintiff sought judgment for the outstanding mortgage balance.

Master Schlosser observed that, procedurally, if, in a foreclosure Action, the mortgagors are exposed to personal liability Rule 6.5(3) requires notice. This is so even if the mortgagors have been noted in default. If the proceeding is not for foreclosure, no notice is required pursuant to Rule 3.37(1).

Master Schlosser was not satisfied on the record that the bank was able to show that anything the Defendants did as individual condo owners caused the structural failure. Master Schlosser made particular note of the fact that the Defendants were required to leave after a structural engineering report noted serious issues. Master Schlosser went on to note that this report was not in evidence, and it was unclear if the building ultimately had to be demolished because of the common areas or the individual condo units.

Some of the evidence adduced by the Plaintiff was hearsay which was contrary to Rule 13.18, but it raised enough of an issue about a breach of the Defendants' covenant to repair for Master Schlosser to order that the Plaintiff seek additional evidence. Master Schlosser ordered that the Application be adjourned pursuant to Rule 3.37(3)(d) to gather additional evidence on the cause of the structural collapse.

TOLE V LUCKI, 2015 ABQB 231 (MASTER ROBERTSON)
Rules 3.45 (Form of Third Party Claim) and 13.5 (Variation of Time Periods)

The Defendants applied to add Third Party Defendants to an existing Claim. The Application was brought long after the six month deadline imposed by Rule 3.45(c). The Defendants sought to extend the deadline pursuant to Rule 13.5. The Court stated that the usual reasons to oppose the late filing of a Third Party Claim are delay and consequential prejudice. There was no evidence that the proposed Third Parties in this case had suffered prejudice as a result of the delay. Further, the proposed Third Parties were already litigants in existing lawsuits arising from the same incident. The Court, held that:

> The failure to give a satisfactory explanation for the delay is only fatal if the delay causes serious prejudice to the third party of the kind that cannot be compensated by costs …

The Court did not find such prejudice in this case. After considering the proposed Third Parties' arguments under the *Limitations Act*, RSA 2000, c L-12, and the *Tort-feasors Act*, RSA 2000, c T-5, the Court allowed the Defendants' Application to file Third Party Claims against the proposed Third Parties.

MICHAEL AWAD PROFESSIONAL CORPORATION V 531845 ALBERTA INC, 2015 ABQB 296 (MASTER ROBERTSON)
Rules 3.62 (Amending Pleadings), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff applied to amend its Statement of Claim. One of the Defendants, Mr. Wilson, a lawyer who had acted for a party opposite the Plaintiff in a commercial tenancy matter, cross-applied under Rule 3.68 to have the Claim against him dismissed as it did not disclose a reasonable cause of action.

Master Robertson noted that, although the Applications were argued together, it was incumbent upon the Court to decide the amendment Application before deciding the Application to strike. The Court reviewed the proposed amendments and noted the classic rule was that an amendment should be allowed no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is repaired. The Court also cited *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2010 ABQB 524, where Wittmann C.J. identified four major exceptions: (1) the amendment would cause serious prejudice to the opposing party, not compensable by costs; (2) the amendment is "hopeless"; (3) unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of the limitation period; and (4) there is an element of bad faith associated with the failure to plead the amendment in the first instance.

Master Robertson held that none of the exceptions applied in this case, and allowed the amendments subject to the decision on the cross-Application to strike brought by Mr. Wilson pursuant to Rule 3.68. Pursuant to Rule 3.65(2), Master Robertson ordered the amended Statement of Claim to be filed and served within three weeks of date of the decision.

With respect to the cross-Application to strike out portions of the Statement of Claim, Master Robertson noted that, generally speaking, in the context of advancing legal proceedings, a lawyer does not owe a duty to an opposing party. The Court found that much of the Claim sought to be advanced against Mr. Wilson was bound to fail in law, and had no reasonable prospect of success. Master Robertson struck the portions of the Claim which related to Mr. Wilson's actions in his role as counsel for the landlord in the underlying matter.

HOOPP REALTY INC V THE GUARANTEE COMPANY OF NORTH AMERICA, 2015 ABQB 270 (GILL J)
Rule 3.68 (Court Options to Deal With Significant Deficiencies)

The Defendant, The Guarantee Company of North America, applied to strike out the Plaintiff's Amended Statement of Claim pursuant to Rule 3.68. The Plaintiff had contracted with a general contractor Clark Builders to construct a warehouse. After the warehouse was completed, the tenant complained about the warehouse floor. The general contractor undertook remedial work and a dispute arose as to whether that remedial work was successful. Under the terms of a performance bond, the Defendant had guaranteed the general contractor's obligations to the Plaintiff under a design build agreement for the warehouse construction.

Justice Gill considered whether the Plaintiff's Amended Statement of Claim disclosed a reasonable Claim under Rule 3.68(2)(b). His Lordship observed that the test for striking a Claim remained the same as that under former Rule 129. Gill J. stated further that, in Applications such as this, no evidence may be submitted pursuant to Rule

3.68(3), and the Court is to assume that the facts in the commencement document are true. The Plaintiff alleged that the Defendant owed amounts under the performance bond, and no payments had been made. Assuming that the facts pleaded were true, the allegations clearly supported a cause of action in breach of contract. On that basis alone the Plaintiff was entitled to advance its claims. Justice Gill determined that the Defendant did not meet the test under Rule 3.68, as the Defendant did not establish that it was plain and obvious, or beyond reasonable doubt, that the Claim could not succeed. Accordingly, the Application was dismissed.

RUSNAK V SHAFIR, 2015 ABQB 290 (MASTER SMART)
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendant, Mr. Shafir, was appointed as the custodian of the Plaintiff's law practice. The Plaintiff, Mr. Rusnak, claimed that he suffered damages due to Mr. Shafir failing in his duties as a custodian. Mr. Shafir applied to strike the Action pursuant to Rule 3.68 as an abuse of process, and sought Summary Dismissal pursuant to Rule 7.3. Mr. Rusnak had previously argued his Claims before other Justices, but in each instance the Court had declined to accept those arguments, and had made Orders accordingly. As a result, Master Smart held that Mr. Rusnak was attempting to re-litigate the issues, which amounted to a collateral attack on the prior Orders.

In response to the claim that Mr. Shafir breached a duty towards the Plaintiff, Master Smart stated that no such duty exists. Mr. Shafir did not undertake to act in the best interests of Mr. Rusnak. The Court held that the Action should be struck pursuant to Rule 3.68 because it amounted to an abuse of process. Master Smart indicated that, in the alternative, the Action would have been Summarily Dismissed since the likelihood that the Defendant, Mr. Shafir, would succeed was very high, and there were no issues of merit that genuinely required a Trial.

RODD V ALBERTA HEALTH SERVICES, 2015 ABQB 320 (LEE J)
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and Rule 13.7 (Pleadings: Other Requirements)

The Defendants applied to strike all the claims in the Statement of Claim related to negligence and breach of fiduciary duty. Justice Lee, citing *O'Connor Associates Environmental Inc v MEC OP LLC*, 2014 ABCA 140, noted that the applicable test in a Strike Application is whether there is a reasonable prospect of the Claim succeeding. If there is a reasonable prospect of success the Claim will not be struck. Justice Lee also noted that striking pleadings that have no reasonable prospect of success accords with the recent cultural shift outlined in Hryniak v Mauldin, 2014 SCC 7. The negligence and breach of fiduciary duties claims were ultimately struck since they disclosed no reasonable prospect of success.

CHARLESTON V RIC NEW BRUNSWICK INC, 2015 ABQB 306 (MASTER ROBERTSON)
Rules 3.73 (Incorrect Parties not Fatal to Application) and 7.3 (Summary Judgment)

The estate for a deceased real estate agent brought a claim for unpaid real estate commission in a Court ordered sale. The Defendant brought a motion for Summary Dismissal, arguing that the Plaintiff had no standing to sue because a claim for commission can only be brought by the brokerage house and not the associate who did the work at the brokerage house. The brokerage house disclaimed their interest in the claim.

Master Robertson dismissed the Summary Dismissal portion of the Claim, noting serious concern that the Court was being asked to deny a previous Court sanctioned commission payment simply because the wrong party asked for the payment to be made. Master Robertson also noted that Rule 3.73, relating to joinder of claims, is "differently worded" from former Rule 40. The current Rule is more detailed than the former Rule, and is intended to have a "more broad-reaching effect". Master Robertson commented that, when Rule 3.73 is read with modern case law relating to claims by non-contracting parties, it may be applicable.

WARMAN V LAW SOCIETY OF ALBERTA, 2015 ABQB 230 (PENTELECHUK J)
Rules 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Respondents, Warman and Attaran, were complainants in disciplinary proceedings of the Law Society of Alberta against a member lawyer. After the Law Society Conduct Committee issued nine citations against the member, and directed the matter to proceed to a hearing, the member successfully applied to a second Conduct Committee to have the proceedings against him discontinued. That Application was supported by the Law Society's counsel, who was of the view that there was no reasonable prospect of conviction. The Respondents sought Judicial Review of the Law Society's Decision, alleging in part that the process was unfair and an abuse.

The Law Society applied for Summary Dismissal of the Respondents' Originating Application. The Law Society sought Security for Costs in the event that Summary Dismissal was not granted. Justice Pentelechuk stated that Rule 7.3(1) provides that Summary Judgment may be granted when there is no defence, or no merit to all or part of a Claim. Justice Pentelechuk concluded that the issues related to the Respondents' standing were unsettled and could not fairly be determined on the record. As such, a full hearing on the merits regarding those issues was required. Accordingly, Pentelechuk J. declined to grant Summary Judgment and considered the alternative Application for Security for Costs.

Pentelechuk J. noted that the factors the Court may consider in deciding whether to grant an Order for Security for Costs are enumerated in Rule 4.22. Both Respondents were resident outside of Alberta, but there was no evidence about any of the factors outlined in Rule 4.22, and the Application for Judicial Review raised issues not yet fully canvassed by the Court. In the circumstances, Justice Pentelechuk declined to grant an Order for Security for Costs.

OWNERS: CONDOMINIUM PLAN NO 0125764 V AMBER EQUITIES INC, 2015 ABQB 235 (RENKE J)
Rules 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Plaintiffs were condominium owners, suing the Defendant developers for failing to complete the construction of interior roads in a condominium complex, as well as failing to hold money in trust under section 14 of the *Condominium Property Act*, RSA 2000, c C-22. The Plaintiffs claimed that the developers were negligent and had breached their sales contracts. The Defendants applied for Summary Judgment, relying on the lapse of the limitation period, pursuant to section 3(1)(a) of the *Limitations Act*, RSA 2000, c L-12.

The Court reviewed the recent case law concerning the test under Rule 7.3, and confirmed that Summary Judgment is suitable if a disposition that is fair and just to both parties can be made on the existing record. Practically speaking, this means Summary Judgment will be granted if there is no merit to the claim. A claim has no merit when a fair disposition can be made even if the Court assumes the accuracy of the facts and position of the non-moving party. The case law further clarifies merit as: "a genuine issue of a potentially decisive material fact". Justice Renke also stated that the moving party under Rule 7.3(1)(b) "bears the burden of establishing that the respondent's claim does not have merit". Once the moving party meets this burden, the Respondent may adduce evidence to establish that its claim is meritorious.

The Court held that the date that the limitation period began to run was August 31, 2006, when the condo board, consisting of condo owners, discussed the problem of the unfinished roads. As a result, Justice Renke held that a Statement of Claim should have been filed by August 30, 2008. The claim was therefore barred by the *Limitations Act*. A Trial would not be necessary to establish any further facts, and the claim with respect to unfinished roads had no merit. The claims relating to holding money in trust for the condo project were likewise barred pursuant to the *Limitations Act*. Summary Judgment was granted.

Justice Renke considered whether the Plaintiffs would have been required to post Security for Costs if the Court had not granted the Summary Judgment Application. Renke J. stated that the test for Security for Costs has two steps. First, a consideration of the factors set out in Rule 4.22. Second, the Court should consider whether it is just and reasonable to grant an Application for Security for Costs after it has taken into account all of the factors in Rule 4.22. This Rule requires that the Court inquire into the merits of the Action, because a reasonably meritorious defence is sufficient to weigh in favour of granting Security for Costs. After analyzing the merits of the claim and considering each of the factors set out in Rule 4.22, Justice Renke found that the Defendants had a reasonably meritorious defence, and would have ordered Security for Costs.

PM&C SPECIALIST CONTRACTORS INC V HORTON CBI LIMITED, 2015 ABQB 248 (MICHALYSHYN J)
Rules 4.22 (Considerations for Security for Costs Order) and 5.30 (Undertakings)

This was an Application to compel Undertakings arising from a cross-examination on an Affidavit sworn in support of a Security for Costs Application. The Respondent, Horton CBI Limited, argued that the Undertakings were overly onerous and were not necessary for this Application and inappropriate at such an early stage in the proceedings. The Court reviewed the case law and relevant authorities dealing with the scope of cross-examination in a Security for Costs Application.

Justice Michalyshyn noted that "the answering of undertakings must not be grossly disproportionate to the likely benefit of an answer". However, the Court also noted that "the scope of cross-examination is wide if the merits of the suit are relevant to an application", as is the case in an Application under Rule 4.22. Justice Michalyshyn reviewed recent prior authorities and noted that the test for a Rule 4.22 Application includes a review of the merits of the Action as well as the likelihood of success of the Plaintiff's claims. In the result, Michalyshyn J. rejected the Respondent's argument that answering the Undertakings would be overly onerous and that the efforts to produce them would be grossly disproportionate to the likely benefit of seeing them answered. The Application was granted.

CHISHOLM V LINDSAY, 2015 ABCA 179 (BERGER, MCDONALD AND VELDHUIS JJA)
Rules 4.24 (Formal Offers to Settle), 6.37 (Notice to Admit) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff appealed an award of damages following the Trial of a motor vehicle accident Claim. At the same time, the Defendant appealed the Costs award, arguing that the Chambers Judge failed to give effect to two informal offers that were made prior to Trial. Neither offer complied with Rule 4.24. The Court held that the decision of the Chambers Judge was reasonable; although Judges have the discretion to consider offers that are not compliant with Rule 4.24, they are not obligated to award Costs to the unsuccessful party even though their offer was greater than the final award.

The Plaintiff cross-appealed, arguing that the Chambers Judge should have awarded enhanced Costs because the Defendant refused to admit the Plaintiff's Expert's Reports. The Plaintiff relied on Rules 6.37 and 10.33(2)(b) to support their position. The Court held that Rule 10.33(2)(b) permits a judge to award Costs where a party fails to make an admission, but does not impose an obligation to do so. The Court dismissed all Appeals, and declined to grant the Costs of the Appeal to either party.

BARATH V SCHLOSS, 2015 ABQB 332 (LEE J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendants applied to dismiss the Action for delay, pursuant to Rules 4.31 and 4.33. The presiding Master dismissed the Action for long delay, and the Plaintiffs appealed.

Justice Lee discussed the delay (approximately five years) and considered Rule 4.33. The Plaintiffs argued that the Defendants acquiesced to the delay by not bringing their Application on a timely basis and, as such, the exception in

4.33(1)(d) applied. The Plaintiffs also argued that because a step had been taken, albeit after a long delay, prior to the Defendants bringing their Application that the Defendants could no longer seek to dismiss for long delay. Justice Lee, however, noted that this interpretation of the Rule had been rejected by the Alberta Court of Appeal. His Lordship found there was a gap of over five years where nothing was done to advance the Action in a meaningful way, and stated that there was no active acquiescence, that the Defendants did not agree to the delays, and determined that the Action had been properly dismissed by the Master pursuant to Rule 4.33.

Lee J. also considered the Defendants' alternative argument for dismissal: that there was an undue delay which resulted in significant prejudice, with the result that the Action should be dismissed pursuant to Rule 4.31. The Court found that the delay had undoubtedly compromised "the availability and the quality of evidence from various contractors who are significant witnesses in this litigation. At least one of the principals of one of the significant contractors has died".

Justice Lee decided that in, addition to the Defendants having grounds to dismiss the Action pursuant to Rule 4.33, the Action ought to also be dismissed pursuant to 4.31 as a result of an undue delay which was inordinate and inexcusable, and which also resulted in significant prejudice. As a result, the Appeal was dismissed with Costs.

STEPARYK V ALBERTA, 2015 ABCA 125 (ROWBOTHAM, O'FERRALL AND WAKELING JJA)
Rules 4.31 (Application to Deal With Delay), 4.33 (Dismissal for Long Delay), 15.4 (Dismissal for Long Delay: Bridging Provision), 15.6 (Resolution of Difficulty or Doubt) and 15.15 (Coming into Force)

The Crown applied to the Court of Queen's Bench to dismiss the Plaintiff's Action for long delay and inordinate delay, pursuant to Rules 4.31 and 4.33. At the time the Application was filed, Rule 15.4 was still in force as the bridging provision for Rule 4.33. The Chamber's Judge granted the Application, and held that the five-year period set out in Rule 15.4(1) applied instead of the three-year period in Rule 4.33(1). By operation of Rule 15.15(3), the bridging provision remained in effect until October 31, 2013. The Plaintiff appealed.

The Court of Appeal held that Rule 15.4 governed the Application, as the Rule stated "on application", and the Crown had filed the Application when it was in force. Any Application brought within the time of the bridging provision continued to be governed by Rule 15.4, even if adjudication took place after Rule 15.4 was repealed. The Court held this determination was justified by Rule 15.6(b), a provision which allows the Court to make modifications of any Rule for transitional purposes.

The last significant step to advance the Action was service of the Crown's Affidavit of Records, which occurred more than 5 years prior to the Crown's Application. The Court of Appeal held that the Plaintiff's Application for Advance Costs, which remained unresolved, did not significantly advance the Action. This was a step to protect funding, not a step to move the litigation along. Further, the Court of Appeal held that none of the exceptions set out in Rule 15.4(2) applied, and therefore the Chamber's Judge was correct in dismissing the Action for long delay. The Plaintiff's Appeal was dismissed.

KENT V MARTIN, 2015 ABQB 315 (TILLEMAN J)
Rules 5.1 (Purpose of this Part) and 5.2 (When Something is Relevant and Material)

In a defamation Action, the Plaintiff sought disclosure of various emails between high level officials at the CBC.

Justice Tilleman reviewed recent appellate authorities as to when a document is producible under Rule 5.2. Justice Tilleman noted that relevance is primarily determined by the Pleadings, whereas materiality relates to whether the information can directly or indirectly help to prove a fact in issue. The first step is to review the Pleadings and assess whether a record is relevant, and then assess its materiality.

Tilleman J. went on to note that material records are records that would significantly help the examining party prove their case. His Lordship went on to quote *Kaddoura v Hanson*, 2015 ABCA 154 noting that when trying to establish that

a record would "significantly help", the Applicant need not demonstrate conclusively that the evidence would be of assistance; rather, they only need to show a "plausible line of argument". A "remote and unlikely line of analysis" will not require production of a relevant record.

Justice Tilleman also noted that an initial motion Court need not determine at the production stage if a record would ultimately be admissible at Trial. The emails were ordered to be produced.

KADDOURA V HANSON, 2015 ABCA 154 (MARTIN AND SLATTER JJA AND YAMAUCHI J (AD HOC))
Rules 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records), 5.8 (Records for Which There is an Objection to Produce), 5.11 (Order for Record to be Produced), 5.13 (Obtaining Records From Others), 5.25 (Appropriate Questions and Objections) and 5.33 (Confidentiality and Use of Information)

The Plaintiffs in a mortgage fraud Action sued the real estate transaction lawyers for their part in the alleged fraud. The Plaintiffs demanded that the lawyers disclose and produce files which were not related to the Action, but involved some of the same parties. A Master and Queen's Bench Justice both ordered that the disputed documents must be disclosed by the lawyers, but not that they be produced. The Plaintiffs appealed. The two main issues on Appeal were whether collateral client files were "relevant and material"; and whether those collateral client files were under the "control" of the lawyers.

The Court of Appeal surveyed authorities relating to records that illuminate similar fact evidence at the production stage of the litigation under Rule 5.2, noting that the Respondents need only show a "plausible line of argument" to compel production. The Court of Appeal went on to note that the production standard of "secondary" or "tertiary" relevance is not helpful when determining whether records relating to circumstantial or similar fact evidence ought to be produced. Further, it is no answer to a disclosure request that the same information could potentially be obtained from some public registry.

The lawyers argued that the mere listing of client files in an Affidavit of Records was a breach of privilege, and that the records were third party documents which should be produced using the processes in Rule 5.13. The Court of Appeal noted that the Rules made a distinction between disclosure and production. Records must be disclosed under Rule 5.6, and Rule 5.6(2)(b) mandates disclosure of all records, even if there is a valid basis to deny their ultimate production. Rule 5.8 provides that if a party objects to production, the records must still be identified and disclosed. Rule 5.11(1)(b) then permits the Court to rule on any Claim of privilege before the record is actually produced. The Court of Appeal also noted that the Master's Order provided for anonymous listings to protect the identities of the clients. The Court of Appeal commented further that Rule 5.33 exists to protect any concerns in regard to the confidentiality of lawyer's files; the implied undertaking rule exists for this exact purpose.

When assessing "control" of the records, the Court of Appeal noted that control has a wide meaning under the *Rules of Court* and extends far beyond mere legal ownership. Control can extend to a multitude of parties all at the same time. The lawyers argued that the ownership of a lawyer's file rests with the client and not a lawyer. The Court of Appeal noted that the physical file at all times remains in "control" of the lawyer, regardless of proper ownership. If a client ultimately wished to object to the production of his or her file in litigation involving their lawyer, the objection ought to be brought forward and decided at the production stage of the process, not the disclosure stage. The Court of Appeal dismissed the Appeal and upheld the Master's Order for disclosure of the records.

HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 378 (MACLEOD J)
Rules 5.3 (Modification or Waiver of This Part), 5.5 (Producible Records) and 5.17 (People Who May be Questioned)

The Plaintiff served the Defendants with Appointments for Questioning on an Affidavit of Records, and Appointments for Questioning under Part 5 of the Rules prior to the

Defendants' Application for Summary Dismissal of the Action. The Master set aside the Appointments for Questioning on the basis that a party should not be able to insist on the usual production of documents and Questioning prior to the hearing of a Summary Judgment Application. The Plaintiff appealed.

Justice Macleod observed that an Application for Summary Judgment or Summary Dismissal may be brought prior to completing pre-Trial steps. His Lordship considered whether the obligations or powers under Part 5 of the Rules are stayed or held in abeyance pending the Application. Rule 5.5 makes production of an Affidavit of Records mandatory and Rule 5.17 grants the right to question a party. Only Rule 5.3 grants the Court the ability to modify or waive these rights and obligations. The Rule also sets out the grounds which would warrant modification of the Rules in Part 5, such as acting in a manner that is abusive or improper. No other Rules suspend the operation of Part 5 in the face of a Summary Judgment Application. Macleod J. acknowledged that certain circumstances may make it appropriate to suspend the rights and obligations under Part 5, but to do so without any analysis is contrary to the meaning of Rule 5.3. The Court "before attenuating those powers must engage in some sort of cost benefit analysis".

In the circumstances, the evidence and factual underpinnings of the Plaintiff's case were within the Defendants' knowledge and possession. Therefore, the request to question the Defendants and review the content of the Affidavit of Records was not unreasonable. The Appeals were granted.

CDM DIRECT MAIL V THE CENTRE FOR IMMIGRATION POLICY REFORMS, 2015 ABCA 168 (PAPERNY, MARTIN AND MCDONALD JJA)
Rules 5.4 (Appointment of Corporate Representatives), 5.17 (People Who May be Questioned), 5.29 (Acknowledgment of Corporate Witness's Evidence), 5.31 (Use of Transcript and Answers to Written Questions) and 14.75 (Disposing of Appeals)

The Plaintiff, CDM Direct Mail (CDM), sued the Centre for Immigration Policy Reform (CIPR) for an unpaid invoice totalling $111,242. At Trial, CIPR's counsel objected to the read-in of the transcript of one of CIPR's officers, Ms. Kopala. The question on Appeal was whether the Chambers Judge correctly interpreted the Rules related to using the transcripts of corporate representatives.

The Court of Appeal noted that Rules 5.4 and 5.17(1)(b) allow pre-Trial Questioning of adverse parties; where that party is a corporation, they may question an officer who has relevant and material information and the corporate representative chosen by the corporation. CIPR chose Mr. Jurshevshi as its corporate representative. CPM questioned both Mr. Jurshevshi and Ms. Kopala. The Court stated that, while Rule 5.31 permits the Plaintiff to use the transcript of an adverse party, Rule 5.29 restricts a corporate witness' transcript from being read-in unless the corporate representative acknowledges it. Although corporate employees may be examined, that evidence cannot be read in at Trial unless those statements are admitted or adopted by the corporate representative. As the corporate representative was never asked to adopt the transcript of Ms. Kopala, the transcript could not be read in.

Although the Chambers Judge made a clear error in allowing the read-in of Ms. Kopala's Questioning transcript, Rule 14.75(2) allows a Court to dismiss an Appeal where no substantial wrong or miscarriage of justice has resulted or where the Decision would have been the same despite the error. The Court held that the result would have been the same even without the inadmissible evidence and dismissed the Appeal.

RVB MANAGEMENTS LTD V ROCKY MOUNTAIN HOUSE (TOWN), 2015 ABCA 188 (BERGER, VELDHUIS AND BROWN JJA)
Rules 5.5 (When Affidavit of Records Must be Served) and 5.6 (Form and Contents of Affidavit of Records)

The Plaintiffs claimed against the Defendant Town on that basis that they caused storm water run-off to flow over the Plaintiffs' land, causing damage to the soil and the natural watercourse. The Town disclosed documents by way of a Supplementary Affidavit of Records on four separate occasions, one of which was near the end of Trial. The Trial

Judge held that the delay in producing the documents did not ultimately prejudice the Plaintiffs and the Plaintiffs appealed. The Plaintiffs argued that Rules 5.5 and 5.6 required that the Town disclose documents that were in their "possession, custody or power" much earlier than they did. The Court of Appeal held that it was unnecessary to perform an analysis of the ownership of and access to those documents because the Plaintiffs did not "address whether these records were material such that they [were] the type of records which should have been included in the documents produced". The Appeal was dismissed.

UNIVERSITY OF CALGARY V JR, 2015 ABCA 118 (ROWBOTHAM, BIELBY AND BROWN JJA)
Rule 5.11 (Order for Record to be Produced)

The complainant, J.R., sought access to certain documents pursuant to the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25. The University complied in part, but asserted that some of the documents were protected under solicitor client privilege. J.R. was also a Plaintiff in a separate Claim claiming wrongful dismissal against the University. J.R. asked the Privacy Commissioner to review the University's response, and a delegate of the Privacy Commissioner issued a notice to produce certain records so that the Commissioner could review them for solicitor-client privilege. The University of Calgary sought Judicial Review of the Privacy Commissioner's Decision to issue the production notice, which Application was dismissed by the Court of Queen's Bench. The University appealed.

The Appeal was allowed. The Court noted, with respect to Costs, that the underlying wrongful dismissal litigation concluded three years ago, and if an objection to the solicitor-client privilege had been made at the time of the litigation (which it was not), the validity of such assertions could and should have been fully and completely assessed under the comprehensive procedure set out in Rule 5.11 of the Rules of Court. Costs were thus assessed against the Commissioner.

MILAVSKY V MILAVSKY, 2015 ABQB 395 (MAHONEY J)
Rules 6.6 (Response and Reply to Application), 6.11 (Evidence at Application Hearings), 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff commenced a divorce and matrimonial property Action, and subsequently filed a separate Action for unjust enrichment seeking the imposition of a constructive trust, alleging that the Defendants had conveyed the matrimonial residence to a trust in 1992 for the purpose of defeating any claims that arose from the matrimonial relationship between the Plaintiff and her former spouse. The Defendants applied for Summary Dismissal of the Plaintiff's claims.

Justice Mahoney noted that Rule 7.3(1)(b) allows Defendants to apply for Summary Dismissal if there is no merit to a claim or part of it. In *Hryniak v Mauldin*, 2014 SCC 7, the Supreme Court of Canada revised the test for Summary Judgment from whether the case presents "a genuine issue for trial" to whether there is "a genuine issue requiring a trial". The Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, held that 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) it is a proportionate, more expeditious and less expensive means to achieve a just result. Justice Mahoney observed that the Court must therefore determine if there is any issue of merit that genuinely requires a Trial, or if a disposition that is fair and just to both parties can be made based on the Court's consideration of the existing record. On a Summary Judgment Application, the parties are required to put their best case forward. The Court is to presume that the evidence that has been presented is the best evidence the parties can "muster".

The Defendants argued that the Plaintiff's earlier filed Affidavits were inadmissible as evidence on the Summary Judgment Motion because she did not indicate that she

would be relying on them. Justice Mahoney reviewed Rules 6.6(1) and (3), and Rule 6.11(1) and stated that, while Applicants for Summary Judgment must satisfy the requirements in Rule 7.2, 7.3 and 13.18(1), the Rules are silent as to the obligation of Respondents. Justice Mahoney noted that the purpose of the procedural Rules is to provide a means by which Claims can be resolved in a timely and cost-effective way. Justice Mahoney held that the previous Affidavits were admissible because the Defendants were well aware of their existence and their contents. Further, the Defendants had a Case Management Judge to whom they could complain.

Justice Mahoney commented that concerns about the number of witnesses, the volume of material and the complexity of the legal issues should not regularly be used to thwart an effective mechanism for the early disposal of cases that lack genuine issues requiring a Trial. Justice Mahoney held, however, that this was not a suitable case for Summary Judgment, because the evidence showed that material facts and the credibility of key witnesses were in serious dispute. Further, there were genuine issues of law which could only be answered in the context of a Trial. Accordingly, the Application for Summary Dismissal was denied.

NOUSHIN V ADESA AUCTIONS CANADA CORPORATION, 2015 ABQB 411 (MASTER ROBERTSON)
Rules 6.6 (Response and Reply to Application), 7.3 (Summary Judgment), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 13.18 (Types of Affidavit)

The Plaintiff shipped several vehicles to the Defendant for sale at auction, and commenced an Action when the Defendant failed or refused to pay the proceeds of the sales to the Plaintiff. Adesa Auctions counterclaimed against Noushin and other related persons claiming that they were involved in a scheme to roll back the vehicles' odometers which resulted in damages to Adesa Auctions. Noushin and the other Defendants by Counterclaim were noted in default, and they applied to set it aside. Adesa Auctions cross-applied for Summary Judgment.

Master Robertson noted that the Court must look closely at the record in order to determine if a fair and just decision can be made on the existing record. Master Robertson considered an Affidavit filed by one of the Defendants by Counterclaim which made self-serving and unsupported assertions about the vehicle's odometers. Master Robertson noted that the Affidavit was filed four days after Adesa Auctions' brief for the Summary Judgment Application which was not a "reasonable time" for the purposes of Rule 6.6(1) or Practice Note 2. Master Robertson stated that a "self-serving general denial of wrong-doing is not sufficient" to oppose a Summary Judgment Application. The Respondent in a Summary Judgment Application must put their "best foot forward" to show why Summary Judgment should not be granted.

Some of Adesa Auction's Affidavit evidence was hearsay which did not satisfy the requirements for Rules 7.3 or 13.18(3). However, Master Robertson held that the balance of Adesa Auction's evidence met the "business records" hearsay exception, so there was no question about the records' veracity. Master Robertson concluded that the evidence, read together, presented a "very clear picture" of Noushin' s actions, and those of the other Defendants by Counterclaim. Accordingly, the Application for Summary Judgment was granted against all but two of the Defendants by Counterclaim, and the Cross-Application to set aside the Noting in Default was dismissed.

KRAMER'S TECHNICAL SERVICES INC V ECO-INDUSTRIAL BUSINESS PARK INC, 2015 ABQB 383 (VEIT J)
Rules 6.40 (Appointment of Court Expert), 6.41 (Instructions or Questions to Court Expert), 6.44 (Persons Who Are Referees), 6.45 (References to Referee), 6.46 (Referee's Report) and 8.4 (Trial Date: Scheduled by Court Clerk)

The Parties were involved in disputes concerning agreements relating to a large industrial site in northeast Edmonton. In earlier proceedings, the Court had determined that the Defendant was entitled to terminate certain agreements with the Plaintiff and to have damages assessed by a Referee. The parties were unable to agree on

a specialist Referee or even a competing list of potential specialist Referees from which the Court could choose. Justice Veit noted that Referees are dealt with under Rules 6.44-6.46. Her Ladyship observed that, while the Court can make determinations about some types of assistance in the absence of consent by the parties, for example Rules 6.40(1)(3) and 6.41(2) with respect to Court appointed Experts, Rule 6.44(d) is categorical: consent of the parties is required to appoint a specialized Referee.

In the absence of consent from all parties, only a Court Clerk or a Master could be appointed as a Referee. It was likely that Expert opinions would be required with respect to the kind and the cost of the work to be undertaken on the industrial site, which could give rise to credibility issues. Veit J. held that there was no benefit to the parties or to the justice system to have the assessment of damages made by a Master acting as Referee. Instead, the Defendant's Claim for damages would be tried in Court, and the parties were directed to file a Form 37 indicating their readiness for Trial.

ALBERTA RESIDENTIAL CORPORATION V CERTAIN LLOYDS UNDERWRITERS, 2015 ABCA 195 (BERGER, MCDONALD AND BROWN JJA)
Rule 7.1 (Application to Resolve Particular Questions or Issues)

The dispute related to an insurance contract between the parties in which the Appellant insurer was alleging that the Insurance Policy did not provide coverage for property located within the undecorated interior surfaces of the floors, walls and ceilings of the units in a shared condominium complex. As this was the only issue under dispute, the parties agreed to have it tried on an Agreed Statement of Facts in Special Chambers, pursuant to Rule 7.1. The Justice in Chambers held that the insurance policy did in fact cover property located within the condominium units. The Appellant argued, *inter alia*, that the Justice in Chambers erred in refusing to consider the condominium by-laws which, according to the Appellant, had been inadvertently excluded from the Agreed Statement of Facts. Brown J.A., on behalf of the Court, held that the Order setting the matter down for hearing under Rule 7.1 restricted the evidence to the Agreed Statement of Facts and the exhibits attached thereto. The Justice in Chambers therefore did not err in refusing to consider evidence which was not part of the Agreed Statement of Facts. The Appeal was dismissed.

ROYAL BANK OF CANADA V BENCHMARK REAL ESTATE APPRAISALS LTD, 2015 ABQB 288 (PARK J)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

Two Actions were brought before a Master with respect to issues arising out of one mortgage transaction, wherein the Plaintiff bank argued that it would never have granted the mortgage but for an alleged fraudulent scheme. The Defendants in one Action, the appraisers and the lawyer, moved for Summary Dismissal under Rules 7.2 and 7.3. The Defendant mortgagor in the related Action also brought a Summary Dismissal Application which was heard at the same time. Both Applications were dismissed by the Master and all Defendants appealed.

The Defendants argued the Master erred primarily on points of law, including that the Master considered authorities dealing with the incorrect statutory provision, and also erred by failing to answer a question posed in their Applications about the effect of a final Order for foreclosure on damages.

Justice Park held that the Master correctly applied the law in relation to the relevant statutory provision and correctly considered the various defences to the claim. At the very least, the alleged fraud was an issue that demanded a Trial. Park J. also held that there was no error with respect to the question posed about the effect of a final Order for foreclosure: the issues in the Plaintiff's claim and issues in the foreclosure Action were distinct. The Appeals were dismissed.

TWOGEE DEVELOPMENTS LTD V FELGER FARMING CO LTD, 2015 ABQB 210 (CAMPBELL J)
Rule 7.3 (Summary Judgment)

The parties disagreed whether a road was a public highway and, as such, should be maintained by one of the Defendants, the County of Lethbridge. The Plaintiffs were

farmers that used the road to access part of their land with farm equipment. They relied on an agreement between the County and previous owners of the land, which granted the County an easement along the road. The Defendants brought an Application for Summary Dismissal, arguing that the Plaintiffs' claim had no merit. The Plaintiffs cross-applied for Summary Judgment, and argued that the existing evidence established their case. The parties agreed that the facts were not in issue, but disagreed over how the law applied to the facts.

The Court reviewed the current state of the law on Summary Judgment and confirmed that the Court may grant Summary Dismissal or Summary Judgment where, on the existing record, a disposition is fair and just to both parties. Granting Summary Judgment is suitable where the "moving party" establishes that there is no merit to the other party's position. The Court must evaluate whether there is any issue of merit that genuinely requires a Trial, or whether the Claim or Defence is "so compelling that the likelihood it will succeed is very high such that it should be determined summarily". Justice Campbell noted that it would be inappropriate to grant Summary Judgment where the Court must weigh the evidence.

Campbell J. then reviewed the evidence pertaining to the road, and found that there was enough to make a fair disposition. The Court held that a proper review of the evidence supported the conclusion that the road was not a public highway. The Action was summarily dismissed.

SEMCAMS ULC V BLAZE ENERGY LTD, 2015 ABQB 218 (STREKAF J)
Rule 7.3 (Summary Judgment)

The Plaintiff brought an Action against the Defendant for unpaid invoices relating to gas transportation and processing agreements, and sought Summary Judgment. The Defendant filed a Counterclaim against the Plaintiff. The Defendant opposed the Summary Judgment Application, arguing that a Trial was necessary to determine what, if any, amounts were owed because of the existence of accounting errors, overcharges, and possible set-off. The issue before the Court was whether the Plaintiff was entitled to Summary Judgment for the amount it had invoiced to the Defendant, subject to potential later adjustments, or whether Judgment could only be granted once the amount was determined at Trial.

The Court stated that a Plaintiff may apply for Summary Judgment under Rule 7.3 where there is no defence to a claim or part of it, or where the only real issue is the amount to be awarded. Justice Strekaf noted that, pursuant to the Alberta Court of Appeal's decision of *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, Rule 7.3 is to be interpreted broadly. 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".

Before considering the substantive Summary Judgment issue, Strekaf J. considered whether the Affidavits provided by the Plaintiff were sufficient to satisfy the evidentiary requirement in Rule 7.3(2). Her Ladyship held that the Plaintiff's affiant, who was the Plaintiff's manager of production revenue accounting, was sufficiently well informed and qualified to provide the evidence contained in his Affidavits. Justice Strekaf noted that it has been recognized in Alberta that a corporate representative need not be personally involved in the transactions in question in order to provide evidence on a Summary Judgment Application.

Strekaf J. observed that this case was not typical to a Summary Judgment Application arising from most commercial agreements. Typically, in order for a Plaintiff to collect on an unpaid account, they must satisfy the Court that the amounts are owing under the agreement, not that they have simply been billed. The Court commented that it is unusual for a party to be able to obtain Summary Judgment on the basis of amounts billed, subject to later adjustments. However, given the contractual language used by the parties in this case, Justice Strekaf held that the Plaintiff was entitled to partial Summary Judgment for the amount billed, plus interest and minus adjustments and set-off amounts. The Defendant was entitled to pursue an audit and Counterclaim to establish any adjustments.

CALLAN V LORRNEL CONSULTING GROUP LTD, 2015 ABQB 287 (MASTER SCHULZ)
Rule 7.3 (Summary Judgment)

The Defendant applied for Summary Dismissal of the Plaintiff's claim on the basis that it was statute barred by virtue of the *Limitations Act*, RSA 2000, c L-12. The issue of whether the Statement of Claim had been filed within the applicable limitation period turned on when a gravel quarry had been built. There was conflicting and unclear evidence before the Court as to who had built the gravel quarry and when the gravel quarry had been built.

With respect to the test for Summary Judgment under Rule 7.3, Master Schulz cited the test set out in *Windsor v Canadian Pacific Railway*, 2014 ABCA 108: whether there is any issue of "merit" that genuinely requires a Trial; or conversely, whether the Claim or Defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily. The Court further noted that the questions to be answered on a Summary Judgment Application are: (a) can a disposition be made that is fair and just to both parties on the existing record; and (b) In light of what a fair and just process reveals, is there merit to the Claim?

Master Schulz was not confident that a disposition that was fair and reasonable to both parties could be made in light of evidence before the Court. Accordingly, Master Schulz held that this matter was not suitable for summary disposition and, as such, dismissed the Defendant's Application.

FLINT V IRON WILL INNOVATIONS CANADA INC, 2015 ABQB 310 (BROWNE J)
Rule 7.3 (Summary Judgment)

The Plaintiff brought an Application for Summary Judgment against his former employer, seeking a contractual retirement allowance arising from his alleged constructive dismissal. The Plaintiff claimed to be entitled to a retirement allowance pursuant to the terms of his written employment contract with the Defendant.

With respect to the principles underlying Summary Judgment, Justice Browne stated that the test for Summary Judgment is whether it is fair and just to both parties to rely on the existing record for adjudication of the matter, rather than Trial. Her Ladyship noted that the key was whether the circumstances required *viva voce* evidence in order to properly resolve the case. Browne J. also observed that the Court must look at whether there is any issue of "merit" that genuinely requires a Trial, or conversely, whether the Claim or Defence is so compelling that the likelihood that it will succeed is so high that it should be determined summarily. After reviewing the facts of the case, Browne J. was unable to find that the Plaintiff was entitled to a retirement allowance pursuant to the terms of his employment agreement. Accordingly, the Summary Judgment Application was dismissed.

MACKEY V SQUAIR, 2015 ABQB 329 (TOPOLNISKI J)
Rule 7.3 (Summary Judgment)

In an Action which arose from two fires that occurred 16 days apart from one another, the Third Party Defendants sought Summary Dismissal of the Claim and Third Party Notices issued against them. The first fire started from a truck that was parked in a freshly-harvested area of a field; it was extinguished by fire fighters. High winds caused the second fire to erupt from remnants of the first fire. The second fire travelled to an adjacent farm and caused significant property damage.

Justice Topolniski noted that Rule 7.3 permits a party to apply for Summary Judgment on all or part of a claim where there is no merit to a claim or part of it, or the only real issue is quantum. Topolniski J. noted the cultural shift mandated by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, and Alberta Court of Appeal in *Windsor v Canada Pacific Railway Ltd*, 2014 ABCA 108, Topolniski J. stated that there are three criteria which must be met pursuant to Rule 7.3 so that Summary Judgment may be ordered: the Summary Judgment Application must: (i) allows the Judge to make the necessary findings of fact; (ii) allows the Judge to apply the law to the facts; and (iii) be a proportionate, more expeditious and less expensive means to achieve a just result. Rule 7.3(2) provides that

the Application must be supported by an Affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

All Claims against the Defendant Dale Squair were unmeritorious and dismissed, and all Claims against the Defendant Durwin Squair concerning alleged negligence for failing to monitor the first fire were dismissed. The balance of the issues could not be decided by a summary proceeding and so had to proceed to Trial.

RAI V 1294477 ALBERTA LTD (VINYL RETRO DANCE LOUNGE), 2015 ABQB 349 (MASTER SCHLOSSER)
Rule 7.3 (Summary Judgment)

The Plaintiff was stabbed at the Defendant's establishment. He sued the Defendant for negligence, or breach of duties under the *Occupier's Liability Act* or of a commercial host to its patrons. The Defendant brought an Application for Summary Dismissal.

Master Schlosser stated that the common test in recent Summary Judgment cases is that there is "no issue of merit that genuinely requires a Trial" and the existing record allows for a fair and just determination on the merits. This change in wording from the prior test encapsulates that there "isn't an issue that requires forensic testing through the Trial procedure". Master Schlosser noted that Justices in Chambers have limited power to weigh evidence, evaluate credibility and draw inferences from Affidavits. Therefore, a legislative change is likely necessary before a Master is able to deal with conflicting Affidavit evidence that goes to a central issue, without consent of the parties.

Master Schlosser held that Summary Judgment performs two functions: (i) it is a gatekeeper to weed out unmeritorious claims or defences; and, (ii) it is available as a dispute resolution mechanism, or a legitimate alternative means for adjudicating and resolving legal disputes. However, these two functions appear to invite two standards. The gatekeeper function deprives a litigant of full participation in the civil legal process, and thus requires a high standard. This standard has been stated as having to convince the Court that the party's position is "unassailable" or "so compelling that the likelihood of success is very high". However, Master Schlosser stated that this is really a question of balancing the confidence that the Court has in being able to determine a result on the evidence before it, and the risk of that result being wrong. The second function, wherein the parties use Summary Judgment voluntarily as a dispute resolution, attracts the ordinary civil standard. The risk of a wrong result is very low because the facts are often clear and undisputed, and the issue may simply be a legal question.

The facts of this case revealed that: (i) numerous security cameras and security staff were present; (ii) the assailant was checked at the door and his ID was screened; (iii) the security staff had been trained in accordance with the applicable standards; and (iv) the surveillance video depicted a spontaneous attack. As such, the Court held that the Defendant's position was unassailable on the existing record: the Defendant did not fall short of the applicable standard of care. The Action was therefore dismissed.

BUSHELL TRANSPORT COMPANY LTD V NOV ENERFLOW ULC, 2015 ABQB 350 (MASTER BREITKREUZ)
Rule 7.3 (Summary Judgment)

An intermediary freight forwarder arranged for the Plaintiff carrier to haul certain equipment from Alberta to Washington for the Defendant shipper. The Defendant paid the intermediary but not the Plaintiff. The Plaintiff claimed against the Defendant for the hauling services and brought this Application for Summary Judgment.

Master Breitkreuz reviewed Rule 7.3 to determine whether the Plaintiff was entitled to Summary Judgment noting that, where a Plaintiff proceeds on the basis that there is no defence to its Claim, it is entitled to Summary Judgment if it presents uncontroverted facts and law which establish all the essential elements of the Action. Even if the Defendant does not contest the facts and the law, the facts and law presented by the Plaintiff must make its position unassailable. If a fact is the subject of a credibility contest, Summary Judgment may not be granted. A Defendant cannot rely on possible evidence that may eventually

result from Questioning or Trial. While the Defendant on an Application for Summary Judgment takes a risk in producing no evidence, the onus remains on the Plaintiff to establish all the essential elements of the Action. Master Breitkreuz found that the Plaintiff had not done so here. Accordingly, the facts and law presented by the Plaintiff at this stage of the litigation did not make its position unassailable, and the Application for Summary Judgment was dismissed.

ROHIT LAND INC V CAMBRIAN STRATHCONA PROPERTIES CORP, 2015 ABQB 375 (THOMAS J)
Rule 7.3 (Summary Judgment)

The Plaintiffs sought Summary Judgment of part of their Claim against the Defendants; specifically, the Claims in respect of an easement registered by one of the Defendants against lands in which the Plaintiffs had an interest. The Defendants cross-applied for Summary Dismissal of the Claims as against them.

Thomas J. remarked that, in determining whether to grant an Application for Summary Judgment, Courts must consider whether a Claim (or Defence) has merit. The concept of merit is linked to the concept of a "genuine issue for trial". His Lordship further noted that there is no obligation to hear oral evidence when a Chambers Judge can make a fair and just determination on the merits of an Application. Finally, Justice Thomas noted that, while a Chambers Judge cannot weigh conflicting evidence, Summary Judgment nonetheless remains available in the face of evidence that clashes if Judgment can be granted on the facts set out by the non-moving party.

Justice Thomas reviewed the evidence relevant to the Plaintiffs' Summary Judgment Application in detail and determined that the portion of the Plaintiffs' Claim against the Defendants dealing with the Easement could be dealt with by way of Summary Judgment. The Court found there was no merit to the Defendants' Defence with respect to the easement, and no genuine issue for which a Trial was necessary. The Plaintiffs' Summary Judgment Application was granted, and the Defendants' Cross-Application for Summary Dismissal was denied.

UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2015 ABQB 380 (MASTER BREITKREUZ)
Rule 7.3 (Summary Judgment)

The Defendants agreed to underpin and stabilize the foundation of an apartment building before selling it to the Plaintiff. A number of years later, the Plaintiff discovered that the work done by the Defendants was ineffective, causing movement in the foundation; the Plaintiffs sued. The Defendants applied for Summary Dismissal of the Claim pursuant to Rule 7.3 on the grounds that the Action was barred under the *Limitations Act*, RSA 2000, c L-12, and that there was no privity of contract as between the Plaintiff and Defendants. Master Breitkreuz held that the limitation period was suspended while the deficiency of the Defendant's work was fraudulently concealed. Master Breitkreuz held that the limitations Defence and the privity of contract Defence were not genuinely arguable Defences. The Application for Summary Dismissal was therefore dismissed.

AMACK V WISHEWAN, 2015 ABCA 147 (FRASER CJA, WATSON JA AND VEIT J (AD HOC))
Rule 7.3 (Summary Judgment)

The Defendant applied for Summary Judgment on the basis that the Plaintiff's claims were statute-barred under section 3 of the *Limitations Act RSA 2000, c L-12*. There were a number of overlapping claims between the parties relating to derivative actions and improper management of various corporations. The limitations argument was rejected and the Summary Judgment Application was dismissed. The Defendant appealed.

The Court of Appeal reviewed the law relating to Summary Judgment citing *Hryniak v Mauldin*, 2014 SCC 7, *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 and *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49. The Court of Appeal noted that a court may grant Summary Judgment to a Defendant when there is "no merit" to a Claim. The Court of Appeal also observed that, despite the recent changes to the Summary Judgment standard since *Hryniak*, a Court must still consider whether there is "no

genuine issue for trial". The Court of Appeal also went on to note that there will be no genuine issue for Trial where a Judge is able to reach a fair and just determination on the merits in a motion for Summary Judgment. This will be possible only where the process allows a Judge to make the necessary findings of fact, apply the law to the facts and where the process is "proportionate" and a more expeditious and a less expensive means to achieve a just result.

The Court of Appeal also surveyed the applicable standard of review from a Summary Judgment decision. The Court of Appeal noted that the decision whether to grant or deny Summary Judgment ought to be afforded deference. Accordingly, the standard of review for determinations of fact, the application of the law to those facts and the ultimate decision to grant or deny Summary Judgment is all reviewed for "palpable and overriding error".

The Appeal was dismissed, as the limitations question remained a live issue requiring a Trial.

ABBEY LANE HOMES V CHEEMA, 2015 ABCA 173 (PICARD, ROWBOTHAM AND O'FERRALL JJA)
Rule 7.3 (Summary Judgment)

The Defendants each executed written contracts with the Plaintiff homebuilder for the purchase of unbuilt condominium units. Each paid a deposit but neither transaction closed, with the result that the Plaintiff home builder sued each of the Defendants in separate Actions. The Defendants defended and issued Counterclaims. Their Applications for Summary Dismissal of the Actions and for Summary Judgment of the Counterclaims were dismissed. The Defendants appealed.

The Court of Appeal noted that, in an Application for Summary Dismissal, the Applicant has the evidentiary burden of showing that there is no genuine issue of material fact requiring Trial. The Court stated that there will be no genuine issue requiring a Trial when the Judge is able to reach a fair and just determination on the merits. 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. The Court noted that this law still applies in Alberta, despite the fact that Rule 7.3(1) now requires an Applicant to demonstrate that there is no merit to a claim or defence.

The Court observed that the burden was on the Defendants to advance enough evidence in support of their Applications to allow the Chambers Judge to make the necessary findings of fact. A review of the facts recited by the Chambers Judge indicated that the Appellants did not meet their onus. The Chambers Judge therefore did not make a palpable and overriding error of fact by finding insufficient evidence available to make a fair and just determination on the merits. In the result, the Appeal was dismissed.

SOLIS V WORKERS' COMPENSATION BOARD (MILLARD HEALTH), 2015 ABCA 227 (BERGER, BIELBY AND BROWN JJA)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiffs' Action was summarily dismissed, and they appealed. The Action related to losses suffered by a group of individuals as a result of a fraudulent Ponzi scheme perpetrated by an employee of the Workers' Compensation Board ("WCB"). One of the grounds of Appeal advanced by the Plaintiffs was that the Chambers Judge erred in considering the Affidavits of the WCB director because they were not sworn on the basis of personal knowledge, contrary to Rule 13.18(3). The Court of Appeal rejected this argument as having no merit: the portions of the Affidavits which the Chambers Judge relied on were not disputed.

The Court of Appeal referred to the test for Summary Judgment set out in *WP v Alberta*, 2014 ABCA 404: Summary Judgment may be granted where no issue of merit genuinely requires a Trial. The Court ultimately held that the Chamber Judge's Decision was not unreasonable; accordingly, the Appeal was dismissed.

PARADIGM QUEST INC V MCLEOD, 2015 ABQB 212 (MASTER SCHULZ)
Rules 9.35 (Checking Calculations: Assessment of Costs and Corrections) and 10.44 (Appeal To Judge)

The Plaintiff in a foreclosure matter first obtained a Redemption Order and submitted a related Bill of Costs which was assessed and filed. A Supplemental Bill of Costs was submitted at the end of the foreclosure process pursuant to the Order Confirming Sale and Vesting Title ("Vesting Order"). The Vesting Order awarded Costs on a solicitor and client basis; however, the Assessment Officer questioned certain fees and expenses on the Bills of Costs. The Plaintiff applied to review and settle Costs, or for further directions pursuant to Rule 9.35(4).

Master Schulz confirmed that an "Order" referred to in Rule 9.35(4) includes the determination of the Assessment Officer, together with the subsequent filing of the Bill of Costs. The normal practice is to file one Bill of Costs at the end of the Action. Since the first Bill of Costs was filed with the Redemption Order, Master Schulz could only address issues arising out of the second unfiled Supplemental Bill of Costs for the Vesting Order. Master Schulz noted that the Bill of Costs for the Redemption Order should have been appealed pursuant to Rule 10.44.

The foreclosure Application only requested "costs of this Action". Master Schulz stated that the general rule is that a party is only entitled to what it asks for in the Application, but due to representations of Plaintiff's counsel, the Vesting Order awarded solicitor and client Costs. Master Schulz held this was appropriate, particularly given that the Vesting Order is a final Order which can only be changed in limited circumstances.

Master Schulz stated that counsel should ensure proper evidence is before the Assessment Officer or Court, including evidence of payment or the client's undertaking to pay. The Assessment Officer had rejected a disbursement for a skip tracer under the first Bill of Costs for the Redemption Order. The Plaintiff then included this disbursement on the Bill of Costs for the Vesting Order. Master Schulz held that: (i) the explanation for this disbursement given by the Plaintiff was sufficient; and, (ii) claiming this disbursement was not an attempt to circumvent an appeal under Rule 10.44 with respect to the first Bill of Costs. All other disbursements were allowed as claimed.

ALBERTA TREASURY BRANCHES V ETHIER, 2015 ABQB 389 (MASTER SCHLOSSER)
Rules 9.35 (Checking Calculations: Assessment of Costs and Corrections) and 10.26 (Appeal to Judge)

The Plaintiff applied for a review of an Assessment Officer's decision in respect of Costs in a foreclosure Action. The mortgage allowed for Costs on a full indemnity basis, and the Order which confirmed the Sale and Vesting of Title awarded Costs on a "solicitor and client basis". The Bill of Costs sought recovery of both legal fees and disbursements and was accompanied by a copy of the proposed fee guideline generated by the Calgary Bar. The Assessment Officer stated that the proposed fee guideline was "a Calgary practice not followed by Edmonton" and awarded $4,500.00 in fees. The Plaintiff sought a review of this Assessment under Rule 9.35(4), filing a supporting Affidavit which acknowledged that the bill would be fully paid as rendered.

Master Schlosser stated that reviewing a Bill of Costs involves applying the ten principles as set out in *Alberta Treasury Branches v 14010507 Alberta Ltd (Katch 22)*, 2013 ABQB 748, noting that the starting point is for the Courts to recognize and give full effect to the Order granting Costs, whether the Court's review is based on Rule 10.26 or Rule 9.35(4). In most instances, the Order will mirror the lending document. Master Schlosser observed, however, that neither an Order nor lending document will shield a Costs Claim from review.

In this instance the lending document was more generous to the lender than were the terms of the Order. Master Schlosser held that, despite the Bill of Costs being outside of the usual range, there was nothing in the case at bar which would disqualify any of the steps taken by the Plaintiff's solicitor nor their time spent. Master Schlosser observed that "it is the market which prevails not some

abstract notion of what a hypothetical reasonable solicitor would bill a client for a routine foreclosure". The Bill of Costs was allowed as submitted.

HERITAGE LAW OFFICES V BABICHUK, 2015 ABQB 321 (LEE J)
Rule 10.5 (Retainer Agreements)

The Defendants retained the Plaintiff law office to assist in administering their late father's Estate and to obtain a Grant of Probate. The Defendants refused to pay the final account totalling $13,240.00, and had this account reviewed. At the review hearing, the legal fees of $13,240.00 were reduced to $600.00, plus disbursements. The law office appealed.

The Court noted that a Review Officer's Decision is entitled to curial deference, and noted that the Taxation Officer's function is a specialized one which requires experience and expertise. The Court noted that deference, however, is not absolute.

The Plaintiff law office submitted that Rule 10.5 embodied the basic principle that a Court must hold the parties to promises in any Retainer Agreement absent a compelling reason not to do so. Lee J. did not comment whether this interpretation was correct, however, his Lordship found that the Retainer Agreement in question was not clear with respect to how fees were to be calculated. The Court noted that, in order for the Appeal to succeed, the Plaintiff law office must demonstrate that the Review Officer made a clearly erroneous factual determination as to the Retainer Agreement. Given the conclusion that the Retainer Agreement was unclear, Justice Lee held that the Review Officer did not rely on any incorrect principles or make any erroneous factual determinations in the award. Lee J. concluded that the award was reasonable in the circumstances and should not be interfered with.

Accordingly, the Appeal was dismissed and Costs were awarded to the Defendants.

CIBC MORTGAGES INC (FIRSTLINE MORTGAGES) V TUCHSEN, 2015 ABQB 241 (NIELSEN J)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.17 (Review Officer's Authority) and 10.26 (Appeal to Judge)

CIBC was the mortgagee pursuant to mortgages entered into with the Defendants in three separate Actions. CIBC commenced Foreclosure Proceedings in each Action and ultimately sought to include an Order for Costs on a full indemnity basis, based on the terms of the contract. CIBC was permitted to recover "reasonable" Costs on a full indemnity basis. CIBC appealed the three Decisions of the Master, and in particular, the use of the word "reasonable".

Nielsen J. found that each of the mortgages in issue in the Appeals contained a clause that stated that the mortgagor would pay CIBC's legal fees on a full indemnity basis if they defaulted. The Court further stated that it was doubtful whether the Master had jurisdiction in relation to Costs in the face of a contractual term regarding Costs. The Court noted that in any event, all Costs were being sought subject to assessment by a Review Officer pursuant to the Alberta *Rules of Court*, and cited Rules 10.9 and 10.17(1)(f). Any Appeal therefrom is then to a Judge of the Court of Queen's Bench pursuant to Rule 10.26. The Court concluded that there was no basis for the Master to insert the word "reasonable", and the Appeal was allowed.

HAIG V WHITMORE, 2015 ABQB 267 (YAMAUCHI J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Applicant, Whitmore, argued, in a family law proceeding, that Costs should not be awarded against him because the Respondent's counsel did not negotiate a settlement in good faith, and because of the unnecessary complexity that resulted from an *ex parte* Application that was made by the Respondent.

Yamauchi J. cited Rule 10.29(2) regarding Applications heard without notice to a party, and found it clear that the Costs of the *ex parte* Application should be in the cause.

The Respondent had proved her case in the *ex parte* Application, and the Applicant was subsequently given the opportunity to present his case to the Court. Yamauchi J. commented that the general rule concerning Costs is contained in Rules 10.29(1), 10.31 and 10.33. These Rules contain substantive portions of the former Rule 601. Yamauchi J. noted that party and party Costs is the starting point for establishing the quantum; those Costs are set out in Schedule C to the Rules. The Rules themselves do not, however, say that courts are duty-bound to award Costs based only on Schedule C. The Rules give courts much wider discretion. Yamauchi J. examined the amounts claimed by the Respondent and awarded party and party costs for various steps taken in relation to the matter, based on Column 1 of Schedule C.

LUM V ALBERTA DENTAL ASSOCIATION AND COLLEGE, 2015 ABQB 276 (GRAESSER J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

Dr. Lum applied for Judicial Review of the Alberta Dental Association and College Registrar's Decision refusing his registration in Alberta. Dr. Lum's Application was dismissed, and Graesser J. directed that Costs could be spoken to if not agreed between the parties. The Registrar applied for Costs on the basis of triple Column 1 of Schedule C to the Rules. Justice Graesser stated that the default position under Rule 10.29(1) is that the successful party is entitled to Costs following the event. Where no monetary amount is sought, the appropriate level of Costs is Column 1 of Schedule C. The Court has a wide discretion to award "reasonable and proper" Costs in the amount it considers appropriate, as provided for by Rule 10.33(1). In the result, Graesser J. found that the context of the Judicial Review Application warranted an award of double Column 1 of Schedule C, plus disbursements. In addition, the Registrar was awarded $500.00 for the Costs Application.

EDWARDS V RESORT VILLA MANAGEMENT LTD, 2015 ABQB 424 (MOREAU J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs sought an adjournment of their Trial on May 29, 2015, which was denied. The Plaintiffs then discharged their counsel. Their new counsel applied for an adjournment on June 1, 2015, which was also dismissed. The Plaintiffs subsequently withdrew their Claim and the Defendants sought indemnity Costs.

Justice Moreau considered Rules 10.31, 10.33 and prior leading authority relating to indemnity and solicitor-client costs, noting that solicitor-client costs are a departure from the standard award of partial indemnity or party-party Costs; they are rare and exceptional. Justice Moreau noted that solicitor-client Costs awards are necessarily punitive in nature. They are awarded to condemn malicious, oppressive or high-handed misconduct. Justice Moreau noted that the amount claimed and the amount recovered ought to be considered when assessing a Costs award. Further, the Court must assess the conduct within the Action and not the conduct that gave rise to the Action.

Justice Moreau held that elevated Costs were appropriate in the circumstances, but that indemnity costs of $300,000 for a $34,000 claim would not be an appropriate remedy, despite counsel withdrawing their claim on the eve of Trial. The conduct complained of was not egregious or reprehensible. Justice Moreau awarded the Defendants Costs based on Schedule C, Column 1 for the steps leading to Trial and for one half day of Trial, as well as Costs associated with two unsuccessful adjournment Applications and the preparation of Briefs. Moreau J. also considered thrown-away Costs, noting that these Costs included only the "disbursements and reasonable fees for work that has been rendered useless" as a result of an adjournment. Thrown-away Costs were awarded for Trial preparation, but a discount was applied because the Defendants received compensation under their successful Counterclaim.

BOYD V JBS FOODS CANADA INC, 2015 ABCA 191 (FRASER, CÔTÉ AND WAKELING JJA)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff, Boyd, unsuccessfully applied to summarily dismiss the Defendant, JBS Foods' Appeal. As a result, JBS Foods applied for enhanced Costs against the Boyd. Boyd argued that party-party Costs on the lowest column of Schedule C should apply.

The Court of Appeal held that there were no exceptional circumstances to award full-indemnity Costs, but that the lowest column of party-party Costs was too low. The Court noted that Schedule C Costs only govern Assessment Officers, and a Judge or Master need not use it at all. Specifically, Rules 10.31(3) and 10.33(1)(c) permit a Judge to consider what is indirectly in issue, and issue Costs accordingly. Court of Appeal Costs are based on what is in issue under Appeal, not on the value of the particular issue under Appeal.

The Court agreed with Boyd that Costs would not normally be enhanced just because the losing party had advanced a proposition for which no authority could be found. However, Applications to dismiss an Appeal summarily are rare and successful Applications are even rarer: they are usually based on an obvious flaw, such as appealing in the wrong Court or without the necessary permission. Further, the Court of Appeal does not generally encourage such Applications because they rarely save time or money. In this case, Boyd's Application essentially doubled the total work of JBS Foods, since the Motion entailed almost all the work and procedures of a full Appeal. The Court of Appeal also noted that Schedule C Costs for Applications are modest and have not been altered to reflect that more Applications have been transferred to a Judge alone as opposed to a panel of three Judges. The Court held that, while there was no serious misconduct, the Application to summarily dismiss the Appeal was unfounded to some degree. Increased Costs were therefore appropriate in the circumstances.

HORST TYSON DAHLEM PROFESSIONAL CORPORATION V JOHN F SCHNEIDER PROFESSIONAL CORPORATION (CANMORE LEGAL SERVICES), 2015 ABQB 413 (MILLAR J)
Rule 10.39 (Reference to Court)

The Plaintiff commenced two Actions against the Defendant for debt and fraudulent preference. An Order for Costs was awarded in the fraudulent preference Action, and the Costs were assessed. Pursuant to Rule 10.39, the Assessment Officer referred several issues to the Court with respect to how the Costs Order should be interpreted and applied. Justice Millar stated that Rule 10.39 allows an Assessment Officer to direct any questions relating to the assessment of Costs to the Court for a Decision or Direction. Millar J. considered each of the referred issues: Costs of steps taken by other parties, apportionment of Costs, and an attachment Order, and directed the matter to be returned to the Assessment Officer.

ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC V AMEC AMERICAS LIMITED, 2015 ABCA 206 (SLATTER JA)
Rules 13.4 (Counting Months and Years), 14.5 (Appeals Only with Permission), 14.8 (Filing a Notice of Appeal) and 14.16 (Filing the Appeal Record – Standard Appeals)

The Applicant, Attila Dogan Construction and Installation Co Inc ("Attila Dogan"), sought an extension of time to appeal a Decision in which their Application to adjourn was dismissed, and the Respondent, AMEC Americas Limited, was granted summary dismissal of the Claim as against them, and Summary Judgment of their Counterclaim. Slatter J.A. noted that the time to appeal a Decision under Rule 14.8 is one month. Pursuant to Rule 13.4, a month is calculated from the numerical date in one month to the numerical date in the next month to maintain consistency regardless of the number of days in the month. The Applicant had filed their Appeal two days late, and sought an extension of the time to Appeal when they realized their error.

Justice Slatter noted that the test for granting an extension of time is guided by four factors. A Court will consider: (1) whether there was a *bona fide* intention to Appeal while the

right to Appeal existed; (2) an explanation or justification for the lateness; (3) an absence of serious prejudice such that it would not be unjust to disturb the judgment; and (4) the Applicant must not have taken the benefits of the judgment under Appeal. Finally, a Court may also assess if there is a reasonable chance of success on the Appeal.

Slatter J.A. stated that the Applicant only missed the deadline by two days and there was no prejudice. Accordingly, a two day extension was granted. His Lordship directed that the Appeal Record and Transcripts be filed with the Clerk promptly pursuant to Rule 14.16.

BUN V SENG, 2015 ABCA 165 (PICARD JA)
Rule 14.5 (Appeals Only With Permission)

The self-represented Plaintiff, Bun, commenced a Claim that alleged irregularities in the financial records of the Defendant, the Cambodian Canadian Friendship Society of Edmonton and Areas, and requested further information. The Plaintiff was not satisfied by the materials he received and sought the assistance of the Court. A Case Management meeting was scheduled, but the Plaintiff did not file an Application or a supporting Affidavit in advance of the Case Management meeting and the Case Management Justice ordered him to pay the Costs of the appearance. The Plaintiff sought to appeal the Costs awarded against him.

Justice Picard observed that Rule 14.5(1)(e) requires a party to obtain permission to appeal a Decision as to Costs only. The case law is clear that permission to appeal Costs Orders should be granted sparingly, and the party seeking permission to appeal such an award must meet a high threshold. The Court of Appeal has held that it is appropriate to rely on the test for permission to appeal a Costs award that was established under the former appellate Rules. That test requires an Applicant to demonstrate: (i) a good arguable case having sufficient merit to warrant scrutiny by this Court; (ii) issues of importance to the parties and in general; (iii) that the Costs Appeal has practical utility; and (iv) no delay in proceedings caused by the Costs Appeal.

Given the high degree of deference owed to Costs awards and the facts of the case, the Plaintiff had not demonstrated a good arguable case of sufficient merit and the first step of the test was not satisfied. The Plaintiff did not demonstrate any general importance, and the Appeal would not have had any practical utility because no issues were raised that would allow the Court of Appeal to provide direction on the law with respect to Costs. Picard J.A. declined to grant permission to Appeal.

WAYMARKER MANAGEMENT (SILVER CREEK) INC V TIBU, 2015 ABCA 140 (O'FERRALL JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant and the Respondents had competing Claims against each other. The Claims were scheduled to be resolved at Trial in the Court of Queen's Bench. The Applicant did not attend the Trial, and the Respondents obtained a Judgment in her absence. The Judgment consisted of damages and a Restraining Order against the Applicant in addition to dismissal of the Applicant's claims. The Applicant subsequently applied to the Court of Queen's Bench for reconsideration of the earlier Judgment against her, submitting that she was not able to attend Trial for medical reasons. The Court of Queen's Bench dismissed that Application, and ordered Costs against the Applicant.

The Applicant sought permission to appeal all aspects of the Queen's Bench Decisions against her. Justice O'Ferrall stated that the only aspect of the Applicant's Appeal that required leave under Rule 14.5 was the award of damages against the Applicant and the dismissal of her Claim for damages, both of which had values under $25,000. Justice O'Ferrall held that nothing in either Appeal involved "a matter of law of sufficient importance to the legal system or the public to justify granting permission to appeals." The Appeal relating to the Restraining Order was not a matter that required permission under Rule 14.5. Similarly, with reference to Rule 14.5(1)(e), the Appeal relating to Costs was related to substantive Decisions that were also being appealed. Therefore, it did not constitute an Appeal of "costs alone," and did not require permission of the Court to be appealed.

O'Ferrall J.A. declined to grant permission for the Applicant to appeal the portion of the Decisions on damages. The Applicant was allowed to appeal the rest of the Decisions. The parties agreed, and the Court ordered, that if any of the matters went to an Appeal, the Appeals should be consolidated.

CARBONE V WHIDDEN, 2015 ABCA 177 (CÔTÉ JA)
Rule 14.5 (Appeals Only With Permission)

The Plaintiff sought permission to appeal from Justice Côté's prior Decision and to be heard by a Panel of the Court of Appeal. Côté J.A. stated that the Plaintiff's Application was an attempt to re-litigate issues that had already been decided. Justice Côté explained that permission to Appeal from one Appeal Court Judge to a Panel of three should only be granted where the topic is one of legal jurisdiction or policy which is important to the public, the Courts, or to counsel. Further:

> For the last 100 years or so, appeals have not been heard afresh on the merits, as though there had been no previous decision. That is just as true of appeals from one appeal court judge as it is of appeals from trial court judges. Indeed, sometimes more so, for example when the question is timing or logistics, which is a considerable part of the present application. In particular, the appeal court hearing the appeal does not merely substitute its own opinion, save on questions of jurisdiction, law, or principle. It gives some deference to the decision appealed from. Often it does not ask whether that decision is correct, but rather whether it is reasonable.

Additionally, Côté J.A. observed that permission to Appeal is required by the Rules because, *inter alia*, the timing of multiple Appeals on the same Action may result in the main Appeal being decided long before the new Appeal could be heard, and the new Appeal "would become academic". Justice Côté denied the Plaintiff's Application for permission to Appeal.

ROCKS V IAN SAVAGE PROFESSIONAL CORPORATION, 2015 ABCA 193 (O'FERRALL JA)
Rule 14.5 (Appeals Only With Permission)

The Plaintiff applied to have the legal account of the Defendant professional corporation reviewed. A Review Officer concluded that the Plaintiff was bound by his retainer agreement with the Defendant and certified the account of $4,200.00 as being payable.

The Plaintiff appealed the Review Officer's Decision to the Court of Queen's Bench. However, the Court of Queen's Bench Justice reviewing that Decision found no error in it and dismissed the Plaintiff's Appeal. The Plaintiff then applied to the Court of Queen's Bench for permission to Appeal the Queen's Bench Justice's Decision to the Court of Appeal. The Queen's Bench Justice hearing the matter dismissed the Plaintiff's Application on the basis that, at that point in time, the Justice no longer had jurisdiction to grant permission to Appeal. The Plaintiff then applied to the Court of Appeal for permission to Appeal the Court of Queen's Bench Decision upholding the Review Officer's Decision. That Application was heard by Justice O'Ferrall, and was denied. Shortly thereafter, the Plaintiff filed the present Application seeking to Appeal the Justice O'Ferrall's Decision denying him permission to Appeal.

Justice O'Ferrall noted that Rule 14.5(3) of the Alberta Rules of Court provides that no Appeal is allowed from a Decision of a single Appeal Judge where that Decision was one denying permission to Appeal. Therefore, the Application was denied, there being no jurisdiction to grant it.

ERDMANN V INSTITUTE OF CHARTERED ACCOUNTANTS OF ALBERTA (COMPLAINTS INQUIRY COMMITTEE), 2015 ABCA 138 (WATSON JA)
Rules 14.37 (Single Appeal Judges) and 14.38 (Court of Appeal Panels)

The Appellant, Erdmann, sought leave to amend her Notice of Appeal to include a Constitutional challenge. The Appellant was not just seeking to expand on the document filed, but the actual scope of the argument of the Appeal

to include additional issues. Justice Watson noted that the role of a single Judge on a Court of Appeal motion is set out in Rules 14.37 and 14.38.

Upon review of the documents attached to the Notice of Appeal, Watson J.A. stated that the content suggested that the Appellant raised a variety of issues, not all of which were separately set out as grounds in her Notice of Appeal. The Constitutional challenge which the Appellant sought to include contained various unsworn allegations of fact, including assertions about the history of proceedings. It became apparent during the Appellant's oral argument that the substance of her Constitutional challenge was that the Respondent violated the *Regulated Accounting Profession Act*, RSA 2000, c R-12, and the requirements of due and fair process. The Appellant was not actually challenging the constitutionality of any part of the legislation. The Application was therefore dismissed.

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