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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.

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

1.1	• STRATEGIC ACQUISITION CORP V MULTUS INVESTMENT CORPORATION, 2016 ABQB 681
1.2	• HUMPHREYS V HANNE, 2016 ABQB 579
	• AE V ALBERTA (DIRECTOR OF CHILD YOUTH AND FAMILY ENHANCEMENT), 2016 ABQB 591
	• PENN WEST PETROLEUM LTD V DEVON CANADA CORPORATION, 2016 ABQB 623
	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624
	• PACIFIC INVESTMENTS & DEVELOPMENT LTD V WOOD BUFFALO (REGIONAL MUNICIPALITY), 2016 ABQB 643
	• STRATEGIC ACQUISITION CORP V MULTUS INVESTMENT CORPORATION, 2016 ABQB 681
	• MAURICE V MATCHETT, 2016 ABQB 704
	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
	• AL-GHAMDI V ALBERTA, 2016 ABCA 324
	• JANSTAR HOMES LTD V ELBOW VALLEY WEST LTD, 2016 ABCA 417
1.4	• PENN WEST PETROLEUM LTD V DEVON CANADA CORPORATION, 2016 ABQB 623
1.5	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319

2.7	• CONDOMINIUM CORPORATION NO 0610078 V POINTE OF VIEW CONDOMINIUMS (PRESTWICK) INC, 2016 ABQB 609
2.11	• GAYTON V RINHOLM, 2016 ABCA 328
2.23	• PARK AVENUE FLOORING INC V ELLIS DON CONSTRUCTION SERVICES INC, 2016 ABCA 327

3.2	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671
3.5	• REGULAR V REGULAR, 2016 ABQB 570
3.13	• UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575
3.15	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.16	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.17	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.18	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.19	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.20	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.21	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.22	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.23	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673
3.24	• MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673

3.26	• KAMBOH V CHAMBERS, 2016 ABQB 711
3.27	• KAMBOH V CHAMBERS, 2016 ABQB 711
3.28	• KAMBOH V CHAMBERS, 2016 ABQB 711
3.56	• 1177620 ALBERTA LTD V AXCESS MORTGAGE FUND LTD, 2016 ABCA 404
3.65	• 1664992 ALBERTA LTD V 1260055 ALBERTA LTD, 2016 ABQB 732
	• D-LINE HOLDINGS LTD V AHLSTROM, 2016 ABCA 351
3.68	• FERNANDES V JENNINGS CAPITAL INC, 2016 ABQB 594
	• FLOCK V COMPLYWORKS LTD, 2016 ABQB 621
	• CONDOMINIUM CORPORATION NO 0723447 V ANDERS, 2016 ABQB 656
3.72	• 1177620 ALBERTA LTD V AXCESS MORTGAGE FUND LTD, 2016 ABCA 404
3.74	• CONDOMINIUM CORPORATION NO 0610078 V POINTE OF VIEW CONDOMINIUMS (PRESTWICK) INC, 2016 ABQB 609
	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624

4.1	• HUMPHREYS V HANNE, 2016 ABQB 579
4.2	• HUMPHREYS V HANNE, 2016 ABQB 579
4.10	• MAURICE V MATCHETT, 2016 ABQB 704
4.13	• AL-GHAMDI V ALBERTA, 2016 ABCA 324
	• AL-GHAMDI V ALBERTA, 2016 ABCA 403
4.14	• AL-GHAMDI V ALBERTA, 2016 ABCA 324
	• AL-GHAMDI V ALBERTA, 2016 ABCA 403
4.15	• AL-GHAMDI V ALBERTA, 2016 ABCA 403
4.22	• ACT FOR COMMUNITY SOCIETY V EDMONTON (CITY), 2016 ABQB 516
4.23	• ACT FOR COMMUNITY SOCIETY V EDMONTON (CITY), 2016 ABQB 516
4.24	• JONES V GEROSA, 2016 ABQB 614
	• GAJJAR V AULAKH, 2016 ABQB 659
	• SMITH V SMITH, 2016 ABCA 376
4.29	• JONES V GEROSA, 2016 ABQB 614
4.31	• STABILIZED WATER OF CANADA INC V BETTER BUSINESS BUREAU OF SOUTHERN ALBERTA, 2016 ABQB 543
	• RENKINN DEVELOPMENT INC (RENKINN DEVELOPMENT LTD) V STEVENS, ET AL 2016 ABQB 549
	• HUMPHREYS V HANNE, 2016 ABQB 579
	• MAURICE V MATCHETT, 2016 ABQB 704
	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
	• BRACE V WILLIAMS, 2016 ABCA 384
4.33	• STABILIZED WATER OF CANADA INC V BETTER BUSINESS BUREAU OF SOUTHERN ALBERTA, 2016 ABQB 543
	• RENKINN DEVELOPMENT INC (RENKINN DEVELOPMENT LTD) V STEVENS, ET AL 2016 ABQB 549
	• HUMPHREYS V HANNE, 2016 ABQB 579
	• AE V ALBERTA (DIRECTOR OF CHILD YOUTH AND FAMILY ENHANCEMENT), 2016 ABQB 591
	• MAURICE V MATCHETT, 2016 ABQB 704
	• BROST V KUSLER, 2016 ABCA 363
	• JANSTAR HOMES LTD V ELBOW VALLEY WEST LTD, 2016 ABCA 417

5.2	• CULLIHALL V LIYANAGE, 2016 ABQB 551
	• STRINGAM DENECKY LLP V SUN MEDIA CORPORATION, 2016 ABQB 692
5.5	• SCHMITZ ESTATE V BARON, 2016 ABQB 598
5.6	• CULLIHALL V LIYANAGE, 2016 ABQB 551
5.10	• SMITH V SMITH, 2016 ABCA 376
5.11	• PENN WEST PETROLEUM LTD V DEVON CANADA CORPORATION, 2016 ABQB 623
5.13	• CULLIHALL V LIYANAGE, 2016 ABQB 551
5.16	• SMITH V SMITH, 2016 ABCA 376
5.17	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671
	• STANKOVIC V 849450 ALBERTA LTD, 2016 ABQB 677
5.18	• STANKOVIC V 849450 ALBERTA LTD, 2016 ABQB 677
5.30	• PACIFIC INVESTMENTS & DEVELOPMENT LTD V WOOD BUFFALO (REGIONAL MUNICIPALITY), 2016 ABQB 643
5.31	• STRATEGIC ACQUISITION CORP V MULTUS INVESTMENT CORPORATION, 2016 ABQB 681
5.33	• STRINGAM DENECKY LLP V SUN MEDIA CORPORATION, 2016 ABQB 692
5.34	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671
5.39	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671
5.40	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671

6.3	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624
6.6	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624
6.7	• PENN WEST PETROLEUM LTD V DEVON CANADA CORPORATION, 2016 ABQB 623
6.14	• JARRETT V FLANNERY, 2016 ABQB 565
	• UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575

7.3	• UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575
	• CCS CORPORATION V SECURE ENERGY SERVICES INC, 2016 ABQB 582
	• SA REFUELING LTD V NORTHERN LIGHTS (COUNTY) (MUNICIPAL DISTRICT OF NORTHERN LIGHTS NO 22), 2016 ABQB 592
	• SCHMITZ ESTATE V BARON, 2016 ABQB 598
	• FLOCK V COMPLYWORKS LTD, 2016 ABQB 621
	• CONDOMINIUM CORPORATION NO 0723447 V ANDERS, 2016 ABQB 656
	• NEUFELD V COUNTY OF MOUNTAIN VIEW, 2016 ABQB 676
	• SIEBEN V TREMMEL, 2016 ABQB 686
	• BOWER V EVANS, 2016 ABQB 717
	• CONDOMINIUM CORPORATION NO 311443 V GOERTZ, 2016 ABCA 362
	• MCDONALD V BROOKFIELD ASSET MANAGEMENT INC, 2016 ABCA 375
7.5	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671

8.17	• SCHMITZ ESTATE V BARON, 2016 ABQB 598
	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671
8.20	• ROSS V EDMONTON (CITY), 2016 ABQB 730

9.1	• OOMMEN V CAPITAL REGIONAL HOUSING CORPORATION, 2016 ABQB 701
9.2	• OOMMEN V CAPITAL REGIONAL HOUSING CORPORATION, 2016 ABQB 701
9.5	• OOMMEN V CAPITAL REGIONAL HOUSING CORPORATION, 2016 ABQB 701
9.12	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624
9.13	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624
	• KS V WILLOX, 2016 ABQB 654
9.14	• AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624
9.30	• CONDOMINIUM CORPORATION NO 311443 V GOERTZ, 2016 ABCA 362
9.31	• CONDOMINIUM CORPORATION NO 311443 V GOERTZ, 2016 ABCA 362

10.31	• GAJJAR V AULAKH, 2016 ABQB 659
10.33	• REGULAR V REGULAR, 2016 ABQB 570
	• DECORE V DECORE, 2016 ABQB 572
	• JONES V GEROSA, 2016 ABQB 614
	• BLANKENSHIP V JENKS-COCHRANE PROPERTIES LTD, 2016 ABQB 642
	• KS V WILLOX, 2016 ABQB 654
	• GAJJAR V AULAKH, 2016 ABQB 659
	• EMSLIE V EMSLIE, 2016 ABQB 693
10.52	• OOMMEN V CAPITAL REGIONAL HOUSING CORPORATION, 2016 ABQB 701

11.5	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.6	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.7	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.8	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.9	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.10	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.11	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.12	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.13	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.14	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.15	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.16	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.17	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.18	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.19	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.20	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.21	• JARRETT V FLANNERY, 2016 ABQB 565
	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
11.23	• TOEWS V GRAND PALLADIUM VALLARTA RESORT & SPA, 2016 ABCA 408
11.25	• TOEWS V GRAND PALLADIUM VALLARTA RESORT & SPA, 2016 ABCA 408
11.27	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319

12.2	• BROST V KUSLER, 2016 ABCA 363
12.34	• BROST V KUSLER, 2016 ABCA 363
12.35	• BROST V KUSLER, 2016 ABCA 363
12.71	• MOLL V ALBERTA (CHILD, YOUTH & FAMILY ENHANCEMENT ACT, DIRECTOR), 2016 ABCA 400

13.4	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
13.5	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
13.6	• UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575
13.7	• UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575
13.18	• UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575
	• WALTER V WESTERN HOCKEY LEAGUE, 2016 ABQB 588
	• SCHMITZ ESTATE V BARON, 2016 ABQB 598
	• FLOCK V COMPLYWORKS LTD, 2016 ABQB 621
	• BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671
	• MCDONALD V BROOKFIELD ASSET MANAGEMENT INC, 2016 ABCA 375

14.2	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
14.5	• RENSONNET V UTTL, 2016 ABCA 316
	• PARK AVENUE FLOORING INC V ELLIS DON CONSTRUCTION SERVICES INC, 2016 ABCA 327
	• HOK V ALBERTA (JUSTICE & SOLICITOR GENERAL), 2016 ABCA 356
	• JORDAN V DE WET, 2016 ABCA 366
	• TD AUTO FINANCE (CANADA) INC V SMITH-JOHNSON, 2016 ABCA 388
	• ROBERTSON V ROBERTSON, 2016 ABCA 394
	• MOLL V ALBERTA (CHILD, YOUTH & FAMILY ENHANCEMENT ACT, DIRECTOR), 2016 ABCA 400
	• MUDRICK CAPITAL MANAGEMENT LP V LIGHTSTREAM RESOURCES LTD, 2016 ABCA 401
	• AL-GHAMDI V ALBERTA, 2016 ABCA 403
14.7	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
14.8	• TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319
14.14	• IBU V LAH, 2016 ABCA 383
14.16	• JORDAN V DE WET, 2016 ABCA 366
14.24	• IBU V LAH, 2016 ABCA 383
14.37	• TD AUTO-FINANCE (CANADA) INC V SMITH-JOHNSON, 2016 ABCA 315
	• TD AUTO FINANCE (CANADA) INC V SMITH-JOHNSON, 2016 ABCA 388
14.38	• RENSONNET V UTTL, 2016 ABCA 316
	• TD AUTO FINANCE (CANADA) INC V SMITH-JOHNSON, 2016 ABCA 388
14.64	• JORDAN V DE WET, 2016 ABCA 366
	• IBU V LAH, 2016 ABCA 383
14.65	• IBU V LAH, 2016 ABCA 383
	• ROBERTSON V ROBERTSON, 2016 ABCA 394
14.74	• GAYTON V RINHOLM, 2016 ABCA 328
	• ALBERTA VETERINARY MEDICAL ASSOCIATION V SANDHU, 2016 ABCA 336

14.88 • PARK AVENUE FLOORING INC V ELLIS DON CONSTRUCTION SERVICES INC, 2016 ABCA 327
14.90 • GAYTON V RINHOLM, 2016 ABCA 328
14.92 • HOK V ALBERTA (JUSTICE & SOLICITOR GENERAL), 2016 ABCA 356

SCHEDULE C • BLANKENSHIP V JENKS-COCHRANE PROPERTIES LTD, 2016 ABQB 642
• KS V WILLOX, 2016 ABQB 654

STRATEGIC ACQUISITION CORP V MULTUS INVESTMENT CORPORATION, 2016 ABQB 681 (MAHONEY J)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules) and 5.31 (Use of Transcript and Answers to Written Questions)

At the Trial related to the purchase and sale of a commercial building, and a right of first refusal contained in the purchase and sale agreement, Justice Mahoney considered the preliminary issue of the admissibility of read-ins to impeach the credibility of a witness, the former director of one of the Defendant corporations who had also worked for the Plaintiff corporation. The Plaintiff called the witness and examined him in chief, but did not cross-examine the witness or confront him with any portion of the previous transcript from Questioning. The Plaintiff then sought to use read-ins from the Questioning at the close of its evidence to impeach the credibility of the witness.

Justice Mahoney considered Rule 5.31 and s.22 of the *Alberta Evidence Act*, RSA 2000, c A-18, ("AEA") which codified the rule in *Browne v Dunn*. Justice Mahoney noted that when dealing with additional admissions which were not addressed in examination in chief, and are not tendered to impeach credibility, the Court may exercise its discretion to allow a party to read these admissions into the Trial record. His Lordship noted that this is consistent with the foundational Rules 1.1(1) and 1.2(2)(b), which mandate the just, fair, timely and inexpensive resolution of claims. Justice Mahoney held that to the extent the Plaintiff sought to introduce read-ins to impeach the witness' credibility this constituted a violation of s. 22 of the AEA and the rule in *Browne v Dunn*, and therefore those read-ins were inadmissible.

HUMPHREYS V HANNE, 2016 ABQB 579 (MICHALYSHYN J)
Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibilities of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendants applied to strike the Plaintiffs' Claim under Rule 4.31 on the basis of delay and alleged prejudice. Michalyshyn J. reviewed the Rule, and held that the Defendants' allegations of prejudice did not satisfy the test of significant prejudice under Rule 4.31(1), because they were general in nature and not supported by meaningful details. Further, the Defendants' allegations of inordinate and inexcusable delay failed to address the whole of the Action except in the most general terms. As the analysis for delay under Rule 4.31(2) is broader than a review of the most recent litigation activities, the Defendants were unable to demonstrate that there was inordinate and inexcusable delay in the whole Action that would amount to a presumption of prejudice under Rule 4.31(2). The Application was dismissed as a result.

Michalyshyn J. considered whether the Defendants had a positive obligation to move the Action along. The Court cited Foundational Rule 1.2, as well as Rule 4.1, both of which emphasize the timely and cost-efficient resolution of claims. The Court also cited Rule 4.2, which specifically sets out the parties' obligations, including the requirement to "respond in a substantive way and within a reasonable time to any proposal for the conduct of the action". Although the Plaintiffs also attempted to refer to Rule 4.2(c), the Court held that Rule 4.2(c) is inapplicable, as the case was not a complex case under the Rules. The Court ultimately concluded that although defendants

"should not encourage delay hoping that they will be successful in an Application under Rule 4.31 or 4.33", it is the Plaintiffs who are responsible for moving their Action forward. In this case, the Defendants were entitled to be "recumbent" in the face of the Plaintiffs' delay, and the Plaintiffs did not demonstrate that the Defendants had contributed to the delay by failing or refusing to cooperate.

Another issue was whether case management affected the analysis for a delay Application. The Court referred to prior case law, and held that case management does not relieve the parties of their obligations under the Rules, particularly Rule 4.1, to manage their dispute and attempt to resolve the Action in a timely and cost-effective way. Case management also does not relieve the Plaintiffs' of the responsibility to advance the Action. Under certain circumstances, participation in case management may be relevant in determining what substantive steps the parties have taken in an Action, and whether the Defendants have acquiesced to the delay. Whether case management constitutes a significant advance of an Action for the purpose of Rule 4.33 Applications is fact-specific to each case. Case law also indicated that "case management should not necessarily be held against defendants as a sign of acquiescence or waiver". The Court held that participation in case management does not alter the approach to a delay Application. In the case at bar, despite a case management Order that required the parties to complete certain steps, the Plaintiffs did not fulfil their obligations. The Defendants' participation in case management, therefore, should not affect their Application for dismissal due to delay.

AE V ALBERTA (DIRECTOR OF CHILD YOUTH AND FAMILY ENHANCEMENT), 2016 ABQB 591 (MASTER MASON)
Rules 1.2 (Purpose and Intention of these Rules) and 4.33 (Dismissal for Long Delay)

The Plaintiffs commenced four Actions concerning the education and medical treatment of their children, and subsequent apprehension of the children by the Director of Child Welfare. The Defendants in each of the four Actions applied to dismiss the Plaintiffs' Actions for long delay under Rule 4.33. The four Actions were directed to be tried together and there was no dispute that activities in one of the Actions might serve to advance the other Actions for the purposes of Rule 4.33. The Defendants submitted that the last activity that could have significantly advanced the Actions occurred no later than March 21, 2013, when the Plaintiffs supplied their producible records. The Plaintiffs submitted that several other subsequent steps had occurred that significantly advanced the Actions.

Master Mason noted that Rule 4.33(1) provides that, if three or more years had passed without a significant advance in an Action, the Court must dismiss the Action. Pursuant to Rule 4.33, for a step to significantly advance an Action, it must move the parties closer to a resolution. Master Mason noted that Rule 1.2 has shifted the dominant mechanism for resolving civil disputes from an emphasis on Trial to procedures such as Summary Dismissal and alternative dispute resolution. Additionally, the focus should be on the outcomes or consequences of anything done by the litigants to significantly advance the Action. Master Mason confirmed that the Court has no discretion to allow an Action to continue if the requirements of Rule 4.33 are met and it generally falls on the Plaintiff to keep the claim moving forward.

Master Mason considered whether the Plaintiffs' preparation and delivery of binders entitled "Summary of Facts in this Action" to the Defendants, which contained reproductions of the Plaintiffs' allegations, along with excerpts from produced records was a significant step. Master Mason held that the binders did not assist in the resolution of any of the issues between the parties, narrow the scope of the claim, or otherwise move the parties closer to resolution, so they were not considered a step under Rule 4.33. The Plaintiff had also proposed that adjourned Applications for Summary Dismissal that were never determined by the Court were a step to a significantly advance the Action. Master Mason noted that nothing was achieved by filing and subsequently adjourning the Summary Dismissal Applications; therefore, they did not significantly advance the Actions.

Master Mason also held that the circulation of a suggested Litigation Plan, and the Plaintiffs' counsel's withdrawal did not significantly advance the Action. The Plaintiffs

also suggested that their proposed Amended Amended Statements of Claim significantly advanced the Action. Master Mason did not agree, as the Defendants did not consent to the amendments and the Plaintiffs did not apply to the Court for Leave to make the amendments. Further, a letter sent by the Plaintiffs attempting to reduce the complexity of the four Actions did not provide new relevant and material information, narrow the issues, or provide any other form of progress toward resolution.

Master Mason held that no significant advancement of these four Actions occurred in the three year period after March 21, 2013, and all four Actions were dismissed for long delay pursuant to Rule 4.33.

PENN WEST PETROLEUM LTD V DEVON CANADA CORPORATION, 2016 ABQB 623 (MASTER PROWSE)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 5.11 (Order for Record to be Produced) and 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

The Plaintiff made an Application for an Order allowing it to question the Defendant's Affiant on the Defendant's Affidavit of Records. The Defendant took the position that this could only take place with leave of the Court, and that Questioning on an Affidavit of Records does not happen as of right. Master Prowse noted that the Rules of Court are silent on this issue, but the former Rules of Court dealt with this matter expressly and allowed for Questioning on an Affidavit of Records.

Master Prowse observed that Rule 6.7 provides that any person who makes an Affidavit in support of an Application or in response or reply to an Application may be questioned under oath on the Affidavit by a person adverse in interest on the Application. Master Prowse also considered Rule 5.11(2)(b) which specifies that the Court, when deciding whether to order the production of a record on Application, may permit Questioning on the original and any subsequent Affidavit of Records. Master Prowse considered these Rules in light of the Foundational Rules, specifically Rule 1.2, which provides that the purpose and intention of the Rules is to provide a means by which Claims can be fairly and justly resolved in a timely and cost-effective way. In addition Rule 1.4 states that the Court may make an Order with respect to practice or procedure in order to implement and advance the intention of the Rules outlined in Rule 1.2. Master Prowse stated that Questioning on an Affidavit of Records does not open up the scope of examination to the extent of a general Questioning.

Master Prowse determined that the Plaintiff should be permitted to question the Defendant's Affiant on its Affidavit of Records as of right, and the opposing party may apply to the Court if they believe the Questioning is unnecessary or abusive. The Application was granted.

AMIK OILFIELD EQUIPMENT & RENTALS V BEAUMONT ENERGY INC, 2016 ABQB 624 (MASTER MASON)
Rules 1.2 (Purpose and Intention of These Rules), 3.74 (Adding, Removing, or Substituting Parties after Close of Pleadings), 6.3 (Applications Generally), 6.6 (Response and Reply to Application), 9.12 (Correcting Mistakes or Errors), 9.13 (Re-Opening Case) and 9.14 (Further or Other Order after Judgment or Order Entered)

Following a hearing with respect to liability, during which the Defendant was held liable for breach of contract regarding the delivery of six units of oilfield equipment, Master Mason directed that the parties return at a later date for a determination with respect to the quantum of damages.

The Plaintiff submitted that it was entitled to damages equal to the contract price. The Defendant argued that the Plaintiff was not entitled to the entire amount on the basis that the Plaintiff was misnamed "Inc." rather than "Ltd" and was thus nonexistent and incapable of suffering damages; all the units ordered were paid for; the Plaintiff's employees had admitted its loss was only 40% of the contract value; the Plaintiff had not proven its losses; and the Plaintiff had not mitigated its damages.

With regard to the Pleadings referring to the Plaintiff as "Inc." rather than "Ltd", the Defendant argued that proceedings brought by a non-existent party must be null. Master Mason explained that this was a case of misnomer,

not a situation where a corporation had lost its status, therefore, the proceedings were not null. The Defendant argued further that amendments to remedy the naming error could no longer be made because a Judgment on liability had already been entered. It argued that Rules 9.12, 9.13 and 9.14 did not allow changes after Judgment was entered. Master Mason held that Rules 9.12 to 9.14 did not apply since the matter related to amending the Pleadings, not varying the Judgment with respect to liability.

Master Mason noted that the applicable Rules were 6.3, which allows Actions to be made pre- or post-Judgment, and Rule 3.74(2)(b) and (3), which allows the Court to add, remove, substitute, or correct the name of a party to an Action if the Court is satisfied that an Order should be made and if it would not result in prejudice to the other party. Further, the Defendant's position on the misnomer issue was not in line with Rule 1.2, as it did not address a true legal issue or attempt to facilitate the quickest means of resolving the claim.

The Defendant, in order to support its position on the quantum of damages, sought to rely on a new Affidavit included at the end of its Responding Brief which was filed one week before the hearing. Master Mason held that Rule 6.6(1) applied, and stated that "new evidence should not be submitted along with a Responding Brief in a Special Application". As a general principle, submitting new evidence in this way is not fair or efficient, and there is no reason that it should be necessary as the Parties generally have ample time to submit evidence in advance.

Master Mason concluded that the Plaintiff suffered a loss and it did not fail to mitigate its damages. Damages were assessed at $486,165.12.

PACIFIC INVESTMENTS & DEVELOPMENT LTD V WOOD BUFFALO (REGIONAL MUNICIPALITY), 2016 ABQB 643 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules) and 5.30 (Undertakings)

The Plaintiff applied to compel answers to Undertaking requests arising from a Questioning on the Defendant's Affidavit of Records. The Defendant opposed the Application on the basis that the questions asked were overly broad.

Master Robertson noted that Questioning on an Affidavit of Records is "as of right". Master Robertson held that the nature of the questions was not to be scrutinized too technically, but rather that the purpose of the Questioning should be considered. Specifically, Master Robertson noted that in accordance with Rule 1.2(3), both parties must identify the real issues in dispute and facilitate the quickest means of resolving the claim. Master Robertson observed that there was a wider "'reasonableness' limitation" placed on decisions relating to record production and Undertaking responses; the principle of proportionality applied to such rulings. The records sought must be relevant and material, and a litigant is not required to go to "extensive lengths" to seek out records which may not exist when those records would not likely have a significant bearing on resolution.

Ultimately, Master Robertson made specific rulings in regards to the objections advanced by the Defendants, and ordered that the Defendant produce a further and better Affidavit of Records.

MAURICE V MATCHETT, 2016 ABQB 704 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules), 4.10 (Assistance by the Court), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff applied for spousal support from the Defendant, who opposed the Application. The Defendant applied to strike the Plaintiff's claim for division of matrimonial property for long delay. The Defendant filed his Statement of Defence and Counterclaim in April 2015, which was two years after the Statement of Claim was filed.

In September of 2015, the Plaintiff provided significant but informal disclosure to the Defendant.

Graesser J. stated that Rule 4.33 did not apply in this case. His Lordship noted that, while merely completing a step in the litigation process, even one required by the Rules, does not necessarily significantly advance the Action pursuant to Rule 4.33, the filing of the Statement of Defence and Counterclaim likely re-started the clock. Further, even if it could be argued that the mere filing of the Statement of Defence and Counterclaim did not advance the Action, Justice Graesser held that, having regard to the functional approach mandated by Rule 1.2, the Plaintiff's document production did advance the Action, despite the fact that it was informal and subject to trust conditions.

Graesser J. reviewed previous jurisprudence on the interpretation of Rule 4.31 and concluded that its application depends on "whether the delay is inexcusable, whether it is inordinate, and whether there has been prejudice to the applicant". His Lordship noted that dismissal of an Action for delay of less than three years requires "exceptional circumstances".

Justice Graesser held that the Defendant waived any delay between the filing of the Statement of Claim and the filing of the Statement of Defence and Counterclaim by proceeding to file the Defence and Counterclaim rather than an Application to dismiss. In addition, Graesser J. held that there was no inordinate delay between the filing of the Statement of Defence and Counterclaim and the Application for spousal support, and that there was no evidence that the delay prejudiced the Defendant. Accordingly, His Lordship declined to dismiss the matrimonial property Action, and found that the Plaintiff's delay in advancing a spousal support Claim was not inordinate and thus not a bar to having her Claim determined on the merits. Finally, Graesser J. indicated that the parties could seek the assistance of the Court pursuant to Rule 4.10 if they continued to have difficulties managing the litigation.

AL-GHAMDI V ALBERTA, 2016 ABCA 324 (SCHUTZ JA)
Rules 1.2 (Purpose and Intention of These Rules), 4.13 (Appointment of Case Management Judge) and 4.14 (Authority of Case Management Judge)

The Plaintiff commenced 10 related Actions against over 100 Defendants. The Actions were under case management. The Plaintiff's Application to recuse the Case Management Justice for an apprehension of bias was dismissed, and the Plaintiff appealed. When the Appeal was struck for failing to file the Appeal Record in time, the Plaintiff applied to restore it.

Schutz J.A. noted that there are five factors relevant in determining whether to restore an Appeal: arguable merit to the Appeal; an explanation for the defect or delay which caused the Appeal to be taken off the list; reasonable promptness in moving to cure the defect and have the Appeal restored to the list; intention in time to proceed with the Appeal; and lack of prejudice to the Respondents (including the length of delay). Justice Schutz noted that none of these factors are individually determinative. A failure to meet one of the factors is not fatal, because all of the factors are considered when determining whether it is in the interests of justice to restore an Appeal. Her Ladyship noted that the Plaintiff intended to appeal in time, was reasonably prompt in moving to restore the Appeal, and there was no prejudice occasioned by the delay. Schutz J.A. observed that the Plaintiff's explanation for the delay was deficient, but that ought not to be dispositive of the Application in this case.

With respect to arguable merit, Her Ladyship noted that deference was to be granted to the Case Management Justice in deciding whether to recuse himself. Additionally, Rule 4.13 authorizes a Case Management Judge to perform the functions specified in Rule 4.14, and the Plaintiff's concern about Case Management neither created nor supported a reasonable apprehension of bias. As such, the Plaintiff did not meet the burden of demonstrating arguable merit for the Appeal, and the Appeal was not restored as a result.

TRAVIS V D & J OVERHEAD DOOR LTD, 2016 ABCA 319 (WAKELING JA)
Rules 1.2 (Purpose and Intention of These Rules), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 4.31 (Application to Deal with Delay), 11.5 (Service on Individuals), 11.6 (Service on Trustees and Personal Representatives), 11.7 (Service on Litigation Representatives), 11.8 (Missing Persons), 11.9 (Service on Corporations), 11.10 (Service on Limited Partnerships), 11.11 (Service on Partnerships other than Limited Partnerships), 11.12 (Service on Individuals Using Another Name), 11.13 (Service on a Corporation Using Another Name), 11.14 (Service on Statutory and Other Entities), 11.15 (Service on Person Providing an Address for Service), 11.16 (Service on Lawyer), 11.17 (Service on Lawyer of Record), 11.18 (Service on Self-Represented Litigants), 11.19 (Service on Business Representatives of Absent Parties), 11.20 (Service of Documents, Other Than Commencement Documents, in Alberta), 11.21 (Service by Electronic Method), 11.27 (Validating Service), 13.4 (Counting Months and Years), 13.5 (Variation of Time Periods), 14.2 (Application of General Rules), 14.7 (How to Start an Appeal) and 14.8 (Filing a Notice of Appeal)

Pursuant to Rules 13.5(2)(a) and 14.2(1) the Applicant, Gordon Travis ("Travis"), applied for a six-month extension of the Notice Period set out in Rule 14.8 (2) within which to file a Notice of Appeal with respect to an Order which dismissed Travis' Claim pursuant to Rule 4.31, on account of delay (the "Application"). Travis brought the Application about seven months after the Order was pronounced.

Wakeling J.A. held that Rules 1.2, 1.5, 13.5(2), 14.2, 14.7 and 14.8 were relevant in adjudicating the matter. Particularly, Justice Wakeling reinforced the importance of timely and cost-efficient resolution of disputes, holding that "[d]elay is not an attribute of justice" and that compliance with the Rules will achieve the desired goal. Wakeling J.A. held that "the obligation in r.14.8(2)(iii)… is much more important than r.13.5(2)(a)", as the "Court must strictly enforce time lines to ensure that disputes are resolved in a timely way and to give credence to the principles of finality".

After thorough consideration of the leading authorities, Wakeling J.A. examined Travis' grounds for appeal. On one of these grounds, Travis argued that the Respondents did not properly effect email service of the Application which gave rise to the Order under appeal. Travis argued that the Respondents failed to comply with Rule 11.21(1) as there was no evidence of the necessary confirmation of email receipt pursuant to Rule 11.21(1)(b). Wakeling J.A. noted that had Travis' counsel acknowledged to anyone that he was aware of the email's existence at the time of receipt this would have activated and satisfied Rule 11.5(1)(a). Wakeling J.A. further noted that Rule 11.5(1)(a) through 11.20(a) provide that "service is effected if the document is 'left with the individual'". Ultimately, Justice Wakeling rejected Travis' argument as Rule 11.27 allows a Court to validate service where the Court is satisfied that the document served was brought to the attention of the person served, which was likely to have occurred in the circumstances of this case.

Wakeling J.A. held that there were no "unique and special circumstances", it was not "in the interests of justice", and there was no reason to exercise the Court's general discretion to grant Travis an extension of the deadline set out in Rule 14.8(2)(iii). The Application was dismissed.

JANSTAR HOMES LTD V ELBOW VALLEY WEST LTD, 2016 ABCA 417 (PAPERNY, MCDONALD AND MARTIN JJA)
Rules 1.2 (Purpose and Intention of these Rules) and 4.33 (Dismissal for Long Delay)

The Plaintiffs appealed a Decision dismissing their Claim for long delay under Rule 4.33. The Plaintiffs commenced the Action in 2008 and the Defendants filed an Application for Summary Judgment on April 7, 2011. The Summary Judgment Application was adjourned sine die. Affidavits of Records were provided by the Plaintiffs on January 11, 2012, and their counsel advised of certain dates available for the hearing of the Summary Judgment Application in February and March of that year. Subsequently, counsel corresponded about dates for Questioning, but no dates were set. On January 7, 2015, Plaintiffs' counsel sent another letter seeking dates for Questioning. On January 19, 2015, the Defendants filed an Application to dismiss

under Rule 4.33. The Plaintiffs appealed the Master's Decision to a Justice of the Court of Queen's Bench and then to the Court of Appeal.

The Court of Appeal considered Rule 4.33, and remarked that, while there were delays in timely responses by both parties, there was no substantive evidence of an ambush on the part of Defendants' counsel in applying for dismissal for delay. The Court of Appeal agreed that there was no express agreement to the delay so as to make the exception in Rule 4.33(1)(a) applicable. Further, Rule 1.2 does not override the mandatory language of Rule 4.33, and does not have the effect of requiring a Defendant to assume carriage of an Action where the Plaintiff is not actively pursuing its own Claim. As such, the Appeal was dismissed.

CONDOMINIUM CORPORATION NO 0610078 V POINTE OF VIEW CONDOMINIUMS (PRESTWICK) INC, 2016 ABQB 609 (STREKAF J)
Rules 2.7 (Amendments to Pleadings in Class Proceedings) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Applicant sought the addition of the Respondent companies as Defendants to the Action. The Respondents opposed the Application on the basis that the limitation period for the proposed claims against them had expired.

The Action was commenced as a Class Proceeding in 2010, seeking to recover the cost of repairs and remediation required to correct construction deficiencies discovered in the Applicant's condominium complex. Following its review of the Defendant developer's Affidavit of Records in 2013, the Plaintiff discovered that various subcontractors had performed services related to some of the alleged deficiencies, but had not been named as parties to the Action.

Justice Strekaf noted that Rule 2.7 states that after a certification order is made under the *Class Proceedings Act*, SA 2003, c 16.5, a party may only amend its Pleading with the Court's permission. Further, after the close of Pleadings, no person can be added, substituted, or removed from an Action started by a Statement of Claim, except in accordance with Rule 3.74, which requires the consent of the party being added, substituted, or removed, or the Court's approval. Rule 3.74(2) also states that a Court may not make an Order under this Rule if prejudice would result.

Justice Strekaf applied the classic rule to amendments, which provides that all amendments are to be allowed no matter how careless or late, unless one of four major exceptions applies. Strekaf J. specifically considered the third exception: whether the amendment sought to add a new party or a new cause of action after the expiry of a limitation period.

Strekaf J. held that once a party becomes aware that it has suffered damage that merits bringing proceedings it is incumbent on that party to take reasonable steps to identify the parties responsible for that damage. The Plaintiff's single letter in 2010, requesting that the developer identify all sub-trades, contractors and consultants, was not found to meet the threshold of reasonable diligence to identify the parties responsible for the losses suffered. Accordingly, the Plaintiffs could not claim that the limitation period should be delayed until they had actual knowledge of the identities of the Respondents. The Application was dismissed.

GAYTON V RINHOLM, 2016 ABCA 328 (ROWBOTHAM JA)
Rules 2.11 (Litigation Representative Required), 14.74 (Application to Dismiss an Appeal) and 14.90 (Sanctions)

The Applicant, Gayton, filed a Notice of Appeal following an Order of the Court of Queen's Bench dismissing the Applicant's Application for the appointment of publicly funded legal counsel, and a publicly funded litigation representative. The Applicant sought a Stay of the underlying medical negligence Action pending the Appeal of the Court of Queen's Bench Order, as well as an extension of time to file her Appeal materials.

The underlying Action was commenced in 2009. In 2014, the Court found the Applicant was not competent to carry on the litigation and ordered that the Applicant have a litigation representative appointed under Rule 2.11 (the "2014 Order"). From late 2015 to mid-2016, the Applicant had an Agent who was a lawyer, and who also planned to be appointed as her Litigation Representative.

That Agent also acted as the Applicant's legal counsel for the purpose of the Application before the Court of Queen's Bench. At the time the Appeal was filed, the Agent was no longer acting as litigation representative or as counsel. Rowbotham J.A. cited Rule 14.90(1)(b) which permits the Court to strike any document, including a Notice of Appeal, for non-compliance of a Rule, Direction or Order. As the Applicant did not have a litigation representative at the time she filed the Notice of Appeal, which was required by the 2014 Order, Rowbotham J.A. directed that the Notice of Appeal be struck.

The Respondent asked that the entire Appeal be dismissed on the basis that it had no merit; however, Her Ladyship held that if the Respondent wanted to make that argument they must do so pursuant to Rule 14.7(4)(c), which provides that only a panel of the Court of Appeal can dismiss all or part of an Appeal if the Appeal is frivolous, vexatious, without merit or improper.

PARK AVENUE FLOORING INC V ELLIS DON CONSTRUCTION SERVICES INC, 2016 ABCA 327 (ROWBOTHAM JA)
Rules 2.23 (Assistance Before the Court), 14.5 (Appeals Only With Permission) and 14.88 (Cost Awards)

An individual applied ostensibly on behalf of Park Avenue Flooring Inc. ("Park Avenue") for permission to appeal the Decision of a single Appellate Judge to a panel of the Court of Appeal pursuant to Rule 14.5(1)(a). The previous single Appellate Judge had ruled that the individual Applicant could not represent Park Avenue herself.

Rowbotham J.A. held that the Court does not have discretion to allow a non-lawyer to represent a party in Court where the representation contravenes section 106 of the *Legal Professions Act*, RSA 2000, c L-8. This section precludes an officer of the corporation from representing the corporation unless the officer is a member of the Law Society. Justice Rowbotham held that the combined effect of Rule 2.33, which outlines when the Court can permit a person to assist a party before the Court, and the *Legal Professions Act*, barred the individual Applicant from representing the corporation herself. Rowbotham J.A. concluded that none of the Applicant's arguments raised an error of law or principle, nor did they raise a serious question of general importance. As such, the Application for permission to appeal to a panel of the Court of Appeal was dismissed.

Her Ladyship also referred to Rule 14.88, which provides that unless otherwise ordered, the successful party in an Appeal or Application is entitled to a Costs award against the unsuccessful party. Rowbotham J.A. held that if the Respondent sought different direction as to Costs, it could make submissions in writing, as could the Applicant.

BARR V ALBERTA (ATTORNEY GENERAL), 2016 ABQB 671 (BURROWS J)
Rules 3.2 (How to Start an Action), 5.17 (People Who May be Questioned), 5.34 (Service of Expert's Report), 5.39 (Use of Expert's Report at Trial Without Expert), 5.40 (Expert's Attendance at Trial), 7.5 (Application for Judgment by Way of Summary Trial), 8.17 (Proving Facts) and 13.18 (Types of Affidavit)

The Applicants sought a declaration that section 69.1 of the *Gaming and Liquor Act*, RSA 2000, c G-1 was unconstitutional. The Action was commenced by filing an Originating Application and three supporting Affidavits. The Attorney General ("AG") responded by filing eight Affidavits.

In an earlier proceeding, Sanderman J. held that the Affidavits filed by the AG contained hearsay and were therefore in violation of Rule 13.18(3). The portions containing hearsay were struck. Sanderman J. also held that the proposed expert evidence was not relevant, and in any event, had not been in the proper form and before the Court as required by Rule 5.34(a). The AG appealed this Order. On Appeal, the Court of Appeal directed that the proceeding be converted from an Originating Application to a Statement of Claim. The Court of Appeal also directed that a Case Management Judge be appointed, who should determine the admissibility of the various Affidavits.

After being converted to a proceeding commenced by Statement of Claim, the AG applied for an Order directing that the matter be set for Summary Trial, pursuant to Rule

7.5. The AG proposed that the Summary Trial consider all Affidavits filed in the prior proceeding and the AG's expert report. Burrows J. held that a Summary Trial was not appropriate for this matter, as to proceed in this manner would be contrary to the Court of Appeal's directions. The Court of Appeal had converted the matter to one commenced by Statement of Claim pursuant to Rule 3.2(6), because Rule 3.2(2)(a) requires that an Action be commenced by Statement of Claim where there is a substantial factual dispute. Further, the factual dispute was better suited for an Action started by Statement of Claim where: (i) there is oral discovery pursuant to Rule 5.17(1); (ii) cross-examination of witnesses; and (iii) opinion evidence is received from a qualified expert who testifies in person after providing the expert report in Form 25, subject to Rules 5.39 and 5.40. A Summary Trial is not practically different than an Originating Application.

Burrows J. considered whether the Affidavits filed in support of the Originating Application were admissible. The Plaintiffs sought Questioning of at least some of the affiants to test the reliability and completeness of the evidence. Justice Burrows held that these were "good reasons" to not order that the Affidavits be admitted at Trial under Rule 8.17(2)(a). However, His Lordship held that the parties could agree to any fact contained in the Affidavits, as per Rule 8.17(1)(b). The AG's Application to have the matter heard by way of Summary Trial was dismissed.

REGULAR V REGULAR, 2016 ABQB 570 (RENKE J)
Rules 3.5 (Transfer of Action) and 10.33 (Court Considerations in Making Costs Award)

A family law Action was commenced in Edmonton by Mrs. Regular. Mr. Regular applied to transfer the Action to the judicial centre of Fort McMurray pursuant to Rule 3.5.

Justice Renke stated that the onus of proof under Rule 3.5 lies with the party applying to transfer the Action to another judicial centre. His Lordship then considered the unreasonableness criteria outlined in Rule 3.5(a). Citing *Siver v Siver*, 2010 ABQB 755, His Lordship noted that the meaning of "unreasonable" is arbitrary, irrational or having no logical grounding. This test is highly deferential to the original judicial centre selected, and the unreasonable threshold is a difficult onus for the party applying to change the judicial centre to meet.

Justice Renke noted that there are several factors informing the balance of convenience test to be used in a Rule 3.5 Application, including: the location of counsel (which is not a decisive factor); the number of parties or witnesses in the current judicial centre as opposed to the proposed judicial centre; the nature of the issues in the lawsuit; the relationship between the parties in respect of the issues in the lawsuit (for example where the interactions between the parties relating to the issues took place); the parties' respective financial resources; and the stage of the proceedings.

Justice Renke observed that there are two more relevant factors to consider; however they are accorded less weight: the convenience of location for pre-trial motions, and the location of relevant assets.

This Action concerned the interpretation of the divorce and property contract between the parties. Justice Renke noted that the Action was properly commenced under Rule 3.3, and thus the unreasonable test applied. Justice Renke noted that the cost and inconvenience to the parties would be equal regardless of which judicial centre was used; the only issue was which party would bear those factors. Further, any Questioning on Affidavits in preparation of a Summary Judgment Application would necessitate a payment of an appropriate allowance under Rule 6.17, and therefore any inconvenience arising therefrom was mitigated. Justice Renke stated that if a number of witnesses for Trial favoured the location of the Action being transferred to Fort McMurray, the Application could be reconsidered at that time.

Justice Renke considered the factors in Rule 10.33 with respect to a costs award, but noted that because this area of law is relatively unsettled, no Costs would be awarded to either party.

UNION SQUARE APARTMENTS LTD V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2016 ABQB 575 (TOPOLNISKI J)
Rules 3.13 (Questioning on Affidavit and Questioning Witnesses), 6.14 (Appeal from Master's Judgment or Order), 7.3 (Summary Judgment), 13.6 (Pleadings: General Requirements), 13.7 (Pleadings: Other Requirements) and 13.18 (Types of Affidavit)

The Defendants appealed a Master's Decision dismissing their Application for Summary Judgment where the Defendants alleged that the Plaintiff's claim was statute barred by the *Limitations Act*, RSA 2000, c L-12 (s.3). The contested issue before the Master, and on Appeal, was whether the ultimate limitation period was suspended due to the Defendant's fraudulent concealment of a defect in the building purchased by the Plaintiff.

The Plaintiff produced a secretarial Affidavit as additional evidence in support of the Appeal. The Affidavit was sworn to by the Plaintiff's lawyer's legal assistant, and attached an expert's report. Rule 6.14(3) allows the Court to consider additional evidence on an Appeal from a Master to a Judge if the presiding Judge considers the evidence relevant and material. Justice Topolniski found that the expert report did not address the issue of whether the Defendant fraudulently concealed the defects complained of by the Plaintiff, and as such, it was not relevant and material.

Justice Topolniski also held that the use of a secretarial Affidavit in these circumstances was inappropriate, highlighting that under Rule 13.18, Affidavits may only be sworn based on the personal knowledge, or information and belief of the Affiant. Because Rule 3.13 restricts Questioning on the Affidavit to the Affiant, the Affiant must have some knowledge of the issues deposed to. The combined effect of these Rules, is that secretarial Affidavits are generally only appropriate where the clerical staff actually has personal knowledge of the matters deposed, and documents exhibited.

Topolniski J. described the focus of the Court in a Summary Dismissal Application requiring a "holistic analysis of whether the claim has merit". A claim is without merit if the facts and law make the moving party's position unassailable, meaning, the likelihood of success at Trial is "very high". On a Summary Dismissal Application the Court is also to consider its obligation to resolve a legal dispute in the most cost-effective and timely method available, provided the process still ensures fairness between the parties.

In considering the merits of the Appeal, Justice Topolniski held that the existing record did not disclose fraudulent concealment on the part of the Defendant which would suspend the running of the ultimate limitation period. Accordingly, the ultimate limitation period had passed, and the Defendants were entitled to an affirmative defence. The Appeal was allowed with costs to the Defendants for the Appeal and the hearing before the Master.

MCLEAN V CANADA (CORRECTIONAL SERVICE), 2016 ABQB 673 (HENDERSON J)
Rules 3.15 (Originating Application for Judicial Review), 3.16 (Originating Application for Judicial Review: Habeas Corpus), 3.17 (Attorney General's Right to be Heard), 3.18 (Notice to Obtain Record of Proceedings), 3.19 (Sending in Certified Record of Proceedings), 3.20 (Other Circumstances when Record of Proceedings may be Required), 3.21 (Limit on Questioning), 3.22 (Evidence on Judicial Review), 3.23 (Stay of Decision) and 3.24 (Additional Remedies on Judicial Review)

The Applicant, McLean, was denied parole by the Parole Board and by the Appeal Division of the Parole Board, and applied to the Court of Queen's Bench for an Order of *habeas corpus*. Henderson J. discussed the general principles the Court should consider when deciding an Application for *habeas corpus*, stating that an Application for an Order for *habeas corpus* is a form of Judicial Review of an administrative Decision; therefore, the Court of Queen's Bench has inherent discretion to decide whether or not to exercise jurisdiction and undertake Judicial Review and can only decline to exercise its jurisdiction to hear an Application for habeas corpus in limited circumstances.

Henderson J. noted that generally the Rules that govern Applications for judicial review are Rules 3.15 to 3.24, the section titled *Additional Rules Specific to Originating*

Applications for Judicial Review. Henderson J. referred to Rule 3.16 which provides that an Application for *habeas corpus* can be filed at any time and must be served as soon as practicable after filing. In addition, any Affidavit or other evidence that the party wishes to rely on must be served at least ten days before the Application. Justice Henderson also considered Rule 3.22 which provides that the evidence that can be heard on a Judicial Review Application is limited, and generally the Court should consider the Application based on the evidence that the Administrative Tribunal had before them. His Lordship stated that additional evidence or Affidavits on Judicial Review should be permitted only in exceptional circumstances, and that Rule 3.22 provides that any additional evidence to be used on a Judicial Review Application must be permitted either by the Court or by another Rule or enactment. The Respondents in the Application had filed two additional Affidavits but later conceded that there were no exceptional circumstances which would justify their review by the Court.

The Applicant, who was a self-represented litigant, filed additional sworn evidence not styled as an Affidavit. Henderson J. determined that the information in the additional filed evidence was already before the Parole Board and the Parole Board Appeal Division, and that there was no new information in the filed material. Justice Henderson concluded that the overarching principle of fairness meant that the Court should consider the new materials. Notwithstanding the Applicant's new evidence, Henderson J. determined that the Parole Board and the Parole Board Appeal Division's Decisions to revoke the Applicant's parole were reasonable and lawful, and therefore dismissed the Application for *habeas corpus*.

KAMBOH V CHAMBERS, 2016 ABQB 711 (MASTER SCHULZ)
Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 3.28 (Effect of Not Serving Statement of Claim in Time)

Counsel for the Plaintiffs could not affect service of a Statement of Claim within the one year period specified by Rule 3.26. They sought an extension of time for service of the Statement of Claim by way of an *ex parte* desk Application. The Clerk's Office filed a draft Order for an extension of time for service and two Affidavits which were then mislaid for a short period of time. The Clerk's Office contacted counsel for the Plaintiff who filed an Affidavit of explanation, and Master Schulz reviewed the Plaintiffs' Application for an extension of time for the service of the Statement of Claim.

Master Schulz granted a three month extension of time for the service of the Statement of Claim pursuant to Rule 3.27(1)(c) noting that the circumstances fell within the meaning of "special or extraordinary": the *ex parte* desk Application made pursuant to Rule 3.26 was filed before the Statement of Claim expired; the Application was misplaced through no fault of the Plaintiff or Plaintiff's Counsel; and the Clerk was not a party to the Action.

1177620 ALBERTA LTD V AXCESS MORTGAGE FUND LTD, 2016 ABCA 404 (BERGER, MARTIN AND GRECKOL JJA)
Rules 3.56 (Right to Counterclaim) and 3.72 (Consolidation or Separation of Claims and Actions)

The Appellant mortgagor, 1177620 Alberta Ltd., developed a residential building. The Respondent, a mortgage administrator, managed three mortgages on the property which were each held by different mortgagees (the "Mortgagees"). After the Appellant defaulted on its mortgage payments, the Respondent and the Mortgagees commenced three foreclosure Actions. The Appellant counterclaimed on the third foreclosure Action for breach of contract, but was prevented from adding its principal and sole shareholder ("McCurdy") as a Plaintiff in the Counterclaim by operation of Rule 3.56, because McCurdy was not a Defendant in the original Action. Therefore, the Appellant filed a separate Statement of Claim for breach of contract, advancing the same claim as the Counterclaim but including McCurdy as a Party.

The Appellant applied for consolidation of the four Actions under Rule 3.72, and the Respondent cross-applied to sever the Counterclaim to the third foreclosure Action. The Chambers Justice held that the four Actions should not be consolidated, but that the Counterclaim should be severed.

In assessing whether or not to consolidate the Actions, the Court of Appeal noted that the three foreclosure Actions and Counterclaim involved a common question of law and fact, and that all three Statements of Claim alleged a forbearance agreement with the Appellant. The Statements of Claim were also very similar, involved the same witnesses, and described the same events. Lastly, the Court noted that the "spectre of inconsistent verdicts" with regard to the forbearance agreement favoured hearing the Actions together. However, the Action involving McCurdy could cause undue delay to the foreclosure Actions, and included a distinct issue and would require the quantification of damages.

The Court of Appeal consolidated the three foreclosure Actions, including the Counterclaim to the third Action, but refused to consolidate the breach of contract claim.

1664992 ALBERTA LTD V 1260055 ALBERTA LTD, 2016 ABQB 732 (MASTER SMART)
Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiffs applied to amend their Statement of Claim to add more specific allegations of misrepresentation against the existing Defendants, and to add two additional Defendants.

Master Smart considered Rule 3.65, which gives the Court jurisdiction to amend Pleadings. Master Smart noted that the Rule provides that generally, any Pleading may be amended no matter how careless or late, subject to four major exceptions: the amendment would cause serious prejudice to the opposing party, not compensable in costs; the amendment is hopeless; the amendments seeks to add a new party or new cause of action after the expiry of a limitation period; and there is an element of bad faith associated with the failure to plead the amendment in the first instance.

Master Smart allowed the proposed Amendment to add specific allegations of misrepresentation in part. The proposed Amendment to add additional Defendants was denied, as the requested Amendment was hopeless.

D-LINE HOLDINGS LTD V AHLSTROM, 2016 ABCA 351 (PAPERNY, ROWBOTHAM AND MARTIN JJA)
Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff appealed a Chambers Judge's Decision permitting an amendment to the Defendants' Statement of Defence. The Plaintiff sued the Defendants in negligence, breach of various duties and breach of contract for failing to register a general security agreement in a timely manner. Following Questioning, the Defendants sought to amend their Statement of Defence because the Plaintiff had objected to several questions on the basis that the Defendants had not pleaded sufficient particulars to support the questions. In support of the Application to amend, one of the Defendants swore an Affidavit which exhibited documents prepared by others. The Affiant did not know who created the majority of the documents. They also attached a Statement of Claim from another Action that named the Plaintiff. At first instance, the Master denied the amendment Application, but on appeal, the Chambers Judge allowed the amendments. The Chambers Judge concluded that the Affidavit evidence was reliable and necessary.

The Court of Appeal noted that any Pleading could be amended, no matter how late or careless, unless one of four exclusions applied: it would cause serious prejudice that was not compensable in costs; the amendment requested was hopeless; the amendment sought to add a new party or new cause of action after expiration of the limitation period; or there was an element of bad faith with the failure to plead the amendment in first instance. Additionally, the Court noted that certain amendments required the application of a higher standard to the evidence, such as in cases of fraud.

In this case, the Defendants sought to amend the Pleadings to plead misrepresentation. The Affidavit in support contained hearsay, but the Court of Appeal held that there was sufficient evidence on the record to support the Chambers Judge's Decision. The Court held that there was little prejudice to the Plaintiff, and it was not the role of the Court of Appeal to reweigh the evidence. Further,

the Decision to allow an amendment to a Pleading was discretionary and in this case, was not unreasonable. The Appeal was therefore dismissed.

FERNANDES V JENNINGS CAPITAL INC, 2016 ABQB 594 (JEFFREY J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Two related Actions were under case management. One of the Actions was brought by shareholders and former employees of the Defendant, alleging that the Defendant had breached the Unanimous Shareholders' Agreement ("USA"). The other Action alleged fraudulent preference, oppression, that the Defendants breached a Share Purchase Agreement ("SPA"), and breached the USA. The USA contained an arbitration provision that directed that any disagreement between the parties that was in respect of the USA or any matter arising thereunder was to be directed to Arbitration. The SPA contained no arbitration clause. The Defendants in both Actions applied to strike the Actions in their entirety under Rule 3.68 on the basis that the parties had agreed to Arbitration, but the Plaintiffs had failed to commence the Arbitration within the time required by the *Limitations Act*, RSA 2000, c L-12.

Jeffrey J. noted that a Claim may be struck under Rule 3.68(a) when it is plain and obvious or beyond reasonable doubt that the Claim cannot succeed. In an Application under Rule 3.68, evidence can be admitted and the Court is not to assume that every fact pleaded is true. Rather, where the record is sufficiently clear to fairly decide an issue, the Court can make findings of fact without the need to defer the issue to Trial.

Justice Jeffrey considered the terms of the USA and held that the majority of the claims brought by the Plaintiff were subject to the arbitration clause; however, those claims were brought outside the two year limitation period. Additionally, the Court had no jurisdiction to extend the limitation period for those claims. For the claims that fell outside of the USA arbitration clause, and the claims for breach of the SPA, the Plaintiff was not bound to proceed by Arbitration and those claims were permitted to continue. The Defendants' Application was granted in part: the portions of the Actions which were subject to Arbitration were struck.

FLOCK V COMPLYWORKS LTD, 2016 ABQB 621 (MASTER PROWSE)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff ("Flock") commenced an Action against the Defendants, including ComplyWorks Ltd. ("CWL") for wrongful dismissal and breach of a promise to provide Flock with a 5% interest in CWL (the "Equity Agreement"). Among the Defendants were CWL's eight directors. Four of those directors (the "Directors") asked that the Claim against them be Summarily Dismissed under Rule 7.3, or, alternatively, struck out under Rule 3.68.

The only evidence advanced by the Directors in support of their Application for Summary Dismissal was an Affidavit by one of CWL's directors who was not an Applicant. The Affidavit only contained hearsay evidence. Master Prowse noted that pursuant to Rule 13.18, hearsay evidence cannot be used in Applications that may dispose of all or part of a Claim. Master Prowse stated that, in a Summary Dismissal Application, the usual practice is to assume that the Respondent's evidence is true, and to then consider whether, notwithstanding the adverse facts, the Applicant was entitled to Summary Dismissal. Master Prowse held that the Directors failed to advance any evidence that their defence was "unassailable", and thus declined to Summarily Dismiss the Claim against them.

Master Prowse also declined to strike the Claim against the Directors, noting that no evidence is admissible for striking a Claim under Rule 3.68. The Court must consider the allegations in the Statement of Claim to be true. Master Prowse noted that the Statement of Claim disclosed an allegation that the Equity Agreement was as between Flock and CWL and its directors. Accordingly, the Directors were proper Defendants in the Action and the Claim against them could not be struck. The Directors' Application was dismissed.

CONDOMINIUM CORPORATION NO 0723447 V ANDERS, 2016 ABQB 656 (MASTER SCHULZ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff Condominium Corporation commenced several Actions against the Defendant owners of condominium units, seeking to compel the Defendants to remove the laundry machines from their condominium units, and to have the Defendants pay fines levied by the Condominium Corporation for failure to remove the machines. The Plaintiff applied for Summary Judgment in each Action. The Defendants in two Actions Cross-Applied to strike the Plaintiff's Amended Statement of Claim pursuant to Rule 3.68 on the basis that it did not disclose a reasonable claim, and alternatively, for Summary Dismissal of the Claims against them on the basis that the Actions were without merit.

Master Schulz considered the test under Rule 3.68, as elucidated by prior leading authorities which provided that a Motion to Strike for failure to disclose a reasonable cause of action will proceed on the basis that the facts pleaded are true unless they are manifestly incapable of being proven, and will be successful if the claim has no reasonable prospect of success. Master Schulz held that the allegation raised in the Amended Statements of Claim did have a reasonable prospect of success, and therefore the Applications to Strike were dismissed.

With respect to Summary Judgment, Master Schulz noted the principles in *Hryniak v Mauldin*, 2014 SCC 7, and the cases which interpreted it, and considered whether it was fair and just, on the evidence before the Court, that the Summary Judgment Applications be granted. Master Schulz observed that there was no evidence before the Court that the positions or arguments of the Defendants in this Action were ignored by the Condominium Board. The Condominium Corporation, having acted within its authority and having practiced due diligence in making its decisions, was entitled to require the Defendants to remove the laundry machines from their units, and to impose fines for failure to do so. The Summary Judgment Application was granted.

AL-GHAMDI V ALBERTA, 2016 ABCA 403 (WATSON JA)
Rules 4.13 (Appointment of Case Management Judge), 4.14 (Authority of Case Management Judge), 4.15 (Case Management Judge Presiding at Summary Trial and Trial) and 14.5 (Appeals only with Permission)

The Plaintiff, Al-Ghamdi, applied for permission to appeal a Decision of a single Justice of the Court of Appeal to a three member panel of the Court of Appeal. The single Appeal Justice had dismissed Al-Ghamdi's Application to re-instate his late-filed Appeal on the basis that it was unmeritorious. Al-Ghamdi was appealing a Case Management Order on the basis that the Case Management Justice was biased because the Justice had been appointed to the bench from a firm which represented one of the Defendants.

Justice Watson noted that the burden on the Applicant to obtain permission to appeal under Rule 14.5(2) requires the Applicant to establish that the Order of the single Justice being reviewed:

(a) Raises a question of general importance which on its own deserves panel review;

(b) Rests on a reviewable and material issue of law worthy of panel review;

(c) Involves an unreasonable exercise of discretion which had a meaningful effect on the outcome of the decision and the outcome is worthy of panel review; or

(d) Rests on a palpable and overriding error of important facts effecting the Order made and the Order is worthy of panel review.

Watson J.A. noted that, while the language of the test for review may vary, at least one of the criteria should be made out, or it will not be in the public interest to have a panel review. In this case, Al-Ghamdi objected to the Decision not to reinstate his Appeal on the basis that it was unreasonable to conclude that the Appeal would not succeed, and that the Appeal Justice who dismissed his initial Application to re-instate was biased. Justice Watson

observed that nothing in the record supported any inference that the Justice was biased. Further, His Lordship was not persuaded that the single Court of Appeal Justice erred. The reasons provided for not re-instating the Appeal were clearly defensible on the facts and the law; there was no palpable or overriding error or any mis-balancing of factors; and the Appeal had no prospect of success. Finally, Watson J.A. noted that a panel review would not move the underlying proceedings forward, which Al-Ghamdi argued was important to him. The Application was dismissed.

ACT FOR COMMUNITY SOCIETY V EDMONTON (CITY), 2016 ABQB 516 (BELZIL J)
Rules 4.22 (Considerations for Security for Costs Order) and 4.23 (Contents of Security for Costs Order)

The Applicant, ACT for Community Society ("ACT") applied for Judicial Review of the decision by the City of Edmonton to develop lands into affordable housing. The Respondents, including the City and the developers of the project, cross-applied for Security for Costs pursuant to Rules 4.22 and 4.23. Justice Belzil noted that Security for Costs Orders are discretionary; therefore, Rule 4.22 requires the Court to consider all relevant circumstances. No one factor is determinative.

Justice Belzil noted that the Respondents would not be able to enforce any Order for Costs against ACT in excess of $10,000. The proceedings were in the preliminary stages, and given the number of issues unresolved, there would likely be multiple Applications going forward. As such, Security for Costs was granted in the amount of $10,000 to each of the Respondents, for a total of $30,000.

JONES V GEROSA, 2016 ABQB 614 (GRAESSER J)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 10.33 (Court Considerations in Making Costs Award)

Following Trial, the parties applied to the Court for a determination with respect to pre-judgment interest and costs. The Plaintiff, Dr. Jones, was successful as against both Defendants, but one of the Defendants, Dr. Phan, obtained damages for his Counterclaim, which were set-off against the Plaintiff's award.

Dr. Jones and Dr. Phan did not agree on Costs. Dr. Jones argued for double Costs pursuant to Rule 4.24 as a result of three Formal Offers which were served prior to Trial. Dr. Phan argued that, pursuant to the considerations in Rule 10.33, Dr. Jones' Costs against him ought to be reduced due to Dr. Jones' inefficient litigation conduct; the supposed formal offers were not "genuine offers to compromise" as they did not address Dr. Phan's Counterclaim; and Dr. Jones had not produced all relevant and material records, and thus Dr. Phan could not make an informed decision on the Offers. Further, Dr. Phan argued that the later Formal Offers "extinguished" earlier Offers, and that Dr. Jones did not beat the most recent Offer. Graesser J. observed that both parties, at various times, were compelled by Court Order to produce records, and that on the whole neither party delayed the Action more than the other. Justice Graesser noted that a Formal Offer expires pursuant to the terms set out in the Offer. His Lordship also held that, after including pre-judgment interest, all Offers were exceeded by the award at Trial.

Justice Graesser concluded that the first Formal Offer was a net, "all-inclusive" amount, which included a set-off for Dr. Phan's Counterclaim, and thus qualified as a Rule 4.29 Offer. His Lordship noted that, alternatively, the Offer would still qualify as a *Calderbank* Offer which would permit the Court to consider double Costs. Justice Graesser detailed the Costs due to each party for each contested line items, and awarded double Costs to Dr. Jones from the date of his first Formal Offer.

GAJJAR V AULAKH, 2016 ABQB 659 (PENTELECHUK J)
Rules 4.24 (Formal Offers to Settle), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The parties each claimed Costs after the conclusion of a Trial that dealt with matrimonial property division, spousal support, and parenting issues. No Formal Offers to settle under Rule 4.24 were served. Pentelechuk J. considered the enumerated factors under Rule 10.33 in the context of the issues heard at Trial.

Justice Pentelechuk noted that, at first glance, it appeared that the parties had mixed success, and should bear their own Costs. However, Rule 10.33(2) sets out additional factors that the Court may consider when imposing, denying, or varying a Costs award. In this case, the Plaintiff was substantially successful at Trial on the parenting issues, and she also made an offer to settle the remaining issues for the amount sought by her former spouse. Had the parties resolved some of these issues, Trial time would have been reduced significantly. However, there was a lack of clarity in the offer made, and the Court concluded that it was appropriate to award the Plaintiff with one-half of her proposed Bill of Costs. The Court disallowed a fee claimed for a judicial dispute resolution brief, as Rule 10.31(2)(c) does not provide for Costs related to a judicial dispute resolution process. The Plaintiff was awarded Costs including fees and disbursements.

SMITH V SMITH, 2016 ABCA 376 (FRASER, PAPERNY, GRECKOL JJA)
Rules 4.24 (Formal Offers to Settle), 5.10 (Subsequent Disclosure of Records) and 5.16 (Undisclosed Records not to be Used Without Permission)

The parties in a divorce and matrimonial property Action appealed and cross-appealed various aspects of the Trial Judge's Decision. The husband appealed the Trial Judgment on the basis that, among other things, the Trial Judge erred with respect to the spousal support award, division of matrimonial property and Costs. The Court of Appeal noted that the husband's Appeal was "precipitated by the failure on the part of the appellant (husband) to provide financial disclosure before or during trial, as required". The wife cross-appealed on the basis that the Trial Judge had erred with respect to the value of certain accounts, and declined the wife's request to award double Costs because a Formal Offer was ambiguous with respect to the duration and scope of support payments.

The Court held that the husband's account statements should have been provided under the disclosure provisions in Rules 5.10 and 5.16, the intent of which is to prevent trial by ambush. The Court also held that the husband's evidence at Trial amounted to opinion evidence, which did not meet any recognized exception. Moreover, it contravened the process prescribed in the Rules for tendering expert opinion evidence, and offended the best evidence rule.

The Court noted that the Trial Judge's Decision regarding Costs was highly discretionary, but the wife's Formal Offer was clear with respect to the amount requested for division of matrimonial property, and that the wife beat that Offer at Trial. The Panel also noted that at least half of the Trial was dedicated to determining matrimonial property division, and that the failure to do so warranted appellate intervention. The Court awarded one half of the double Costs award sought, in addition to Trial Costs.

The Appeal was dismissed, and the Cross-Appeal allowed in part.

STABILIZED WATER OF CANADA INC V BETTER BUSINESS BUREAU OF SOUTHERN ALBERTA, 2016 ABQB 543 (MASTER PROWSE)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant, the Better Business Bureau of Southern Alberta ("BBB"), applied to have the Action against them dismissed for delay under both Rules 4.31, and 4.33. BBB argued that the Plaintiffs had shown a pattern of doing just enough to save the Action from long delay applications over the 14 year history of the Action. The Plaintiffs argued that the recent delays in moving the Action forward was attributed to the Defendant, and that the Defendant had failed to preserve the evidence which they then claimed was prejudicial due to its absence.

The Action was commenced in October, 2002, and the parties exchanged Affidavits of Records in October and November 2003. In 2008, BBB's counsel informed the Plaintiffs' counsel that BBB was not prepared to Question the Plaintiffs' until the Plaintiffs remedied their deficient Affidavit of Records. The Plaintiffs provided some of the requested records in February 2009. Questioning of BBB's representative occurred in April, 2009, and answers to Undertakings were provided in October, 2009. In March,

2012, Plaintiffs' counsel served written interrogatories to be answered by BBB, which were completed in December, 2013. In the written interrogatories, the vast majority of the answers indicated that BBB had been unable to locate the information needed. In June and August 2014, Plaintiffs' counsel requested that BBB Question the Plaintiffs' representative. BBB's counsel responded in December 2014 that BBB was still not prepared to conduct Questioning until the Plaintiffs' Affidavit of Records was remedied. No response was given to the December, 2014 letter.

Master Prowse determined that there was inordinate delay, as set out in Rule 4.31(2), given that the Action was almost 14 years old, and that Questioning of the Plaintiffs' representative had not yet taken place. Master Prowse examined the entire history of the Action and found that the delay was inexcusable, since a total of 7 years and 10 months' delay was attributable to the Plaintiffs over the life of the Action. The Plaintiffs argued that they did not have the ability to compel BBB to bring an application to establish the adequacy of the plaintiffs' Affidavit of Records. Master Prowse noted however, that the ultimate burden for moving a matter forward still lies with the Plaintiffs, and that they could have moved to disentitle BBB from Questioning and to set the matter down for Trial, which would have, at a minimum, resulted in a procedural Order dealing with the scheduling of Questioning of the Plaintiffs. As a result of finding the delay inordinate and inexcusable, prejudice to BBB was presumed under Rule 4.31(2).

The Plaintiffs argued that the evidence raised a legitimate doubt about the presumption of prejudice under Rule 4.31(2), since many of BBB's officers or employees were still alive and could be called as witnesses by BBB, and BBB's relevant and material documents had all been delivered to counsel and therefore preserved. BBB countered that, essentially every support staff or lower level manager who was involved in the matters in dispute could not be located. Furthermore, BBB asserted that a claim in defamation is not document based rather, it is a fact driven analysis. Master Prowse held that the evidence did not raise a legitimate doubt about the existence of prejudice, and found that, had there been a doubt, the evidence was sufficient to demonstrate actual prejudice due to the unavailability of key witnesses. As a result, Master Prowse dismissed the Action pursuant to Rule 4.31.

Master Prowse held that the answers to Interrogatories provided in December, 2013, significantly advanced the Action, and that this occurred less than 3 years before the 4.33 Application was commenced. The Rule 4.33 Application was therefore dismissed.

RENKINN DEVELOPMENT INC (RENKINN DEVELOPMENT LTD) V STEVENS, ET AL, 2016 ABQB 549 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff commenced an Action on the basis of breach of contract arising from the Defendants' failure to pay amounts owing under a residential construction agreement. The agreement contained a "dispute resolution clause" but the application of that clause was under dispute. The Plaintiff applied to stay the Action pending the outcome of Arbitration, and the Defendants cross-applied to dismiss the Plaintiff's Action for delay pursuant to Rule 4.31. Master Robertson reviewed the *Arbitration Act*, RSA 2000 c A-43, and leading authorities and concluded that the Action should not be stayed pending Arbitration, and dismissed the Plaintiff's Application to Stay the Action.

Master Robertson considered the Cross-Application for delay, and noted that the Action was almost 10 years old, and that much of the delay was the result of the inactivity of the Plaintiff. Master Robertson noted that the Action was so old that during part of its life span, the old Rules applied, which allowed for a delay of 5 years as opposed to 3 years under the current Rules. However, Master Robertson observed that there was no period of time in the Action where there was a continuous delay of time as long as 3 or 5 years. Therefore, Master Robertson concluded that Rule 4.33 did not apply.

Master Robertson considered the Defendants' Cross-Application for delay pursuant to Rule 4.31, which provides that an Action may be dismissed for delay if the delay

has resulted in significant prejudice to a party. Master Robertson noted that where the delay is inordinate and inexcusable, prejudice is presumed to have resulted, and the Plaintiff must then rebut that presumption. Master Robertson observed that, at some point during the course of the Action, the Defendants had sold the property, and there was therefore no access to the property. Further, Master Robertson observed that if experts were to assess the property 10 years after the Claim arose, it would be very difficult for them to determine the status of any renovations at the time of the Claim. Master Robertson found that there was prejudice to both Parties in that regard. Master Robertson held that the Plaintiff was unable to rebut the presumption that the delay had resulted in prejudice, and the Plaintiffs had not provided a sufficiently good reason for the delay. Master Robertson granted the Defendants' Application and dismissed the Plaintiff's Claim under Rule 4.31.

BRACE V WILLIAMS, 2016 ABCA 384 (WATSON, ROWBOTHAM AND GRECKOL JJA)
Rule 4.31 (Application to Deal with Delay)

The Plaintiffs commenced an Action in 2006 against the Defendants for the non-payment of a promissory note. The Defendants contended that the promissory note was forged. The Defendants sought and obtained dismissal for delay pursuant to Rule 4.31(1). The Chambers Judge held, and the Plaintiffs conceded, that there had been "inordinate and inexcusable delay" in their Action. However, the Plaintiffs appealed the Chambers Judge's finding that the delay had caused both presumptive and actual prejudice which justified the dismissal of their Action.

The Court of Appeal held that Rule 4.31(2) recognizes that prejudice is presumed to result from inordinate and inexcusable delay. The Court noted that "[m]erely because the party prejudiced cannot itemize every impact of prejudice is not an answer to the presumption".

The Plaintiffs argued that the Defendants could not rely on an argument of delay when they had acquiesced to, or waived the delay. The Court of Appeal stated that this argument was not made in the original Application and therefore could not be raised as a new issue on Appeal. The Court observed that there was no evidence before the Court which would demonstrate that the Defendant had acquiesced to the delay or waived their right to assert it. The Appeal was dismissed.

BROST V KUSLER, 2016 ABCA 363 (ROWBOTHAM, GRECKOL AND MARTIN JJA)
Rules 4.33 (Dismissal for Long Delay), 12.2 (What this Part Applies to), 12.34 (Application of Part 4) and 12.35 (Operation of Rule 4.34 Under this Part)

The Defendant, Ms. Kusler, had both her Statement of Defence and Counterclaim (which dealt with divorce and the division of matrimonial property) struck for long delay, pursuant to Rule 4.33. Ms. Kusler, whose estate continued the Action following her death, appealed.

The Defendant argued that Rule 4.33 does not apply to matrimonial or divorce proceedings, or alternatively that the Trial Judge erred in holding that filing a Statement of Defence to Counterclaim upon demand did not significantly advance the Action.

The Court of Appeal held that Rule 4.33 applies to divorce proceedings. The Court noted that Rule 12.2 provides that Part 12 of the Alberta Rules of Court applies to proceedings under the *Divorce Act*, RSC 1985, c 3 (2nd supp), and Rules 12.34 and 12.35 set out that the Rules in Part 4 apply to the proceedings listed in Rule 12.2.

The Court of Appeal examined whether the Statement of Defence to Counterclaim constituted a "significant" step in the litigation, noting that the Chambers Judge did not have the benefit of recent authority which recognized that a functional review of the steps in the litigation should be undertaken to determine whether a significant advance occurred. The substance of the step taken, rather than its form, should be assessed to determine whether it was significant.

Although the Respondent, Brost, argued that the Statement of Defence was an "innocuous document which did not narrow the issues", the Court of Appeal noted that the document raised specific issues and also joined issues,

linking the issue of the date of separation with that of the wife's entitlement to property acquired during the marriage. In addition, context suggested that the document was a significant step, as the litigation was taken over by the wife's Estate after her death, and the Estate appeared to be proactive in moving the litigation forward. Therefore, the Statement of Defence to Counterclaim was held to have significantly advanced the Action. The Appeal was allowed.

CULLIHALL V LIYANAGE, 2016 ABQB 551 (MASTER MASON)
Rules 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records) and 5.13 (Obtaining Records from Others)

The Plaintiff commenced an Action against the Defendant following a motor vehicle collision. Among other things, the Defendant defended on the basis that the Plaintiff failed to mitigate his damages by failing to return to work in a timely and reasonable fashion. The Defendant applied under Rule 5.13 for an Order that the Plaintiff's employers provide the Plaintiff's employment records.

Master Mason considered Rule 5.13 which defines a number of pre-conditions that must be met for the Court to order a non-party to produce a record. First, Master Mason noted that there is no issue raised by the Plaintiff as to the records being in the control of his employers. Next, the Court considered the relevance and materiality of the records sought by the Defendant. The Court stated that Rule 5.2 defines relevance and materiality for the purpose of disclosure, and that this determination must be in the context of the particular facts and Pleadings in issue. The Court considered the current Rule 5.13(1)(b), its predecessor Rule 209 and prior leading authorities, and held that the Rule continues to recognize that relevance and materiality need not be guaranteed in order for the Court to direct non-parties to produce records. The party seeking the Order only needs to show that the Record in question may relate to a matter in issue. In this case, while there was no serious dispute about the relevance and materiality of the typical contents of some of the Records that would exist on the employers' files, some of the Defendant's requests were overly broad and required further submissions to determine relevance and materiality.

The Court also considered and rejected the Plaintiff's argument that the non-party records should first go to the Plaintiff to be assessed for relevance, materiality and privilege. The Court observed that, pursuant to Rule 5.6 and case law, as long as the Plaintiff has not been and is not in control of the records, he was not required to disclose them. The Plaintiff was seeking to control the disclosure and production of records that he maintained were not in his control. It is the Court's function to determine relevance, materiality and privilege under Rule 5.13.

The Plaintiff further opposed this Application on the basis that the records could contain privileged information. Master Mason noted that the Court should consider the Plaintiff's objections based on privilege under Rule 5.13, and it was sometimes necessary to review the disputed documents in order to resolve this question. However, the person objecting has to provide "some cogent basis for expecting that privileged records may exist, and the basis of the claim to privilege". In this case, the Plaintiff's submissions did not do so in a sufficiently clear fashion, and further submissions were necessary to demonstrate the basis of the privilege claimed. Master Mason directed that the parties return at a later date to make further submissions on the remaining issues.

STRINGAM DENECKY LLP V SUN MEDIA CORPORATION, 2016 ABQB 692 (MASTER SCHLOSSER)
Rules 5.2 (When Something is Relevant and Material) and 5.33 (Confidentiality and Use of Information)

In an Action related to the Defendants' reporting of the Plaintiff law firm's billing in a family law matter, the Plaintiff applied to compel answers to questions objected to at Questioning. Specifically, the Plaintiff sought the name of a Defendant journalist's confidential source.

Master Schlosser considered whether the information sought was relevant and material pursuant to Rule 5.2, and whether importance of the disclosure outweighed the public

interest in maintaining confidentiality over the journalist's source. Master Schlosser noted that the "starting point" is to ascertain the issues in the pleadings that the evidence would help resolve, and lines of inquiry that are "unrealistic, speculative or without any air of reality" should be rejected. Master Schlosser held that the records sought by the Plaintiff related to a number of the issues that were in dispute, and therefore were relevant and material. In this case, the issues were malice, recklessness and improper purpose to the journalistic publications.

Master Schlosser noted that, even though the information may be relevant and material, it may still be protected under common law privilege, and therefore subject to the four Wigmore criteria. Master Schlosser considered whether the information in this case was privileged, noting that any disclosure was subject to the express undertaking in Rule 5.33, and that the Defendants had the right to object to the admissibility of the evidence pursuant to Rule 5.2(2). Master Schlosser granted the Plaintiff's Application to obtain information relating to the journalist's source.

SCHMITZ ESTATE V BARON, 2016 ABQB 598 (MASTER SCHULZ)
Rules 5.5 (When Affidavit of Records Must be Served), 7.3 (Summary Judgment), 8.17 (Proving Facts) and 13.18 (Types of Affidavit)

The Plaintiff, the Schmitz Estate, commenced an Action related to a dispute about a Share Purchase Agreement and two Promissory Notes. The Plaintiff applied for Summary Judgment of its Claim.

Several evidentiary issues arose due to the deaths of three key individuals in the case. Master Schulz noted that pursuant to Rule 8.17(3) the Plaintiff gave proper notice that it would be relying on a Probate Application in order to prove the date of death of one individual. Master Schulz granted leave to rely on the probate Application document.

Regarding the admission of hearsay evidence, counsel for some of the Defendants argued that under Rules 7.3 and 13.18, evidence before the Court on a final Application must be based on personal knowledge; as a consequence, hearsay evidence may not be used, even if it falls under an exception to the hearsay rule. Master Schulz reviewed leading authorities and held that affidavit evidence falling under an applicable hearsay rule is allowed if it meets the test for admissibility. Master Schulz therefore assessed admissibility using the "principled approach", under which hearsay evidence may be admitted if it meets a threshold level of necessity and reliability.

Concerning reliability of various documents, Master Schulz noted that Rule 5.15 deems documents listed in an Affidavit of Records to be "authentic", in other words:

> ...the documents are deemed to be printed, written, signed or executed as purported, an original is an original and a copy is a true copy. Parties are presumed to admit that a record referenced in the Affidavit of Records is authentic unless an objection is made within 3 months after the date on which the records are produced. Rule 5.15 does not apply if the pleadings deny receipt, transmission or authenticity of the document.

Since there was no objection, or denial of receipt or authenticity of the documents made within 3 months of production, the documents were deemed to be signed as they were purported to be signed. After a consideration of whether some documents contained admissions against pecuniary interest made by parties adverse in interest, and whether the probative value of admitting the evidence outweighed its prejudicial effect, Master Schulz admitted the second set of documents for the truth of their contents.

The Defendants argued that the Application for Summary Judgment was brought prematurely, as it was brought prior to Questioning. Master Schulz rejected this argument, noting that there is no need for all pre-Trial steps to be exhausted prior to an Application for Summary Judgment. Master Schulz also observed that Rule 7.3 "specifically allow[s] for a summary disposition of liability with quantum to be determined at a future date if necessary". Based on the admitted documents, Master Schulz held that the

Plaintiff had proved each element of liability. The Court granted Summary Judgment on the basis that, "the moving Party is entitled to summary judgment if … it presents uncontroverted facts and law which entitle it to Judgment against the non-moving Party" or if the non-moving Party's position is without merit.

STANKOVIC V 849450 ALBERTA LTD, 2016 ABQB 677 (MASTER PROWSE)
Rules 5.17 (People Who May be Questioned) and 5.18 (Persons Providing Services to Corporation)

The Defendant applied to Question the Plaintiff's solicitor who was involved in negotiations of a commercial deal which was in dispute. The Defendant sought to Question the solicitor as the Plaintiff's employee under Rule 5.17(1)(d).

Master Prowse considered the changes in the Rules from the former Rule 200 to the current Rules 5.17 and 5.18, and noted that Rule 5.17 is "largely a restatement" of former Rule 200. Master Prowse observed that, under Rules 5.17 and 5.18, it is no longer necessary to classify a "consultant" as an officer or employee of the Plaintiff in order for that person to be questioned. With respect to a consultant providing services to a corporation, the Court must first determine whether the consultant is actually an officer or employee of the corporation. The narrow definition of "employee" in Rule 5.17 may be gleaned from authorities in employment and tax law. If the consultant is not an officer or employee, they may nevertheless be examined under Rule 5.18 if the applicant has satisfied certain "public policy criteria":

(a) a party cannot obtain relevant and material information from an examination of the adverse party under Rule 5.17,

(b) it would be unfair to require the party seeking the examination of the service provider to proceed to trial without having the opportunity to ask the service provider about the information sought, presumably because it deals with a key issue in the litigation, and

(c) the questioning of the service provider will not cause undue hardship, expense or delay to, or unfairness to, the adverse party or the service provider.

Because Rule 5.17 was enacted concurrently with Rule 5.18, the Rules should be interpreted together. Master Prowse noted that litigants should utilize the public policy criteria in Rule 5.18 to "seek the examination of a consultant service provider than to refer to the voluminous case law under old Rule 200".

Master Prowse summarized the process to follow in an Application to Question a solicitor or other service provider of an adverse party:

(i) If the lawyer is or was an employee of the adverse party, then she/he may be examined for discovery under Rule 5.17;

(ii) If the lawyer is not an employee of an adverse corporate party, but provided services to the adverse corporate party, then the application to compel the lawyers attendance at discovery should proceed under Rule 5.18; and

(iii) If the lawyer is not an employee, and the adverse party is an individual as opposed to a corporation, the court should have reference to the criteria listed under Rule 5.18 in deciding whether to allow questioning to take place, even though the application is not proceeding under Rule 5.18.

The Court acknowledged that the solicitor had provided services to a natural person rather than a corporation, but that the criteria under Rule 5.18 should be applied. Therefore, the definition of "employee" under Rule 5.17 should only be broadened to cover the solicitor if all three criteria under Rule 5.18 could be satisfied. Master Prowse held that the Defendant was unable to demonstrate that he could not obtain material and relevant information without examining the solicitor, and it was not unfair for the Defendant to proceed to Trial without having the

opportunity to Question the solicitor. Accordingly, the Defendant's Application to Question the Plaintiff's lawyer under Rule 5.17 was dismissed.

JARRETT V FLANNERY, 2016 ABQB 565 (BROOKER J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 11.21 (Service by Electronic Method)

The Plaintiffs appealed the Summary Dismissal of their Action against the Defendants. The Defendants cross-applied to strike the Plaintiffs' Appeal as being out of time.

The Action was summarily dismissed on October 22, 2014. The endorsed Summary Judgment Order was filed on January 21, 2015. On January 22, 2015, Counsel for the Defendants emailed a copy of the Summary Judgment Order to Counsel for the Defendants and provided the Defendants with a second copy of the Order by email on February 12, 2015, confirming service on January 22, 2015. On March 9, 2015, the Plaintiffs filed and served by email an Appeal of the Summary Judgment Order. On August 25, 2015, the Defendants filed an Application for an Order dismissing the Plaintiffs' Appeal for being out of time. The Plaintiffs subsequently filed an Affidavit attaching a surgical opinion letter on October 16, 2015.

Justice Brooker noted that under Rule 6.14, an Appeal from a Master's Order must be filed and served within 10 days after the Order or Judgment is entered and served. The Court noted that in this case, the Order was sent to an email address provided by Counsel for the Plaintiffs for the purpose of service in this Action. Additionally, the Order was sent and received in a form usable for subsequent reference, and the sending agent, the Defendants' Counsel's computer and email system, obtained confirmation that the transmission was successfully completed. Further, service of the Notice of Appeal was effected by email 24 days after the Defendants served the Order. Brooker J. observed that as there was no Application to extend the time for service; therefore, the Appeal was dismissed.

Despite dismissing the Appeal as being out of time, Brooker J. considered the Appeal on its merits. The Court noted that the standard of review for an Appeal of a Master's decision is correctness and is a *de novo* hearing. The Plaintiffs in this case filed additional evidence on Appeal and the Defendants objected on the basis that the Affidavit was filed late. Brooker J. agreed with the Defendants, and held that the Affidavit was filed and served long after the one month limit set out in Rule 6.14(5)(b). Additionally, the Affidavit was not filed and served in accordance with QB Civil Practice Note 2 and the Affidavit contravened two prior Court Orders setting deadlines for the Plaintiffs to file expert evidence in 2013. His Lordship held that the attempt to introduce expert evidence by attaching it as an appendix could not be permitted and was clearly hearsay.

Justice Brooker held that the Plaintiffs had no expert evidence that any of the Defendants failed to meet the applicable standard of care, and the Plaintiffs' Claim had no real chance of success. The Cross-Application was allowed and the Appeal was dismissed with Costs.

CCS CORPORATION V SECURE ENERGY SERVICES INC, 2016 ABQB 582 (WITTMANN CJ)
Rule 7.3 (Summary Judgment)

The Defendant, Pembina Pipeline Corporation ("Pembina"), applied for Summary Judgment with respect to allegations in a Re-Amended Statement of Claim. CCS Corporation ("CCS") alleged that Pembina entered into negotiations with CCS about business opportunities that the two corporations could develop together; however, Pembina subsequently encouraged former employees of CCS to establish Secure Energy Services Inc. ("Secure") as a competitor to CCS, for the purpose of using CCS' confidential information to pursue the same business opportunity without CCS.

In June 2013, Pembina was successful in having the allegations contained in 3 paragraphs of the Amended Statement of Claim Summarily Dismissed. In those proceedings, the Court noted that Rule 7.3 allowed for Summary Judgment in respect of "all or part of a claim" and dismissed the allegations on the basis that there was no evidence provided by CCS that supported its claims in those paragraphs. Specifically, there was no evidence that confidential information was exchanged between CCS and

Pembina in the course of the negotiations between the parties. This finding was upheld by the Court of Appeal.

In considering the subsequent Application for Summary Judgment, Wittmann C.J. noted that since the first Summary Judgment Application was heard, the Supreme Court of Canada and the Alberta Court of Appeal had considered the proper approach to Summary Judgment Applications in Hryniak v Mauldin, 2014 SCC 7, *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, and *776826 Alberta Ltd v Ostrowercha*, 2015 ABCA 49. Wittmann C.J. noted that the mere assertion of a positon by the non-moving party in a pleading, or the mere hope of that party that something will come to light at Trial, is not sufficient for confirming that the non-moving party's case has merit, or that there is a genuine issue for Trial. The crucial consideration is whether the circumstances require *viva voce* evidence in order to properly resolve the case.

Wittmann C.J. considered each of the allegations in the Amended Statement of Claim. When examining the evidence for each allegation in light of the findings made in the first Summary Judgment Application, His Lordship held that there was no merit to all but one of the allegations raised in the Amended Statement of Claim. The Court found no evidence to support the allegations that Pembina persuaded, induced or procured Secure to unlawfully use CCS's confidential information, but did find some evidence that Pembina might be held jointly or vicariously liable for use of CCS's confidential information by another Defendant. Based on this, Pembina was entitled to Summary Dismissal of all of CCS' claims against it, with the exception of the vicarious liability claim that arose from the alleged use of CCS confidential information by another Defendant.

SA REFUELING LTD V NORTHERN LIGHTS (COUNTY) (MUNICIPAL DISTRICT OF NORTHERN LIGHTS NO 22), 2016 ABQB 592 (MANDERSCHEID J)
Rule 7.3 (Summary Judgment)

The Defendant/Counterclaimant, County of Northern Lights (the "County"), appealed a Master's Order dismissing their Application for Summary Judgment as against the Plaintiff, SA Refueling. The County had leased certain premises at an airport to SA Refueling for the use of aircraft refueling operations. The lease provided that an annual rent would be paid in addition to a charge based on the amount of fuel which was purchased by the County and delivered to the SA Refueling's tank at the airport premises. The County notified SA Refueling that it was terminating the lease due to unauthorized behaviour. SA Refueling commenced an Action claiming that the termination of the lease was invalid. The County filed a Counterclaim alleging unpaid rent and fuel charges.

The County applied for Summary Judgment which was dismissed by a Master due to a factual disagreement as to whether the lease provided that the payment would be based on the amount of fuel delivered to or dispensed from the tank. The Master determined that the Counterclaim was inextricably bound up with the Action itself, and even if it were possible to give Judgment for the Counterclaim, it would be appropriate to Stay the Judgment pending the outcome of the entire Action.

On appeal, Justice Manderscheid noted that the test for Summary Judgment under Rule 7.3 asks, in part, whether there is an issue of merit that genuinely requires a Trial; and, where there is such an issue, if the Claim is so compelling that the likelihood of success is very high, it can be determined summarily.

Justice Manderscheid noted that SA Refueling clearly did not meet its obligation to pay under the lease and the only issue was the amount outstanding. Justice Manderscheid allowed the County's Appeal and granted Summary Judgment.

SIEBEN V TREMMEL, 2016 ABQB 686 (MASTER BREITKREUZ)
Rule 7.3 (Summary Judgment)

The Plaintiffs purchased a home from the Defendants. The Plaintiffs discovered a water leak in the home's basement and commenced litigation alleging that the house contained pre-existing defects which were not adequately disclosed over the course of the sale. The Defendants commenced a Third Party Action against the real estate agent for the sale.

The Third Party Defendant applied for Summary Dismissal of the Third party Claim against him.

The Defendants contested the Summary Judgment Application on the basis that, among other things, there were many disputed facts which necessitated a Trial. Master Breitkreuz noted that Summary Judgment rules "should be interpreted broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of claims". Summary Judgment was appropriate where there was no genuine issue requiring Trial. The question was whether the moving party's position was "so compelling that the likelihood of success is very high such that it should be determined summarily".

Master Breitkreuz acknowledged that the nature of evidence required, or the issues at play in some cases made Summary Judgment inappropriate. Alberta's Rules did not provide "enhanced-fact-finding powers" to Chambers Judges for Summary Judgment Applications. Further, Masters could not weigh evidence and any fact-finding abilities were restricted by Section 9(3)(b) of the *Court of Queen's Bench Act*, RSA 2000, c C-31, which provided that Masters did not have the jurisdiction to determine disputed or contentious questions of fact unless the parties agreed to the disposition of the questions in Chambers on Affidavit evidence without a Trial. Subject to limited exceptions, Summary Judgment was typically not appropriate where there was conflicting evidence. These exceptions included situations where a Judge was able to make a determination by assuming that the evidence of the party opposing Summary Judgment was correct; when the conflicting evidence was irrelevant to the grounds for Summary Judgment; and when evidence was either "destroyed by cross-examination on affidavit or introduction of other evidence that would render that party's evidence completely non-credible".

Master Breitkreuz noted that the first step in determining whether to grant Summary Judgment required the Court to determine whether viva voce evidence was necessary. It was not essential that the Court see the witnesses, but before the Court could determine whether Summary Judgment was appropriate, it should engage in a 6-step analysis of the evidence:

1. The Court "should presume that the best evidence from each side is before the court", and each party must put their "best foot forward";

2. The Court must "consider whether an absence of evidence leads to a negative inference on certain points";

3. The Court should consider the "complete package" and the admissibility all of the evidence;

4. The Court should consider whether there is a conflict in the evidence; if so, the Court should ask whether Questioning has resolved the conflict, or whether the evidence is purely self-serving;

5. The Court should examine the evidence for admissibility, sufficiency, and reliability and may apply the law to the facts without deciding a "genuine question of law"; and

6. Finally, the Court can "make a determination on the summary judgment claim".

Master Breitkreuz concluded that the legal issues relevant to the Action were unsettled, complex or intertwined with the facts, and that this made it necessary to have a full Trial. Additionally, the Defendants alleged fraudulent misrepresentation against the Third Party Defendant. Master Breitkreuz noted that in order to determine whether the Third Party Defendant knowingly made false statements, or was reckless or willfully blind to the truth, the Court was required to weigh evidence. In this case, it was not clear who was responsible for the misrepresentation, and the Court would be required to undertake a credibility assessment to determine the facts. The Third Party Defendant's Application was dismissed.

NEUFELD V COUNTY OF MOUNTAIN VIEW, 2016 ABQB 676 (HUGHES J)
Rule 7.3 (Summary Judgment)

The Defendants (collectively referred to as the "County"), successfully obtained Summary Judgment under Rule 7.3 on the basis that there was no merit to the claims of the Plaintiffs, collectively (referred to as "Neuroese"). The Action involved Neuroese, a developer, purchasing approximately 625 acres of land in the County of Mountain View in order to develop it in accordance with a development plan. Following an election, and extensive public consultation on the development plan, the County passed a Bylaw that amended the development plan and negatively impacted Neuroese's ability to re-designate its lands and obtain a development permit. Neuroese appealed the Summary Judgment Decision to a Justice of the Court of Queen's Bench.

Hughes J., referring to prior leading authorities, stated that the Court was permitted under Rule 7.3 to grant Summary Judgment where there was "no merit" to a Claim or Defence. Further, there was no genuine issue requiring a Trial when the Court was able to reach a fair and just determination on the merits of the Action or an issue on a motion for Summary Judgment. Justice Hughes noted that this will occur when the process allows the Court to make the necessary findings of fact, apply the law to the facts, and when the process is a proportionate, more expeditious and less expensive means to achieve a just result. Further, factual disputes between Affidavit evidence did not necessarily mean that Summary Judgment could not be granted. However, Summary Judgment was not possible if the opposing parties' Affidavits conflicted on material facts or if the Chambers Justice was required to weigh the evidence or assess credibility.

In this case, Hughes J. noted that the *Municipal Government Act*, RSA 2000, c M-26, granted the County council the discretion to approve or refuse re-designation applications. In order to be successful in their Action, Neuroese had the onus of establishing that the Bylaw was passed for the sole purpose of defeating their re-designation application and not in furtherance of any legitimate public planning purpose. Hughes J. examined Neuroese's claims and the evidence presented for each claim and held that there was no evidence presented by Neuroese to support any of the claims in the Action. Neuroese failed to demonstrate that there was any issue of merit that genuinely required a Trial. Neuroese's Appeal was denied.

BOWER V EVANS, 2016 ABQB 717 (BELZIL J)
Rule 7.3 (Summary Judgment)

The Action arose from a tank explosion causing death and injury to employees of a corporation. The Plaintiffs sued the individual directors of the corporation, alleging that the accident was caused by their negligence, but did not name the corporation as a Defendant. The Defendant directors were unsuccessful in their Application for Summary Dismissal before a Master, and they appealed the Order.

Justice Belzil noted that the "modern test" for Summary Judgment is, following an examination of the existing record, to see if a disposition that is fair and just to both parties can be made. "Summary Judgment is appropriate when the resolution of the dispute turns primarily on issues of law".

Belzil J. noted that personal liability of a negligent director is not automatic; there must be something more to establish independent tortious liability. There was no evidence in this case that the directors had any involvement with the work being undertaken on the tank. Even if the Defendants may have been negligent in their corporate capacities, this was not sufficient. Moreover, the evidence did not support a causal link between the alleged negligence and injury to the Plaintiffs. The Masters' Order was set aside and Summary Dismissal was granted.

CONDOMINIUM CORPORATION NO 311443 V GOERTZ, 2016 ABCA 362 (MCDONALD, BIELBY AND WAKELING JJA)
Rules 7.3 (Summary Judgment), 9.30 (When an Affidavit of Value Must be Filed) and 9.31 (Other Material to be Filed)

The Defendant, Goertz, was sued by the Plaintiff Condominium Corporation for arrears on condominium fees and foreclosure. Goertz counterclaimed. The Plaintiff

sought Summary Judgment of their Claim, and Goertz cross-applied for Summary Judgment of his Counterclaim. The Plaintiff was successful, and Goertz' Application was dismissed. Goertz appealed. The Justice at the Court of Queen's Bench had relied on the principles stated in *Hryniak v Mauldin*, 2014 SCC 7, and had concluded that Goertz's Counterclaim could be summarily dismissed because all necessary findings of fact could be made from the record, there were no credibility issues and summarily dismissing Goertz's Counterclaim would be proportionate, faster and less costly than a full Trial. An Order for foreclosure was granted.

Goertz argued that the foreclosure Order should be set aside because, among other things, no Affidavits of value or certified copies of title had been advanced by the Respondents in accordance with Rules 9.30 and 9.31. The Court noted that Rule 9.30 specifically permits a Court to dispense with the filing of an Affidavit of value before granting a redemption or foreclosure Order. In addition, the Court observed that certified copies of title had been previously filed. Accordingly, the Court held that there was no merit to Goertz' argument, and the Court had not erred in granting the Order.

The Court of Appeal concluded that the test for Summary Judgment under Rule 7.3(1) had been properly applied, and that Goertz had failed to establish that the Court of Queen's Bench had erred in granting Summary Judgment as against Goertz. The Appeal was dismissed.

MCDONALD V BROOKFIELD ASSET MANAGEMENT INC, 2016 ABCA 375 (FRASER, SLATTER AND O'FERRALL JJA)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Representative Plaintiff, McDonald, was a director and shareholder in Birch Mountain Resources Ltd. ("Birch Mountain"). He commenced Class Action on behalf of all those who held common shares in Birch Mountain against the Defendants who provided Birch Mountain with various credit facilities. Before the Certification Application was heard, the Defendants successfully applied for Summary Dismissal. The Chambers Judge concluded that there was no substantial evidence showing any merits to the Plaintiff's claims. The Plaintiff appealed.

The Court of Appeal noted that, under Rule 7.3, an Action should be summarily dismissed if there was "no merit to a claim or part of it". In an Application for Summary Dismissal, the Defendant was required to introduce evidence relating to the absence of merit to the Claim, and the onus then passed to the Plaintiff who was required to prove that its Claim had merit. The Court of Appeal noted that Summary Judgment was appropriate where there was no genuine issue requiring a Trial; this meant that the Court was able to ascertain the necessary findings of fact, apply the law to the facts, and achieve a just result through a proportionate, more expeditious and less expensive means. The Rules for Summary Judgment should be interpreted broadly and should provide fair access to affordable, timely and just adjudication.

In this case, the Court noted that the Action was dismissed primarily because the Plaintiff failed to provide any substantive evidence showing merit. The only evidence the Plaintiff presented was an Affidavit consisting entirely of hearsay and non-expert interpretation of documents. The Plaintiff argued that this finding disclosed a reviewable error, because a Respondent to a Summary Dismissal Application could rely on hearsay under Rule 13.18(3), which allowed for hearsay evidence when the relief requested was not final. The Court of Appeal found that this was too narrow a reading of the Decision, and held that the Chambers Judge did not err in attributing "little or no evidentiary value" to the Affidavit.

The Plaintiff also sought to introduce fresh evidence on appeal in the form of an Affidavit by the representative Plaintiff. The Court of Appeal considered a four part test for introducing fresh evidence on Appeal: the evidence should generally not be admitted if, by due diligence, it could have been adduced at Trial; the evidence must be relevant in the sense that it pertained to a decisive or potentially decisive issue in the Trial; the evidence must be credible in that it was reasonably capable of belief; and it must be such that, if believed, it could reasonably be expected to have affected

the result. The Court of Appeal reviewed the Affidavit and held that the Plaintiff's new evidence was not admissible.

After considering the evidence for each of the causes of action alleged in the Plaintiff's Claim, the Court of Appeal concluded that the Chambers Judge correctly found that there was no merit, and that the Claim was properly dismissed because the Appellant failed to adduce sufficient evidence. The Application to admit fresh evidence and the Appeal were both dismissed.

ROSS V EDMONTON (CITY), 2016 ABQB 730 (VEIT J)
Rule 8.20 (Application for Dismissal at Close of Plaintiff's Case)

The Plaintiff applied to appeal a Decision of the Edmonton Local Assessment Review Board (the "Board") which had denied her request to lower the assessment of her residential property. Veit J. noted that in any civil proceeding the Claimant must initially only provide some evidence in support of their Claim, and once that threshold is satisfied, the onus shifts to the Respondent. Veit J. considered Rule 8.20 and stated that, at the close of a Plaintiff's case, the Defendant may request that the Court dismiss the Action on the grounds that no case has been made without being asked to elect whether evidence will be called. Following prior authority, Veit J. stated that the test for a non-suit Application under Rule 8.20 was that:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a prima facie case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. ...

Justice Veit observed that the Court should assume that the Plaintiff's evidence is true and draw all reasonable inferences from it. Her Ladyship stated the burden of proof in the Board hearing was not statutorily varied.

Veit J. stated further that there was no obligation on the Plaintiff to prove her case on a balance of probabilities before the evidentiary burden shifted to the City of Edmonton to make a response. The Plaintiff had provided some evidence to the Board that the assessment was unfair, and therefore, she had met the *prima facia* test. The Court determined that the Board had departed from the ordinary principle of law when it required the Applicant to prove that the assessment was incorrect before assessing the totality of the evidence before it. Therefore, the Application was dismissed and the Applicant's complaint was returned to the Board for reconsideration.

OOMMEN V CAPITAL REGIONAL HOUSING CORPORATION, 2016 ABQB 701 (VEIT J)
Rules 9.1 (Forms of Judgments and Orders), 9.2 (Preparations of Judgments and Orders), 9.5 (Entry of Judgments and Orders) and 10.52 (Declaration of Civil Contempt)

The Plaintiff sued his landlord. Leading to Trial, the Court ordered that the Plaintiff was to provide records to the Defendant; he failed to comply with the Court's Order and was held in contempt. The Defendant was granted leave to apply to strike out the Plaintiff's Statement of Claim if the records were not provided by June 17, 2016. The Defendant did not prepare the resulting Order in a timely way, and the Plaintiff applied to hold the Defendant in contempt.

Justice Veit noted that, pursuant to Rule 9.2(1), the Court may direct which party should prepare a draft Judgment or Order, but if the Court does not do so, the successful party should prepare the draft and, pursuant to Rule 9.2(2)(a), serve the proposed form of Order within 10 days of the decision being rendered. Under Rule 9.5(2), a Judgment or Order must be entered, by filing it with the Court Clerk within 3 months of its pronouncement, except with the Court's permission. Justice Veit stated that the breach of a Rule is not, on its own, a basis for contempt. Veit J. noted that contempt constitutes a deliberate breach of an Order or Rule, and that most Rules can be extended by consent or by the Court. Justice Veit explained that a Court has various options upon reviewing evidence of the failure to comply with a Rule: it can forgive the breach in

the circumstances; require the breaching Party to comply (usually within a certain time period); or, hold the offending Party in contempt.

Justice Veit held that the Defendant's lawyer failed to comply with Rules 9.2 and 9.5, but the failure did not amount to contempt. The failure to comply did not cause prejudice to the Plaintiff, and could be rectified by a new Order. Her Ladyship therefore ordered that the 10 day limit did not apply in the present case, approved the form of Order presented by the Defendant's lawyer which the Plaintiff did not object to, and granted leave to the Defendants to file the Order even though more than 3 months had passed by since the Decision was initially made.

KS V WILLOX, 2016 ABQB 654 (MOREAU J)
Rules 9.13 (Re-Opening Case) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

Following a Judgment at Trial, the Parties returned to speak to Costs and to finalize the terms of the Judgment Roll. Moreau J. considered the point at which the Plaintiff's former Litigation Representative, JS, ceased to be liable for Costs. In 2010, JS removed herself as Litigation Representative, and a lawyer subsequently filled the role. JS had discontinued her own Claim against the Defendant in 2014. The Plaintiff argued that JS should not be liable for Costs after she made clear her intention to no longer act as the Plaintiff's Litigation Representative. The Defendant argued that JS should be liable for Costs up until she discontinued her Claims against the Defendant, and that a multiplier of Column 5 of Schedule C was appropriate.

Justice Moreau held that JS would be liable for Costs until the point where she discontinued her own Claims against the Defendant. In making the determination of the amount of the Costs award, Moreau J. considered Rule 10.33, which provides the factors that the Court must consider when making a Costs award. In reviewing the factors set out in 10.33, Moreau J. noted that the Action was complex; it involved multiple issues regarding both liability and the quantum of damages; it involved multiple experts; and it took five weeks of Trial. Moreau J. also took into consideration that JS would experience some financial hardship in paying the Costs award. Her Ladyship, referring to prior leading authorities, held that Costs in Schedule C, Column 5 was appropriate with the application of a multiplier of 2 as against JS.

Moreau J. considered the quantum of damages as it related to a structured settlement and future cost of care in order to settle the formal terms of the Judgment. Moreau J. referred to Rule 9.13 which provides that, at any time before a Judgment or Order is entered, the Court may vary the Judgment or Order; or, if there is good reason to do so, the Court may hear more evidence and change or modify its Judgment or Order. Justice Moreau held that there was no reason to re-open the Trial to hear further evidence, but the parties were permitted to make further written submissions with respect to damages.

DECORE V DECORE, 2016 ABQB 572 (MICHALYSHYN J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Parties, two sons (the "Sons") and two daughters and two related family corporations (the "Daughters"), made competing Summary Judgment Applications relating to a dispute over their mother's Estate. Both Summary Judgment Applications were dismissed, and the Parties were unable to agree to Costs.

The Daughters argued that they should recover Costs because they were successful on three important issues which streamlined the litigation. Second, they argued the Sons' conduct during the proceedings required an award for Solicitor-Client Costs, or in the alternative, enhanced Costs. The Sons opposed enhanced Costs and argued that the matter of Costs should be handled later, by a Trial Judge.

Michalyshyn J. held that the Daughters were entitled to enhanced Costs, in particular because the Sons had alleged unproven claims of bad faith and dishonesty.

On the issue of the Daughters' partial success, Michalyshyn J. noted that Costs are not usually allocated for each issue, but that the Court is not prohibited from apportioning Costs for partial successes. His Lordship also noted that Rule 10.33(1)(a) entitles the Court to consider "the result of the

action and degree of success of each party". Further, Rule 10.33(1)(c) requires the Court to consider the "importance of the issues", and 10.33(1)(g) allows the Court to consider "any other matter relating to the question of reasonable and proper costs that the Court considers appropriate".

With regard to the Sons' conduct during the proceedings, Justice Michalyshyn reviewed Rule 10.33(2), which entitled the Court to consider whether the conduct of a party unnecessarily slowed the Action, or whether a party engaged in misconduct. His Lordship concluded that the Sons' conduct fell short of necessitating an award for Solicitor-Client Costs, but that enhanced costs were still appropriate in the circumstances. The Court did not agree that the matter should be deferred to the Trial Judge.

Michalyshyn J. therefore awarded the Daughters 2/5ths of their claimed Costs, as well as an additional $15,000 for the Sons' conduct during the proceedings.

BLANKENSHIP V JENKS-COCHRANE PROPERTIES LTD, 2016 ABQB 642 (READ J)
Rule 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff was successful in obtaining Judgment against two of the Defendants for oppression, based on the value of the Plaintiff's shares. The parties returned to the Court for a determination as to whether the Plaintiff was entitled to Costs under Column 1 or Column 5 of Schedule C. The Defendants argued that the underlying Application was non-monetary and the Judgment was declaratory in nature, so Column 1 was appropriate. The Plaintiff argued that Column 5 was appropriate as the amount awarded was in fact a monetary Judgment.

Justice Read noted that the Court has wide discretion to award Costs. Her Ladyship referred to the factors set out in Rule 10.33 that must be considered in exercising discretion to award Costs. The factors include: the result of the Action and the degree of success of each party; the amount claimed and the amount recovered; the importance of the issues; the complexity of the Action; the apportionment of liability; the conduct of a party that tended to shorten the Action; and any other matter related to the question of reasonable and proper Costs that the Court considers appropriate. Read J. also considered the principles of recovery of Costs in Schedule C and held that, in this case, the underlying issues in the Action were complex and needed to be tried. Further, the Defendants' conduct during Trial made it needlessly longer. These factors weighed in favour of increased Costs as against the Defendants. Costs under Column 5 were awarded.

EMSLIE V EMSLIE, 2016 ABQB 693 (GRAESSER J)
Rule 10.33 (Court Considerations in Making Costs Award)

Following a Judgment relating to child support in a family law matter, the parties returned before Justice Graesser for a determination as to Costs. The husband argued that Costs should be awarded to him because he was the successful Party. The wife argued that each party should bear their own Costs as success was mixed.

Justice Graesser noted that, pursuant to Rule 10.33(1), Costs are in the discretion of the Court, and that the "loser pays" principle also applies to family law matters. Justice Graesser stated that the Ms. Emslie had ultimately prevailed by "receiving an order in her favour in a significant amount". Graesser J. observed that, in some cases, the Court has apportioned Costs based on a ratio of success, while in others, Courts have awarded full Costs to the successful party even if they were unsuccessful on a small number of issues. His Lordship held that Costs should not be apportioned in this case: Mr. Emslie had been successful on a number of issues, but he had also unnecessarily lengthened the Action which is a factor listed under Rule 10.33(2)(a) as a consideration in making a Costs award. As a result, Justice Graesser held that each party should bear their own Costs.

TOEWS V GRAND PALLADIUM VALLARTA RESORT & SPA, 2016 ABCA 408 (BERGER, SCHUTZ AND MARTIN JJA)
Rules 11.23 (Additional Service Options in Foreclosure Actions) and 11.25 (Real and Substantial Connection)

The Plaintiffs (Respondents on Appeal) suffered a personal injury while vacationing at the Defendants' hotel in Mexico.

A Master and Justice of the Court of Queen's Bench held that the Court in Alberta had jurisdiction over the Action based on a real and substantial connection between the parties. The Defendants appealed.

The Court of Appeal stated that the Appeal was capable of adjudication on the common law test of "real and substantial connection" which is expressly adopted in Rule 11.25(3): a claim which "relates to" or is "connected with" a contract made in Alberta. A "presumptive connecting factor exists where a contract connected with a dispute was made in the Province". Ultimately, the Court of Appeal held that Alberta Courts had jurisdiction on the basis of a real substantial connection; but for a chain of related contracts, the Respondents would not have stayed at the Appellant's hotel and the injury would not have occurred.

MOLL V ALBERTA (CHILD, YOUTH & FAMILY ENHANCEMENT ACT, DIRECTOR), 2016 ABCA 400 (MCDONALD JA)
Rules 12.71 (Appeal From Decision of Court of Queen's Bench Sitting as Appeal Court) and 14.5 (Appeals Only With Permission)

Following a 20 day Trial in Provincial Court in which guardianship of the Applicants' three grandchildren was granted to the Director of Child, Youth and Family Enhancement the Applicants appealed to the Court of Queen's Bench. Their Appeal was dismissed for lack of merit and they appealed to the Court of Appeal. The Appeal was struck and the Applicants then applied for permission to appeal the Court of Queen's Bench Decision pursuant to Rule 14.5(i) and to restore their Appeal to the Court of Appeal's list.

Justice McDonald noted that, pursuant to Rule 12.71, there is no Appeal as of right from a Court of Queen's Bench Decision made under the *Family Law Act*, SA 2003, c F-4.5, and permission to Appeal can only be granted on a question of law or jurisdiction. McDonald J.A. held that the Applicants had failed to show that there had been an error of law or jurisdiction which would justify an Appeal. As such, their Application was dismissed.

WALTER V WESTERN HOCKEY LEAGUE, 2016 ABQB 588 (HALL J)
Rule 13.18 (Types of Affidavit)

The Representative Plaintiff applied to certify a proposed Class Action against the Defendants alleging that Western Hockey League players were employees who should have been paid according to applicable employment standards legislation. The Defendants applied to strike an Affidavit and an Expert's Declaration, as well as various paragraphs contained in the Affidavits tendered by the Plaintiff in support of the Certification Application.

The Defendants objected to one of the Affidavits on the basis that the Affiant provided unacceptable opinion evidence, although she was not an Expert, and that her Affidavit contained inadmissible hearsay evidence. The Representative Plaintiff argued in response that under Rule 13.18, Affidavits in support of an interlocutory Motion may be based upon information and belief. Justice Hall considered the parties' arguments, and struck the majority of the paragraphs contained in the Affidavit as they were inadmissible and argumentative.

With respect to a declaration by the Representative Plaintiff's expert, Justice Hall stated that, despite the Defendants' arguments that the declaration was inadmissible because Rule 13.18 requires the source of the information be disclosed when an Affidavit is based on information and belief, Experts are allowed to use their judgment and to rely on a variety of sources to reach their conclusions. Further, the Expert and Representative Plaintiff did not assert that the contents of the declaration were tendered for the truth of their contents. As a consequence, the declaration was not struck.

Hall J. considered the remaining impugned Affidavits and held that the contested statements and exhibits were simply proof of the existence of evidence. The Affidavits were not struck.

RENSONNET V UTTL, 2016 ABCA 316 (MARTIN JA)
Rules 14.5 (Appeals Only With Permission) and 14.38 (Court of Appeal Panels)

Ms. Rensonnet applied to appeal the Trial Judge's cost award and to submit fresh evidence on the Cost Appeal, after lengthy child custody proceedings.

Following a Trial on February 18, 2016, the Trial Judge issued Reasons, but did not make a determination regarding Costs or the final form of Judgment. The Respondent, Mr. Uttl, then appealed the Decision on the merits. That Appeal was dismissed in June 2016. The Trial Judge subsequently heard arguments as to Costs on June 23, 2016, and ordered that each party bear their own Costs on the same day. On July 22, 2016, Ms. Rensonnet appealed aspects of the final Judgment Roll and Costs. Costigan J.A. dismissed the Appeal as it was out of time on September 14, 2016, but did not comment on Costs.

Martin J.A. directed that Ms. Rensonnet's appeal as to Costs was by right. Pursuant to Rule 14.5(1)(e), an Applicant must receive permission to appeal a Decision "as to costs only" – but Ms. Rensonnet's Appeal was for Costs in addition to other aspects of the Judgment Roll, even if only the Appeal as to Costs was permitted to go forward.

Martin J.A. also noted that under Rule 14.38(2)(n), only a panel of the Court of Appeal can hear an Application to submit new evidence. His Lordship explained that, generally, the Court will hear such an Application at the beginning of the Appeal hearing itself.

HOK V ALBERTA (JUSTICE & SOLICITOR GENERAL), 2016 ABCA 356 (WATSON, BIELBY AND SCHUTZ JJA)
Rules 14.5 (Appeals Only With Permission) and 14.92 (Authority of the Registrar)

The Plaintiff, Hok, appealed the Summary Dismissal of her Action. A Court of Appeal Case Management Officer advised Hok that the Appeal was "irregular" pursuant to Rule 14.92(e), and that Hok required permission to Appeal. Hok failed to make such an Application. The Registrar of the Court of Appeal referred the irregular Appeal to a panel of three Court of Appeal Justices for a determination of whether the Appeal required leave.

The Court noted that Hok had initiated the Claim in Provincial Court for $3,227.73, but the Action was subsequently transferred to Queen's Bench. The Court also noted that, while Hok had sought to inflate her Claim to $600,000, the Registrar was correct to conclude the Claim fell under Rule 14.5(1)(g), requiring Appeals for less than $30,000 to be made only with Leave. The Court observed that the inflation of the Claim amount appeared to be for the purpose of avoiding the application of this Rule.

In addition, the Summary Dismissal Decision mandated that the Appellant not file any material on any Court file, or institute any new proceedings, without permission of the receiving Court. This Order was in effect when the Appellant filed the Appeal. As both irregularities required permission to Appeal, and permission was not obtained, the Court struck the Appeal as "sufficiently irregular". The Registrar's Reference to the Court pursuant to Rule 14.92(e) was granted.

JORDAN V DE WET, 2016 ABCA 366 (O'FERRALL JA)
Rules 14.5 (Appeals Only With Permission), 14.16 (Filing the Appeal Record – Standard Appeals) and 14.64 (Failure to Meet Deadlines)

The Applicant, Jordan, applied to restore an Appeal struck by the Registrar. He had filed an Application for permission to appeal; however, the Registrar struck his Appeal for failing to file the Appeal Record pursuant to Rule 14.16(3), and for failing to meet deadlines in accordance with Rule 14.6(4)(a). The Applicant argued that he did not require permission to appeal in the first place.

The Applicant had originally sought permission to appeal because he had been declared a vexatious litigant by the Court of Queen's Bench. Rule 14.5(1)(j) provides that no Appeal is allowed to the Court of Appeal by a person who has been declared a vexatious litigant in the Court appealed from unless permission to appeal is obtained. The Applicant subsequently argued that he did not require permission to appeal because nothing in the vexatious litigant Order made

by the Court of Queen's Bench prohibited the Applicant from proceeding with this specific Action.

O'Ferrall J.A. considered Rule 14.5(1)(j) and noted that the language is specifically "in the Court appealed from" and not "in the Action appealed from". Therefore, a vexatious litigant Order made by the Court of Queen's Bench is applicable to all proceedings taken by the person who has been declared a vexatious litigant. O'Ferrall J.A. referred to Rule 14.5(1)(j) and held that the Applicant required permission to appeal pursuant to Rule 14.5. O'Ferrall J.A. reviewed the background and the Decision of the Court of Queen's Bench Justice and determined that permission to appeal should not be granted. The Application was dismissed.

TD AUTO FINANCE (CANADA) INC V SMITH-JOHNSON, 2016 ABCA 388 (MARTIN JA)
Rules 14.5 (Appeals Only With Permission), 14.37 (Single Appeal Judges) and 14.38 (Court of Appeal Panels)

The Defendant, Smith-Johnson, applied to the Court of Appeal for an extension of time to Appeal a Summary Judgment granted against her. Justice Martin had dismissed that Application on the basis that the Appeal would have had no reasonable chance of success. Smith-Johnson then sought leave to appeal Justice Martin's decision to a panel of the Court of Appeal.

Justice Martin considered Rule 14.5, which deals with permission to appeal a single Court of Appeal Justice's Decision, and stated that the Applicant must establish that there is "(a) a question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts".

In this case, Smith-Johnson argued that Justice Martin had dismissed her Appeal by considering the merits of it, therefore bringing that Decision within Rule 14.38(2), which Appeal must be heard by a panel of the Court of Appeal. Smith-Johnson further argued that a single Justice is limited to hearing matters incidental to an Appeal under Rule 14.37(1), and an Application to extend time to appeal is not "incidental" within the meaning of that Rule. The Court rejected Smith-Johnson's arguments and stated that a single Justice has the power to deal with an Application for the extension of time to file an Appeal under Rule 14.37. The Court may consider the merits of the Appeal as part of the test in that Application, and doing so is not the same as deciding or dismissing the Appeal itself. Justice Martin held that Smith-Johnson failed to provide further information that would "call into question" the Court's prior Decision. The Application was dismissed.

ROBERTSON V ROBERTSON, 2016 ABCA 394 (MARTIN JA)
Rules 14.5 (Appeals Only With Permission) and 14.65 (Restoring Appeals)

The Plaintiff husband applied under Rule 14.65(1) to restore his Appeal relating to retroactive child support which was struck. Justice Martin, referring to recent Court of Appeal authority, noted that the five factors to be considered in reinstating a struck Appeal were:

i. Arguable merit to the appeal;

ii. An explanation for the defect or delay which caused the appeal to be taken off the list;

iii. Reasonable promptness in moving to cure the defect and have the appeal restored to the list;

iv. Intention in time to proceed with the appeal;

v. Lack of prejudice to the respondents (including length of delay).

Justice Martin noted that none of the factors are determinative; rather, the factors are weighed to determine whether it is in the interest of justice to permit an Appeal to be restored.

The husband argued that in making the Order for retroactive child support the Chambers Judge had failed to give adequate weight to the circumstances surrounding the change of the child's living circumstances. Justice Martin noted that Chambers Judge was afforded deference in such

circumstances. Consequently, the Appeal had no arguable merits. Justice Martin also noted that the Appeal was for an amount under $25,000, and the husband was required to seek leave to appeal pursuant to Rule 14.5(1)(g). As no such permission had been sought, the Appeal was also struck on this ground. Her Ladyship also noted that leave under Rule 14.5 would also be denied, had it been sought. The Application was dismissed.

MUDRICK CAPITAL MANAGEMENT LP V LIGHTSTREAM RESOURCES LTD, 2016 ABCA 401 (WAKELING JA)
Rule 14.5 (Appeals Only With Permission)

The Court of Queen's Bench granted Lightstream Resources Ltd. ("Lightstream") protection as a debtor company under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA"). The Plaintiffs had commenced oppression Actions against Lightstream, and they sought an Order directing Lightstream to enter into a security exchange agreement pursuant to Section 242(3)(e) of the *Business Corporations Act*, RSA 2000, c B-9 ("BCA"). The Court resolved the oppression Actions within the context of the CCAA proceeding, and concluded that the Plaintiffs were bound to fail and that there was no issue to be tried. The Plaintiffs applied for permission to present two questions to a panel of the Court of Appeal for consideration. The first question was whether the Justice of the Court of Queen's Bench failed to apply the correct test for an appropriate remedy for oppressive conduct, and the second was whether the Justice erred in using the context of the CCAA proceeding to restrict the availability of the oppression remedy in a manner contrary to law and public policy.

Wakeling J.A. noted that under Rule 14.5 if no statute stipulated the standard that a Court must apply in order to grant permission to Appeal, the Court of Appeal was to ask if there were "serious and arguable grounds that are of real and significant interest to the parties". Additionally, Wakeling J.A. set out four questions the Court should consider to narrow the focus of the inquiry and to determine if the proposed Appeal warranted the attention of a panel of the Court of Appeal: whether the question was one of significant importance to persons who were interested in the proper and efficient administration of the CCAA or the BCA, or any other identifiable segment of the public; and whether the answer to the question determined a significant issue within the proceeding or the outcome of the proceeding. If the answers to the two questions were "yes", the Appeal raised a "significantly important issue". The third consideration was the likelihood that the potential Appellant's question would be favourably answered for the potential Appellant to a point high enough to justify a second hearing that put the ultimate disposition into doubt and required the attention of a panel of Justices. In making this consideration, the Court must note that an Appeal Court will only set aside a decision of a supervising Justice if he or she committed an error of law, clearly misapprehended an important fact or made a decision that was obviously wrong. Assuming that permission to Appeal was granted and that the Appeal was brought with reasonable diligence, the Court should finally consider whether the time for the Appeal unduly hindered the proceedings under the CCAA.

Wakeling J.A. noted that even if the potential Appellant failed to satisfy these four factors, the Court had discretion to permit an Appeal if the Court was satisfied that the contested decision was clearly wrong.

In this case, Justice Wakeling concluded that the Plaintiffs' questions were of significant importance to the parties and the segment of the community interested in the administration of the CCAA and the BCA. However, the Application for permission to Appeal was denied as the Plaintiffs were unlikely to prevail on Appeal and granting permission to Appeal would unduly hinder the progress of the proceedings under the CCAA.

IBU V LAH, 2016 ABCA 383 (SLATTER JA)
Rules 14.14 (Fast Track Appeals), 14.24 (Filing Factums – Fast Track Appeals), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The self-represented Applicant appealed a Judgment relating to parenting. As such, it was to be heard as a fast track Appeal under Rule 14.14(2)(b). The Applicant requested the maximum extension to file documents with the Registrar at the Court of Appeal. The Case Management

Officer gave the Applicant an extra two months, and informed him that if the Appeal documents were not filed within two months, the Appeal would be struck pursuant to Rule 14.24(1)(a). The Applicant missed the deadline and the Appeal was struck.

The Applicant applied to restore the Appeal. The Case Management Officer informed the Applicant of the steps that would need to be taken in order to do so, and specifically referred him to Rule 14.65(3)(b) which provides that an Appeal or Application is deemed to have been abandoned if no Application to restore the Appeal or Application for Permission to Appeal has been filed, served and granted within three months after having been struck in the case of a fast track Appeal. The Applicant appeared at the Court of Appeal Registry just before closing on the date which he was required to file the Application to restore the Appeal.

Slatter J.A. noted the factors relevant to deciding whether or not the Court should restore an Appeal. His Lordship considered whether or not the Appeal had arguable merit, and concluded that there was none. Slatter J.A. also considered whether there was an explanation for the defect or delay which caused the Appeal to be struck. The Applicant alleged bias, unpleasant help from the Registry staff, and many other issues despite the fact that the Registry staff had given the Applicant several chances and several instructions on how to navigate the procedure. Justice Slatter noted that the Appeal was filed over seven months prior, and the Appeal should have been scheduled for oral argument pursuant to Rule 14.64(d), which provides that an appeal must be struck by the Registrar if it has not been placed on the hearing list within six months of filing the Notice of Appeal in the case of a fast track Appeal. Slatter J.A. determined that there was nothing on the Court record that justified the delay on the part of the Applicant. The Application to restore the Appeal was therefore dismissed and the Appeal was deemed abandoned.

TD AUTO-FINANCE (CANADA) INC V SMITH-JOHNSON, 2016 ABCA 315 (MARTIN JA)
Rule 14.37 (Single Appeal Judges)

The Defendant applied to the Court of Appeal for an extension of time to file an Appeal. Summary Judgment was granted against the Defendant by a Master, which was subsequently upheld on Appeal to a Justice on July 4, 2016. The Applicant filed her Notice of Appeal on August 17, 2016, after previously attending at the Court Clerks on July 25 and August 3 to request a waiver of filing fees, which was denied.

Martin J.A. noted that Rule 14.37(2)(c) allows the Court of Appeal to extend the time to file an Appeal. Granting an extension depends on whether it is in the interest of justice to grant such relief. His Lordship noted that the Applicant must show that:

1. There was a *bona fide* intention to appeal while the right existed;

2. There was some special circumstance that would explain the delay;

3. The Respondent was not seriously prejudiced;

4. The Appellant had not taken the benefits of the Judgment from which the Appeal was sought; and

5. The Appeal would have a reasonable chance of success if allowed to proceed.

Martin J.A. held that the Defendant met the first four criteria, but did not meet the last. The question on Appeal was whether a payment which TD had requested toward a loan was a part payment or a full settlement. All facts and arguments put forward by the Defendant about a binding settlement were advanced, disputed and eventually rejected by both the Master and the Justice. Martin J.A. held that the Defendant had no reasonable chance of success, and as such the Application was denied and the Appeal itself was struck for being out of time.

ALBERTA VETERINARY MEDICAL ASSOCIATION V SANDHU, 2016 ABCA 336 (COSTIGAN, WATSON AND SCHUTZ JJA)
Rule 14.74 (Application to Dismiss an Appeal)

Dr. Sandhu, a veterinarian, was found guilty by a tribunal of the Veterinary Medical Association (the "Association") of unprofessional conduct on seven charges, and levied sanctions. He appealed the Decision to the Council of the Alberta Veterinary Medical Association (the "Council). Dr. Sandhu then applied to the Council seeking an order either setting aside or permanently staying the tribunal's Decision because the Council had failed to schedule the Appeal hearing within 90 days of receiving the Appeal notice. Dr. Sandhu also sought the recusal of the Association's legal counsel who had prosecuted the original complaints. When the Council dismissed Dr. Sandhu's Applications, he appealed to the Court of Appeal.

The Association applied to dismiss the Appeal to the Court of Appeal because it was "frivolous, vexations, without merit or improper", or because the Appeal was an abuse of process pursuant to Rule 14.74. The Court noted that it had no statutory authority to stay or dismiss the tribunal's chosen sanctions or findings of guilt. It also found that Dr. Sandhu had not fully exhausted the administrative process. The Court held that the Appeal was premature and should be dismissed. The Court further stated that the Council's Decision regarding its own jurisdiction was something that is "generally left to the tribunal to decide".

Finally, the Court noted that Dr. Sandhu's Appeal on the merits of the Association's Decision regarding unprofessional conduct was still pending – and that "intercepting" the Council's involvement in those proceedings would not bring any benefit to Dr. Sandhu. As such, the Appeal would not be in the interest of justice or a prudent use of Court resources. The Court dismissed the Appeal.