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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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AMIK OILFIELD EQUIPMENT & RENTALS INC V WHITECAP RESOURCES INC, 2016 ABQB 192 (MASTER MASON)
Rules 1.2 (Purpose and Intention of these Rules), 6.3 (Applications Generally) and 7.3 (Summary Judgment)

The Plaintiff sold and serviced oilfield equipment. The Plaintiff commenced an Action against the Defendant after it allegedly refused to take delivery of, and pay for, custom built equipment which they ordered from the Plaintiff. The Plaintiff applied for Summary Judgment for the purchase price of the equipment, plus interest and Costs. The Defendant argued that an amendment Application should have been brought prior to the Summary Judgment Application in order to include additional claims with respect to a contract between the parties made in December 2014.

Master Mason stated that this approach is inconsistent with Rule 1.2(3)(a) which requires the parties to identify the real issues in dispute and to facilitate the quickest means of resolving the claim at the least expense. Master Mason observed that the Defendants understood the claims brought by the Plaintiff, and the Summary Judgment Application complied with Rule 6.3(2).

Master Mason noted that Summary Judgment is governed by Rule 7.3, and that Alberta has a long history of taking a robust approach to Summary Judgment. The Court noted that Summary Judgment is no longer denied solely on the basis that the evidence discloses a triable issue. The Court now asks 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 Court also should consider whether an examination of the existing record can lead to a fair and just disposition. The standard for fairness is not whether the process is as exhaustive as a Trial, but whether it gives the Judge confidence that the necessary facts can be found and the relevant legal principles can be applied. The Court is to presume the best evidence from both sides is before it, and the party faced with an Application for Summary Judgment must put its best foot forward. The key is whether the circumstances require viva voce evidence in order to properly resolve the case.

Following an examination of the evidence on the record, Master Mason granted Summary Judgment in favour of the Plaintiff.

DECORE V DECORE, 2016 ABQB 246 (MICHALYSHYN J)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 3.56 (Right to Counterclaim), 7.3 (Summary Judgment) and 13.6 (Pleadings: General Requirements)

The parties were involved in a complex dispute over their late mother's will and estate. Following lengthy surrogate proceedings, the Plaintiffs commenced an Action against the Defendants, and the Defendants counterclaimed. The parties then filed competing Summary Judgment Applications against each other.

Michalyshyn J. considered the Summary Judgment Applications and observed that the legal test for Summary Judgment is now settled, and followed the principles set out in *Hryniak v Mauldin*, 2014 SCC 7. Justice Michalyshyn referred to recent authorities, and held that the question is whether there is any issue of merit that "genuinely requires a trial" or "whether the claim or defence is so compelling that the likelihood it will succeed is very high". The test for Summary Judgment requires the Court to examine the available facts and determine if a fair and just disposition can be made on the existing record. Justice Michalyshyn reviewed the available evidence and stated that it was not sufficient to allow the Court to make the necessary findings of fact to support the Plaintiffs' case. The Plaintiffs' Summary Judgment Application was dismissed.

Before examining the Defendant's Counterclaim and Summary Judgment Application on the merits, Michalyshyn J. considered two threshold issues raised by the Plaintiffs. One of the Counter-Claimants was not named as a Defendant in the Statement of Claim. The Plaintiffs argued that, based on Rule 3.56(1), only a named Defendant can advance a Counterclaim. The Court agreed that while there was a strong appeal to the concept of adding a new Plaintiff by Counterclaim to ensure that all necessary parties are before the Court, to allow a Counterclaim made by a non-party would in effect "re-write" Rule 3.56(1).

In order to resolve whether the new Counter-Claimant could be added, Justice Michalyshyn considered s. 8 of the *Judicature Act*, RSA 2000, c J-2, and noted that the Courts have been mindful of the purpose of the Rules as set out in Rule 1.2, which is to facilitate the "quickest means of resolving a claim at the least expense", to provide "an effective, efficient, and credible system of remedies and sanctions" and, most importantly, as set out in Rule 1.2(1), to "provide a means by which claims can be fairly and justly resolved". The *Judicature Act*, at s.8, grants the Court the power to determine matters in dispute and to avoid a multiplicity of proceedings. Further, Rule 1.3(1) allows the Court to give any relief described in the *Judicature Act* or the Rules. Rule 1.3(2) specifically states that the Court may grant a remedy whether or not it is sought in an Action. Justice Michalyshyn ultimately agreed with the Plaintiffs that the reach of s.8 of the *Judicature Act* "stops short of affecting legislated rules" and therefore Rule 3.56(1) effectively disallowed a *Judicature Act* remedy in this case.

His Lordship held that the parties were essentially engaged in estate litigation. As a result, the *Surrogate Rules* Alta Reg 130/1995 also applied. The *Surrogate Rules*, at s.2, preserves the Court's discretion to vary any Rule where appropriate, and where it would serve the ends of justice. His Lordship held that the Summary Judgment Applications in this case should have been brought under the *Surrogate Rules*, and observed that Rule 3.56(1) applies specifically to Court Actions, Actions commenced by way of a Statement of Claim, and Counterclaims. As a result of the broad applicability of the *Surrogate Rules*, it was unnecessary to apply a specific provision of the Rules of Court, such as Rule 3.56(1). Therefore, the new party could be added as a Counter-Claimant.

The Plaintiffs argued further that the Counterclaims were barred by the *Limitation Act*, RSA 200 c L-11. The Plaintiffs did not raise this argument until their written submissions before the Court and the Defendants argued that the Plaintiffs violated Rule 13.6(3)(q). Michalyshyn J. stated that that the Counterclaims were necessary and desirable in this case, and allowed the Counterclaims to stand.

Finally, Justice Michalyshyn considered the merits of the Defendants' Summary Judgment Application and held that there was insufficient evidence before the Court to find for the Defendants. The Defendants' Summary Judgment Application was accordingly dismissed.

STACKARD V HARRINGTON, 2016 ABQB 357 (BAST J) Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

The Plaintiffs appealed from a Master's decision dismissing their Application under Rule 4.33. The main issue before the Master and on appeal was whether the Action was significantly advanced since the Defendants' filing of its

Statement of Defence on November 29, 2011. One of the Plaintiffs, Stackard, had passed away on December 31, 2011; as such, the Action was automatically stayed under Rule 4.34. Ms. Dorath was appointed personal representative of the Plaintiff's estate, and she obtained an *ex parte* Order ending the Stay and permitting the Action to continue under Rule 4.34(2). However, the Order was only served on previous counsel for the Plaintiffs. Justice Bast noted that Rule 4.34(3) requires such an Order to be served on all parties as soon as it is received.

The Defendants brought an Application under Rule 4.33 on July 15, 2015, over three years and seven months since the filing of the Statement of Defence. The Defendants were served with the *ex parte* Order ending the Stay a month after filing their Rule 4.33 Application. The Master dismissed the Rule 4.33 Application on the grounds that: (1) Ms. Dorath had intended to serve the Order upon all parties; and (2) obtaining the Order was a "required step" under the Rules, which significantly advanced the Action.

Bast J., referring to prior authority, noted that a Stay pursuant to Rule 4.34 does not expressly stop the running of the clock under Rule 4.33. Further, the reference to Rule 4.31 points to the fact that, if a Stay remains in place with no Order to continue the Action, a Defendant may apply for relief under Rule 4.31 notwithstanding the Stay. Bast J. observed that the law with respect to Rule 4.33 had changed recently. Prior leading Court of Appeal authority held that Rule 4.33 requires a functional approach rather than an overemphasis on formalistic steps, and that anything "required by the Rules" does not necessarily significantly advance the Action. Further, the functional approach is consistent with Foundational Rule 1.2.

Consequently, Bast J. held that reliance on the Order as being a "mandatory" step which therefore advanced the action was in error. Lifting the Stay was only required if the Plaintiff Estate wished to continue with the litigation; it was not a mandatory step. Her Ladyship also noted that the step had not even been properly completed. The Appeal was granted and the Plaintiff's Action was dismissed.

URSA VENTURES V EDMONTON (CITY), 2016 ABCA 135 (MARTIN, ROWBOTHAM AND WAKELING JJA)
Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibilities of Parties to Manage Litigation), 4.3 (Categories of Court Action), 4.4 (Standard Case Obligations), 4.5 (Complex Case Obligations), 4.6 (Settling Disputes About Complex Case Litigation Plans), 4.8 (Court May Categorize Actions), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.6 (Form and Contents of Affidavit of Records) and 5.15 (Admissions of Authenticity of Records)

The Applicant appealed a Decision which held that the Respondent's Affidavit of Records significantly advanced the Action for the purposes of Rule 4.33. Rowbotham J.A., for the majority, discussed the purposes of Rule 4.33 and observed that a purposive approach should be taken when determining applications under Rule 4.33, in keeping with the foundational principles underlying the Rules of Court, particularly in Rule 1.2. Rowbotham J.A. stated that Courts must look at whether or not the substance of the step taken advances the Action, and that this same analysis should be made whether or not the step is mandated by the Rules of Court. Justice Rowbotham reviewed the distinction between Rule 4.31 and Rule 4.33, stating that Rule 4.31 can be triggered by prejudice whereas Rule 4.33 acts as a sort of limitations period and is there to terminate Actions that have "truly died". The Court cautioned that a step taken under the Rules, such as serving an Affidavit of Records, will not automatically significantly advance actions for the purpose of Rule 4.33.

Rowbotham J.A. held that, although many of the documents produced in the Affidavit of Records were records that the Applicant already had in its possession, one element of Rule 5.6(2)(e) is that a party must certify that it has no other documents, which confirms that the opposing party is aware of the extent of the party's production, and ensures that there are no "surprise" documents that arise later in the litigation. Further, Rule 5.5 requires that the parties make admissions about the validity and authenticity of the documents in an Affidavit of Records. When a party includes the opposing party's documents in their Affidavit of Records, it is admitting to their authenticity.

The Appeal was dismissed and the Court ordered that the Respondent file a further and better Affidavit of Records, and that they serve the Applicant with a Litigation Plan in accordance with Rule 4.4(2).

In dissent, Wakeling J.A. noted that there is a line dividing acceptable and unacceptable delay by a party, and that the Respondent's delay in serving its Affidavit of Records was unacceptable. Wakeling J.A. stated that the Court should not have tolerance for plaintiffs who do not advance their actions in a timely and consistent manner, and that Courts should become involved with these actions by way of Litigation Plans in order to move actions along. To emphasize this, Wakeling J.A. cited Rule 4.1, which provides that the parties are responsible for managing their dispute and planning its resolution in a timely and cost-effective way; Rule 4.3, which categorizes types of Court Actions; Rules 4.4 and 4.5, which delineate between standard case obligations and complex case obligations; Rule 4.8, which provides that a Court may direct how a case is to be categorized; and Rule 4.6, which provides that a prudent Plaintiff may ask the Court to grant an Order settling disputes about complex Litigation Plans. Wakeling J.A. did not find the Respondent to be a reasonably diligent Plaintiff and would have allowed the Appeal.

XS TECHNOLOGIES INC V VERITAS DGC LAND LTD, 2016 ABCA 165 (PAPERNY, ROWBOTHAM AND MCDONALD JJA)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.22 (Questioning Options), 5.28 (Written Questions), 5.29 (Acknowledgment of Corporate Witness's Evidence), 15.4 (Dismissal for Long Delay: Bridging Provisions) and 15.15 (Coming into Force)

The Action was commenced in 2002. In May 2009, the Defendant provided Answers to Undertakings given at Questioning. In August 2013, the Plaintiff sent the Defendant a Notice of Written Questioning and copies of documents listed in the Appellant's Affidavit of Records in electronic format. On August 30, 2013, the Plaintiff served a Supplemental Affidavit of Records. On November 4, 2013, the Defendant filed an Application to Dismiss for Long Delay. The Chambers Judge found that the last step which significantly advanced the Action was the Response to Undertakings in May 2009. Accordingly, the Action was dismissed under Rule 4.33. The Chambers Judge also held that the delay in the Action was inordinate and inexcusable such that significant prejudice could be presumed, warranting dismissing the Action under Rule 4.31. The Plaintiff appealed.

The Plaintiff argued that the Chambers Judge erred in applying Rule 4.33 rather than Transitional Rule 15.4. The Court of Appeal held that because Rule 4.33 came into force before the Defendant brought its Application to Dismiss for Long Delay that Rule 4.33 applied. The Court of Appeal considered the Plaintiff's argument that the Chambers Judge misapplied the test for long delay, and held that a Chambers Judge's conclusion with respect to whether a step has significantly advanced an Action is entitled to deference. The Court noted that the consideration of whether a step advances an Action involves a functional analysis as to the nature, quality, genuineness, timing, and outcome of the step taken. The Plaintiff also asserted that the Defendant had failed to advance its Counterclaim, and this inaction negated the Plaintiff's failure to take any steps in its own Action. The Court of Appeal held that, notwithstanding Rule 1.2, a Plaintiff bears the ultimate responsibility for prosecuting its Claim. The Defendant's failure to move the litigation forward did not excuse the Plaintiff's inaction.

The Plaintiff had Questioned an employee of the Respondent in 2008. In August 2013, the Plaintiff served a Notice of Written Questioning pursuant to Rules 5.22 and 5.29, appending 258 questions and the employee's answers. The Notice requested that the Defendant acknowledge that the evidence of the employee to those questions formed some of the information of the Respondent. The Chambers Judge concluded that the Notice was similar to a Notice to Admit Facts, and without an acknowledgement, it did not significantly advance the Action. Rule 5.29 states that evidence given by a corporate witness may not be read in as evidence at Trial unless a corporate representative under oath acknowledges that the evidence forms the information of the corporation. A

corporation may refuse to acknowledge some or all of the evidence given by a witness pursuant to Rule 5.29(2). Rule 5.29 does not impose a time limit for acknowledgement or the consequences for the failure to acknowledge.

As a result, the Court of Appeal held that the Chambers Judge did not err in likening the Notice of Written Questioning and request for acknowledgement to a Notice to Admit Facts. It is not the Notice to Admit that significantly advances the Action, it is the admission, or unreasonable refusal to admit, or a lapse of time with no reply which constitutes the advancement of the Action. In the result, the Appeal was dismissed.

DEMB V VALHALLA GROUP LTD, 2016 ABCA 172 (ROWBOTHAM, MCDONALD AND SCHUTZ JJA)
Rules 1.2 (Purpose and Intention of These Rules), 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records) and 10.52 (Declaration of Civil Contempt)

The Plaintiffs obtained an Order which explicitly set out that the Respondents were each required to prepare and swear a further and better Affidavit of Records. The Defendants produced heavily redacted documents, and produced a hard drive without properly listing the documents in the schedule to the Affidavit of Records. The Plaintiffs applied unsuccessfully before a Case Management Judge to hold the Defendants in Contempt, pursuant to Rule 10.52. The Case Management Judge dismissed the Contempt Application on the basis that it was premature and the Order did not give the Defendants an ultimatum which would reasonably lead them to believe that failing to comply would result in Judgment against them. Subsequent to these events, one of the Defendants swore an Affidavit in support of a Summary Dismissal Application which attached as exhibits a number of invoices and other supporting documentation which had not been previously produced. The Plaintiffs applied a second time for Contempt, but this was also dismissed by the Case Management Judge. The Plaintiffs appealed the second Order.

The Court of Appeal held that the Case Management Judge had erred in dismissing the Application for Contempt and granted the Appeal. The second Order was granted in the context of the prior Order which explicitly set out that the Respondents "shall each prepare and swear a further and better Affidavit of Records". Only one of the Defendants swore an Affidavit of Records on behalf of all them. Further, the Defendants' failure to previously produce relevant documents, as determined by Rule 5.2, that they relied on for their own Summary Dismissal Application, was in clear breach of the Order and their obligations to comply with Rule 5.6. The Respondents were therefore found in contempt. The Court of Appeal referred to Foundational Rule 1.2 and stated that the Rules must be interpreted and applied in a manner that promotes access to justice and encourages early disclosure. The matter was returned to the Case Management Judge to impose the appropriate penalty for the contempt.

NEP CANADA ULC V MEC OP LLC, 2016 ABCA 201 (SLATTER, BIELBY AND O'FERRALL JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 7.1 (Application to Resolve Particular Questions or Issues)

The parties were involved in two related Actions. In one of the Actions (the "Merit Action") the Case Management Judge ordered that a single discrete issue be tried separately and in advance of the balance of the Trial with the second Action (the "Carr Action"). The Defendants in the Merit Action appealed the Order which severed the issues (which resulted in two Trials) on the basis that the evidence did not meet the requirements under Rule 7.1 in order to permit the Trial of a directed issue. They argued that it would not result in the disposition of all or part of the claim, would not substantially shorten the length of Trial for the remaining issues, and would not defray expense.

The Court of Appeal noted that to order the Trial of an issue, a Judge must be convinced that the severance of the issue is likely to or has a good probability of satisfying one or more of the requirements in Rule 7.1. The Court of Appeal reviewed whether the Order under Appeal would resolve all or part of the Claim, shorten the Trial or save expense, and considered whether there was any prejudice to a fair hearing. The Court agreed with the Case Management

Judge that Rule 7.1 must be viewed through the lens of Foundational Rule 1.2, and that the Rules are intended to be used to facilitate the quickest means of resolving a claim at the least expense.

The Court of Appeal concluded that, while in some situations a full Trial on all issues is required and is proportionate to the relief sought, the Case Management Judge was not unreasonable in concluding that this was not one of those cases. The Court of Appeal stated that "consideration of the quickest means to resolve a dispute is entirely consistent with the wording of Rule 7.1". The Appeal was dismissed.

BARD V CANADIAN NATURAL RESOURCES, 2016 ABQB 267 (NIXON J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 3.62 (Amending Pleadings), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 5.2 (When Something is Relevant and Material), 5.3 (Modification or Waiver of this Part), 5.5 (When Affidavit of Records Must be Served), 5.6 (Form and Contents of Affidavit of Records), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

In a dispute related to an oil sands project, the Plaintiffs, ("Devon") applied for permission to amend their Statement of Claim and to compel the Defendants, ("CNRL") to produce certain records.

CNRL consented to some of the amendments sought by Devon which were allowed pursuant to Rule 3.62. Nixon J. considered whether the remainder of the amendments could be granted pursuant to Rule 3.65, and noted that the general rule is that any pleading may be amended, no matter how careless or late, subject to four exceptions: (1) the amendment would cause serious prejudice not compensable in costs; (2) the amendment is hopeless and would have been struck; (3) the amendment seeks to add a party or cause of action outside a limitation period; and (4) there is an element of bad faith in the failure to plead the amendment in the first place. Nixon J. noted that the evidentiary burden in seeking to amend is low, but the amendments must have some foundation in fact. Justice Nixon considered each amendment, and held that most could be allowed with the exception of several paragraphs which were hopeless as they alleged that CNRL's conduct in the litigation amounted to bad faith. Nixon J. stated that there is no fiduciary duty owed between parties to litigation, nor a contractual duty to act in good faith. Misconduct during the litigation gives rise to a remedy of Costs only, not punitive damages.

Some of the amendments alleged bad faith in respect of CNRL's pre-litigation conduct. The parties and the Court agreed that amendments alleging fraud or bad faith were subject to a higher threshold of proof. However, where the amendments particularize an existing cause of action, this requirement is relaxed. Nixon J. noted that this exception was consistent with the technical requirements for Pleadings in Rules 13.6 and 13.7: parties must plead those causes of action which may take the other party by surprise. The amendments related to bad faith were allowed. CNRL objected to other proposed amendments on the grounds that they added remedies which were not initially pleaded. Nixon J. allowed the amendments on the basis that Rule 1.3 gives the Court discretion to grant remedies whether pleaded or not, and this discretion extended to allowing amendments to plead new remedies. Justice Nixon held that the remainder of the amendments did not cause serious prejudice which could not be compensated with costs, were not barred by the *Limitations Act*, RSA 2000, c L-12, and were not hopeless or proposed in bad faith. These amendments were allowed pursuant to Rule 3.65.

Devon also sought production of a number of electronic records related to the oil sands project. CNRL resisted production on the grounds that: (1) the records were not relevant and material, (2) that the records had already been produced in a different format, (3) that the records were not readily available and a request to produce 3,516 native spreadsheets would cause an undue burden disproportionate to the probative value of the records, and (4) that Devon had enough records to accomplish their objective of reconstructing the joint account without further production. The parties agreed that Rule 5.2 governed relevance and materiality. Nixon J. noted that the starting point for assessments of relevance and materiality was

the amended Pleadings. Her Ladyship noted that Devon's expert witness had sworn that the requested documents were necessary for his analysis, and no independent witness had suggested otherwise. As such, the test under Rule 5.2 was met, and the records were producible.

Justice Nixon also found that for very large spreadsheets, the TIFF format was effectively unusable. Production of electronic records in an unusable format undermined procedural fairness and failed to meet CNRL's disclosure obligations. Nixon J. declined to exercise discretion under Rule 5.3 to relieve hardship on CNRL in producing these records, and held that, while proportionality is a consideration in production, this case involved damages in the hundreds of millions of dollars and proportionality did not "figure prominently". Nixon J. ordered the production of all requested records.

DORNAN (RE), 2016 ABQB 259 (MASTER SCHLOSSER)
Rules 1.4 (Procedural Orders), 5.3 (Modification or Waiver of this Part), 5.12 (Penalty for not Serving Affidavit of Records) and 13.5 (Variation of Time Periods)

The purpose of this Action was to set aside a transfer of assets by Mr. Dornan, who had a Division 1 Bankruptcy Proposal pending, or to obtain Judgment against Mr. Dornan for the difference between the transfer value and the fair market value of the transferred assets. An Appeal of the Order granting permission for the Action was scheduled to be heard May 27, 2016, but prior to the hearing, Mr. Dornan's creditors served a Statement of Claim on Mr. Dornan. The deadline for filing the Statement of Defence was April 21, 2016 and the creditors refused to grant an extension of that deadline. Mr. Dornan applied for a Stay of the procedural steps in the Action pending the Appeal of the Registrar's Order.

Master Schlosser, acting as the Registrar in Bankruptcy, considered the test for granting a Stay under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and noted that the Applicant was seeking a Stay of up to two procedural steps in the Action. Both Rules 1.4 and 13.5 permitted the Court to extend procedural deadlines and Master Schlosser noted that the time for serving a Statement of Defence was commonly extended as a courtesy between counsel. Under Rule 5.12, the penalty for late production of an Affidavit of Records was usually a monetary sanction, but this sanction was not absolute and could be avoided with "sufficient cause". The Court noted several cases where an extension of time was granted for filing an Affidavit of Records and concluded that the efficiencies of time and expense supported granting a Stay in this instance.

MD OF OPPORTUNITY NO 17 V GUN-SHY INVESTMENTS INC, 2016 ABQB 244 (MASTER SCHLOSSER)
Rules 3.2 (How to Start an Action), 7.1 (Application to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)

The Applicant, Municipal District of Opportunity No. 17, brought an Originating Application seeking the return of lands which had been conveyed to the Respondent, Gun-Shy Investments Inc., for development in accordance with a detailed contract between the parties (the "Agreement"). The Agreement contained an option to repurchase in the event that the Respondent did not meet the contractual deadlines or conditions. By the first anniversary of the Agreement, the Respondent had not completed any of the steps required under the Agreement, and the Applicant elected to rescind the Agreement and to exercise its option to repurchase.

The Respondent brought a Cross-Application under Rule 3.2(6) seeking a conversion of the Originating Application to an Action brought by Statement of Claim, arguing that there were facts in dispute which necessitated a Trial. Master Schlosser noted that Courts are well able to deal with factual issues arising on an Originating Application. Master Schlosser commented that the Originating Application procedure is similar to a Summary Judgment Application, except that the standard of proof is higher on an Application for Summary Judgment. Master Schlosser observed that some Courts have put the standard for Summary Judgment Applications at 80%, whereas the threshold on an Originating Application is 51%. As such, an Originating Application is analogous to an Application under Rule 7.1.

On the facts before the Court, Master Schlosser determined that the Agreement had been breached and ordered that the Applicant was entitled to exercise its repurchase option.

CONDOMINIUM CORPORATION NO 072 9313 (TRAILS OF MILL CREEK) V SCHULTZ, 2016 ABQB 338 (MASTER SCHLOSSER)
Rules 3.2 (How to Start an Action), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff commenced an Action by way of Originating Application in order to evict the Respondent's son, a minor, from a condominium unit. The condominium unit in question was sold before the Court rendered its Decision so the eviction issue became moot.

One of the remaining issues before the Court was in relation to the nature and sufficiency of the evidence given in the Originating Application. Master Schlosser noted that pursuant to Rule 3.2(2), the Originating Application procedure is meant for situations in which there are no facts in dispute, or when a decision is the subject of Judicial Review. An Originating Application is decided on a balance of probabilities, unlike Summary Judgment Applications under Rules 7.3 and 3.68. Furthermore, pursuant to Rule 13.18(3), the evidence required in these circumstances must be first-hand, direct, and personal and cannot be hearsay as the Application may finally dispose of some or all of the issues. Master Schlosser considered the Affidavit evidence given by the Applicant condominium's property manager, and held that the key evidence given was second-hand, and that the Affidavit was silent about certain facts in question.

The nature and sufficiency of the evidence given, in combination with other remaining issues before the Court, suggested that more was expected of the Plaintiff condominium's board. Master Schlosser held that the Plaintiff's Originating Application for fines and recovery of Costs was dismissed, and the Respondent's Cross-Application was allowed. Finally, the fines issued to the Defendant by the Plaintiff condominium corporation were set aside.

GAUTHIER V STARR, 2016 ABQB 213 (ROOKE ACJ)
Rules 3.42 (Limitation on When Judgment or Noting in Default May Occur), 3.62 (Amending Pleading), 3.68 (Court Options to Deal with Significant Deficiencies), 10.29 (General Rule For Payment of Litigation Costs) and 13.6 (Pleadings: General Requirements)

The Plaintiff sued three individuals for trespass, but the Statement of Claim was extremely brief and did not particularize any claims against two of the three Defendants. All three Defendants applied to have the Action struck under Rule 3.68. Associate Chief Justice Rooke noted that a Statement of Claim must provide a minimum threshold of information so the Defendants can provide a meaningful response. Bald allegations are insufficient, and a claim in trespass requires material facts sufficient to demonstrate an intentional tort.

An Amended Statement of Claim was accepted for filing just prior to the chambers Application, pursuant to Rule 3.62, as the Pleadings had not closed. The Amended Statement of Claim was similar to the original but provided additional details about the dates of the alleged trespasses by each Defendant. The Plaintiff also sought to have the Defendants noted in default, but this step was unavailable, pursuant to Rule 3.42(b), as the Defendants had applied to strike the Claim under Rule 3.68. The Defendants argued that the Statement of Claim failed to provide anything more than bald allegations of trespass and did not meet the criteria for pleadings in Rule 13.6. Rooke A.C.J. agreed that the Statement of Claim failed to provide the necessary material facts for the Defendants to make a meaningful response, and therefore struck the Action.

The Plaintiff had been warned in another Action that he may be declared a vexatious litigant if he continued to litigate on the basis of a strategy which Rooke A.C.J. grouped as Organized Pseudolegal Commercial Arguments ("OPCA"). It was apparent that the OPCA tactics exhibited similarities in the Plaintiff's current litigation, and His Lordship held that the Action was in fact OPCA litigation. Rooke A.C.J. further held that the Plaintiff was a vexatious litigant.

Because the Defendants were successful in their Application, they were each awarded $500 in litigation costs, pursuant to Rule 10.29(1) for a contested Application without written briefs. Rooke A.C.J. also ordered that the Plaintiff was prohibited from any further Court filings in respect of the three Defendants.

HERCHAK V ENBRIDGE PIPELINES INC, 2016 ABQB 217 (TILLEMAN J)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.66 (Costs), 3.68 (Court Options to Deal with Significant Deficiencies), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 5.32 (When Information May be Used), 5.33 (Confidentiality and Use of Information) and 13.6 (Pleadings: General Requirements)

The Plaintiff was a former employee of the Defendant, Enbridge, and during his employment the Plaintiff had a relationship with the individual Defendant, Scratch. When the relationship was brought to Enbridge's attention, the Plaintiff was dismissed for cause. The Plaintiff commenced separate Actions against Enbridge and Scratch which were consolidated by consent. The Plaintiff applied to file an Amended Statement of Claim seeking, among other things, to add Scratch's partner Holden as a Defendant on the basis that the individual Defendants conspired to have him fired. He also sought an Order waiving Rules 5.2 and 5.33.

Scratch and Holden argued that the Amended Statement of Claim contained impermissible evidence in breach of Rule 5.33 (implied undertakings). Further, Scratch argued that, if the Court allowed the amendments to the Statement of Claim, she was entitled to Costs pursuant to Rule 3.66. Holden argued that there were insufficient facts to add him as a Defendant for conspiracy. He also argued that the amendment Application was brought in bad faith and that the contents were frivolous, irrelevant and designed to embarrass, contrary to Rule 3.68(2).

Justice Tilleman reviewed the relevant Rules and held that the Rule against implied undertakings in Rule 5.33 is only infringed if information from pre-Trial discovery is used beyond the scope of the litigation in which it has been obtained. The production relied upon by the Plaintiff to seek the addition of Holden as a Defendant was not beyond the scope of the litigation in which it was discovered, and was therefore not in violation of Rule 5.33. Tilleman J. also held that there were communications that met the threshold to add conspiracy as a cause of action against both Scratch and Holden, and therefore granted permission to add Holden as a Defendant under Rule 3.74(2)(b).

Justice Tilleman observed that the Amended Statement of Claim contained a significant amount of content that was superfluous, salacious, or in breach of Rule 13.6(2)(a), which provides that a Pleading must state the facts on which a party relies but not the evidence by which the facts are to be proved. His Lordship ordered the removal of irrelevant, salacious and redundant information in the Amended Statement of Claim.

MANJI V PRASAD, 2016 ABQB 273 (PENTELECHUK J)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.66 (Costs) and 13.6 (Pleadings: General Requirements)

The parties were involved in a long-standing dispute over the purchase of certain real estate. Shortly before the Trial was set to be heard, the Court was informed that the Defendant, Prasad, intended to make additional arguments relating to a resulting trust or, alternatively, that the Applicant was entitled to relief from forfeiture. The parties sought directions from the Court as to whether Prasad was required to amend his Defence to plead these new arguments and, if so, whether leave to amend should be granted.

Justice Pentelechuk considered Rule 13.6 and stated that only the factual situation that discloses a cause of action needs to be pleaded, not the cause of action itself. In this case, none of the underlying facts had changed. Moreover, relief from forfeiture and resulting trust were not causes of action, but rather defences or forms of relief. On a plain reading of Rule 13.6(2), both defences were matters that could defeat or raise a defence to the Plaintiff's claims, and should be pleaded. Further, Pentelechuk J. noted that Rule 13.6(3) states that a Pleading must include "any matter on

which a party intends to rely that *may* take another party by surprise" including matters listed under the Rule. Although neither relief from forfeiture or resulting trust are listed, Justice Pentelechuk stated that the list is not exhaustive, and the paramount factor is whether the matter may take another party by surprise. The purpose of Rule 13.6(3) is consistent with the Courts' position that Trial by ambush is not tolerated, and that parties are entitled to know the case they must meet. Pentelechuk J. concluded that the Respondent in this case could be caught by surprise, because both new arguments were not so routine that they would be anticipated in any contractual dispute. Her Ladyship concluded that the proposed amendments should be allowed.

Justice Pentelechuk noted that, pursuant to Rule 3.66(2), the Costs of a contested Application to amend a pleading are in the discretion of the Court. Because there was mixed success on the Application, each party was ordered to bear its own Costs.

MCMORRAN V HOCKETT, 2016 ABQB 279 (MASTER ROBERTSON)
Rules 3.62 (Amending Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order), 10.48 (Recovery of Goods and Services Tax), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements) and Schedule C

The Plaintiffs sued the Defendants for, among other things, defamation. The Defendants applied to strike the Plaintiffs' Claim under Rule 3.68. In the alternative, the Defendants also applied for Security for Costs against the Plaintiffs.

Master Robertson considered Rules 13.6 and 13.7 in order to assess if the Pleadings disclosed a cause of action. Master Robertson considered the law as set out in *Abrams v Johnson*, 2009 ABQB 575 regarding a defamation Pleading, and noted that a claim in Defamation requires a number of particulars. A Pleading must disclose a concise statement of the material facts, the words published by the Defendant, references to the Plaintiff, the time and place of the publication, the manner of publication and to whom the publication was made. The requirements are strict, but are necessary to allow someone to defend their words. Master Robertson held that the Plaintiffs' Pleadings lacked proper clarity and had conflicting particulars. In the result, the claims relating to defamation were struck.

Master Robertson also considered the Security for Costs Application. Master Robertson noted that the corporate Plaintiff did not carry on business in Alberta nor did the individual Plaintiff have any exigible assets in Alberta. Furthermore, both of the Plaintiffs were significantly indebted to the corporate Defendant. The Canada Revenue Agency also had a writ of enforcement against the Plaintiff. Master Robertson held that the evidence clearly demonstrated that the Plaintiff would very likely not be able to pay an award of Costs. As a result, Master Robertson ordered Security for Costs against the Plaintiff in the amount of double Column 5 of Schedule C.

EASY LOAN CORPORATION V BASE MANAGEMENT & INVESTMENTS LTD, 2016 ABCA 163 (WAKELING JA)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 14.2 (Application of General Rules), 14.12 (Contents and Format of Notices of Appeal and Cross Appeal), 14.25 (Contents of Factums) and 14.37 (Single Appeal Judges)

The Appellants applied to amend their Notice of Appeal in order to add relief that was not part of the earlier Notice of Appeal, and to appeal only part of the Trial Decision. Wakeling J.A. considered Rules 14.2(1), 14.12(1)(2), 14.25(1) and 14.37(1), and stated that Rule 14.12(2) sets out the purposes of a Notice of Appeal and mandatory elements. Rules 14.25(1)(c) and (e) establish that the arguments in support of the Appeal are appropriately placed in the Appellant's factum and oral argument, not the Notice of Appeal. Wakeling J.A. noted that Rule 14.37 grants a single Appeal Judge the jurisdiction to amend a Notice of Appeal. Alternatively, this jurisdiction is granted by Rule 14.2(1), which makes the other Rules applicable where the Appeal Rules do not deal with matters directly. Therefore, Rule 14.2 allows a party to amend the Notice of Appeal pursuant to the Rules governing the amendment of pleadings, namely Rules 3.62 and 3.65.

Justice Wakeling held that the proposed amendments to the Notice of Appeal did not purport to enlarge the scope of the Appeal. The amendments clarified the Appellants' intention that they no longer wanted to Appeal against the whole decision, only portions of it. As such, the Application was granted.

BORDEN LADNER GERVAIS LLP V CBI INVESTMENTS LTD, 2016 ABQB 220 (MAHONEY J)
Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Plaintiff law firm ("BLG") appealed a Master's Decision which denied BLG's request to amend its Amended Amended Appointment for Review of BLG's charges and retainer agreement, and to add individual directors and shareholders of the Defendant company ("CBI") as named Respondents in their personal capacities.

Justice Mahoney stated that Rule 3.65 does not apply to an amendment to add, remove, substitute or correct the name of a party to which Rule 3.74 applies. His Lordship considered Rule 3.74, which provides for the addition, removal or substitution of parties after the close of Pleadings. Mahoney J. held that the applicable threshold to allow such an amendment is low. According to the "classic rule" as set out in Balm v 3512061 Canada Ltd. , 2003 ABCA 98, "any pleading can be amended no matter how careless or late is the party who is seeking to amend". The "classic rule" is subject to four exceptions:

a) that the amendment would cause serious prejudice to the opposing party, not compensable in costs;

b) the amendment requested is "hopeless";

c) unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; and,

d) there is an element of bad faith.

The Master had previously held that granting the amendment would have resulted in prejudice and harm to the opposing party, and that the proposed amendment was both "hopeless" and out of time. Justice Mahoney agreed with this analysis, and denied the Appeal.

WOOD BUFFALO HOUSING & DEVELOPMENT CORPORATION V ALVES CONSTRUCTION LTD, 2016 ABQB 249 (MASTER WACOWICH)
Rules 3.65 (Amendments to Pleadings) and 7.3 (Summary Judgment)

The Defendants, David Hamilton Architect Ltd. and David Hamilton (the "Hamiltons"), applied for Summary Judgment to dismiss the Plaintiff's claim. The Plaintiff cross-applied to amend the Statement of Claim to include particulars of the allegations against the Hamiltons. The Action involved a building deficiency claim relating to the restoration of a condominium complex damaged by fire.

Master Wacowich noted that amendments after the close of pleadings are governed by Rule 3.65, which provides the Court broad discretion to amend. The classic rule is that an amendment should be allowed no matter how careless or late, unless there is prejudice which cannot be compensated by costs. The discretion to allow amendments should be exercised generously, allowing amendments that raise even doubtful pleas, so long as it is arguable. The Court should consider whether an amendment is disallowed because it is hopeless. Master Wacowich observed that, in this case, the amendments sought would be hopeless if the Summary Judgment Application was granted.

Master Wacowich stated that the key points to be considered on an Application for Summary Judgment were set out by the Court of Appeal in *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49. Procedurally, Summary Judgment should only be given if a disposition that is fair and just to both parties can be made on the existing record. Substantively, Summary Judgment can be granted where there is no merit to the Claim. No merit means that, even assuming the accuracy of the position of the non-moving party, the non-moving party's position has no merit in law or fact. In order for the non-moving party's case to have

merit, there must be a genuine issue of potentially decisive material fact which cannot be summarily found against the non-moving party on the existing record. The assertion by a non-moving party that something will turn up at Trial does not suffice. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case.

On the present Application, Master Wacowich stated that the only disputed issues were matters of basic contract law concerning the legal significance of undisputed facts. The disputed issues could be determined on the existing record. Master Wacowich held that there were several elements of a binding legal contract missing, and therefore no contract. As such, the Plaintiff's claims were without merit and were summarily dismissed. With the claims summarily dismissed, the proposed amendments were held to be hopeless, and the Application to amend the Statement of Claim was dismissed.

WAQUAN V CANADA (ATTORNEY GENERAL), 2016 ABQB 191 (WITTMANN CJ)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiffs, members of the Mikisew Cree First Nation ("MCFN"), brought an Action to set aside certain terms of a treaty settlement agreement from a prior Action between MCFN and Canada. The Defendant, the Attorney General, applied to strike the Plaintiffs' Pleadings for failing to disclose a cause of action. Wittmann C.J. noted that Rule 3.68 governs the striking of claims, and stated that:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action... Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

Chief Justice Wittmann held that the individual Plaintiffs had no standing to bring the Action on behalf of the MCFN, as the rights settled under the treaty were collective rights belonging to all members of the MCFN. His Lordship also held that the individual Plaintiffs had no authority to bring a derivative Action on behalf of MCFN. As a result, Wittmann C.J. struck the claim in its entirety for failing to disclose a cause of action.

STONEY NAKODA NATIONS V CANADA, 2016 ABQB 193 (JEFFREY J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff, Stoney Nakoda Nations ("SNN"), commenced an Action for trespass and conversion of petroleum, natural gas, and related hydrocarbons ("PNG") which they claimed were properly theirs. SNN argued that various transfers of PNG to Canadian Pacific Railway ("CPR") and CPR's wholly owned subsidiary, which is now Encana, were either invalid or for inadequate consideration. The Defendants, Encana and CPR, brought an Application for Summary Dismissal. Encana argued that the claims were brought out of time, that it cannot be a trespasser on its own property, and that SNN's claims fail because of Encana's indefeasibility of title. CPR's Application for Summary Dismissal was on the same grounds, and any interest it had in the lands was wholly transferred to Encana, and therefore CPR had no interest in any of the PNG at issue in the Action. Further, any claim for damages against CPR was out of time and thus statute-barred. SNN argued that what was being sought by CPR and Encana was, in effect, an extinguishment of Aboriginal Treaty Rights. Therefore the Applicants bore the onus of proving that there was a clear and plain intent by the Crown to extinguish SNN's Aboriginal Treaty Rights in the PNG.

Jeffrey J., in considering Rule 7.3, noted that Summary Judgment can be granted if there is no merit to the claim. "No merit" means that, even assuming the accuracy of the position of the non-moving party as to any material or potentially decisive matters, the non-moving party's position has no merit in law or in fact. Justice Jeffrey noted that another way to explain the concept of merit is that, in order for the non-moving party's case to have merit, there must be a genuine issue or a potentially decisive material fact in the case which cannot be summarily found against the Respondents on the record. The mere assertion of a

position by the Respondent in a Pleading or otherwise, or the mere hope of the non-moving party that something will turn up at Trial, will not suffice for a position to have merit. This is distinguished from the test under Rule 3.68, which involves deciding "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed".

Based on the record before the Court, Jeffrey J. dismissed the claim as against CPR. Jeffrey J. also found that SNN had actual knowledge that certain parties had claimed ownership of the PNG in issue by 1982 at the latest. As such, the Action against CPR was summarily dismissed as it was statute barred and without merit.

Regarding SNN's claim as against Encana for the recovery of *in situ* PNG, Jeffrey J. held that Encana had not met its burden to show that the Crown had intended the alienation of the PNG at issue to CPR such that SNN's Aboriginal Rights were extinguished. Consequently, the issue could not be decided on a summary basis, and Encana's Application was denied. Jeffrey J. also found that SNN had raised sufficient doubt as to whether the transfer from CPR to Encana's predecessor was for sufficient consideration such that it was not beyond doubt that the defence had merit. Jeffrey J. noted that the determination of indefeasibility of Encana's title called for a complex determination of legal issues, intertwined with various degrees of social, historical, legislative and corporate facts. Justice Jeffrey concluded that, in such cases, a full Trial is required.

ELLMAR DEVELOPMENTS LTD V BEARSPAW DEVELOPMENT INC, 2016 ABQB 221 (MASTER HANEBURY)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment against the Defendants, and the Defendants cross-applied for the claims against them to be struck or, in the alternative, Summary Dismissal. Master Hanebury considered whether Summary Judgment could be granted when there was conflicting evidence between the parties. Master Hanebury noted that Summary Judgment could not be denied solely on the basis that the evidence disclosed a triable issue, but rather when there was an issue of merit that genuinely required a Trial. Additionally, issues of credibility could generally not be determined summarily. Master Hanebury concluded that:

> …conflicting evidence on a material matter usually results in a trial unless one side's evidence is completely non-credible, i.e. it is destroyed either by other evidence or on cross-examination, or is found to be bald, self-serving and unsupported.

In this case, Master Hanebury held that neither party's evidence was sufficiently bolstered or destroyed to the degree necessary to grant Summary Judgment; therefore, a Trial was required.

Regarding the Defendants' Application to strike the claims against them, Master Hanebury noted that an Application under Rule 3.68(2)(b) to strike a claim on the basis that it disclosed no reasonable cause of action must be made without evidence. The Court assumed that the allegations of fact found in the Claim were true. Master Hanebury held that the claim disclosed a cause of action against both Defendants; therefore, the Defendants' Applications to Strike were dismissed. Additionally, as neither Defendant filed evidence in support of their Cross-Applications for Summary Dismissal, the Court dismissed both Applications stating that, if they were to succeed, it would set an "unacceptable precedent".

GRENON V CANADA REVENUE AGENCY, 2016 ABQB 260 (DARIO J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants, the Canada Revenue Agency and a number of its Officers, applied to strike the Statement of Claim of the Plaintiff, Grenon. The Action had arisen out of a tax audit and reassessment against Grenon and a number of corporations wholly owned by him. Grenon protested the Defendants' conduct, including negligence, misfeasance in public office, interference with contractual relations, and breach of fiduciary duty. Justice Dario considered whether

the facts alleged in Grenon's Statement of Claim were sufficient to support the causes of action.

Dario J. reviewed prior leading authority on Applications to strike, and summarized the principles as:

1. The Court must assume the facts alleged in the Pleading are true, but this assumption does not extend to bald allegations, to legal conclusions or to speculations, absurdities, highly implausible statements or statements incapable of proof.

2. Making conclusory statements without evidence is an abuse of process and such statements should be struck.

3. Improper reference to terms such as "maliciously" and "recklessly" also constitutes an abuse of process and such terms should be struck unless they are relevant to the cause of action alleged.

4. Where a plaintiff's statement of claim includes contradictory facts that cannot both be true, such contradictory allegations need not be accepted by the Court.

5. The Court is not obligated to assume that an alleged fact is true where that allegation is contrary to a statutory directive.

Dario J. noted that these principles were non-exhaustive and a Court may consider other bases in rejecting a Plaintiff's allegations; further, while a Court should not be quick to dismiss novel claims, the entire contents and context of a Pleading must be considered, and a line-by-line analysis may not be appropriate.

Dario J. noted that the test under Rule 3.68 for failing to disclose a reasonable cause of action is whether the Claim has a reasonable prospect of success. Several paragraphs in Grenon's Statement of Claim were struck because they were found to be a collateral attack on the exclusive jurisdictions of the Tax Court of Canada and Federal Court of Canada, or because they failed to disclose a reasonable cause of action. A number of terms were struck, and some were replaced.

HARTWELL V TAYLOR, 2016 ABQB 289 (WILSON J)
Rule 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

Following a failed real estate transaction, the Plaintiff commenced a Claim against the Defendant, and the Defendant counterclaimed to recover his deposit. During Questioning of the Defendant, the Plaintiff became aware of information that suggested that new parties may be liable, and applied to amend the Statement of Claim. The Defendant opposed the Application and, based on the existence of a parallel Action involving the same parties, also applied to have this Action declared an abuse of process.

The Plaintiff submitted that the material in the parties' Affidavits provided sufficient evidence to connect the new parties to the issues raised in the Action. Justice Wilson noted that, pursuant to Rule 3.74, three requirements must be met to amend the Claim: the Application to Amend must be brought by a party to the Action; the Court had to be satisfied that an Order should be made; and there must be no prejudice if the Pleading was amended. Wilson J. considered whether the addition of new parties was more likely to expand the scope and expense of the Action. Justice Wilson noted that, generally, any pleading could be amended no matter how careless or late the party was when seeking to make the amendment, subject to four exceptions.

Wilson J. noted that the Defendant's objection to the amendments was based on the Plaintiff's lack of evidence. Justice Wilson reviewed what quality and quantity of evidence was required for an amendment Application. His Lordship noted that a modest degree of evidence was required, but in this case such evidence included hearsay evidence, evidence of an uncertain conclusion, and evidence in Affidavits by parties other than the party seeking the amendment. Further, Wilson J. observed that the lack of a factual basis was ordinarily not a ground for

denying an amendment, so long as it alleged facts which, if true, gave rise to a cause of Action. His Lordship held that there was nothing before the Court to suggest that the exceptions to the general rule applied, and there was sufficient allowable evidence upon which to base the amendments. In the result, Wilson J. held that the Pleadings could be amended.

IMPERIAL OIL V FLATIRON CONSTRUCTORS, 2016 ABQB 310 (GRAESSER J)
Rules 4.10 (Assistance by the Court), 6.3 (Applications Generally), 7.5 (Application for Judgment by Way of Summary Trial) and 7.8 (Objection to Application for Judgment by Way of Summary Trial)

Altalink, the Third Party Defendant, applied to have the Third Party Claim against them determined by way of Summary Trial pursuant to Rule 7.5. Although the Plaintiffs would not be involved in the Summary Trial, the Plaintiffs objected to its arguing that the issues were too complex and thus not appropriate to proceed by way of Summary Trial, and that they would suffer prejudice if the Third Party Claim was determined by way of Summary Trial.

The Defendant, Flatiron, questioned whether the Plaintiffs had standing to bring their Application. Justice Graesser noted that Rule 6.3 requires notices of Applications to be served on "all parties". Such is the case even where the Application has no potential to affect a party. The Court stated that the Summary Trial would require notice to the Plaintiffs, and that it was preferable for the Plaintiffs to bring this Application, instead of waiting until the date of the Summary Trial to object. His Lordship held that the Plaintiffs had standing to bring the Application.

Justice Graesser considered the appropriateness of setting the matter down for Summary Trial. After reviewing the amounts involved; the complexity of the matter; the urgency of the matter; any prejudice likely to arise by reason of delay; the cost of taking the issues forward to a conventional Trial in relation to the amount involved; the course of proceedings; and issues relating to witnesses, Graesser J. held that Summary Trial was appropriate. The Plaintiffs' Application was dismissed accordingly.

MILAVSKY V MILAVSKY ESTATE, 2016 ABQB 333 (TILLEMAN J)
Rules 4.22 (Considerations for Security for Costs Order) and 12.36 (Advance Payment of Costs)

The Plaintiff, Ms. Milavsky, commenced an Action for Divorce and Division of Matrimonial Property in June of 2009, which was expanded in May 2010 to include a Claim of Unjust Enrichment against three trusts settled by the Defendant, the late Mr. Milavsky. The litigation had an extensive history, and was scheduled for an 8 week Trial. Ms. Milavsky applied for the Defendant Estate to pay $1,000,000 in advance Costs in order to fund the complex Estate and Trust litigation.

Ms. Milavsky characterized the Action as a matrimonial property claim, and argued that the Action against the trusts was ancillary and, therefore, that Rule 12.36 should apply. The Estate argued that Rule 12.36 did not apply. The Respondent Trusts characterized the Claim against them as solely a civil one to which the test under Rule 4.22 applies.

Justice Tillman held that the Claim against the Estate was primarily a matrimonial property Action to which Rule 12.36 applied. Under Rule 12.36, the Court has wide discretion to order advance Costs, and the primary consideration is whether the Applicant has sufficient resources to pay for their part of the litigation. The purpose of advance Costs awards under Rule 12.36 is to "level the playing field", and no consideration is given to the merits of the Claim. Justice Tillman noted that Ms. Milavsky was 68 years old, earned no employment income, and had an income that was insufficient to keep up with the escalating legal fees required to advance her Claim. This evidence was sufficient to meet the test for advance Costs.

Tilleman J. observed that, under Rule 4.22, an Applicant must meet the three criteria set out by the Supreme Court of Canada in *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, which are:

(i) The applicant is impecunious to the extent that they would be deprived of the opportunity to proceed with the case without the order,

(ii) The applicant has a prima facie case of sufficient merit,

(iii) There must be special circumstances sufficient to satisfy the Court that the case is within the narrow class of cases where the extraordinary exercise of its powers is appropriate.

Justice Tillman held that Ms. Milavsky did not meet the test as set out in *Okanagan Indian Band*. In the result, advance Costs were payable by the Estate, but not by the Trusts.

STEWART ESTATE V TAQA NORTH LTD, 2016 ABCA 144 (ROWBOTHAM, MCDONALD AND O'FERRALL JJA)
Rules 4.24 (Formal Offers to Settle), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Appellants, a group of Plaintiffs, were successful in their Appeal and in having the Respondents' Cross-Appeal dismissed. The parties sought a determination with respect to Costs for Trial and for the Appeal.

The Court of Appeal held that awarding Costs to the Appellants was appropriate as they were successful, and the factors which would militate against Costs did not arise at Trial or on Appeal. The key issue was whether the Court should award enhanced Costs above the tariffs prescribed by Column 5 in Schedule C. The Court of Appeal referred to Rules 10.31 and 10.33, noting the Court's discretion in awarding Costs and the factors the Court may consider when doing so. The Court of Appeal observed that a multiplier may be applied when the Trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million. Generally, the Courts recognize that, where the amount in dispute greatly exceeds Column 5, Schedule C is deficient and a multiplier may be applied. However, the courts must be careful not to avoid over-indemnifying the successful party. Given the Action's complexity, a multiplier of two times the Column 5 tariff was granted. Further, the Appellants bested a Formal Offer made before Trial and, as such, were awarded double Costs for the Trial from the time of the Formal Offer.

In addition, the Appellants bested two informal Offers before the Appeal. The Respondents argued that double costs did not apply, relying on Rule 4.24 which requires Formal Offers to use Form 22 and be unconditional. The Respondents contended that the informal Offers were conditional on approval and were merely invitations to treat. The Court of Appeal acknowledged that these informal Offers were conditional, but there were indications that acceptance would have led to approval by all of the Appellants. These Offers were a sincere attempt to settle the dispute and, as such, the Appellants were awarded double Costs for the Appeal for the steps taken after the informal Offers.

KITCHING V DEVLIN, 2016 ABQB 212 (JEFFREY J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 5.31 (Use of Transcript & Answers to Written Questions) and 5.36 (Objection to Expert's Report)

The Plaintiff was involved in a personal injury Claim and he retained the Defendant lawyer, Mr. Devlin, to represent him. The matter settled for $350,000. Subsequently, the Plaintiff sued Mr. Devlin for negligently handling the Claim, claiming that the settlement was improvident.

Both parties called experts to provide evidence with respect to the standard of care of a personal injury lawyer, and whether that threshold was met by Mr. Devlin. At Trial, the Plaintiff objected to the Defendant's expert report. Since the objection was not made in accordance with Rule 5.36, the Plaintiff proposed that the Court hear the Defendant's expert's evidence subject to a later Ruling on the objection, to which the Court agreed. One of the issues in determining the admissibility of the Defendant's expert was the use of Discovery transcripts pursuant to Rule 5.31. The Defendant's expert, Mr. Rodin, based a number of his conclusions on answers given by the Defendant at Questioning. The Plaintiff did not give Mr. Rodin permission to use the transcript for that purpose and argued that the transcript was evidence belonging to him alone, and it was improper for the Defendant's expert to introduce that evidence at Trial through his report.

Justice Jeffrey stated that, while it was less than ideal that Mr. Rodin relied on the Questioning transcript of Mr. Devlin, this did not render the report inadmissible. The Court found that where references to the transcript were corroborated by other admissible Trial evidence, the opinions associated with that evidence would be admissible. Conversely, if transcript references were not corroborated by admissible evidence, then the associated opinions would not be used by the Court. In determining whether the settlement, and the advice provided to the Plaintiff by Mr. Devlin were reasonable, the Court looked at the statements made by Mr. Devlin to the Plaintiff. Mr. Devlin advised the Plaintiff that he would face significant risk if they went to Trial because he may have to pay double Costs to the opposing party. Jeffrey J. noted that, under Rule 4.29, if a Defendant makes a Formal Offer to Settle that is not accepted, and the Plaintiff's Trial Judgment exceeds that Offer, then the Plaintiff must pay double the Defendant's legal Costs incurred after the Offer was made. Since the Defendant had stated that a Formal Offer in the amount $350,000 would be made if the settlement offer was not accepted, Justice Jeffrey held that it was reasonable for Mr. Devlin to advise the Plaintiff he might face serious Cost consequences if he pursued the matter to Trial. In the result, Justice Jeffrey dismissed the Action against Mr. Devlin.

MIKKELESEN V TRUMAN DEVELOPMENT CORPORATION, 2016 ABQB 255 (ERB J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The parties were involved in a dispute over the proposed development of the Plaintiffs' farmland. The Trial Decision concluded that there was no binding agreement between the parties. Based on this conclusion, the Court granted much of the relief sought by the Plaintiffs but the results were mixed. Some of the Defendant's claims in its Counterclaim were granted. The Plaintiffs sought full indemnity Costs or, alternatively, a lump sum award of $300,000, which represented approximately 60% of the actual amount they paid as legal fees and disbursements. The Defendant argued that the parties should bear their own Costs.

The Plaintiffs argued that they were the successful party, and that the Court's Judgment at Trial was equal to the Formal Offer made by the Plaintiffs prior to Trial. The Plaintiffs further argued that the Defendant engaged in misconduct, including improperly denying Discovery records, changing evidence given under oath after hearing the Plaintiffs' case at Trial, forcing the Plaintiffs to prove facts that should have been admitted, and forcing the Plaintiffs to exhaust legal proceedings to obtain that which was obviously theirs. The Defendant argued that the Plaintiffs did not meet or exceed the Formal Offer, and they were not wholly successful at Trial. The Defendant indicated that the Plaintiffs were ordered to make partial payments to the Defendant for pre-development Costs pursuant to the Counterclaim.

Justice Erb held that, pursuant to Rule 10.29 and case law arising out of that Rule, Costs generally follow the ultimate result, but are not usually apportioned on an issue-by-issue or claim-by-claim basis, as it is rare for a successful party to succeed on each item claimed. Overall, the Plaintiffs succeeded on the most important issue between the parties; the Defendant's success was "minimal" for the purpose of determining Costs.

Justice Erb considered Rule 10.31(6), noting that Costs are discretionary, and subject to specific requirements in the Rules. Specifically, pursuant to Rule 10.31(6)(b), the Court has the ability to award Costs on an indemnity or a lump sum basis. Pursuant to Rule 10.33(1)(a), (b), and (g), the Court may take into account factors including the result of the Action and each party's degree of success, the amount claimed and the amount recovered, and any other matter the Court considers appropriate. Further, pursuant to Rule 10.33(2)(a), (b), (f) and (g), the Court may also consider the conduct of a party that unnecessarily lengthened or delayed the Action, a party's denial of or refusal to admit facts that should have been admitted, a contravention of or non-compliance with the Rules or an Order, and a party's engagement in misconduct. Erb J., referring to prior leading authority, held that the Court has jurisdiction to award Costs on a higher scale than provided for in Schedule C, but that solicitor and client Costs are only awarded in "rare and exceptional" circumstances. With respect to solicitor

client Costs, Erb J. noted that enhanced Costs may also be appropriate for the purpose of satisfying the objectives of deterrence and punishment. Justice Erb considered that the Defendant's witness's testimony was not credible and contained many inconsistencies, the unnecessary expenses incurred by the Plaintiffs, and the settlement offer. Justice Erb concluded that the circumstances of this case supported a Costs award beyond the usual party and party amount.

With respect to the Formal Offer, Erb J. stated that, under Rule 4.29(1), a Plaintiff is normally entitled to double Costs if the Plaintiff makes a Formal Offer that was not accepted and subsequently obtains a Judgment or Order that is equal to or more favourable than the Offer. However, in accordance with Rule 4.29(4)(a), this general principle does not apply if Costs were awarded on an indemnity or lump sum basis under Rule 10.31(1)(b). Justice Erb held that the Offer in this case was as favourable as the Judgment in the main Action, but did not address the Defendant's Counterclaim. As a result, Rule 4.29(1) was not triggered in this case; however, it was open to the Court to consider, as a factor in determining Costs, a Formal Offer that fell "marginally short" of the Judgment, as long as it was a legitimate attempt to settle the issues in dispute.

Erb J. observed that, while the Schedule C amounts were inadequate, this was not a case that required full indemnity for the Plaintiffs' Costs. Her Ladyship stated that there are numerous options available, including adjusting Schedule C amounts in various ways, as long as the final total is reasonable. Ultimately, Justice Erb held it was reasonable to award a lump sum Costs award pursuant to Rule 10.31(1)(b)(ii). The Plaintiffs were awarded $300,000, which was discounted by $100,000 because the Plaintiffs alleged but failed to prove fraud against the Defendant.

PARK AVENUE FLOORING INC V ELLISDON CONSTRUCTION SERVICES INC, 2016 ABQB 332 (MCCARTHY J)

Rules 4.29 (Cost Consequences of Formal Offer to Settle), 5.10 (Subsequent Disclosure of Records), 5.12 (Penalty for Not Serving Affidavit of Records), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.41 (Assessment Officer's Decision)

Following a Trial in a contractual dispute, the parties returned to argue Costs. The Plaintiff had been represented by counsel for only part of the litigation. The Defendant argued that the Plaintiff was only entitled to Costs for the time that it was represented by counsel, and was not entitled to Costs for any of the time that it was self-represented. McCarthy J. noted that Rule 10.29 provides that a successful party to an Application is entitled to Costs and that Rule 10.31(5) provides that, in appropriate circumstances, the Court may award Costs to a self-represented litigant for an amount part of or equal to the fees specified in Schedule C. McCarthy J. reviewed Rule 10.33, which lists considerations that a Court may take into account when making a Costs award. Justice McCarthy concluded that, given the circumstances, particularly the length of the Trial, the complicated facts, and the degree of conflict between the parties, the Plaintiff was entitled to Costs during the time it was self-represented in accordance with Rule 10.31(5).

McCarthy J. held that, despite the Formal Offers between the parties, an award of double Costs pursuant to Rule 4.29 was not appropriate. The Plaintiff also argued that the Defendant should be penalized for delay pursuant to Rule 5.12; specifically, for its failure to comply with Rule 5.10, which provides that a party must subsequently disclose records that it discovers in its possession that are relevant and material if it has not already disclosed them. McCarthy J. rejected this argument and did not find that the Defendant's actions caused significant delay. Justice McCarthy also rejected the Plaintiff's argument that they should be awarded inflation under Rule 10.41(3)(d) as this Rule deals with how an Assessment Officer may set Costs.

RO-DAR CONTRACTING LTD V VERBEEK SAND & GRAVEL INC, 2016 ABCA 123 (SLATTER, MCDONALD AND BIELBY JJA)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.10 (Subsequent Disclosure of Records)

The Plaintiff appealed an Order dismissing their Action for long delay under Rule 4.33. The Chambers Judge who had granted the dismissal of the Action provided a summary of the litigation history, which included, amongst other things: (i) the Defendants complying with an Order compelling answers to questions from Examination for Discovery on October 4, 2010; (ii) settlement discussions between October 2012 and February 2013; (iii) the Defendants disclosing additional detailed invoices on October 22, 2012 as part of the settlement discussions; and (iv) the Plaintiff serving a Supplemental Affidavit of Records on October 30, 2013 with a missing Schedule 1. Prior to the initial Application for dismissal for long delay, the Plaintiff served their missing Schedule 1 with a Supplemental Affidavit of Records.

The Master dismissed the Application and a Justice overturned the prior Order and granted a dismissal of the Action on Appeal.

The parties agreed that the Defendants' compliance with the Order on October 4, 2010, was a significant advance in the Action. The new Rules came into force on November 1, 2010, effectively starting a three year drop dead period. Therefore, the relevant period of consideration was between November 1, 2010, and the date the Application to dismiss was filed on February 24, 2014. The Court of Appeal noted that the Chambers Judge had applied a functional approach and stated that settlement initiatives could significantly advance an Action, but the discussions in this Action accomplished little. The Chambers Judge also held that the failure to include Schedule 1 in the Supplemental Affidavit of Records was inadvertent, but that this step did not advance the Action.

The Court of Appeal referred to Rules 4.31 and 4.33 as the two Rules that deal with delay, and noted that the functional approach was adopted by the 2013 amendments to the Rules. It was held that the phrase "materially advances" in the prior Rule had the same meaning as a "significant advance" in new Rule 4.33.

The Court observed that production of new information or documents can significantly advance an Action, but the nature of those documents and their importance to the litigation must be examined. The Court considered the disclosure of detailed invoices on October 22, 2012. One of the issues in the Action was how much the Plaintiff was entitled to be paid. As such, the invoices were relevant and material, and the Defendants were required to produce them under Rule 5.10. They should have done so in a Supplemental Affidavit of Records, as opposed to attaching them to a settlement letter on a "without prejudice" basis. These documents were important to both parties and their production constituted a significant advance in the Action. Therefore, the Appeal was granted and the Action was restored.

WEAVER V CHERNIAWSKY, 2016 ABCA 152 (BERGER, MARTIN AND ROWBOTHAM JJA)
Rules 4.33 (Dismissal for Long Delay) and 15.3 (Dispute Resolution Requirements)

The Plaintiff appealed a Decision which struck her Action for long delay. The Plaintiff's Action was commenced in 2004, and Questioning took place in May 2009. In October 2011, the Plaintiff's counsel produced a copy of a written note which had not been produced earlier due to inadvertence. In November 2011, Plaintiff's counsel confirmed with the Court that the parties had agreed to attend Judicial Dispute Resolution ("JDR"); however, none of the parties' agreed dates were available from the Court, and no further attempt was made to schedule a JDR. In June 2014, the Defendants applied to dismiss the Plaintiff's Claim under Rule 4.33. A Master held that disclosure of the written note did not significantly advance the Action, but the agreement to participate in the JDR did. The Defendants appealed. The Justice held that the last significant advance in the Action was Questioning which occurred more than 3 years before the Application to dismiss for long delay. The Plaintiff then appealed.

The Court of Appeal confirmed that the delay Rules apply a functional approach, which require determining whether a particular step significantly advanced the Action by moving the Action forward in a "meaningful way considering its nature, value, importance and quality". A Court is also to look at the genuineness and timing of the step at issue. The emphasis is on substance, not form. The Court of Appeal held that the agreement to have a JDR, and subsequent correspondence with the booking Coordinator, constituted nothing more than a failed attempt at scheduling the JDR which did not materially advance the Action. The Court rejected the Plaintiff's assertion that agreeing to participate in an alternative dispute resolution ("ADR") process significantly advanced the Action because it is a mandatory step required by the Rules. Because the Court's analysis is one of substance, not form, even taking mandatory steps imposed by the Rules does not necessarily significantly advance the Action for the purposes of Rule 4.33. Secondly, because Questioning took place before November 2010, Rule 15.3 operated to make Rules 4.16 and 8.4 (which require some form of ADR before a Trial date could be requested) inapplicable.

With respect to the production of the written note, the Court held that its contents had already been extensively covered in Questioning. It therefore could not be said to have narrowed the issues in dispute or moved the matter closer to resolution. Accordingly, it did not significantly advance the Action. The Appeal was dismissed.

KOHAN V KOHAN, 2016 ABCA 125 (MARTIN, SLATTER AND VELDHUIS JJA)
Rule 5.6 (Form and Content of Affidavit of Records)

The Defendant appealed a Judgment granting child support and spousal support. One of the issues in the Appeal was whether adequate evidence was adduced that the parties' daughter ought to be considered a dependant for the purposes of child support. The Trial Judge had awarded child support for a period in which the child was over the age of majority. The Court of Appeal found there was insufficient evidence regarding the child's present and intended educational plan to support this finding, and that the Plaintiff (Respondent) had failed to meet the burden of proof for child support. The Respondent argued that the burden of proof at Trial had been met by noting that she had answered 99 Undertakings and provided 45 Releases with respect to documents in the Affidavit of Records. The Court of Appeal noted that Rule 5.6 requires each party to produce "relevant and material" documents under their control, and that providing a Release to allow the other party to obtain a record does not satisfy this obligation. The Court held that the party that controls the document must obtain and produce it.

The Court also noted that, even where a party takes a Release, and does nothing with it, that does not affect the burden of proof at Trial. A party who fails to produce relevant and material records cannot take the position at Trial that missing evidence is the responsibility of the other party because that party had obtained a Release.

WEATHERFORD CANADA PARTNERSHIP V ADDIE, 2016 ABQB 188 (VEIT J)
Rules 5.31 (Use of Transcript and Answers to Written Questions), 6.6 (Response and Reply to Application), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 7.3 (Summary Judgment) and 13.6 (Pleadings: General Requirements)

Two of the Defendants applied for leave to Amend their Statements of Defence to plead the *Limitations Act*, RSA 2000, c L-12, and, if the amendment Application was granted, for Summary Dismissal of the Plaintiff's Claim. The parties agreed that the amendments need only cross a low bar, but that they should not be allowed if they cause the party opposite prejudice which cannot be compensated by Costs, or if the proposed amendments are hopeless. The parties also agreed, with respect to Summary Judgment, that there has been a shift in the legal culture which now supports the granting of Summary Judgment in situations where uncontroverted evidence establishes that there is no genuine issue for Trial.

The Defendants objected to the filing of an Affidavit by Weatherford because it was filed after the parties' written briefs had been filed. Justice Veit allowed the Affidavit in question stating that there were procedural

uncertainties including whether the Defendants were applying only to amend their Statements of Defence, or whether the Application for Summary Judgment would be included in the Application as well. The Defendants also objected, pursuant to Rule 5.31(2), to Weatherford's use of portions of the transcript of Questioning of one of its own witnesses. Veit J. noted that Weatherford could not use its own witness's Questioning evidence in a self-serving way. However, in this case, it was entitled to ensure that any excerpt from its witness' evidence constituted a fair representation of that witness' evidence. The Defendants also objected, pursuant to Rule 6.7, to Weatherford's use of excerpts from the transcripts of cross-examination on Affidavit by Weatherford's affiant. Justice Veit held that the use of this evidence was used to ensure that a fair representation of that witness' evidence was before the Court.

The parties also disagreed on whether laches and acquiescence could be raised without having been pleaded. Justice Veit noted that the requirement of Pleadings is to state the facts, not to state the law. Her Ladyship also noted that Rule 13.6(3) lists a number of arguments that must be pleaded if a party wishes to rely on them at Trial. The list does not include laches and acquiescence.

With respect to Summary Judgment, Veit J. commented that the parties are required to put their best foot forward, and the Court is entitled to, and should, grant the Application if it can fairly do so on the basis of the material put forward, without requiring a Trial.

Veit J. allowed the amendment to the Statement of Defence, and concluded that there was no genuine issue for Trial, given that the limitations issue could be fairly decided on the basis of the evidence before the Court. Her Ladyship granted the Defendants' Summary Judgment Application accordingly.

GEOPHYSICAL SERVICE INCORPORATED V ENCANA CORPORATION, 2016 ABQB 230 (EIDSVIK J)
Rule 5.36 (Objection to Expert's Report)

The Plaintiff sued a number of Defendants in separate Actions for breach of copyright and breach of contract. The Case Management Judge ordered the trial of two common issues regarding the breach of copyright claim in an attempt to help streamline the Actions and clear the Court's docket.

In the Trial in respect of the two common issues, Eidsvik J. considered what the effect of the Regulatory Regime was on the Plaintiff's claims, and whether or not copyright could subsist in seismic materials of the kind that were the subject matter of the Plaintiff's claims. The evidence during the Trial of the two common issues was considerable, and included the evidence of five experts. During the Trial, the Plaintiff objected to the evidence of one of the experts, arguing that he was biased because he had previously been employed by one of the Defendants. Eidsvik J. determined that the expert's former employment with one of the Defendants did not necessarily mean that his evidence was biased for the Trial of the common issues. Justice Eidsvik accepted the expert's evidence, noting that a party objecting to the opinion of an expert must raise the objection in advance of Trial, and must notify the party serving the report. Her Ladyship noted that, although Rule 5.36 does not specifically refer to an expert's qualifications being objected to in advance, as opposed to their opinion, it is still good practice to make an objection to an expert's qualifications in advance of Trial, pursuant to Rule 5.36.

Eidsvik J. determined that copyright could and did exist in the seismic materials that were at issue; however, under the existing Regulatory Regime, the Defendants were permitted to disclose these materials after a certain amount of time, and therefore they had not breached the Plaintiff's copyright.

FELDMAN V BENDLE GLASS CO (1975) LTD, 2016 ABQB 219 (LEE J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiffs appealed from a Master's Decision which granted the Defendants' Summary Dismissal Application. The Master determined that the Plaintiffs had extensive knowledge of the requisite facts more than two years prior to commencing their Action, and that a purported standstill

agreement could not preserve the Plaintiffs' claims since it was entered into after the expiry of the limitation period. Justice Lee reviewed Rules 6.14 and 7.3 and observed that, given that the hearing was *de novo*, no standard of review was applicable.

The Plaintiffs filed transcripts of the proceedings before the Master and their new evidence late. The Plaintiffs applied to extend timelines, and Justice Lee held that, although the Plaintiffs' counsel was not very diligent about the deadlines, nothing prejudicial resulted from the delay.

Justice Lee stated that Rule 7.3 establishes a "merit based" test for Summary Judgment in Alberta: the Court will grant Summary Judgment where there is no issue of genuine merit requiring Trial. Justice Lee considered evidence contained in an Affidavit filed subsequent to the Master's Decision, filed pursuant to Rule 6.14(3), which set out *prima facie* evidence that there was a standstill agreement in place. His Lordship held that the issue regarding the existence and scope of the standstill agreement was an issue of fact which should be determined at Trial.

Justice Lee noted that the Application for Summary Judgment was brought many years after the Statement of Claim was filed, and observed that a timely and just adjudication of the issues necessitated that the parties proceed expeditiously to Trial. The Appeal was allowed and the Summary Dismissal set aside.

BUSINESS BLOSSOMS INC V BLOSSOMS FRESH FRUIT ARRANGEMENTS LTD, 2016 ABQB 275 (YAMAUCHI J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

Business Blossoms Inc. ("Business") appealed the dismissal of its Summary Judgment Application. Business was seeking Summary Judgment against Blossoms Fresh Fruit Arrangements Ltd. ("Fresh Fruit") in relation to the nature of the relationship between the parties and its net losses for failed retail operations. Yamauchi J. noted that, pursuant to Rule 6.14, an Appeal from a Master's decision was a hearing *de novo* and the standard of review was correctness. Further, when applying Rule 7.3, Summary Judgment could only be granted to a moving party if the non-moving party's position was without merit. In this case, Business was required to show that Fresh Fruit's position was without merit, such that the facts and law made Business's position "unassailable" and "so compelling that the likelihood of success is very high". When balanced against Section 19 of the *Franchise Act*, RSA 2000 c F-23, the Court stated that Fresh Fruit first bore the onus of proving on a balance of probabilities that the arrangement between it and Business was not a "franchise". If it succeeded in this, Business would not have met its onus and the Court could grant Summary Judgment in its favour. If it did not succeed in this, the Court was required to move on and consider whether Business could meet the test for Summary Judgment. The moving party was required to present "uncontroverted facts and law which entitle it to judgment against the nonmoving party".

Yamauchi J. was unable to determine whether the relationship between Blossoms and Fresh Fruit was a franchise based on the evidence before the Court. In this case, there were disputed facts and law that required a full Trial of the issues. The record before the Court did not show that Business's position was "unassailable" and His Lordship dismissed the Appeal of the Master's Order.

LINDE CANADA LIMITED V LUFF INDUSTRIES LTD, 2016 ABQB 298 (WILSON J)
Rules 6.14 (Appeal from a Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff appealed from a Master's Decision which dismissed its Application for Summary Judgment as against the Defendant, and refused Summary Dismissal of the Defendant's Counterclaim. Wilson J. referred to Rule 6.14 which governs appeals of Master's decisions. Justice Wilson reviewed the record and observed that no further or additional evidence was offered by either party.

With respect to the Summary Judgment Application, Wilson J. noted that, essentially, this Action arose from a contractual dispute. Wilson J. found that the underlying contract was unclear, and the Master was correct in

determining that one of the real issues in the case was the expectations of the parties. Wilson J. agreed that there was a genuine issue for Trial and so upheld the Master's Decision to refuse Summary Judgment as against the Defendant.

Justice Wilson then considered the appeal of the Decision which denied Summary Dismissal of the Defendant's Counterclaim. His Lordship noted that the Counterclaim was over a matter of an exclusionary clause in the contract between the parties. After reviewing prior leading authority with respect to exclusionary clauses, Wilson J. found that there was no evidence to support the claim that the exclusion clause should not be applied. Wilson J. therefore allowed the Plaintiff's Appeal and granted Summary Dismissal of the Counterclaim.

FELDMAN V BENDLE GLASS CO (1975) LTD, 2016 ABQB 321 (LEE J)
Rules 6.14 (Appeal From Master's Judgment or Order), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs successfully appealed a Summary Dismissal decision, sought Costs for the Appeal and sought the return of the Costs awarded by the Master. The Defendant condominium corporation (the respondent on the Appeal) argued that the Court should not grant Costs for the Appeal or, alternatively, that Costs should be in the cause. The Defendant submitted that a return of the Costs awarded by the Master was not warranted because of the Plaintiffs' improper Affidavit, admissions during Questioning on Affidavit, and their attempt to rely on evidence not properly before the Court. The Defendant argued further that the Plaintiffs also failed to comply with the procedural requirements of Rule 6.14 at the Appeal.

Justice Lee referred to Rules 10.31 and 10.33, and the Court's general discretion to grant Costs. His Lordship held that the procedural and evidentiary irregularities were due to the conduct of the Plaintiffs' former counsel and, as such, the Plaintiffs should not be denied a return of their Costs. At the Appeal, the Defendant waived all of the procedural irregularities when the matter was heard; and, the Defendant did not suffer any prejudice from the deficiencies. Therefore, the irregularities had minimal bearing with respect to Costs. The Plaintiffs were awarded their Costs on the Appeal and a return of the thrown away Costs previously paid pursuant to the Master's Order.

ELKOW V SANA, 2016 ABQB 235 (GRAESSER J)
Rules 6.37 (Notice to Admit) and 7.3 (Summary Judgment)

One of the Defendants in a defamation Action, Ms. Sana, applied to settle the terms of a Judgment following a Summary Judgment Application. Graesser J. had granted Summary Judgment of some of the Plaintiff's claims, and had issued a supplemental Decision with respect to damages. Ms. Sana objected to the supplemental Decision, arguing that an assessment of damages should not have been removed. Ms. Sana also argued that the formal Judgment should clarify that the claims for which Summary Judgment were not granted should be expressly dismissed. Graesser J. stated that, generally speaking, a Plaintiff who applies for Summary Judgment and fails is not at risk of their Action being dismissed. Similarly, a Defendant who brings a Summary Dismissal Application and fails will not, as a result, have Judgment entered against them. Graesser J. therefore declined to expressly dismiss those claims which remained extant after Summary Judgment.

The Plaintiff had argued that there was a deemed admission of liability by Ms. Sana because a Reply to Notice to Admit Facts contained only a bare denial of the facts which the Plaintiff argued was not made in accordance with Rule 6.37(3)(a). The Plaintiff argued that the Rule requires that a denial to a Notice to Admit Facts "set out in detail the reasons why the fact cannot be admitted". Justice Graesser considered this a technical but fair argument. However, His Lordship held that it was inappropriate to determine issues of defamation and malice on the basis of a deemed admission which resulted from "imperfect compliance" with the Rules relating to Notices to Admit.

336239 ALBERTA LTD (DAVE'S DIESEL REPAIR) V MELLA, 2016 ABQB 190 (SHELLEY J)
Rules 7.3 (Summary Judgment) and 9.24 (Fraudulent Preferences and Fraudulent Conveyances)

The Plaintiff obtained a Consent Judgment as against the Defendants and subsequently learned that one of the Defendants had been using his wife's bank account to divert funds that would otherwise be subject to enforcement proceedings. The Plaintiff sought Judgment against the Defendant's wife, who was not a party to the Action. The Plaintiff argued that the *Fraudulent Preferences Act*, RSA 2000, c F-24, or the *Statute of Elizabeth*, 13 Eliz I, C-5 (UK) allowed for a Judgment against a non-party recipient of assets who no longer had possession of the assets and received little or no benefit from them.

Shelley J. noted that Rule 9.24 only permitted the Court to order a non-party to an Action who received wrongfully conveyed property to sell that property to pay the debt owed pursuant to the Action. The *Statute of Elizabeth* did not give the Plaintiff the right to damages or compensation as that statute only allowed the Court to set aside a conveyance. Further, as the Plaintiff did not bring an Application for Summary Judgment under Rule 7.3, the Court was not permitted to grant Judgment against the Defendant's wife as a non-party.

After examining the impugned transactions, the Court concluded that there was a fraudulent conveyance by the Defendant to his wife; therefore, the Plaintiff was required to commence an Action against the Defendant's wife, since Rule 9.24 and the *Statute of Elizabeth* only provided for seizing and selling the transferred asset.

1059028 ALBERTA LTD V CAPIO OILFIELD SERVICES LTD, 2016 ABQB 234 (MASTER SCHULZ)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Defendants applied for Summary Dismissal on the basis that the Plaintiffs' claims were based on an unenforceable Restrictive Covenant in an agreement between the parties. The Plaintiffs cross-applied seeking a declaration that the Restrictive Covenant was valid and enforceable.

The Plaintiffs argued that the Application for Summary Judgment should be dismissed because the Defendants' Affidavit did not contain a statement swearing positively that there was no merit to the Claim. Master Schulz noted that, because a Summary Judgment Application may dispose of all or part of a Claim, Rule 13.18(3) applies. It requires that the Affiant swear the Affidavit based on his or her personal knowledge. Master Schulz stated that "the magic words are not necessary, but evidence on personal knowledge is necessary". The Affiant's role is to provide the Court with the evidence required to form an opinion on the issues in question. The presence or absence of a declaration that a claim or defence has no merit will not have any bearing on an Application for Summary Judgment.

Master Schulz held that the Restrictive Covenant was valid and enforceable and dismissed the Defendants' Application for Summary Judgment.

ALBERTA V GRETER, 2016 ABQB 293 (MASTER SCHULZ)
Rule 7.3 (Summary Judgment)

After receiving her PhD, the Defendant failed to repay her student loans from the Government of Alberta in the amount of over sixty thousand dollars. The Plaintiff argued that the Defendant had breached the loan contract, and they applied for Summary Judgment pursuant to Rule 7.3 on the basis that the Defendant had no real defence to the claim. Master Schulz observed that the Defendant had used some "freeman on the land" tactics, and had also informed the Plaintiff that she would not be attending the Summary Judgment Application. The Defendant had also made arguments which the Courts have referred to as "Organized Pseudolegal Commercial Arguments" ("OPCA").

The Defendant had delivered documents to the Plaintiff which unilaterally imposed several terms and obligations on the Plaintiff. Master Schulz determined that the Defendant had no basis in law to make any of the demands or to impose any obligations on the Defendant. Further, Master Schulz held that the Defendant's position was contractually

and legally wrong, and that she had no defence to the government's action to enforce the outstanding student loan debts. Master Schultz awarded Summary Judgment in favour of the Plaintiff.

CLEAR HILLS DEVELOPMENT CORPORATION V HORSEMAN, 2016 ABQB 341 (ROSS J)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit) and Schedule C

The Defendants applied for Summary Dismissal of the claim against them by the Plaintiff, Clear Hills Development Corporation. The Defendants had brought a prior Application in 2014 to summarily dismiss the claim. Ross J. dismissed the earlier Application, as it did not meet the test for Summary Dismissal, and suggested that the Summary Trial Rule might eventually be employed to dispose of some of the issues. The Defendants argued that the subsequent Application was appropriate because the law had developed since the 2014 Summary Dismissal Application.

The Court agreed that the law pertaining to Summary Dismissal had developed since the 2014 Application; specifically, Ross J. noted the 6 step process for Summary Judgment Applications formulated by Master Schlosser in *1214777 Alberta Ltd v 480955 Alberta Ltd*, 2014 ABQB 301. Justice Ross examined the parties' evidence using the 6 step analysis, and based on the lack of evidence from both parties, among other deficiencies, dismissed the Summary Judgment Application.

The Plaintiff sought solicitor and client Costs or enhanced Costs on the grounds that the Application was essentially a repeat of the 2014 Application and that it was *res judicata*. Ross J. held that the Application was not *res judicata*, as the 2014 Application did not result in a final Order. Additionally, the Court was not prepared to characterize the Application as an abuse of process. The Court awarded the Plaintiff Costs based on Column 4 of Schedule C, payable forthwith.

WAQUAN V CANADA (ATTORNEY GENERAL), 2016 ABQB 280 (WITTMANN CJ)
Rule 9.13 (Re-Opening Case)

Wittmann C.J. reserved Judgment in *Waquan v Canada (Attorney General)*, 2016 ABQB 191, and, prior to written reasons being issued, the Federal Court issued a Decision in a similar case. Counsel for several of the Plaintiffs asked Wittmann C.J. to reconsider the earlier Judgment in light of the Federal Court Decision. His Lordship noted that while Rule 9.13 represents an expansion of judicial discretion as compared with its predecessor, Rule 339 which merely provided for correction of clerical mistakes or errors arising from accidents, slips, or omissions, discretion under Rule 9.13 is not boundless. Taking Rule 1.2 into account and the principles of fairness, justice, and efficiency which are set out in that Foundational Rule, Rule 9.13 allows the Court to correct a plain and manifest error, but does not permit parties "another kick at the can".

Wittmann C.J. denied the request for a reconsideration of the Judgment, noting that the Federal Court Decision was not binding authority. The existence of a contrary, non-binding Decision is an insufficient ground to show a plain and manifest error. Further, the Federal Court Decision offered no new analysis for the circumstances in the instant case and did not, contrary to the argument of Plaintiff's counsel, "come to the exact opposite conclusion".

POLOMA INVESTMENTS LTD V YUEN, 2016 ABCA 93 (SLATTER, MCDONALD AND BIELBY JJA)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiffs appealed a Decision which set aside a Default Judgment against the Defendant, Yuen. The Court noted that a Default Judgment may be set aside in certain circumstances, including where no notice of the Claim was received by the Defendant pursuant to Rules 9.15(1)(b) and (3)(c) of the Rules. The Plaintiffs argued that there is a requirement that the Applicant seeking to set aside a Default Judgment must show, not only that the document was not served on them, but that they did not know of the document and that the document's contents

did not otherwise come to their attention. The Court noted that the established common law test for setting aside a Default Judgment under prior Rule 158, now Rule 9.15(3), directed that a Court may set aside or vary any Judgment entered on default or to commit a Defence to be filed by a party who has been noted in default.

The Court concluded that there was evidence before the Chambers Judge which allowed an inference to be drawn that the Respondent had no knowledge of the Claim made against him. Further, he promptly launched the Application to Set Aside once he was served with the resulting Default Judgment and identified an arguable defence to the Action. No evidence of prejudice was advanced by the Appellants. In the result, the Appeal was dismissed.

GEOPHYSICAL SERVICE INCORPORATED V ENCANA CORPORATION, 2016 ABQB 229 (STREKAF 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)

A Master granted twenty-six Orders for Security for Costs as against the Plaintiff, and the Plaintiff appealed. The combined amount of Security ordered to be posted by the Master was reduced by $431,655.75, but the success on the Appeal was mixed. The parties appeared before Justice Strekaf to obtain a direction with respect to Costs.

Justice Strekaf referred to Rules 10.29 and 10.31, stating that the Court has discretion in ordering Costs, and that Rule 10.33 provides the factors the Court should consider. Here, the relevant considerations included that: (i) the case involved multiple parties participating on the Appeal in numerous Actions; (ii) the amount in issue on the Appeal was $1.9 million; (iii) success was mixed; (iv) the issue was a matter of considerable importance to all parties; (v) the Appeal raised some novel arguments; (vi) there was cooperation among counsel which allowed the Appeal to proceed efficiently; and (vii) there was no misconduct which would justify a Costs penalty. Strekaf J. held that the parties' proposals as to Costs were unreasonable, and as such, Her Ladyship apportioned less than what was requested.

ET V ROCKY MOUNTAIN PLAY THERAPY INSTITUTE INC, 2016 ABQB 299 (STREKAF 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

Following the Appeal of a Master's Decision in which the Defendant was successful, Strekaf J. heard the parties' submissions with respect to Costs. The Defendant, Mr. Kwan, requested solicitor and client Costs in an unspecified amount or, in the alternative, five times Column C in the amount of $30,000. Justice Strekaf noted that Rules 10.29 and 10.31 provide that Costs are in the Court's discretion, having regard to the considerations outlined in Rule 10.33.

Despite the allegations by the self-represented Plaintiff E.T. being "highly inflammatory" and not relevant to the issues before the Master or in the Appeal, Strekaf J. declined to award solicitor and client Costs. Her Ladyship noted that such Costs are reserved for exceptional circumstances of reprehensible, scandalous, or outrageous conduct; were inappropriate to award at this stage; and ought to be left to the discretion of the Trial Judge. However, Strekaf J. held that enhanced Costs should be awarded given that serious allegations of impropriety were unsuccessfully advanced by the Plaintiff. Her Ladyship awarded three times the taxable Column C costs, being $18,000.

VOISEY V CANADA (ATTORNEY GENERAL), 2016 ABQB 316 (CRIGHTON J)
Rule 10.29 (General Rule for Payment of Litigation Costs) and Schedule C

The Applicant, a prisoner at the Bowden Institution, applied unsuccessfully for *habeas corpus* following an involuntary transfer from the minimum security Grierson Institution to Bowden Institution, a medium security facility. The Attorney General sought Costs of the Application based on the presumption under Rule 10.29 that the successful party in a civil proceeding is entitled to their Costs. The Applicant argued that he should not be forced to pay Costs for enforcing his rights, and that he was impecunious.

Crighton J. noted that the default position for the quantum of costs for an application with no monetary value is based on Column 1 of Schedule C, but that section 8 of the Schedule contemplates an enhanced costs award where the subject matter is complex. The Applicant was entirely unsuccessful, and had filed voluminous application materials which were "not particularly well focused". Further, Justice Crighton found the Application to have been meritless, which raised the concern that the "unrestricted use of *habeas corpus* by incarcerated individuals risks unwarranted and expensive litigation paid out of the taxpayers' purse". The Attorney General was awarded costs of $1,000.

MILAVSKY V MILAVSKY ESTATE, 2016 ABQB 347 (MAHONEY J)
Rule 10.29 (General Rule for Payment of Litigation Costs) and Schedule C

The Defendants unsuccessfully applied for Summary Dismissal of the Plaintiff's Action. The Plaintiff applied for an Order for payment of 60% of the Costs that she incurred. The Plaintiff submitted that an award of Costs pursuant to Schedule C would be inadequate because Column 5 only entitled her to less than 5% of the actual fees incurred. The Defendants argued that Costs should be determined by the Trial Judge following Trial.

The Court first noted that it was well established that Costs were awarded on the assumption that a winning party deserved compensation for legal costs, but that full indemnity of legal fees could significantly hamper a party's access to justice. While Costs consequences were an effective mechanism for controlling litigation, not all unsuccessful cases were without merit; therefore, a party should not be unduly punished for bringing a losing Action. Mahoney J. held that Costs on indemnity basis were not justified based on the Application being complex or novel. Nonetheless, the Application required extensive research and preparation. His Lordship held that, while the Summary Judgment Application was not an abuse of process, the Plaintiff was successful in defending against a complex and voluminous Application. On this basis, Justice Mahoney awarded the Plaintiff Costs calculated using the draft Bill of Costs prepared by Plaintiff's counsel, except for the fee amount under Column 5 which was doubled.

TURNER V BELL MOBILITY INC, 2016 ABCA 188 (BERGER, WATSON AND ROWBOTHAM JJA)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.32 (Costs in Class Proceeding), 10.33 (Court Considerations in Making Costs Award) and 14.88 (Cost Awards) and Schedule C

Following a successful Appeal in a Class Action, the Defendant communication companies argued that they were entitled to Costs of the Appeal and Costs from the proceedings in the Court below.

The Court reiterated that it had jurisdiction to vary Trial Costs as a result of a successful Appeal in class proceedings pursuant to s. 37 of the *Class Proceedings Act*, RSA 2000 c C-16.5 and Rule 10.32. The Court noted that Rule 10.32 allows the Court to consider access to justice issues in awarding Costs in class proceedings. The Court considered the factors outlined in Rule 10.33, and awarded a multiplier of 1.5 times Schedule C for the Appeal and Trial level to the Defendants. Access to justice considerations persuaded the Court to reject levying a "sanction" of greatly enhanced Costs, despite noting that Schedule C Costs had not been updated in some 20 years and the lawsuit was potentially worth billions of dollars.

WAYMARKER MANAGEMENT (SILVER CREEK) INC V TIBU, 2016 ABCA 118 (BERGER, WATSON AND O'FERRALL JJA)
Rule 10.31 (Court-Ordered Costs Award)

The Appellant and the Respondents were involved in a dispute which resulted in a Restraining Order against the Appellant. The Trial Judge awarded Costs to the Respondents, despite the fact that the Respondents' counsel at Trial was also the Respondent Company's sole director and majority shareholder. On Appeal, the Appellant argued that Costs should not have been awarded in counsel's own cause. However, the Court of Appeal rejected

this argument, holding that the Trial Judge had broad discretion to award Costs pursuant to Rule 10.31(5). The Appeal against the Costs award was dismissed accordingly.

MA V COYNE, 2016 ABCA 119 (MARTIN, ROWBOTHAM AND O'FERRALL JJA)
Rules 10.31 (Court Ordered Costs Award), 10.41 (Assessment Officer's Decision) and 14.88 (Costs Awards)

The Defendants appealed from a Chambers Judge's Decision allowing an Order which awarded interpreters' fees incurred before a Statement of Claim was filed. An Assessment Officer had allowed the fees. The Assessment was appealed to the Court of Queen's Bench, and a Chambers Judge dismissed the Appeal. The Defendants appealed to the Court of Appeal.

The Court of Appeal noted that most cases decided under prior Rule 600 concluded that pre-commencement disbursements were not recoverable. However, the wording of the new Rules is very different. Rule 10.31 permits a Court of Queen's Bench Judge to award reasonable and proper Costs that a party incurred to file an Application or commence proceedings. For added clarity, Rule 10.31(2)(a) states that this includes "reasonable and proper costs that a party incurred to bring an action". The Court further noted that Rule 10.41 grants an Assessment Officer jurisdiction to "determine whether the costs that a party incurred to file an application or take proceedings are reasonable and proper costs". Rule 10.41(2)(a) further clarifies that "costs of a party under subrule (1) include the reasonable and proper costs that a party incurred to bring an action".

The Court held that the pre-commencement interpreters' fees were reasonable and proper Costs as contemplated by Rules 10.31 and 10.41. The Appeal was dismissed and the Court awarded the Respondents their Costs in accordance with Rule 14.88.

RO V DF, 2016 ABCA 170 (COSTIGAN, PAPERNY AND ROWBOTHAM JJA)
Rules 10.52 (Declaration of Civil Contempt) and 14.45 (Application to Admit New Evidence)

The Appellant, R.O., appealed two Orders of a Case Management Judge which declared the Appellant a vexatious litigant and held her in contempt of Court for failing to comply with two restricted Court Access Orders. The Appellant also brought three Applications to admit new evidence.

The Court of Appeal noted that, under Rule 10.52(3), a finding of contempt required that the person know that they had breached a Court Order with the burden of proof for such a finding being beyond a reasonable doubt. The Case Management Judge held that there was no evidence which raised a reasonable doubt that the Appellant was responsible for breaching the Restricted Access Orders. In response to this finding, the Appellant sought to adduce new evidence on appeal. In this instance, the bulk of the new evidence consisted of an Expert's Report and the supporting Affidavits for that Report. The Court concluded that the Expert's Report could not be admitted because it did not meet the criteria set out in *R v Palmer* [1980] 1 SCR 759, and no injustice would arise from a decision not to admit it. While the Appellant submitted that time and expense prevented her from obtaining the Report earlier, the Court noted that she did not request an adjournment of the Application and, further, the Report contained no new evidence. The purpose of the Report was to corroborate or bolster evidence that was before the Case Management Judge. The Court noted that the appellate process could not be "routinely used to augment the trial record"; therefore, the Applications to admit new evidence were dismissed. Further, the Court noted that the penalty imposed by the Judge in striking the Statement of Claim was a reasonable exercise of the Court's discretion.

With respect to the Vexatious Litigant Order, the Court of Appeal noted that the reasons for granting the Order were focused on this Action against the Respondent. The Court of Appeal held that the Order was too broad in that there was insufficient evidence to support a finding that the

Appellant had a history of "'persistently' engaging in any of the prohibited actions" against anyone other than the Respondent. Based on this finding, the Court of Appeal varied the Order to specifically require that the Appellant seek leave to the Court before commencing or taking any steps in litigation against the Respondent and those associated with him.

IBU V LAH, 2016 ABCA 108 (SLATTER JA)
Rules 13.4 (Counting Months and Years), 14.4 (Right to Appeal), 14.8 (Filing a Notice of Appeal), 14.14 (Fast Track Appeals), 14.16 (Filing the Appeal Record – Standard Appeals), 14.17 (Filing the Appeal Record - Fast Track Appeals), 14.24 (Filing factums – Fast Track Appeals) and 14.27 (Filing Extracts of Key Evidence)

The Appellant ("IBU") applied to permit the late filing of his Appeal. The Decision being appealed from was pronounced on February 9, 2016, which provided for a filing deadline of March 9, 2016 in accordance with Rule 13.4(1). IBU attempted to file the Appeal on that date, but was unable to do so because of some uncertainty as to whether he was entitled to have the filing fee waived. On March 10, 2016, he returned with documentation clarifying his entitlement to waiver of the filing fee. Rule 14.8(2)(a)(iii) requires the Appeal to be filed within "one month", so the filing was one day late.

Justice Slatter noted that the Appeal was brought pursuant to section 21 of the Divorce Act, RSC 1985, c 3 (2nd Supp), which requires filing within "30 days". Rule 14.8(2)(a)(i) recognizes the timelines set out in another enactment for filing an Appeal. Because the Decision was rendered in February, which has only 29 days, technically the Appellant was not late in filing the Appeal and no extension of time was required. Justice Slatter set out new deadlines, as the Appeal was a Fast Track Appeal under Rule 14.14(2)(b), and stated that the Respondent's materials were required to be filed in accordance with Rules 14.24(1)(b) and 14.27(3). His Lordship directed that, if the deadlines were not met, then the Appeal would be struck under Rule 14.16(3).

KE V CSM, 2016 ABQB 342 (BROWNE J)
Rule 14.5 (Appeals Only With Permission)

In a family law dispute, KE appealed an Order from the Provincial Court which denied her access to children born from various relationships. KE was the subject of an Order from the Provincial Court restricting her access to Provincial Court processes.

Justice Browne noted that Rule 14.5(1)(j) requires a person who is subject to a vexatious litigant Order to obtain leave to appeal, and that denial of leave is final. According to prior leading authorities, this leave requirement applies to any vexatious litigant declaration made under the *Judicature Act*, RSA 2000, c J-2, the *Family Law Act*, SA 2003, c F-4.5, or under a superior Court's inherent jurisdiction. In this case, KE was only restricted from activities in the Provincial Court of Alberta, and therefore her Application to appeal the Provincial Court's Order was not subject to a vexatious litigant Order. Browne J. considered the substance of KE's Appeal of the Provincial Court Decision, and returned the matter to the Provincial Court for consideration of materials which would be relevant to an Application for leave to appeal.

SETTLEMENT LENDERS INC V BLICHARZ, 2016 ABCA 109 (ROWBOTHAM JA)
Rules 14.5 (Appeals Only With Permission), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

The Applicant, Blicharz, sought leave to Appeal a prior Decision which denied her Application to set aside a Default Judgment. The Applicant's filing of a Notice of Appeal was out of time by four months, and her Appeal was eventually struck for failure to file the Appeal Record in a timely fashion. She then brought an Application to restore the Appeal or extend the deadline to file the Appeal Record. That Application was dismissed due to significant delay and a lack of arguable merit of the Appeal.

Justice Rowbotham stated that an Appeal of the dismissal required leave pursuant to Rule 14.5. Her Ladyship noted that the test for leave to Appeal is that permission can

be granted if the Applicant establishes that there is: a question of general importance; a possible error of law; an unreasonable exercise of discretion; or a misapprehension of important facts.

Rowbotham J.A. found that there was no question of general importance, no error of law, and no unreasonable exercise of discretion, emphasizing the Applicant's delinquency in following procedural Rules. The Applicant contended that she did not receive legal advice at the time she entered into the agreements which were the subject of the original litigation, and the failure to consider this constituted a misapprehension of important facts. Rowbotham J.A. held that the Applicant had had legal advice both during the present Appeal and in the Court below. Rowbotham J.A. also reiterated that the test for restoration under Rule 14.47 and the test for extension of time to file an Appeal both require consideration of the factors of delay and arguable merit of the Appeal. The Application for leave was accordingly denied.

CONDOMINIUM CORPORATION NO 0311443 V GOERTZ, 2016 ABCA 167 (PAPERNY, ROWBOTHAM AND VELDHUIS JJA)
Rules 14.5 (Appeals Only With Permission) and 14.38 (Court of Appeal Panels)

The Applicants, a condominium corporation and condominium management company, filed caveats against, and sought Court Orders to foreclose on properties for which condominium fees were not paid. The individual Respondent argued that he did not owe the Applicants anything, and therefore the Caveats and proposed foreclosure Orders were baseless. The Respondent also counterclaimed for $200,000 for general and punitive damages, as well as out-of-pocket expenses. The Chambers Judge summarily dismissed the Counterclaim, and ordered the Respondent to pay damages of $1,562.62 plus Costs. The Respondent appealed, and the Applicants applied to strike the Appeal. The Application was initially brought before a single Justice of the Court of Appeal, who directed the Application to be heard by a panel, as only a panel may "allow or dismiss an appeal on the merits" under Rule 14.38(1)(a).

The main issue before the panel was whether the Respondent required permission to appeal pursuant to Rule 14.5(1)(g), which states that matters where the controversy in the appeal can be estimated in money and does not exceed the sum of $25,000 exclusive of costs cannot be appealed unless permission to appeal has been obtained from the Court. In this case, the dollar amount of the damages was well within the $25,000 limit. However, the panel held that the "matter in controversy" in this case was about more than money. It was appropriate to consider the extent that the Judgment under appeal affected the interest of the party prejudiced by it. Here, the Respondent contended that the Chambers Judge erred on whether there was a debt at all – and it is the fact of a debt, regardless of the dollar amount, that would give rise to the right to file a Caveat and to commence foreclosure proceedings. The Application to dismiss the Appeal was accordingly dismissed.

BARRY V INSTITUTE OF CHARTERED ACCOUNTANTS OF ALBERTA (COMPLAINTS INQUIRY COMMITTEE), 2016 ABCA 89 (WAKELING JA)
Rules 14.15 (Ordering the Appeal Record), 14.16 (Filing the Appeal Record – Standard Appeals), 14.20 (Contents of Appeal Record – Appeals from Tribunals), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Plaintiff's Appeal was struck pursuant to Rules 14.16(3) and 14.64(a) for failing to file the Appeal Record in time. Counsel for the Plaintiff subsequently presented a proposed copy of the Appeal Record to the Clerk, which confirmed that the records were in proper form. The Plaintiff Applicant then sought to restore his Appeal, pursuant to Rule 14.47, and filed an Affidavit which set out the reasons why he failed to file on time. Wakeling J.A. referred to Rules 14.15(1), 14.16(3), 14.20(1), 14.47(a), 14.64(a) and 14.65(3) stating that an Appeal may be restored when it is in the interests of justice to do so. The Court will consider such things as whether the Applicant intended to prosecute the Appeal; provided an explanation for the deficiency; moved with sufficient expediency to cure the defect; has arguable grounds in support of an Appeal; and has caused any prejudice to the Respondent.

Justice Wakeling held that the Appeal should be restored: the Plaintiff had demonstrated a clear intent to prosecute the Appeal; the error was due to counsel's misunderstanding that the Appeal tribunal would commence preparation of the record of proceedings; the Plaintiff applied promptly to restore; the Appeal was not frivolous; and there was no prejudice to the Respondent.

PINTEA V JOHNS, 2016 ABCA 99 (MARTIN, MCDONALD AND VELDHUIS JJA)
Rule 14.45 (Application to Admit New Evidence)

The Appellant was a Plaintiff in an Action arising from an automobile accident. The Action was under the direction of Case Management and in May 2014, the Case Management Judge directed the Plaintiff to produce his witness list and comply with procedural requirements for Trial. In July 2014, the Plaintiff moved, but failed to file a change of address with the Court and subsequently failed to attend further Applications and Case Management meetings. When the Plaintiff failed to appear at a Case Management meeting in January 2015, the Court held him in contempt and the Statement of Claim was struck. This final Order was also served on the Plaintiff's former address, but the Plaintiff became aware of the Order when it was also emailed to him.

The Plaintiff appealed the Order and both parties sought to adduce fresh evidence. The majority of the Court noted that the Plaintiff's Factum did not clearly state his grounds of appeal, but noted that he appeared to argue that the Application documents for the Case Management hearing were served on him improperly at his former address. The Respondents submitted that the Appellant only raised the new address on Appeal. The Majority applied the four part test from *R v Palmer*, [1980] 1 SCR 759, when determining whether or not to admit fresh evidence. Under the *Palmer* test, the Court must consider first, whether the evidence could have been adduced at Trial if the parties exercised due diligence. Second, the evidence must be relevant to a decisive issue in the Trial. Third, the evidence must be credible and fourth, the evidence could reasonably be expected to have affected the result. The Court added that, in applying the *Palmer* test, they must consider whether the "proposed evidence is or would be admissible under any rules of law applicable to its nature, its source, its continuity", and "its balance of probative force against prejudicial effect".

The Majority noted that the Appellant had not complied with Rule 14.45 in that he did not file a Notice of Application before the Court to introduce the fresh evidence, nor did he provide an Affidavit attesting to compliance with the *Palmer* factors. Given these failings, the Court held that the Applicant's fresh evidence failed the threshold requirement set out in *Palmer*. The Court then considered the Respondents' Application to adduce fresh evidence of the Applicant's "mischief" in presenting documents suggesting he had filed a change of address with the Court. The Majority held that this evidence met the *Palmer* requirements and clearly established that the Appellant's evidence was either not provided at all prior to Appeal, or was altered to make it appear as though the Appellant provided his new address to the Court. The Majority added that being a self-represented litigant did not excuse the Appellant's failure to comply with the Rules and the Appeal was dismissed.

In dissent, Martin J.A. focused on the Appellant being a self-represented litigant who could reasonably have expected to receive a significant award of damages. Martin J.A. opined that dismissing the Appellant's claim in such circumstances was a significantly disproportionate consequence for failing to file a change of address with the Court. Martin J.A. would have allowed the Appeal on the basis that dismissal of the Action was excessively punitive.