JSS BARRISTERS

RULES

OCTOBER 2015

Jensen Shawa Solomon Duguid Hawkes LLP

Volume 1 Issue 19

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

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

1.2	• EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425 • MALTON V ATTIA, 2015 ABQB 430 • URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438 • READ V LIBERTY MORTGAGE SERVICES LTD, 2015 ABQB 448 • SIMPSON V CANADA (ATTORNEY GENERAL), 2015 ABQB 451 • HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459 • PANASIUK V LECLERCQ, 2015 ABQB 464 • DIXON V CANADA (ATTORNEY GENERAL), 2015 ABQB 565 • PROVALCID INC V GRAFF, 2015 ABQB 574
1.4	• ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC V AMEC AMERICAS LIMITED (AMEC E&C SERVICES LIMITED AND AGRA MONENCO INC), 2015 ABQB 429 • DAWSON V DAWSON, 2015 ABQB 449 • QUINNEY V 1075398 ALBERTA LTD, 2015 ABQB 452
1.5	• PHOENIX LAND VENTURES LTD V FIC REAL ESTATE FUND LTD, 2015 ABCA 245
1.7	• EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425

2.7	• KOHLER V APOTEX INC, 2015 ABQB 610
2.9	• KOHLER V APOTEX INC, 2015 ABQB 610
2.10	• KOHLER V APOTEX INC, 2015 ABQB 610
2.12	• PADGET ESTATE (RE), 2015 ABQB 515
2.13	• PADGET ESTATE (RE), 2015 ABQB 515
2.22	• R FLODEN SERVICES LTD V SOLOMON, 2015 ABQB 450

3.5	• ABOU-MORAD V ABOUMOURAD, 2015 ABQB 584
3.15	• PETER LEHMANN WINES LTD V VINTAGE WEST WINE MARKETING INC, 2015 ABQB 481 • RACZYNSKA V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 494 • RUHL V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 513
3.45	• WHITECOURT POWER LIMITED PARTNERSHIP V ELLIOTT TURBOMACHINERY CANADA INC, 2015 ABCA 252
3.58	• FIELD, FIELD & FIELD ARCHITECTURE-ENGINEERING LTD V TEMPO CONSTRUCTION (2000) LTD, 2015 ABQB 471

3.59	• FIELD, FIELD & FIELD ARCHITECTURE-ENGINEERING LTD V TEMPO CONSTRUCTION (2000) LTD, 2015 ABQB 471
3.62	• PROVALCID INC V GRAFF, 2015 ABQB 574
	• KOHLER V APOTEX INC, 2015 ABQB 610
3.65	• GOLDHART V WESTLAKE DEVELOPMENTS INC, 2015 ABQB 543
	• PROVALCID INC V GRAFF, 2015 ABQB 574
3.68	• 926 CAPITAL CORP V PETRO RIVER OIL CORP, 2015 ABQB 431
	• HILL V HILL, 2015 ABQB 436
	• KENT V POSTMEDIA NETWORK INC, 2015 ABQB 461
	• JEC ENTERPRISES INC V CALGARY (CITY), 2015 ABQB 555
	• DIXON V CANADA (ATTORNEY GENERAL), 2015 ABQB 565
3.74	• WALTON DEVELOPMENT AND MANAGEMENT INC V OSMAN AUCTION INC, 2015 ABCA 298
3.75	• RACZYNSKA V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 494
3.76	• RACZYNSKA V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 494

4.2	• ABOU-MORAD V ABOUMOURAD, 2015 ABQB 584
4.4	• SIMPSON V CANADA (ATTORNEY GENERAL), 2015 ABQB 451
4.22	• PADGET ESTATE (RE), 2015 ABQB 515
4.29	• LEE V BOYD, 2015 ABQB 426
	• KCM V BTM, 2015 ABQB 502
	• BRANSON V BRANSON, 2015 ABQB 602
	• CARBONE V WHIDDEN, 2015 ABCA 255
4.31	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
	• DAWSON V DAWSON, 2015 ABQB 449
	• SIMPSON V CANADA (ATTORNEY GENERAL), 2015 ABQB 451
	• FOREST RESOURCE IMPROVEMENT ASSOCIATION OF ALBERTA V MOORE, 2015 ABQB 588
	• M L BRUCE HOLDINGS INC V CECO DEVELOPMENTS LTD, 2015 ABQB 604
4.33	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
	• SIMPSON V CANADA (ATTORNEY GENERAL), 2015 ABQB 451
	• WEIR-JONES TECHNICAL SERVICES INCORPORATED V PUROLATOR COURIER LTD, 2015 ABQB 468
	• FIELD, FIELD & FIELD ARCHITECTURE-ENGINEERING LTD V TEMPO CONSTRUCTION (2000) LTD, 2015 ABQB 471
	• KERR V MCDONALD & BYCHKOWSKI LTD (CMB INSURANCE BROKERS), 2015 ABQB 473
	• FOREST RESOURCE IMPROVEMENT ASSOCIATION OF ALBERTA V MOORE, 2015 ABQB 588
	• M L BRUCE HOLDINGS INC V CECO DEVELOPMENTS LTD, 2015 ABQB 604
	• ALLEN V ALBERTA (SENIORS AND COMMUNITY SUPPORTS), 2015 ABCA 238
4.36	• KOHLER V APOTEX INC, 2015 ABQB 610

5.1	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
5.2	• READ V LIBERTY MORTGAGE SERVICES LTD, 2015 ABQB 448
	• SOUTHFORT DEVELOPMENT CORPORATION V 1491888 ALBERTA LTD, 2015 ABQB 457
	• HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459
	• DEMB V VALHALLA GROUP LTD, 2015 ABQB 618

5.3	• GOODSWIMMER V CANADA (ATTORNEY GENERAL), 2015 ABCA 253
5.5	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
	• HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459
	• FIELD, FIELD & FIELD ARCHITECTURE-ENGINEERING LTD V TEMPO CONSTRUCTION (2000) LTD, 2015 ABQB 471
	• DEMB V VALHALLA GROUP LTD, 2015 ABQB 618
5.6	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
	• HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459
	• PADGET ESTATE (RE), 2015 ABQB 515
	• FLOATE V GAS PLUS INC, 2015 ABQB 545
5.7	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
	• PADGET ESTATE (RE), 2015 ABQB 515
	• DEMB V VALHALLA GROUP LTD, 2015 ABQB 618
5.8	• PADGET ESTATE (RE), 2015 ABQB 515
5.9	• MALTON V ATTIA, 2015 ABQB 430
	• DEMB V VALHALLA GROUP LTD, 2015 ABQB 618
5.10	• MALTON V ATTIA, 2015 ABQB 430
	• DEMB V VALHALLA GROUP LTD, 2015 ABQB 618
5.12	• MALTON V ATTIA, 2015 ABQB 430
5.14	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
5.16	• URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438
5.33	• HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459
	• FLOATE V GAS PLUS INC, 2015 ABQB 545
5.34	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249
5.35	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249
5.36	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249
5.37	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249
5.38	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249
5.39	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249
5.40	• KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249

6.7	• SUTHERLAND V DORSEY, 2015 ABQB 477
6.10	• ABOU-MORAD V ABOUMOURAD, 2015 ABQB 584
6.11	• HARI V BARIANA, 2015 ABQB 605
6.14	• QUINNEY V 1075398 ALBERTA LTD, 2015 ABQB 452
	• SOUTHFORT DEVELOPMENT CORPORATION V 1491888 ALBERTA LTD, 2015 ABQB 457
	• SHALLOW GAS DRILLING CORP V LEGACY OIL & GAS INC, 2015 ABQB 606
	• TORONTO DOMINION BANK V DEMICHELE, 2015 ABQB 607
	• DBD CONSTRUCTION LTD V TENFOLD CONTRACTING LTD, 2015 ABCA 303
6.21	• DAWSON V DAWSON, 2015 ABQB 449
6.25	• R FLODEN SERVICES LTD V SOLOMON, 2015 ABQB 450

6.37	• PERRON V HLUSHKO, 2015 ABQB 595

7.1	• MALTON V ATTIA, 2015 ABQB 430
7.3	• 926 CAPITAL CORP V PETRO RIVER OIL CORP, 2015 ABQB 431
	• PRECISION DRILLING CANADA LIMITED PARTNERSHIP V YANGARRA RESOURCES LTD, 2015 ABQB 433
	• DAWSON V DAWSON, 2015 ABQB 449
	• QUINNEY V 1075398 ALBERTA LTD, 2015 ABQB 452
	• KENT V POSTMEDIA NETWORK INC, 2015 ABQB 461
	• SUTHERLAND V DORSEY, 2015 ABQB 477
	• 681210 ALBERTA LTD V 1335422 ALBERTA LTD, 2015 ABQB 489
	• PADGET ESTATE (RE), 2015 ABQB 515
	• 1499925 ALBERTA LTD V NB DEVELOPMENTS LTD, 2015 ABQB 516
	• SHAMAC COUNTRY INNS LTD V SANDY'S OILFIELD HAULING LTD, 2015 ABQB 518
	• BAHRAMI V AGS FLEXITALLIC INC, 2015 ABQB 536
	• MICHAEL HANUSCHUK DRUGS LTD V KEITH, 2015 ABQB 537
	• JEC ENTERPRISES INC V CALGARY (CITY), 2015 ABQB 555
	• DIXON V CANADA (ATTORNEY GENERAL), 2015 ABQB 565
	• HORNER V DAVIDSON, 2015 ABQB 580
	• GIAMMARCO & CO (WESTERN) DIVISION LTD V TRL REAL ESTATE SYNDICATE (05) LTD, 2015 ABQB 587
	• FOREST RESOURCE IMPROVEMENT ASSOCIATION OF ALBERTA V MOORE, 2015 ABQB 588
	• HARI V BARIANA, 2015 ABQB 605
	• SHALLOW GAS DRILLING CORP V LEGACY OIL & GAS INC, 2015 ABQB 606
	• WHITECOURT POWER LIMITED PARTNERSHIP V ELLIOTT TURBOMACHINERY CANADA INC, 2015 ABCA 252
7.5	• JAGODNIK V OUDSHOORN, 2015 ABQB 456
	• PERRON V HLUSHKO, 2015 ABQB 595

8.4	• 1400467 ALBERTA LTD V ADDERLEY, 2015 ABQB 524

9.6	• PHOENIX LAND VENTURES LTD V FIC REAL ESTATE FUND LTD, 2015 ABCA 245
9.13	• SIMPSON V RONDEAU, 2015 ABCA 283
9.14	• DG V CANADA (CORRECTIONAL SERVICE), 2015 ABQB 539
9.15	• POLOMA INVESTMENTS LTD V YUEN, 2015 ABQB 598
9.35	• MICHAEL HANUSCHUK DRUGS LTD V KEITH, 2015 ABQB 537

10.2	• O'BRIEN V DE VILLARS JONES, 2015 ABQB 535
	• WILLIER V MCGURK, 2015 ABCA 299
10.3	• ALBERTA TREASURY BRANCHES V 14010507 ALBERTA LTD (KATCH 22), 2015 ABQB 548
10.9	• BORDEN LADNER GERVAIS LLP V CBI INVESTMENTS LTD, 2015 ABQB 442
	• MANUFACTURERS LIFE INSURANCE COMPANY V 423632 ALBERTA LTD, 2015 ABQB 566
10.10	• O'BRIEN V DE VILLARS JONES, 2015 ABQB 535
10.11	• BORDEN LADNER GERVAIS LLP V CBI INVESTMENTS LTD, 2015 ABQB 442
10.26	• WILLIER V MCGURK, 2015 ABCA 299

10.28
- ZYPHERUS HOLDINGS INC V DORAIS, 2015 ABQB 523

10.29
- EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425
- LEE V BOYD, 2015 ABQB 426
- MALTON V ATTIA, 2015 ABQB 430
- CARE VEST CAPITAL INC V 1336868 ALBERTA INC, 2015 ABQB 458
- ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL) V WILLIS 2015 ABQB 463
- KCM V BTM, 2015 ABQB 502
- DAVID V PREMIERE CANADIAN MORTGAGE CORPORATION, 2015 ABQB 505
- ZYPHERUS HOLDINGS INC V DORAIS, 2015 ABQB 523
- JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553
- MANUFACTURERS LIFE INSURANCE COMPANY V 423632 ALBERTA LTD, 2015 ABQB 566
- BRANSON V BRANSON, 2015 ABQB 602

10.30
- ALBERTA TREASURY BRANCHES V 14010507 ALBERTA LTD (KATCH 22), 2015 ABQB 548
- SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281

10.31
- EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425
- LEE V BOYD, 2015 ABQB 426
- MALTON V ATTIA, 2015 ABQB 430
- CARE VEST CAPITAL INC V 1336868 ALBERTA INC, 2015 ABQB 458
- ZYPHERUS HOLDINGS INC V DORAIS, 2015 ABQB 523
- ALBERTA TREASURY BRANCHES V 14010507 ALBERTA LTD (KATCH 22), 2015 ABQB 548
- MANUFACTURERS LIFE INSURANCE COMPANY V 423632 ALBERTA LTD, 2015 ABQB 566
- BRANSON V BRANSON, 2015 ABQB 602
- SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281
- RVB MANAGEMENTS LTD V ROCKY MOUNTAIN HOUSE (TOWN), 2015 ABCA 304

10.33
- EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425
- LEE V BOYD, 2015 ABQB 426
- CORNELSON V ALLIANCE PIPELINE LTD, 2015 ABQB 427
- MALTON V ATTIA, 2015 ABQB 430
- CARE VEST CAPITAL INC V 1336868 ALBERTA INC, 2015 ABQB 458
- KCM V BTM, 2015 ABQB 502
- ZYPHERUS HOLDINGS INC V DORAIS, 2015 ABQB 523
- JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553
- MANUFACTURERS LIFE INSURANCE COMPANY V 423632 ALBERTA LTD, 2015 ABQB 566
- BRANSON V BRANSON, 2015 ABQB 602
- SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281
- RVB MANAGEMENTS LTD V ROCKY MOUNTAIN HOUSE (TOWN), 2015 ABCA 304

10.34
- ALBERTA TREASURY BRANCHES V 14010507 ALBERTA LTD (KATCH 22), 2015 ABQB 548

10.36
- JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553

10.37
- JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553

10.38
- CIBC MORTGAGES INC V ULRICH, 2015 ABQB 445
- JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553

10.39	• CIBC MORTGAGES INC V ULRICH, 2015 ABQB 445
	• JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553
10.40	• JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553
10.41	• CIBC MORTGAGES INC V ULRICH, 2015 ABQB 445
	• JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553
	• RVB MANAGEMENTS LTD V ROCKY MOUNTAIN HOUSE (TOWN), 2015 ABCA 304
10.42	• PADGET ESTATE (RE), 2015 ABQB 515
10.49	• KCM V BTM, 2015 ABQB 502
10.50	• MALTON V ATTIA, 2015 ABQB 430
10.52	• DEMB V VALHALLA GROUP LTD, 2015 ABQB 618

11.25	• PAPPAS V BCE INC, 2015 ABQB 435
11.27	• PAPPAS V BCE INC, 2015 ABQB 435

12.36	• SCOTT V GLAZEBROOK, 2015 ABCA 235
	• ABOU-MORAD V ABOUMOURAD, 2015 ABQB 584
12.51	• PANASIUK V LECLERCQ, 2015 ABQB 464
12.60	• PANASIUK V LECLERCQ, 2015 ABQB 464

13.5	• RACZYNSKA V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 494
	• CARDINAL V AMISK HOUSING ASSOCIATION, 2015 ABQB 503
	• RUHL V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 513
	• O'BRIEN V DE VILLARS JONES, 2015 ABQB 535
	• TORONTO DOMINION BANK V DEMICHELE, 2015 ABQB 607
	• THE OWNERS: CONDOMINIUM PLAN NO 802 2845 V HAYMOUR, 2015 ABCA 234
	• SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281
13.6	• HORNER V DAVIDSON, 2015 ABQB 580
13.7	• PROVALCID INC V GRAFF, 2015 ABQB 574
	• HORNER V DAVIDSON, 2015 ABQB 580
13.18	• PADGET ESTATE (RE), 2015 ABQB 515
	• HARI V BARIANA, 2015 ABQB 605
13.25	• HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459

14.2	• SCOTT V GLAZEBROOK, 2015 ABCA 235
14.5	• SCHULTE V ALBERTA (APPEALS COMMISSION FOR WORKERS' COMPENSATION BOARD), 2015 ABCA 268
	• MILLER V DEVINE, 2015 ABCA 269
	• WILLIER V MCGURK, 2015 ABCA 299
14.8	• PANASIUK V LECLERCQ, 2015 ABQB 464
	• PHOENIX LAND VENTURES LTD V FIC REAL ESTATE FUND LTD, 2015 ABCA 245
14.16	• CORNELSON V ALLIANCE PIPELINE LTD, 2015 ABCA 272
14.18	• CORNELSON V ALLIANCE PIPELINE LTD, 2015 ABCA 272

14.23	• THE OWNERS: CONDOMINIUM PLAN NO 802 2845 V HAYMOUR, 2015 ABCA 234
	• ALLEN V ALBERTA (SENIORS AND COMMUNITY SUPPORTS), 2015 ABCA 238
14.38	• RO V DF, 2015 ABCA 267
14.47	• THE OWNERS: CONDOMINIUM PLAN NO 802 2845 V HAYMOUR, 2015 ABCA 234
14.48	• HILL V HILL, 2015 ABCA 260
	• DBD CONSTRUCTION LTD V TENFOLD CONTRACTING LTD, 2015 ABCA 303
14.57	• WALTON DEVELOPMENT AND MANAGEMENT INC V OSMAN AUCTION INC, 2015 ABCA 298
14.65	• THE OWNERS: CONDOMINIUM PLAN NO 802 2845 V HAYMOUR, 2015 ABCA 234
	• ALLEN V ALBERTA (SENIORS AND COMMUNITY SUPPORTS), 2015 ABCA 238
14.67	• SCOTT V GLAZEBROOK, 2015 ABCA 235
14.88	• SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281
15.2	• PAPPAS V BCE INC, 2015 ABQB 435
15.16	• THE OWNERS: CONDOMINIUM PLAN NO 802 2845 V HAYMOUR, 2015 ABCA 234
Schedule C	• EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425
	• MALTON V ATTIA, 2015 ABQB 430
	• CARE VEST CAPITAL INC V 1336868 ALBERTA INC, 2015 ABQB 458
	• ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL) V WILLIS, 2015 ABQB 463
	• SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281
	• RVB MANAGEMENTS LTD V ROCKY MOUNTAIN HOUSE (TOWN), 2015 ABCA 304

EAD PROPERTY HOLDINGS (103) CORP V GREYHOUND CANADA TRANSPORTATION ULC, 2015 ABQB 425 (TOPOLNISKI J)
Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff corporation was unsuccessful in its bid for injunctive and declaratory relief against its tenant, the Defendant. The parties disagreed about Costs consequences. The Defendant, Greyhound, argued that $45,000.00 was within the 30-50% range of indemnification intended by Schedule C of the Rules of Court and wanted that amount payable immediately or, in the alternative, double Column 5 Costs for all steps taken after it made a Calderbank offer. The Plaintiff wanted Costs of the Application set at $2,500.00 to $5,000.00, based on Column 1 of Schedule C.

Topolniski J. stated that interpretation of the Rules requires a purposive and contextual approach pursuant to Rule 1.7. Foundational Rule 1.2 describes the purpose of the Rules as a means by which claims can be fairly and justly resolved in a timely and cost-effective way. The provisions dealing with Costs uphold the function of Rule 1.2(2)(e) and provide an effective, efficient and credible system of remedies and sanctions with which to enforce the Rules, Orders and Judgments. Rule 1.2 also obliges litigants to periodically evaluate dispute resolution alternatives with or without assistance from the Court. Justice Topolniski noted that, pursuant to Rules 10.29(1) and 10.31 Costs awards are discretionary. Further, Rule 10.33(1) describes the considerations in making a Costs award; it dovetails with Rule 1.2(4) which requires a proportionate remedy when the Court is called upon to exercise its discretion.

Topolniski J. awarded Costs under Column 5 of Schedule C, and double Column 5 Costs for all steps after Greyhound's Calderbank offer was made. The Plaintiff sought deferral

of payment of the Costs award until Greyhound delivered vacant possession of the leased premises on or before expiration of the lease. Topolniski observed that a successful party is entitled to its Costs at the time of the Judgment, and that Rule 10.29 requires an unsuccessful litigant to pay Costs forthwith. Accordingly, Topolniski J. ordered the Costs payable forthwith.

MALTON V ATTIA, 2015 ABQB 430 (MOEN J)
Rules 1.2 (Purpose and Intention of These Rules), 5.9 (Who Makes Affidavit of Records), 5.10 (Subsequent Disclosure of Records), 5.12 (Penalty For Not Serving Affidavit of Records), 7.1 (Application To Resolve Particular Questions or Issues), 10.29 (General Rule For Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations In Making Costs Award) and 10.50 (Costs Imposed On Lawyer) and Schedule C

The Plaintiffs were successful at Trial in a matter concerning the negligence of their lawyer, and they applied for Costs. The Plaintiffs had sued a number of Defendants, but the only Defendant who remained at the end of Trial was the lawyer. The Defendant lawyer argued that, because the Plaintiffs were self-represented for the majority of the proceedings, they should receive minimal Costs. Moen J. held that the Defendant's conduct throughout the Action was inconsistent with the guiding principles of Rule 1.2, and in breach of Rules 5.9-5.10 regarding reciprocal obligations of the parties for document disclosure.

Justice Moen first addressed what Costs were generally available to the Plaintiffs, noting that Rule 10.29(1) allows Costs for the successful party. Rule 10.31(5) explicitly permits a Court to order Costs to a self-represented litigant for an amount, or part of an amount, equivalent to the fees set out in Schedule C. Moen J. stated that the plain reading of this Rule means that a self-represented litigant is entitled to Schedule C costs for specific steps taken. For those activities where the Plaintiffs were represented by counsel, they are presumptively owed party and party Schedule C Costs. Rule 10.31(5) then applies to the remaining steps taken by the self-represented litigant. However, Justice Moen noted that the Court had a broad authority to award appropriate Costs for the circumstances, pursuant to Rule 10.31 and in light of the factors enumerated in Rule 10.33.

In the view of the Court, the Plaintiffs had conducted themselves appropriately: they had not wasted Court time or overly complicated the proceedings. Conversely, the Defendant had acted aggressively, failed to disclose relevant documents in his possession, conducted poor and incomplete research, failed to admit obvious liability, and attempted to cause litigation by installment by splitting the Trial to determine a preliminary issue. Justice Moen held that the split Trial was a serious abuse of Court process and warranted a strong Costs sanction. A split proceeding granted by Rule 7.1 is an unusual step and is normally brought where the preliminary issue is decisive of the matter. Upon Application by the Defendant, Justice Moen preliminarily determined that an expert lawyer was not needed at Trial. The Defendant appealed the Decision without leave of the Court, and without notifying Justice Moen in any way but then abandoned the Appeal. Justice Moen observed that the Defendant did not intend to use the Decision on the preliminary issue to settle the Action, but rather to stall the Trial and cause significant delay. Defendant's counsel had taken advantage of the fact that the Plaintiffs were self-represented.

Justice Moen considered Costs, and pursuant to Rule 5.12(1), imposed a penalty for the Defendant's breach of his Rule 5.10 obligations. The Plaintiffs were awarded twice item 3(1) of Schedule C. His Lordship further ordered second counsel fees for the work done by the second Plaintiff at Trial.

Ultimately, Justice Moen held that pursuant to Rule 10.31(5) the Schedule C "cap" does not restrict the Court's authority to make Costs awards for litigation misconduct outside the items addressed in Schedule C. Capping the Plaintiffs Costs award only to Schedule C amounts denies appropriate justice, invites an abuse of self-represented litigants, and trivializes the waste of judicial resources. The Plaintiffs were awarded full Schedule C Costs and full indemnification of Costs for the steps in the Action where they were represented by counsel. An additional lump sum payment in the amount of $20,000 was awarded for

the delay caused by splitting the Trial. The Plaintiffs were not awarded Costs to compensate for lost income during the Action since the lost opportunity to earn income via litigation is not identified as a policy basis for awarding Costs under Rule 10.31(5).

URSA VENTURES LTD V EDMONTON (CITY), 2015 ABQB 438 (PARK J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.1 (Purpose of Disclosure of Information), 5.5 (When Affidavit of Records Must be Served), 5.6 (Form and Content of Affidavit of Records), 5.7 (Producible Records), 5.14 (Inspection and Copying of Records) and 5.16 (Undisclosed Records Not to be Used Without Permission)

The Plaintiff commenced an Action by way of Statement of Claim on November 1, 2010. The Statement of Defence was filed November 24, 2010. The Plaintiff's Affidavit of Records was not delivered until October 30, 2013 in violation of Rule 5.5(2), which requires service of the Plaintiff's Affidavit of Records within three months of service of the Statement of Defence. Pursuant to Rule 5.6, the Affidavit of Records stated that the producible records could be inspected at the offices the Plaintiff's counsel. The Plaintiff failed to make and deliver copies of the producible documents as requested by the Defendant, and the Defendant's request to attend, inspect and copy the documents in accordance with Rule 5.14 was not accommodated. On February 12, 2014, counsel for the Defendant advised that they would apply for the dismissal of the Action for long delay under Rule 4.33 based on the three-year period of inactivity. Park J. noted that the Defendant failed to produce its Affidavit of Records at all, contrary to Rule 5.5(3); however, this was not a bar to bringing the Application.

Justice Park stated that the purpose of the new Rules was to foster access to justice by promoting timely and cost-effective litigation, particularly through the Rules regarding delay. This purpose is embodied in Rule 1.2, which must be employed as an analytical tool in interpreting and applying Rule 4.33.

The Defendant argued that, although the Plaintiff's Affidavit of Records was served within the three year period, it did not materially advance the Action. The Defendant contended further that the Affidavit of Records failed to comply with Rule 5.7(2) and did not sufficiently describe bundles of documents. Justice Park held that such an irregularity is a small transgression which is not a matter of concern in an Application under Rule 4.33.

The Defendant also asserted that the Affidavit of Records did not comply with the technical requirements of Rule 5.6(1)(b) which requires disclosure of all records which are relevant and material to the Action. Justice Park held that such a deficiency would only prejudice the Plaintiff in proving particular aspects of its Claim at Trial on account of Rule 5.16 which, *prima facie*, prevents undisclosed records from being produced at Trial. Furthermore, such an alleged deficiency was mere speculation and insufficient to support an Application under Rule 4.33. In the result, Justice Park held that the Plaintiff's Affidavit of Records complied with the disclosure requirements set out in Part 5 of the Rules, particularly, the technical requirements set out in Rule 5.6.

The Plaintiff's Affidavit of Records, being in compliance with the technical requirements under Rule 5.6, was sufficient to trigger Rule 5.1 which describes the substantive purpose of disclosure. The delivery of the Affidavit of Records, therefore, constituted a step that materially advanced the Action. The Defendant's Application under Rule 4.33 was dismissed.

READ V LIBERTY MORTGAGE SERVICES LTD, 2015 ABQB 448 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules) and 5.2 (When Something is Relevant and Material)

The Plaintiffs applied to compel the Defendants to provide Answers to Undertakings. The issue was whether the information sought was relevant and material to the issues in the Claim.

With respect to Rule 5.2, Master Robertson noted that in determining whether something is relevant and material the starting point is to consider the Pleadings. The Court

also noted that it is not just some aspect of the Pleadings in isolation, but rather all of the Pleadings. The question is whether the information sought could reasonably be expected to significantly help determine one or more of the issues raised in the Pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the Pleadings.

Master Robertson observed that the Court must be cautious not to allow the Applicant to go on a fishing expedition to find some evidence to support the allegations it is making. There must be some underlying factual foundation upon which the allegation is based. Master Robertson noted that the Court's role at this stage was to find the balance between information sought by the Plaintiffs, whether the inquiries are relevant and material, and to try to ensure that the information is properly available to the Trial Court.

The Court also addressed the issue of which Pleadings should be reviewed. The question was whether information should be provided based on the Pleadings that were in place when the Questioning was conducted, as they stood at the time of argument, or at the time of the Decision. The Court concluded that

> … if a particular request were not appropriate at the time of the questioning, but would be appropriate now based on the amended pleadings, the undertaking request should be answered. The difference in timing might be a consideration for costs.

Master Robertson considered the areas of inquiry at length and made determinations on each separate group of Undertaking requests.

SIMPSON V CANADA (ATTORNEY GENERAL), 2015 ABQB 451 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 4.4 (Standard Case Obligations), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant in a personal injury Action applied to dismiss the Claim for long delay under Rules 4.31 and 4.33. The parties agreed to a litigation plan in October 2013 and the issues in this Application concerned whether the litigation plan was a significant advance in the Action in order to re-start the three year clock under Rule 4.33.

Master Robertson noted that under Rule 4.31 the Court may dismiss a Claim if it determines that the delay has resulted in significant prejudice; when the Court finds that the delay is inordinate and inexcusable, the delay is presumed to have resulted in significant prejudice. Under the "drop dead" Rule, Rule 4.33, the test is whether three or more years has passed without a significant advance in the Action, in which case the Action must be dismissed. Master Robertson observed that the analysis of when delay is inordinate and inexcusable under Rule 4.31 must bear in mind the particular facts of the case, and Rule 1.2(2)(b) which states that the Rules "are intended to be used … to facilitate the quickest means of resolving a claim at the least expense". The onus to show that there is a credible excuse for delay lies upon the delaying party. Master Robertson observed that no excuse was given here. The subsidiary questions under Rule 4.31 then were whether the delay was inordinate, and whether by entering into the litigation plan the Defendant effectively "excused" prior delay. As to Rule 4.33, if the litigation plan itself did not significantly advance the Action, then there had clearly been a three year period during which the Action was not significantly advanced. The question was therefore whether the litigation plan itself significantly advanced the Action.

Master Robertson noted that entering into a litigation plan, where it is not ordered by the Court, is just "formalized" talk. It is only if the steps contemplated are actually done that the litigation plan takes on meaning. Otherwise, there would be no consequence to a procrastinating Plaintiff who agrees to a litigation plan, and then simply defaults. That would allow a Plaintiff to "buy" almost three years before another step would have to be taken, which is what happened in this Action. In contrast, where a litigation plan has been ordered by the Court under Rule 4.4(2), the party in default is then in violation of a Court Order. The granting of an Order setting dates is itself a step. Functionally, the litigation plan was used in this case as an instrument of delay. In the result, Master Robertson allowed the Application because three years had passed

without a significant advance in the Action and because the inference was clear after 14 ? years that there had been an inordinate and unjustified delay, with no evidence to rebut the presumption of prejudice.

HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2015 ABQB 459 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 5.2 (When Something is Relevant and Material), 5.5 (When Affidavit of Records Must be Served), 5.6 (Form and Contents of Affidavit of Records), 5.33 (Confidentiality and Use of Information) and 13.25 (Use of Filed Affidavits)

The Plaintiffs in an oppression action sought directions as to what was relevant and material for the purposes of record production and answering Undertakings. The Plaintiff sought production of various corporate records which the Defendant claimed were confidential business records. Only the Corporate Defendant had produced and served an Affidavit of Records. Master Robertson held that this did not satisfy Rule 5.5 which requires each party to provide their own Affidavit of Records. Further, Rule 5.6 provides that each party must disclose which records were previously under their control.

With regard to whether a question, record or information is relevant and material under Rule 5.2, Master Robertson stated the starting point is to look at the Pleadings considered in their entirety. The allegation must not only be raised in the Pleadings but also supported by some evidence that demonstrates some underlying factual foundation on which the allegation is based. The Defendant asserted that, because the Plaintiffs filed no evidence in support of this Application, they could not meet their evidentiary burden. Master Robertson held, however, that Rule 13.25 provides that any Affidavit may be used on an Application and that the transcript of a cross-examination on it may also be used. It was therefore proper for the Plaintiff to rely on the Defendant's Affidavit filed in support of its Summary Judgment Application for the purposes of the Application. It would be inconstant with Rule 1.2(1)(b) for an Applicant to have to file an Affidavit if the evidence is already before the Court.

With respect to the Defendant's assertion that the records which the Plaintiff sought were confidential business documents, Master Robertson held that claims to confidentiality are irrelevant to considering whether records or information are relevant and material for the purposes of Rule 5.2. Relevance and materiality involve concerns as to probative value, not confidentiality. In any event, confidentiality is not lost by production because of the operation of Rule 5.33 which states that records revealed in litigation are to be kept in confidence. The individual Defendants were each ordered to produce their own Affidavit of Records and the records sought by the Plaintiff were ordered to be produced.

PANASIUK V LECLERCQ, 2015 ABQB 464 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 12.51 (Appearance Before the Court), 12.60 (Appeal from Decision of Court of Queen's Bench Sitting as Original Court) and 14.8 (Filing a Notice of Appeal)

The Plaintiff husband brought an Application to set a Trial date in relation to his child support arrears. The Plaintiff had previously brought an Application for child support arrears which was set over to a Family Special Chambers Application. Following the Application, the Court ordered the payment of arrears, and the Order was never appealed. The Defendant argued that, if an Appeal was appropriate, the Court of Appeal would be the proper forum, but the Plaintiff was beyond the appeal period pursuant to Rules 14.8 and 12.60.

The Plaintiff argued that the arrears Order was merely an interim Order and that a full Trial ought to occur. Justice Shelley considered the scope of Rule 12.51 and indicated that this Rule provided the Court with wide latitude to direct final Orders in a Family Special Chambers Application. Her Ladyship went on to consider Foundational Rule 1.2, and noted that alternative solutions in family litigation ought to be sought out wherever possible. Justice Shelley also noted that Rule 12.51 differed from former Rule 580.7, as the new Rule expressly contemplates decisions on a "final basis". Shelley J. dismissed the Plaintiff's Application on the basis of res judicata since the issue was previously decided.

DIXON V CANADA (ATTORNEY GENERAL), 2015 ABQB 565 (MCINTYRE J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiffs, members and representatives of First Nation Bands, commenced an Action against the Defendants, the Attorney General of Canada and Her Majesty the Queen in Right of Alberta for the sale of reserve lands which were purportedly surrendered in the early 1900s. The Plaintiffs had commenced three similar and related Actions regarding the same lands. The Defendants sought to strike the Plaintiffs' Pleadings as an abuse of process, pursuant to Rule 3.68, because they failed to disclose a cause of action, and on the basis that the claim was barred by the *Limitations Act*, RSA 2000, c L-12. In the alternative, the Defendants sought Summary Dismissal under Rule 7.3.

With respect to Rule 3.68, McIntyre J. noted that the Rule empowered the Court to strike all or any part of a Claim if the Pleadings constitute an abuse of process. Abuse of process is a flexible doctrine which can arise in many different contexts; there is no universal test or statement of law that encompasses all of the examples. McIntyre J. observed that the doctrine allows the Court to use its inherent jurisdiction to prevent the administration of justice from coming into disrepute.

After reviewing the Pleadings and the specific circumstances of the case, His Lordship granted the Defendants' Application under Rule 3.68 to strike the Plaintiffs' Action for abuse of process. In coming to this Decision, Justice McIntyre noted that Foundational Rule 1.2 provided guidance with respect to eliminating duplicative Claims.

PROVALCID INC V GRAFF, 2015 ABQB 574 (YAMAUCHI 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) and 13.7 (Pleadings: Other Requirements)

The Plaintiff applied to amend its Statement of Claim pursuant to Rules 3.62 and 3.65. The Plaintiff had originally pleaded only breach of contract, but after Questioning was conducted, it learned of additional causes of action based in negligent or fraudulent misrepresentation. Justice Yamauchi noted that Rule 13.7 requires that Pleadings give particulars of fraud and misrepresentation. The Defendant and Third Party, Rowland Seeds, opposed the Application to amend.

Justice Yamauchi referred to the four exceptions to amending Pleadings listed in *Dow Chemical Canada Inc v Nova Chemicals Corp*, 2010 ABQB 524: whether the amendment would cause serious, non-compensable prejudice; whether it was beyond the applicable limitation period; whether the amendment was "hopeless"; or whether there was an element of bad faith associated with not pleading the amendment in the first instance. As the added claims related to the events described in the original Statement of Claim, they were saved by the operation of s. 6 of the *Limitations Act*, RSA 2000, c L-12. Further, there was no serious prejudice that would result from the proposed amendments that would not be compensable in Costs.

Rowland Seeds also argued that the Plaintiff failed to comply with Rule 1.2(2)(b) by delaying in applying to amend its Pleadings. However, Justice Yamauchi noted that Rule 1.2(2)(a) requires the identification of the real issues in dispute, and one purpose of the Rules does not outweigh another. Yamauchi J. allowed some amendments to the Statement of Claim with a few exceptions for amendments which did not have sufficient evidence to support the allegations.

ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC V AMEC AMERICAS LIMITED (AMEC E&C SERVICES LIMITED AND AGRA MONENCO INC), 2015 ABQB 429 (WITTMANN CJ)
Rule 1.4 (Procedural Orders)

The Defendant was granted Summary Judgment in respect of its Counterclaim. Substantial damages were awarded, and the Plaintiff sought a stay of the Judgment pending the Appeal of the Summary Judgment decision and the Trial of the original Claim. The Court outlined the test for a party to be granted a stay pursuant to Rule 1.4. Justice Wittmann stated that the test:

> … requires the party applying for the stay to establish that there is an arguable issue, that it will suffer irreparable harm if the stay is not granted, and that the balance of convenience between the parties favours the granting of a stay. In addition, the Court may grant a stay where exceptional circumstances exist and it is fit and just to do so.

There was no dispute that the remaining Claim raised serious or arguable issues. Wittmann J. held that the Plaintiff would be unable to continue to pursue their Claim if the Counterclaim Judgment was enforced, and therefore irreparable harm was established. For the same reason, His Lordship held that the balance of convenience favoured granting a stay until a Decision was rendered by the Court of Appeal. The Application was granted and the Counterclaim Judgment was stayed pending the results of the Appeal.

DAWSON V DAWSON, 2015 ABQB 449 (MASTER PROWSE)
Rules 1.4 (Procedural Orders), 4.31 (Application to Deal with Delay), 6.21 (Preserving Evidence for Future Use) and 7.3 (Summary Judgment)

The Defendants brought an Application for Summary Dismissal of the Plaintiff's Claim. The Plaintiff alleged that the family ranch should have been willed to him upon his father's death. The Court noted that, since *Hryniak v Mauldin*, 2014 SCC 7, the onus for obtaining a summary disposition has lessened. Master Prowse stated that, due to the conflict in evidence between the parties, the evidence of the Respondent is to be assumed true. As such, Master Prowse declined to summarily dismiss the Claim pursuant to Rule 7.3.

The Defendants argued, in the alternative, that the Claim should be dismissed for inordinate delay pursuant to Rule 4.31. The Defendants argued that they were significantly prejudiced by delay due to the death of their father's wife, who was one of their witnesses. The Court acknowledged that her death affected the Defendant's ability to present a full defence, but that the prejudice complained of was not caused by the Plaintiff's delay. Further, there was evidence that she was in poor health for quite some time and the Defendants could have applied to order Questioning to preserve evidence under Rule 6.21.

Master Prowse declined to strike the Action, but made a procedural Order directing the Plaintiff to complete Questioning and answer Undertakings, failing which the Defendants could apply for an Order dismissing the Action pursuant to Rule 1.4(2)(a).

QUINNEY V 1075398 ALBERTA LTD, 2015 ABQB 452 (TOPOLNISKI J)
Rules 1.4 (Procedural Orders), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiffs sued for outstanding payments for the purchase price of shares of Quintel Communications. The Defendants counterclaimed for misrepresentation of the value of the shares and breach of contract. The Defendants appealed the decision of a Master which granted Summary Judgment of part of the Claim. The Master also stayed enforcement of the award for six months, giving time for the Defendants to review financial information.

The Defendants sought to adduce new evidence on Appeal. Topolniski J. stated that evidence which was not before the Master must satisfy the requirements under Rule 6.14. This Rule requires new evidence to be significant enough that it could have affected the Master's decision, and must be permitted by the Appeal Judge. The Court permitted the additional evidence to be adduced.

The Defendants argued that the Stay granted by the Master was unfair as it should have been extended further. Justice Topolniski considered Rule 1.4(2)(h), which provides that a Court may stay the effect of a Judgment where necessary, and is entirely discretionary. The Court held that it was unnecessary to extend the Stay of the Judgment, as it would have had to be paid in any event. Justice Topolniski considered Rule 7.3 and concluded that the Master was correct in granting the award. Part of the Appeal was dismissed and the Counterclaim was referred to Trial.

PHOENIX LAND VENTURES LTD V FIC REAL ESTATE FUND LTD, 2015 ABCA 245 (CÔTÉ JA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 9.6 (Effective Date of Judgments and Orders) and 14.8 (Filing a Notice of Appeal)

The Appellant, Phoenix Land Ventures Ltd., in an Action involving a contractual dispute, applied to extend the time to file an Appeal. The Appellant submitted that it applied for an extension of time only out of caution, as it appealed in time and did not need an extension. Côté J.A. stated that, although the time limitation to Appeal under the old Rules did not start to run until formal Judgment was entered and served, this led to too much delay, and the language of Rule 14.8(1) deliberately removed the need for an entered Judgment before the limitation started to run. Rule 14.8(1)(b) applies if the Reasons for Decision are issued after Judgment, which is unusual.

His Lordship held that 14.8(1)(a) was applicable, and that the time limitation to appeal started to run when Reasons were given, which could be in the form of a Judgment, Order or Decision. Under Rule 9.6(a), Orders and Judgments are effective when pronounced and before a formal written document is entered. Time starts to run at the time of pronouncement under Rule 14.8(1)(a) and not entry. In this case, time started to run when written reasons from the Judge were issued, and the Appeal was therefore filed late. Justice Côté observed that the delay was short and there was no prejudice. However, the late filing was due to carelessness, and the grounds for Appeal were vague. Under Rule 1.5(4), the Court must not cure any contravention or irregularity unless there is no harm to any Party and the Court can impose a suitable sanction. Côté J.A. allowed the Application if the Applicant paid $4500 into Court, a part of which would be compensated to the Respondent as Costs.

KOHLER V APOTEX INC, 2015 ABQB 610 (ROOKE ACJ)
Rules 2.7 (Amendments to Pleadings in a Class Proceeding), 2.9 (Class Proceeding Practice and Procedure), 2.10 (Intervenor Status), 3.62 (Amending Pleadings) and 4.36 (Discontinuance of Claim)

The Plaintiffs sought certification of a multi-jurisdictional Class Proceeding. Associate Chief Justice Rooke held that the Plaintiffs were permitted to discontinue the Action against one of the Defendants. His Lordship noted that, pursuant to Rule 4.36, a Plaintiff is typically able to discontinue an Action against a party, subject to Costs. His Lordship noted that this is qualified in a Class Proceeding as Court permission is required to discontinue an Action.

Associate Chief Justice Rooke also considered whether materials submitted by the Plaintiffs in a parallel Ontario Action ought to be considered in the Alberta Class Proceeding. His Lordship noted that Rule 2.9 provides the Court with wide procedural latitude in a Class Action, but also found that the Court expects parties that receive a Notice to conform to Alberta procedural practices. In this matter, the Ontario Plaintiffs failed to seek Intervenor status under Rule 2.10. Without Intervenor status the Ontario Plaintiffs would not be able to file materials or make submissions. Nevertheless, the Ontario Plaintiffs were able to make submissions as all other parties consented to them being granted Intervenor status at the certification hearing, and the Court agreed to do so. The Action was certified as a multi-jurisdictional Class Proceeding.

PADGET ESTATE (RE), 2015 ABQB 515 (MASTER SCHLOSSER)
Rules 2.12 (Types of Litigation Representatives and Service of Documents), 2.13 (Automatic Litigation Representatives), 4.22 (Considerations for Security for Costs Order), 5.6 (Form and Contents of Affidavit of Records), 5.7 (Producible Records), 5.8 (Records for Which there is an Objection), 7.3 (Summary Judgment), 10.42 (Actions within Provincial Court Jurisdiction) and 13.18 (Types of Affidavits)

The Defendants brought an Application for Summary Judgment or, alternatively, for a further and better Affidavit of Records. The Claim was for roughly $2,600. The Estate as Plaintiff claimed from the Defendants a $1,000 loan made by the deceased, which allegedly had not been repaid, and a portion of a $4,000 cheque which allegedly was not properly accounted for by one of the Co-Executors/Defendants.

With respect to Rule 7.3, Master Schlosser noted that Summary Judgment is a function of whether a fair and just determination can be made on the merits without a Trial. It is a measure of the confidence the Court has in predicting the outcome of the case. The Court reviewed the evidence with respect to the $1,000 loan and the unaccounted portions of the cheque and found that the evidence was not sufficient to dispose of the Claim by way of Summary Judgment. The Court noted that much of the evidence was hearsay and that pursuant to Rule 13.8(3), Applicants could not tender hearsay evidence in support of a final Application. The Summary Judgment Application was dismissed.

The Court then turned its attention to the Application by the Defendants for a further and better Affidavit of Records by the Plaintiff. The Court noted that the Affidavit did not comply with Rules 5.6, 5.7 and 5.8, which require that bundles of records be uniquely identified and numbered. The Court ordered that the Affidavit should be revised to that extent and in that regard ordered Costs against the Estate pursuant to Schedule C and Rule 10.42.

The Court then considered whether Security for Costs should be posted pursuant to Rule 4.22. The Court stated that, in cases of a near miss, ordering Security for Costs is a "wholesome practice". Given the intensity of the litigation and the fact that it was at an early stage, it was the Court's view that the Estate should post Security for Costs in the amount of $20,000.

The Applicant also took exception to Donald Padget, one of the beneficiaries, appearing on behalf of the Estate. The Court found that Mr. Padget was an automatic Litigation Representative pursuant to Rules 2.12 and 2.13. Litigation Representatives are obliged to retain counsel unless they are active members of the Law Society themselves. The Court noted that Mr. Padget is a barrister and solicitor and is entitled to act as counsel. However, the Court referenced its authority pursuant to Rule 2.21 to: (a) terminate the authority or appointment of the Litigation Representative; (b) appoint a person or replace the Litigation Representative; and (c) impose terms and conditions upon, or the appointment of, a Litigation Representative or cancel of vary the terms or conditions. Master Schlosser found that there was an obvious, inherent conflict with the other beneficiaries. In the result, Master Schlosser terminated the appointment of Donald Padget as Litigation Representative.

R FLODEN SERVICES LTD V SOLOMON, 2015 ABQB 450 (RENKE J)
Rules 2.22 (Self-Represented Litigants) and 6.25 (Preserving or Protecting Property or its Value)

Solomon, the individual Defendant, was an inventor who had access to a new product and associated technologies. Solomon approached the Plaintiff, and reached an oral agreement that the parties would be shareholders in a new corporation where the Plaintiff would provide funding and Solomon would provide expertise, equipment and intellectual property. The new corporation was incorporated and controlled by Solomon. It had not yet provided any financial return when the relationship between the parties broke down. The Applicant claimed that Solomon engaged in various forms of self-dealing, and commenced an Action for oppression under the *Alberta Business Corporations Act*, RSA 2000, c B-9.

Preliminarily, the Court noted that there were several corporate Respondents, each of which was linked to Solomon. None of the Respondents was currently represented by counsel, and only Solomon appeared at the Application. Justice Renke stated that, although Solomon was entitled to represent himself, he was not allowed to represent the corporate Respondents. Under Rule 2.22, an "individual" may be self-represented in the superior Courts. However, other types of litigants, including corporations, must be represented by counsel. Therefore, Solomon was not entitled to represent the corporate Respondents.

Renke J. considered the substance of the Application, and concluded that Solomon had engaged in conduct that was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of the Applicant. Among other things, the Court granted preservation Orders under Rule 6.25(1) against Solomon and the corporate Respondents, whereby the Plaintiff's personal property would be protected.

ABOU-MORAD V ABOUMOURAD, 2015 ABQB 584 (VEIT J)
Rules 3.5 (Transfer of Action), 4.2 (What the Responsibility Includes), 6.10 (Electronic Hearing) and 12.36 (Advance Payment of Costs)

Mr. Abou-Mourad commenced an Action for divorce in Edmonton. Ms. Abourmourad applied to transfer the Action to Fort McMurray. Veit J. held that she had failed to establish it was unreasonable to carry on the Action in Edmonton on a balance of convenience. Justice Veit noted that Ms. Abourmourad was able to be involved in Applications via telephone rather than attend in person, pursuant to Rule 6.10. Should the balance of convenience change throughout the proceedings, Ms. Abourmourad could renew her Application for a transfer.

Ms. Abourmourad also applied for advance Costs for the proceedings, pursuant to Rules 12.36 and 4.2, relying on the great disparity between her husband's income and her own. Veit J. held there was not yet any basis to award advanced Costs, particularly so early in the proceedings and where her ability to earn income was in dispute. Ms. Aboumourad's Applications were dismissed.

PETER LEHMANN WINES LTD V VINTAGE WEST WINE MARKETING INC, 2015 ABQB 481 (GRAESSER J)
Rule 3.15 (Originating Application for Judicial Review)

The Plaintiff sought Declarations and Orders that would allow it to implement a new agency relationship in Alberta without notification to its former agent for distribution. One of the Respondents to the Application was the Alberta Gaming and Liquor Commission (the "AGLC"). The AGLC's policies precluded it from recognizing multiple distribution agents for one producer without proper notification. The Plaintiff asked the Court to compel the AGLC to recognize the new agency. The Court stated that such relief is in the nature of Mandamus, which is confined to Judicial Review. Since the AGLC is an agent of the Provincial Crown, under Rule 3.15(3)(b), notice to the Minister of Justice and Solicitor General of Alberta was required. Without such notice Justice Graesser was unable to grant an Order in the nature of Mandamus. The Application was dismissed.

RACZYNSKA V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 494 (GRAESSER J)
Rules 3.15 (Originating Application for Judicial Review), 3.75 (Adding, Removing or Substituting Parties to Originating Application), 3.76 (Action to be Taken When Defendant or Respondent Added) and 13.5 (Variation of Time Periods)

The Applicant, a registered dental assistant, had her complaint to the Human Rights Commission discontinued. The Chief Commissioner of the Commission and Tribunals upheld the decision, and the Applicant sought Judicial Review.

Prior to the Judicial Review hearing, a procedural issue arose as to whether the professional corporation which was the subject of the initial human rights complaint should be added as a Respondent to the Application pursuant to Rules 3.75 and 3.76. There was no evidence that the professional corporation was notified of the Judicial Review Application within six months as required under Rule 3.15. Justice Graesser held that the Applicant did not comply with the necessary service requirements with respect to the professional corporation, and commented that there is

only one set of Rules and they apply equally to all litigants. Time limits cannot be extended under Rule 13.5 merely because of a lack of familiarity with the requirements under the Rules. Rule 3.15 provides a deadline which is essentially "absolute". As a result, the Application to add the professional corporation as a party was denied.

RUHL V ALBERTA (HUMAN RIGHTS COMMISSION), 2015 ABQB 513 (VEIT J)
Rules 3.15 (Originating Application for Judicial Review) and 13.5 (Variation of Time Periods)

The Plaintiff applied for an extension of time to file an Application for Judicial Review of a Human Rights Commission Decision. The Applicant had mis-diarized the six month deadline set out in Rule 3.15, and argued that he suffered from mental incapacity which prevented him from meeting the deadline. The Defendants, citing Rule 13.5, argued that the Court had no jurisdiction to extend the six month time period as set out in Rule 3.15.

Justice Veit noted that the authorities emphasize that the Court does not have the power to extend the six month time period in Rule 3.15, and to do so would undermine the policy foundations for that deadline. Failing to diarize the date is precisely the type of conduct Rule 3.15 is intended to discourage. Justice Veit did not discount the possibility that the Court may extend the deadline in the event of a real incapacity, but here there was no supporting evidence of the Applicant lacking mental capacity. The Application was dismissed.

WHITECOURT POWER LIMITED PARTNERSHIP V ELLIOTT TURBOMACHINERY CANADA INC, 2015 ABCA 252 (PAPERNY AND ROWBOTHAM JJA AND EIDSVIK J (AD HOC))
Rules 3.45 (Form of Third Party Claim) and 7.3 (Summary Judgment)

The Defendant, Elliott Turbomachinery Canada Inc., sought Summary Dismissal of a Third Party Claim issued against it on the basis of two defences: 1) a contractual liability exclusion clause; and 2) the Third Party Claim was statute barred by the *Limitations Act*, RSA 2000, c L-12. The Application was dismissed by both a Master and then a Justice of the Court of Queen's Bench. The Defendant then appealed to the Court of Appeal.

The Court noted that Decisions to grant or deny Summary Judgment involve an exercise of discretion. As such, these Decisions are entitled to deference. Practically speaking, this means that Appeals from denials of motions for Summary Judgment will be difficult to establish.

Considering the contractual defence claim, the Court reviewed the Chambers Judge's conclusion that Summary Judgment was inappropriate because there were multiple parties with no written contract, which would require a Court to discern from the evidence whether there was in fact a contract, who the parties to it were, and its precise terms. The Court found that the Chambers Judge weighed the evidence and found that these were issues of genuine merit requiring Trial. The Court noted that it was not their place to re-weigh the evidence, and found that there was no reviewable error. As such, they dismissed this ground of Appeal.

With respect to the limitations defence, the Court affirmed the Chambers' Judges' decision that, due to unclear evidence, there remained issues of merit which genuinely required a Trial.

The Defendant also sought to strike the Third Party Claim on the grounds that it was not filed and served within six months of filing the Statement of Defence as required by Rule 3.45. The Plaintiff by Third Party Claim had, however, applied, on notice to the Defendant, for an Order extending the time for filing its Third Party Claim. The Defendant chose not to attend or contest the Application. Because of this, the Master and Chambers Judge declined to set aside the Third Party Claim and the Court of Appeal found no reviewable error. The Appeal was dismissed.

FIELD, FIELD & FIELD ARCHITECTURE-ENGINEERING LTD V TEMPO CONSTRUCTION (2000) LTD, 2015 ABQB 471 (BROWNE J)
Rules 3.58 (Status of Counterclaim), 3.59 (Claiming Set-Off), 4.33 (Dismissal for Long Delay) and 5.5 (When Affidavit of Records Must be Served)

The Plaintiff (Field) sued the Defendant (Tempo) in debt. Tempo filed its Defence and also claimed set-off. As well, Tempo Counterclaimed for damages resulting from negligence and breach of contract. The allegations of negligence triggered the involvement of Field's insurer. As a result, separate law firms represented Field in its capacities as Plaintiff and as Defendant by Counterclaim. Tempo served Field with an Affidavit of Records, but sent it only to counsel representing Field as Plaintiff, and not counsel representing Field as Defendant by Counterclaim.

Field subsequently applied to strike Tempo's Counterclaim for long delay under Rule 4.33. Field argued that service of the Affidavit of Records on the other counsel did not serve to interrupt a delay of more than three years in the Counterclaim Action.

Justice Browne noted that, pursuant to Rule 3.58, a Counterclaim is an independent Action. Further, pursuant to Rule 3.59, set-off may be claimed by Counterclaim or pleaded as a defence. Browne J. reviewed the applicable case law relating to Rule 4.33, and held that a thing done in an Action that materially advances the Action may be considered an event in a closely related Action when the proceedings are inextricably linked.

Justice Browne concluded that the Actions were inextricably linked as they related to the same parties and the same contract. Her Ladyship held that service of the Affidavit of Records materially advanced the Action as a whole. Accordingly, the Application was dismissed.

GOLDHART V WESTLAKE DEVELOPMENTS INC, 2015 ABQB 543 (TOPOLNISKI J)
Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiffs sought to amend their Statement of Claim to include, among other things, switching the status of a party from Defendant to Plaintiff. This amendment raised limitation issues. Other proposed amendments were resisted by the Defendant on the basis of hopelessness and failure to meet the requisite threshold.

With respect to the proposed adding of a Plaintiff, the Defendant argued that the Claim was statute barred by the *Limitations Act*, RSA 2000, c L-12. The Court noted that when there is a limitations issue, the traditional approach is for the Court to: 1) determine that the limitation has not expired and allow the amendment; 2) rule the limitation has expired and then consider *Limitations Act* Section 6; or, 3) find that the amendments should be allowed subject to the determination of the issue at Trial. After reviewing the circumstances, the Court allowed the amendment to add a Plaintiff, noting that in this case it was appropriate that all limitation issues be determined at trial without prejudice to any party's right to raise Claims or Defences under the *Limitations Act*.

With respect to the other proposed amendments within the Statement of Claim, Justice Topolniski noted that Rule 3.65 was applicable. The Court also noted the "classic rule" for the amendment of Pleadings is: "any pleading can be amended no matter how careless or late is the party seeking to amend". The exceptions to this rule are: serious non-compensable prejudice; hopelessness (such that the plea would have been struck if originally pled); expiration of a limitation period; and, bad faith in failing to plead the matter in the first instance.

Topolniski J. noted that the threshold for permitting amendments is low unless there are allegations of fraud, high-handedness or malicious conduct. If so, then the test is stiffer and there must be significant evidence in support of the purported amendment. After reviewing the relevant case law and the proposed amendments, Justice Topolniski held that the amendments should be allowed.

926 CAPITAL CORP V PETRO RIVER OIL CORP, 2015 ABQB 431 (MASTER PROWSE)
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff landlord brought an Application to amend its pleadings to add another claim when the Defendant tenant moved for Summary Dismissal. Master Prowse considered which Application ought to go first. Master Prowse, quoting from *Hur v 726913 Alberta Ltd*, 2013 ABQB 208, held that when an Application for Summary Judgment is heard concurrently with an Application to amend pleadings, the Court must determine the amendment Application before the Application for Summary Judgment. Master Prowse observed that it was not unusual for amendments to occur when a party seeks to strike pleadings pursuant to Rule 3.68, or seeks Summary Judgment pursuant to Rule 7.3. Master Prowse considered the amendments first, holding that the additional claims could be added. The Summary Dismissal Application was granted with respect to the original claims for unpaid rent.

HILL V HILL, 2015 ABQB 436 (HALL J)
Rule 3.68 (Court Options to Deal With Significant Deficiencies)

The Plaintiff was unsuccessful at Trial and on Appeal. He sought to bring a fresh Claim against the same Defendants with the same relief on the basis that new evidence was discovered. He further alleged that the original Judgment was granted because the Defendants were dishonest and fraudulent. The Defendants sought to strike the Plaintiff's Claim under Rules 3.68(2)(c) and 3.68(2)(d) on the grounds that it was *res judicata*. Hall J. held that the new evidence was significant and that there was a reasonable probability that a new Trial Judge would find the evidence conclusive. The Defendants' Application to strike the Claim was dismissed.

KENT V POSTMEDIA NETWORK INC, 2015 ABQB 461 (CAMPBELL J)
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff commenced an Action against various individual and corporate Defendants for defamation. The individual Defendants, who were officers and directors of the corporate Defendants, sought Summary Judgment dismissing all Claims against them personally.

Justice Campbell confirmed that Summary Judgment can be granted if there is no merit to the Claim, which means that even if the non-moving Party's material position was accurate, such a position would not have merit in law or fact. This test is distinguishable from the test under Rule 3.68, which asks "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed". If the Court is able to reach a determination on the merits, then there is no issue which requires a Trial. Accordingly, an Order for Summary Judgment may be granted if the summary procedure is a "proportionate, more expeditious and less expensive means to achieve a just result".

Campbell J. considered the law on personal liability of directors and officers, and concluded that it was not appropriate to impose personal liability against them. The Action against the individual Defendants was therefore dismissed.

JEC ENTERPRISES INC V CALGARY (CITY), 2015 ABQB 555 (STREKAF J)
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff sued the City of Calgary ("City") for the failure to pass a bylaw which would have allowed the Plaintiff's lands to be re-designated for development. The City applied for Summary Dismissal of the claims of negligence, negligent misrepresentation and misfeasance, pursuant to Rule 7.3, and to strike the balance of the claims, pursuant to Rule 3.68, as they disclosed no reasonable cause of action. Justice Strekaf cited recent leading authorities for

the broader, modern test to be applied in an Application for Summary Judgment. Her Ladyship stated that one of the goals of Summary Judgment is to ensure proportional and fair access to the affordable, timely and just adjudication of Claims.

With respect to the negligence claims, the City simply argued it owed no duty of care to the Plaintiff. Justice Strekaf held that this issue could not be justly and fairly determined on the Court record, as a more fulsome record would be needed to resolve the disputed facts. However, with respect to the claim of negligent misrepresentation, Strekaf J. held that a fair and just determination could be made on the existing record, and that this raised no genuine issue for Trial. The City's Application for Summary Dismissal of the negligent misrepresentation claim was granted.

After reviewing the relevant legal tests for the remaining causes of action, Justice Strekaf struck the allegations of breach of the duty of good faith; breach of statutory duty; and intentional interference with economic interests for having no reasonable prospect of success, pursuant to Rule 3.68(2)(b).

WALTON DEVELOPMENT AND MANAGEMENT INC V OSMAN AUCTION INC, 2015 ABCA 298 (WATSON JA)
Rules 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings) and 14.57 (Adding, Removing or Substituting Parties to an Appeal)

Walton Development and Management Inc. ("Walton") applied to be added as a Respondent on an Appeal by Osman Auction Inc. ("Osman") from a decision of the City of Edmonton Subdivision and Development Appeal Board ("City"). Osman obtained leave to Appeal pursuant to s. 688(3) of the *Municipal Government Act*, RSA 2000, c M-26. Osman opposed the addition of Walton as a party primarily on the basis that adding Walton as a party was 'belated': Walton knew of the Application to Appeal but failed to attend. Walton conceded that it did not attend the hearing, but stated that it relied on the position in *Saskatchewan Power Corporation v Alberta Utilities Commission*, 2013 ABCA 341 that "only in exceptional circumstances should a party be granted respondent status prior to the decision in a leave application". Watson J.A. noted that there was no prejudice arising from the delay in adding Walton as a Respondent, and determined that Walton's involvement was therefore not belated.

Watson J.A. concluded that there was no conflict between the decision by the Court in the leave Application and the potential exercise of Rule 14.57 in the instant Application. Further, there was no evidence of prejudice under Rule 3.74(3), as the mere fact that Osman would have an opponent was not prejudice and served only to positively benefit a fair hearing. Watson J.A. granted Walton's motion to be added as a Respondent on the Appeal.

LEE V BOYD, 2015 ABQB 426 (MASTER SCHULZ)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Master Schulz considered the quantum of a Costs award following a successful strike motion by the Defendants, and whether a Formal Offer was genuine in the circumstances.

Master Schulz noted that Rule 4.29 is similar to its predecessor Rule and applied the decisions of *Tonizzo v Moysa*, 2007 ABQB 370 and *Allen (Next Friend of) v Mueller*, 2006 ABCA 101, noting that a Formal Offer must be "reasonable and realistic" in all of the circumstances at the time it was served. Master Schulz went on to note that the Formal Offer was provided after the Notice of Application to strike had been served and the cross-examinations on the Affidavit in support of the Application completed. In the circumstances, the Formal Offer was found to be a genuine attempt at compromise.

Master Schulz also considered whether there had been inordinate delay in filing the strike motion that might disentitle the Defendants from Costs. Master Schulz noted that some professional courtesies had been extended by both counsel to deliver various items and these delays could not now be used against the Applicants. The Defendants were not deprived of their Costs simply because of delay.

KCM V BTM, 2015 ABQB 502 (GATES J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and 10.49 (Penalty for Contravening Rules)

In a family law matter dealing with spousal support, division of matrimonial property, pension division, child support arears and Section 7 expenses, the mother, KCM, was successful at Trial. KCM was represented by counsel, and the father, BTM, was self-represented. KCM's counsel brought an Application for Costs under Rule 10.29(1), based on the general rule that the successful party should be awarded Costs of the litigation. Gates J. stated that Costs in a matrimonial matter should be no different than in a regular civil litigation matter.

Gates J. considered Rule 10.33(2), noting that a Justice had previously directed that this matter proceed to Trial, and that, despite this direction, KCM's counsel brought additional interim Applications which prolonged the matter and delayed the Trial. Justice Gates commented that Rule 10.49(1)(b) allows the Court to impose a penalty on a party that has interfered with the proper administration of justice; but ultimately did not impose a penalty on KCM or her counsel.

Additionally, Gates J. considered Rule 4.29(1) in light of KCM's Formal Offer to Settle, which BTM rejected, and acknowledged that KCM may be entitled to double Costs, as KCM received Judgment which was in line with the Formal Offer to Settle. His Lordship considered previous authority which stated that applying this Rule is discretionary, and the Court may consider the unique circumstances of the case. Ultimately, due to the conduct of KCM and her counsel, Gates J. refused to award double Costs to KCM under Rule 4.29(1), and also refused to make a Costs award in favor of KCM under Rule 10.29(1). Each party was responsible for their own Costs at Trial.

BRANSON V BRANSON, 2015 ABQB 602 (YAMAUCHI J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In a contested Estate matter, the Court issued a Decision in favour of the Plaintiff, and awarded Costs. Justice Yamauchi noted that the Rules which apply to Costs considerations in surrogate matters are Rules 10.29, 10.31 and 10.33, as well as Rule 64 of the Alberta *Surrogate Rules*, AR 130/95. Yamauchi J. observed that, historically, it was common practice in estate matters for the Court to award the Costs of all parties to be paid from the Estate. However, this is no longer the general approach in estate litigation, and Costs now follow the event unless the challenge to a Will was reasonable, or an exception could be justified on public policy grounds.

Citing recent authority, Justice Yamauchi noted that Courts will take a broader view of Costs following the basic principles that: Costs follow the event; Schedule C of the Rules is the usual measure of Costs; the Court has a wide discretion to award Costs in any matter; a successful party's costs may be refused or reduced based on their conduct during the litigation; Costs on an elevated scale "are the exception and not the rule"; and an award of elevated Costs requires either that the magnitude of the award is "well more than $1.5 million" which is not reflected in Schedule C, or the elevated Costs are justified by misconduct by the unsuccessful party.

Yamauchi J. also considered the principles with respect to full indemnity Costs as set out in *Jackson v Trimac Industries Ltd* (1993), 138 AR 161, 8 Alta LR (3d) 403 (ABQB), and cited *Daved v Daved*, 2010 ABQB 696 with respect to the law as it relates to solicitor and client Costs for party misconduct. His Lordship noted, *inter alia*, that solicitor and client Costs are awarded where the conduct of a party has been reprehensible, scandalous or outrageous.

Justice Yamauchi ordered the Respondent to pay Costs on a full indemnity basis and to bear his own Costs which would not be reimbursed by the Estate. Rule 4.29 did not apply since Costs were awarded pursuant to Rule 10.31(1)(b).

CARBONE V WHIDDEN, 2015 ABCA 255 (PAPERNY AND ROWBOTHAM JJA AND EIDSVIK J (AD HOC))
Rule 4.29 (Costs Consequences of Formal Offer to Settle)

The Plaintiff underwent liposuction surgery performed by the Defendant in 2003. She was not satisfied with the result and in 2004 sued the Defendant and his professional corporation for damages. The Plaintiff was unsuccessful after a two week Trial and had double Costs awarded against her. The Plaintiff appealed, disputing the dismissal of her Action and the Costs awarded against her.

The Court of Appeal dismissed each ground of appeal. With respect to the double Costs award, which the Plaintiff claimed was excessive, the Court noted that Rule 4.29 of the Rules permits the party that makes a Formal Offer to recover double Costs from the date of service of the Formal Offer if that party obtains an Order or Judgment that is more favourable than the Formal Offer. The Court found that there was no reason to deviate from that Rule. The Court noted that since a Formal Offer was properly served on the Plaintiff's counsel in 2005, a double Costs award was within the Trial Judge's discretion and was not unreasonable in the circumstances.

FOREST RESOURCE IMPROVEMENT ASSOCIATION OF ALBERTA V MOORE, 2015 ABQB 588 (LITTLE J)
Rules 4.31 (Application to Deal With Delay), 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)

The Forest Resource Improvement Association of Alberta ("FRIAA") commenced two separate debt Actions against the Applicants, Moore and Ringwald, for unpaid reforestation levies. Several steps occurred in both Actions, including Ringwald serving a Supplementary Affidavit of Records in January 2011 and FRIAA sending Notices of Appointments for Questioning in June 2013 which were refused. FRIAA applied to compel Moore to attend Questioning, which Application was granted November 4, 2013. On January 24, 2014, the Applicants filed an Application to transfer the Actions to Lethbridge from Edmonton, which FRIAA consented to. The Applicants then applied to dismiss both Actions for delay pursuant to Rules 4.31 and 4.33, and FRIAA applied separately for Summary Judgment.

Justice Little held that setting a date for Questioning, when it was known that the party would not attend, does not significantly advance an Action. While seeking an Order to compel attendance at Questioning could significantly advance an Action, simply filing an Application itself does not. Moore's Application to strike for long delay under Rule 4.33 was therefore granted. Similarly, Ringwald's Application to strike under Rule 4.33 was granted on the basis that the service of the Supplemental Affidavit of Records in the Ringwald Action did not significantly advance the Action because the records produced were records which had already been conveyed to Mr. Ringwald during the course of business between the parties, and because they were not relevant and material to the main issue in dispute.

With respect to the Application to dismiss for inordinate delay pursuant to Rule 4.31, Little J. held that the Actions had aged five years and four years with "nothing much of consequence accomplished". The Defendants' Applications for dismissal for inordinate delay were nonetheless denied on the basis that the Plaintiff had raised sufficient evidence to rebut the presumed prejudice arising from the delays.

Finally, Little J. considered FRIAA's Application for Summary Judgment out of an abundance of caution, and in case the Court's prior considerations were insufficient to determine the matter. FRIAA asserted that the Defendants' positions had no merit. Little J. however, held that some of the Defendants' defences had merit; specifically those with respect to limitations dates. The Application for Summary Judgment was therefore dismissed.

M L BRUCE HOLDINGS INC V CECO DEVELOPMENTS LTD, 2015 ABQB 604 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal For Long Delay)

The Defendants in a construction related dispute applied to dismiss the Plaintiff contractor's Claim for long delay, pursuant to Rule 4.33, or alternatively for inordinate and inexcusable delay under Rule 4.31. The Claim was commenced in 2003, but little activity occurred until 2007. The last step that was taken during a period of activity

was when the Plaintiff finally delivered its responses to Undertakings on October 31, 2013, which Undertakings were given more than three years prior. Counsel for the Plaintiff sent correspondence over a year later about scheduling Questioning on the Undertaking responses, and then served a Notice of Continuation of Questioning on June 1, 2015 despite a previous consent Order which stipulated that all Questioning would be completed by April 2010.

The Plaintiff argued that the responses to Undertakings delivered on October 31, 2013 constituted a significant advance in the Action such that the Rule 4.33 Application must fail. The Plaintiff also argued that the exchange of correspondence between 2014 and 2015 invoked the exception in Rule 4.33(1)(d) because the Applicant had participated in proceedings for a purpose and, as such, the Rule 4.31 Application must fail. Master Robertson held that the Plaintiff's argument confuses the two Rules: they apply to two different circumstances.

Master Robertson agreed that the answers to the Undertakings were substantive and significantly advanced the Action, so Rule 4.33 was not engaged. The focus was therefore on Rule 4.31. Master Robertson considered the correspondence between counsel, and observed that, although the letters may have suggested a potential willingness to participate in proceedings, no proceedings actually took place. More than 12 years had passed since the start of the Action, and the case was based on an oral agreement which was affected by fading memories. There had been long periods of inactivity and the delay was primarily caused by the Plaintiff's lack of interest in moving the case forward. Master Robertson held that there was inordinate delay and it was inexcusable. Further, the Plaintiff failed to rebut the presumption of prejudice due to the delay. Accordingly, the Action was dismissed.

ALLEN V ALBERTA (SENIORS AND COMMUNITY SUPPORTS), 2015 ABCA 238 (PAPERNY JA)
Rules 4.33 (Dismissal for Long Delay), 14.23 (Filing Factums – Standard Appeals) and 14.65 (Restoring Appeals)

The Plaintiffs brought an Action against the Defendants alleging that the Defendant care centre had kidnapped and sexually assaulted the elder Plaintiff while she was in care. The Plaintiffs took no steps for at least four and a half years and the Action was dismissed for long delay by a Master pursuant to Rule 4.33. The Plaintiff appealed the Master's Order to a Justice of the Court of Queen's Bench, and the Appeal was dismissed. The Plaintiff then appealed to the Court of Appeal, but again failed to take any steps for nine and a half months. The Appeal was struck pursuant to Rule 14.23(1) and subsequently deemed abandoned pursuant to Rule 14.65(3). The Applicant sought to have her abandoned Appeal restored on the basis that it was in the public interest to do so. Justice Paperny held that the reasons for delay were not compelling, and the Appeal lacked merit. The Application to restore the Appeal was dismissed.

WEIR-JONES TECHNICAL SERVICES INCORPORATED V PUROLATOR COURIER LTD, 2015 ABQB 468 (MASTER SCHULZ)
Rule 4.33 (Dismissal for Long Delay)

The Defendants applied to dismiss an Action pursuant to Rule 4.33. The Statement of Claim was served on July 25, 2011 under a cover letter stating that the writer would be on vacation until August 16, 2011, and therefore a Statement of Defence would not be required until September 2, 2011. On July 29, 2011, defence counsel responded stating, *inter alia*, "we request that you do not take any further steps regarding this matter without written notice to us". Nothing further happened in the Action until a letter was sent by Plaintiff's counsel dated July 24, 2014 requiring that a Statement of Defence be served on or before August 1, 2014. The Defendant then filed an Application to dismiss the Action pursuant to Rule 4.33.

Master Schulz stated that Rule 4.33 functions similarly to the prior Rule, and that a significant advance is required. Master Schulz noted that "a significant advance must be viewed in the context of the real issues in dispute and the advance must be relevant to the issues in the sense that it adds something new". The Court determined that the letter of July 24, 2014 did not qualify as a significant advance under Rule 4.33. Master Schulz also held that the facts in this case established that correspondence from Plaintiff's counsel extending the time for filing the Statement of Defence operated as a stand-still agreement for the period up to and including September 2, 2011.

In the result, the Defendant's Application was dismissed. However, the Court made a procedural Order under Rule 4.33(2) directing that a Statement of Defence be filed within three weeks from the date of the Decision, and that counsel agree upon and file a Litigation Plan within four weeks of filing of the Statement of Defence.

KERR V MCDONALD & BYCHKOWSKI LTD (CMB INSURANCE BROKERS), 2015 ABQB 473 (MASTER SCHULZ)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff applied for an Order setting the matter for Trial, and the Defendant cross-applied for an Order dismissing the Action for delay pursuant to Rule 4.33. Master Schulz first considered whether a significant advance in the Action had occurred within a three year period. Although there was an Appointment for Questioning filed and several requests by Plaintiff's counsel requesting the matter be set for Trial, these were not significant enough to advance the Action. Master Schulz cited the authorities for delay and stated that simple requests to set down the matter for Trial were not sufficient to qualify as a significant advance. Master Schulz noted that had Questioning occurred, it would have been a significant advance. The Action was dismissed for delay.

SOUTHFORT DEVELOPMENT CORPORATION V 1491888 ALBERTA LTD, 2015 ABQB 457 (VEIT J)
Rules 5.2 (When Something is Relevant and Material) and 6.14 (Appeal From a Master's Judgment or Order)

The Defendant, 1491888 Alberta Ltd., appealed to set aside a Master's Order confirming judicial sale of a property and vesting of title in the property. The Master also gave the Defendant the opportunity to redeem the property by staying the Order confirming the sale for a specified period of time. The Defendant appealed.

The Defendant sought to introduce new evidence in support of their Appeal that showed that they were able to redeem the property relatively quickly. Veit J. considered Rule 6.14(3) which lays out the test for introducing new evidence when a Justice hears an Appeal of a Master's Decision. Justice Veit stated that, pursuant to Rule 6.14(3), the Court may hear new evidence in an Appeal from a Master if they believe that it is relevant and material. The test for relevance and materiality is set out in Rule 5.2(1).

Veit J. determined that materiality refers to weight, and while the new evidence of the Appellants was relevant, it was not material. Therefore, Her Ladyship concluded that the Appeal could not be based on the Defendant's new evidence. The Appeal was dismissed and the judicial sale and vesting was allowed.

DEMB V VALHALLA GROUP LTD, 2015 ABQB 618 (JONES J)
Rules 5.2 (When Something is Relevant and Material), 5.5 (When Affidavit of Records Must be Served), 5.7 (Producible Records), 5.9 (Who Makes Affidavit of Records), 5.10 (Subsequent Disclosure of Records), and 10.52 (Declaration of Civil Contempt)

The Defendants were ordered, in a prior Application, to produce a further and better Affidavit of Records (the "Order"). The Plaintiffs alleged that the Respondents failed to comply with the Order and applied for a Declaration that the Defendants were in contempt of court. Justice Jones noted that the applicable Rule relating to civil contempt as it related to this case was Rule 10.52(3)(a)(i). His Lordship also noted that the standard of proof in civil contempt is proof beyond

a reasonable doubt. It is not necessary that there be an intention to disobey a Court Order for a finding of contempt.

The Plaintiffs argued that the Defendants should be held in contempt because they swore a common Affidavit of Records. The Plaintiffs referred to Rule 5.5 which requires that every party must serve an Affidavit of Records, as well as Rule 5.9 which confirms who may swear an Affidavit of Records on behalf of others. However, Jones J. noted that Rule 5.10 governs subsequent disclosure of records, and it was not clear that the individual Defendants had breached Rule 5.10 in delivering a single Affidavit of Records. The language of the Order also did not support the contention that the Defendants were in contempt for submitting a common Affidavit.

The Plaintiffs also alleged that the documents within the Affidavit of Records were not listed properly. Jones J. stated that, while the production was sloppy and disorganized, it did not breach the Order and it did not amount to contempt. The Plaintiffs alleged further that the contents of the electronic production were not reviewed for relevance and materiality, resulting in an overbroad production of hundreds of thousands of documents. The Court reviewed Rule 5.2 and noted that it is necessary to look at the Pleadings to decide relevance and materiality. The Court reviewed the Pleadings and the evidence and determined that the Plaintiffs required a broad production from the Defendants and that all produced records were therefore relevant.

The Applicants also took issue with the manner in which the relevant and material records were bundled. The Court noted that bundling is permitted in an Affidavit of Records under Rule 5.7(2), provided that the records are all of the same nature and the bundle is described in sufficient detail to enable another party to understand what it contains. Jones J. noted that, if the Affidavit gives no indication of its contents, and no other finding tool is provided, it is likely not a valid Affidavit of Records. His Lordship ultimately held that a finding of contempt would be inappropriate in the circumstances since the Defendants were required to produce the records in a short period of time. In the result, the contempt Application was dismissed and Justice Jones referred any future production issues to Case Management.

GOODSWIMMER V CANADA (ATTORNEY GENERAL), 2015 ABCA 253 (ROWBOTHAM, O'FERRALL AND WAKELING JJA) Rule 5.3 (Modification or Waiver of This Part)

The Plaintiff band representatives appealed a Case Management Order which forced them to produce a number of undertakings relating to privileged records. The Court, in the Majority, surveyed the authorities considering how privilege might be waived in a lawsuit, and relied on the Ontario decision of *Leggat v Jennings*, 2015 ONSC 237 for the principle that privilege might be waived by pleadings where: (i) the presence or absence of legal advice is material to the lawsuit; or (ii) the party who received the legal advice must make the receipt of it an issue or claim a defence based upon the advice.

The Court, in the Majority, noted that Rule 5.3 can be applied to the requirement to produce records where to do so would be "grossly disproportionate to the likely benefit", but declined to apply the Rule in the circumstances. The Case Management Order was upheld and the Band was ordered to produce the records since they put privilege at issue in the Pleadings.

FLOATE V GAS PLUS INC, 2015 ABQB 545 (JEFFREY J) Rules 5.6 (Form and Contents of Affidavit of Records) and 5.33 (Confidentiality and Use of Information)

The Applicants, the Minister of Environmental Sustainable Development and the Ministry of Health (collectively the "Regulators") acquired records during an investigation of possible regulatory offences. The Regulators took the position that they were required to produce all these records unless privileged. The Respondents, GasPlus Inc. and Handel Transport (Northern) Ltd., argued that the common law implied undertaking rule applied to the records in the Regulators' possession, restricting their disclosure for any purpose other than that for which they were acquired.

Jeffrey J. noted, and the parties agreed, that Rule 5.33 did not apply to the records in dispute. Rule 5.33 imposes an undertaking on records exchanged in the course of civil proceedings. The parties acknowledged that none of the records in issue were so obtained.

After reviewing authorities related to implied undertakings in other contexts, Justice Jeffrey held that there was no rule of law which would restrict the requirements to produce the relevant and material records which were the subject matter of the Application. Accordingly, the Court ordered production of the records in question.

KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2015 ABCA 249 (CÔTÉ, SLATTER AND WAKELING JJA)
Rules 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Experts' Reports), 5.36 (Objection to Expert's Report), 5.37 (Questioning Experts Before Trial), 5.38 (Continuing Obligation on Expert), 5.39 (Use of Expert's Report at Trial Without Expert) and 5.40 (Expert's Attendance at Trial)

The Plaintiff was hired to deliver and deposit clay to a subdivision during the 2005 construction season in Edmonton, but was delayed for problems that were not their fault. The Defendant terminated the contract and the Plaintiff sued. The Chambers Judge found that the Defendant did not have grounds to terminate the contract. The Defendant appealed, arguing, *inter alia*, that the testimony of one of the witnesses should not have been admitted because they were not qualified as an expert.

The Court considered the definition of an expert, and stated that, in Alberta the definition of an expert is less narrow than the definition in the Ontario Rules. The Court further stated that Part 5 of the Alberta Rules is meant to avoid surprise at Trial and applies to any witness who proposes to give expert opinion evidence. The Court found no palpable and overriding errors in the Chambers Judge's Decision and, as such, dismissed the Appeal.

SUTHERLAND V DORSEY, 2015 ABQB 477 (MASTER ROBERTSON)
Rules 6.7 (Questioning on Affidavit in Support, Response and Reply to Application) and 7.3 (Summary Judgment)

The Plaintiff commenced an Action against the Defendants, claiming that they conspired to defame him and have him suspended from the practice of law. The Defendants applied, pursuant to Rule 7.3, for Summary Dismissal of the Plaintiff's Claim. The Defendants argued there was no evidence of any bad faith, and having satisfied the requirements of Rule 7.3, the onus falls to the Plaintiff to establish some evidence that there is a genuine issue for Trial. Master Robertson reiterated the judicial principles established recently with respect to Summary Judgment Applications; specifically that each party must put their best foot forward.

The Plaintiff had cross-examined some of the Defendants on their Affidavits, but failed to file the transcripts as required by Rule 6.7(b). Further, the Plaintiff did not refer to any evidence from the cross-examinations in oral argument. Master Robertson reserved the decision until the transcripts could be reviewed. Master Robertson observed that the evidence failed to demonstrate that the Defendants acted in bad faith, but the Plaintiff's actions were indicative of bad faith. Further, no particulars were provided with respect to the alleged defamatory statements. Master Robertson held that there was no merit to the Claim and the record allowed for a fair and just determination to be made; Summary Dismissal was granted.

HARI V BARIANA, 2015 ABQB 605 (MASTER ROBERTSON)
Rules 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff sued on his own behalf and on behalf of his deceased father for transfer of an interest in the family farm. The Defendant, the Plaintiff's aunt, applied for Summary Dismissal of the Plaintiff's Claim.

Master Robertson weighed the evidence before the Court in order to determine if the Plaintiff's Claim should be summarily dismissed. The Plaintiff had presented hearsay evidence of the alleged oral contract between his father and grandfather. Master Robertson stated that, pursuant to Rule 13.18(1) and 13.18(2), this hearsay evidence could be entered to rebut a Summary Judgment Application, but hearsay evidence would not be admissible in that form at Trial. The Defendant sought to rely on Affidavit evidence sworn by another family member which was tendered in

a separate Action which had been discontinued. Master Robertson stated that the Defendant could not use the evidence from the hearing without prior notice to the Plaintiff and the Court's permission pursuant to Rule 6.11(f).

Master Robertson applied the test for Summary Judgment, and considered previous authority in deciding whether the record evidence of the Defendant provided a fair and just adjudication of the issue. Master Robertson noted that the Plaintiff had not provided much evidence in his favor. Master Robertson held that the Defendant's likelihood of success at Trial was extremely high. Therefore the Application for Summary Judgment was granted and the Claim of the Plaintiff was dismissed.

SHALLOW GAS DRILLING CORP V LEGACY OIL & GAS INC, 2015 ABQB 606 (BENSLER J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff commenced a Claim against the Defendant for breach of contract, negligence, and unjust enrichment in connection with an agreement for drilling test wells. The Defendant successfully applied before a Master for Summary Dismissal of the Claim, and the Plaintiff appealed.

An essential fact in dispute was whether the test wells were drilled to the proper depth pursuant to the agreement. The Plaintiff sought to enter a new Affidavit by a geological expert sworn after the Summary Judgment Decision was rendered. Justice Bensler noted that, pursuant to Rule 6.14(3), new evidence may be admissible on an Appeal from a Master's Decision if the Judge hearing the Appeal is of the opinion that the new evidence is relevant and material. Bensler J. stated that litigants are not permitted to call evidence, including expert evidence, on the meaning of a contract; therefore, the new Affidavit was not relevant and material because it essentially provided an interpretation of the agreement.

Justice Bensler then considered whether the Master erred in granting the Defendant's Application for Summary Dismissal. Citing Rule 7.3 and prior leading authority, Her Ladyship stated that Summary Judgment is appropriate for determining issues of law and then considered whether the Defendant met the threshold of proving that the Plaintiff's Claim had no merit. Based on the facts of this case, Bensler J. held that the Plaintiff's Claim had no merit and dismissed the Appeal.

TORONTO DOMINION BANK V DEMICHELE, 2015 ABQB 607 (SHELLEY J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 13.5 (Variation of Time Periods)

Mr. Demichele and Ms. Henderson (collectively the "Respondents") owned property with two registered mortgages against it. The first mortgage was registered in favour of Co-operative Trust Company of Canada ("First Mortgagee") and the second mortgage was registered in favour of the Applicant, Toronto Dominion Bank. The First Mortgagee obtained a Redemption Order (the "Order") and a subsequent Order Confirming Sale and Vesting Title. The sale of the property closed, and the excess proceeds were paid into Court.

The Applicant applied successfully to have the excess funds paid out of Court. After receiving the funds, the Applicant instructed counsel to appeal the Order since the amount of excess funds was insufficient to cover the second mortgage. The Applicant sought an extension of the time to appeal the Order because it wished to obtain a deficiency Judgment against the Respondents. Justice Shelley noted that, under Rule 6.14(2), the Appeal period was ten days, beginning when the Order was entered and served. Referencing recent authority, Shelley J. set out three factors to be considered when extending time pursuant to Rule 13.5: the length of delay; the explanation for the delay; and the relative prejudice to the parties.

In the result, the Application was dismissed on the basis that the delay in seeking the extension was considerable and the explanations by the Applicant were insufficient to overcome the magnitude of the delay, or its potential prejudice to the Respondents.

DBD CONSTRUCTION LTD V TENFOLD CONTRACTING LTD, 2015 ABCA 303 (BERGER, MARTIN AND VELDHUIS JJA)
Rules 6.14 (Appeals from a Master's Judgment or Order) and 14.48 (Stay Pending Appeal)

Tenfold Contracting Ltd. ("Tenfold") registered builder's liens against property for which DBD Construction Ltd. ("DBD") was the general contractor. DBD claimed that Tenfold had failed to meet certain deadlines for payment into Court and service of an Affidavit proving the liens. Tenfold sought an Order from a Master for an extension of time to file and serve its Affidavit proving the liens and its Statement of Claim. DBD cross-applied seeking, *inter alia*, dismissal of Tenfold's extension Application. The Master refused Tenfold's Application for an extension. Tenfold appealed the Master's Order to a Justice who then granted a stay of execution of the Master's Order. DBD appealed the Justice's Decision.

The Court of Appeal considered whether the appeal period had expired pursuant to Rule 6.14(2). The Court opined that the date of the pronouncement of the Master's Order was the commencement of the appeal period. The Court held that, under Rule 14.48 the Justice had the jurisdiction to hear and grant the stay of enforcement of the Master's Order. DBD's Appeal was accordingly dismissed.

PERRON V HLUSHKO, 2015 ABQB 595 (PENTELECHUK J)
Rules 6.37 (Notice to Admit) and 7.5 (Application for Judgment by Way of Summary Trial)

The parties were divorced and shared care of their children. The Applicant applied in Special Chambers to vary the amount of child support that he was obliged to pay. One of the peripheral issues in this Application was whether the expense and delay of a Trial was justified. The Court stated that in balancing the need to produce a fulsome evidentiary record and the need to achieve a timely and cost-effective resolution, litigants face a dilemma that will only be amplified when the new Family Practice Note 2 comes into effect. The Court advised counsel to "get creative" and utilize civil procedure Rules, such as Rule 6.37, where the quantum in question may be admitted without the need to attach voluminous exhibits to an affidavit. Summary Trial was another option, which would have allowed for more fulsome Affidavits supplemented by *viva voce* evidence as needed. In the result, child support was varied.

PRECISION DRILLING CANADA LIMITED PARTNERSHIP V YANGARRA RESOURCES LTD, 2015 ABQB 433 (MASTER PROWSE)
Rule 7.3 (Summary Judgment)

The Plaintiff brought a Summary Judgment Application for payment for work it performed on three wells of the Defendant. The Defendant claimed set-off arising from the Plaintiff's faulty drilling which caused loss to, and additional expenses incurred by, the Defendant. The parties had entered into a bilateral no fault contract in which each party released the other of all fault except where there was intentional harm.

In determining whether the Claim should be determined summarily, Master Prowse reviewed the facts and assumed some facts in favour of the Defendant. Master Prowse held that a disposition that is fair and just to both parties could be made on the existing record. As the parties had entered into a no fault contract, the Plaintiff was entitled to payment for its work without deducting the set-off claimed by the Defendant. Accordingly, Summary Judgment was granted.

681210 ALBERTA LTD V 1335422 ALBERTA LTD, 2015 ABQB 489 (MASTER FARRINGTON)
Rule 7.3 (Summary Judgment)

The Defendant, 1335422 Alberta Ltd., applied to dismiss or stay the Action against it pursuant to Section 7 of the *Arbitration Act*, RSA 2000, c A-43, arguing that there was an arbitration agreement between the parties. The Plaintiff argued, *inter alia*, that notwithstanding an arbitration agreement, a case may proceed through the Court if it would be an appropriate case for Summary Judgment. Master Farrington agreed with this proposition and stated that, in *Hryniak v Mauldin*, 2014 SCC 7, the Supreme Court of Canada urged the Courts to be more receptive to Summary Judgment Applications under appropriate circumstances.

Master Farrington held that, in this case, a Summary Judgment motion would be weak at best and the case did not fall under the Summary Judgment exception in Section 7(2) of the *Arbitration Act*. However, the time limit for seeking arbitration had expired under the *Limitations Act*, RSA 2000, c L-12, so the Action was dismissed.

1499925 ALBERTA LTD V NB DEVELOPMENTS LTD, 2015 ABQB 516 (MASTER PROWSE)
Rule 7.3 (Summary Judgment)

The Plaintiff mortgage lender who participated in the development of a golf course and related residential lands applied for Summary Judgment against the Defendant borrower and six Defendant guarantors. Master Prowse held that the existing record allowed an adjudication which was fair to the parties, and the evidence before the Court did not support the contention of the Defendant guarantors that the borrower should bear the burden of the alleged mismanagement of the project by the individual Defendant who was a shareholder of both the Plaintiff lender and Defendant borrower. The Plaintiff sought interest other than the rate set out in the mortgage. Master Prowse observed that under the Summary Judgment Rule 7.3, if the only real issue to be tried is the amount of the award, the Court may determine the amount or refer the amount for determination by a referee. Because the rate of interest was an issue of quantum and not of liability, Master Prowse proceeded to grant Summary Judgment against all Defendants and directed the Plaintiff to re-calculate the amount owing according to the interest rate set out in the mortgage. If the exact amount could not be agreed by the parties it would be determined on a future Application or referred to a referee for resolution.

SHAMAC COUNTRY INNS LTD V SANDY'S OILFIELD HAULING LTD, 2015 ABQB 518 (MASTER WACOWICH)
Rule 7.3 (Summary Judgment)

In an Action brought as a subrogated Claim on behalf of the Plaintiff's insurers who sought to recover the payment made as a result of a fire which destroyed a hotel owned and operated by the Plaintiff Corporation. The Defendants brought an Application for Summary Dismissal under Rule 7.3, and the Plaintiff brought a Cross-Application for Summary Judgment under the same Rule.

Master Wacowich relied on the test for Summary Judgment as set out by the Court of Appeal in *776926 Alberta Ltd. v Ostrowercha*, 2015 ABCA 49 which stated that Summary Judgment can be given if a disposition that is fair and just to both parties can be made on the existing record, and, substantively, "whether there is in fact 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".

As the facts were not in dispute, Master Wacowich conducted an analysis of the legal issues which were raised (relating to the doctrines of vicarious liability, common employees, and shared employees) and found that the Defendants would succeed if this matter were to proceed to Trial. Summary disposition was therefore warranted. The Defendants' Application for Summary Dismissal was granted, and the Plaintiff's Cross-Application for Summary Dismissal was dismissed.

BAHRAMI V AGS FLEXITALLIC INC, 2015 ABQB 536 (SHELLEY J)
Rule 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment in a wrongful dismissal Action in which he sought damages against his former employer.

The Parties submitted that there were essentially no disputed facts and that the only real issue was the amount to be awarded. The Parties were at odds regarding whether and the extent to which the Plaintiff's employment status should affect the length of notice period to which the Plaintiff was entitled, but the parties submitted that there was enough evidence before the Court to resolve the issue without resorting to a full Trial. Justice Shelley held that this dispute did not concern material facts, but instead reflected differing legal positions based on otherwise undisputed facts. Justice Shelley held that the Plaintiff was entitled to Summary Judgment, and awarded damages accordingly.

MICHAEL HANUSCHUK DRUGS LTD V KEITH, 2015 ABQB 537 (NIXON J)
Rules 7.3 (Summary Judgment) and 9.35 (Checking Calculations: Assessment of Costs and Corrections)

The Plaintiffs and the Defendants were Parties to a contractual dispute involving real estate products. The threshold issue before the Court was whether Summary Judgment was appropriate. Justice Nixon considered prior authorities including the Supreme Court of Canada case of *Hryniak v Mauldin*, 2014 SCC 7, and stated that Summary Judgment Applications should be granted when there is no genuine issue requiring Trial. The Court should take into consideration whether it is able to make the necessary findings of fact and apply the law to the facts, and whether the Summary Judgment process is a proportionate, more expeditious and less expensive means to achieve a just result. Justice Nixon was satisfied that there was sufficient evidence in this case to conclude that there was no genuine issue requiring a Trial, and therefore Summary Judgment was appropriate.

A final issue before the Court was whether the requirements of Rule 9.35(1)(a) should be waived. The Court directed the Plaintiffs to speak to Costs and to its request for a waiver of the Rule 9.35(1)(a) requirements within 30 days of the date of the written Decision.

HORNER V DAVIDSON, 2015 ABQB 580 (MASTER SCHLOSSER)
Rules 7.3 (Summary Judgment), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Defendant wife applied for Summary Dismissal of an Action stemming from a matrimonial dispute. The main issue in the Action was whether one estranged spouse could sue the other for using an Emergency Protection Order to gain exclusive possession of the matrimonial home. The Plaintiff husband was self-represented and his Statement of Claim did not expressly use the word "defamation" or "abuse of process". Master Schlosser noted that Rule 13.7(f) requires particulars of defamation to be pleaded. Rule 13.6 does not require that abuse of process be specifically pleaded. Master Schlosser stated that, even if the form of the Pleadings was defective, the Defendant's counsel was under no illusions about the basis of the Plaintiff's Claim. The outcome of the case was not sufficiently certain that the Action should be summarily dismissed. In the result, Master Schlosser dismissed the Defendant's Application for Summary Judgment.

GIAMMARCO & CO (WESTERN) DIVISION LTD V TRL REAL ESTATE SYNDICATE (05) LTD, 2015 ABQB 587 (MASTER MASON)
Rule 7.3 (Summary Judgment)

Three Defendants in an Action for breach of a real estate purchase agreement applied for Summary Judgment dismissing the Claim against them. The corporate Defendants were all limited partners in a partnership agreement, and all corporate entities were controlled by one individual, Mr. Swift. Master Mason referenced Rule 7.3(1)(b) which provides that a party may apply to the Court for Summary Judgment in respect of all or part of the Claim on the basis that there is no merit to the Claim. Master Mason also referenced Rule 7.3(2) which provides that the Application for Summary Judgment must be supported by an Affidavit swearing positively that the stated grounds have been met, or by other evidence to that effect.

Master Mason analyzed the relevant authorities and summarized that, in order to determine the liability of limited partners, the Court has to consider the nature of the business of the particular partnership, the actions taken by the limited partner, and the terms of the limited partnership in question. Master Mason concluded that each case must be determined on its own facts. Master Mason considered the evidence before the Court, including that of the general partner which provided that Mr. Swift was involved in the decision making process of the business and that he had taken part in decisions of significance in the transaction in issue.

Master Mason concluded that, because the evidence conflicted, it presented a credibility issue. The Court may not make findings of credibility or resolve contested issues of fact on a Summary Judgment Application. The Application for Summary Judgment was dismissed.

JAGODNIK V OUDSHOORN, 2015 ABQB 456 (ROSS J)
Rule 7.5 (Application for Judgment by Way of Summary Trial)

Two Actions were consolidated for Summary Trial: a tort Action, in which the Plaintiff sought damages arising from a physical battery, and a partition and sale Application in relation to property held jointly between the Plaintiff and Defendant. The Plaintiff and Defendant engaged in a physical altercation which the Plaintiff claimed caused injuries to her shoulder and jaw, as well as post-traumatic stress. At issue in the tort Action was whether damages should be reduced by reason of provocation, as well as whether the Plaintiff's temporal mandibular joint ("TMJ") injury pre-existed the battery. There was conflicting evidence with regard to both the provocation and the TMJ issues.

The Parties agreed to a Summary Trial in an effort to avoid the additional delay and costs which would be involved with scheduling and conducting a conventional Trial. Justice Ross noted that the consent of the Parties, the low amount at issue, the relatively low complexity of the issues, as well as the significant delay which had already occurred all tended to weigh in favour of proceeding by way of Summary Trial. However, the fact that there was conflicting evidence required Justice Ross to proceed with caution.

Justice Ross noted that *viva voce* evidence may be heard at Summary Trials, and held that it was necessary in this case because resolution of the provocation issue depended almost entirely on the credibility of the witnesses. *Viva voce* evidence was heard respecting this issue alone. While there remained conflicting evidence on other issues, Justice Ross found that there was sufficient evidence to make the necessary findings of fact. Particularly, with regard to the medical evidence concerning the Plaintiff's TMJ injury, Justice Ross found that the Plaintiff's medical records coupled with the reports created by the medical experts were sufficient to make factual findings on a balance of probabilities. Additionally, the fact that one expert's diagnosis was tentative tended to reduce the amount of actual conflict between the two experts. Justice Ross held that Summary Judgment on this issue would be appropriate.

With regard to the partition and sale Application, Justice Ross held that the conflicts in evidence could be relatively easily resolved within the confines of Summary Trial given that credibility was not a real concern. Documentary evidence, or the lack thereof, and reliance on the onus of proof, was sufficient to resolve these conflicts.

1400467 ALBERTA LTD V ADDERLEY, 2015 ABQB 524 (VEIT J)
Rule 8.4 (Trial Date: Scheduled by Court Clerk)

The Plaintiff applied to file an Amended Amended Amended Statement of Claim. The parties entered into an agreement relating to the filing of an Amended Amended Amended Statement of Claim, as well as filing a Form 37 to set a Trial date. A dispute arose in regard to the merits of the amendment to the Claim. Veit J. considered Section 6 of the *Limitations Act*, RSA 2000, c. L-12, as they related to the amendments.

Her Ladyship also considered whether or not parties could file a Form 37 even if they had not completed every required pre-trial step. Veit J. noted that, where experienced counsel agree to undertake with the Court that they will complete various pre-trial steps in time, the Court will accept a partially completed Form 37 and set a Trial date. Veit J. referred to Rule 8.4 and noted that the current Rules codify the previous practice of issuing conditional certificates of readiness. The Court, therefore, held that a Form 37 could be filed before all pre-Trial steps were completed if there was an appropriate agreement to ensure completion in place.

SIMPSON V RONDEAU, 2015 ABCA 283 (SLATTER, MCDONALD AND O'FERRALL JJA)
Rule 9.13 (Re-Opening Case)

The parties were involved in a complex dispute over child custody and access. In 2014, the Court ordered that the child's grandmother could supervise the father's access to the child. In January 2015, a second Order rescinded that direction for reasons of practicality, as the grandmother resided in British Columbia and the child resided in Alberta. In March 2015, a Chambers Judge ordered the

restoration of the original Order permitting the grandmother to be a supervisor for the father's visits. The Order followed a prior adjournment Application in which the matter was not argued or decided.

The Defendant father appealed the Decision, arguing that under Rule 9.13 the Chambers Judge could not change the previous Order without following a more rigid process. The Court of Appeal stated that, although the power of the Courts under Rule 9.13 to vary a pronounced Judgment must be exercised cautiously, no particular procedure is required under that Rule. Further, it is not inappropriate to use the Rule to deal with overlooked matters. The Court of Appeal held that there was no reviewable error to the Chamber Judge's Decision, and dismissed the Appeal.

DG V CANADA (CORRECTIONAL SERVICE), 2015 ABQB 539 (PENTELECHUK J)
Rule 9.14 (Further or Other Order After Judgment or Order Entered)

The Applicant previously applied for *habeas corpus* and obtained an Order mandating that he be returned to his day parole and that an appropriate period for his day parole later be determined. The government parole board failed to properly reinstate the Applicants' day parole in accordance with the Order. The Applicant then applied for a second order for *habeas corpus* demanding his immediate release in light of the parole board's breach of the Court's previous Order. The Attorney General of Canada ("AG Canada") argued that the Application was barred by *res judicata*. AG Canada also argued that the remedies sought by the Applicant would require an Amendment to the original Order, and such amendment was precluded by Rule 9.14.

Justice Pentelechuk noted that Rule 9.14 does not operate to preclude the Court from clarifying, supplementing or working out the terms of an Order, even after it is entered. Her Ladyship went on to find generally that, no legislation, including the Rules of Court, can curtail a Superior Court Justice's ability to maintain supervision over the enforcement of their earlier Orders.

Pentelechuk J. granted the Applicant's Order for *habeas corpus* and directed that he be released forthwith from prison, in accordance with the terms of his statutory release.

POLOMA INVESTMENTS LTD V YUEN, 2015 ABQB 598 (LEE J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

In an Action for damages resulting from the purchase and sale of a double-sided LED billboard, the Plaintiffs mistakenly served their Statement of Claim on the wrong "Andrew Yuen". The Plaintiffs discovered their mistake and obtained an Order for substitutional service which was effected by leaving the Statement of Claim with Andrew Yuen's tenant. The three Defendants did not respond to the Statement of Claim and the Plaintiffs obtained Default Judgment against all of them. Seven days after being served with a Notice of Intent to sell his residence, Mr. Yuen served the Plaintiffs with a Statement of Defence, an Application to set aside the Default Judgment and his supporting Affidavit.

Justice Lee agreed with the Plaintiffs that the Court did not need to make a determination as to Mr. Yuen's actual knowledge of the Claim. The Court also noted that there was uncontradicted evidence that the Claim was left with the tenant, and nothing happened for seven months until a Writ was filed against the home.

Lee J. considered Rule 9.15 which allows the Court to vary or discharge a Judgment or Order. His Lordship determined that the Court should exercise its discretion in this case and set aside the Default Judgment to allow what appeared to be an arguable Defence. Justice Lee also awarded the Plaintiffs Costs to compensate for the prejudice caused by setting aside the Default Judgment.

O'BRIEN V DE VILLARS JONES, 2015 ABQB 535 (MASTER WACOWICH)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.10 (Limitation on Reviewing Retainer Agreements and Charges) and 13.5 (Variation of Time Periods)

The Applicant law firm applied to have a Review Officer's Decision reviewed. At the client-initiated Appointment for Review, the Review Officer refused to review two of three accounts as they were outside of the six month review period pursuant to Rule 10.10(2). The Applicant firm then served the client with an Appointment for Review, arguing that the accounts were proper.

Master Wacowich initially considered whether the accounts were interim or final, as Rule 10.10(2) only applies to final accounts. Master Wacowich held that the parties entered into a verbal retainer agreement to bill for work as it was provided. Master Wacowich reviewed Rule 10.2(1) which outlines factors that may permit a lawyer to adjust legal costs on accounts throughout the retainer if the retainer agreement allows for it, and determined that the Rule did not apply. Master Wacowich concluded that the accounts were final.

Master Wacowich also considered the Applicant law firm's argument that the six month limitation period in Rule 10.10(2) should be extended. Master Wacowich considered Rule 13.5(1), which allows for variation of time periods. Master Wacowich noted that the reason a lawyer has an account reviewed is different from the reason a client has an account reviewed. Master Wacowich ultimately concluded that, even though the wording in Rule 10.10(2) has changed to include both client-initiated and lawyer-initiated account review, the time for the review of the two accounts that were outside the limitation date should be extended in this case. Master Wacowich noted that it is poor policy to force counsel to sue their client because they cannot collect an account when the review process is much less complicated.

WILLIER V MCGURK, 2015 ABCA 299 (VELDHUIS JA)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.26 (Appeal to Judge) and 14.5 (Appeals Only With Permission)

The Plaintiff appealed the Decision of a Review Officer in respect of legal accounts. The Chambers Justice upheld the Decision and the Plaintiff sought permission to appeal to the Court of Appeal. As a preliminary matter, Justice Veldhuis considered whether new evidence could be adduced on an Appeal under Rule 10.26. Veldhuis J.A. noted that, even if Rule 10.26(3) allowed new evidence on an appeal from a Review Officer's Decision, the Plaintiff's affidavit evidence was deficient: the Affidavit was not served within a reasonable time prior to the Appeal; it contained "false, self-serving or unsupported assertions"; and it raised new accusations not heard or considered by the Review Officer. The Chambers Justice had not erred in refusing the admission of new affidavit evidence.

Justice Veldhuis also considered the test for permissive Appeals under Rule 14.5 and noted that a Court will assess a number of factors including: (i) whether there is an arguable case, having regard to the standard of review on Appeal; (ii) whether there is a question of law or jurisdiction at issue; (iii) whether the law or precedent is of importance to others or the public; (iv) the practical effect on the parties; (v) whether there will be undue prejudice to a party; (vi) whether there is a bar to the appeal; (vii) whether the expense of a further Appeal is commensurate with the value to be gained from an Appeal; and (viii) the standard of review on the Appeal if leave is granted.

Justice Veldhuis also noted that a Review Officer's Decision will be given deference, and Appellate interference will only be justified where the Review Officer operated on wrong principles or made an error of fact. Her Ladyship denied leave to appeal as the Applicant failed "the most important" element of the test, a reasonable prospect of success on Appeal.

ALBERTA TREASURY BRANCHES V 14010507 ALBERTA LTD (KATCH 22), 2015 ABQB 548 (WAKELING JA (EX OFFICIO))
Rules 10.3 (Lawyer Acting in Representative Capacity), 10.30 (When Costs Award may be Made), 10.31 (Court-Ordered Costs Award) and 10.34 (Court-Ordered Assessment of Costs)

The Court previously allowed Appeals against two Decisions of a Review Officer certifying legal fees pursuant to Costs awarded on a solicitor-client basis. The parties were unable to agree on the form of Order and requested that the Court finalize its terms.

Under the agreements between the parties, the Plaintiff, (ATB) was entitled to full indemnification of legal fees. Wakeling J.A. cited Rules 10.30 and 10.31 as the governing Rules, noting that generally, a Court will enforce a fee indemnification agreement unless there is a compelling reason not to grant full indemnity, such as when an indemnitee has acted unreasonably. It was not disputed that the fees sought by ATB were stipulated legal services. Justice Wakeling held that ATB had not acted unreasonably and there was no compelling reason not to enforce the fee indemnification provisions in the agreements between the parties. Further, ATB had complete success before the Court. Accordingly, Wakeling J.A. held that ATB was entitled to a costs award for full indemnity of the amounts paid to its legal counsel, and if the parties could not agree on Costs, they could apply pursuant to Rule 10.34(1) for an assessment of Costs.

BORDEN LADNER GERVAIS LLP V CBI INVESTMENTS LTD, 2015 ABQB 442 (MASTER FARRINGTON)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review) and 10.11 (Who may Request Review of Lawyer's Charges)

The Plaintiff law firm sought to amend their Appointment for review of a retainer agreement to include two new Defendants in relation to an Assessment of legal fees. Master Farrington considered Rules 10.9 and 10.11, stating that the assessment process allows fee matters to be reviewed in a less public forum than in a civil Action. Master Farrington concluded that the proposed Defendants were not clients of the Plaintiff and declined to add them to the proceedings.

Master Farrington nevertheless reviewed the law pertaining to the amendment of pleadings. Master Farrington stated that the classic rule is that pleadings may be amended no matter how late or careless the party seeking to amend, subject to four major exceptions. The main exception is whether the amendment would cause serious prejudice, not compensable in Costs, to the opposing party. The Court found that there would have been prejudice to the new Defendants had the Application been allowed. The Application to amend the Appointment for review was dismissed.

MANUFACTURERS LIFE INSURANCE COMPANY V 423632 ALBERTA LTD, 2015 ABQB 566 (YAMAUCHI J)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In an Action in respect of a mortgage dispute, the Defendant opposed the Plaintiff's Claim for solicitor-client Costs arising from its successful Application for the appointment of a receiver to manage the mortgaged property. Justice Yamauchi cited Rules 10.9, 10.29(1)(a), 10.31 and 10.33, and stated that there can be no doubt that the Court retains discretion to award Costs.

The Defendant conceded that the Plaintiff was entitled to solicitor-client Costs for commencing the Action and for duties surrounding the net rentals of the property. The Court also allowed the Plaintiff its solicitor-client Costs for the issuance of demand letters and a notice of intention to enforce security pursuant to s. 244(i) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. Taking into consideration the cumulative effect of the factors before the Court, Yamauchi J. found that the Plaintiff was not entitled to its solicitor-client Costs beyond those steps.

ZYPHERUS HOLDINGS INC V DORAIS, 2015 ABQB 523 (THOMAS J)
Rules 10.28 (Definition of "Party"), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff, Zypherus Holdings Inc. ("Zypherus"), applied before a Master for a Foreclosure Order with respect to lands registered in the names of the Defendants, who were deceased. The estate of one of the Defendants was bankrupt, and the Trustee in Bankruptcy (the "Trustee") advanced arguments on behalf of the creditors. Zypherus's Application was dismissed. Zypherus successfully appealed the Master's Decision before Justice Thomas. The Trustee then appealed Justice Thomas's Decision, and the Court of Appeal dismissed the Trustee's Appeal. Following the Trustee's unsuccessful Appeal, Zypherus returned to the Court of Queen's Bench and applied for Costs before Justice Thomas.

The parties agreed that by operation of the Alberta *Law of Property Act*, RSA 2000 c L-7 ("LPA"), Costs contemplated in the impugned mortgage could not be awarded. The Court therefore considered whether Costs could be awarded in the normal course of proceedings pursuant to the Rules. Justice Thomas considered the language of Rules 10.28 and 10.29, emphasizing that a "party" under Rule 10.28 includes a person participating in an Application, who may be subject to a Costs award. Further, under Rule 10.29, an unsuccessful party must pay Costs, but subject to "an enactment governing who is to pay costs in particular circumstances".

The Court considered whether the relevant section in the LPA was an enactment that governs who is to pay Costs under Rule 10.29. The Court held that in enacting the LPA, the Alberta legislature did not intend to deprive Courts of their discretion to award Costs in the normal course. The LPA can prohibit a separate Action on Costs, but does not govern which Party is to pay Costs in an existing Action. Therefore, the LPA is not the type of enactment contemplated by Rule 10.29.

Justice Thomas then considered whether the Trustee is a party against whom Costs may be awarded under Rule 10.28. His Lordship stated that the Trustee is the owner at law of the property in question, and therefore has all of the rights and defences of an owner, and is subject to the same risks and liabilities. This includes liability for Costs. Therefore, Rule 10.28 applied to the Trustee.

Finally, Thomas J. considered whether Costs should be awarded. Thomas J. noted that there were no special circumstance in this case that would warrant solicitor-client Costs. Therefore, only party-party Costs were considered. Justice Thomas stated that, in granting Costs awards, Courts in Alberta must do so judicially, taking into consideration the principles set out by Rules 10.31 and 10.33. Citing prior authority, the Court stated that Costs serve as a tool to discourage litigation, and that a Trustee in Bankruptcy should not be immune from potential Costs implications and consequences. In the circumstances, Thomas J. awarded Costs against the Trustee.

ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL) V WILLIS 2015 ABQB 463 (SCHUTZ J)
Rule 10.29 (General Rule for Payment of Litigation Costs) and Schedule C

The parties could not agree on Costs following an Order by Justice Schutz denying the Application of the Minister of Justice and Solicitor General ("Minister") to compel one of the Respondents, Mrs. Willis, to answer questions, despite declaring the questions to be relevant and material. The questions posed were declared relevant and material and Mrs. Willis' refusal entitled the Minister to apply for forfeiture. Mrs. Willis argued that the primary purpose of the Application was to compel answers to the questions, which was not granted, and therefore the Minister was not successful. The Minister sought Costs on the basis that it was substantially successful. Mrs. Willis did not seek Costs.

Citing Rule 10.29(1), the Court noted that generally a successful party is entitled to Costs, including a substantially successful party even if that party was not totally successful on every issue or argument. Justice Schutz

held that the Minister was unsuccessful in compelling Mrs. Willis to answer relevant and material questions. The declaration of relevance and materiality by the Court was not properly characterized as substantial success, particularly because Mrs. Willis conceded that the questions were relevant and material. Nor was the Minister's entitlement to recourse by way of forfeiture a substantial success. The Minister's request for Costs was denied.

CARE VEST CAPITAL INC V 1336868 ALBERTA INC, 2015 ABQB 458 (THOMAS 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 Respondent mortgagee, Bowstein Holdings Inc., in a creditor dispute was successful in an Application for priority status, and sought solicitor-client Costs pursuant to the mortgage. The Applicant, Care Vest Capital Inc., submitted that counsel for both parties had agreed that Costs for the Application should not exceed $1,500.

Justice Thomas confirmed that the general approach under Rule 10.29 is that the successful party to an Application is entitled to a Costs award as against the unsuccessful party, and that this is subject to the Court's general discretion under Rule 10.31 and section 21 of the *Court of Queen's Bench Act*, RSA 2000 c C-31. Rule 10.33 identifies factors that the Court may consider in exercising that discretion. However, judicial discretion relating to Costs can be fettered by clear contractual terms that set out how Costs will be determined. Because the mortgage in question was not explicit with respect to Costs, solicitor-client Costs were not appropriate in the circumstances.

Thomas J. applied the general rule that the successful party is entitled to their Costs forthwith and awarded Costs to the Respondent mortgagee in accordance with Schedule C. His Lordship tripled the Column 3 Costs because of the substantial sums involved as well as the time and effort involved in resolving the Costs issue.

DAVID V PREMIERE CANADIAN MORTGAGE CORPORATION, 2015 ABQB 505 (GRAESSER J)
Rule 10.29 (General Rule for Payment of Litigation Costs)

The Plaintiffs unsuccessfully claimed against the Defendant mortgage corporation for a failure to disclose the interest requirements in a mortgage document. The Master awarded Costs on a solicitor-client basis and the Plaintiffs appealed.

Justice Graesser dismissed the Appeal after finding that the Defendant mortgagor had not contravened Section 6 of the *Interest Act*. Justice Graesser also reviewed the Costs award against the Plaintiffs, noting that the awarding of Costs in litigation is a discretionary matter. As a general rule, an award of solicitor-client costs is reserved for "rare and exceptional circumstances". His Lordship also noted that, notwithstanding the general proposition that Costs are discretionary, the parties are able to agree by way of contract on the allocation of Costs. This Cost allocation provision is common in mortgage documents, and the parties are entitled to rely on clauses to that effect.

In the result, Graesser J. held that the defence of the Action by the Defendant was not contemplated in the contract, and overturned the Master's Decision with respect to solicitor-client Costs. Instead, Costs were awarded in accordance with Column 2, of Schedule C.

JE V ALBERTA (WORKERS' COMPENSATION BOARD), 2015 ABQB 553 (SCHUTZ J)
Rule 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award), 10.36 (Assessment of Bill of Costs), 10.37 (Appointment for Assessment), 10.38 (Assessment Officer's Authority), 10.39 (Reference to Court), 10.40 (Absence of Person Served With Notice of Appointment for Assessment) and 10.41 (Assessment Officer's Decision)

After delivering Reasons for Judgment, Justice Schutz invited the parties to provide written submissions regarding Costs, which only the Defendant provided. The Defendant had been successful in both its Application for Amendment to its Statement of Defence and its Application for Summary Judgment, and accordingly asserted entitlement

to party-party Costs against the Plaintiff. Justice Schutz stated that, pursuant to Rule 10.29(1), a successful party is generally entitled to costs.

Rule 10.33 provides a number of considerations that a Court may take into account in making a costs award. Schutz J. commented that while Costs are discretionary, there are limits to the discretion. Costs cannot be awarded or withheld on legally irrelevant grounds, such as sympathy, wealth or dislike of improper conduct. A judge exercising discretion must similarly give some weight to all legally relevant factors. Taking relevant matters into account, Justice Schutz allowed the Defendant's fee items, plus reasonable disbursements. If the parties were unable to agree on proper Costs, either could schedule an appointment before an Assessment Officer in accordance with Rules 10.36 to 10.41.

SASKATCHEWAN POWER CORPORATION V ALBERTA (UTILITIES COMMISSION), 2015 ABCA 281 (ROWBOTHAM, BEILBY AND BROWN JJA)
Rules 10.30 (When Costs Award May be Made), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 13.5 (Variation of Time Periods) and 14.88 (Cost Awards) and Schedule C

Four power companies unsuccessfully appealed two decisions of the Alberta Utilities Commission. Permission to Appeal was granted on limited grounds, which grounds excluded a review and variance Decision. The Respondent utilities commission and utilities operators requested that certain paragraphs of the Appellants' factums be struck for discussing issues for which Permission to Appeal had not been granted. The Appeals were dismissed and the impugned paragraphs of the offending factums were struck. The Decision was silent on Costs, and the parties applied for directions with respect to Costs.

The Appellants argued that the Court was *functus officio* with respect to Costs by reason of it having entered a final judgment. The Court held that Rule 10.30(1)(c) creates an exception to the *functus officio* doctrine. Rule 14.88 provides the presumption that a successful party to an Appeal will be entitled to Costs as set out in Schedule C, and that the appropriate scale will be the same as that which applies to the Order or Judgment appealed from. The Information Note associated with Rule 14.88 states that the Reasons for Judgment of the Court of Appeal will not make any specific direction with respect to Costs, unless a request for a specific direction is made within two months of the pronouncement of the Decision. Rule 13.5(2) allows for the two month time limit in the Information Note to be relaxed.

The Respondents sought Costs on Column 5 of Schedule C against each of the four Appellants. The Respondents argued that Column 5 was appropriate because of the economic consequences at stake in the Appeal. The Appellants argued that Column 1 of Schedule C should apply because no monetary amount was directly at issue. The Court affirmed the principle that Courts have wide discretion in awarding Costs under Rule 10.31, and that the discretion is to be exercised while considering the factors provided in Rule 10.33. While Column 1 is the presumptive scale for matters which have no monetary amounts, Courts have wide discretion to fix an appropriate scale. The Court held that although the issues raised in the Appeal concerned statutory interpretation, that interpretation was in the context of a complicated legislative framework and an evolving industry and regulatory regime. Column 5 was therefore appropriate. Costs were payable for the preparation of a Statement of Facts, second counsel Costs and for the appearance at a contested Application before the Court of Appeal.

RVB MANAGEMENTS LTD V ROCKY MOUNTAIN HOUSE (TOWN), 2015 ABCA 304 (PAPERNY, WATSON AND SLATTER JJA)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.41 (Assessment Officer's Decision) and Schedule C

The Plaintiffs lost at Trial and appealed the Costs award made against them. The Trial was lengthy and complex, with voluminous documentation. The Trial Judge awarded Costs pursuant to Schedule C and increased them by 25% to account for inflation. During the litigation, the Plaintiffs amended their Claim to $25 million. As such, the Costs for

the steps after this amendment were calculated pursuant to Column 5. The Trial Judge awarded double Column 5 Costs since the Claim was well in excess of the $1.5 million provided for in Column 5. The Plaintiffs appealed the Costs award which accounted for inflation, and the multiplication of Column 5 Costs.

The Court of Appeal noted that the amounts in Schedule C have not been updated since 1998 and Judges have wide discretion in awarding Costs. The criteria in Rule 10.33 for exercising the Court's discretion in awarding Costs would lose meaning if the Court was restricted by Schedule C amounts. Since 1998, the cost of living has increased by 39%. As such, the increase in Costs of 25% for inflation was not unjust. With regard to double Column 5 Costs, Rule 10.31(3)(b) explicitly allows a Judge to award a multiple of any amount in any column. Further, an Assessment Officer may determine if there is any over-indemnification under Rule 10.41 due to double the amount of Column 5 being awarded. The Appeal was dismissed.

CORNELSON V ALLIANCE PIPELINE LTD, 2015 ABQB 427 (VERVILLE J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Plaintiff was successful in a wrongful termination Action in which he obtained Judgment for $1,873,900.00. The employer, Alliance Pipeline Ltd. ("Alliance"), had conceded some liability a year and a half after the Statement of Claim was filed, and 11 years before Trial. Alliance paid $998,578.00 to the Plaintiff as an early concession of liability.

The parties disputed whether or not this amount should be included in the Plaintiff's overall entitlement when determining which Costs column should be applied. Justice Verville held that the column should be assigned according to the amount that is really at issue, rather than a nominal amount claimed on the face of the pleadings. Because the only amount at issue at Trial was that which exceeded the early payment, the early payment was not considered a part of the Plaintiff's overall entitlement for the purposes of determining Costs.

Alliance submitted that Cornelson's second counsel Costs should be limited to 25% of the Trial days, predominantly because second counsel's only address to the Court consisted of one half day of read-ins. Justice Verville determined that the factors relevant to considering the appropriateness of second counsel Costs were the complexity and general importance of the legal issues, the monetary value of the case, as well as the respective roles each counsel took. With regard to the roles of counsel, Justice Verville held that while active roles by both counsel may support Costs for second counsel, the converse is not necessarily true. The amount at issue and the complexity and importance of the issues supported granting full Costs for second counsel.

CIBC MORTGAGES INC V ULRICH, 2015 ABQB 445 (MASTER SCHULZ)
Rules 10.38 (Assessment Officer's Authority), 10.39 (Reference to Court) and 10.41 (Assessment Officer's Decision)

The Plaintiff in a foreclosure Action obtained an Order confirming the sale of a property, and vesting title to the mortgaged lands. The Order provided for "costs on a solicitor and client basis". A Bill of Costs was submitted by the solicitor for the Plaintiff to the Assessment Officer for approval. The originally submitted Bill of Costs was not supported by Affidavit evidence. The Assessment Officer, pursuant to Rule 10.38, directed that this evidence be produced, and referred the matter to the Court for an assessment of the reasonableness of the Bill of Costs, pursuant to Rule 10.39.

Master Schulz noted that, on references to the Court, the Master stands in the shoes of the Assessment Officer and applies the same standards and reasoning. Rule 10.41 awards Costs for steps which are "reasonable and proper". Where Costs are to be paid by a third party, reasonable Costs are those which are necessary for the proper presentation of the case. Master Schulz held that necessary steps are those which increase the likelihood of the lender's security being protected, and those which would bring the Action to a conclusion. Master Schulz noted that a Bill of Costs must be supported by proper evidence, which

includes: copies of invoices for disbursements incurred and time spent; a copy of the Retainer Agreement and tariff (if applicable); and confirmation that an account has been rendered to the client and that the client has agreed to pay the account in full, regardless of whether the opposing party pays it. Such evidence must be set out in Affidavit form.

At the Hearing, counsel for the Plaintiff sought the Costs incurred in having to appear before the Court on the reference, which is permitted under Rule 10.41(2)(b). Master Schulz, however, noted that the reference would not have been necessary had the proper evidence been presented to the assessment officer. It was therefore inappropriate to award costs incurred as a result of the Plaintiff's counsel's own omission.

PAPPAS V BCE INC, 2015 ABQB 435 (MASTER PROWSE) Rules 11.25 (Real and Substantial Correction), 11.27 (Validating Service) and 15.2 (New Rules Apply to Existing Proceedings)

The Plaintiffs filed their Statement of Claim in 2004 against a number of Defendants, including various Telus entities. The Plaintiffs' counsel brought the Statement of Claim to the attention of Telus in 2004 by faxing a copy to the President of the parent Telus Corporation in Vancouver, British Columbia. Telus did not acknowledge service and did not defend. The Plaintiffs took no further steps against Telus or any of the other Defendants in the ensuing ten years. The Plaintiffs then applied for an Order deeming that service via fax was good or, alternatively, extending the time for service of the Statement of Claim on Telus. Telus brought a Cross-Application for a Declaration that the Action had expired as against Telus one year after the Statement of Claim was filed.

Given the substantial presence of Telus in Alberta, Master Prowse was prepared to deem service by fax in British Columbia good under the old Rules of Court. Master Prowse observed that, under the new Rules of Court, the position of the Plaintiffs for a deeming Order was even stronger. Rule 15.2 states that the new Rules apply to "every existing proceeding". Rule 11.27 states that the Court may make an Order validating service; this Rule applied to the Plaintiffs' Application to deem service good. In addition, Rule 11.25 allows that an Alberta commencement document may be served within Canada without an Order for Service ex juris where a real and substantial correction exists, and the document contains facts in support of the service outside of Alberta. Master Prowse observed that a deeming Order is discretionary under both the old Rules and the new Rules. Because Master Prowse deemed service good, it was unnecessary to consider whether it was possible or desirable to extend the time for service in the circumstances.

SCOTT V GLAZEBROOK, 2015 ABCA 235 (WAKELING JA) Rules 12.36 (Advance Payment of Costs), 14.2 (Application of General Rules) and 14.67 (Security for Costs)

The Applicant, Scott, sought a Costs award in advance related to an Appeal brought by the Respondent. The Appeal related to a child custody Order and related spousal support.

Justice Wakeling considered whether the Court of Appeal had authority to grant a Costs award in advance. His Lordship considered Rule 14.2 and noted that if Part 14 does not address the matter then other Parts of the Rules may apply "with any appropriate modifications". His Lordship observed that Rule 12.36 empowers the Court of Queen's Bench to make any Order that it thinks fit for the advance payment of Costs to either party. Justice Wakeling held that, since Part 14 did not contain an advance Costs provisions, and there is nothing in any enactment or Part 14 that precludes the utilization of Rule 12.36 in Part 14, Rule 12.36 will apply to Part 14. Justice Wakeling also noted that, in the alternative, Section 12 of the *Court of Appeal Act*, RSA 2000, c C-30 may allow such an award. Rule 14.67 would govern an Application for advance Costs as a single Judge of the Court of Appeal is authorized to provide security for costs awards.

Advance Costs in the amount of $25,725 were granted with the direction that the amount could be assessed for reasonableness by the panel hearing the Appeal.

CARDINAL V AMISK HOUSING ASSOCIATION, 2015 ABQB 503 (MASTER SCHLOSSER)
Rule 13.5 (Variation of Time Periods)

The Applicant tenant applied to extend the date for vacant possession of their rental premises; they had been given one week to vacate. The initial vacant possession date was ordered by the Residential Tenancy Dispute Resolution Service ("RTDRS") after noting substantial breaches of the lease agreement. The Applicant sought a Stay of Execution for eleven days to allow her to move herself and her five children from the premises.

Master Schlosser noted that the *Residential Tenancy Dispute Resolution Service Regulation*, AR 98/2006 governs what relief is available to Applicants following an RTDRS Order, but it is silent about short term or interim relief where there is no Appeal. RTDRS Orders do not take effect until they are entered in the Court of Queen's Bench upon which they become Orders of the Court. Rule 13.5(2) allows the Court to stay, extend or shorten time periods that are specified in Orders or Judgments. Master Schlosser accordingly applied Rule 13.5(2) and granted the time extension sought by the Applicant.

THE OWNERS: CONDOMINIUM PLAN NO 802 2845 V HAYMOUR, 2015 ABCA 234 (WAKELING JA)
Rules 13.5 (Variation of Time Periods), 14.23 (Filing Factums – Standard Appeals), 14.47 (Application to Restore and Appeal), 14.65 (Restoring Appeals) and 15.16 (Transitional Provisions – Part 14)

The Appellant, Haymour, sought to overturn an Order pronounced May 30, 2014, holding him in contempt for failure to comply with earlier Court Orders, and dismissing his Application to set aside an Order which allowed for the sale of his condominium while simultaneously granting leave to disburse the proceeds. On June 25, 2014, the Appellant filed his Notice of Appeal and the Appeal Record on October 17, 2014. On December 18, 2014, the Registrar of the Court of Appeal struck his Appeal pursuant to Rule 14.23(1)(a) for not filing his Factum within two months of filing the Appeal Record. On June 18, 2015, the Appellant filed an Application to restore his Appeal under Rule 14.47 and served it on June 19, 2015. The Application was returnable July 2, 2015.

Justice Wakeling held that the Appellant had failed to comply with Rule 14.47 by not filing, serving and making returnable his Application to restore the Appeal within six months. Accordingly, the only way for his Appeal to continue would be for the Court to exercise its discretion to extend this missed deadline pursuant to Rule 13.5.

Justice Wakeling held that, in order to persuade a Court to exercise its discretion under Rule 13.5, an Applicant needs a compelling reason. Owing to the long period to file an Application under Rule 14.47, the Appellant required a very compelling reason for failing to file within the stipulated period. The Appellant's only excuse for missing the deadline was "medical reasons". Wakeling J.A. did not find these reasons sufficient to extend the filing deadline.

Justice Wakeling commented that, even if the deadline had been extended, the Appellant's Application would have been dismissed on account of the Appellant having missed the limitation period for filing an Appeal under the former Rule 506(1)(b). Rule 15.16(1) provides that the new Rules pertaining to Appeals came into force on September 1, 2014. Because the Appellant's Appeal was filed on June 25, 2014, the old Rules for Appeals were still in force. Former Rule 506(1)(b) provided a twenty day period to file an Appeal from the date of the Order being signed, entered and served. The Appellant missed this period by four days. Furthermore, the Appellant had no reasonable prospects of success, as he provided no credible evidence to impugn the Chambers Judge's Order. Justice Wakeling also held that an opposing party can reasonably expect that an Appeal deemed to be abandoned will not be restored in the absence of compelling reasons. Because of this, the Respondent would be prejudiced if the Appellant's appeal were restored. The Application was dismissed.

SCHULTE V ALBERTA (APPEALS COMMISSION FOR WORKERS' COMPENSATION BOARD), 2015 ABCA 268 (VELDHUIS JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant, Schulte, sought permission pursuant to Rule 14.5(1)(a) to appeal Justice Veldhuis' prior Decision denying an extension of time to appeal a prior Judicial Review Decision. The extension of time was denied on the basis that the Appellant had failed to explain the two and a half year delay in filing his Appeal. The Applicant also sought a declaration of impecuniosity in order to waive the fees related to the Appeal.

Justice Veldhuis noted that the test for permission to appeal was that permission to appeal will only be granted if certain criteria are met: the issue raises a serious question of general importance; there was a possible error of law; the judgment appealed from demonstrates an unreasonable exercise of discretion; or the first instance justice misapprehended important facts. Veldhuis J.A. held that the correct legal test was applied and the Court properly used its discretion in denying the extension. The procedural Rules were clear and well understood by the Applicant. Justice Veldhuis denied the Appeal, noting that the declaration of impecuniosity was therefore moot.

MILLER V DEVINE, 2015 ABCA 269 (ROWBOTHAM JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant applied for a Stay of proceedings pending an Appeal. Rowbotham J.A. considered the elements for the test for a Stay pending Appeal: whether a serious issue was raised by the Appeal; whether the party seeking the stay would suffer irreparable harm if the Appeal was not granted; and whether the balance of convenience militated towards granting the stay. Justice Rowbotham held that the Applicant had not met the test. Her Ladyship also noted that the monetary value of this case was less than $25,000.00. Under Rule 14.5(1)(g), the Applicant must apply to obtain permission from the Court of Appeal before the Appeal could proceed. The Application was dismissed.

CORNELSON V ALLIANCE PIPELINE LTD, 2015 ABCA 272 (O'FERRALL JA)
Rules 14.16 (Filing the Appeal Record – Standard Appeal) and 14.18 (Contents of Appeal Record – Standard Appeal)

The Applicant failed to file his Appeal Record and Transcripts within the four months mandated by Rule 14.16, and it was struck. The Applicant applied to have the Appeal restored.

Justice O'Ferrall summarized the Court of Appeal's recent decision in *Taylor v 1103919 Alberta Ltd*, 2015 ABCA 201, which set out the test for restoring an Appeal that had been struck for failure to comply with a filing requirement. The five factors to be reviewed are: (i) arguable merit to the Appeal; (ii) explanation for the defect or delay which caused the Appeal to be struck; (iii) reasonable promptness in moving to cure the defect, (iv) intention in time to proceed with the Appeal; and, (v) lack of prejudice to the respondents, which includes considerations of the length of delay. Justice O'Ferrall went on to note that none of these factors are determinative and a failure to meet one of the factors is not fatal to Application. All of these factors must be weighed together to determine whether, overall, it is in the interest of Justice to permit the Appeal to be restored.

Justice O'Ferrall noted that both parties had moved forward diligently, there was always an intent to challenge the trial Judge's decision, and the Respondent in fact conceded that there was no prejudice. On balance, the interest of Justice favoured restoring the Appeal.

RO V DF, 2015 ABCA 267 (WATSON JA)
Rule 14.38 (Court of Appeal Panels)

The Appellant, who was self-represented, applied to amend her Application in which she sought to introduce new evidence on Appeal. The Appellant applied by way of request in a letter to the Case Management Officer. The letter did not explicitly detail what type of evidence the Appellant proposed to introduce, but the evidence seemed to relate to an expert report. The letter also attached an email exchange with the Respondent's counsel, who reserved their right to cross-examine the possible expert on his credentials and

report. The Appellant expressed the difficulty she was having with the process, the Rules, and the Court requirements. Watson J.A. noted that, although the Appellant expressed these troubles, she clearly understood the concept of introducing new evidence on Appeal.

Watson J.A. then referred to Rule 14.38(2)(b), which provides that a panel of three Justices of the Court of Appeal, as opposed to a single Appellate Justice, must hear an Application for new evidence on Appeal, unless the Court of Appeal directs otherwise. Watson J.A. held that the Appellant's letter requesting to introduce new evidence on Appeal was not a proper Application, and that the Appellant would have to file a supplementary Application consistent with Rule 14.38(2)(b). Watson J.A. gave the Appellant guidance for the Application requirements, and further directed that the Application had to address the criteria for admission of new evidence, the test for which is outlined in the case of *Palmer v The Queen*, [1980] 1 SCR 759. The Court instructed that the Appellant had 30 days to make a supplementary Application to introduce new evidence on Appeal.

HILL V HILL, 2015 ABCA 260 (ROWBOTHAM JA)
Rule 14.48 (Stay Pending Appeal)

In 2005 the Plaintiff individual initiated an Action against his siblings and the Defendant companies alleging that he was an equal beneficiary of a Trust which held one of the Defendant companies. The Action and the Plaintiff's subsequent Appeal were dismissed in 2013 (with leave to Appeal to the Supreme Court of Canada denied). The Plaintiff commenced a second Action in 2014, seeking to set aside the Judgment in the 2005 Action. The Defendants sought to strike the second Action, but the Application was denied on the basis that the Plaintiff had provided new evidence which had a reasonable probably of being found "practically conclusive" of the matter. The Defendants immediately filed Notices of Appeal, and an Application to stay the second Action pending the determination of the Appeals.

Justice Rowbotham applied the test for a Stay from *RJR-MacDonald Inc v Canada*, [1994] 1 SCR 311 which requires that: there is a serious question to be tried; the Applicant will suffer irreparable harm if the Stay is not granted; and the balance of convenience favours granting the Stay. Justice Rowbotham considered the elements of the test as it applied to the case at bar, and held that a Stay was appropriate in the circumstances. The Action was therefore stayed pending the hearing of the Appeal.