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

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MCFAUL V RANCH-LEWCHUK, 2015 ABQB 706 (PENTELECHUK J)
Rules 1.2 (Purpose and Intention of These Rules), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings) and 13.18 (Types of Affidavit)

The Plaintiff sought to amend his Statement of Claim in a personal injury action to add the personal representative of a deceased Defendant (the "Proposed Defendant"), and to plead particulars of the Proposed Defendant's negligence. The Court considered whether the proposed amendments were outside the limitation period, whether they prejudiced the Proposed Defendant, and whether they were appropriate amendments generally.

Justice Pentelechuk was not satisfied that the Proposed Defendant received notice of the Claim within the applicable time period, and the Plaintiff's added claim against the Proposed Defendant was therefore statute barred. Justice Pentelechuk was also not satisfied that allowing the amendment in the circumstances was appropriate. Under Rule 3.74, the Court may order that a person be added as a party to an action if the Application is made by a party and the Court is satisfied the Order should be made. An amendment is also inappropriate if it would result in prejudice to a party which could not be remedied by the imposition of costs.

Pentelechuk J. observed that Rule 13.18 requires that an Affidavit be sworn based on personal knowledge or on information known to the affiant and their belief. The Affidavits from both parties referenced hearsay evidence and were conflicting with respect to crucial details.

The Foundational Rules, specifically Rule 1.2, underscore the objective of determining claims as expeditiously and economically as possible. Considering the conflicting evidence as to the type of vehicle involved, and the limited evidence tying the vehicle to the Proposed Defendant, Justice Pentelechuk determined that the amendment "ought not to be allowed in the interests of justice". The Proposed Defendant was awarded Costs of the Application.

MUSLIM COUNCIL OF CALGARY V OSMAN, 2015 ABQB 720 (NIXON J)
Rules 1.2 (Purpose and Intention of These Rules) and 3.8 (Originating Applications and Associated Evidence)

The Muslim Council of Calgary ("MCC") brought an Originating Application on behalf of the Muslim Association of Calgary ("MAC") and the Muslim Community Foundation of Calgary ("MCFC") seeking a Declaration that the MCC was the legitimate Board of Directors of MAC and MCFC, and an Order directing that a new Board of Directors be elected in accordance with an amendment to the Bylaws of MAC and MCC. The Application was resisted by individual members of the societies who argued, *inter alia*, that a Chambers Application on Affidavit evidence was not an appropriate forum to decide the issues, in part because the Respondents disputed that MCC had properly authorized the Action.

Justice Nixon held that the Action was appropriate for a Chambers Application as a Trial would only perpetuate the uncertainty, conflict and confusion between the parties and within the Muslim community, which would serve no one. Justice Nixon held that the concept of proportionality as set out in *Hryniak v Mauldin*, 2014 SCC 7, and which is enshrined in Rule 1.2, requires courts to attempt to come to a fair and just adjudication of the issues before them in a timely and effective manner which does not impose upon the parties unnecessary expense.

In the present case there was a serious issue of corporate governance which urgently needed to be determined and could be done on the basis of the evidence before the Court. In light of this, Justice Nixon held that despite the fact that the Respondents contested some of the facts of the Applicants, the issue could be resolved based on the record before the Court, and did not require a Trial or *viva voce* evidence. Justice Nixon reviewed the record, and granted the Order and declaration sought by the Applicants.

RAIN V CANADA (PAROLE BOARD), 2015 ABQB 747 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May be Made), 10.31 (Court Ordered Costs Award), 10.32 (Costs in Class Proceeding) and 10.33 (Court Considerations in Making Costs Award)

The Respondent was a prisoner at the Bowden Institution, where he was serving a sentence for sexual assault and assault causing bodily harm. The Respondent made an Application for *habeas corpus*, which Justice Shelley rejected in a Decision reported as *Rain v. Canada (Parole Board)*, 2015 ABQB 639. This Application related to Costs arising from that Decision.

The Applicant argued that it was entitled to Costs in accordance with the Alberta Rules of Court, Schedule C, for an Application with a written brief - being $1000. The Applicant also stated it was entitled to Costs for Disclosure of Records which in this case was $500 according to Schedule C. The Applicant, however, suggested that due to the Respondent's incarceration and restricted income, he should pay $500 instead.

The Respondent said he would be pursuing his Claim at the Federal Court and requested that any Costs award be deferred until that Action has been resolved. He also stated that he received only $15 every two weeks as an inmate.

Shelly J. noted that the jurisdiction to award Costs is very broad, citing Rules 10.29 to 10.33. The Court further noted that a successful party is presumptively entitled to Costs on a party and party basis.

Shelly J. opined that unrestricted use of *habeas corpus* by incarcerated individuals risks unwarranted and expensive litigation paid out of the taxpayer's purse. On the other hand, Costs should not become a roadblock to accessing the Writ of *habeas corpus*. The Court commented that a balance could be found in imposing more modest Costs awards, having regard for the length of the hearings, the conduct of the party, the merits of the claim, and recognizing the inmate's special position.

The Court noted that a modest Costs award of $250 was appropriate for an unsuccessful *habeas corpus* Application where the Applicant advanced a well-argued and reasoned case. However, the Court found that in this case there was no merit to the Respondent's Application, and the Applicant should face a higher and more substantial Costs penalty. The Court noted that this was in accord with Rule 10.33 which outlines the considerations that are relevant to a determination of Costs, and Rule 1.2 which aims to achieve efficient and timely resolution of legal disputes. In the result, the Court awarded Costs to the Applicant in the amount of $500.

WILLARD V COMPTON PETROLEUM CORPORATION, 2015 ABQB 766 (MAHONEY J)
Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 4.34 (Stay of Proceedings on Transfer or Transmission of Interest), 13.18 (Types of Affidavit) and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Plaintiffs, Ward Willard and Whispering Winds Stables Incorporated, sued the Defendant, Compton Petroleum Corporation ("Compton"), for breach of a surface lease agreement due to alleged damage to the Plaintiffs' land. The last formal step taken was service of the Plaintiffs' undertaking responses on October 18, 2007. Thereafter, settlement discussions ensued and a meeting was held on February 17, 2011 to inspect the Plaintiffs' land. Mr. Willard's sister, Marsha Willard, swore an Affidavit that a site inspection of the land did in fact occur on the date of that meeting which conflicted with the Affidavit evidence of the Defendant. However, Ms. Willard did not assert that she

was actually in attendance at the meeting or give a source for the basis of that information. As such, her Affidavit evidence was rejected pursuant to Rule 13.18.

On August 22, 2012, Mr. Willard passed away and transferred his Estate to his sister. On October 23, 2013, Compton applied to dismiss the Claim pursuant to Rules 4.31 and 4.33. That Application was adjourned and, on February 7, 2014, Ms. Willard filed to continue the Action under Rule 4.34.

The Master held that Mr. Willard's death displaced Rule 4.33 by virtue of Rule 4.34, and the requirements of Rule 4.31 were not met. In addition, the Master lifted the stay under Rule 4.34 so that the Action could continue. Compton appealed the Master's Order. Mahoney J. cited the issue on Appeal as whether a Defendant could apply under Rule 4.33 to dismiss an Action when, as a result of the death of the Plaintiff, the Action was subject to a stay of proceedings under Rule 4.34.

Mahoney J. agreed that the last step taken to significantly advance the Action was service of the undertaking responses on October 18, 2007. The Application to dismiss was filed on October 23, 2013, during the time the bridging provision of Rule 15.4 was in effect. If Mr. Willard's death and resulting stay had no effect on the calculation of inactive time, then Compton's Application was well-placed: the earlier date pertinent to Rule 15.4 was October 18, 2007, as the last thing done to significantly advance the Action.

Rule 4.34(4) specifically references Rule 4.31 as the remedy to deal with delay:

> (4) If an order to continue an action is not made within a reasonable time after the date on which the action is stayed, the defendant or respondent may apply to the Court to have the action dismissed for delay under rule 4.31.

The Master held that, as a result, Rule 4.33 was not even engaged. Compton argued that the Master interpreted the word "may" in this subrule to mean "shall", thereby removing the right of an Applicant to seek mandatory dismissal of an Action for long delay. The Respondents argued that, when there are two possible interpretations in interpreting the drop dead rule, the interpretation which favours the Plaintiff's right to litigate should govern.

Mahoney J. held that Rules 4.33 and 4.34 must be read together and in a manner which achieves the goals of Rule 1.2 to provide a fair and just resolution of disputes in a timely fashion. Given the wording of both Rules, the Legislature could not have intended the permissive language of Rule 4.34(4) to restrict the Defendant to *only* a Rule 4.31 Application. Rule 4.31 deals with situations where the delay faced is presumably short of the three year period in Rule 4.33. There is nothing in the language of Rule 4.34(4) which indicates a legislative intent to remove the ability of a Defendant to benefit under the drop dead rule. Rules 4.33 and 4.34 can operate together and the permissive language used in Rule 4.34(4) does not displace the availability of alternate remedies under Rule 4.33. Having found that Rule 4.34 does not qualify as an exemption under Rule 4.33, the Action was dismissed.

Mahoney J. also considered the analysis under Rule 4.31 and held that there had been an inordinate and inexcusable delay. However, the Master was correct in holding that no serious prejudice resulted from the delay. Therefore, Compton's Appeal on this alternative ground was denied.

STRINGER V EMPIRE LIFE INSURANCE COMPANY, 2015 ABCA 349 (PAPERNY, SLATTER AND ROWBOTHAM JJA)
Rules 1.2 (Purpose and Intention of These Rules), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 6.14 (Appeal from Masters Judgment or Order), 6.37 (Notice to Admit), 8.4 (Trial Date: Scheduled by Court Clerk) and 10.33 (Court Considerations in Making Costs Awards)

The Court considered whether the Plaintiffs (Respondents on Appeal) should be permitted to withdraw certain deemed admissions that arose because they failed to reply to a Notice to Admit to Facts in time. The Defendants served a Notice to Admit Facts for an impending Trial on October 2, 2013. The Plaintiffs replied to the Notice to Admit

Facts twenty days after the deadline stipulated under Rule 6.37(3), in the middle of November, 2013. Three days prior to the scheduled Trial beginning, the parties appeared before the Trial Judge and the Plaintiffs requested that the deemed admissions under Rule 6.37(6) be withdrawn. The Trial Judge ruled that an Application would be required and adjourned the Trial.

The Chambers Judge withdrew the disputed deemed admissions and the Defendants appealed. The Court of Appeal considered the applicable legal test. The Court of Appeal noted that there are four elements to consider when deciding whether to withdraw deemed admissions. The four factors are: (i) whether the party who made the admission, whether explicit or deemed, has demonstrated to the satisfaction of the Judge that the evidence available about the facts in question is such that a determination of the truth at a Trial is the only satisfactory means to settle the issue, (ii) whether the decision to admit was conscious and deliberate and without reasonable excuse, (iii) whether the withdrawal of the admission would cause substantial prejudice not compensable in Costs, and (iv) in the case of intentional admissions, whether a penalty should be applied. The Court of Appeal also noted that no single factor is determinative. Other factors must be balanced and, in the end, the Justice or Master has the discretion to allow or withdraw the admissions. The Court of Appeal also noted that a Judge should also consider whether withdrawing the admission would cause prejudice to the other party that cannot be remedied by Costs or other terms under Rule 1.5.

The Court of Appeal also noted that some evidence needs to be presented to justify not admitting the facts in question. The moving party is required to show cause as to why the deemed admissions ought to be withdrawn. The Court of Appeal upheld the Chambers Judge's decision overturning the deemed admissions, as there was some evidence showing that the deemed admissions were actually in dispute.

CONDOMINIUM PLAN NO 8222909 (WATER'S EDGE) V BELAS, 2015 ABQB 751 (MASTER SCHLOSSER)
Rules 1.4 (Procedural Orders), 9.30 (When Affidavit of Value Must be Filed) and 13.5 (Variation of Time Periods)

This was a foreclosure Action between the Plaintiff condominium corporation and the Defendant condominium owners. The Condominium corporation claimed for unpaid special assessments levied against the condominium owners. The owners counterclaimed, alleging that the corporation neglected to maintain their townhouse units.

On an Application for summary relief, Master Schlosser considered whether it would be appropriate to stay the Action pending a determination of the Counterclaim. Master Schlosser reviewed a number of ways to stay an Order, including a Redemption Order and a conventional stay based on the *Judicature Act*, RSA 2000, c J-2, the *Civil Enforcement Act*, RSA 2000, c C-15, the *Condominium Property Act*, RSA 2000, c C-22, or Rules 1.4(2)(h) and 13.5 of the *Rules of Court*.

Master Schlosser considered each option, and the relevant case law, and held that a Redemption Order was appropriate in this case.

NOWOSAD V BOUTILLIER, 2015 ABQB 763 (GOSS J)
Rules 1.4 (Procedural Orders) and 3.72 (Consolidation or Separation of Claims and Actions)

The Applicants, Nowosad, brought an Originating Application for an oppression remedy. An earlier separate Originating Application was brought by the Respondents, the Boutilliers, also alleging oppression. The Respondents sought to use their Originating Application as a Cross-Application within the Boutillier's Application. Justice Goss considered the parties' affidavits, and reviewed Rules 1.4 and 3.72 relating to consolidating claims. Justice Goss held that the Actions were related as they had common questions of law and fact that arose out of exactly the same series of transactions and occurrences. The Applications were therefore consolidated under Rule 3.72.

SHAW V BOYDA, 2015 ABCA 393 (SLATTER JA)
Rule 1.4 (Procedural Orders)

The Defendant wife appealed an Order by the Case Management Justice refusing recusal from managing the Action, and which found the wife to be a vexatious litigant. The Defendant sought an "interim" Order from the Court of Appeal removing the Case Management Judge so she could contact the Court of Queen's Bench regarding several questions which were equivalent to requests for legal advice.

Justice Slatter noted that it was not appropriate for any party to an Appeal to bring an Application to a single Judge of the Court of Appeal asking for advice on how to advance their litigation or explain why Court procedures are in place. Rule 1.4(2)(g) empowers the Court to manage litigation; but, it does not turn Judges into legal advisors. The Application was dismissed.

NATIONAL LEASING GROUP INC V ACME ENTERPRISES LTD, 2015 ABQB 631 (MASTER SCHLOSSER)
Rules 1.6 (Changes to These Rules), 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff applied for Summary Judgment with respect to a claim involving a financing agreement for a trailer. One of the preliminary issues was whether one of the individual Defendants, who was not a lawyer, could represent himself as well as the corporate Defendant. Master Schlosser stated that non-lawyers were not permitted to represent individuals or companies pursuant to the *Legal Profession Act*, RSA 2000, c L-8. Although former Rule 5.4 provided a discretionary exception to this prohibition, more recent authority has confirmed that this discretionary exception no longer exists. The Court also stated that, although Judges have an "undoubted rule making power" pursuant to Rule 1.6, Masters do not have this power; further, this authority does not extend to reviving Rules that have been repealed. It also does not extend to "authorizing a breach of statute, or sanctioning an offence". The individual Defendant was therefore not permitted to represent the other Defendants.

Master Schlosser considered the evidence before the Court rather than further adjourning the Application and held that there was sufficient contravening evidence that a fair and just determination could not be made against the individual Defendants. Summary Judgment was denied as against the individual Defendants. Master Schlosser held that there was no question with respect to the corporate Defendant's liability, and granted Summary Judgment against the corporate Defendant. On the issue of quantum, the Court held that the evidence in support of the valuation was unqualified opinion evidence. Although expert evidence under Rule 6.11 might be proper evidence for this type of Application pursuant to Rule 13.18, unqualified opinion evidence was not. Therefore, the value of the claim could not be made out. Master Schlosser ordered that the amount be proved by way of an Assessment.

LC V ALBERTA, 2015 ABQB 713 (GRAESSER J)
Rules 2.11 (Litigation Representative Required), 2.13 (Automatic Litigation Representatives), 2.15 (Court Appointment in Absence of Self-Appointment), 2.17 (Lawyer Appointed as Litigation Representative), 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions), 10.32 (Costs in Class Proceeding), 10.33 (Court Considerations in Making Costs Award), 10.47 (Liability of Litigation Representative for Costs), 10.49 (Penalty for Contravening Rules) and 10.50 (Costs Imposed on Lawyer)

In January, 2011, Mr. Tinkler was appointed Litigation Representative for the minor Plaintiff, EMP, who was involved in a proposed Class Action with respect to invalid Temporary Guardianship Orders for children in Government custody. At that time, Graesser J. exempted Mr. Tinkler from liability for Costs and held that reasonable legal fees and disbursements of counsel consulted by EMP's Litigation Representative should be paid by the Crown (the "January 2011 Decision"). Mr. Tinkler brought an Application to be exempted from Costs because he was unwilling to continue to act as Litigation Representative for EMP without such an exemption. Mr. Tinkler argued that no other Litigation Representative would be available or willing to act without an exemption from Costs, which would mean that the proposed Child Class Action would be unable to proceed.

Graesser J. highlighted that both exemption from liability for Costs and advance Costs, for a Litigation Representative of a Representative Plaintiff in a Class Proceeding, appeared to be novel issues, which should be addressed if the Class Proceeding went forward. However, such considerations were premature because there was no decision yet regarding Certification. The Court held that it was only necessary to determine the extent to which the January 2011 Decision should be continued or varied. Graesser J. considered this to be an "unusual situation" where the Application for Certification should be covered by the exemption for liability of Costs; however, the Court did not grant any exemption from Costs that might be awarded under Rules 10.49 or 10.50. The Court noted that Mr. Tinkler is a lawyer and as such, Rule 2.17 applied **[and?]**. Further, it was held that there was at least arguable merit to EMP's Claims and it would not be in EMP's best interest if the Certification Application was dismissed because of the absence of a Litigation Representative.

SINGH V KALER, 2015 ABQB 738 (MCINTYRE J)
Rule 3.12 (Application of Statement of Claim Rules to Originating Applications)

The Plaintiffs and Defendants were involved in a dispute over land. The substance of the Action was complex, and involved multiple parties whose Claims have been modified several times since the incidents giving rise to the dispute occurred in 1996. One of the issues before Justice McIntyre was whether the Plaintiffs' Action was brought in time pursuant to the *Limitations Act*, RSA 2000 c L-12.

One of the Plaintiffs filed his Statement of Claim in 2013, 4 years after entering into a Consent Order which provided that he may file a Statement of Claim "to stand in place of the issues identified in the Originating Notice". The Court briefly considered the nature of the Statement of Claim, and stated that Rule 3.12 deals with Actions started by Originating Application. The Court cited the commentary to Rule 3.12, which provides that a "Statement of the Applicant's Claim" filed upon the Court's direction is not a Statement of Claim that starts a new proceeding.

The evidence suggested that the Plaintiff was aware of a potential Claim against the Defendants in 2005. Justice McIntyre held that, regardless of the nature of the Statement of Claim, it was not filed in time.

ALBERTA (ATTORNEY GENERAL) V PROVINCIAL COURT OF ALBERTA, 2015 ABQB 728 (READ J)
Rule 3.17 (Attorney General's Right to be Heard)

A police detective with the Edmonton Police Service sought a Production Order pursuant to the *Criminal Code of Canada*, RSC 1985, c C-46 (the *"Criminal Code"*). The detective was unsuccessful on three separate Applications before the same Provincial Court Judge. The Attorney General of Alberta subsequently brought an Application for *certiorari* and *mandamus* seeking to quash the Decisions of the Provincial Court Judge and to compel the issuance of a Production Order for the items sought.

A preliminary issue was whether or not the Attorney General of Alberta had standing to bring this Application. Division 2, Rule 9 of the Queen's Bench *Criminal Proceeding Rules* states that the Rules under Part 60 of the Former Rules, apply to an Application for an extraordinary remedy under the *Criminal Code*, including applications seeking *mandamus*, and *certiorari*. Further, the Former Rules were not repealed in 2010 when the New Rules came into effect.

Rule 833 of the Former Rules provides that the Crown may apply for *certiorari* on an *ex parte* basis to quash a conviction, order, warrant or inquisition. Justice Read held that this Rule applied equally to the decision to refuse an order.

Alternatively, the Attorney General of Alberta has standing under Rule 3.17 which grants the Attorney General the right to bring an Originating Application for judicial review. Justice Read held that Rule 3.17 applied to Part 60 of the Former Rules, and therefore to the present case.

The Attorney General therefore had standing, and was granted the relief sought.

3S RESOURCES INC V IMPROVISIONS INC, 2015 ABQB 754 (GRECKOL J)
Rules 3.37 (Application for Judgment against Defendant Noted in Default), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiffs brought a claim against the Defendants regarding a home renovation project. The Defendants filed Statements of Defence; however, they failed to serve the Plaintiffs with Affidavits of Records and the Defences were struck. The Plaintiffs applied for Summary Judgment against the Defendants under Rule 3.37 and were granted general and special damages. The Defendants subsequently brought an Application under Rule 9.15 to set aside the Noting in Default and the Judgment. The Court set aside the Default Judgment and awarded the Plaintiffs thrown away Costs, finding that the Defendants were Noted in Default due to a "calamity of errors" by their Counsel.

The parties brought this Application before Justice Greckol to determine whether the Order for thrown away Costs ought to include Costs for the successful Application to open up the Default Judgment. The Court considered *Koppe v Garneau Lofts Inc*, 2005 ABQB 727, as an exhaustive source on the principles to be applied when an Order for thrown away Costs is issued. From that decision, Justice Greckol drew a distinction between:

a) the costs of the wasted work caused by the procedural misstep that is the source of the problem, and

b) litigating the dispute over whether the person who took the misstep has the right to fix it.

In this case, the Plaintiffs were not entitled to Costs, because the Defendants were successful in their Application and the Plaintiffs could have relented prior to the Application being heard. Justice Greckol held that Costs for the Application were payable to the Defendants according to Schedule C, but not on a solicitor-client basis, as there was no principled reason to indemnify a litigant for legal Costs before a final decision on success was made.

CONDOMINIUM CORPORATION NO 0321364 V PRAIRIE COMMUNITIES CORP, 2015 ABQB 753 (HALL J)
Rules 3.44 (When Third Party Claim may be Filed) and 7.3 (Summary Judgment)

Two of the Third Party Defendants in this Action, RESG and Penner, brought an Application to summarily dismiss the Third Party Proceedings brought against them. Justice Hall noted that the Court is to ask whether there is any issue of merit that genuinely requires a Trial or conversely whether the claim or defence is so compelling that the likelihood that it will succeed is very high. Another consideration which the Court must assess is whether a review of the existing record can lead to a disposition that is fair and just to both parties. Finally, Hall J. noted that the decision to grant or deny Summary Judgment is an exercise of the Chambers Judge's discretion, based upon the above noted principles.

The Court reviewed the evidentiary record relating to the Third Party Claims against RESG, and concluded that the Application by RESG to summarily dismiss the Third Party Claims against it failed, and dismissed this portion of the Application. With respect to Penner, who was a principle, director, officer and controlling mind of RESG, the Court found that there was no basis in the evidence to support piercing the corporate veil and holding Penner personally liable for the actions of RESG. The Third Party Proceedings against Penner were dismissed.

CONDOMINIUM CORPORATION NO 0425636 V AMYOTTE'S PLUMBING LTD, 2015 ABQB 801 (MASTER SCHULZ)
Rules 3.44 (When Third Party Claim may be Filed), 3.45 (Form of Third Party Claim) and 13.5 (Variation of Time Periods)

The Defendants brought an Application for an Order allowing them to serve a Third Party Claim against a proposed Third Party. Master Schulz noted that, pursuant to Rule 3.45, a Third Party Claim must be filed within six months after the date on which the Defendant filed the Statement of Defence.

Master Schulz stated that the time limits in Rule 3.45 are not limitation periods and therefore can be extended by Court Order pursuant to Rule 13.52. The Court reviewed the applicable authorities and determined that the test for the extension of time to file a Third Party Claim is a three part test: 1) was the delay inordinate; 2) was the delay adequately excused in the circumstances; and 3) did the delay prejudice the proposed Third Party Defendant. Master Schulz noted that, on this type of Application, the Court looks to both the Pleadings and the evidence adduced on the Application. This is not an Application to strike where only the Pleadings are considered and evidence is not allowed.

After reviewing the Pleadings and evidence in this case, the Court found that the short delays were not inordinate and had been adequately excused in the circumstances. Any prejudice that might have been suffered by the Third Party could be met through monetary compensation. Master Schulz allowed the Application.

NORTH BANK POTATO FARMS LTD V CANADIAN FOOD INSPECTION AGENCY, 2015 ABQB 653 (MASTER SCHULZ)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Canadian Food Inspection Agency ("CFIA") discovered a soil borne pest on the Plaintiffs' property and imposed restrictions on the production and sale of potatoes by the Plaintiffs. The CFIA was subsequently unable to replicate the original test results finding a pest; however, it continued to restrict the Plaintiffs from producing and selling potatoes. The Plaintiffs commenced an Action against the CFIA, its laboratory and the Crown, alleging negligence which resulted in significant financial losses. The Defendants brought an Application to strike the Statement of Claim or, in the alternative, for Summary Dismissal.

Master Schulz summarized the test for striking a Statement of Claim: whether, based on the Pleadings, there is a reasonable prospect that the claim will succeed, erring on the side of generosity to permit novel claims to proceed. Master Schulz considered the Pleadings and held that the Statement of Claim should not be struck on the basis that there was a reasonable prospect that the claim could succeed and there were novel but arguable claims which should be fully heard. Additionally, Master Schulz noted that the Pleadings had not yet closed and granted leave to amend the Statement of Claim to add further particulars.

Master Schulz next considered the questions to be answered on a Summary Dismissal Application as summarized from prior leading authorities: can a decision be made that is fair and just to both parties on the existing record; and, when viewed in the whole, is there sufficient merit to the Claim to require a Trial, or is the likelihood that the defence will succeed so high that the matter should be summarily determined? Merit in the context of Summary Judgment should be distinguished from the test for striking Pleadings under Rule 3.68. Master Schulz determined that Summary Dismissal was inappropriate in the circumstances since both parties had raised questions and issues which required a Trial.

NOV ENERFLOW ULC V ENERFLOW INDUSTRIES INC, 2015 ABQB 759 (MCCARTHY J)
Rules 3.62 (Amending Pleadings), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiffs applied to amend their Amended Statement of Claim. The parties agreed that, pursuant to Rule 3.65, the Court had broad discretion regarding whether or not to allow amendments. Justice McCarthy noted that any pleading may be amended, no matter how careless or late, subject to four exceptions: (a) the amendment would cause serious prejudice to the opposing party which was not compensable in costs; (b) the amendment requested is hopeless; (c) unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; and (d) there is an element of bad faith associated with the failure to plead the amendment in the first instance.

The Defendants did not dispute every proposed amendment, and the undisputed amendments were allowed by the Court pursuant to Rule 3.62. The Defendants opposed the remainder of the amendments on the basis that they were hopeless and would have been struck if they had been contained in the original Statement of Claim. McCarthy J. noted that, whether an amendment is "hopeless" is a high standard. As a starting point, Rule 3.68(2) sets out the conditions necessary for a Court to exercise its discretion to strike all or part of the Pleadings. Additionally, a claim can be hopeless to the extent that it does not meet the minimum, modest evidentiary threshold required to support the amendment, or if the amendment is "so inconsistent with the record that it could fairly be described as 'hopeless'". The Court must assess the limited evidence available and is not required to take that evidence at face value.

The Defendants argued that the Court did not have jurisdiction under the contract between the parties to grant some of the remedies sought by the Plaintiffs and, as such, claims based on those remedies were hopeless. After considering the evidence, Justice McCarthy granted leave to amend the Amended Statement of Claim as proposed, with the exception of those that were premised on breaches of specific articles of the contract that had expired.

513320 ALBERTA INC V ST JEAN, 2015 ABQB 826 (GOSS J)
Rules 3.62 (Amending Pleading), 3.64 (Time Limit for Application to Disallow Amendment to Pleading) and 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings)

The Plaintiff appealed a Master's Decision dismissing its Application to add new claims and a new Defendant to an existing Action. The Pleadings had closed.

Justice Goss noted that Rule 3.62(1)(b) allows a party to amend Pleadings after the Pleadings have closed in accordance with Rule 3.74 and Rule 3.65. Rule 3.74 requires the Court to be satisfied that an Order should be made to add, substitute or remove or correct the name of any party other than a Plaintiff. The Court cannot make an Order under Rule 3.74 if prejudice would result that could not be remedied by a Costs Award, an adjournment or the imposition of terms. The burden is on the party resisting the amendment to show that it would suffer non-compensable prejudice if the amendment is allowed. The most common form of prejudice is the Respondent's lost chance to lead more evidence; however, other prejudice may exist including the significant passage of time or the death or incapacitation of a key witness. Exceptions to the general rule allowing for amendments include where the amendment requested is hopeless, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period, and where there is an element of bad faith associated with the failure to plead the amendment in the first instance.

This Application to amend dealt with an amendment that was after the expiry of a limitation period. The Court was thus required to consider Section 6 of the *Limitations Act* to determine whether the added claim was "related to the conduct, transaction or events described in the original pleading in the proceeding". After reviewing the facts of this case, Justice Goss allowed the Appeal and granted the Plaintiff's Application for an Order allowing it to amend its Amended Statement of Claim.

TVC V MLH, 2015 ABQB 668 (READ J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

In a dispute regarding ongoing child support and arrears, the parties appeared before Justice Read for a half-day Case Management Hearing at which time they were directed to provide specific information for the Application. Notwithstanding that direction, the parties provided voluminous documentation and their filed Affidavits were not in accordance with Justice Read's Order, nor in accordance with the Rules or the Court's Practice Notes. Much of the documentation was neither relevant nor material. Some of the documentation was hearsay or seemingly provided for the sole purpose of attacking the other party's character. Read J. noted that the offending paragraphs of the Affidavits could have been formally struck out under Rule 3.68(4), but, rather than waste valuable

time, Read J. stated that the inadmissible contents of the Affidavits would be ignored. In the result, Justice Read held that the Respondent had overpaid his child support obligations and ordered some amounts set-off against the over payments.

MCDONALD & BYCHKOWSKI LTD (CMB INSURANCE BROKERS) V LOUGHEED, 2015 ABQB 792 (MASTER SCHLOSSER)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 5.5 (When Affidavit of Records Must be Served) and 5.12 (Penalty for Not Serving Affidavit of Records)

One of the Defendants, Ms. Tory, brought a motion to strike claims for inducing breach of contract and conspiracy against her personally. There was also a related motion for costs for the late service of the Plaintiff's Affidavit of Records.

Master Schlosser reviewed prior leading authority on striking a claim and noted that the test to strike a claim is whether, after assuming the facts pleaded are true, there is no reasonable prospect of success, with some latitude given to novel claims. Master Schlosser also considered whether the Pleadings from another matter could be submitted for the Court's consideration on a strike Application. Master Schlosser stated that there is no "bright line" for the material that can be used in support of a Rule 3.68(2)(b) Application, and concluded that using the Pleadings in another matter fell within the acceptable category of materials permitted on a strike motion.

Master Schlosser struck the Plaintiff's claim as against Ms. Tory, noting that the Plaintiff failed to set out all the elements of inducing breach of contract. Master Schlosser also dismissed the portion of the Application relating to conspiracy. Master Schlosser observed that Rules 5.5 and 5.12 provide timelines for service, and allow costs penalties for the late service of an Affidavit of Records. Master Schlosser noted that there was no reasonable excuse offered for the "very late" Affidavit of Records and, therefore, ordered Costs.

HOOPP REALTY INC V THE GUARANTEE COMPANY OF NORTH AMERICA, 2015 ABCA 336 (MCDONALD, BIELBY AND WAKELING JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant, The Guarantee Company of North America ("GCNA"), had entered into a written guarantee which guaranteed the obligations of a general contractor in relation to a construction contract. A separate bond agreement (the "2004 bond agreement") was subsequently executed between GCNA, the Respondent, HOOPP Realty Inc. ("HOOPP"), and the contractor when a dispute arose with respect to the construction of the floor of the building. The 2004 bond agreement preserved HOOPP's ability to claim losses for Costs and interest which might arise due to the floor replacement.

HOOPP commenced separate Actions against the contractor for damages under the construction contract, and against GCNA pursuant to their performance guarantee and the 2004 bond agreement. The contractor successfully applied to strike the Claim against it. GCNA then applied to strike HOOPP's Action against it pursuant to Rule 3.68(2)(b). GCNA's Application was dismissed and they appealed.

The Court of Appeal held that, pursuant to Rule 3.68(3), the Chambers Judge was required to determine whether HOOPP's Claim had a "reasonable prospect of success". The Chambers Judge was not to consider any evidence, but was required to consider the entirety of the Pleadings. However, the Court held that the Chambers Judge did not err by considering factors other than evidence, even when outside the contents of the Pleadings; therefore, consideration of the underlying litigation context of the Claim was not incorrect. The Court concluded that an Application to strike is not the "proper vehicle for engaging in a definitive interpretation of complex contractual provisions", but it was arguable that the provisions of the 2004 bond agreement created a reasonable claim within the wording used in Rule 3.68(2)(b). The Appeal was dismissed.

NAMMO V CANADA (JUSTICE AND ATTORNEY GENERAL), 2015 ABCA 389 (ROWBOTHAM, BIELBY AND WAKELING, JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant, Nammo, had previously commenced a claim against a number of Defendants, who were participants in the administration of justice in the Province of Alberta. The Defendants applied in two separate Applications to strike the Action against them, which Applications were both granted. In one of the Applications, the Master found that the Pleading failed to disclose a cause of action, and was an abuse of process. Nammo unsuccessfully appealed both Masters' Decisions to a Justice the Court of Queen's Bench. The Justice upheld the Masters' Decisions to strike the Action against many of the Respondents, and dismissed the Action against the remaining Respondents who had applied to the Court for relief at that time. Nammo appealed to the Court of Appeal.

The Court of Appeal held that a Court's decision to strike a claim is discretionary; further, under Rule 3.68, all or part of a claim can be struck if the commencement document or Pleading discloses no reasonable claim.

On appeal, the Court of Appeal held that the Court of Queen's Bench Justice did not err in upholding the Master's decision to strike the claim as against the Respondents, as the Pleading disclosed no reasonable claim, and further, the claim was not brought within the prescribed limitation period set out in the *Limitations Act*, RSA 2000, c L-12. The Court of Appeal also held that there was no reasonable apprehension of bias on the part of the Court of Queen's Bench Justice, as the Appellant had argued. The Court of Appeal dismissed Nammo's Appeal.

FJN V JK, 2015 ABCA 353 (FRASER CJA, AND MARTIN AND SLATTER JJA)
Rules 4.22 (Considerations for Security for Costs Order) and 12.51 (Appearance Before the Court)

The Defendant Appealed a Chambers Judge's Decision to order interim child support, Security for Costs and Costs. The Defendant Appellant argued that the Chambers Judge had no jurisdiction to order child support until paternity was resolved, that the Chambers Judge erred in ordering Security for Costs without proper consideration of the relevant factors, and erred by awarding the Plaintiff Costs of an Application where the Defendant had been successful in the adjournment he sought.

The Court noted that when a Chambers Judge is asked to adjourn a hearing and put all matters over to Trial, the Chambers Judge is not limited to granting or denying the adjournment. There is a third option available and that is to allow the adjournment on conditions, which option is expressly contemplated in Rule 12.51.

The Court of Appeal reviewed the facts and the *Family Law Act*, RSA 2003, c F-4.5 and held that the Chambers Judge did not err in awarding interim child support, nor in awarding the Plaintiff Costs for an Application which ultimately was adjourned and put over to Trial. The Costs award was reasonable given the circumstances of the case, including that the Defendant refused to take a DNA test which would have been "decisive, conclusive and cheap".

Finally, the Court noted that under Rule 4.22, a Court may order a party to provide security for payment of a Costs award if the Court considers it just and reasonable to do so. This rule is not limited to ordering a Plaintiff to give security; it applies to any "party". A Court is to take into account certain considerations, including the merits of the Action and any other matter that the Court considers appropriate. The Court reviewed the circumstances of this case and concluded that the Security for Costs Order, while unusual, was justifiable.

MCKERCHER V THE RENOVATION STORE LTD, 2015 ABQB 748 (GRECKOL J)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs sued the corporate Defendant and its principal for breach of contract and for breaching the *Fair Trading Act*, RSA 2000 c F-2 ("FTA"), in connection with

a dream home renovation that went badly awry. The Court held that the Defendants were liable for breach of contract and for breaching the provisions of the FTA.

In determining Costs, the Court referred to Part 10, Division 2 of the Rules and the wide discretion that Judges have in awarding Costs. The Plaintiffs made a Formal Offer under Rule 4.24 in advance of Trial, but they did not beat that offer, and therefore did not qualify for double costs under Rule 4.29. However, Rule 10.33(2)(g) provides the basis for elevated costs in the event of litigation misconduct. The Defendants refused to set this matter down for Trial after the necessary steps had been completed, which resulted in delay and additional proceedings, and ultimately did not participate in the Trial itself. Greckol J. held that, when parties engage in litigation and simply ignore part of the process, this constitutes litigation misconduct. In this case, the litigation misconduct was to a sufficient degree so as to attract double Costs.

ET V ROCKY MOUNTAIN PLAY THERAPY INSTITUTE INC, 2015 ABQB 824 (MCINTYRE J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs may be Made), 10.31 (Court- Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Awards)

The Defendant applied for Summary Dismissal, but abandoned the Application just prior to the Hearing. The Plaintiff sought thrown away Costs and punitive Costs. Master Prowse awarded enhanced Costs of $13,000. The Plaintiff Appealed the Costs award, which Appeal was dismissed. The Plaintiff had refused to accept a number of offers to settle prior to the Appeal, all of which were beaten on Appeal. The Defendant sought an enhanced Costs award for the Appeal.

Justice McIntyre noted that partial or full indemnity Costs can be awarded if a case involves "reprehensible, scandalous or outrageous conduct". The Defendants retained second counsel to argue the Costs Appeal when it came to light that the Plaintiff was making direct allegations of misconduct against the Defendant's lawyer. Justice McIntyre noted that this was an acceptable reason to employ second counsel in these matters, but declined to award full Costs for the second counsel because that would amount to indemnity Costs for the Defendant.

Justice McIntyre noted that the Plaintiff's statement that employing second counsel was merely a "ploy" to get an adjournment was "over the line" in the circumstances, warranting enhanced Costs. Justice McIntyre also noted that Rule 4.29 indicates that if settlement is offered, but refused, and the final result is less than the offer, Costs against that party ought to be increased under Rule 4.29, but the proportion is in the discretion of the judge. Justice McIntyre held that, in the circumstances, an enhanced Costs award against the Plaintiff was warranted.

HUERTO V CANNIFF, 2015 ABCA 316 (BERGER, WATSON AND VELDHUIS JJA)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.2 (When Something is Relevant and Material) and 5.10 (Subsequent Disclosure of Records)

The Applicant, Huerto, appealed a decision dismissing his Action for long delay pursuant to Rules 4.33 and Rule 4.31. The Chambers Judge found that neither Huerto's filing of a Supplemental Affidavit of Records nor the retention of experts significantly advanced the Action.

The Court of Appeal considered Huerto's argument that his Action should not be dismissed because he had disclosed allegedly relevant documents in his Supplemental Affidavit of Records pursuant to Rule 5.10. Huerto argued that since Rule 5.10 was a required step under the Rules the disclosure automatically qualified as a step that significantly advanced the Action. The Court of Appeal rejected this argument noting that, in order for the records to significantly advance the Action, they must actually be relevant and material as defined in Rule 5.2(1). Huerto also argued that the gathering of expert evidence also significantly advanced the Action. The Court of Appeal dismissed this argument and noted that the expert opinions were never actually shared with the Defendants and therefore could not have significantly advanced the Action.

The Court of Appeal upheld the lower Court's Decision and dismissed the Action under Rule 4.33. The Court also upheld the Order for solicitor-client Costs under Rule 4.33 noting that, although there was no direct evidence of improper motivation, there was significant circumstantial evidence showing that Huerto acted only to avoid the operation of Rule 4.33. The Appeal was dismissed.

FLOCK V FLOCK (ESTATE), 2015 ABQB 671 (MARCEAU J)
Rule 4.33 (Dismissal for Long Delay)

The Defendant died before the conclusion of the matrimonial property Action. The Litigation Representative for the Defendant's Estate applied to dismiss the matrimonial property Action for long delay pursuant to Rule 4.33. The Defendant's Estate also sought severance of the joint tenancy of the parties' matrimonial home, relying on the *Matrimonial Property Act*, RSA 2000, c M-8 (the "MPA Application").

The Rule 4.33 Application was filed on December 19, 2014. Justice Marceau determined that the last step which materially advanced the Action was the continued Examination for Discovery of the parties on July 28 and 29, 2009; however, the Defendant subsequently made an offer to the Plaintiff to agree to a delay. While that offer was never agreed to formally, the conduct of the Defendant's counsel lulled the Plaintiff into believing there would be no proceedings taken to enforce time limits as the parties moved towards mediation, settlement and Trial. Taking into account the time during which the Defendant excused the delay, Justice Marceau held that three years had not passed since the last significant advance in the Action. Further, the MPA Application, in combination with the Rule 4.33 Application, would unfairly disadvantage the Plaintiff if successful: the Plaintiff would not only lose his interest in the property held in the Defendant's name, but also his half interest in the former matrimonial home. As such, continuation of the matrimonial Action was warranted. The Application to dismiss the Plaintiff's Action was dismissed.

BRIAN W CONWAY PROFESSIONAL CORPORATION V PERERA, 2015 ABCA 404 (PAPERNY, MARTIN AND MCDONALD JJA)
Rules 4.33 (Dismissal for Long Delay), 14.45 (Application to Admit New Evidence) and 14.70 (No New Evidence Without Order)

The Appellant, Perera, applied for dismissal of a debt Claim on the basis of long delay as provided by Rule 4.33. The Application was denied by a Master and a Chambers Judge, who both found that a standstill agreement existed between the parties. Perera appealed the Chambers Judge's Decision.

Perera also applied for an Order to strike an Appendix to the Respondent's factum on the basis that it amounted to fresh evidence for which the Respondents were required to bring an Application pursuant to Rules 14.45 and 14.70. The Respondents did not bring an Application, and therefore failed to comply with the requirements under the Rules. The Court held that the contents of the Appendix in question should be disregarded in their entirety.

With respect to Rule 4.33, the Court examined the former Rules, and observed that the Court of Appeal has previously decided that a standstill agreement must be "express," and not ambiguous or implied. Under former Rule 243.1(1), "express" meant that the parties' intention must be clear and not left to inference. The Chambers Judge had reviewed the law on the interpretation of Rule 4.33, and concluded that there was sufficient evidence in this case to support a reasonable interpretation that the Appellant had agreed to a standstill agreement. The Court of Appeal held that there was no reviewable error, and the Appeal was accordingly dismissed.

In *obiter*, the Court observed that, although the law does not require standstill agreements to contain the words "standstill agreement", it would be prudent practice for counsel to include those specific words and a reference to the Rule, where a standstill agreement under Rule 4.33(1)(a) is intended.

SIMBAJON V LEDUC, 2015 ABCA 321 (O'FERRALL JA)
Rules 4.36 (Discontinuance of Claim) and 14.5 (Appeals Only with Permission)

The Plaintiff filed for divorce and sought equal division of the matrimonial property. Divorce was granted and the Plaintiff intimated that she was considering discontinuing her Action with respect to the division of property. The Defendant applied for an Order preventing the Plaintiff from discontinuing. The Chambers Judge granted the Order and held that the Discontinuance was to avoid dividing the Plaintiff's Property in the Philippines. The Plaintiff appealed the Order of the Chambers Judge prohibiting her from discontinuing her Action. As she did not file her Appeal in time, she also applied to extend the time for filing her Appeal.

In deciding whether to grant an extension of time to appeal, O'Ferrall J.A. noted that an Applicant must show:

1. a *bona fide* intention to appeal while the right to appeal exists;

2. an explanation for the delay and a lack of prejudice to the other side;

3. assurance that the applicant has not taken the benefits of the judgment from which appeal is sought; and

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

Justice O'Ferrall held that the Plaintiff did not satisfactorily account for her delay, and that she had taken the benefits of the Order from which the Appeal was sought. The Court also held that the Appeal would not have a reasonable chance of success if allowed to proceed. The Court noted that Rule 4.36 provides that a Plaintiff may discontinue all or part of an Action at any time before a date is set for Trial. However, a Plaintiff may not discontinue his or her Action if to do so would amount to an abuse of process. The Court commented that, although the matter had not been set down for Trial as contemplated by Rule 4.36(1), the matter had been set for Judicial Dispute Resolution, something clearly analogous to a Trial. O'Ferrall J.A. concluded that allowing a Discontinuance to be filed at this stage of the proceedings would constitute an abuse of process.

Justice O'Ferrall refused to allow an Appeal on Costs, which would have been within the Appeal period. His Lordship noted that, since the Plaintiff could not appeal the Chambers Judge's substantive Decision, the Plaintiff's Appeal would be as to Costs only, which is an Appeal only with permission pursuant to Rule 14.5. O'Ferrall J.A. held that the Plaintiff had not satisfied the Court of the merits of a Costs Appeal, and declined to grant permission.

P BURNS RESOURCES LIMITED V HONOURABLE PATRICK BURNS MEMORIAL TRUST, 2015 ABCA 390 (PAPERNY, BIELBY AND VELDHUIS JJA)
Rules 5.1 (Purpose of this Part), 5.3 (Modification or Waiver of This Part) and 7.3 (Summary Judgment)

The Respondent, Royal Trust Company of Canada in its Capacity as the Trustee of the Honourable Patrick Burns Memorial Trust, brought an Action for oppression against the Appellants, and sought documents and information to determine the next steps in the Action. The Appellants, P Burns Resources, applied to dismiss a part of the Action by way of Summary Judgment. The Respondent then sought to cross-examine on the Appellants' Affidavit of Records and to conduct Questioning pursuant to Part 5 of the Rules of Court. A Master set aside the appointment for Cross-Examination and Questioning, stating that Summary Judgment provisions are ineffective if a Respondent is entitled to insist on the usual production and discovery process before a Summary Judgment Application is heard. The Respondent then issued further Appointments for Questioning. In response, the Appellants expanded their Summary Dismissal Application to include the entire claim, and refused to attend the Appointments. The Respondent sought an Order requiring the Appellants' attendance at the appointments, which the Master once again refused.

The Respondent appealed both of the Masters' Decisions to a Justice of the Court of Queen's Bench. The Chambers Judge overturned the Master's Decisions, noting that the

Master made no inquiry into the nature of the Action before proceeding on the basis that, in the face of a Summary Judgment Application, the Rules related to Questioning and production should be put on hold. P. Burns Resources appealed.

The Court of Appeal agreed with the Chambers Judge, and stated that the there is no "default position" that the usual production and questioning procedures under Part 5 of the Rules be put on hold pending a Summary Judgment Application. Rule 5.3 provides that a Court may modify or waive any right or power under Part 5, if the harm of complying with the Rule would be "grossly disproportionate" to the likely benefit. Part 5 does not cease operation in face of a Summary Judgment Application. Rather, whether to alter it is in the discretion of the Court. The Court's discretion must be exercised taking into consideration the purposes of Part 5, including facilitating resolution of issues and discouraging unnecessary conduct and Costs, as provided in Rule 5.1(1).

The Court of Appeal held that, although there will be cases where the circumstances dictate that a Summary Judgment Application should proceed without expending additional time and expenses to satisfy all disclosure requirements under Part 5, this was not such a case. The Court noted that the Chambers Judge considered the nature of the Action, and held that the Justice's Decision contained no reviewable error. The Appeal was accordingly dismissed.

HABTE V LEWIS, 2015 ABQB 684 (MACKLIN J)
Rules 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

The Plaintiff issued a Statement of Claim against a police detective ("Lewis"), and others, who allegedly assaulted him during an arrest. Lewis was also subject to criminal and disciplinary proceedings as a result of being charged for allegedly trafficking steroids. During Questioning, counsel for the Plaintiff asked Lewis if he was using steroids at the time of the alleged assault. Counsel for Lewis objected on the basis that the question was not relevant. A second Defendant ("Humphreys") was asked whether she was aware of any steroid use by Lewis, and counsel also instructed her to not answer the question.

The Plaintiff sought an Order against Lewis and Humphreys compelling them to answer the questions. Lewis and Humphrey opposed the Application on the basis that the questions were not relevant or material to the civil proceeding. Lewis also objected on the basis that the answers may be relied upon in the criminal and disciplinary proceedings, which would result in prejudice to him. The Plaintiff submitted that whether or not Lewis was using steroids was relevant and material to the central question of whether Lewis used unwarranted and excessive force during the arrest. Macklin J. reviewed Rule 5.2 for the delineation of what is "relevant and material", and held that the assessment of whether the force used was objectively reasonable in the circumstances was irrelevant to whether Lewis was using steroids at the time. Questions relating to how Lewis recalled the events due to the steroids' side effects could be seen to be relevant and material to his credibility. However, there was no evidence to suggest the use of steroids could impact one's recollection of events. Further, questions that go solely to credibility are not permissible at Questioning. Justice Macklin dismissed the Application to compel answers from Lewis and Humphreys relating to Lewis' use of steroids.

DAO V HUSSAIN, 2015 ABCA 372 (BERGER, MCDONALD AND VELDHUIS JJA)
Rules 5.41 (Medical Examinations) and 8.16 (Number of Experts)

The Respondent had sought an Order pursuant to Rule 5.41 that would require the Appellant to be examined by an orthopedic spine specialist. The Appellant had previously been examined by two orthopedic surgeons, and two other experts in separate areas. One expert recommended that the Appellant obtain an opinion from someone who specialized in the spine. The Appellant disputed the Decision of the Chambers Judge who ordered, pursuant to Rule 5.41, that he be examined by an orthopedic spine specialist. The Appellant argued that an assessment by an orthopedic spine specialist could only address his general medical condition. The Respondent's position was that the opinion of a specialist was relevant because the Appellant's condition could have been the cause of recurrent injuries, but these recurrent injuries were not limited to the motor

vehicle accident. The Respondent's position was based on what was stated in a previous expert report. The Court of Appeal dismissed the Appeal, and upheld the Chambers Judge's Decision to order an examination by a spine specialist pursuant to Rule 5.41. The Court of Appeal agreed that an opinion from an orthopedic spine specialist would be helpful to the Trial Judge on matters of causation, seriousness of injuries and damages. The Court of Appeal also referenced Rule 8.16, which provides that more than one expert give opinion evidence on one subject on behalf of the same party, if the Court permits.

TOMCO PRODUCTION SERVICES LTD V SMITH, 2015 ABQB 820 (NIXON J)
Rules 6.3 (Applications Generally), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Defendant, Mr. Smith, had been employed by the Plaintiffs, Tomco Production Services Ltd. and Tomco Industrial Ltd. ("Tomco"). He left Tomco and became an employee of the Defendant, Jimbob Rentals (2000) Ltd. ("Jimbob"). Tomco commenced an Action against Mr. Smith and Jimbob, alleging that they were using confidential information. All of the Defendants were unsuccessful in an Application for Summary Dismissal.

The parties were unable to agree on the appropriate column for Costs under Schedule C, as well as whether a multiple for Costs was appropriate and whether Costs should be awarded forthwith or in the cause. Nixon J. stated that the general rule under Rule 10.29(1) was that the successful party was entitled to Costs payable forthwith. When exercising discretion to award Costs, the Court could consider any of the factors set out under Rules 10.33(1) and 10.33(2). In this case, there was no amount claimed in the Action, so Column 1 of Schedule C applied. Nixon J. noted that it was not possible to set out a general principle for situations that required a higher Costs column or a multiple of a Costs column. Each case needed to be assessed on its own circumstances and this case required consideration of complexity, duration, difficulty, cooperativeness of the parties, and the end result.

Justice Nixon noted that the purpose of Rule 6.3(2) is to ensure that a Respondent is properly notified of the arguments which need to be addressed in the Application. The Rule also allows the Court to properly prepare for the hearing. "Absent this Rule, both the Respondent and the Court could be blindsided". In order to determine Costs, the Court considered several factors including that Tomco was required to address a total of six issues in the Application, even though Tomco was not notified of two of these issues which was contrary to Rule 6.3(2).

Nixon J. noted that when a Respondent was successful in avoiding a Summary Judgment, Costs should not be granted in the cause, as this would be inconsistent with the nature of the Application and the results, which were for the benefit of the Respondent. The Court awarded Costs at a multiple of 2 times the amounts in Column 1, payable forthwith.

KIDCO CONSTRUCTION LTD V GRIFFITH, 2015 ABQB 814 (MASTER HANEBURY)
Rules 6.8 (Questioning Witness Before Hearing) and 7.3 (Summary Judgment)

The Defendant owned farm land which was sold for the development of a proposed subdivision. The lands were contaminated and the Defendant agreed to remediation with the new owner. The Plaintiff completed the last steps of the remediation but the Defendant refused to pay its bills, on the basis that he had no contract with the Plaintiff for such work. The Plaintiff commenced the Action and then applied for Summary Judgment, arguing that it had an agreement with the Defendant through a third party to authorize the work. The Defendant cross-applied for Summary Dismissal of the Claim. Affidavits were filed by the Defendant and by the Plaintiff's representative. Transcripts were filed from the cross-examination of both parties, and from two other individuals who were examined under Rule 6.8.

Master Hanebury observed that the test for an Application for Summary Judgment is that the Application should be granted where no genuine issue for Trial exists. Rule 7.3 provides that Summary Judgment may be granted if a disposition that is fair and just to both parties can be made

on the existing record. The question is 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 that it will succeed is very high, such that it should be determined summarily. The legal or persuasive burden is on the Applicant throughout. The authorities are clear that the Court is to assume that the best evidence from the parties is before it.

Master Hanebury commented that issues of credibility generally cannot be decided summarily and require a Trial. In rare cases, where one party's evidence on the material facts is destroyed as a result of other evidence or on cross-examination so that it is "completely non-credible", the Court may "accept certain facts or may draw inferences of fact". Master Hanebury found that the Defendant's evidence left the impression of evasiveness, but this was insufficient to find his evidence "completely non-credible". In the result, Master Hanebury held that it would not be a just resolution of this case to either allow or dismiss the claim at this stage of the proceedings.

S & K RESTORATION INC V 1389978 ALBERTA LTD (PRIME SCHOOL OF MUSIC), 2015 ABQB 73 (MASTER SCHLOSSER)
Rules 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment), 10.42 (Actions within the Provincial Court Jurisdiction) and 13.18 (Types of Affidavit)

This Action was commenced under the *Builders' Lien Act*; however, Master Schlosser approached the Application as an Application and Cross-Application for Summary Judgment on the Claim and Counterclaim. Master Schlosser noted that, in such an Application for Summary Judgment, it was critical to consider the applicable principles of evidence:

1. The legal burden is on the applicant throughout; in this case, on the lien claimant for the claim and on the owner for the deficiencies[.]

2. Once the party with the primary burden has discharged their evidentiary burden, an evidentiary burden then passes to the respondent. This engages various obligations like the requirement to put your best foot forward or to suffer various inferences, and possibly defeat.

3. In this case, the parties had consented to resolution based on affidavit evidence that sometimes conflicted (*Court of Queen's Bench Act*, section 9(3)(b)).

4. If consent had not been given, the court, could (in addition to the sort of things set out in 121, above):

   . . . assume the relevant facts asserted by the party opposing the summary judgment application and determine whether the law permits judgment on those facts.

Master Schlosser observed that the Court has some additional "evidentiary tools" at its disposal, including that unsworn evidence or unqualified opinion evidence is inadmissible or of little value (Rule 6.11), and that first-hand evidence is required for the party with the primary legal burden (Rule 13.18). The Court reviewed and summarized each of the matters in dispute between the parties, resolving each. As there was mixed success, Master Schlosser awarded Costs to each party in accordance with Rule 10.42, and set off the Costs awards in favour of the Plaintiff.

WENZEL V NENSHI, 2015 ABQB 742 (GATES J)
Rules 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment), 8.4 (Trial Date: Scheduled by Court Clerk), 8.5 (Trial Date; Scheduled by the Court) and 8.6 (Notice of Trial Date)

The Plaintiff brought an Action for defamation that was set for a three week Jury Trial commencing February 16, 2016. The matter was set down for Trial by agreement under Rule 8.5. The Plaintiff retained new Counsel after the matter was set down for Trial. The Plaintiff sought leave to bring an application for Summary Judgment prior to the Trial.

The Defendant argued that section 17 of the *Jury Act*, RSA 2000, c J-3 precludes an applicant from seeking Summary Judgment or Dismissal after a Jury Trial has been set. Justice Gates rejected this argument. The Defendant also argued that a jury trial is a factor that must be taken into consideration when determining whether to grant the Plaintiff leave to bring their Summary Motion. Justice Gates rejected this argument and noted that the fact that a matter has been set down for trial by Jury should have no bearing on a decision regarding leave to bring a Summary Motion after a matter has been set down for Trial.

The Plaintiff argued that a Summary Motion as this stage could save judicial resources. Justice Gates noted, however, that the Plaintiff was unwilling to provide any firm commitment that they would abandon the balance of their Claim if successful on their Summary Judgment motion. Justice Gates also went on to note that a partial Summary Judgment motion on the eve of a jury trial would not create greater judicial economy and would in fact create a complex and messy process. Justice Gates also noted that prior Counsel had agreed that there were no further interlocutory matters, and that subsequent Counsel was now bound by this commitment.

Justice Gates also noted that there would be numerous scheduling difficulties attempting to run a Summary Dismissal motion prior to a Jury Trial and that the potential prejudice to the Defendant could not be adequately compensated by costs. Justice Gates also noted Rule 8.6 that provides a list of justifications for abandoning or adjourning a trial date and noted that none of these were present, or argued, in this Action.

GRIVICIC V ALBERTA HEALTH SERVICES (TOM BAKER CANCER CENTRE), 2015 ABQB 811 (CAMPBELL J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff commenced a medical malpractice Action against four individual treating physicians and Alberta Health Services acting as the Tom Baker Cancer Centre ("TBCC"). All of the Defendants applied for Summary Dismissal of the Action under Rule 7.3. The Master who heard the Summary Dismissal Application granted the Application as against three of the physicians, partially granted the Dismissal Application by the fourth physician, and denied the Summary Dismissal Application by the TBCC. The Plaintiff, and the Defendants who were denied Summary Dismissal, each appealed part of the Master's Decision.

Campbell J. stated that an Appeal of a Master's Decision is an Appeal *de novo*, where no deference is owed to the Master. Further, Rule 6.14(3) provides the Court with broad authority to admit new evidence on an Appeal. The test for relevance and materiality to admit new evidence under Rule 6.14(3) is a "very lax" one.

The Court further stated that, pursuant to Rule 7.3, a party may apply for Summary Judgment if it can establish that there is no merit to a claim or part of it. Justice Campbell held that the relevant question is whether there is a "genuine issue of merit requiring a trial and not merely that the evidence discloses a triable issue." An Applicant is no longer required to demonstrate that it is "plain and obvious or beyond doubt" that there is no genuine issue of material fact requiring Trial. The evidentiary burden to establish that there is no genuine issue of merit for Trial rests with the Applicant. Once this is established, the burden shifts to the Respondent to adduce evidence to establish that there remains a genuine issue of merit for Trial. Both parties must put their best evidence forward, instead of relying on speculation that better evidence might be available at Trial.

The TBCC provided new evidence in support of its Appeal. Justice Campbell held that the evidence in this case met the low threshold of being relevant and material. Based on the new evidence, the Court summarily dismissed the Plaintiff's Action against the TBCC. Her Ladyship also held that the Plaintiff had failed to provide sufficient evidence to support the claim, and the Master did not err in granting Summary Judgment in favour of the Defendant physicians. There was no evidence to suggest a genuine issue of merit for Trial.

REKUNYK V DELOITTE LLP, 2015 ABCA 318 (COSTIGAN, WATSON AND O'FERRALL JJA)
Rule 7.1 (Application to Resolve Particular Questions or Issues)

The Appellant, Rekunyk, retained an accounting firm to provide an expert opinion relating to the tracing of funds for his matrimonial property litigation. Upon receiving the opinion, the Appellant settled the matrimonial claim and sued the accounting firm for providing an opinion that was allegedly so prejudicial to the Appellant's position that he was forced to settle. The accounting firm applied for, and the Case Management Judge ordered, a Trial of an Issue pursuant to Rule 7.1 regarding the applicability of a limited liability clause in the parties' retainer agreement. The Appellant appealed, arguing that the Case Management Judge misinterpreted the test for the Trial of an Issue.

The Court of Appeal reviewed the Case Management Judge's Reasons, and determined that the three criteria under Rule 7.1(1)(a) were considered: the Trial of an Issue could narrow the issues and shorten Trial time; it could reduce some of the damages claimed; and could save expenses. There was no merit to the Appellant's argument that the Judge misinterpreted the test and, moreover, the conclusions reached on each criterion were reasonable. The Appeal was dismissed.

SMIGELSKI V SMIGELSKI, 2015 ABCA 320 (PICARD, PAPERNY AND ROWBOTHAM JJA)
Rule 7.1 (Application to Resolve Particular Questions or Issues)

The Appellant wife and the Respondent husband were engaged in an Action for divorce and division of matrimonial property. One of the issues in the Action was the validity and scope of a pre-nuptial agreement between the parties. Upon the husband's Application, a Chambers Judge granted an Order, under Rule 7.1(1)(a), directing a Trial of a preliminary issue to be held on the validity and scope of the pre-nuptial agreement. The wife appealed the Order.

The Court of Appeal noted the three grounds under Rule 7.1(1)(a) that allowed a Court to order an issue to be tried separately before Trial: disposing of all or part of a Claim; substantially shortening the Trial; or saving expense. The Court stated that a Trial "should not be split unless the savings are clear or at least probable". Further, "[s]plitting Trials is the exception, not the rule". While savings are clear and probable in some cases involving pre-nuptial agreements, they are not as clear and probable when issues overlap.

In this case, the Court of Appeal found that there was significant overlap between the pre-nuptial agreement issue and the rest of the Action. Therefore, the savings would not be meaningful. Accordingly, the Court of Appeal held that the Chambers Judge's Decision was unreasonable, and the Appeal was allowed.

COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK BA V LIEBIG & KEOWN LLP, 2015 ABQB 669 (MASTER ROBERTSON)
Rule 7.3 (Summary Judgment)

The Plaintiff multinational bank sued two accounting firms for negligent misstatements in connection with financial statements prepared for a former business associate of the Plaintiff. There was no contractual relationship between the Plaintiff and the Defendants. The Defendants applied for Summary Dismissal of the Action on the basis that there was no genuine issue of merit for Trial. The Defendants argued that there are five components to the tort of negligent misrepresentation and that the Plaintiff could not prove four of those components. The Plaintiff argued that some of the elements of the tort could be made out, and those that were unclear should go to Trial.

Master Robertson considered the law of negligent misrepresentation and noted that in this Application for Summary Judgment the questions were: whether, on an examination of the record as a whole, a decision could be made that was fair and just; and whether there was an issue of merit that genuinely required a Trial, or conversely, whether the Defence was so compelling that the likelihood it would succeed was very high. Master Robertson further

noted that the "key is whether the circumstances require … *viva voce* evidence in order to properly resolve the case". Master Robertson stated that the initial burden lies with the Applicant and must be satisfied on a balance of probabilities. If the burden is satisfied, it then shifts to the Respondent to show that there is a genuine issue of merit for Trial. Each party must put its best foot forward on a Summary Judgment Application.

Master Robertson reviewed the evidence and submissions from the parties and, in the result, dismissed the claim as against three of the Defendants but allowed the claim to continue against two of the Defendants.

STUDIO HOMES LTD V CARTER, 2015 ABQB 741 (MASTER WACOWICH)
Rule 7.3 (Summary Judgment)

The Defendant, Louis Joseph Albinati ("Albinati"), applied for Summary Dismissal of a claim initiated by Studio Homes Ltd. ("Studio"). There was also an Application for Summary Dismissal of the claims against the other Defendants, Signature Land Corp., Kevin Szakacs and Darrel Gunderson (the "Other Defendants"). The dispute in this case arose from an Agreement for Sale between Albinati and a company called Elaborate Developments Inc. ("Elaborate"), whereby Albinati sold a portion of land to Elaborate. Elaborate experienced financial difficulties and subsequently signed a Quit Claim and Settlement Agreement with Albinati to void the Agreement for Sale. Elaborate filed for bankruptcy and negotiated a Consent Order with the Receiver to transfer Elaborate's land claims to Studio.

The Court first considered the validity of each claim raised by the Plaintiff, Studio. Master Wacowich was not satisfied that there was no possibility that Studio had a claim against the Other Defendants and held that the issues in the claim could only be determined through Questioning pursuant to the Rules. The Court added that these issues may have been resolved at this stage if Affidavits had been filed by the Other Defendants, but as none had been provided they could not be used to settle the Application. The only Defendant to provide evidence was Albinati and the Court was satisfied on his evidence that Studio's claim against Albinati should be dismissed.

Following this determination, Master Wacowich considered the role of evidence generally as it related to an Application for Summary Judgment. There was a question raised as to whether an adverse inference should be drawn from a failure of the Other Defendants to give evidence. Master Wacowish noted that there was no onus on a party to give evidence under Rule 7.3, but referenced *Grivicic v Alberta (Health Services)*, 2014 ABQB 444, in which Master Prowse held that the Defendant bore the initial burden of establishing that it was plain and obvious that the Plaintiff could not succeed. Once this was established, the burden shifted to the Plaintiff to demonstrate that there was a triable issue. The Court also noted that *Hryniak v Mauldin*, 2014 SCC 7 required adjudicators to examine the evidence even when there was conflicting evidence. In this case, because the Plaintiff positively deposed that there was a conspiracy claim between the Defendants, and there was evidence to support portions of this allegation, the onus switched to the Defendants to put forward evidence to demonstrate that there was no merit to the Plaintiff's claim. Without any evidence from the remaining Defendants, the Plaintiff's evidence was sufficient to show merit to the claim at this juncture.

STICKS AND STONES COMMUNICATIONS INC V HOLE'S GREENHOUSES & GARDENS LTD, 2015 ABQB 774 (GRAESSER J)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff applied unsuccessfully for Summary Judgment before a Master, and subsequently appealed the Master's Decision to Justice Graesser. Graesser J. reviewed the law on Summary Judgment and noted that the Courts had undertaken a fresh approach to Summary Judgment, and had effectively eliminated the old test of "beyond doubt" or "plain and obvious". The Court's new approach is to look at the record and decide whether it is essential that the Court hear *viva voce* evidence in order to resolve the dispute. If the answer is yes, the matter must go to Trial. If the answer is no, the Court is to engage in a multistage process which

includes: presuming that the best evidence from both sides is before the Court; asking whether a negative inference can be drawn from the absence of evidence on certain points; looking at the complete package and asking whether all the evidence is admissible (for example, Rule 13.18(3) states that hearsay cannot be used for a final Application); asking whether there is a conflict in evidence and if so, whether (a) the conflict has been resolved on cross-examination or (b) whether the evidence giving rise to the conflict is purely self-serving and otherwise unsupported; and examining the evidence and assessing the sufficiency of the evidence.

Assessing the sufficiency of the evidence will also involve considering whether the issue can fairly be decided on the factual record before the Court, keeping in mind that "Summary Judgment is no longer to be denied solely on the basis that the evidence discloses a triable issue". Rather:

> ...the question is 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 that it should be determined summarily.

After reviewing the evidence, Justice Graesser allowed the Appeal and granted Summary Judgment in favour of the Plaintiff.

BILG V UNIFUND ASSURANCE COMPANY, 2015 ABQB 779 (PENTELECHUK J)
Rule 7.3 (Summary Judgment)

The Plaintiffs commenced an Action for damages arising from a motor vehicle accident. One of the Plaintiffs who was not involved in the accident sued Unifund Assurance Company ("Unifund"), claiming damages for loss of consortium. Unifund applied for Summary Judgment pursuant to Rule 7.3 in respect of two of the three Plaintiffs who were involved in the accident, arguing that the wording of the policy did not extend to them.

The Plaintiffs cited authorities prior to the decision of *Hryniak v Mauldin*, 2014 SCC 7. Given the cultural shift endorsed post-*Hryniak*, Justice Pentelechuk cautioned reliance on these authorities, but noted some principles remain valid, such as Summary Judgment being inappropriate where there are questions of fact or credibility. The Court considered whether the Plaintiffs were dependant relatives of the named insured under the policy, such that coverage would extend to them. The evidence was clear that the Plaintiffs were not residing with the named insured at the time of the accident. Pentelechuk J. noted that the authorities supported an interpretation of "dependency" to mean financially dependent. There was no evidence that the Plaintiffs were principally dependent on the financial support of the named insured or his spouse.

Penteluchuk J. held that the evidentiary record allowed for a just and fair determination to both parties, and Summary Judgment against the Respondents was granted.

HOLMES V EDMUNDS, 2015 ABQB 798 (KENNY J)
Rule 7.3 (Summary Judgment)

The claim related to a dog bite incident in which a young girl was injured. Two of the Defendants, landlords of the premises where the bite occurred, applied for Summary Dismissal of the claim against them.

Kenny J. noted that Rule 7.3(1)(b) allows for an Application for Summary Judgment where there is no merit to the claim. The Court must consider whether "the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily". Justice Kenny further observed that the Supreme Court has confirmed that Summary Judgment is appropriate "where the Court is able to reach a fair and just determination on the merits".

Justice Kenny noted that the Applicant landlords did not have sufficient control over the premises to be defined as an occupier under the *Occupiers Liability Act*, RSA 2000, c O-4, given that the landlord cannot enter the premises, except in an emergency or abandonment situation, without prior consent or permission of the tenant. The Plaintiffs argued that the landlords were liable for negligence for breach of their duty of care to ensure the premises were safe from foreseeable dangers. As this duty is assumed by

the tenants, the Plaintiffs were raising a novel argument. They argued further that the standard of care was raised because the landlord required the tenants to do certain things under the lease with respect to pets. Justice Kenny rejected this argument, and held that the pet rules in the lease may have heightened the required diligence on behalf of the tenants, but not so for the landlord.

Summary Judgment was granted as the landlords' defence was so compelling that the likelihood it would succeed was very high.

ELKOW V SANA, 2015 ABQB 803 (GRAESSER J)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff in a defamation Action applied for Summary Judgment. One of the two Defendants argued that this was not an appropriate case for Summary Judgment due to the large amount of time and money that had been invested into the Action, and because the Plaintiff was not seeking Summary Judgment against the second Defendant, this was not an efficient use of Summary Judgment. Graesser J. determined that Summary Judgment was the most efficient way to deal with the Action. Justice Graesser also confirmed that Summary Judgment is always available on individual claims against only one or some Defendants in an Action, and not all conflicts in Affidavit evidence preclude Summary Judgment.

His Lordship noted that, if the Court determines in a Summary Judgment Application that *viva voce* evidence is not required, the Court should engage in a six step analysis to determine whether the matter is suitable for summary determination:

1. The court is to presume that the best evidence from both sides is before the court.

2. As a corollary to number 1, the court is to ask whether a negative inference can be drawn from the absence of evidence on certain points.

3. Next, the court should look at the complete package and ask whether all of the evidence is admissible.

4. Next, the court should ask whether there is a conflict in the evidence and, if so, whether, (a) the conflict has been resolved on cross examination, or (b), whether the evidence giving rise to the conflict is purely self-serving and is otherwise unsupported.

5. The next step is to examine the evidence.

6. Having performed that evidentiary exercise a plaintiff will be entitled to judgment if the plaintiff can prove all elements of the cause of action and the defendant either has no defence or is missing critical elements of proof necessary to maintain that defence. A defendant will be entitled to judgment if the plaintiff cannot prove an essential element of its cause or if the defendant has a complete defence.

Graesser J. granted the Plaintiff's Application for Summary Judgment and awarded nominal general damages, taking in to account the fact that the Plaintiff made no submissions on damages, and the Defendant had limited financial means.

WARMAN V THE LAW SOCIETY OF ALBERTA, 2015 ABCA 368 (PICARD, COSTIGAN AND WAKELING JJA)
Rule 7.3 (Summary Judgment)

This matter dealt with the issue of whether parties who had made complaints to the Law Society of Alberta have standing to seek judicial review of the Law Society Conduct Committee's decision to dismiss their complaints. The Law Society had sought Summary Judgment of the matter, arguing that Warman and the other complainant did not have standing. The Court of Queen's Bench did not grant the Law Society's Application for Summary Judgment. The Law Society appealed that Decision. On Appeal, the majority of the panel, Justices Picard and Costigan, upheld the Court of Queen's Bench decision to dismiss the Application for Summary Judgment. The majority

determined that Warman and the other complainant's position had sufficient merit, and that both the law and the facts on this matter were arguable by both parties. The majority also stated that, while the modern application of Summary Judgment is to determine the matter in a way that is fair and just to both parties, the intent of Summary Judgment is not to prevent new arguments on unsettled law from being heard.

The dissenting decision by Wakeling J.A. concluded that Summary Judgment should have been granted in this case. Wakeling J.A. stated that Summary Judgment is a tool for speedy resolution of meritless positions, and the purpose and effect of Summary Judgment is the dismissal of a party's claim if it is highly likely that the Applicant's position will prevail. Wakeling J.A. stated that, under the *Legal Profession Act*, RSA 2000, c L-8, a party who makes a complaint about the conduct of a member of the Law Society is not a party to the proceedings that follow, despite the fact that their complaint initiated the proceedings. Wakeling J.A. determined that the Law Society's likelihood of success on this matter was very high, as Warman and the other complainant's position had no merit, because they had no standing to make an Application for Judicial Review.

ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC V AMEC AMERICAS LIMITED, 2015 ABCA 406 (PAPERNY, SLATTER AND MCDONALD JJA)
Rule 7.3 (Summary Judgment) and 14.48 (Stay Pending Appeal)

The Plaintiff, Attila Dogan, appealed a partial Summary Judgment granted against it on a Counterclaim, and an Order staying the Summary Judgment until the hearing of the first Appeal. Attila Dogan argued that the stay should remain in place until the Trial of the Action.

The Court noted that the test for Summary Judgment under Rule 7.3(1)(b) was that a Court may grant Summary Judgment where there was "no merit" to a claim or a defence. The Court also noted that there is no genuine issue for Trial when the Judge is able to reach a fair and just determination on the merits on a motion for Summary Judgment:

> This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The Appellant argued that the Case Management Judge failed to apply the principle of proportionality when granting Summary Judgment, and Summary Judgment was not appropriate because the claim involved large sums of money and the dispute was complex, in that it involved determining whether an agreement existed between the parties. The Court of Appeal stated that the size of the claim and the complexity of the issues did not mean that Summary Judgment was disproportionate.

It was possible to separate particular issues that should be resolved before Trial, as Rule 7.3 specifically contemplates Summary Judgment of part of a claim. The Court of Appeal was satisfied that the Case Management Judge's Decision as a whole demonstrated that the Judge was satisfied that there was "significant potential" that Summary Judgment on part of the claim would shorten the Trial.

A stay was granted by the Case Management Judge only until the hearing of the Appeal of the Summary Judgment on the basis that the Appellant was experiencing financial difficulties and enforcement of the Judgment might preclude it from pursuing the main claim. The Case Management Judge concluded that the prejudice to AMEC from a stay would be a delay in receiving amounts owing to it from the Summary Judgment, and the prejudice to Attila Dogan might be a loss of its claim. The Case Management Judge also noted that the litigation had been ongoing since 2007, and felt that there was a legitimate concern that the Trial would not be held in a timely fashion. Based on these considerations, the balance favoured granting a stay until the Appeal, but not a stay until the Trial. While the Appellant argued that the Judge erred in the assessment of the balance of convenience, the Court of Appeal stated that there was "no fixed rule that financial harm is always less serious than non-financial harm". The Court of Appeal held that the Judge's weighing of the factors relevant to the request for a stay was not unreasonable. Ultimately, the Appellant failed to

show a reviewable error for either the Summary Judgment or the Order for a Stay granted by the Case Management Judge; accordingly, both Appeals were dismissed.

HENDRIKS CONSTRUCTION LTD V JACKIE, 2015 ABQB 782 (MACKLIN J)
Rule 8.15 (Notice of Persons Not Intended to be Called as Witnesses)

The Defendant lawyers contracted with the Plaintiff general contractor to construct a new office building. The Plaintiff claimed for outstanding amounts under the construction contract and subsequent construction change order. The Defendants denied any remaining amounts and counterclaimed for damages arising from the failure to complete the project on time and for deficiencies in the work performed. Each side argued that the other acted in bad faith in fulfilling their obligations under the contract.

The Plaintiff asked the Court to draw an adverse inference against the Defendant for their failure to call witnesses who were named on a Form 37. Macklin J. held that it was not necessary for the Defendants to serve a notice of their intention not to call those witnesses under Rule 8.15. Trial strategy evolves and changes over time, and it was open for the Plaintiff to call those witnesses if it desired so no adverse inference should be drawn. Justice Macklin allowed the Plaintiff's Claim, and dismissed the Counterclaim and the mutual allegations of bad faith.

ABOUGOUCHE V MILLER, 2015 ABQB 724 (MASTER FARRINGTON)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

The Applicant tenant applied to set aside an Order made by the Residential Tenancy Dispute Resolution Service ("RTDRS"), which terminated the tenancy between the parties, and granted Judgment to the landlord for one month of unpaid rent plus Costs.

Master Farrington stated that if a Master had jurisdiction to set aside an RTDRS Order based on nonappearance through inadvertence or mistake, it would be based on Rule 9.15. Master Farrington further stated that the test under 9.15 is "whether there is a reasonable explanation for failing to appear, whether there is an arguable defense, and whether the moving party promptly requested to set aside the order". However, the preliminary issue in this case was whether Rule 9.15 applied. Master Farrington stated that Rule 9.16 is relevant in determining that question. The wording of Rule 9.16 suggests that only Orders granted by a Master or a Judge are subject to a Rule 9.15 Application. The RTDRS Order was not granted by a Master or a Judge. Citing relevant legislation and prior authority, Master Farrington held that the tenant's Application was actually an Appeal of the RTDRS Judgment, and the Master did not have jurisdiction to hear an Appeal.

PARADIGM QUEST INC V MOSER, 2015 ABQB 557 (BROWNE J)
Rules 9.35 (Checking Calculations: Assessment of Costs and Corrections), 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.41 (Assessment Officer's Decision)

The Plaintiff appealed a Master's Decision which reviewed an Assessment Officer's Decision in a foreclosure Action. The issue was whether the Master erred in upholding the Assessment Officer's Decision to award lower Costs than the solicitor-client Costs sought by the Plaintiff. The Plaintiff had appeared before the Master under Rule 9.35(4) seeking a review of the Assessment Officer's Decision. Browne J. observed that the Rules set out the framework for the review of Costs Decisions in a foreclosure matter. Under Rule 9.35, the Assessment Officer must assess the reasonable and proper costs pursuant to Rule 10.41. The Assessment Officers' task in reviewing Costs is to determine the reasonableness of the Costs which have been submitted.

Justice Browne noted that, pursuant to Rule 9.35(3), if the Plaintiff disagrees with the Assessment Officer's initial assessment of Costs, it may ask that the assessment be amended or corrected. Under Rule 9.35(4), if the Plaintiff is not satisfied with the Assessment Officer's Decision under

Rule 9.35(3) it may re-attend before the Master or Judge who granted the foreclosure Order to settle the Costs.

Rule 10.2(1) provides some factors which assist in determining which Costs were reasonable, including: the nature, importance and urgency of the matter; the client's circumstances; the manner in which the services are performed; and the skill, work and responsibility involved. Justice Browne observed that Rule 10.41 provides that a written agreement may expressly provide for a different basis for recovering Costs including full indemnification. Justice Browne concluded that the Master erred by not enforcing the full indemnity clause in the mortgage. The Appeal was allowed and the Plaintiff was entitled to Costs on a full solicitor-client basis.

The Plaintiff also sought Costs for applying to the Master to review the Assessment Officer's Decision, and in appealing the Master's Decision. Justice Browne noted that a successful party is entitled to Costs and, ordinarily, a successful party can claim for Costs incurred in an assessment of Costs before the Court or before an Assessment Officer pursuant to Rule 10.31(2)(b). However, Justice Browne declined to order Costs related to the review taken from the Assessment Officer and the Appeal from the Master.

NIAM V SILVERBERG, 2015 ABQB 682 (BROOKER J) Rules 10.7 (Contingency Fee Arrangement Requirements), 10.8 (Lawyer's Non-Compliance with Contingency Fee Agreement), 10.18 (Reference to Court) and 11.27 (Validating Service)

An Assessment Officer referred a dispute about the interpretation, enforceability and application of a Contingency Fee Agreement to the Court pursuant to Rule 10.18. The Plaintiff, Niam, contended that the Defendant lawyer, Silverberg, could not collect fees under the contingency agreement because the requirements of the Rules of Court applicable to contingency fee agreements had not been satisfied. The Plaintiff argued that Rule 10.8 was applicable. The Rule provides that, when a lawyer does not comply with the contingency fee agreement requirements, the lawyer is only entitled to his or her fees under Rule 10.2, as if there was no contingency fee agreement.

The Plaintiff also argued that the contingency fee agreement contravened Rule 10.7(2)(d), claiming that the particulars in the agreement were not precise and understandable with respect to the event which would trigger payment of the lawyer's fees. Brooker J. held that there was a clear contingent event which had occurred, and the contingent event had been precisely and understandably described in the contingency fee agreement in accordance with Rule 10.7(2)(d). Brooker J. also determined that, unlike most situations in which a client enters into a contingency fee agreement, the Plaintiff was represented by her own independent legal counsel at the time of the drafting of the agreement.

The Plaintiff also asserted that the Defendant had not served the agreement in strict accordance with Rule 10.7(4), which provides that a signed copy of the agreement must be served on the client within 10 days after the agreement was executed. The Defendant acknowledged that a signed copy of the Agreement was never formally served on the Plaintiff. However, the Plaintiff executed the agreement in the presence of a Notary Public and then emailed a copy of the executed document back to the Defendant. Brooker J. reviewed the authorities provided by both parties and concluded that only in rare circumstances will the Rules surrounding contingency fee agreements be relaxed. Brooker J. also found no indication that the Plaintiff was vulnerable or that there was a power imbalance between the Plaintiff and Defendant at the time the contingency fee agreement was executed. Justice Brooker noted that Rules surrounding the "cooling off period"; 10.7(2)(g) and 10.7(5), which allow a client to terminate a contingency fee agreement within five days of the executed agreement having been served on them, could be relaxed in this case, as the "cooling off period" could be easily determined from the date that the Plaintiff executed the Agreement in front of a Notary Public.

Given the exceptional circumstances, Brooker J. found that the contingency fee agreement was in compliance with the Rules. His Lordship also granted the Defendant's Application to validate service of the Agreement on the Plaintiff pursuant to Rule 11.27. Justice Brooker held the

Agreement enforceable and referred the dispute respecting the amount payable under the agreement back to the Assessment Officer.

GELUVICH V MILLER, 2015 ABCA 411 (WATSON, ROWBOTHAM AND O'FERRALL JJA)
Rule 11.25 (Real and Substantial Connection)

The Plaintiffs commenced a claim against an Ontario doctor alleging negligence. The Defendant doctor allegedly improperly rendered an MRI report in Ontario resulting in Ms. Geluvich's illness being improperly treated in Alberta. The Defendant doctor was served outside of Alberta pursuant to Rule 11.25 and he sought to overturn the service of documents, arguing that Ontario was the proper forum. The Chambers Judge granted the Defendant doctor's Application and the Plaintiffs appealed.

Justices Watson and Rowbotham noted that the Supreme Court of Canada has recently provided guidance with respect to the governing test for jurisdiction for a tort. Justices Watson and Rowbotham observed that, in order to determine the place where the tort was committed, the Court may still be informed by the location "most substantially affected by the defendant's activities or its consequences". The majority held that, because the allegedly negligent report led to an improper course of treatment and subsequent injury in Alberta, Alberta was the appropriate forum.

Justice O'Ferrall agreed in the result, but indicated that the focus should be on whether there was a "real and substantial connection" under Rule 11.25 and that there should be less focus on the location of the tort. His Lordship noted that the location of the tort is a presumptive connecting factor under Rule 11.25, but not the only factor. Justice O'Ferrall cautioned that undue emphasis on the location of the tort in the majority opinion could erode the test prescribed by Rule 11.25, namely, a real and substantial connection for service *ex juris*.

1400467 ALBERTA LTD V ADDERLEY, 2015 ABQB 656 (VEIT J)
Rule 13.6 (Pleadings: General Requirements)

Justice Veit set aside a previous Decision granting permission to the Plaintiffs to resile from a Pleadings amendment agreement between the parties, owing to a misapprehension of the effect of bankruptcy proceedings in Saskatchewan.

The Defendants applied to further amend their Pleadings to add a defence of set-off. Justice Veit denied the Application on the basis that the parties had an amendment agreement in place, and there was no allowance for a further amendment to the Pleadings in that agreement, and no authority existed in Alberta which interpreted the current Rules with respect to the necessity to plead defences. Justice Veit noted that the common law rule that "defences do not need to be pleaded" has been over-ridden, except with respect to matters set out in Rule 13.6(3). Her Ladyship concluded that it was not clear that set-off had to be pleaded in the circumstances. In the result, the pleadings amendment agreement was confirmed.

PEAVINE METIS SETTLEMENT V WHITEHEAD, 2015 ABCA 366 (WAKELING JA)
Rules 14.2 (Application of General Rules), 14.3 (When These Rules Apply), 14.4 (Right to Appeal), 14.7 (How to Start an Appeal), 14.8 (Filing a Notice of Appeal) and 14.12 (Contents and Format of Notices of Appeal and Cross Appeal)

A controversy existed within Metis settlements about the status of some persons whose names appeared on the settlement members list in the Metis Settlements Land Registry. Lester Calaheson, a member of the Gift Lake Metis Settlement, alleged that there were ineligible persons on the membership list and objected to the validity of the voting list. The Gift Lake Metis Settlement took the position that it would allow any person on the current membership list to vote. Mr. Calaheson appealed to the Metis Settlement Appeal Tribunal to set aside the approval of the membership bylaws. The Appeal Tribunal held that the position of the Gift Lake Metis Settlement was lawful. Three Metis settlements then

sought leave to Appeal the Decision of the Metis Settlements Appeal Tribunal to the Court of Appeal; however, none of the persons who participated in the proceedings before the Appeal Tribunal sought leave to Appeal.

Justice Wakeling considered whether the Court of Appeal has jurisdiction to permit a non-party to the proceedings before the Appeal Tribunal to file a Leave Application; and, if so, whether the Court should exercise its jurisdiction in favour of the Applicants to grant them permission to Appeal.

Wakeling J.A. observed that Rule 14.12(2)(a) supports the proposition that persons who are parties to the proceedings are entitled to appeal. Rule 14.3 declares that if a person has a right to appeal to the Court of Appeal under an enactment or the Rules, or is granted permission to appeal to the Court of Appeal, the Appeal must be made and managed in accordance with that part of the Rules. Wakeling J.A. held that Rule 14.3 applied, and the *Rules of Court* were held to govern any Appeal under the *Metis Settlements Act*, RSA 2000, c M-14. While Rule 14.4 gives the Court of Appeal jurisdiction to hear Appeals from any decision of a Queen's Bench Judge, there is no provision that expressly records who has a right to appeal.

Wakeling J.A. determined that the *Rules of Court* allow a party before the Court of Queen's Bench to file an Appeal, supported by three Rules: Rule 14.7, which directs an Applicant to file a Notice of Appeal under 14.8; Rule 14.8(2) which obliges an Appellant to file a Notice of Appeal that meets the requirement of Rule 14.12; and Rule 14.2(2)(a) which makes it mandatory that a Notice of Appeal contain the parties' names in the same order used in the style of cause in the Court appealed from, with an indication of the status of each on the Appeal and in the Court appealed from. Wakeling J.A. noted that this was a clear indication that a party in the proceedings below is entitled to Appeal.

It was common ground that the three Metis settlements were not parties to the proceedings before the Appeal Tribunal, which triggered the general rule that a non-party cannot appeal. There were no exceptional circumstances to accord the Applicants with status to apply for permission to Appeal. In the result, Wakeling J.A. determined that the Applicants did not have standing and the Applications were dismissed with Costs.

LASER CLEAN LTD V CLARK, 2015 ABCA 373 (WATSON JA)
Rule 14.5 (Appeals Only with Permission)

This Application followed an earlier oral Decision by Watson J.A. where a stay of an injunction was granted. This Application was for Leave to Appeal the stay Decision to a panel of the Court of Appeal, and secondly to suspend the stay so as to await the panel determination. The Application was brought pursuant to Rule 14.5(2)(a), which requires an application for Leave to Appeal to be brought before the same appeal Judge who made the original decision. Under the circumstances, Watson J.A. did not think there would be much to be gained by granting Leave to Appeal from himself, particularly since the Appeal from himself could not be heard any sooner than the Appeal from the merits of Justice Veit's injunction Decision. Watson J.A. was not persuaded to reverse his decision on its substance or its effect. Rather, Watson J.A. determined that it was better to direct that the Appeal be heard forthwith.

INDUS DEVELOPMENT CORPORATION V ANSAR DEVELOPMENT CORPORATION, 2015 ABCA 400 (PAPERNY JA)
Rule 14.48 (Stay Pending Appeal)

The parties' dispute related to whether an agreement for the sale of the Defendant's land was concluded. The Defendant argued the sale was incomplete and sold the property to a third party. The Plaintiff filed a caveat against the land. At a show cause hearing under section 141 of the *Land Titles Act*, RSA 2000, c L-4 ("LTA"), the Chambers Judge ordered the caveat to be discharged. The Plaintiff appealed the discharge of the caveat, and applied for a Stay of the Order to discharge the caveat pending Appeal, pursuant to Rule 14.48.

Paperny J.A. held that the triparte test for a stay applied, but that section 191(3) of the LTA must be considered, as it provides for an automatic stay of an Order discharging a

caveat, pending the exhaustion of the registrant's avenues of appeal. This statutory stay implies that some prejudice or harm to the registrant is presumed. While section 191(3) may express a preference for a stay of proceedings in certain circumstances, it is not without exception. The Judge still retains discretion with respect to granting the stay. The Chambers Judge did not refer to the applicable triparte test and, as such, there was an arguable issue on Appeal. However, Paperny J.A. held that there would be no irreparable harm if the stay was not granted, nor did the balance of convenience favour the granting of the stay. The Application was dismissed.

PATEL V TULAN, 2015 ABCA 384 (O'FERRALL JA)
Rule 14.68 (No Stay of Enforcement)

The Plaintiffs (Respondents at the Court of Appeal) were minority shareholders in two companies. They obtained an Order directing an investigation pursuant to s.231 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 for oppression. The Defendants (Applicants at the Court of Appeal), who were the controlling directors and shareholders of both companies, applied to the Court of Appeal for a stay pending Appeal for the enforcement of the investigation Order.

Justice O'Ferrall applied the three-part test for injunctions from leading Supreme Court authority: whether there is a serious issue to be tried; whether the Applicant will suffer irreparable harm if the injunction were not granted; and whether the balance of convenience favours the injunction. The Applicants argued that in the context of a stay pending Appeal, a serious issue to be tried should be found unless the party opposing the stay can demonstrate that the appeal has no possibility of success. Justice O'Ferrall expressed doubt that this was the proper test given the default position under Rule 14.68 that the filing of an Appeal or an Application for permission to Appeal does not operate as a stay of proceedings or enforcement of the Decision under appeal. This presumption, according to Justice O'Ferrall, implied that the onus should be on the Applicant to demonstrate that their Appeal has a reasonable prospect of success. For the purposes of the Application however, Justice O'Ferrall was prepared to accept that the test for a serious issue to be tried was that there was no possibility of success. Justice O'Ferrall was not prepared to find that the Appellants had no possibility of success on their Appeal.

Justice O'Ferrall further held that the refusal to grant a stay would at most render the Appellant's Appeal without merit, but that this would amount to no more than an adverse procedural ruling. An adverse procedural ruling could not meet the second part of the three-part test. Furthermore, Justice O'Ferrall found that both the *Business Corporations Act* and the Order under appeal provided sufficient safeguards to prevent there being irreparable harm.

Justice O'Ferrall held that granting a stay of the investigation Order could undermine the rights and protections given to the Respondents under the Business Corporations Act, which were invoked to obtain the impugned Order. As such, the balance of convenience was in favour of the Respondents. The Application was therefore dismissed.

FRASER-TABAK V TABAK, 2015 ABCA 403 (PAPERNY JA)
Rule 14.70 (No New Evidence Without Order)

The Applicant husband, the Respondent to an Appeal, sought an Order striking portions of the Appellant's factum and extracts of key evidence which reproduced material not in evidence before the Trial Judge. Justice Paperny noted that Rule 14.70 states that Appeals must be determined on the basis of the record of the proceedings below. The contested material was not entered as evidence in the proceedings below, and accordingly did not form part of the record.

The wife argued that the evidence was relevant and was of probative value, and should therefore be included in the Appeal record in any event. Paperny J.A. observed that Rule 14.70 does not afford discretion to include new evidence on the record before the Court on appeal. In the result, the portions of the factum and extracts of key evidence were struck.

KNUDSON V KNUDSON, 2015 ABCA 398 (FRASER, WATSON AND ROWBOTHAM JJA)
Rule 14.88 (Costs Awards)

The Appellant husband appealed a Trial Judge's award against him for retroactive spousal support and Costs in a divorce and matrimonial property Action. In reviewing the Decision of the Trial Judge, the Court of Appeal found no reviewable errors and dismissed the Appeal. The Appellant also appealed the award of double Costs that the Trial Judge awarded against him. The Trial Judge had awarded double Costs because the damages at Trial were greater than the Formal Offer made by the Respondent. The Court of Appeal agreed that the Respondent wife was entitled to double Costs, referring to Rule 14.88(3) which states that "unless otherwise ordered, the scale of Costs on an Appeal shall be the same as the scale that applies to the Order or Judgment appealed from". The Court of Appeal dismissed the Appeal of the Costs award.