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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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HEWITT V BARLOW, 2016 ABQB 81 (MASTER ROBERTSON)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

The tenant, Barlow, alleged that the Residential Tenancies Dispute Resolution Service ("RTDRS") did not follow the rules of natural justice in determining a dispute with his landlord. While away from the rental premises for work, the tenant was substitutionally served an RTDRS Application filed by Mr. Hewitt. The tenant only received notice from a friend by telephone. The tenant called RTDRS and explained that he was away at work, and stated that Mr. Hewitt was not the landlord. The unsigned lease showed a Ms. Hewitt-Guimienny as the landlord and it was Ms. Hewitt-Guimienny who had been collecting rent. The clerk at RTDRS advised that no proof of ownership was needed by an Applicant, but further advised that the RTDRS hearing could be rescheduled if Barlow sent a letter explaining the issue. Barlow faxed a letter to the RTDRS and was later advised that a notice to reschedule would or should be mailed to him. A month later, he returned to the rental premises and found that the locks had been changed.

The tenant learned that the Hearing had proceeded in his absence and without notice, contrary to what was advised by the RTDRS clerk. He applied to the Court of Queen's Bench for a stay of enforcement of the RTDRS Order. Master Robertson considered whether Rule 9.15 was available to set aside the Order, but held that, without legislative changes, the Rule is not available to a Master in Chambers to set aside a decision of the RTDRS. However, a re-hearing is possible when RTDRS has failed to follow the rules of natural justice. Under Rule 9.16, an Application to set aside under Rule 9.15 is to be brought before the Justice or Master who granted the original Order. Similarly, the Application to seek a re-hearing should be brought before the same Tenancy Dispute Officer. However, Master Robertson directed the matter back to the RTDRS and ordered that it be heard by someone different to avoid further complications. Master Robertson also ordered a Stay of Enforcement of the Order as the rules of natural justice had not been followed.

BEAUCHESNE V BEAUCHESNE, 2012 ABQB 308 (ROSS J)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 1.7 (Interpreting These Rules), 1.9 (Conflicts and Inconsistencies with Enactments), 12.44 (Application Within Course of Proceeding), 12.45 (Application After Order or Judgment Under Divorce Act (Canada), 12.46 (Provisional Order to Vary a Support Order Under Divorce Act (Canada) and 12.47 (Confirmation Hearing)

Following the parties' divorce, the husband moved to the United Kingdom, and the Alberta child support Order was registered in the United Kingdom for enforcement purposes. The Applicant husband obtained an *ex parte* Order from the English Court which purported to vary the previous child support Order granted in Alberta. Justice Ross considered whether the *International Support Orders Act*, SA 2000, c I-3.5 ("ISO Act") could be used to bring a UK provisional order before an Alberta Court as a variation application under the *Divorce Act*, RSC 1985, c 3 (2nd supp).

Ross J. considered the relevant provisions of the *Divorce Act*, the ISO Act and the *Judicature Act*, RSA 2000, c J-2. Ross J. also considered Rule 12.45, which provides that an Application to vary, suspend or rescind an Order of the Court in a proceeding under the *Divorce Act* must be made by filing a family Application in Form FL-18 accompanied with an Affidavit in accordance with Rule 12.44(1)(a). Ross J. also noted the relevant time frames within which these Applications and Affidavits must be served by both parties to an Action. Specifically, Rules 12.46 and 12.47 are the Rules used to address the procedure to be followed for provisional Orders made under the *Divorce Act*.

Justice Ross also referenced Rules 1.2, 1.3, 1.4, 1.5, 1.7 and 1.9 in order to exemplify the general purpose of the Rules of Court, the powers the Court has to implement these Rules in order to advance their purpose and to illustrate the approach and interpretation that is to be taken when applying the Rules of Court. Her Ladyship reviewed previous authority which provided that a Province has no authority to expose a divorce Order to variation under provincial legislation, as the *Divorce Act* is a Federal Act. However, Ross J. also stated that the *Divorce Act* permits a provincial rule-making body to make rules applicable to any proceeding under the *Divorce Act* in a Court in the Province. Further, the Rules of Court provide for a broad approach to interpretation and must be read in light of the purpose and intention set out in Rule 1.2.

Ross J. held that the Rules of Court provide that the Court has broad power to cure contravention, noncompliance or irregularity where it is in the overall interest of justice to do so, and where it would not cause irreparable harm to any party. Justice Ross concluded that the *Divorce Act*, when read with the Rules of Court, allowed the Court to hear the variation Application, and that to do so would be in keeping with the purpose of the Rules. Ross J. recalculated the husband's income accordingly and directed the Designated Authority in England to prepare an Order that reflected Her Ladyship's analysis.

KLEIN V WOLBECK, 2016 ABQB 28 (RENKE J)
Rules 1.2 (Purpose and Intention of These Rules), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 5.33 (Confidentiality and Use of Information), 6.3 (Applications Generally), 6.11 (Evidence at Application Hearings), 10.51 (Order to Appear), 10.53 (Punishment for Civil Contempt of Court), 12.18 (Response to Proceeding Under Family Law Act), 12.43 (Application of Part 6, Division 1), 12.44 (Application Within Course of Proceeding), 12.51 (Appearance Before the Court) and 13.18 (Types of Affidavit)

The Plaintiff, Klein, sought to terminate partner support payable to the Defendant, Wolbeck, and Wolbeck sought an Order respecting certain lands held as a co-tenant with Klein. Both Applications involved the same parties, the same relationship, overlapping issues and overlapping evidence. There were two preliminary evidentiary Applications before Renke J., one of which was whether materials from other proceedings between the parties were admissible in either Application. Justice Renke noted that Court Orders, filed Affidavits and transcripts of Questioning on Affidavits are matters of public record and may be referred to in another Application; the "implied undertaking" rule in Rule 5.33 does not apply to these materials. Renke J. held that information disclosed in prior litigation between these parties or in one Application should be admissible in the other Application.

The second evidentiary issue was whether hearsay was admissible. Renke J. noted that Klein's Application did not fall within the types of Application in paragraph 1 of Family Law Practice Note 2 (as it then was); hence, the Rules governing Affidavits for Klein's Application fell under Rules 12.43(1) and (2), 6.11 and 13.18. If the Applications were not "final" Applications, Rule 13.18(3) would not be engaged and hearsay would be permitted. Wolbeck's Application sought a final determination of rights, but Justice Renke held that evidence admissible through an exception to the hearsay rule is admissible even in an Application falling under Rule 13.18(3). If admissible through an exception to the hearsay rule, the evidence may be proffered by an Affiant based on his or her knowledge of the third-party information.

Wolbeck's Affidavit sought relief for, amongst other things, retroactive child support, financial disclosure, retroactive partner support, and Costs; however, Renke J. determined that there was no Cross-Application properly before the Court respecting retroactive child support or partner support. Despite Rules 1.2(1) and 1.5, Justice Renke considered the requirement to provide notice of claimed relief through formal documents contemplated by the Rules of Court. Justice Renke held that the claims for relief should have been set out in the appropriate form, as required by Rules 6.3(2) and 12.44. The claims for relief were not proper components of an Affidavit under Rule 13.18 and Rule 12.18(4).

Regarding spousal support, Renke J. confirmed that any determination made respecting the duration of Klein's obligation to pay support did not extinguish any right that Wolbeck may have to recover retroactive amounts. Citing Rule 12.51, Renke J. observed that the parties did not provide any argument as to whether a final decision could not or should not be rendered in the Application for spousal support. Klein also raised an issue with respect to Wolbeck's contravention of a Court Order, arguing that Wolbeck was in contempt. However, Renke J. ascertained that Klein was effectively seeking to impose a penalty on Wolbeck for contempt without having followed the requisite procedure under Rule 10.51(1). The remedy sought by Klein fell within Rule 10.53(d)(iii). Justice Renke declined to impose a contempt penalty on Wolbeck.

MCCARTY V MCCARTY, 2016 ABQB 91 (RENKE J)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court), 13.6 (Pleadings: General Requirements) and 13.18 (Types of Affidavit)

The parties, parents of two children, divorced in 2008. Ms. McCarty applied for an Order directing reimbursement for orthodontic expenses and a variation of the prior child support Order.

With respect to the orthodontic expenses, the Court considered whether Mr. McCarty was required to carry insurance for these expenses as per the prior Order. Ms. McCarty submitted hearsay evidence about her insurance, but Renke J. held that the evidence was admissible in an interim Application under Rule 13.18. Mr. McCarty simply denied he had insurance coverage, but did not provide any evidence to support his assertion. Justice Renke granted reimbursement for the orthodontic expenses as the remedy for the contravention of the prior Order. Justice Renke noted that Ms. McCarty did not have a cause of action simply for the contravention of the prior Order. Civil contempt was not a "useful avenue of approach" since Rule 10.52(3)(a)(i) prevents civil contempt from being declared with respect to an Order to pay money without reasonable excuse, and Rule 10.53 does not appear to allow for a compensation Order. Renke J. considered what, if anything, should be ordered regarding future orthodontic work for the children. His Lordship noted that Rule 1.3(2) permits the Court to grant a remedy whether or not it is claimed. However, this additional dental treatment was only raised in Ms. McCarty's reply Affidavit, to which Mr. McCarty did not have an opportunity to respond. Therefore, it was held that awarding the costs of future orthodontic work would not be fair to him.

With respect to the variation of the child support Order, Ms. McCarty claimed retroactive child support based on Mr. McCarty's income. Renke J. observed that, normally, *viva voce* evidence, tested by cross-examination, was appropriate to make a retroactive award, and retroactive support ought not to be granted on interim Applications. However, given Rule 1.2 and the principles in *Hryniak v Mauldin*, 2014 SCC 7, the Court should come to conclusions based on the evidence where possible. Pursuant to Rule 13.18, the parties could rely on hearsay evidence for the interim Application, so long as the source of the information was disclosed in the Affidavit. The hearsay pertaining to the retroactive child support issue was a report included in Mr. McCarty's Affidavit. Ms. McCarty did not object to its admissibility, but simply challenged its conclusions.

As part of determining the retroactive child support issue, Justice Renke considered Ms. McCarty's allegations that Mr. McCarty received non-arm's length benefits from his companies, which was not disclosed. Justice Renke noted

that Ms. McCarty should have notified Mr. McCarty about the benefits issues, thereby identifying the real issues in dispute under Rule 1.2(3)(a), and complying with Rules 13.6(2) and (3) which circumscribe the requirements for the contents of Pleadings. Ms. McCarty also failed to identify the source of information within her Affidavit, contrary to Rule 13.18(2). Ultimately, however, the Court held that retroactive child support was appropriate in all the circumstances.

MCKENZIE V SMITH, 2016 ABQB 114 (MASTER SCHULZ) Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 7.1 (Application to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)

The Plaintiffs commenced an Action against the Defendants for an undisclosed defect in a residential property which the Plaintiffs had purchased from the Defendants. The Plaintiffs then applied for Summary Judgment with respect to the Defendants' liability.

Master Schulz noted that Summary Judgment can be granted if a fair and just disposition can be made on an existing record. Further, Summary Judgment is appropriate if there is no merit to the claim or defence.

Master Schulz considered Rule 7.1 and stated that the test as set out in Rule 7.1(a) and the leading authority is "a real likelihood that the net result will save time and money for all concerned". Master Schulz held that there was no overlap between the issues of liability and damages. Further, there was a real likelihood that proceeding with Summary Judgment on liability would save time and costs; the criteria from Rule 7.1(a) were met. Master Schulz concluded that this was a fair and just process and there was no issue of merit regarding liability that required a Trial.

The Plaintiff also requested that the matter be sent to a Referee to assess damages; however, the Court was not satisfied that the damages issue was restricted to the amount only, as required by Rule 7.3(b). The assessment was not directed to a Referee. Instead, Master Schulz granted Summary Judgment on the issue of liability, and directed the parties to proceed to an assessment of damages.

REID V BITANGCOL, 2016 ABQB 122 (GOSS J) Rules 1.2 (Purpose and Intention of These Rules), 5.1 (Purpose of This Part), 5.35 (Sequence of Exchange of Experts' Reports), 5.41 (Medical Examinations) and 5.44 (Conduct of Examination)

The Plaintiffs commenced an Action for medical negligence in the care of a 16 year old male who sustained a spinal cord injury. The Plaintiffs had served their expert reports pursuant to Rule 5.35, but, despite the Defendants having performed their medical examinations pursuant to Rule 5.41, and the Plaintiffs having requested these reports under Rule 5.44(3)(a), the Defendants had not delivered the rebuttal expert reports.

The Defendants applied for an Order compelling the Plaintiffs to produce certain test protocols and raw data upon which the Plaintiffs' expert report was based, pursuant to Rule 5.44, which they claimed were required for their experts to complete the rebuttal reports. They argued that the information should be produced prior to Trial in order to avoid unnecessary costs and delay, in accordance with Rules 1.2 and 5.1. The Plaintiffs argued that the requested records were privileged. Further, Rule 5.44(3) governs the way in which disclosure must occur.

Justice Goss, noted that Rule 5.35 generally reflects a plaintiff's onus to advance its Action. There is nothing in the Rules preventing a defendant from waiting to rely on Rules 5.41 and 5.44 until after the expert report of the plaintiff is produced. The mandatory disclosure under Rule 5.35 does not, however, include raw data, test protocols or documents which were used by the expert for their report. Her Ladyship stated further:

> A party delivering a detailed written report of the health care professional's findings and conclusions under Rule 5.44(3)(a) is entitled to receive, on request, every ME previously or subsequently made of the physical or mental condition of the person under

> Rule 5.44(3)(b). The continuing litigation privilege over related documents does not disappear until Rule 5.44(3) comes fully into play, in other words, when the reports under Rule 5.44(3)(a) have been provided, and a request has been made for Rule 5.44(3)(b) disclosure.

Justice Goss dismissed the Defendants' Application for disclosure.

SWEEZEY V SWEEZEY, 2016 ABQB 131 (YUNGWIRTH J)
Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicant father applied to retroactively vary a child support Order, arguing that his real income was lower than what was imputed to him. The Applicant, who was both owner and shareholder of a corporation, argued that many of the expenses he had listed were valid corporate expenses, whereas the Respondent's position was that they were not. The Respondent also contended that the Applicant had not provided enough evidence for the Court to properly determine his income. Yungwirth J. stated that it was the Applicant's onus to provide all relevant financial information regarding his corporation to ensure that the Respondent and the Court were provided with enough information to determine whether the Applicant's stated income amount was reflected in the financial statements of his corporation.

Justice Yungwirth noted that Rule 1.2 requires the parties to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense, and stated that in order to do so, complete disclosure is required from both parties, including the information of a party who is a shareholder in a company in order to determine both parties' child support obligations. Yungwirth J. determined that the Applicant had not provided sufficient information or disclosure for a number of his claims in support of his Application, and dismissed his Application to vary the child support Order accordingly.

MADORE V MADORE, 2016 ABQB 146 (GATES J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 12.38 (Affidavit of Records)

The Applicant, Ms. Madore, sought an Order dismissing the matrimonial property Action initiated by the Respondent, Mr. Madore, on the basis of long delay. The Applicant conceded that the facts of the case did not fall within Rule 4.33; rather, she argued that the delay had resulted in significant prejudice under Rule 4.31. Gates referenced *Kahlon v Cheecham*, 2015 ABQB 203, for the steps in assessing an Application under Rule 4.31 and stated that the Court must determine whether the delay is inordinate, whether the delay is inexcusable and, finally, if these two criteria are met, whether the "presumption of significant prejudice is engaged". Regarding prejudice, an Applicant must establish the likelihood of serious prejudice before an Action will be struck, and this presumption can be rebutted by evidence that raises a legitimate doubt as to the existence of serious prejudice. Additionally, Rule 1.2 should inform the application of Rule 4.31 to ensure Actions are moved forward in a timely and cost effective way. Gates J. noted that the Court must examine the conduct of the litigation and should focus on whether the litigation has been moved forward in a meaningful way, and must examine the nature, value, importance and quality of any steps taken.

Gates J. held that the Respondent had not pursued his Action with haste and neither party had complied with Rule 12.38. Justice Gates considered the various steps taken by both parties, and held that the delay in this case was inordinate. Gates J. noted that the Respondent brought no Applications to address alleged delay issues due to the Applicant. As such, the delay was inexcusable. Finally, Gates J. noted that the Respondent did not advance any evidence or argument to raise legitimate doubt regarding the existence of significant prejudice; therefore, the Applicant was entitled to rely on the presumption of prejudice under Rule 4.31(2). Accordingly, the Application to dismiss for long delay was granted.

PACQUIN V WHIRLPOOL CANADA LP, 2016 ABQB 147 (MASTER FARRINGTON)
Rules 1.2 (Purpose and Intention of These Rules), 4.16 (Dispute Resolution Process), 4.33 (Dismissal for Long Delay) and 8.4 (Trial Date: Schedule by Court Clerk)

The Defendants applied for Dismissal of the Action for Long Delay pursuant to Rule 4.33 on the basis that the last significant advance in the Action was the filing and service of Third Party Claims; alternatively, forwarding an expert report could extend the timeline by several months, but the Plaintiffs were still beyond the Rule 4.33 date.

As an initial issue, Master Farrington considered whether without prejudice settlement offers could be considered during a Rule 4.33 Application. Master Farrington held that without prejudice settlement offers were admissible for the purposes of considering if there had been an advancement of the Action. Master Farrington summarized the law relating to dismissal for long delay and focused on the need for a cultural shifts since *Hryniak v Mauldin*, 2014 SCC 7. The focus is now on whether a particular activity has moved a matter closer to resolution. Master Farrington emphasized that the Court should look beyond just the regimented steps under the Rules, and focus on whether a particular activity actually narrowed issues or otherwise advanced a matter towards Trial. The Court also referred to prior authority which considered Rules 4.16 and 8.4 and the need for parties to dutifully advance their Actions.

Master Farrington dismissed the Application, noting that the detailed settlement letters exchanged between counsel provided substantive analysis that helped to narrow the issues in the matter and bring it closer to resolution. Master Farrington stressed that the settlement letters provided significant details about the state of the case and helped advance the Action towards Trial.

LC V ALBERTA, 2016 ABQB 151 (GRAESSER J)
Rule 1.2 (Purpose and Intention of These Rules)

The Plaintiffs applied for Certification of their Action as a Class Proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5 ("CPA"). They alleged failures of successive Directors of Child Welfare to comply with legislation which provided for the preparation and filing of care plans for children who became the subject of Temporary Guardianship Orders.

Justice Graesser noted that it is possible to certify a Class Proceeding subject to amendments to the pleadings. Graesser J. noted that, while the Court should be slow to draft pleadings itself, the Court can, and should in appropriate cases, give guidance on the pleadings. This may be appropriate during the Certification process, as opposed to sending the Plaintiffs away to reframe their class definition and common issues if they have not been perfectly drafted the first time. Justice Graesser noted that sending the Plaintiffs away to redraft their Pleadings would not be a wise use of scarce judicial resources, and would miss the thrust of the new Alberta Rules of Court and specifically Rule 1.2. Graesser J. certified the Action pursuant to section 5 of the CPA, and directed that some amendments to the Pleadings were required.

PYRRHA DESIGN INC V PLUM AND POSEY INC, 2016 ABCA 12 (BERGER AND MCDONALD JJA AND SCHUTZ J (AD HOC))
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies) and 7.3 (Summary Judgment)

The Plaintiff commenced an Action claiming that the Defendants had breached the terms of a settlement agreement. The Plaintiff applied for Summary Judgment. The Defendants did not formally apply for Summary Dismissal, but argued in their brief that the claim should be summarily dismissed. Summary Dismissal of the Claim was granted and the Plaintiff appealed.

The Plaintiff argued on Appeal that the Defendants failed to formally comply with Rule 7.3(2), which dictates that an Application for Summary Dismissal must be supported by an Affidavit swearing positively that one or more of the grounds for Summary Dismissal have been met. The Court of Appeal held that the Defendants met the substance of Rule 7.3(2) and the underlying basis for it. The Court of Appeal noted that the Court possesses the inherent jurisdiction to

control its own processes, which jurisdiction is also expressly granted by the *Judicature Act*, RSA 2000, c J-2 and Rule 1.3. The Majority of the Court concluded that the Chambers Judge did not err in granting Summary Dismissal on the record before the Court, and dismissed the Appeal.

In dissent, McDonald J.A. observed that neither Rule 1.2 nor the new Summary Judgment regime permits disregard for the Rules of Court. Rule 1.2(3)(a) expressly states that the parties must identify the real issues in dispute and facilitate the quickest means of resolving the Claim with the least expense. McDonald J.A. observed that Rule 7.3 does not specify what is to happen in the event that an Application for Summary Judgment is unsuccessful; it only specifies in Rule 7.3(3) what the Court may do in the event the Application is successful. Since the Defendants had not filed an Application for Summary Dismissal, at minimum they ought to have specifically and unequivocally advised Appellant's counsel of their intention to utilize the Appellant's own Application for Summary Judgment to seek an Order to have the entire Claim dismissed, which they did not do.

With respect to Rule 1.3, McDonald J.A. stated that the provision simply clarifies the jurisdiction generally of the Court of Queen's Bench, and is not to be interpreted in a manner that would improperly permit the Court to grant relief when it would be unfair or inappropriate to do so. McDonald J.A. would have allowed the Appeal and would have directed that the Appellant re-apply for Summary Judgment before another Justice of the Court of Queen's Bench.

KAZAKOFF ESTATE V CAMROSE CROWN CARE CORPORATION, 2016 ABQB 99 (HALL J)
Rules 1.4 (Procedural Orders), 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Court considered two related Actions together. Devtex Ltd. ("Devtex") and the Estate of Polly Kazakoff, as mortgagees, applied for Summary Judgment in respect of a mortgage (the "Camrose Mortgage"), with Camrose Crown Care Corporation as mortgagor. Devtex, as mortgagee, also applied for Summary Judgment in respect of another mortgage (the "Melville Mortgage"), with 330906 Alberta Ltd. as mortgagor. The Respondents were judgment creditors of the mortgagors who were not parties to the Action; they sought to intervene in the foreclosure Applications in order to have standing, and raised a limitations defence in respect of the Summary Judgment Applications. Further, they argued that the debt underlying the Camrose Mortgage had been repaid, such that the Melville Mortgage should secure less than was alleged by the mortgagees.

Justice Hall held there was an insufficient evidentiary record to determine Summary Judgment and directed the judgment creditors to file Statements of Defence on behalf of the mortgagors. Summary Judgment or Summary Dismissal could be sought with further evidence.

The Plaintiffs also applied for an Order for Security for Costs against the Defendant mortgagors. Hall J. observed that "[a]lthough the Rules of Court permit such an order against a defendant, it is rarely granted". His Lordship noted that, where a party has "just missed" summary judgment, or where a party consistently flouts Court Orders, Security for Costs may be appropriate. Further, where there is evidence that defendants are "improperly arranging their affairs" during litigation in order to avoid a Judgment, Security for Costs may be justified. Justice Hall held that the applicable circumstances and not give rise to an award for Security for Costs.

THOMPSON V PROCRANE INC (STERLING CRANE), 2016 ABCA 71 (SLATTER JA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.9 (Service of Originating Application and Evidence), 9.4 (Signing Judgments and Orders), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 11.4 (Methods of Service in Alberta), 11.5 (Service on Individuals), 11.27 (Validating Service), 13.5 (Variation of Time Periods) and 14.5 (Appeals Only With Permission)

Procrane Inc. and the Applicant, Mr. Thompson, both brought Originating Applications for review of an Occupational Health and Safety Council decision regarding

Mr. Thompson's employment with Procrane Inc. With respect to the Procrane Originating Application, Procrane made three attempts to serve Mr. Thompson personally before serving him by email. Counsel for Procrane appeared on the return date for its Originating Application and, in the absence of Mr. Thompson, obtained an Order deeming service good and sufficient ("Service Order"). The Procrane Originating Application was adjourned to the same date as Mr. Thompson's Originating Application. Mr. Thompson asked to vary the Service Order, but was advised to raise this issue at the later Application. Mr. Thompson did not raise the Service Order at his Originating Application, but instead brought a separate Application to vary. The Application to vary the Service Order was heard and dismissed. The Judge who heard the Application to vary held that, even though Procrane had not given the requisite 10 days' notice under Rule 3.9, the matter had been adjourned over for many months, thereby giving ample notice. Solicitor-Client Costs to Procrane were also ordered. Mr. Thompson sought permission to Appeal the Service Order, the dismissal of the Application to vary the Service Order and the Costs award.

The Court of Appeal did not grant permission to appeal the Service Order. Slatter J.A. noted that an Appeal must be launched within 1-month of the pronouncement of the Order and this Appeal was brought out of time and without grounds to justify an extension. Additionally, under Rule 9.15(1)(b), the preferred procedure for reviewing an *ex parte* Order was to apply to have the Order set aside or varied. Mr. Thompson had applied to vary the Service Order; therefore, any Appeal would be considered redundant.

Regarding the Application to vary which was denied, Slater J.A. considered the test for obtaining permission to Appeal as set out under Rule 14.5, and noted that the test was applied differently depending on the subject matter and overall context of the Appeal. While the Applicant correctly noted that Rule 3.9 required 10-days' notice for an Originating Application, the Court noted that the covering letter sent with the Originating Application stated that the return date was for scheduling purposes and the actual hearing date would be at a later time. Rule 13.5(2) allowed for the 10-day period to be abridged when there was an irregularity or non-compliance and the Court could also remedy this under Rule 1.5(1). Rule 1.5(4) did not allow the Court to cure an irregularity where there was prejudice to the other party; however, the date of the actual hearing allowed for 11 months of notice, which was far in excess of the 10-day requirement. Additionally, although email was not a contemplated method for service under Rules 11.4 and 11.5, Rule 11.27 enabled the Court to validate service effected in a manner other than that contemplated under the Rules. Service was a question of fact in that, if the document was actually received by the person being served, the method of service was "inconsequential".

Regarding the Costs Order, Slatter J.A. noted that Rule 10.29 creates a presumption that Costs of interlocutory proceedings will be awarded to the successful party, and Rule 10.31(3) confirms that a wide range of Costs are possible. Solicitor-Client Costs were awarded against Mr. Thompson because of persistent unsupported allegations of perjury, deceit, misconduct and bias against counsel and members of the Court. The Court of Appeal noted that Rule 10.33(2)(g) allowed the Court to consider Mr. Thompson's misconduct when awarding Costs. Both Applications for permission to Appeal were dismissed, and Slatter J.A. held that the resulting Order could be filed without approval from Mr. Thompson pursuant to Rule 9.4(2)(b).

CALGARY (CITY) V RESMAN HOLDINGS LTD, 2016 ABCA 81 (PAPERNY, O'FERRALL AND VELDHUIS JJA)
Rules 1.9 (Conflicts and Inconsistencies with Enactments), 14.4 (Right to Appeal) and 14.5 (Appeals Only With Permission)

The City of Calgary Appealed a Court of Queen's Bench decision denying it permission to appeal a Local Assessment Review Board Decision. The Chambers Judge had concluded that neither of the proposed grounds of appeal met the test for permission to appeal under the *Municipal Government Act*, RSA 2000, c M-26 ("MGA").

Justices Paperny and Veldhuis stated, for the Majority, that, since the Court of Appeal is a statutory Court, a right of Appeal must be found in statute. The Majority noted that it had jurisdiction to hear and determine all Appeals

respecting a Judgment, Order or Decision of a Judge of the Court of Queen's Bench. Rules 14.4 and 14.5 distinguish between Appeals as of right and those that require permission. This Appeal did not fall under the enumerated grounds requiring permission to Appeal found in 14.5. The circumstances would therefore typically fall under Rule 14.4. However, Rule 14.4(1) provides that it applies "except as otherwise provided".

The Majority held that even if the exception in Rule 14.4 did not apply, Rule 1.9 is clear that, where there is a conflict between the Rules and another enactment, the other enactment prevails. Accordingly, the restrictions on the right of appeal in s.470 of the MGA prevails over the general appeal provisions in the Rules.

In this case, the Legislature had "otherwise provided" an alternative appeal process, which is found in s. 470 of the MGA. The Legislature expressly provided that a Judge of the Court of Queen's Bench must determine whether permission to appeal should be granted. The Legislature did not provide for an Appeal of such decision to the Court of Appeal, and the Majority of the Court of Appeal determined that the Court lacked jurisdiction to do so. The Appeal was dismissed accordingly.

Justice O'Ferrall, concurring in the result, noted that there is nothing in the Rules of Court which constrains the Court of Appeal's power and jurisdiction other than the requirement, in certain cases, to seek permission to appeal pursuant to Rule 14.5. Rule 14.4(1) confirms the broad jurisdiction of the Court of Appeal. There are no express words in s.470 of the MGA which limit the application of Rule 14.1(1). The Court of Appeal, therefore, has the discretion to restrain Judges from the lower Courts when they are not acting judicially in granting or denying permission to Appeal.

DM V REEVES, 2016 ABQB 68 (MASTER PROWSE)
Rules 2.11 (Litigation Representative Required) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Director of Child and Family Services (the "Director") successfully obtained Permanent Guardianship Orders ("Orders") for three abused children at Trial. During the Trial, the Plaintiffs, the paternal grandparents of the three children, commenced two Actions against the Director and several civil servants for damages related to being separated from the children. The Plaintiffs were unsuccessful in their Appeals of the Orders before the Court of Queen's Bench and the Court of Appeal. The Defendants applied to summarily dismiss the Actions.

Master Prowse considered Rule 2.11(a), which states that individuals under 18 years of age must have a Litigation Representative to commence an Action, unless otherwise ordered by the Court. In this case, the Plaintiffs commenced the Actions to seek damages on behalf of the children. The Plaintiffs were neither legal guardians nor the children's Litigation Representatives. As such, the Court held that the Plaintiffs had no status to bring the Actions on the children's behalf. Further, even if the Plaintiffs were permitted to bring the Actions on the children's behalf, their Claims were based on the premise that the Plaintiffs were wrongfully denied custody of, or access to, the children. The Court determined that the Plaintiffs' Actions constituted an attempt to relitigate issues that had already been adjudicated. Master Prowse held that the Actions were a collateral attack on previous Court Orders for custody and access. The Court held further that a collateral attack is an abuse of process, and that conclusion alone was sufficient to meet the criteria to strike the Action pursuant to Rule 3.68(2)(d). Accordingly, the Plaintiffs' Actions were struck.

ROYAL BANK OF CANADA V WAPITI WASTE MANAGEMENT INC, 2016 ABQB 145 (VEIT J)
Rule 2.22 (Self-Represented Litigants)

The Defendant company's Receiver applied for the approval of the sale of the Defendant's remaining assets at a price far below the property's original list price. The Defendant's largest unpaid creditor opposed the Application. The Defendant's apparent current president and shareholder sent a personal representative to appear at the Application.

Justice Veit commented that the Defendant company likely had no status at the Application because the Receiver would stand in the place of the Defendant with respect to

the disposition of the Defendant's property. In any event, pursuant to Rule 2.22, if the Defendant Company wished to make representations on the Application, it could only do so through a lawyer. Rule 2.22 provides that an "individual" could represent themselves in the Superior Courts, but other litigants, including corporations must be represented by counsel.

In the result, Justice Veit denied the Application for the sale of assets.

BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 10 (SANDERMAN J)
Rules 3.15 (Originating Application for Judicial Review), 5.34 (Service of Expert's Report) and 13.18 (Types of Affidavit)

The Applicants were charged for refusing to leave a licensed premise after being directed to do so by the RCMP, pursuant to Section 69.1 of the *Gaming and Liquor Act*, RSA 2000, c G-1 (the "Act"). The Applicants filed an Originating Application for Judicial Review and sought a declaration that Section 69.1 of the Act is *ultra vires* the legislative authority of the Province of Alberta and infringes Section 2 of the *Canadian Charter of Rights and Freedoms*.

Once the Originating Application was filed, the Applicants applied to have certain Affidavit evidence filed by the Respondent struck out, as the Affidavits allegedly contained hearsay evidence, contrary to Rule 13.18, and inadmissible opinion evidence. The Applicants also objected to the expert Affidavit of the Respondents, arguing that the Affidavit was not in compliance with Rule 5.34, which requires an expert to disclose the information and assumptions upon which the opinion is based. The Applicants urged strict compliance with the Rules, as they ensure orderly and fair litigation. The Respondent argued that a liberal approach should be taken with respect to the relevance of evidence in order to allow the Respondent to defend legislation that has been enacted for the public good. It argued that the Act was properly enacted, and its intent is to provide protection to bar owners, staff and other patrons from gang members and prevent the influence of gangs in public bars. The Respondent further argued that the Court can only understand the need for such legislation by allowing Affidavit evidence in relation to the history of this matter and the general broad experience that peace officers have had in policing gang members in bars. A strict adherence to the Rules would prevent this.

Justice Sanderman stated that the procedural Rules are to be followed unless an exception can be made. Despite the Applicants seeking a final Order, the Respondent filed Affidavits that contravened Rule 13.18(3). Sanderman J. held that strict adherence to the Rules dealing with evidentiary matters is required in any Application for a final Order. As such, hearsay evidence is not permitted on such an Application. The hearsay portions of the Affidavits were struck.

With respect to the expert evidence, Sanderman J. noted that the issue to be determined by the Court is whether the Act can withstand the constitutional challenge raised by the Applicants. This is a legal question. The expert was not a legal expert and the Affidavit did not focus on the constitutional aspects of the dispute. Rather, it referred to the criminological and legal literature in relation to civil remedies. The Respondent's expert was not an appropriate expert witness to offer opinions on legal issues. His evidence was unnecessary to determine the validity of the Applicant's Claim. Further, the Affidavit was not in Form 25 as required by Rule 5.34(a). Therefore, the Affidavit was inadmissible for failing to comply with Rule 5.34 and on the basis that the evidence did not appear to be relevant or necessary to decide the constitutional issue before the Court.

TELECOMMUNICATIONS WORKERS UNION V TELUS COMMUNICATIONS INC, 2016 ABQB 106 (STREKAF J)
Rule 3.22 (Evidence on Judicial Review)

The Telecommunications Workers Union (the "Union") applied for Judicial Review of a labour arbitration award which denied a grievance filed by the Union on behalf of its member who was seeking reimbursement for relocation expenses. The Union sought to rely on an Affidavit sworn by a witness who attended the arbitration and took contemporaneous notes throughout. The Union sought to

use the Affidavit to support the Union's submission that the Arbitrator's refusal to permit certain questioning constituted a breach of natural justice and denial of procedural fairness, and that the Award did not adequately reflect the nature of the breach. Telus opposed on the basis that the Affidavit was not necessary or reliable.

Strekaf J. reviewed Rule 3.22, which limits the evidence in an Application for Judicial Review, and noted that the "record before the tribunal is generally the record before the Court, and additional affidavits and evidence are exceptional". Justice Strekaf held that the Affidavit was not necessary as the tribunal's Award provided a sufficient record to deal with the issues raised in the Judicial Review Application; the Union's Application for permission to rely on the Affidavit was denied.

SWAIN V MCLACHLAN, 2016 ABQB 8 (MASTER SCHLOSSER)
Rule 3.27 (Extension of Time for Service)

In a motor vehicle liability Action, the Defendants applied to open up a Noting in Default. The Defendants' insurer had been notified upon the Defendants being served with the Statement of Claim. The insurer contacted the Plaintiff's lawyer to ask if a Statement of Defence was required. The Plaintiff's lawyer did not reply and did not "confirm that a Statement of Defence was required". Settlement discussions continued for over a year. When the matter did not settle, the Plaintiff noted the Defendants in default.

Master Schlosser noted that the ability to extend time for service after expiry of the Statement of Claim is limited by Rule 3.27, and commented that it is tempting to limit the ability to extend time for a Defence in a similar way. However, the Court considered the relevant test which a litigant must satisfy: 1) the default of making a defence was unintentional; 2) the Application to set aside the Default Judgment was brought as soon as the Default Judgment was brought to the attention of the litigant; and 3) there is a good defence on the merits. Master Schlosser reviewed the circumstances in this case and allowed the Defendants' Application. The Court permitted the Defendants ten days from the date of the decision to file their proposed Defence.

FIELL V INTEGRAL WEALTH SECURITIES LIMITED, 2016 ABQB 69 (MASTER PROWSE)
Rules 3.57 (Contents of Counterclaim) and 13.5 (Variation of Time Periods)

The Plaintiff commenced an Action against the Defendant for wrongful dismissal. More than two years after filing its Statement of Defence, the Defendant applied for permission to file a Counterclaim containing allegations that the Plaintiff destroyed data on his work computer when he was notified of his dismissal. The Court noted that permission was required to file a Counterclaim late since Rule 3.57(c) stipulates that a Counterclaim must be filed at the same time as the Statement of Defence. In this case, the Defendant had already filed its Statement of Defence, so the time for filing a Counterclaim had passed.

Master Prowse observed that, pursuant to Rule 13.5, the Court has the ability and discretion to extend the time for filing a Counterclaim. Master Prowse considered whether to allow the late filing using the test to amend Pleadings. Since the proposed amendment to the Pleadings amounted to fraud and included serious allegations of destruction of data by the Plaintiff at the time of dismissal, the test for such amendments included whether there was a "good ground" or "exceptional circumstances" to amend. "Good grounds" require significant evidence. Master Prowse observed that the evidence was unclear with respect to the destruction of data, and so granted the Defendant's Application to extend time to file its proposed Counterclaim without prejudice to the Plaintiff to advance a limitations defence.

864503 ALBERTA LTD V GENCO PLACE PROPERTIES LTD, 2016 ABQB 163 (MASTER ROBERTSON)
Rules 3.65 (Amending Pleadings), 6.6 (Response and Reply to Application) and 7.3 (Summary Judgment)

The Parties, former business partners, decided to wind up their joint venture operations and enter into a separation agreement after a dispute arose. The Plaintiffs commenced an Action in 2013 seeking to enforce certain terms of the separation agreement while the balance of the transactions contemplated in the separation agreement were concluded.

The transactions contemplated by the separation agreement closed in December, 2013, and the original Action filed by the Plaintiffs was dismissed via a Consent Order. On January 21, 2014, the Plaintiffs commenced a new Action which, in essence, sought to look behind the concluded separation agreement. The Defendants sought Summary Dismissal of the claim in its entirety on the basis that the new Action was simply the first Action in disguise. The Plaintiffs cross-applied to amend their Statement of Claim, compel Undertakings and to Question a Third Party.

Master Robertson noted that, normally, the Court would address an Application to amend Pleadings before considering an Application for Summary Dismissal. However, the defects in the Plaintiffs' claim were fundamental and could not be rectified by the Amendment Application. Under the circumstances, it was appropriate to address the Application for Summary Dismissal first. If that Application were successful, the rest of the Applications would become moot.

The Application was originally heard in a half-day Special Chambers Hearing, but could not be concluded on the first day. When the Hearing was resumed some nine months later, the Plaintiffs presented new evidence by way of a "compendium" of documents and correspondence relating to what the Plaintiffs learned after consent was given to dismiss the first Action. Certain exhibits in the compendium were drawn from Affidavits sworn in the new Action; however, it also included correspondence not previously in evidence. The compendium was not presented to the Defendants until shortly after the Hearing began. Counsel for the Defendants objected to the compendium, arguing that it was not in evidence and, if it were, that it would have been late in violation of Rule 6.6. The Application was therefore adjourned so that the compendium could be placed in Affidavit form and the Defendants could have an opportunity to cross-examine and file a reply Affidavit. Costs of $10,000 were awarded to the Defendants.

The Plaintiffs had filed a Partial Discontinuance discontinuing their Claims against certain of the Defendants; however, in doing so, they had purportedly inadvertently discontinued their Action against parties who they wanted to keep in the litigation. After realizing their error, the Plaintiffs brought an Application to Amend their Statement of Claim to re-add a Defendant. Concurrently, the Plaintiffs sought to file an Amended Discontinuance which had the effect of adding the Defendant against whom they had accidentally discontinued. When the Clerks accepted the Amended Discontinuance, the Plaintiffs withdrew the Application to correct the error. The Defendants argued that the Plaintiff could not "undo" a Discontinuance, and acceptance by the Clerk of the Court did not make the amendment valid. For the purposes of the Summary Judgment Application, Master Robertson approached the Amended Discontinuance as valid without ruling that it was.

Master Robertson noted that an Application for Summary Judgment will only be successful where the moving parties' position is "unassailable", meaning that it is so compelling that the likelihood of success is very high. Procedurally, Summary Judgment can only be given if a disposition that is fair and just to both parties can be made on the existing record. In considering the Summary Judgment Application, Master Robertson was able to review the pleadings from both Actions, the separation agreement and correspondence leading up to the closing of the transactions described in the separation agreement. On the basis of this record, Master Robertson found that the new Action related to the same conduct, transaction and events as the original Action. Accordingly, the principles of *res judicata* and abuse of process operated to estop the Plaintiffs from proceeding with the new Action. The Action was summarily dismissed.

KAVANAGH V KAVANAGH, 2016 ABQB 107 (SHELLEY J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

In prolonged divorce proceedings, which culminated in a Trial, the parties appeared before the Court to deal with the division of the remaining matrimonial property. Justice Shelley examined the Plaintiff's litigation strategies in detail and noted that the Plaintiff conducted the litigation in a vexatious manner. Her Ladyship made it clear that the Plaintiff's questionable litigation history and tactics were an important factor to consider in dividing the remaining

matrimonial property. Shelley J. noted that the common law and the Rules of Court provide a number of tools to manage problematic litigation, including Rules to strike out pleadings (Rule 3.68) and Orders for Summary Judgment (Rule 7.3); as well as restrictions on filing or continuing litigation such as a vexatious litigant declaration, and the broad common law authority of the superior Courts to control their own processes.

Justice Shelley reviewed the parties' assets and liabilities, and divided the matrimonial property accordingly. Her Ladyship also ordered that the parties appear again in order to determine whether the Plaintiff should be declared a vexatious litigant.

GENWORTH FINANCIAL MORTGAGE INSURANCE COMPANY CANADA V CASUGA, 2016 ABQB 155 (MASTER FARRINGTON)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendant had acted as a lawyer on a number of high ratio mortgage transactions involving the Bank of Montreal ("BMO") where Genworth was the mortgage default insurer. BMO and the Defendant had entered in to a Settlement Agreement which included a covenant not to sue by BMO. The Defendant sought Summary Dismissal primarily on the basis that the Settlement Agreement with BMO prevented any further claim by Genworth against him, and that there was no further recourse for either BMO or Genworth, as Genworth's claim was a subrogated claim. Genworth sought to amend its Statement of Claim in order to remove any suggestion that the source of its claim against the Defendant was BMO.

Master Farrington noted that many of the facts appeared to be missing in this case, particularly with respect to Genworth. For example, the insurance policy was not included as evidence. Master Farrington cited prior leading authority which provided that it is presumed and required that each party put their "best foot forward" in a Summary Judgment Application. Because strategic and tactical choices made by the parties are respected by the Court, Master Farrington determined that the Court must proceed on the basis that Genworth had put its best foot forward. Without the required evidence from Genworth, Master Farrington granted the Defendant's Summary Dismissal Application pursuant to Rule 7.3. Since Summary Dismissal was granted pursuant to Rule 7.3, the Court did not consider Genworth's Rule 3.68 amendment Application.

JABNEEL DEVELOPMENT INC V LAMONT (TOWN), 2016 ABQB 161 (NIELSEN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The parties were involved in a dispute about a failed construction project for certain residential properties located in the Defendant Town. The Plaintiffs sought an Order for the return of money it had posted to the Defendant as security. The Master who heard the initial Application directed that approximately 3/4 of the money should be returned to the Plaintiffs with interest. The Defendant Town appealed the Master's Decision before Justice Nielsen.

In support of its Appeal, the Defendant Town provided a new Affidavit sworn by its Chief Administrative Officer. Nielsen J. commented that under Rule 6.14(3), an Appeal from the Decision of a Master may be based on additional evidence that is relevant and material. Justice Nielsen held that the Defendant's new Affidavit was relevant and material, and could be considered in order to determine the Appeal.

The main issue for the Appeal was whether the Master erred in granting partial Summary Judgment to the Plaintiffs. Justice Nielsen considered Rule 7.3, as well as current leading authorities, and summarized the test for Summary Judgment as:

> [...] if a judge on a summary judgment application can make the necessary findings of fact, is able to apply the law to the facts and the process is proportionate, more expeditious and less expensive than a trial, summary judgment is appropriate. If a fair and just adjudication can be made in determining

> whether a claim has merit, it is appropriate for a court to consider summary judgment. A party's position is without merit if the facts and law make the moving party's position unassailable. A party's position is unassailable if it is so compelling that the likelihood of success is very high. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case.

Justice Nielsen noted that the concept of "merit" under the test for a Summary Judgment Application is distinguished from the test for striking pleadings under Rule 3.68.

Nielsen J. considered the facts of this case, and held that a fair and just adjudication could not be made on the record before the Court. Therefore, the Master erred in ordering the money to be released to the Plaintiffs. The Defendant was entitled to continue to hold the full security pending a final determination of its entitlement to receive the money.

CHIC-HOG-O'S SOCIAL ROAST HOUSE LTD V VIRVILIS PROPERTIES LTD, 2016 ABQB 37 (MASTER SCHLOSSER)
Rules 4.22 (Considerations for Security for Costs Order) and 10.31 (Court-Ordered Costs Award) and Schedule C

The parties were involved in a dispute about a commercial lease renewal in which the Plaintiff corporation was economically strained and had no income. The Defendant brought a Security for Costs Application. Master Schlosser stated that the amount of Security for Costs must first be determined pursuant to Rules 4.22(a) and (b), as well as Section 242 of the *Business Corporations Act*, RSA 2000, c B-9.

Master Schlosser observed that Rule 10.31 is a starting point for determining Costs, and while Schedule C Costs are an option they are neither presumed nor binding. The Action fell under Column 3 of Schedule C. Master Schlosser commented that Security for Costs Applications are usually a balancing act between protection of the Applicant for their Costs, and the "risk of creating an impediment that the Respondent cannot overcome". Security for Costs should not become "*de facto* Summary Judgment for economic reasons," and incremental Security for Costs Orders can solve this problem. Master Schlosser considered the parties' circumstances and relevant prior authorities, and determined that a Security for Costs assessment should be prospective in nature, and in this case should be determined in increments for three future stages: disclosure of information, expert reports and Trial. The Security for Costs Application was granted.

VAASJO V JURINA, 2016 ABQB 78 (MASTER SCHULZ)
Rule 4.22 (Considerations for Security for Costs Order)

The Defendants sought Security for Costs. The Plaintiff argued that he was not required to pay Security for Costs as his claim was based in oppression under section 243(3) of the Alberta *Business Corporations Act*, RSA 2000, c B-9 (the "Act"). The Defendants argued that the oppression claims were limitation barred and, therefore, hopeless.

Master Schulz noted that, a "complainant" is not required to pay Security for Costs in any Application brought pursuant to the Act dealing with oppression claims and derivative Actions; s.243(3) is "proscriptive and a complete answer to an application for security for Costs". However, "merely uttering the word "oppression" is not sufficient to invoke the protection of s. 243(3)", the Claim must be examined in its entirety to determine what portion of it, if any, is based in oppression. Where the core of the Action is an oppression claim, an Application for Security for Costs will fail. Master Schulz examined the Claim in its entirety and determined that the Plaintiff met the definition of a "complainant" under the Act and, despite the existence of other causes of action, the bulk of the Claim was founded in oppression. Master Schulz also noted that an arguable defence was a factor to be considered under Rule 4.22; however, where s.243(3) of the Act applied, an arguable limitations defence was no longer a consideration when assessing whether or not to order Security for Costs. Master Schulz dismissed the Application for Security for Costs.

COMMERCIAL CONSTRUCTION SUPPLY LTD V GHOST RIDERS FARM INC, 2016 ABQB 166 (NIELSEN J)
Rule 4.22 (Considerations for Security for Costs Order)

The Plaintiff commenced an Action in relation to a failed business venture which supplied building materials in BC and Alberta. The Defendants counterclaimed and applied for an Order directing that Commercial Construction Supply Ltd. ("CCS") provide Security for Costs.

The Court considered s.254 of the *Business Corporations Act*, RSA 2000, c B-9 ("BCA"), Rule 4.22, and the leading authorities, and stated that the BCA is applicable in this case because CCS is a corporation. Regardless of whether an Application for Security for Costs is brought under the BCA or Rule 4.22, the onus of proof does not change. The Applicant bears the initial onus to establish that the Respondent would be unable to pay Costs if the Applicant is successful in its defence, and, if the Applicant successfully meets this initial onus, the burden shifts to the Respondent to show why the Court should not exercise its discretion to make an Order for Security for Costs against it.

The Court stated that it was appropriate to consider cases decided under Rule 4.22 in this case, but only to determine whether the Applicants had met their onus under the BCA rather than whether it is "just and reasonable" to require the Respondent to provide Security for Costs as provided under Rule 4.22. The Court considered the factors for and against a Security for Costs order in the context of this case, and directed CCS to furnish Security for Costs in favour of the Applicants.

MRAZ V HERMAN, 2016 ABQB 14 (SULLIVAN J)
Rule 4.29 (Costs Consequences of Formal Offer to Settle)

The Plaintiffs brought a Claim against the Defendants for professional negligence, and the Defendants counterclaimed for fees. The Claim and Counterclaim were both dismissed at Trial. Prior to Trial, the Defendants served the Plaintiffs with a Formal Offer to Settle, in which the Defendants agreed to a Discontinuance of the Claim on a without Costs basis. The parties made submissions regarding Costs after the conclusion of the Trial, where the Defendants submitted that they were entitled to double Costs pursuant to Rule 4.29(2). The Plaintiffs argued that the Defendants' offer was not a "genuine" Offer to compromise, and that the Defendants should not be entitled to double Costs by operation of Rule 4.29(4).

Justice Sullivan examined Rule 4.29 and its predecessors and prior authorities and confirmed that, generally, for an offer to qualify as being "genuine" it must have been "reasonable and realistic" in its circumstances, and must contain an element of compromise. A waiver of Costs may constitute a genuine Offer. Sullivan J. held that, in this case, the Defendants' settlement offer was a considered and substantial Offer. The Court also held that some of the Defendants' behaviours called for some mitigation of Costs. Accordingly, the Court ordered double Costs with some reductions.

ADM V SWL, 2016 ABQB 96 (JONES J)
Rules 4.29 (Cost Consequences of Formal Offer to Settle) and 10.33 (Court Considerations in Making Costs Award)

Following the adjudication of a family law issue, the parties disputed Costs and reappeared before Justice Jones. The Respondent had submitted a detailed draft Bill of Costs for the Court's consideration. The Respondent, SWL, submitted, amongst a number of things, that he was entitled to double Costs in accordance with Rule 4.29 because his Formal Offer to Settle was not accepted. The Applicant, ADM, argued that SWL had not served the Formal Offer to Settle in accordance with the Rules, and therefore could not claim double Costs. SWL argued that, in the alternative, if the Court would not award double Costs in accordance with Rule 4.29, enhanced Costs should be awarded based on the factors set out in Rule 10.33.

SWL's draft Bill of Costs addressed many other Costs claims which ADM disputed. Jones J. referred to Rules 10.33(1) and 10.33(2), which provide factors and guidelines that the Court may consider when making a discretionary Costs award. Justice Jones held that many of the enhanced Costs claimed by SWL were warranted, not because their Formal Offer to Settle was rejected, but because of the complexity of the claims and arguments that SWL advanced. His

Lordship awarded double Schedule C Column 1 for some of SWL's Costs. Jones J. also allowed Costs for the provision of evidence by expert witnesses on the basis that, when the information obtained from the experts assists the Court in making determinations on the best interests of the child, Costs associated with the experts may be awarded.

Justice Jones did not, however, award much of the Costs claimed for supervised access visits, holding that Costs incurred for supervised access visits did not bear a sufficient connection to the Action. Jones J. also refused to award Costs claimed for 15 contested Applications that were heard previously in the Provincial Court of Alberta. Although the matters were related, His Lordship held that it was not appropriate for a Court to award Costs in respect of a distinct Action heard by a different Court at an earlier time.

BERLINIC V PEACE HILLS GENERAL INSURANCE COMPANY, 2016 ABQB 104 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.2 (When Something is Relevant and Material), 15.4 (Transitional Rules) and 15.6 (Resolution of Difficulty or Doubt)

The Plaintiffs' house burned down in 2005, and the maximum amount under their insurance policy was paid in 2007. The Plaintiffs sued their insurance company in 2006, seeking damages on the basis that they were underinsured. In 2011, one of the Defendants brought an Application to compel answers to the Plaintiffs' Undertakings given at Questioning. Pursuant to a Consent Order, the Plaintiffs were required to provide answers by November 28, 2011. Nothing happened in the Action for nearly three years after that date. A day before the three-year period was up, the Plaintiffs applied to require the Defendants to provide answers to Undertakings, provided a Request to Schedule a Trial Date, and swore a Supplementary Affidavit of Records which did not add to what was already provided in November 2011. The Application was adjourned *sine die*, and the Defendants applied to strike the Action for long delay.

Since Rule 4.33 came into force on November 1, 2013, the Plaintiffs argued that it should not be given retroactive effect and that the drop-dead period should be five years as under the former Rules instead of three years. Master Schlosser, referring to prior authority which explained Rule 4.33, stated that the Rule plainly has retroactive effect. The authorities are clear that there is interplay between transitional Rules 15.4, 15.6 and Rule 4.33 so that the Rule "applies to actions that were in existence when it came into force".

Master Schlosser considered whether the Action had been significantly advanced within the three year drop-dead period. The Court stated that Applications, Requests for Trial Dates and a Supplemental Affidavit of Records which lists documents already provided are not significant advances in the Action. The only remaining issue was whether the Undertaking Responses provided were sufficient to significantly advance the Action. Master Schlosser noted that the relevant Rule for this question was Rule 5.2(1), which is very similar to former Rule 186. Master Schlosser reviewed whether the Undertaking Responses were relevant and material, and held that none of the Undertaking Responses would have significantly advanced the Action. The Action was not advanced in the time permitted by the Rules. Accordingly, the Action was dismissed for delay.

KINGSWAY GENERAL INSURANCE COMPANY V FEKETE CONSTRUCTION CO LTD, 2016 ABQB 149 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.5 (When Affidavit of Records Must be Served) and 13.18 (Types of Affidavit)

Two separate Actions were commenced in 2009 and 2010 which related to a building built on shifting land. The Third Party in the 2009 Action, CT & Associates Engineering Inc. ("CT"), was also a Defendant in the 2010 Action. CT applied to strike both Actions for delay pursuant to Rule 4.33 and, in the alternative, Rule 4.31.

Kingsway General Insurance Company argued that its Affidavit of Records was served in 2010; however, CT, without proffering supporting first hand evidence on the point, disputed that they had received the Affidavit of

Records until 2014. Master Schlosser noted that service of an Affidavit of Records is a required step under Rule 5.5 and, as such, will re-start the clock for the purpose of Rule 4.33; holding a sworn affidavit on file is not enough to re-start the clock. Master Schlosser observed that Rule 13.18(3) requires that an Affidavit sworn in support of an Application that may dispose all or part of a Claim, such as a Rule 4.33 or 4.31 Application, must be sworn on the basis of personal knowledge. Master Schlosser held that, while normally all of CT's evidence which violated Rule 13.18(3) would be ignored, the determination of the Application did not turn on this point.

During the course of the 2009 Action, CT had appealed the striking of its Fourth Party Notice to the Court of Appeal. Master Schlosser considered whether Reasons following an Application, a Formal Order or the passing of an appeal period counts as an advance which would re-start the clock under Rule 4.33. Master Schlosser held that the events following the Court of Appeal hearing, such as the written Reasons and formal Order and "possibly" the passing of an appeal period, restarted the three year clock.

In the result, the Application to dismiss the two Actions for delay under Rule 4.33 and 4.31 was dismissed.

NEP CANADA ULC V MEC OP LLC, 2016 ABQB 186 (MASTER FARRINGTON)
Rules 5.1 (Purpose of This Part), 5.6 (Form and Content of Affidavit of Records), 5.10 (Subsequent Disclosure of Records) and 5.25 (Appropriate Questions and Objections)

The Defendants, MEC, applied to compel further document production and Questioning responses from the Plaintiff, NEP. Master Farrington referred to Rules 5.1, 5.6 and 5.10, and noted that the requirement for document production to produce relevant and material documents and records, whether or not they help a party's case, subject to exceptions such as privilege. The Affidavit of Records confirms what documents exist and that production obligations have been met. Further, counsel plays an important role in the production process and must ensure that the client clearly understands its production obligations. In this case, the Plaintiff's production was large and the Plaintiff had a continuing obligation to produce records as its damages claims were linked to ongoing remediation efforts. The Defendant sought unredacted portions of a witness' notebook, further proof of damages and documents which the Defendant said were required by its damages expert. Master Farrington considered the rationale for the disclosure, and declined to order further production of most of the requested records.

With respect to the Questioning issues, Master Farrington observed that it was fundamental to our legal system that "questioning by a party adverse in interest be permitted to continue without interruption within reason for the purpose of discerning the facts in the litigation". The Defendant was entitled to know the factual basis for the allegations made in the Statement of Claim and was entitled to test the witness' understanding freely and without interruptions. It was not permissible for counsel for the Plaintiff to use an interruption as a way of coaching the witness on how to answer the question. Master Farrington stated that objections should be measured, and only made when necessary. Master Farrington noted further that the questioning party was entitled to have a useful transcript, and with all the unfounded objections, the Defendant was denied that right. The Court observed that, in large cases, it may be pragmatic to make each individual question subject to a specific costs award, but declined to order costs for each question in this Application. In the result, Master Farrington held that counsel for the Plaintiffs was overly obstructive during Questioning.

ALEXANDER V SUN LIFE ASSURANCE COMPANY OF CANADA, 2016 ABCA 2 (O'FERRALL, VELDHUIS AND WAKELING JJA)
Rules 5.1 (Purpose of This Part), 5.2 (When Something is Relevant and Material), 5.11 (Order for Record to be Produced) and 5.30 (Undertakings)

The Plaintiff commenced an Action against the Defendant insurer for refusing to pay long term disability benefits. The Defendant appealed the Decision of a Chambers Judge that required the Defendant to produce a document sought in Questioning by the Plaintiff. The document was an index to reference materials that was given by the Defendant insurer

to its adjusters for use as an aid in disposing of claims. The Majority of the Court of Appeal held that the Chambers Judge erred in ordering the Defendant to produce the document without having first made a determination that it was relevant and material under Rule 5.2(1). The Court ordered that the Plaintiff arrange for a Special Chambers hearing and that the Defendant provide both the Plaintiff and the Court with a copy of the index, so the relevance and materiality of the document could be determined.

O'Ferrall J.A., in dissent, noted that, without producing the index, it was impossible for the Chambers Judge to determine its relevance or materiality; therefore, the index needed to be produced if only to determine the issue of relevance. O'Ferrall J.A. stated that, while the Court must ultimately be satisfied that the document was relevant and material on an Application for a document to be produced, Rule 5.11(2)(a) is clear that the Court may inspect the record in order to make such a determination. Additionally, if there was no claim of privilege, the Chambers Judge was fully entitled to direct that the document be produced so that the party seeking the document might be able to make submissions on relevance and materiality. Rule 5.1(2) authorized the Court to give directions or make any Order required to achieve the purposes of Part 5, which were to obtain evidence, encourage disclosure of records, facilitate the evaluation of the parties' positions, resolve issues in dispute and discourage conduct which delayed proceedings or increases costs. O'Ferrall J.A. noted that the Defendant failed to respond to the Undertaking to produce the index "within a reasonable period of time" pursuant to Rule 5.30. Based on this, O'Ferrall J.A. concluded that the Appeal should be dismissed and that the Plaintiff should be awarded solicitor-client Costs from the date the Defendant first refused to answer the Undertaking, despite being ordered to do so.

THORNTON V SWIRSKI-COWNDON, 2016 ABQB 88 (ROMAINE J)
Rules 5.6 (Form and Contents of Affidavit of Records) and 5.23 (Preparation for Questioning)

The Plaintiff, in an Action involving a commercial financing dispute, sought an Order to include the contents of the corporate Defendant's solicitor's file in the Affidavit of Records, and for the individual Defendant ("Swirski-Cowndon") to make certain inquiries of the corporation's solicitor. The Master dismissed the Plaintiff's Application, and the Plaintiff appealed.

The Plaintiff argued that Rule 5.6 applied and that a party must disclose all records it has under its power and control. The solicitor and Swirski-Cowndon argued that the records were privileged. Romaine J. noted that for a party to have power over a record held by a non-party, the requesting party must have a legal right to access it, and must have an ability to enforce compliance by the non-party. Justice Romaine noted that the corporate Defendant's solicitor did not challenge Swirski-Cowndon's right to access the records and, as a result, Swirski-Cowndon had *de facto* control of the contents of the file, and should list them in her Affidavit of Records.

With respect to obtaining certain information from the corporate solicitor, Justice Romaine noted that Swirski-Cowndon had not been Questioned as a corporate representative, but rather in her personal capacity. In that capacity, and given the allegations, she could be Questioned about what she did as a director or employee of the corporation, but she was not under a duty to inform herself in the same way as a corporate representative. Swirski-Cowndon's obligations were to reasonably prepare herself for Questioning pursuant to Rule 5.23. She was not required to refresh her memory by reference to the evidence of a third party, the solicitor, who she did not control.

In conclusion, Justice Romaine ordered Swirski-Cowndon to add the contents of the solicitor's file to her Affidavit of Records. However, the Court stated she was not obligated to make inquiries of the solicitor with respect to advice he may have given, or to incorporate the results of that inquiry as part of her Questioning.

CANADIAN NATURAL RESOURCES LIMITED V SHAWCOR LTD, 2016 ABQB 21 (WITTMANN CJ)
Rules 5.17 (People Who May be Questioned), 5.18 (Persons Providing Services to Corporation), 5.29 (Acknowledgment of Corporate Witness's Evidence) and 5.31 (Use of Transcript and Answers to Written Questions)

CNRL commenced an Action against the Defendants alleging that they negligently provided a pipe-coating and insulation system related to an underground pipeline owned by CNRL. Certain individuals from the Third Party, Dunn Hiebert, who had provided services to CNRL, were questioned, and the Defendants IMV and Flint made identical Applications pursuant to Rule 5.18(4) for an Order that the evidence of those individuals be treated as if it were evidence of the employees of CNRL. CNRL refused to acknowledge the evidence of the Dunn Hebert witnesses as some of the evidence of its corporate representative, arguing that allowing such evidence would unfairly prejudice them at Trial. Wittmann C.J. considered Rules 5.17, 5.18, 5.29, and 5.31 and noted that there was overwhelming evidence that construction management and inspection services evidence could not be obtained from an officer or employee, or former officer or former employee, of CNRL within the meaning of Rule 5.18(1)(a). Further, CNRL was adverse in interest to IMV and Flint. The witnesses had been produced by Dunn Hiebert because it was a party to the Action and Questioning had been conducted by the parties that declared themselves adverse in interest.

The Court saw no unfairness to CNRL by allowing the evidence from the Dunn Hebert witnesses to be treated as some of CNRL's evidence under Rule 5.18. With respect to Rule 5.18(c), there was no undue hardship, expense or delay to CNRL or any other person. Wittmann C.J. observed that if a read-in answer was attempted in any case before a Trial Judge the party may object on the basis that the answer is incomplete pursuant to Rule 5.31(3). Moreover, by making the declaration that the evidence of the Dunn Hiebert witnesses was to be treated as if it were the evidence of employees of CNRL, the Court was not ruling on any aspect of Rule 5.29.

The Court granted the Applications of IMV and Flint, and the evidence of the Dunn Hiebert witnesses was to be treated as if it were evidence of CNRL pursuant to Rule 5.18(4). In light of this declaration, Wittmann C.J. concluded that an inquiry should be made again of CNRL to ascertain whether the corporate representative of CNRL still refused to make the acknowledgement contemplated in Rule 5.29(2) with respect to the evidence of the Dunn Hiebert witnesses. If the parties still disputed the issue, a further application to the Court could then be made.

GAULT ESTATE (RE), 2016 ABQB 53 (MAHONEY J)
Rules 5.17 (People Who May be Questioned) and 6.8 (Questioning Witness Before Hearing)

The Plaintiff, the litigation representative of the deceased, commenced an Action against the Defendant, the trustee for the Estate, for unjust enrichment. The Defendant denied the claim and counterclaimed. The Defendant then brought an Application for Summary Dismissal, as well as an Application for procedural Orders to require the Plaintiff's accountant, a non-party, to produce documents and attend Questioning pursuant to Rule 6.8, and to require the production of documents by the Plaintiff's lawyers.

Mahoney J. denied the Defendant's procedural Application and held that the records sought from legal counsel were not producible as they were not relevant and were privileged. The records requested from the accountant were also not discoverable because they were irrelevant, privileged or both. The Court also took notice of the accountant's argument that the Defendant had attempted to circumvent Rule 5.17 and obtain pre-Trial Discovery of the accountant through the use of Rule 6.8. Based on the finding that the records did not need to be produced, it was not necessary to "delve into the proprietary" of using Rule 6.8 to examine non-parties for a Summary Dismissal Application. The Application was dismissed.

CCS CORPORATION V SECURE ENERGY SERVICES INC, 2016 ABQB 94 (WITTMANN CJ)
Rule 5.17 (People Who May be Questioned)

The Plaintiff commenced an Action against several former employees and their new employers for unlawfully using the Plaintiff's confidential information in order to compete with it. One of the Defendant corporations, Triumph, entered into a partial settlement agreement ("PSA") with the Plaintiff, which PSA was disclosed to the other Defendants. The settling parties applied to have the PSA approved by the Court at a case management hearing; but, the Court directed that an Application was necessary in order to properly consider the procedural fairness of the making and performance of the PSA. Secure Energy Services Inc. ("Secure") and the individual employees applied to the Court at the same time seeking disclosure of records from the Plaintiff and leave to question witnesses of the settling Defendant corporation. The Plaintiff joined Secure in seeking clarity around which parties were adverse in interest, but resisted the Questioning of witnesses.

Chief Justice Wittmann reviewed the phrase "party adverse in interest" under Rule 5.17. Secure argued that, because of the PSA, the settling Defendant was no longer adverse in interest and should not be subject to the usual document productions and Questionings. Wittmann C.J. reviewed authorities relating to parties being adverse in interest. His Lordship indicated that the determination is made by reference not only to the pleadings but also to the record as a whole. Wittmann C.J. also noted that adverse interest can arise at any point in the proceedings as the record and evidence develop. A Justice will be tasked with looking beyond the pleadings to the entire record. Wittmann C.J. also commented that adverse inference is a flexible term and can relate to any number of different types of interests between Parties. His Lordship ordered production of various records from the settling Defendant as well as Questioning of their witnesses.

INFANTE V DZOGOV, 2016 ABQB 41 (KENNY J)
Rules 6.3 (Applications Generally), 6.14 (Appeal from Master's Judgment or Order), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiffs appealed a Decision by a Master in which one of the Defendants, a lawyer, successfully obtained Summary Dismissal of the Claim against him. The Plaintiffs argued that the Defendants had brought their Summary Dismissal Application under Rule 7.3 but that the Application was in fact argued based on Rule 7.2. The Plaintiffs contended that Rule 6.3(2)(b) required that the moving party state the grounds for their Application, and that the grounds stated in this Notice of Application were different than those actually argued.

With respect to the test for Summary Judgment, Justice Kenny noted that Summary Judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record and if, in light of what that fair and just process reveals, there is no merit to the Claim. In order for the non-moving party's case to have factual merit, there must be a genuine issue of a potentially decisive material fact in the case. Kenny J. noted that the Court should first 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 such that it should be determined summarily. The second consideration is whether an examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties.

After reviewing the facts and the issues on appeal, Kenny J. held that the Plaintiffs had shown that their case presented a genuine issue requiring a Trial. As such, the Master's Decision was reversed.

GEOPHYSICAL SERVICE INCORPORATED V ENCANA CORPORATION, 2016 ABQB 49 (STREKAF J)
Rules 6.11 (Evidence at Application Hearings) and 6.14 (Appeal from Master's Judgment or Order)

The Plaintiff ("GSI") appealed 26 Master's Orders for Security for Costs granted to various Defendants in 17

Actions. There were many issues on Appeal, one being whether the Master erred in utilizing evidence from Security for Costs Applications heard in October and November 2014 in the Actions to assist the Master in deciding the Security for Costs Application heard in February 2015. The Master had given the parties leave under Rule 6.11(1)(f) to refer to and rely on evidence filed in the other Applications in the February 2015 Security for Costs Application. However, GSI submitted that the Master erred in utilizing evidence from the February 2015 Application to determine the previous October and November 2014 Applications. Strekaf J. held that utilizing some evidence of the February 2015 Application to decide the October and November 2014 Applications was not authorized by the Master's own previous Order, and as such was an error.

Strekaf J. considered whether the Court could consider only the evidence on the record for the Security for Costs Applications, or if the Court could use the entire evidentiary record, including the earlier evidence. Strekaf J. noted that Rule 6.14(3) provides that an Appeal from a Master's Order or Judgment may also be based on additional evidence that is, in the opinion of the Judge hearing the Appeal, relevant and material. Strekaf J. also noted that Rule 6.14(6) provides that a Respondent to an Appeal is to file and serve on the Applicant any additional evidence referred to in Rule 6.14(3). Strekaf J. observed that the various Defendants did not serve GSI with the evidence from the February 2015 Application; however, as part of the overall record on Appeal, GSI had access to that evidence and no prejudice resulted. Strekaf J. held that the evidence on the record from the February Application was relevant, material and helpful to the Court in deciding the Appeal of the October and November 2014 Applications. Her Ladyship determined that this was consistent with the foundational principles of the Rules of Court which attempt to have claims "fairly and justly resolved in a timely and cost-effective fashion".

The Appeal was allowed to the extent that the amounts GSI was ordered to post for Security for Costs were varied and reduced.

SPECIALIZED PROPERTY EVALUATION CONTROL SERVICES LTD V LES EVALUATIONS MARC BOURRET APPRAISALS INC, 2016 ABQB 85 (TILLEMAN J)
Rule 6.11 (Evidence at Application Hearings)

The Plaintiff sought injunctive relief against its former employee to enforce a non-competition and non-solicitation agreement, and against the corporate Defendant in order to prohibit the use of the Plaintiff's confidential information and to prohibit the Defendant from providing services to the Plaintiff's clients. The Defendants sought to rely on an Affidavit filed in a separate Court of Queen's Bench Action pursuant to Rule 6.11.

Tilleman J. observed that the separate Action only included one of the Defendants named in the present Action, there had been no opportunity to Question on the Affidavit, and filed copies were not provided five days in advance, as required in the Rules. Further, Justice Tilleman noted that the Defendants also did not give the Court sufficient notice of their intention to obtain leave to file the Affidavit late. In the result, Tilleman J. denied the use of the Affidavit.

HS (RE), 2016 ABQB 121 (MARTIN J)
Rule 6.28 (Application of This Division)

An adult woman in the final stages of ALS applied to the Court by way of Originating Application, seeking to end her life by means of physician-assisted death. In considering the Application, the Court considered the confidentiality concerns surrounding such Applications. Martin J. observed that the circumstances of the case demonstrated a necessity for a Confidentiality Order. Her Ladyship noted that the confidentiality concerns would be addressed at the Originating Application instead of at a separate Application to deal with confidentiality, as is contemplated by Division 4, Part 6 of the Alberta Rules of Court. Justice Martin observed that Rule 6.28 contains the proviso which states that Division 4, Part 6 applies "unless an enactment otherwise provides or the Court otherwise orders". Justice Martin stated that, "the Court may exercise its discretion to depart from these general rules in this distinctive type of application".

Justice Martin determined that this was an appropriate case to proceed *in camera*, and ordered that the Court file and Affidavit in this matter be sealed, and that the Judgment be released with the parties identified by initials only.

GRANT V SMIGELSKI, 2016 ABQB 20 (READ J)
Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Judgment dismissing all Claims against them in an unjust enrichment and constructive trust action. The Plaintiff alleged that her ex-husband caused transfers of funds between the two Defendant companies for the purpose of defeating her matrimonial property interest in one of the companies, and that she held interests in both companies by way of a constructive trust.

Justice Read noted that the applicable test was whether there was, in fact, any issue of merit that genuinely required a Trial, or whether a decision could be made on the existing record that was fair and just to both parties. Her Ladyship held that there were numerous factual issues which prevented the Court from making the necessary findings of facts. Such factual issues included whether or not the Respondent was an employee of the companies, the existence of a collateral oral agreement and whether the agreement was valid and enforceable. Justice Read further held that the Court was unable to apply the law to the facts, even if the facts were clear, because the law in respect of a principal issue was unclear. Read J. noted that the law may not actually support the argument raised by the Applicants regarding the codification of the law in respect of constructive trusts for married people. Justice Read also determined that the issue of undue influence genuinely required a Trial. Lastly, it was not fatal to the Claim that no specific remedy was sought, other than a declaration. The Application for Summary Judgment was dismissed.

URBANSON V WESTERN CANADIAN PLACE, 2016 ABQB 32 (MASTER PROWSE)
Rule 7.3 (Summary Judgment)

The Applicant, HSG Health Systems Group Limited ("HSG"), was one of many Defendants in a personal injury claim. The Plaintiff was injured when a treadmill at a fitness facility malfunctioned. HSG sought Summary Judgment of the claim against it on the basis that the Plaintiff had signed a liability waiver which purported to release the Defendant from any liability arising out of any injuries sustained during the Plaintiff's use of the fitness facility.

Master Prowse confirmed that a Summary Judgment Application should only be granted if the record before the Court would provide for a fair and just determination for both parties. Master Prowse reviewed prior authorities concerning the signing of a release or waiver, and held that, given the Plaintiff's sophisticated background, the moderate inherent risk of using a fitness facility, and the circumstances surrounding the signing of the waiver there was no evidence which indicated to the Defendant that the Plaintiff was not consenting to the terms in the waiver agreement when the Plaintiff signed it. Master Prowse held that the record before the Court clearly favoured the granting of Summary Judgment, and there was no indication that a Trial Judge would have better evidence to determine the matter. The Defendant's Summary Judgment Application was granted.

CPI CROWN PROPERTIES INTERNATIONAL CORPORATION V BARTSCH, 2016 ABQB 93 (HALL J)
Rule 7.3 (Summary Judgment)

The Plaintiff sued the Defendants for repayment of three loans. The Defendants argued that the Plaintiff never forwarded the proceeds of the loans to their intended recipients; therefore, there was no consideration and no loans enforceable against them. The Defendants counterclaimed against the Plaintiff and others for rescission of the loan agreements, and also alleged breaches of contract and fiduciary duties, and sought an accounting and damages.

The Defendants/Plaintiffs by Counterclaim applied for Summary Judgment on their Counterclaim. Justice Hall reviewed Rule 7.3 and observed that the test for Summary Judgment has changed from "plain and obvious" or "clear or beyond doubt" to a less stringent test of "whether there

is any issue of merit that genuinely requires a trial". Justice Hall was satisfied on the evidentiary record that the Plaintiff did not forward the loan funds. As such, the Plaintiff wholly failed to perform its obligations. The Plaintiff's claim was dismissed and the Defendants were awarded Summary Judgment for all of the funds they paid to the Plaintiff under the loan agreement.

The Defendants also sought Summary Judgment against the other Defendants by Counterclaim. These claims were essentially for fraud, alleging that many of the representations made by the Defendants by Counterclaim were inaccurate and the invested funds were put to unauthorized uses. Hall J. held that, based on the lean evidentiary record before the Court, the Defendants' claims for repayment of their investments could not be dealt with summarily.

101147420 SASKATCHEWAN LTD V SWIFT HOTELS GROUP LTD, 2016 ABQB 109 (JONES J)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Applicant, 101147420 Saskatchewan Ltd., sought an oppression remedy by way of Summary Judgment. The Respondent, Swift Hotels Group Ltd., contended that this Action could not be determined summarily because the material facts were contested.

Justice Jones found that there were several crucial and material facts which remained uncertain based on the Affidavits before the Court, and that an assessment of credibility was necessary to resolve the conflicting version of events. Crucially, some of the evidence was hearsay. His Lordship stated that, under Rule 13.18, a party seeking to dispose of some or all of the Claim summarily can rely on hearsay evidence only if that evidence would have been admissible at Trial. The Applicant sought to have documents admitted under the vicarious party admission exception; however, they failed to provide the necessary factual foundation to demonstrate that the parties who authored the documents were acting as agents of the Respondent. Because of the conflicting evidence, and the fact that the credibility of the parties was at issue, the matter was not appropriate for Summary Judgment. The Application was dismissed and the matter was directed to Trial.

ROUGH V COLD LAKE FIRST NATIONS, 2016 ABQB 153 (MACKLIN J)
Rules 7.3 (Summary Judgment), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 11.4 (Methods of Service in Alberta), 11.14 (Service on Statutory and Other Entities), 11.28 (Substitutional Service) and 11.29 (Dispensing with Service)

The Plaintiff purported to serve the Defendant, Cold Lake First Nations, with the Statement of Claim by Registered Mail to the post office box address displayed on the Defendant's website and letterhead. The Defendant failed to defend and was Noted in Default, though the Noting in Default was never served on the Defendant. The Plaintiff subsequently applied for Summary Judgment, and the Application was delivered to the Defendant on December 15, 2014. Counsel for the Defendant sought consent to set aside the Noting in Default so that it could defend, claiming this was the first it had learned of the Claim, but the Plaintiff refused to consent. The Defendant's Application to set aside the Noting in Default was dismissed. The Defendant appealed the Order dismissing its Application to open up the Noting in Default.

Macklin J. noted that the test for setting aside a Noting in Default is provided by Rule 9.15(3), and requires the Applicant to show: an adequate explanation as to why a Statement of Defence was not delivered; whether there was any delay in applying to set aside the Default and, if so, whether there was a satisfactory explanation accounting for that delay; and whether the material discloses a meritorious defence, that is, a triable issue of fact or law.

The Defendant argued that it had not been served in accordance with the Rules of Court, and had no actual knowledge of the claim. Macklin J. observed that Rule 11.4 does not apply to the service of commencement documents on a First Nations because there is no enactment that describes the particular method for service on First Nations. Instead, Rule 11.14(1) applied. Rule 11.14(1)

(b) allows service on a statutory entity by Registered Mail sent to the entity's principal place of business or activity in Alberta. The post office box which the Plaintiff addressed the Statement of Claim to, was not the principal place of business for the Defendant, notwithstanding that this address appeared on the Defendant's letterhead. Rather, the Band office was the Defendant's principal place of business. Further, Justice Macklin pointed out that the Plaintiff did not attempt to apply for an Order for Substitutional Service under Rule 11.28, or apply to dispense with service under Rule 11.29, although Justice Macklin indicated the Plaintiff likely would not have met the preconditions necessary for either such Orders. The failure to properly serve the Statement of Claim was a sufficient and adequate explanation as to why a Statement of Defence was not filed.

The Defendant did not delay in applying to set aside the Noting in Default given that it scheduled the Application to set it aside less than three months after learning of the Claim, and less than one month after receiving a refusal to consent to set aside the Noting in Default. The fact that the Plaintiff had not diligently pursued Default Judgment spoke to the lack of prejudice involved in setting aside the Noting in Default. Under the third arm of the test, the Defendant had to show both that it *may* succeed should it prove the facts it alleged, and that it genuinely wished to defend the Action. The Defendant, using case law, argued the merits of its defences; Justice Macklin held that, while the authorities the Defendant relied upon were distinguishable, they were sufficient to create a meritorious defence for the purposes of Rule 9.14.

Justice Macklin held that had the Defendant's only defence related to quantum, Rule 7.3(1)(c) would allow the Defendant to contest just the amount claimed without reopening the Noting in Default. However, because the Defendant raised meritorious defences on the other substantive issues in the Action, it was necessary to reopen the Noting in Default. The Appeal was allowed, although the Plaintiff was awarded thrown-away Costs, including travel costs for the initial Application and the Appeal.

TP V DR B, 2016 ABQB 158 (MASTER PROWSE)
Rule 7.3 (Summary Judgment)

The Defendant physician was disciplined by his professional association for interviewing the Plaintiff's 13 year old daughter at the behest of the child's father without the Plaintiff's knowledge or consent, notwithstanding that the Plaintiff was the mother and guardian of the child. As a result of the interview, and the Defendant's subsequent report which found that the father should have primary care of the child, the Plaintiff consented to an Order which gave custody of the child to the father. The Plaintiff commenced a civil Action seeking remedies for the Defendant's issuance of the report. The Defendant applied to summarily dismiss the Claim against him pursuant to Rule 7.3.

Master Prowse noted that the Court must determine whether there is "any issue of merit that genuinely requires a trial or, conversely, whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily", and whether "examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties". Master Prowse held that a cause of action does not arise simply because the Defendant acted in a way which resulted in a professional sanction. There was no evidence to suggest that there was a duty of care, or that the Defendant was careless in preparing the report or that he was motivated by malice. Accordingly, Master Prowse allowed the Defendant's Application for summary dismissal of the proceedings against him.

COMMERCIAL CONSTRUCTION SUPPLY LTD V GHOST RIDERS FARM INC, 2016 ABQB 165 (NIELSEN J)
Rule 7.3 (Summary Judgment)

The Plaintiff commenced an Action in relation to a failed business venture which supplied building materials in BC and Alberta. The Defendants counterclaimed, and the Plaintiff (Defendant by Counterclaim) applied to summarily dismiss the Counterclaim against them, arguing that there was no merit to the allegations.

Nielsen J. considered Rule 7.3 and the relevant leading authorities relating to Summary Judgment, and summarized the test for Summary Judgment as follows:

> [...] if a judge on a summary judgment application can make the necessary findings of fact, is able to apply the law to the facts and the process is proportionate, more expeditious and less expensive than a trial, summary judgment is appropriate. If a fair and just adjudication can be made in determining whether a claim has merit, it is appropriate for a court to consider summary judgment. A party's position is without merit if the facts and law make the moving party's position unassailable. A party's position is unassailable if it is so compelling that the likelihood of success is very high. The key is whether the circumstances require viva voce evidence in order to properly resolve the case.

Justice Nielsen further stated that, if the ultimate outcome of a case depends on the interpretation of a document, the test for Summary Judgment is whether the issue of law can fairly be decided on the record before the Court. In this case, Justice Nielsen held that *viva voce* evidence was required to properly resolve the issues in the Counterclaim, and therefore it was not fair and just to grant summary dismissal of the Counterclaim sought by the Plaintiff. The Application was accordingly dismissed.

954470 ALBERTA LTD (CENTRE SOUTH) V SOVEREIGN GENERAL INSURANCE CO, 2016 ABQB 185 (MANDERSCHEID J)
Rules 7.5 (Application for Judgment by way of Summary Trial), 7.6 (Response to Application), 7.7 (Application of Other Rules), 7.8 (Objection to Application for Judgment by way of Summary Trial), 7.9 (Decision After Summary Trial), 7.10 (Judge Remains Seized of Action) and 7.11 (Order for Trial)

The Plaintiffs sought indemnification from the Defendant insurers for costs associated with repairing the roof of a building. The Defendants brought an Application to dismiss the claim by way of Summary Trial pursuant to Part 7, Division 3 of the Rules.

The parties submitted Briefs, Affidavit evidence, and Read-Ins from Questioning. Manderscheid J. noted that there are no hard-and-fast rules for determining whether a matter is suitable for Summary Trial. The Plaintiffs did not object to the Defendants' Application to have the matter disposed of by way of Summary Trial, and all the necessary evidence was before the Court. Accordingly, His Lordship stated that there was no reason why it would be unjust to dispose of the matter by way of Summary Trial. The Defendant's Application to have the matter determined by Summary Trial was granted. Upon consideration of the evidence and the applicable law, Justice Manderscheid gave judgment in favor of the Plaintiffs.

BENC V PARKER, 2016 ABCA 82 (BERGER, MARTIN AND VELDHUIS JJA)
Rules 8.4 (Trial Date: Scheduled by Court Clerk) and 8.5 (Trial Date: Scheduled by the Court]

The parties' counsel in a personal injury Action had completed and signed a Form 37 which was a condition precedent to setting the Action down for Trial pursuant to Rule 8.4; however, the Form 37 was not filed. On the Form, counsel for the Defendant wrote "not applicable" in response to the question of whether all medical examinations and reports had been completed and exchanged. Counsel for the Defendant then applied unsuccessfully to have the Plaintiff's injuries deemed "minor" pursuant to the *Minor Injury Regulation*, AR 123/2004 on the basis that the Plaintiff had failed to attend a Certified Medical Examination.

The Defendant "elected a change in strategy" and made a second Application for an Order requiring that the Plaintiff attend for an Independent Medical Examination (IME). The Plaintiff filed a Cross-Application, pursuant to Rule 8.5, for an Order to file a request to schedule a Trial date, relying upon the Form 37 which the Defendant's counsel had signed. The Chambers Judge denied the Defendant's Application and directed that the matter proceed to Trial. The Defendant appealed on the basis that the Chambers Judge erred in interpreting Rule 8.4. The Defendant submitted that Form 37 must be filed for Rule 8.4 to apply.

The Court of Appeal stated that the purpose of Form 37 is to authorize the Court Clerk to fix a date for Trial if all conditions are met. It does not follow that a completed and signed but unfiled Form 37 has no effect on the litigation. The Court noted that a Form 37 constitutes a binding mutual representation to the opposite party that the issues are joined, and that no further steps will be taken by either party except to proceed to Trial. The Court noted that counsel for both parties were entitled to rely upon such representations. As such, the Applications in the Court below were properly adjudicated and the Appeal was dismissed.

SMITH V SMITH, 2016 ABQB 143 (NEUFELD J)
Rule 9.13 (Re-Opening Case)

Following a Trial Decision with respect to a divorce and division of matrimonial property, the parties re-appeared before the Court to settle the Judgment Roll. During the Application to settle the Judgment Roll, the husband sought to re-open the matrimonial property proceedings, pursuant to Rule 9.13(b), on the basis that he had new evidence relating to an increase in his pension plan. The Defendant justified this late disclosure by explaining that the settlement of the supplemental pension occurred after the conclusion of Trial.

Justice Neufeld held that although maintaining fairness in the trial process requires that the parties avoid litigation by instalments and by collateral attacks on the trial result, re-opening was necessary in this case in order for there to be accurate evidence before the Court. In the circumstances, Justice Neufeld re-opened the proceedings for the limited purpose of considering the value discrepancy of the Defendant's pension between separation and Trial. Justice Neufeld held that the increase of value of the supplemental pension should be divided on a 60 / 40 basis in the husband's favour.

KERR V COULOMBE, 2016 ABQB 11 (MASTER SCHLOSSER)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

The Plaintiff tenants applied for relief from an Order of the Residential Tenancy Dispute Resolution Service (RTDRS). One of the Applicants had attended at the RTDRS office for a hearing against the Defendant landlord, but was not given the chance to appear or participate. Master Schlosser considered whether the Court has the power to grant interim relief (short of an Appeal) when the RTDRS Order was obtained in breach of a fundamental rule of natural justice.

Master Schlosser noted that the Court has the inherent jurisdiction to set aside an Order which was obtained in violation of the principles of natural justice, and Rule 9.15 permits an Order to be set aside for non-appearance. Master Schlosser, referring to prior authorities, observed that the Court has circumscribed the applicability of Rule 9.15 in similar circumstances since Rule 9.16 is limited to Orders of the Courts. RTDRS Orders have to be filed in the Court of Queen's Bench to have effect, and then the Rules and various other statutes are needed to give it power. There is no direct equivalent to Rule 9.15 in the RTDRS Regulation.

Master Schlosser ultimately held that the merits of the case entitled the tenants to a stay of the Order, and stated that it was inappropriate to set aside the Order without an Appeal.

ROYAL BANK OF CANADA V MCLAUGHLIN, 2016 ABQB 80 (YAMAUCHI J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendants sought to terminate an Attachment Order that the Plaintiff bank, RBC, had obtained against the Defendants' motorhome (the "RV"). The bank alleged that the Defendants had used borrowed funds to fraudulently purchase the RV under a numbered company. The Defendant, Mr. McLaughlin, defaulted on the loan agreement, and RBC registered notice of its security interest in the RV. RBC argued that, while

the RV was registered in the name of the corporation, at all material times the loan was issued to the individual Defendants. There was no lawful or legitimate business of the corporation that was related to the use of the RV. Accordingly, RBC argued, the Attachment Order should stand.

The Court noted that the Defendants, in making their Application, were relying on Rule 9.15 which provides that a Court may set aside, vary or discharge a Judgment or Order, if the prescribed circumstances are met. Yamauchi J. reviewed the relevant authorities, and found that Rule 9.15 gives the Court broad discretion in determining whether to set aside Interlocutory Orders. After reviewing the procedural history and the facts, Justice Yamauchi concluded that RBC had met its onus to show that the Attachment Order should be maintained pending the Trial of this matter. The Court dismissed the Application.

LYMER V JONSSON, 2016 ABCA 32 (COSTIGAN, PAPERNY AND WAKELING JJA)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Appellant, Lymer, appealed an Order by the Case Management Judge declaring him a vexatious litigant, among other things. The Order was made on the Case Management Judge's own motion without notice to the Appellant.

The Appellant argued that he was not provided with notice, and was not provided with an opportunity to be heard with respect to the Order prohibiting him from commencing proceedings without leave. The Appeal was based on the grounds that the Case Management Judge failed to comply with the principles of natural justice, and that there was a reasonable apprehension of bias. The Respondent argued that the Order was *ex parte*, and the Appellant ought to have applied to the Court to have the Order set aside or varied pursuant to Rule 9.15, rather than appealing.

The Court did not accept the Respondent's position, stating that Rule 9.15 is designed to provide relief where an Order is issued in circumstances that make the provision of notice impractical. The Court noted that notice to the Appellant was not impractical in this case. The Appeal was allowed and the Order was set aside.

DENIS V PALMER, 2016 ABQB 54 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Respondent, Palmer, obtained an ex parte Emergency Protection Order ("EPO") from the Provincial Court of Alberta against the Applicants, Palmer's ex-husband and his mother. The Applicants sought a review of the EPO by the Court of Queen's Bench, and Palmer sought an Order from the Court pursuant to section 4 of the *Protection Against Family Violence Act*, RSA 2000, c P-27 (the "Act"). Jones J. rejected the Applicants' request for an Order setting the EPO aside *nunc pro tunc*, but did accommodate the request to abridge time for service. Upon review, Jones J. revoked the EPO and declined Palmer's request for an Order pursuant to section 4 of the Act. The matter again came before the Court when the parties were unable to agree on Costs.

Jones J. considered Rules 10.29, 10.31, 10.33, as well as the objectives of the Act and the importance that society attaches to protecting its vulnerable members from family violence. Jones J. further noted the Act prohibits making a frivolous or vexatious complaint with malicious intent, but does not provide a sanction for doing so. His Lordship did not hold that Palmer acted vexatiously or maliciously. The Court noted that success in the Application was mixed. Justice Jones did not consider it reasonable to use judicial discretion to make a Costs award to achieve a result that legislation did not provide; as such, the parties were ordered to bear their own Costs.

NATURE CONSERVANCY OF CANADA V WATERTON LAND TRUST LTD, 2016 ABQB 65
(JEFFREY J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Defendants, who were divided in two groups, each with their own counsel, sought two sets of Costs on a solicitor-client basis or elevated scale following their success at Trial. The Plaintiff asserted that a single set of Costs on the standard tariff was appropriate, and that Costs should be assessed in accordance with each party's respective success on an issue by issue basis.

Justice Jeffrey considered Rules 10.29, 10.31 and 10.33, and confirmed: the Rules relating to Costs are to be interpreted in such a way as to do justice between the parties; solicitor and client Costs are rare and exceptional; alleging but not proving fraud is relevant, but not determinative, to awarding solicitor and client Costs; and enhanced Costs can be awarded to signify Court disapproval of a litigant's conduct.

Jeffrey J. held that a single set of Costs for all Defendants collectively was inappropriate in this case because the interests of the Defendants were not aligned on all issues. Each group retaining their own counsel was not unnecessary, or duplicative. Considering Costs on an issue by issue basis was inappropriate since the issues were tied together and common evidence was proffered.

Justice Jeffrey awarded Costs to the Defendants on an enhanced scale amounting to four times Column 5 of Schedule C for those procedures that related to the main Claim. Justice Jeffrey considered the complexity of the Trial, the degree of success enjoyed by the Defendants, the importance of the issue to the parties, the fact that fraud was alleged but unproven, and Plaintiff counsel's conduct in advancing clearly unmeritorious positions. His Lordship held that it was appropriate to address Costs in respect of the Counterclaim separately since the factors affecting Costs in Rule 10.33(1), when applied to the issues in the Counterclaim, resulted in different outcomes from the issues within the main Claim. Each party was ordered to bear their own Costs for proceedings related to the Counterclaim.

OPTIMAX DEVELOPMENTS LTD V CALGARY (CITY), 2016 ABQB 70 (GATES J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Optimax successfully obtained leave to appeal a decision of the City of Calgary Property Assessment Review Board ("Board"). The parties returned before Justice Gates with respect to Costs.

Justice Gates noted that Costs are awarded at the Court's discretion. The power to award Costs is set out in Rules 10.31(1) and the factors to consider are provided by Rule 10.33(1) and (2). Gates J. noted that solicitor-client Costs were generally awarded in instances of misconduct occurring during a legal proceeding, and were reserved for rare and exceptional circumstances.

His Lordship noted that the City of Calgary only consented to allow the Appeal after Optimax had fully argued its Application. While this was not a rare or exceptional case warranting solicitor-client Costs, the conduct of the City created an unnecessary burden for the taxpayer by forcing Optimax to appeal. Optimax was awarded Costs representing 50% of its solicitor-client Costs. With respect to the Board, while Costs are generally not awarded to or against an administrative tribunal, Gates J. held that the Board failed to attend the Court hearing, thereby unnecessarily extending proceedings. Costs were awarded against the Board in the amount of $1,500.00.

GENDRE V FORT MACLEOD (TOWN), 2016 ABQB 111 (NIXON J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Mayor of Fort Macleod sought to set aside bylaws and resolutions passed by the Town Council removing his powers as Mayor. The Mayor's Judicial Review Application was dismissed and the Town Council sought Costs on an enhanced scale. The Town Council requested five times

Column 5 Costs, in order to reimburse the Town Council for half of its legal fees. The Mayor argued that double Column 1 was an appropriate award of Costs.

Justice Nixon referred to Rules 10.31 and 10.33 as the applicable Rules which govern the Court's discretion in awarding Costs. The main factors in choosing the appropriate column in public interest litigation are the importance of the proceeding to each of the parties and the community, and the complexity of the proceedings.

Although the Mayor argued that he pursued the Judicial Review Application for the principles of democracy, he had a significant personal interest in the outcome as the core of the dispute related to his authority as Mayor. Nixon J. held that the Application was not fundamentally public interest litigation; however, the matter was of great importance to the parties and the community. The key issue at stake was the Town Council's ability to govern, and its authority to do so. The Town Council incurred significant legal costs in its defence, but the Application itself was only two half-days. Further, the conduct of the parties was not out of the ordinary. Taking into account all of the factors, Justice Nixon held that three times Column 3 was an appropriate Costs award in favour of the Town Council.

LAU V IBU, 2016 ABQB 74 (MICHALYSHYN J)
Rule 10.33 (Court Considerations in Making Costs Award) and Schedule C

Following a Trial which involved divorce proceedings and a custody dispute, the Court considered Costs. The Court noted that the father had raised many unproved allegations of racism and discrimination, and that this could attract Costs on either a solicitor-client or an enhanced basis. Counsel for the father argued that Costs should not be awarded in a custody case; however, Michalyshyn J. held that the Rules were to be applied equally to both custody cases and other civil litigation.

Justice Michalyshyn considered the factors set out in Rule 10.33(1), and noted: that the mother was entirely successful; the Action was not complex; and the father's conduct lengthened the Trial. His Lordship also noted that the father should not be protected from higher Costs despite the mother's status as a legal aid-supported litigant. Based on all of these considerations, the father's Costs were set based on Schedule C Column 4, but if this resulted in Costs exceeding full indemnity, the father could apply for reconsideration. The father was also ordered to pay 100% of the reasonable disbursements arising from the Trial.

HOLOWAYCHUK V MAKOWICHUK, 2016 ABQB 17 (BURROWS J)
Rule 10.42 (Actions within Provincial Court Jurisdiction) and Schedule C

The Plaintiff was successful following a Trial, and the parties could not agree on Costs. The Defendant submitted that Rule 10.42(2) should apply to the Costs award, as the Judgment was for $32,000. Rule 10.42(2) provides that where Judgment granted does not exceed the amount the Provincial Court has jurisdiction over, the costs granted will not be more than 75% of the amount specified in Column 1 of the tariff in Division 2 of Schedule C. The Plaintiff disputed this, arguing that at the time the Action commenced, the Provincial Court only had jurisdiction over amounts of $25,000 or less.

Burrows J. made reference to section 9.6(3) of the *Provincial Court Act*, RSA 2000, c P-31, which states that the Provincial Court has jurisdiction over amounts of $50,000 or less, but only with regards to Claims that arose after the *Provincial Court Act* was amended to prescribe jurisdiction over that amount. Burrows J. held that the Plaintiff's Claim was issued before the $50,000 prescribed limit of the Provincial Court came into force, and therefore Rule 10.42(2) had no application to determining Costs of the Plaintiff in this case.

336239 ALBERTA LTD. (DAVE'S DIESEL REPAIR) V MELLA, 2016 ABQB 174 (SHELLEY J)
Rules 10.49 (Penalty for Contravening Rules) and 10.52 (Declaration of Civil Contempt)

The Plaintiff commenced the Action after discovering that the individual Defendant, Mella, had fraudulently misappropriated funds and had distributed them to the

other Defendants. The Plaintiff obtained an Attachment Order against the Defendants that capped their payable per month expenditures. The Defendant breached the Attachment Order, and the Plaintiff obtained an Order for contempt. The Defendants were permitted to purge their contempt by making full repayment of the money that exceeded their allowance. The Defendants consented to Judgment against them for fraudulent misappropriation of funds. Following the Consent Judgment, the Plaintiff sought a further Order for contempt under Rule 10.52 for the Defendants continued breach of the contempt Order and the Defendants' subsequent breach of the Consent Judgment.

Shelley J. noted that under Rule 10.52 contempt of Court can take many forms including disobedience of a Court Order, breach of the Rules of Court or other misconduct. Justice Shelley noted that Courts must have the power to deal with contemptuous conduct in the course of administering their judicial mandate. Her Ladyship noted that, once a party was found to be in contempt of Court, the onus is on the breaching party to prove that they have purged their contempt, and contempt ought to be used as a remedy of last resort. The rationale for a Contempt Order is that the party has committed an offence against the authority of the Court, and fines are therefore payable to the Court and not the Litigants.

Shelley J. found the Defendants in contempt for continuous breaches of the first contempt Order and the subsequent Consent Judgment. Shelley J. ordered that the Defendants make payment as promised, or attend before the Court to show cause as to why payment had not been made, failing which the Defendants would face time in jail.

GRIVICIC V ALBERTA HEALTH SERVICES (TOM BAKER CANCER CENTER), 2016 ABCA 47 (ROWBOTHAM JA)
Rules 14.8 (Filing a Notice of Appeal) and 14.15 (Ordering the Appeal Record)

The Plaintiff in a medical malpractice Action applied for an extension of time to file an Appeal. Rowbotham J.A. cited the four part test from *Cairns v Cairns* (1931), 26 Alta LR 69 (CA) as the leading authority with respect to extending time for an Appeal. An Applicant must show that there was a bona fide intention to file the Appeal and there was some special circumstance that would excuse or justify the delay; the Respondents were not seriously prejudice by the delay having regard to position of both parties; the Appellant has not taken the benefit of the judgment from which Appeal is sought; and the Appeal would have a reasonable chance of success if allowed to proceed.

The parties did not dispute the first three requirements of the test. The main issue was whether the Appeal had a reasonable chance of success. Her Ladyship noted that, when assessing if the Appeal has a reasonable chance of success, the standard of review must be considered. Justice Rowbotham noted that, while the Appeal might be a difficult one given the appropriate standard of appellate review, it could not be said that this was a hopeless Appeal, particularly in light of the grounds of Appeal involving procedural fairness. Rowbotham J.A. also noted that the requested time extension was only four days. The extension to file the Appeal was granted.

KEW RIDGE ROAD UTILITY LTD V MILES, 2016 ABCA 53 (BERGER JA)
Rule 14.8 (Filing a Notice of Appeal)

The Applicants, Kew Ridge Road Utility Ltd. and the other Plaintiffs, sought an Order striking the Respondent's Appeal, arguing that the Appeal was filed after the one-month time limit as set out in Rule 14.8. Berger J.A. noted that the Appeal was filed out of time; however, His Lordship determined that the test as set out in *Cairns v Cairns* (1931), 26 Alta LR 69 (CA) had been satisfied in this case. Specifically, the Court found that the Appeal had a reasonable chance of success; the Respondent had a clear intent to appeal; the delay was a result of counsel misinterpreting the Rules of Court regarding the deadline; there was only a brief delay in filing the Notice of Appeal; and the Applicants had not alleged or suffered any prejudice. Accordingly, Justice Berger dismissed the Application to strike the Appeal.

ALBERTA TREASURY BRANCHES V CONSERVE OIL 1ST CORPORATION, 2016 ABCA 87 (ROWBOTHAM JA)
Rules 14.8 (Filing a Notice of Appeal) and 14.44 (Application for Permission to Appeal)

Following a receivership Order, Conserve Oil 1st Corporation ("Conserve") sought an extension of time to Appeal and leave to Appeal the Order. The underlying Action related to the effect of guarantees given to Alberta Treasury Branches ("ATB") by the predecessors of Conserve.

Justice Rowbotham considered the merits in order to determine whether leave to Appeal should be granted. Her Ladyship noted that, in addition to the merits, the Court on a Leave Application under s 193(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA") must also consider whether: the Appeal is significant to the bankruptcy practice; the Appeal is of significance to the Action; the Appeal will "unduly hinder" the Action; and the Judgment appears to be "contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice, for which there is no other remedy". Rowbotham J.A. considered, among other factors, the significance of the Application to bankruptcy practice, and declined to grant leave to Appeal.

Rowbotham J.A. addressed the Application to extend time, even though the determination of the leave Application was dispositive of the entire matter, because Conserve's former counsel erroneously relied on Rule 14.8(2)(a)(iii), which requires an Appeal be made within 30 days of an Order. Because this Order was made in the context of a receivership, the Appeal period was prescribed by the BIA, which provides for a 10 day period of Appeal. Notice of Appeal in this case was given within the 30 day period, but outside the 10 day period. Her Ladyship noted that the test to extend time limits under the BIA Rules is the same as that required by the Rules of Court. The Court must consider whether: there was a *bona fide* intention to Appeal within the prescribed time period; the delay to Appeal did not create prejudice; and, the Appellant had not taken the benefits of the judgment from which the Appeal is sought. Conserve's counsel indicated at the Hearing that there would be an intention to appeal immediately after an Order was given and there was no evidence of prejudice to the Respondents. Justice Rowbotham noted that it was apparent that the Applicant took no benefit from the Order. The Applicant therefore met the test to extend time, provided that there was an issue of arguable merit to the Appeal. In the result, the Applications were dismissed as Conserve had not met the test for leave to appeal.

BACON V GULLBERG, 2016 ABCA 62 (WATSON JA)
Rules 14.14 (Fast Track Appeals), 14.17 (Filing the Appeal Record ? Fast Track Appeals) and 14.64 (Failure to Meet Deadlines)

The Appellant, Bacon, applied to restore a Fast-Track Appeal relating to his child support obligations under Rule 14.14(2)(b). His Appeal had been struck pursuant to Rules 14.17(1) and 14.64(a), which provide that the Appeal Record for the case must be filed "not later than one month from the date on which the Notice of Appeal was filed". The Case Management Officer had issued a letter by fax reminding counsel that the Appeal Record would be required by November 30, 2015. The price of the transcripts was not provided until after that date so the Appeal Record was not filed in time. Justice Watson noted that Rule 14.17(2) does permit the Appeal Record to be filed without the transcripts, if necessary, subject to a follow-up obligation to file and serve it as soon as possible thereafter.

Watson J.A. observed that there was no indication that the Respondent, Gullberg, had suffered any prejudice by the delay. Nonetheless, the Respondent argued that the striking of the Appeal was justified by the operation of the Rules and, more importantly, that the revival of the Appeal was inappropriate by virtue of the fact that the Appeal was devoid of arguable merit. The key question was whether it was in the interests of justice to restore the Appeal. Watson J.A. found no merit in the Appeal as there was no reasonable prospect that a panel of the Court of Appeal would interfere with the calculation of income for the Appellant's support obligations. In the result, the Application for restoration of the Appeal was denied.

JAV INTERNATIONAL VENTURES LTD V HALLIBURTON GROUP CANADA INC, 2016 ABCA 64 (BERGER JA)
Rules 14.23 (Filing Factums – Standard Appeals) and 14.47 (Application to Restore an Appeal)

The Appellants, JAV International Ventures Ltd, applied for an Order restoring their Appeal after the Registrar had struck it due to the Appellants failure to file their Factum within the required deadline pursuant to Rule 14.23. Berger J.A. considered the factors that the Court should consider in determining if an Appeal should be restored after being struck for failing to comply with filing requirements. Berger J.A. stated that the Court should consider whether there was: an explanation for the defect or delay which caused the Appeal to be struck; reasonable promptness in moving to cure the defect; intention and time to proceed with the Appeal; arguable merit to the Appeal; and a lack of prejudice to the Respondent (including the length of delay). Justice Berger also noted that none of these considerations are determinative on their own.

Berger J.A. held that the Appeal had arguable merit and that the Appellants intended to proceed with the Appeal in a timely fashion. His Lordship also took into consideration the compelling explanation for the delay; however, there was a five-month period where no action was taken. Justice Berger held that the Appellants had not prosecuted their Appeal with diligence, and this delay had caused the Respondent prejudice. The Appellants' Application to restore their Appeal was dismissed.

CC V ALBERTA (DIRECTOR OF CHILD, YOUTH AND FAMILY ENHANCEMENT ACT), 2016 ABCA 84 (BERGER JA)
Rule 14.65 (Restoring Appeals)

The Applicant, C.C., sought an Order restoring his Appeal of a Decision under the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12. The underlying Appeal was struck for failure to file the Appeal Record in accordance with the Rules. The Appeal was subsequently deemed abandoned in accordance with Rule 14.65(3) because three months had passed since the Appeal was struck.

Berger J.A. stated that the Application to restore the Appeal could still be heard, but additional considerations applied. His Lordship stated that an Order to restore an abandoned Appeal is discretionary; the Court is required to take into account:

1. Whether there is a reasonable and sufficient explanation for the delay;
2. Whether there was a timely intention to proceed with the appeal;
3. Whether the appeal has arguable merit;
4. Whether the delay will unduly prejudice the respondent.

Justice Berger stated that the prejudicial effect of delay on interested Third Parties must also be considered. In the circumstances, Berger J.A. rejected C.C.'s submission that the success at the Appeal would not in any way jeopardize the children involved in the dispute. Berger J.A. found the opposite to be true. The un-contradicted Affidavit evidence of the case worker established a pattern of behaviour on the part of C.C. that thwarted rather than furthered the administration of justice in the case. In the result, the Application to restore the Appeal was dismissed.

VAS V GRACE, 2016 ABCA 45 (MARTIN AND VELDHUIS JJA AND SCHUTZ J (AD HOC))
Rule 14.70 (No New Evidence Without Order)

The Appellant police officers appealed a Trial decision for an award of damages for false arrest and false imprisonment, as well as pre-judgment interest from the date of the incident to the date of Judgment. The Appellants argued that pre-judgment interest was inappropriate because Statements of Defence were not filed until four years after service of the Statement of Claim, and that there was another one year delay during which work was done by the parties to prepare the matter for Trial. The Appellants asserted that, given the number of litigants and lawyers involved, the delay in getting the matter to Trial was unavoidable. The Respondents objected to this ground of appeal because the issue of pre-judgment interest was not raised before the Trial Judge.

The Court of Appeal noted that Rule 14.70 provides that an Appeal is decided on the record before the Court appealed from. The Court of Appeal observed that the Trial Judge's decision with respect to liability was amply supported by the evidence on the record, and that the Trial Judge's assessment of general damages was supported by the circumstances of the case. Because there was no evidence before the Court of Appeal to support the Appellants' position, the Court of Appeal declined to interfere with the Trial Judge's discretionary decision with respect to pre-judgment interest. The Appeal was dismissed on all grounds.

PREDIGER V SANTORO, 2016 ABCA 11 (WATSON, ROWBOTHAM AND O'FERRALL JJA)
Rule 14.88 (Cost Awards) and Schedule C

The Appellant wife, Santoro, appealed a Trial Judge's Decision in a family matter. Both parties were self-represented in the Appeal. The Court of Appeal dismissed the Appeal, and considered the issue of Costs. The Court noted that, under Rule 14.88, the successful party is, by default, entitled to Costs.

Generally, Costs are in the discretion of the Court, and the successful party is entitled to receive party and party Costs in accordance with Schedule C. The Court of Appeal explained that party and party Costs are not a full indemnity for legal costs, but rather compensation to the successful party for some portion of those costs. In the case of a self-represented litigant who has not incurred legal costs, such as the Respondent, the Court has discretion to award Costs. In this case, given the large volume of material the successful Respondent was required to respond to, the Court awarded Costs based upon Schedule C, Column 1 for the preparation of various documents and disbursements. The Respondent did not receive Costs for lost income while preparing for and attending the Appeal.

SPRUCE GROVE GUN CLUB V PARKLAND (COUNTY) SUBDIVISION AND DEVELOPMENT APPEAL BOARD, 2016 ABCA 25 (BIELBY JA)
Rule 14.88 (Cost Awards)

The Plaintiff gun club applied for a stay of the Defendant Appeal Board's Decision, and various individuals applied to be added as Respondents. The Plaintiff's Application was dismissed, and the other Applications were unopposed and were therefore granted. The Parties returned before the Court of Appeal after counsel could not agree on the terms of two Orders resulting from the earlier Applications. The Orders did not determine Costs.

Bielby J.A. noted that Rule 14.88 provides that, "unless otherwise ordered, the successful party in an appeal or an application is entitled to a Costs award against the unsuccessful party". Justice Bielby reviewed the Applications and noted that each of the Applications raised several issues. The Respondents had achieved success, and there was no adequate reason to vary the presumptive operation of Rule 14.88. Bielby J.A. awarded Costs plus reasonable disbursements to the Respondents.