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

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OOMMEN V CAPITAL REGIONAL HOUSING CORPORATION, 2017 ABQB 56 (VEIT J)
Rules 1.1 (What These Rules Do), 9.2 (Preparation of Judgments and Orders) and 9.5 (Entry of Judgments and Orders)

The Plaintiff, Oommen, was unsuccessful in his Application to hold the individual Defendant, Neal, in contempt of Court. The Plaintiff's contempt Application was based on Neal's non-compliance with Rule 9.2(2)(a) which provides that, within ten days after a Judgment or Order is pronounced, the responsible party must prepare and draft the Order or Judgment in accordance with the Court's pronouncement and serve it on every party in attendance at the hearing, and Rule 9.5(2), which provides that a Judgment or Order is not to be entered more than three months after it is pronounced, except with the Court's permission. Veit J. held that the Defendant's conduct was not morally reprehensible, and non-compliance with Rules 9.2 and 9.5 did not constitute contempt.

The Defendant applied for Costs against the self-represented Plaintiff, and argued that Rule 1.1(2) provides that the Rules govern all persons who come to the Court for resolution of a claim whether the person is self-represented or is represented by a lawyer. Veit J. noted that Rule 1.1 did not directly come into play on this Application, as there was no other specific Rule which the Plaintiff was required to follow. Veit J. ordered that the Plaintiff pay Costs to Neal forthwith in the amount of $750.

DIRECTOR (EAP) V HANDEL TRANSPORT, 2017 ABQB 3 (JEFFREY J)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies) and 1.5 (Rule Contravention, Non-Compliance and Irregularities)

The Director of Alberta Environment & Parks ("Director") applied to the Provincial Court for an Order authorizing entry on to private lands owned by the Respondents for the purposes of carrying out outstanding remediation work, pursuant to the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("EPEA"). The Respondents opposed the Application for access and cross-applied for an Order requiring the parties to submit to mediation.

The Director argued that the Provincial Court Judge did not have the jurisdiction to order the parties to mediation. However, the Judge concluded that the Provincial Court had inherent authority to assist parties in resolving their disputes through appropriate directions, pursuant to Rules 1.2 and 1.3, and granted the Order directing the parties to mediate. The Director then applied for Judicial Review of the mediation Order, alleging that it was *ultra vires*. The Respondents argued that the Application was a nullity, because the appropriate challenge should be brought by way of Appeal, not Judicial Review. Justice Jeffrey held that the challenge was properly brought by way of Judicial Review, as the Appeal provisions for Provincial Court apply only to Civil Claims, not access Applications under the EPEA. Further, the Court has broad curative powers to remedy procedural irregularities under Rule 1.5 and s. 8 of the *Judicature Act*, RSA 2000, c J-2.

Justice Jeffrey held that the Provincial Court had exceeded its jurisdiction as the mediation Order: (i) encroached on the Director's exclusive statutory jurisdiction; (ii) constituted a collateral attack on the remediation Orders; and (iii) required the expenditure of funds by the Provincial government without any statutory power to do so. The mediation Order was therefore quashed.

SRG TAKAMIYA CO LTD V SPRUNG INSTANT STRUCTURES LTD, 2017 ABQB 118 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 3.62 (Amending Pleading), 6.44 (Persons who are Referees) and 7.3 (Summary Judgment)

The Plaintiff (Defendant by Counterclaim), SRG Takamiya Co Ltd. ("SRG") applied for Summary Judgment and, in support of the Application, to amend its Statement of Claim to include unjust enrichment. The Defendant (Plaintiff by Counterclaim), Sprung Instant Structures Ltd ("Sprung"), argued that if SRG was allowed to amend its Statement of Claim, Sprung should be allowed to defend the amended claims; and, SRG's claims should be resolved at the same time as the Counterclaim.

Master Robertson considered whether the amendment to the Statement of Claim was required, and held that the Rules require parties to plead facts, not the law, and thus, there is no requirement to specifically state the cause of action on which a claim is based, despite it being advisable to do so for clarity. Master Robertson held that the amendment to add unjust enrichment was unnecessary as the Statement of Claim pled the facts which supported a claim for unjust enrichment. Master Robertson held that SRG was entitled to Summary Judgment pending a determination of damages because Sprung had refused to comply with the contract between the parties. Master Robertson noted that Rule 7.3(3)(b) provides that, in an Application for Summary Judgment a Court may determine the issue of damages or refer the matter to a referee, which include Masters in Chambers pursuant to Rule 6.44. Master Robertson proceeded to assess damages for the value of the disputed structure, and directed that the parties return with further evidence regarding reasonable shipping costs, as well as argument concerning the appropriate date for a US dollar to Canadian dollar conversion.

Sprung requested a Stay of Enforcement on the basis that it would be unfair to grant Judgment to a foreign company while there was an active Counterclaim against it. Sprung alleged that SRG was withholding relevant and material information for the Counterclaim, and as a

result of this refusal SRG had caused staged litigation where the Counterclaim had to be resolved at a later date. Master Robertson noted that the Foundational Rule supports the notion that the determination of a clear claim should not be delayed simply because the Defendant has a Counterclaim, and the parties must identify the real issues in dispute. Master Robertson held that the enforcement of the Judgment against Sprung would be stayed until the earlier of: 18 months from the date of the determination of the Award, settlement of the Claim and Counterclaim and the filing of Discontinuances or Consent Judgments accordingly, and Judgment against SRG in the Counterclaim. Alternatively, Master Robertson held that the Stay would end if SRG posted a bond from a Canadian bonding or insurance company for the full amount sought in the Counterclaim including interest. SRG's Application for Summary Judgment was granted.

AL-GHAMDI V HER MAJESTY THE QUEEN, 2017 ABQB 169 (HILLIER J)
Rules 1.2 (Purpose and Intention of These Rules), 1.8 (Interpretation Act), 9.15 (Setting Aside Varying and Discharging Orders), 11.2 (Service Not Invalid), 11.5 (Service on Individuals), 11.22 (Recorded Mail Service) and 11.27 (Validating Service)

Al-Ghamdi sued 97 Defendants and purportedly served them by registered mail sent directly to the hospital where the individuals worked. Al-Ghamdi received, but did not respond to correspondence from two law firms, advising him that they were acting for certain Defendants, and requesting an extension of time to defend. When prompted for a response, Al-Ghamdi refused the request for an extension of time. Al-Ghamdi subsequently filed several Affidavits of Service, and required the Clerk to note the Defendants in Default based on the Affidavits of Service. Several of the Affidavits of Service which purported service by registered mail had been refused, or signed for by an individual other than the Defendant who was supposed to have been served. Certain individuals were also supposedly served personally, but the Affidavits were sworn by Al-Ghamdi when he was not the one who served the document. When certain Defendants attempted to file Statements of Defence, they were prevented from doing so because of the Notices of Default.

The Defendants applied to open up the Notices of Default but Al-Ghamdi argued that the Defendants' Applications to open up the Default should be dismissed for a failure to comply with the timelines for filing and service of Applications set by Case Management. The deadline set for filing and service was January 6, 2017. Al-Ghamdi deposed that he did not receive hard copies with court date stamps until several weeks after this date, despite having received electronic copies (albeit, without date stamps) concurrent with the filing of the materials. Justice Hillier held that this objection was without merit, noting that:

> Deadlines set in case management are intended to provide: (1) structure that will govern the parties' expectations and responsibilities, (2) time to prepare and properly respond and (3) efficient standards for work priorities, all with an objective of facilitating access to timely decisions of the court on substantive matters.

Hillier J. held that Al-Ghamdi had sufficient time to prepare and respond.

Al-Ghamdi also argued that the Applications should be dismissed because they were not brought within 20 days of learning of the Default Notices as required by Rule 9.15(2). Hillier J. observed that Noting in Default is not a Judgment or Order, but rather an administrative notation made by the Clerk of the Court. Thus, the 20 day limit in the Rule did not apply to a Noting in Default. Further, Hillier J. held, even if the Rule applied, the Rule provides the Court with discretion to extend the time limits if it is deemed fair to do so. Regarding the merits of the Application to set aside the Noting in Default, Justice Hillier confirmed that the overriding objective was to "do what is fair", noting that the relevant considerations under Rule 9.15(3) are for an Applicant to show: an adequate explanation as to why a Statement of Defence was not delivered; whether there was any delay in applying to set aside the Default and, if so, whether there was a satisfactory explanation accounting for that delay; and whether the material discloses a triable issue of fact or law. Justice Hillier noted however, that these considerations were not "essential elements that constitute a fixed test" but rather, examples of the

relevant considerations for the Court to take into account in exercising its discretion under Rule 9.15(3).

Al-Ghamdi argued further that commencement documents can be served by recorded mail, and that Rule 11.2 provides that service was not invalid because the addressee refused to accept the mail. Hillier J. held that Rule 11.2 is a general provision, which could not overrule the specific provision in Rule 11.5, which states that service of commencement documents is only effected by registered mail when the party acknowledges receipt. Al-Ghamdi argued further that s. 23 of the *Interpretation Act* RSA 2000, c I-8 creates a presumption of service if an enactment authorizes a document to be sent by mail. Hillier J. however noted that Rule 1.8(c) states that s. 23 of the *Interpretation Act* does not apply to service of documents under the Rules. Al-Ghamdi further argued that s. 24 of the *Interpretation Act*, which is not excluded from application to the Rules, provides that service can be effected where persons other than the addressee signs on the addressee's behalf. Hillier J. however, noted out that the Rules have their own presumptions regarding service by recorded mail under Rule 11.22, but that Rule expressly excludes commencement documents. Hillier J. therefore held that the generic provisions of the *Interpretation Act* could not overrule the specific provisions in the Rules. As such, Hillier J. held that service by recorded mail could only be effected by the acknowledgement of receipt by the addressee, and remarked that this conclusion should not be read to effect possible exceptions that may be validated by the Court in an Application under Rule 11.27.

Justice Hillier held that the Defendants had moved quickly to set aside the Noting in Default, given the circumstances, and stated that given the number of professionals, public bodies, and institutions which were impugned in the Action, as well as the arguable points raised in response to the allegations by some of the Defendants, it was not necessary for every Defendant to individually set out a meritorious Defence.

The Applications were allowed, and the Defendants permitted to file Defences.

BAVARIA AUTOHAUS (1997) LTD (BAVARIA BMW) V TIFFINGER, 2017 ABQB 220 (MASTER SCHULZ)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.59 (Claiming Set-off), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 7.3 (Summary Judgment)

The Plaintiff employer claimed against a former employee in negligence and breach of fiduciary duty. The Defendant employee sought Summary Dismissal of the Claim pursuant to Rule 7.3. The Plaintiff employer opposed the Application, and without filing a separate Notice of Application, requested: (i) a consolidation of this Action with the employee's wrongful dismissal Action, pursuant to Rule 3.72(1); and (ii) permission to amend the Statement of Defence in the wrongful dismissal Action to include a claim for set-off, pursuant to Rules 3.59 and 3.65(1).

Master Schulz noted that foundational Rules 1.2 and 1.3 promoted the efficient, timely and effective resolution of disputes and permitted the Court to grant relief whether or not it is sought. However, Rule 1.5 "admonishes the Court" to not cure a contravention or irregularity if it is not in the overall interests of justice. Master Schulz stated that, to allow a party to "spring a request for relief" in a written Response Brief without providing adequate notice or evidence in support of the request contravened the Rules and was not in the interests of justice. The Plaintiff's request for consolidation and amendment of the Pleadings was therefore denied.

With respect to the Defendant's Summary Dismissal Application, Master Schulz reviewed the leading authorities and summarized the relevant principles as:

A. Summary Dismissal can be granted if a disposition that is fair and just to both parties can be made on the existing record.

B. Summary Dismissal can be granted where there is no merit to the claim. To have merit, there must be a genuine issue of a potentially decisive material fact.

C. There is no genuine issue requiring a trial when the fair and just process allows for the necessary findings of fact and allows the law to be applied to the facts in a proportionate, expeditious and less expensive manner that achieves a just result.

D. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily.

E. The Respondent must put its best foot forward at the Summary Dismissal application.

Master Schulz held that the evidence was insufficient to raise a genuine issue requiring a Trial. The employer had not put its best foot forward and their allegations had not been made out. Moreover, the Court accepted the evidence in support of the employee's limitations defence regarding the alleged negligence in her accounting duties and breach of fiduciary duty. Summary Dismissal of the Claim was granted.

PREFONTAINE V BELL, 2017 ABQB 226 (MASTER BREITKREUZ)
Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay) and 15.6 (Resolution of Difficulty or Doubt)

The Defendant had applied to strike the Plaintiff's Claim for long delay pursuant to Rule 4.33. During the previous hearing, Master Breitkreuz held that the Defendant had met all the requirements of Rule 4.33 to dismiss the Plaintiff's Claim for long delay, but sought submissions from the Parties as to whether Rule 15.6 might affect how Rule 4.33 applied in the circumstances. Master Breitkreuz noted that Rule 15.6 provides that, if there is doubt about how the Rules of Court apply when a "difficulty, injustice or impossibility" may arise, the Court may suspend the operation of any Rule or modify how the Rule operates or applies. Master Breitkreuz considered prior authority in which Rule 15.6 did not stop the operation of Rule 4.33 and observed that Rule 1.2(2) is meant to facilitate the quick resolution of a Claim and to encourage resolutions of claims early in the process.

The Plaintiff argued that Rule 15.6 was a codification of the Court's inherent jurisdiction to grant equitable relief. Master Breitkreuz observed that the rules of equity will not override the Rules of Court, and that in these circumstances, allowing Rule 15.6 to affect the Rule 4.33 Application would result in uncertainty in the future application of Rule 4.33. Accordingly, Master Breitkreuz held that Rule 15.6 could not save the Plaintiff from the Defendant's Rule 4.33 Application. The Application was granted.

PILLAR RESOURCE SERVICES INC V PRIMEWEST ENERGY INC, 2017 ABCA 19 (BIELBY, WAKELING AND MCDONALD JJA)
Rules 1.2 (Purpose and Intention of These Rules), 6.37 (Notice to Admit), 7.3 (Summary Judgment), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Defendants and Plaintiffs by Counterclaim ("Appellants") appealed the Costs decision of the Trial Judge who awarded full-indemnity Costs to the Respondent. The Trial Judge held that full-indemnity Costs were warranted given the totality of the Appellants' actions, which consisted of having:

a) made misleading and disingenuous requests for further information during pre-litigation negotiations as a delay tactic;

b) attempted to introduce new evidence in its written argument following Trial;

c) refused to admit facts which were not ultimately in issue; and

d) alleged, but did not address or prove, fraud.

On appeal, the Appellants asserted that each party should bear their own Costs.

The Appellants' Trial strategy was described as "let the other side prove its case", where they required the Respondents to prove facts which the Appellants had no intention of disputing. The Court of Appeal noted that the Trial time would have been reduced from 14 days to 3 had the Appellants conceded items which they had no intention of contesting, and focused on the single issue in dispute between the parties.

Wakeling J.A. agreed with the Trial Judge's reasons for awarding full-indemnity Costs, including that pre-litigation misconduct could be an appropriate ground to justify a full indemnification Costs award. However, both McDonald and Bielby J.J.A. held that pre-litigation misconduct, on its own, does not permit an award of full-indemnity Costs. Justice Bielby held that the remaining grounds upon which the Trial Judge based the Costs award were sufficient justification for the extraordinary remedy.

Justice Wakeling held that the Appellants' Trial conduct was inconsistent with the foundational Rules generally, and Rule 1.2 specifically, which require the parties to "identify … the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense". Wakeling J.A. continued that the Respondent's decision not to take any positive steps to expedite resolution or a narrowing of the issues, such as serving a Notice to Admit under Rule 6.37, or applying for Summary Judgment under Rule 7.3, did not relieve the Appellants of their obligations under Rule 1.2 to identify the real issues in dispute, and communicate openly, honestly, and in a timely way.

Wakeling J.A. held that the Appellants' Trial conduct, and their allegation of fraud without addressing or proving the allegation at Trial, justified an enhanced Costs award. The Appellants' conduct in trying to adduce new evidence through written argument following Trial was held to be a further ground to support the Costs award.

The Court upheld the Trial Judge's Decision and dismissed the Appeal. McDonald J.A., in dissent, would have allowed the Appeal, and awarded Costs to the Respondents in accordance with Schedule C.

FLOCK V FLOCK ESTATE, 2017 ABCA 67 (MCDONALD, VELDHUIS AND SCHUTZ JJA)
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 Appellant (the deceased Ms. Flock, by her litigation representative) in a matrimonial property Action applied to strike her ex-husband's Statement of Claim for long delay pursuant to Rule 4.33. The Application was dismissed, and the Appellant appealed.

At the Court of Queen's Bench, the Chambers Judge held that over three years had passed without anything "materially advancing" the Action, and though the Appellant did not expressly consent to a delay, the Appellant had "excused" the delay and had "lulled" opposing counsel into believing the time limit imposed by Rule 4.33 would not be enforced. The Chambers Judge held that striking the Action would mean that the matrimonial property would be inequitably divided.

The Court of Appeal noted that the Chambers Judge did not have the benefit of recent decisions emphasizing that a functional approach should be used to determine whether an Action has been "significantly advanced", rather than an approach based on formal steps. The Court stated that dismissal on an Action is required after three years of inactivity, except "where the moving party has participated in steps after the expiry of the three years to the extent that it would be unjust to dismiss the action". The Court also noted that Rule 4.33 is mandatory, not discretionary, and that the Plaintiff is responsible for timely prosecution of its claim. While the Defendant cannot obstruct or purposely delay the Action, it need not actively assist in moving the Plaintiff's Action along. The Court of Appeal also observed that standstill agreements may be made orally, but cannot be implied; and that, if a party does not take steps to dismiss a Claim under Rule 4.33, and meaningful steps are taken after the three year period, it may lose its ability to have the Action dismissed automatically.

In applying the above principles to the facts, the Court of Appeal found that there was no evidence to suggest that the Appellant had expressly waived the entitlement to rely on Rule 4.33. The Court explained that writing to request that "litigation be put on hold" is not the same as entering into a standstill agreement, and that in any event, the offer was not accepted. Although the Appellant's counsel did not communicate that the Appellant did not consent to further delay, silence is not agreement, much less an express agreement. The Court also noted that Rule 4.33 must be read in light of Rule 1.2, which states that the Rules are intended to enable more efficient and lest costly resolutions of disputes.

With respect to the Chambers Judge's consideration of prejudice and the inequitable division of matrimonial property, the Court of Appeal again emphasized that Rule 4.33 mandatorily requires dismissal after three years of inactivity. The Court of Appeal contrasted Rule 4.33 to Rule 4.31 in this regard: Rule 4.31 is a "prejudice-based discretionary delay rule", while Rule 4.33 is "written in absolute terms". The Court held that it would not be "just or appropriate" to create an exception to Rule 4.33 when the wording of the Rule, read plainly, does not do so.

The Court of Appeal allowed the Appeal, and struck the Respondent's Claim for long delay.

GRENON V CANADA REVENUE AGENCY, 2017 ABCA 96 (VELDHUIS, SCHUTZ AND CRIGHTON JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant, Grenon, appealed a decision of the Court of Queen's Bench in which all the causes of action pleaded in the Statement of Claim were struck (save one, which was stayed pending the outcome of a different hearing at the Tax Court of Canada). The causes of action were struck pursuant to Rule 3.68 on the basis that they either disclosed no claim, or that the issues fell exclusively within the jurisdiction of the Federal Court of Canada and the Tax Court of Canada.

The Court reviewed the test to strike a Claim under Rule 3.68(2)(b), which permits a Court to strike all or part of a Claim if it does not disclose a reasonable claim, meaning that there is no reasonable prospect of success. The Court noted that, in considering whether a reasonable claim has been disclosed, the Court must accept that the allegations as pleaded are true, except if they are incapable of proof, patently ridiculous, or are based on speculation or assumption. Further, the Court should "err on the side of generosity" so that novel but potentially meritorious claims are still able to be heard. The Court observed that this approach is consistent with Rule 1.2(2)(a) and (b), which support the facilitation of efficient and economic resolutions of Claims. The Court dismissed the Appeal except with respect to the Appellant's claim that he was the proper party to sue on behalf of the trust.

HEARING OFFICE BAIL HEARINGS (RE), 2017 ABQB 74 (WITTMANN CJ)
Rule 1.4 (Procedural Orders)

The Attorney General of Alberta (the "Applicant") applied for a Declaration that police officers have the legal authority to act as Prosecutors at first appearance bail hearings before a Justice of the Peace. The Application was brought in response to a tragic incident in which an individual who was on bail shot two police officers, killing one of them. Chief Justice Wittmann declined to grant the Application sought and declared that police officers do not have the requisite authority to act as Prosecutors under the *Criminal Code*, RSC 1985, C-46.

The Applicant requested that, given the nature of the Court's Declaration, that it be suspended for six months, to allow for an orderly transition and to uphold the rule of law. Chief Justice Wittmann held that s. 8 of the *Judicature Act*, RSA 200 c J-2 and Rule 1.4 granted the Court the power to fashion a suspended Declaration as a remedy. His Lordship further noted that with respect to Rule 1.4(2)(h), there was no "great semantic difference between the terms 'stay' and 'suspend' as they both refer to postponing the effect of a judgment". Wittmann C.J. stated that immediate

and significant changes to the bail hearing system would raise legitimate concerns for the administration of justice in Alberta. The Applicant's request for a six month stay was granted.

CHISAN V FIELDING, 2017 ABQB 233 (EAMON J)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 2.24 (Lawyer of Record), 6.3 (Applications Generally), 13.6 (Pleadings: General Requirements), 13.29 (Certified Copies of Original Records) and 13.47 (Proof of Official Court Reporter's Signature Not Required)

The Defendant applied for a declaration that the Plaintiff was a vexatious litigant. The Plaintiff had commenced several Actions dating back to 1992, all of which involved the City of Calgary or its representatives and agents, and generally involved allegations about the seizure of the Plantiff's lands. The Plaintiff had appealed an Order to strike his claim, and, in response, the Defendants had filed the Application for a declaration that the Plaintiff was a vexatious litigant. The Chambers Judge who adjourned the two Applications to a Special Application noted that it might be irregular to bring a motion within a struck Action, but Eamon J. stated that Rule 6.3(1) permitted such an Application. Justice Eamon further noted that, in the event this was an irregularity, time had long since passed to raise an objection pursuant to Rule 1.5(3).

The Plaintiff complained that counsel for the City should not be able to represent the City since counsel was a "corporate lawyer". Eamon J. observed that the lawyer in question had become lawyer of record under Rule 2.24 by having filed a record in the Action. As the Plaintiff had not articulated an intelligible basis to question the lawyer's authority, the Court declined to delve further.

The Defendants tendered several records in support of their Application to declare the Plaintiff a vexatious litigant. The Court noted that some of the records failed to comply with Rule 13.29(2) in that they were not endorsed by the Court Clerk as true copies. Eamon J. also noted that various transcripts submitted by the Applicant were not signed by the Court Reporter, but that this was cured by Rule 13.49. Finally, Justice Eamon noted that in the absence of objection from the Plaintiff, these materials were admissible notwithstanding their technical noncompliance.

Justice Eamon reviewed the Plaintiff's litigation history and noted that his pleadings often failed to comply with Rule 13.6(2) in that the Plaintiff did not discharge his burden to properly plead his case such that, if the allegations were proven, liability would result. Further, the Plaintiff often made bald allegations of bad faith without particulars in contravention of Rule 13.6(3). On that basis, among other reasons, His Lordship granted the Defendant's Application and held that the Plaintiff was a vexatious litigant.

ROYAL BANK OF CANADA V RACHER, 2017 ABQB 181 (EAMON J)
Rules 3.2 (How to Start an Action), 3.12 (Application of Statement of Claim Rules to Originating Applications), 3.14 (Originating Application Evidence), 7.1 (Application to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)

Royal Bank of Canada ("RBC"), a creditor of James Racher ("Mr. Racher"), sought to set aside a conveyance of lands which was jointly owned by Mr. Racher and Audrey Racher (collectively the "Rachers") to Mrs. Racher alone. It applied on the basis that the land was undervalued, and that the sale constituted a fraudulent conveyance prior to Mr. Racher's bankruptcy.

Justice Eamon noted that most of the written evidence was conflicted, and it was not possible to "resolve a material credibility dispute" in Chambers, based only on inconsistent Affidavit evidence. Eamon J. noted that neither party applied to adduce oral evidence, or for pre-Trial disclosure, though the Court had the authority to consider such evidence pursuant to Rule 3.14(1).

RBC argued that the Court should apply Summary Judgment principles to interpreting the issues, even though it did not rely upon Rule 7.3 or request Summary Judgment in its Originating Application. If Summary Judgment principles were to apply, RBC submitted that the Court would be entitled to presume that the best evidence from each party was before the Court, and that self-serving

evidence would not create a triable issue. Justice Eamon declined to apply Summary Judgment principles, and held that it could cause unfairness to the Rachers if Summary Judgment principles were applied when they were not originally requested by RBC. Eamon J. assessed whether there were "sufficient findings on the record to arrive at a fair and just disposition", noting that contests of credibility could not be tried in Chambers, but that conflicts within the parties' Affidavits which did not affect essential facts or constitute a difference in opinion only, could be heard in Chambers. Justice Eamon emphasized that, where "final relief" is sought, a self-serving Affidavit on its own may not be enough to create a triable issue.

Eamon J. reviewed the nature of the issues (whether a transfer was undervalued, whether a fraudulent conveyance occurred, and whether an exemption existed) in order to decide whether, pursuant to Rules 3.2(6), 3.12, and 7.1(1)(a), the issues could be assessed summarily in Chambers, or referred to a Trial of the issues.

In the result, Justice Eamon declared that the land transfer was at undervalue and was void as against the trustee in bankruptcy and RBC.

SEROYA V CALGARY (CITY), 2017 ABQB 157 (MACLEOD J)
Rule 3.15 (Originating Application for Judicial Review)

The Applicant sought a Judicial Review of a decision of the Calgary License and Community Standards Appeal Board ("Appeal Board"), which affirmed the revocation of the Applicant's taxi plate licences for several breaches of the *Livery Transport Bylaw*, 6m2007. The Appeal Board gave its reasons for decision orally on October 28, 2014, and issued a written decision on December 11, 2014. The Application for Judicial Review was filed on June 4, 2015, and served June 5, 2015.

The Respondent asserted that the Application for Judicial Review was not brought within the limitation period in Rule 3.15(2) which requires that an Originating Application for Judicial Review to be filed and served "within 6 months after the date of the decision or act". Justice Macleod noted that the Appeal Board procedural manual required written reasons of its Decision where the rights of a party are adversely affected. Accordingly, the Decision was only final when the Parties were provided the written reasons, and thus, the limitations date in Rule 3.15(2) began to run on December 11, 2014. The Originating Application for Judicial Review was therefore brought in time. Nonetheless, the Applicant failed to demonstrate that his defence was prejudiced for want of procedural fairness, or that the Manager and Hearing Officer had made a reviewable error. As such, the Application was dismissed.

NIXDORF V BROADSTREET PROPERTIES LTD, 2017 ABQB 132 (MASTER ROBERTSON)
Rules 3.37 (Application for Judgment Against Defendant Noted in Default), 6.44 (Persons who are Referees) and 7.3 (Summary Judgment)

The Defendant, Broadstreet Properties Ltd., ("Broadstreet") in an Action for wrongful dismissal argued that the Plaintiff's ("Nixdorf") Application for Summary Judgment was inappropriate, as it required an assessment of damages, which was beyond the jurisdiction of a Master.

Master Robertson found that a reading of the *Court of Queen's Bench Act*, RSA 2000, c C-31 and the Rules of Court are clear that a Master may hear a Summary Judgment Application. Master Robertson noted that this was in keeping with the "culture shift" toward summarily determining disputes where possible as described in *Hryniak v Mauldin*, 2014 SCC 7. Master Robertson stated that Rule 7.3 is not limited to debt claims or liquidated damages claims, noting that any "claim" may be heard under the Rule. Further, if Judgment is given for part of a claim, the deciding Court may refer the balance of the claim to a referee and Masters may be referees under Rule 6.44 in such cases. Master Robertson noted that previous Summary Judgment cases decided under former Rule 159 are distinguishable on that basis, as the text of the two rules are "significantly" different.

Finally, Master Robertson noted that wrongful dismissal Actions are particularly well-suited for Summary Judgment, as the law is well settled and the facts are often not in

dispute. Following a review of the facts in the case and the merits of Nixdorf's claims, Master Robertson granted Summary Judgment in favour of Nixdorf.

POMERLEAU V CANADA (REVENUE AGENCY), 2017 ABQB 123 (MASTER SCHULZ)
Rules 3.61 (Request for Particulars), 4.16 (Dispute Resolution Processes), 6.37 (Notice to Admit), 7.3 (Summary Judgment) and 10.29 (General Rule for Payment of Litigation Costs)

The self-represented Plaintiff had filed two Actions against the Canada Revenue Agency. The Canada Revenue Agency had applied for Summary Dismissal pursuant to Rule 7.3 on the basis that the Plaintiff's Claims had not been brought in the correct forum, and that they should have been brought in front of the Tax Court of Canada; and alternatively, that the Plaintiff's claims had no merit and had characteristics of Organized Pseudolegal Commercial Argument (OPCA) schemes.

Master Schulz outlined the history of the two Actions, which were largely similar. Throughout the litigation, the Plaintiff had filed a number of documents, including an Application made under Rule 3.61, which provides that a party may serve a Request for Particulars when served with a pleading, along with a supporting Affidavit. Later, the Plaintiff filed an Application under Rule 4.16, the Dispute Resolution Processes Rule which provides that it is the responsibility of the parties to manage their dispute and that this includes good faith participation in one of the dispute resolution processes listed under the Rule with respect to all or any part of the Action. Master Schulz noted that the Application under Rule 4.16 was unnecessary as that Rule has been suspended due to a lack of judicial resources.

The Plaintiff also filed two Notices to Admit Facts pursuant to Rule 6.37. Master Schulz noted that Rule 6.37 provides that a party to a lawsuit who receives a Notice to Admit Facts is presumed to agree with an alleged fact in that notice unless it denies that fact or objects to that fact. The Plaintiff had argued that, legally, silence meant agreement. Master Schulz stated that silence as agreement is not a principle of common law, but Rule 6.37 which was law put in place by the Alberta Legislature does provide that silence, in the face of a Notice to Admit Facts, does constitute agreement to those facts.

Master Schulz set out the test for Summary Dismissal under Rule 7.3: Summary Judgment may be granted if a "disposition that is fair and just to both parties can be made on the existing record by using that alternative method for adjudication"; this is a "question of merit". Both parties must put their best foot forward. Master Schulz held that the Court of Queen's Bench did have jurisdiction to hear the Plaintiff's claims, and that the Tax Court of Canada does not have the sole jurisdiction to assess the amount of tax due from a taxpayer, as well as the constitutional validity of tax legislation. However, Master Schulz granted the Summary Dismissal Application on the basis that the Plaintiff's claims had no merit and were an attempt to implement legally incorrect OPCA schemes.

Master Schulz also considered Rule 10.29(1), which provides that a successful party to an Application is entitled to a Costs award against the unsuccessful party. Master Schulz noted that because of the nature of the OPCA litigation, the Court could award a heavy Costs award against the Plaintiff. However, Master Schulz determined that the Court should only order Costs pursuant to Schedule C, which was still significant. Master Schulz took the unusual step of not awarding punitive Costs as against the Plaintiff because he had conducted himself in a cooperative and constructive manner.

TRIMOVE INC V SERVUS CREDIT UNION LTD, 2017 ABQB 50 (NIELSEN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 3.71 (Separating Claims), 3.72 (Consolidation or Separation of Claims and Actions), 4.22 (Considerations for Security for Costs Order) and 13.7 (Pleadings: Other Requirements)

Through its Statement of Claim, the Plaintiff alleged that the Defendant initiated receivership proceedings hastily, and in breach of a forbearance agreement, causing the Plaintiff to go out of business. The Defendant, Servus, applied for an Order Striking out the Statement of Claim

for failure to disclose a cause of action, collateral attack on receivership proceedings, and abuse of process. Alternatively, the Defendant applied for Security for Costs.

The Defendant proposed to strike out the Plaintiff's claims relating to the Defendant's conduct leading up to the Receivership Order (the "Conduct Claims"), and claims relating to the Receiver's shortcomings (the "Receiver Claims"). Nielsen J. noted that the test for striking out pleadings is outlined in Rule 3.68, and has been interpreted by the leading authorities to mean that a claim may be struck where it is "beyond doubt" and "plain and obvious" that the claim will fail.

Nielsen J. held that the Conduct Claims did not conflict with the receivership and sale proceedings. The Defendants' allegations revolved around a concern that the Statement of Claim revealed similar allegations to those made in its defence to the receivership proceedings. Justice Nielsen noted that Rules 3.71 and 3.72 provided that a claim may be asserted in a separate Action, and as a Counterclaim in another Action if the claim arose from the same occurrence or series of occurrences. Nielsen J. observed that since the receivership Action was nearing completion, and because the pleadings disclosed a reasonable cause of action, allegations regarding Servus' conduct should be tried apart from the receivership Action. However, Nielsen J. held that the Conduct Claims were not sufficiently particularized, since they did not provide particulars with respect to alleged misrepresentation, in accordance with Rule 13.7(c). The Plaintiff was granted 30 days from the date of the Reasons for Judgment to provide particulars. Nielsen J. noted that the Plaintiff had the opportunity to challenge the Receiver Claims in the context of the receivership. Accordingly, Nielsen J. held, among other things, that the Receiver Claims were a collateral attack on the receivership proceedings, and several paragraphs in the Statement of Claim should be struck.

Nielsen J. considered Rule 4.22, and granted the Defendant's request for Security for Costs. Justice Nielsen noted that Rule 4.22 applies to all cases which are not subject to statutory regulations. In this case, security would be granted under section 254 of the *Business Corporations Act*, RSA 2000, c B-9 rather than Rule 4.22, because the Plaintiff was a body corporate.

THEAKER V PUBLIC SERVICE ALLIANCE OF CANADA, 2017 ABQB 170 (MASTER SCHLOSSER)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 5.33 (Confidentiality and Use of Information), 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

Three of the Defendants applied under Rule 3.68 to strike the Plaintiff's Amended Statement of Claim in which the Plaintiff alleged harassment and retribution. Master Schlosser observed that the Defendants should have relied on Rule 7.3 and the relevant authorities under that Rule to seek Summary Judgment, instead of Rule 3.68 which requires the Court to proceed on the assumption that all allegations in the Statement of Claim are true, however "preposterous". Further, the tests for Rules 3.68 and 7.3 are different: a Rule 3.68 Application requires the Court to identify a "fatal flaw in the lawsuit" to the "plain and obvious" or "beyond a reasonable doubt" standard; whereas, a Rule 7.3 Application requires the Court to decide whether a "fair and just determination" can be made on the record. As a result, Rule 3.68 is often not the optimal choice for Applicants, and as Rule 3.68 typically prompts an amendment, authorities have suggested that "more money is wasted on this rule than any other."

Master Schlosser concluded, pursuant to Rule 3.68(2)(a), that the Court had the jurisdiction to adjudicate the claims in this Action. Master Schlosser considered the Defendants' Rule 3.68 Application in detail, and reviewed Rule 3.68(2)(b), which requires the Court to consider whether the lawsuit disclosed no reasonable claim. Master Schlosser noted that pursuant to Rule 3.68(3), the parties may not submit evidence, and the Court must proceed on the basis that facts alleged in the Amended Statement of Claim are either true or capable of being proven. In this case, the Court was unable to conclude that it was beyond doubt that the Plaintiff's Amended Statement of Claim disclosed no reasonable claim. Unlike Rule 3.68(2)(b), the other portions of Rule 3.68 permit the use of evidence.

Master Schlosser reviewed the parties' Affidavits and held that none of the evidence in the Defendants' Affidavit was admissible. Mater Schlosser stated that, since a Rule 3.68 Application is a "final application," the evidence must be first-hand, pursuant to the technical rules under Rule 13.18(3). Further, Rule 5.33 prevents "evidence taken in one lawsuit from being used in another." Although Rule 6.11(1)(f) may permit the use of an Affidavit sworn in an earlier Action, this use requires notice of intention to the other side and leave of the Court. As a result, there was very little admissible evidence in the Application other than the Plaintiff's Affidavits.

Master Schlosser also considered Rule 3.68(2)(c) and Rule 3.68(2)(d), noting that the Rules ask whether the commencement document is "frivolous, irrelevant or improper," or whether it "constitutes an abuse of process." The Court noted that the Defendants' authorities that "bore the hallmarks of vexatious litigation" were not on point, and that "vexatious" was no longer part of the current Rule 3.68. The Court commented that the definitions in older case law tend to be circular in the context of Rule 3.68, and opined that "the Courts should be slow and cautious about labelling litigants or branding claims as preposterous", and unless a claim is obviously and *prima facie* inadequate, "the Court owes litigants a duty to explain why a claim cannot succeed and should be dismissed summarily".

The Court held that much of the Plaintiff's Amended Statement of Claim was irrelevant or improper. Master Schlosser attempted to review the Amended Statement of Claim to potentially edit and remove improper materials to salvage the claim, but this proved to be impossible in this case, and the Court noted that even the Plaintiff's Affidavit disclosed the fact that she too believed her Claim to be hopeless and unprovable. Master Schlosser held that maintaining an Action that a claimant knows cannot be proven "is improper or frivolous for the purpose of Rule 3.68(2)(c)". The Application was allowed, and the Plaintiff's lawsuit was struck.

1536466 ALBERTA LTD V PRESTIGIOUS PROPERTIES INC, 2017 ABQB 176 (MASTER SCHLOSSER)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 4.22 (Considerations for Security for Costs Order)

The Defendant applied under the *Business Corporations Act*, RSA 2000, c B-9 (the *"Act"*) for Security for Costs as against the Plaintiff. Master Schlosser noted that the Defendant relied on an Affidavit attesting to the Plaintiff's inability to pay Costs. While Master Schlosser noted that neither the Act nor Rule 4.22 provide a specific time in which a Security for Costs Application must be brought, there was no doubt that such an award must be made at the earliest opportunity and may be brought before a Statement of Defence is filed.

Master Schlosser also noted that the former Rule for Security for Costs stipulated that the Affidavit must attest to the merits and nature of the Action in which the Order was sought. Master Schlosser observed that the "old Rule contains good advice". As the Applicant had not entered such evidence in this case, the Application was dismissed with leave to re-apply with a further or better Affidavit.

THOMPSON V INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO 955, 2017 ABQB 210 (NIELSEN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 4.22 (Considerations for Security for Costs Order)

The Defendants applied to have the Plaintiff declared a vexatious litigant, and to strike the Plaintiff's Applications in which he, in turn, sought a declaration that the Defendants' counsel and representatives were vexatious litigants. The Plaintiff had commenced various Actions against a number of Defendants and had generally been difficult and uncooperative throughout a lengthy litigation process.

Justice Nielsen allowed the Defendants' Application and declared the Plaintiff a vexatious litigant. His Lordship also reviewed the factors relevant to a Security for Costs award and noted that it was just and reasonable to award Security

for Costs in this case. The Court held that the Respondent had failed to pay previous Costs awards made against him, that there was no evidence that he had any exigible property in Alberta. With respect to the merits of the underlying Action, it did not appear that the Plaintiff had a very strong case. The Court found that a properly crafted Order for Security for Costs would not unduly prejudice the Plaintiff's ability to continue the litigation, and ordered that he post $55,000 based on an estimate of party-and-party Costs to complete the Action.

GAULT ESTATE (RE), 2017 ABQB 182 (MAHONEY J)
Rules 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court-Ordered Costs Award)

Following the Defendant's successful Application to strike the Plaintiff's new Action, the Defendant sought full-indemnity solicitor client Costs. The Plaintiff had commenced a new Action amidst a number of proceedings which were under Case Management which was dismissed as an abuse of process and for failing to disclose a cause of action.

The parties agreed that the successful party to an Application was entitled to Costs subject to the Court's general discretion to award Costs under Rules 10.29 and 10.31. Mahoney J. observed that full-indemnity Costs are an exception, and should be made in accordance with established principles. Justice Mahoney held that this was not a case where the novelty and complexity of issues required complete indemnification for Costs, but that it was not a "run of the mill" special chambers Application.

His Lordship noted that the Defendant had successfully argued that the new Action was an attempt to circumvent Rule 3.74, which restricts when new parties may be added to an Action following the close of Pleadings. Following consideration of this factor and the other circumstances of the case, Mahoney J. awarded 50% of the amount of full-indemnity Costs to the Defendant.

HAYDEN V ALBERTA HEALTH SERVICES (FOOTHILLS MEDICAL CENTRE), 2017 ABQB 111 (MASTER FARRINGTON)
Rule 4.22 (Considerations for Security for Costs Order)

The Plaintiff, a self-represented litigant, commenced an Action against many parties following a workplace disciplinary action and subsequent termination and grievance. The Plaintiff alleged that the Defendants had been part of a broad conspiracy to remove her from her employment. The Plaintiff named the law firm and individual lawyer who had acted as counsel for one of the Defendants ("Defendant Counsel"). The Defendant Counsel applied for Security for Costs against the Plaintiff.

Master Farrington considered the leading Alberta authorities relating to Security for Costs, and the factors enumerated in Rule 4.22, noting that the factors play a "critical role" in determining what is "just and reasonable" in the circumstances.

Master Farrington considered each of the factors, including the merits of the Plaintiff's Claim. Master Farrington noted that the Defendant Counsel had met their onus of showing they had an arguable defence, and that this factor weighed in favour of granting the Application. Master Farrington also stated that in some cases, Security for Costs should not be ordered when the Claim has arguable merit. On the other hand, if the Claim has little merit, the case for posting Security for Costs is strengthened. Master Farrington noted that the allegations made against the Defendant Counsel were very serious, and when a Plaintiff cannot prove allegations of this nature, they may be subject to an aggravated Costs award.

Master Farrington considered whether the granting of the Application would unduly prejudice the Plaintiff's ability to continue the Action. The Plaintiff argued that "justice" favoured not granting the Application as it could have a serious impact on her ability to continue the litigation. Master Farrington held that "justice" was required to be applied in a way that was fair to all parties. Master Farrington considered the factors that influenced whether Costs were appropriate, including whether the Plaintiff had

assets in Alberta and whether the Plaintiff likely had the ability to pay a Costs award, both factors which weighed in favour of granting the Security for Costs Application. Master Farrington also noted that there was a prior outstanding Costs award against the Plaintiff, and that the litigation had been very contentious.

Master Farrington granted the Application for Security for Costs, but not in the full amount sought by Defendant Counsel. Master Farrington observed that the Court may order a phased posting of Security for Costs when appropriate. Master Farrington held that the Action was stayed as against the Defendant Counsel pending the posting of the Security for Costs by the Plaintiff; and, if the Plaintiff did not post the Security for Costs within the Court's deadlines, then the Action was to be dismissed.

KENT V MARTIN, 2017 ABQB 27 (STREKAF J)
Rules 4.24 (Formal Offers to Settle), 4.25 (Acceptance of Formal Offer to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 9.14 (Further or Other Order After Judgment or Order Entered), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award may be Made), 10.31 (Court-Ordered Costs Award), 10.32 (Costs in Class Proceeding) 10.33 (Court Considerations in Making Costs Award) and 10.34 (Court-Ordered Assessment of Costs)

Following a lengthy Trial in two defamation Actions between the parties, the Court held that the Plaintiff had been defamed by an article written and published by the Defendants. Following the Court's Trial Decision, the Plaintiff applied for a permanent Injunction prohibiting the Defendants from publishing the article in the future, and sought partial indemnity Costs.

Justice Strekaf noted that, under Rule 9.14, a Court is permitted, after a Judgment has been entered, to make a further or other Order which provides a "remedy to which a party is entitled in connection with the judgment" so long as doing so does not require variance of the original Judgment. Strekaf J. held that the Plaintiff had not met the requirements for a permanent Injunction and dismissed the Application for such relief.

The Plaintiff sought Costs that represented a partial indemnity of his legal fees in connection with two Actions which had been combined, and a Bullock Order directing that he be indemnified by the Defendants for Costs that he was required to pay to previous Defendants who were granted Summary Dismissal in earlier stages of the Actions. The Defendants submitted that each side should bear their own Costs.

The Court held that Costs are a matter within the Court's discretion, to be exercised in accordance with Rules 10.29 through to 10.34. Specifically, Rule 10.29(1) provides that a successful party is entitled to Costs, subject to the Court's discretion under Rule 10.31. Rule 10.31 then provides a broad range of Costs that may be ordered, including full-indemnity and lump sum Costs. Justice Strekaf noted that Rule 10.33 lists various factors a Court may consider in awarding Costs. In this case, the Court considered the result of these Actions, the importance and complexity of the issues, the parties' conduct to shorten or lengthen the Actions, the Defendants' noncompliance with the Rules, and the Plaintiff's unfounded allegations of misconduct. With respect to the Costs in connection with previous Defendants who successfully sought Summary Dismissal, the Court held that there was no reasonable basis for the Plaintiff to have added them to the Action, and therefore the Defendants were granted a credit to be set-off against any Costs awarded to the Plaintiff.

Strekaf J., as part of the consideration with respect to Costs, reviewed the effect of settlement offers. The Defendants had relied on Rule 4.29(2) and argued that the Plaintiff should not be entitled to Costs because the Defendants had achieved a result at Trial that was more favourable than their Formal Offers to the Plaintiff. The Court reviewed relevant case law and each of the Defendants' three Offers to the Plaintiff, and determined that none of the three Offers triggered Rule 4.29(2): the Defendants failed to establish that the Judgment was more favourable to them than the first Offer; the second Offer did not meet the requirements for a Formal Offer as set out in Rule 4.24 (2); and the third Offer required the Plaintiffs to waive certain rights pursuant to Rules 4.25(2)(a) and 4.25(3). As a result, the Offer was inconsistent with Rule

4.25(1), and therefore did not qualify as a Formal Offer for the purpose of Rule 4.29(2). As Rule 4.29(2) did not apply, the Court needed not to consider the provisions under Rule 4.29(3)(e) with respect to the third Offer.

Justice Strekaf awarded taxable Costs and reasonable disbursements to the Plaintiff, in the net amount of $250,000. In awarding taxable Costs, Her Ladyship noted Rule 10.31(5), which allows Costs for steps taken by self-represented parties to be included in the taxable Costs calculation. Strekaf J. observed that the Plaintiff was represented throughout the litigation, and only elected to represent himself for some steps to avoid legal expenses. The Court found that it was not unreasonable to include those steps in the calculation of the Plaintiff's taxable Costs.

AMIK OILFIELD EQUIPMENT & RENTALS LTD V WHITECAP RESOURCES INC, 2017 ABQB 45 (MASTER MASON)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff was awarded damages for breach of contract, but the parties were unable reach an agreement regarding Costs. The Plaintiff argued that it was entitled to double Costs on the basis of two unaccepted Offers extended to the Defendant, pursuant to Rule 4.29 and *Calderbank v. Calderbank*, [1975] 3 All ER 333 (CA) (*"Calderbank"*).

Master Mason noted that, under Rule 10.29(1), the successful party to an Application is entitled to a Costs award against the unsuccessful party. Additionally, Rule 10.31(1) allowed the Court to order one party to pay another party the reasonable and proper Costs that a party incurred or any amount that the Court considered to be appropriate. Rule 10.33 lists the factors which the Court may consider in making a Costs award. Finally, Rule 10.31(6) provides that the Court's discretion is subject to any specific requirements with respect to what Costs are payable by whom. Master Mason also considered Rules 4.24 and 4.29 which relate to double Costs awards following a Formal Offer. With respect to a *Calderbank* offer, Master Mason stated that the defining feature was that, if it is not accepted, the party making the Offer reserved the right to disclose non-privileged communications about Costs to the Court.

Master Mason held that the Plaintiff's initial Offer, which was issued by way of a letter marked "Without Prejudice" prior to the commencement of the Action, did not qualify as a Formal Offer within the meaning of the Rules, and noted that it was not clear from the letter that it would not be privileged at the Costs stage. The Plaintiff's second Offer was also issued by way of a letter marked "Without Prejudice", but was issued after the Action was commenced and after the Plaintiff had obtained Summary Judgment. The Offer was extended before the damages were awarded, but failed to meet the requirements of Rule 4.24(2) and also did not indicate that it would be referenced in Costs proceedings. Despite this, Master Mason stated that both Offers could still factor into the Costs award.

Master Mason held that the Plaintiff made two reasonable and genuine offers of compromise prior to and after the commencement of the Action. Each Offer carried a possibility of resolving the matter for significantly less than the full amount claimed and a savings of further Costs. On that basis, Master Mason ordered that the Defendants pay total fees of $6,000 under Schedule C, as well as enhanced Costs in the amount of $2,000. The Court also ordered disbursements paid in the amount of $1,000, and Costs in the amount of $750 for submissions related to the Costs Application.

MORIN V ALBERTA UTILITIES COMMISSION, 2017 ABCA 39 (ROWBOTHAM JA)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 14.59 (Formal Offers to Settle) and 14.88 (Cost Awards) and Schedule C

Following the dismissal of the Plaintiffs' Application (the "Applicants") for permission to Appeal a Decision of the Alberta Utilities Commission ("AUC"), the parties returned before Rowbotham J.A. for a determination on Costs. The

AUC did not seek Costs, but the remaining Respondents submitted that they were entitled to Costs. All parties agreed that Costs should be awarded in accordance with Column 1 of Schedule C for items 19 and 22; but AltaLink L.P. ("AltaLink"), TransAlta Corporation ("TransAlta"), and Her Majesty the Queen in right of Canada ("Canada") sought double Costs, or enhanced Costs, for Formal Offers they made in accordance with Rule 14.59.

Rowbotham J.A. noted that Rule 14.88 provided that the successful party was entitled to Costs against the unsuccessful party. Prior to the Court's dismissal, AltaLink, TransAlta and Canada had offered that, if the Applicants discontinued their Appeal, each party would bear its own Costs. The Applicants contended that the Appeal Rules regarding Offers did not apply to Applications for permission to Appeal. Rowbotham J.A. stated that, Rule 14.59(1) provided that 10 days or more before an Appeal is scheduled to be heard, a party may serve a Formal Offer in order to "settle the appeal or any part of the appeal in accordance with Part 4, Division 5"; and Part 4, Division 5 of the Rules, specifically Rule 4.24(1), contemplated that an Offer could be made before an Application. Her Ladyship held that the Rules were intended to manage litigation, and if a party brought an Application that was without merit, a Respondent should be able to compromise in an effort to settle the matter. Justice Rowbotham noted that this particular issue did not appear to have been judicially considered; however, under the former Rules there was nothing to prevent the Court from awarding double Costs when an Appeal was interlocutory. In this case the Offers were genuine and, as set out in Rule 14.59(4), AltaLink, TransAlta and Canada were entitled to double Costs for the period after the service of their Offers.

SANGHA V (ADMINISTRATOR, MOTOR VEHICLE ACCIDENT CLAIMS ACT), 2017 ABQB 91 (MASTER PROWSE)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

In an Action respecting a motor vehicle accident, the Defendant (the "Administrator") applied to have the Plaintiff's claim dismissed for long delay pursuant to Rule 4.33. The Administrator argued that the Action was not significantly advanced by the Plaintiff ("Sangha") between May 31, 2013, and May 31, 2016.

The Action was commenced in October 2004. Between May 31, 2013, and May 31, 2016 Sangha filed two notices of change of representation; the Administrator filed one notice of change of representation; Sangha's counsel made an informal and without prejudice settlement offer to the Administrator, which was rejected; Sangha filed seventh, eighth, and ninth supplemental Affidavits of Records (which included answers to Undertakings and expert reports); Sangha's new counsel withdrew as lawyer of record; and a tenth supplemental Affidavit of Records was filed. The Administrator argued that the real issue in the litigation was whether or not an unknown driver struck Sangha's vehicle, causing the accident. Despite the fact that steps were taken in the litigation, the Administrator argued that there was no progress on the true issue in the dispute.

Master Prowse noted that damages were as much in issue as liability, and a significant advance on damages qualifies as a significant advance in the Action. Master Prowse noted that the Administrator did not make an alternative argument that the Action should be struck on the basis of undue delay under Rule 4.31, and that perhaps it was because no prejudice resulted from the delay. Instead, the Administrator argued, in relation to Rule 4.31, that steps during the "drop dead period" under Rule 4.33 should have been completed earlier. Master Prowse observed that the test "is simply whether there was a significant advance … during the drop dead period or not." Further, Master Prowse found that there was no evidence suggesting that Sangha was deliberately moving slowly or "taking steps sporadically in order to avoid having the action struck".

In the result, Master Prowse held that steps were taken between May 31, 2013 and May 31, 2016, which significantly advanced the Action with respect to the issue of damages during the "drop dead" period. The Defendant's Application was dismissed.

MCROBERTS V BRONSCH, 2017 ABQB 171 (MASTER BREITKREUZ)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff applied to strike the Defendants' Counterclaim in which the Defendant lawyers sued for their unpaid legal fees associated with their carriage of litigation that resulted in a Judgment in favour of the Plaintiff. Master Breitkreuz noted that counsel for the parties had exchanged correspondence about the indefinite extension of the deadline to file a Defence to the Counterclaim. The Defendants relied on this email as an agreement to preclude the Plaintiff from successfully applying to strike the Counterclaim for long delay pursuant to Rule 4.33.

Master Breitkreuz held that, even though the Defendants may have forgotten about the existence of this email, the Defendants were not precluded from using this email as the Applicant's waiver of rights on a Rule 4.33 Application at this stage. The email in question could be fairly interpreted to mean that time will not start running until further notification. The Court further commented that a right must only be waived consciously, and not inadvertently. The Plaintiff's Application was dismissed.

ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY V H. ASH AND ASSOCIATES LTD, 2017 ABQB 230 (MASTER PROWSE)
Rule 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)

The Plaintiff Diocese applied for Summary Judgment for a part of the Claim against the Defendant real estate lawyer and his professional corporation. The Defendants applied to dismiss the Plaintiff's claim for long delay pursuant to Rule 4.33.

Master Prowse stated that the evidence of the non-moving party would be deemed to be true for the purpose of the Summary Judgment Application. It was therefore not possible to say that the Plaintiff had an unassailable position that its claim would succeed. Further, even without the Defendants' evidence, the Court would have declined to award Summary Judgment on the basis that the legal issues raised were "too intricate and novel" to be decided on affidavit evidence alone and without trial evidence. The Court held that, "even in a post-*Hryniak* world, where the court avoids trials unless clearly necessary", complicated issues of law should not be decided on a limited record. Master Prowse stated that the underlying principle for Summary Judgment Applications is that they are appropriate only when the Court is confident that it can fairly resolve the dispute. Master Prowse confirmed that a full Trial is required where a summary process cannot fairly determine legal issues that are "unsettled, complex or intertwined with the facts". The Plaintiff's Application for Summary Judgment was accordingly dismissed.

The Defendants argued that the Plaintiff's claim ought to be dismissed because three years had passed without significant advance in the Action. The Plaintiff replied that there were two "advances" during the three year period: a discontinuance of the Action against all Defendant lawyers other than the Defendant lawyer who was a part of this Application, and the within Application for Summary Judgment that was originally set to be heard within the relevant three year period. Master Prowse held that the partial discontinuance against some of the Defendants constituted a significant advance in the Action, as it "simplified the claim and advanced it towards trial". Conversely, given that the Summary Judgment was originally returnable in morning chambers only four days prior to the expiry of the three year period, it did not constitute a significant advance in the Action. Master Prowse therefore declined to dismiss the Action pursuant to Rule 4.33.

ALBERTA V COX, 2017 ABCA 5 (FRASER, PAPERNY AND GRECKOL JJA)
Rules 4.33 (Dismissal for Long Delay), 7.5 (Application for Judgment by Way of Summary Trial), 7.8 (Objection to Application for Judgment by Way of Summary Trial) and 15.4 (Dismissal for Long Delay: Bridging Provision) (Repealed)

The Crown commenced two separate Actions against the Appellant, Cox, relating to the Appellant's harvesting and sale of timber on various parcels of Crown land. The Crown

sought damages for unpaid fines, penalties, fees, and interest.

The fines and penalties were levied between July 2004 and April 2005, and the Crown commenced the Actions in May 2005. The Appellant defended the Actions, and counterclaimed alleging negligent misrepresentation against the Crown and its agents. Affidavits of Records were exchanged between June 2006, and March 2007. The Appellant failed to respond to requests by the Crown to inspect the records disclosed in the Appellant's Affidavit of Records, and on January 29, 2009, the Crown served a motion for an Order requiring the Appellant to provide the records listed in his Affidavit of Records. On February 2, 2009, the Appellant provided his producible records. On January 19, 2012, the Crown served an Application to have the Actions set for Summary Trial. On March 17, 2012 the Parties set dates for the Summary Trial suitability hearing, and on May 29, 2012, the Appellant served a Notice of Objection to Summary Trial, and applied for dismissal due to long delay under transitional Rule 15.4.

At the suitability hearing, Justice Sulyma held that the filing and service of the Applications for Summary Trial significantly advanced the Actions, and that this occurred within five years of the last undisputed significant advance of the Actions. Sulyma J. determined that the Actions were suitable for Summary Trial and set the matters down. At Summary Trial, the Crown was successful in both Actions.

On Appeal, the Appellant contended that the Summary Trial Judge erred in failing to dismiss the Actions for long delay, relying on authorities which stated that a "step" must be "completed" for it to significantly advance an Action, and accordingly, the "unilateral" act of the mere filing on an Application for Summary Trial is insufficient to significantly advance the Actions. The Court of Appeal confirmed that the law in Alberta with respect to examining delays under Rules 15.4 and 4.33 had shifted from the formalistic approach suggested by the Appellant's authorities, to a functional and substantive analysis, that requires the Court to assess whether the Action has advanced toward resolution in a meaningful way. Whether an Action has been significantly advanced depends on the various factors, including "the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred". Further, if a step narrows the issues in dispute, clarifies the positions of the parties, or completes discoveries, depending on the circumstances, that may be sufficient to significantly advance the Action.

The Court held that the delay Application was properly dismissed as the Application for Summary Trial narrowed the issues for Trial, and clarified the parties' positions. The Court noted that the Order setting the matter down for Summary Trial under Rule 7.11 significantly advanced the Actions, as did the production of the Appellant's outstanding documents, given that many proved pivotal to the issues at Trial. The Court confirmed that the test for whether a Summary Trial is appropriate is twofold: whether disputed questions of fact can be decided based on Affidavits or any of the other processes authorized by the Rules for a Summary Trial; and whether it would be unjust to decide the issues in that way.

The Summary Trial Judge held that the Appellant could not prove reasonable reliance for his allegation of misrepresentation, therefore his Counterclaim was bound to fail. The Court held that this Decision was reasonable. The Appeal was dismissed.

CANADIAN NATURAL RESOURCES LIMITED V WOOD GROUP MUSTANG (CANADA) INC (IMV PROJECTS INC), 2017 ABQB 106 (NATION J)
Rules 5.15 (Admissions of Authenticity of Records), 5.17 (People Who May be Questioned), 5.18 (Persons Providing Services to Corporation), 5.28 (Written Questions) and 5.31 (Use of Transcript and Answers to Written Questions)

The Plaintiff, Canadian Natural Resources Limited ("CNRL") commenced an Action against an engineering company, IMV Projects Inc. ("IMV"), and others for damages arising from a pipeline failure. CNRL settled with the other Defendants prior to Trial. Extensive evidence was put forth over the course of the three month Trial in which the Court ultimately held IMV liable for negligence and breach of contract.

Prior to the start of the pipeline project, the parties had entered into a memorandum of agreement ("MOA"). The MOA had been renewed several times, and CNRL had produced a full 19 page copy of the MOA in their Affidavit of Records though there were many versions within IMV's production. At Trial, IMV brought a preliminary Application to declare that CNRL was bound by the full 19 page MOA on the basis that the MOA was authenticated. IMV argued that, pursuant to Rule 5.15, the MOA in CNRL's production was admitted to be the contract. Justice Nation observed that, although Rule 5.15 meant that the authenticity of a record produced within a party's Affidavit of Records is admitted as a true copy of the original document, the Rule was not determinative since each party produced different versions of the same contract in their Affidavits of Records. Nation J. observed that the Court must look at the various forms and all of the evidence to determine the applicable terms of the contract, particularly when there is conflicting evidence about what the actual terms were.

During Trial, IMV called a former employee of CNRL as a witness. In cross-examination, CNRL requested to use some of the witness' transcript evidence from Questioning to challenge his recollection and credibility. IMV argued that Rule 5.31(2) prevented CNRL from using the Questioning transcripts, as only IMV as the questioning party could use it. Nation J. noted that Rule 5.31 allows a party to use the evidence obtained through Questioning under Rule 5.17 or 5.18, and any evidence to written questions under Rule 5.28, as against a party adverse in interest. Justice Nation highlighted that the restrictions in Rule 5.31 are set so that counsel may question on an Affidavit, or conduct Questioning, with the knowledge that the evidence can only be used by them, against the party being questioned. However, the wording of Rule 5.31 is permissive, not restrictive: it provides for how the transcript may be used as evidence at Trial, but does restrict the use of the transcript to impeach a witness. Here, CNRL was not trying to use the transcript as evidence for their own case; CNRL simply wanted to use the transcript to impeach the witness' credibility. As such, CNRL was permitted to put the transcript to the employee in cross-examination.

LYMER (RE), 2017 ABQB 110 (MASTER SMART)
Rules 5.28 (Written Questions), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

After an assignment into bankruptcy, a number of objecting creditors moved to ascertain the financial information of the bankrupt, Lymer, and his companies. Lymer was held in Civil Contempt of Court for swearing a false Affidavits of Records and failing to disclose relevant and material records, despite a Court Order. Lymer subsequently filed a series of Affidavits of Records and responded to written questions posed by the objecting creditors. As such, Lymer applied for a declaration that he had purged his contempt under Rule 10.53(3). The objecting creditors disagreed that Lymer had purged his contempt and cross-applied for a new Civil Contempt Order, pursuant to Rule 10.52.

Master Smart reviewed Rule 10.53(2), which provides that if the contemnor purges their contempt, "the Court may waive or suspend any penalty or sanction". The contemnor bears the onus of proving they have purged their contempt, and the Court may issue specific directions with respect to the actions that the contemnor must take. The Court held that Lymer continued to be in contempt of the prior Court Orders for failing to adequately disclose relevant and material documents in his possession. Lymer's responses to the written questions posed by the objecting creditors were insufficient to purge his contempt. Specifically, Lymer needed to swear, without qualifications, whether: (i) he operated a personal bank account since 2007; (ii) he had assets or had acquired assets; (iii) certain tax records exist; (iv) certain business records exist for Lymer's companies and their location; and (v) he had relevant and material, electronic records in his possession and control.

Master Smart dismissed Lymer's Application and ordered that, if deadlines were not met with respect to Lymer's Affidavits of Records, the Court would hear submissions with respect to whether a custodial sentence was appropriate for the continuing unpurged contempt.

TORONTO DOMINION BANK V LEFFLER, 2017 ABQB 154 (PENTELECHUK J)
Rules 6.12 (If Person Does Not get Notice of Application), 6.13 (Recording Hearings When Only One Party Present), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff bank foreclosed against the Defendant and obtained a Redemption Order with a 6 month redemption period, setting the list price at $165,000. Prior to the expiry of the Redemption Order, the property was destroyed by fire. After the expiry of the redemption period, the property was listed for $165,000. In March, 2008, the Plaintiff received, but did not accept, an offer to purchase the property for $125,000. In May 2008, the Plaintiff amended the listing price to $130,000, and eventually sold the property in February 2009, for $94,000.

After the sale, the Plaintiff obtained a deficiency Judgment against the Defendant for $22,408.72 plus solicitor and client Costs. Enforcement of the deficiency Judgment was stayed to allow the Defendant, who was self-represented, to file a Counterclaim relating to his claims that the Plaintiff bank was negligent in its handling of the judicial sale, and that the bank had failed to submit an insurance claim after the property was damaged by fire, despite the fact that the property was insured, and the premiums were charged to the Defendant under the terms of the mortgage. The Plaintiff applied for Summary Judgment. The Master in Chambers dismissed the negligence claim regarding the failure to submit the insurance claim, but refused to dismiss the claim regarding the Plaintiff's conduct of the judicial sale. The Parties cross-appealed the Master's Order.

Justice Pentelechuk noted that the Plaintiff bank sought to adduce fresh evidence on Appeal under Rule 6.14(3), however, it had filed an Affidavit sworn by a legal assistant at the Plaintiff bank's law firm five months after it served its Notice of Appeal, well outside the one month timeline provided by Rule 6.14(5). Justice Pentelechuk also noted, without ruling on the issue, that the parties had agreed to extend the timelines for filing Briefs, opting for the provisions of Civil Practice Note 2, rather than the timelines provided by Rule 6.14. Pentelechuk J. held that although the evidence contained within the Affidavit was relevant and material, it required findings of fact and credibility which were more appropriate for Trial. Pentelechuk J. declined to draw conclusions from the evidence without further context and information.

Pentelechuk J. held that the Plaintiff failed to demonstrate what efforts it took, if any, to resurrect the offer it obtained for $125,000, as well as why it had rejected the offers of $99,000 and $105,000, and why it failed to obtain another appraisal after the property was damaged by fire. In the face of that evidence, the Counterclaim respecting the handling of the judicial sale possessed sufficient merit to proceed to Trial. The bank's Appeal was therefore dismissed.

Regarding the insurance Claim, Pentelechuk J. found that the Plaintiff failed to produce evidence to support its stated assumptions, particularly that there was no insurable interest to advance an insurance claim under, since the building on the property possessed no value. In the absence of this evidence, and coupled with the ambiguity in the law concerning insurable interests in buildings slated for demolition, Pentelechuk J. held that the Application for Summary Dismissal could not succeed. The Defendant's Cross-Appeal was therefore allowed.

COCO HOMES INC V CALERON PROPERTIES LTD, 2017 ABQB 15 (POELMAN J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff, Coco Homes Inc. ("Coco") applied to a Master of the Court of Queen's Bench seeking Summary Judgment to enforce a settlement agreement it alleged was entered into on the eve of Trial. The settlement agreement was proposed orally via a telephone call between counsel, and was accepted through a cursory email exchange. The Defendant, Caleron Properties Ltd's ("Caleron") counsel advised the Trial Judge that the parties had settled, and asked that the matter be adjourned *sine die* while the settlement was being papered. The parties could not settle the matter, and Coco sought to have the settlement agreement enforced.

A Master granted Coco's Application for Summary Judgment, holding that there was an enforceable settlement agreement, which could be made out on the existing record. Caleron appealed to a Justice of the Court of Queen's Bench. On appeal, Poelman J. affirmed that an Appeal of a Master's Decisions under Rule 6.14 is *de novo*.

Justice Poelman considered whether Summary Judgment was appropriate, referring to the 'modern' approach to Summary Judgment. His Lordship noted that the approach in prior leading authorities called "for a more holistic analysis of whether the claim has 'merit', and was not confined to the test of a 'genuine issue for trial'".

Justice Poelman noted that not every factual dispute or conflict in affidavit evidence will preclude Summary Judgment. The Court may proceed without *viva voce* evidence "where the judge can make the necessary findings of fact and apply the law to those facts". His Lordship observed, with respect to Caleron's evidence that the settlement and the value was a mistake, a "court is not bound to accept patently unreasonable statements of subjective understandings".

Justice Poelman dismissed the Appeal, upholding the Master's Decision granting Summary Judgment.

DD V CALGARY COUNSELLING CENTRE, 2017 ABQB 95 (DARIO J)
Rules 6.14 (Appeal from Master's Judgment or Order), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Defendants appealed a Master's Decision which had dismissed their Application for Summary Dismissal of the Plaintiff's claim. On appeal, the Plaintiff and Defendants each sought the admission of new Affidavit evidence.

Following the consideration of Rule 6.14(3), Dario J. noted that the relevant test to admit new evidence on appeal is one of relevance and materiality, and held that the Affidavits advanced by the parties met this test.

The Defendants also argued that the Plaintiff's Affidavit submitted in response to the Application for Summary Dismissal contained impermissible hearsay evidence. The Respondent argued the same in respect of the Defendants' Affidavit in support of the Application for Summary Dismissal. Dario J. noted that Rule 13.18(3) only stipulates requirements for the Applicant's evidence in the context of Summary Dismissal. Specifically, it requires that an Applicant "provide evidence of matters within the personal knowledge of the affiant, not evidence based on hearsay". Accordingly, Dario J. held that the Plaintiff's hearsay evidence was permissible, while the Defendants' was not.

Finally, Dario J. considered whether Master Prowse incorrectly found that Summary Dismissal was not available to the Defendants. After analysing the Defendants' arguments for dismissal, Dario J. opined that there was insufficient information to meet the test for Summary Dismissal, and upheld the Master's Decision.

CALLAN V LORRNEL CONSULTING GROUP LTD, 2017 ABQB 158 (LEE J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Defendant ("Lorrnel"), in an Action for trespass, nuisance, and unlawful interference with economic interests relating to property, appealed a Master's Decision which refused Summary Dismissal of the Plaintiff's ("Callan") Claim.

Lee J. noted that a "correctness" standard of review applies on an Appeal from the Master under Rule 6.14. Justice Lee stated that Summary Dismissal helps to fulfill the principles set out in the Foundational Rules and "ensures that only claims with merit proceed". If a Claim is not meritorious, it is just that it be dismissed early on. Although the Court should not determine "disputed or contentious questions of fact", where the evidence of one party "destroys" the other party's evidence during Questioning on Affidavit, or evidence renders one party completely noncredible, then a Master may draw inferences and accept certain facts. Justice Lee commented that Summary Judgment Applications must be decided on the material before the Court, and not on what might be pleaded in the future.

Further, Summary Judgment Applications require both parties to put their best evidence forward.

Upon review of the record before the Court, Justice Lee observed that the Plaintiff made assertions in Affidavits without tangible evidence, and a number of allegations could not be given any weight. The Court held that the Plaintiff's Claim had no merit, and granted Summary Dismissal accordingly.

GAULT ESTATE (RE), 2017 ABQB 186 (MAHONEY J)
Rule 6.22 (Obtaining Evidence Outside Alberta) and 10.32 (General Rule for Payment of Litigation Costs) and Schedule C

In an estate litigation matter, the parties returned for a determination of Costs following the dismissal of the Defendant's Application to question a non-party pursuant to Rule 6.22. Justice Mahoney stated that the Application was dismissed because the Questioning sought by the Defendants would be "a fishing expedition extraordinaire and an injustice." Counsel for the Plaintiff proposed a Bill of Costs which was four times Schedule C, totalling $40,804.32.

Mahoney J. noted that the parties agreed that the successful party is usually entitled to costs, and that the Court has broad discretion to determine the amount. Justice Mahoney, quoting prior leading authority, held that the Court's "discretion must be exercised judicially in accordance with the established principles".

Counsel for the Plaintiff drew the Court's attention to the fact that he had written to the Defendant's counsel proposing a Bill of Costs which included the standard Schedule C amounts for all items except one, totalling $16,346.35, and advised the Defendant's counsel that they would be seeking higher Costs if a Costs hearing was required. When counsel for the Defendant failed to respond, the Plaintiff increased the amount claimed to $40,804.32 (representing four times the Schedule C amount for all cost items).

Justice Mahoney noted that a lot of work was performed by the Plaintiff's counsel, at significant cost, and ultimately ordered Costs under Schedule C totalling $19,000, in addition to disbursements.

ATHABASCA MINERALS INC V SYNCRUDE CANADA LTD, 2017 ABQB 47 (JONES J)
Rule 6.25 (Preserving or Protecting Property or its Value)

The Defendant, Syncrude Canada Ltd. ("Syncrude"), applied for various pre-Judgment relief, including a Preservation Order under Rule 6.25. The Plaintiff, Athabasca Minerals Inc. ("Athabasca"), sued Syncrude, alleging an outstanding debt under a sand and gravel agreement, and asserting that the Defendant had removed surface materials from lands subject to the agreement without compensating the Plaintiff. The Defendant counterclaimed, alleging that the Plaintiff had wrongfully permitted excavation, removal and use of reclamation material from an area subject to one of Syncrude's mineral leases which overlapped with the lands subject to the agreement between the parties. Syncrude then applied to, among other things, preserve all reclamation material within the boundaries of Syncrude's mineral surface lease, as well as attach Athabasca's management fees.

Jones J. noted that the Court's authority to make a Preservation Order arises from Rule 6.25 which provides that "on application, the Court may make an order for the preservation or custody of property that is in dispute or that may be evidence in an action". Jones J. observed that "judicial restraint must be exercised" when determining whether such an Order should be made, and the scope of the resulting Order.

The parties disagreed on the appropriate test for granting a Preservation Order: Syncrude argued that the Preservation Order is interlocutory injunctive relief, and the well-established tri-part test for an injunction was appropriate. Athabasca argued that the test for granting a Preservation Order is more onerous and requires considerations of the *Civil Enforcement Act*, RSA 2000, c-15. Jones J. held that the *Civil Enforcement Act* does not inform the test for a Preservation Order since the *Civil Enforcement Act* refers

to the "defendant's exigible property", and a preservation order applies to property whose ownership is as yet undetermined.

Justice Jones considered whether a Preservation Order was warranted using the test for injunctive relief, and held that the evidence supported Athabasca's argument that the Preservation Order would unduly hamper its cash flow and operation. The Court dismissed Syncrude's Application.

MALHOTRA V 1743134 ALBERTA LTD, 2017 ABQB 34 (GOSS J)
Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 7.4 (Proceedings After Summary Judgment Against Party)

The Plaintiff claimed that he owned an interest in a condominium development for which he was the transactional lawyer, and commenced an Action against the Defendants for a share of the profits when the development was sold. The Plaintiff applied for Summary Judgment. The Defendants asserted that the matter was not suitable for Summary Judgment.

The parties agreed that the Plaintiff advanced funds toward the purchase of the property; however, the Defendants claimed that the funds were a loan. The Plaintiff relied on several documents and agreements as support, but the Defendants asserted that the agreements were signed as part of a bundle of documents related to the impugned transaction and other transactions, and they had been signed without any explanation or advice from the Plaintiff. The Plaintiff admitted that he did not advise the Defendant to seek independent legal advice prior to signing.

Goss J. noted that Summary Judgment applications must be considered from the perspectives of both process and substance. Procedurally, Summary Judgment can be granted where the Court can make a fair and just determination based on the existing record. Where *viva voce* evidence is required to resolve the dispute, the matter must go to Trial. Substantively, Summary Judgment can be granted where the non-moving party's position is without merit in fact or law, even assuming the accuracy of its position. The moving party must demonstrate that its position is so compelling, given the facts and law, that the likelihood of success at Trial is very high.

Justice Goss held that, despite the wording of the agreements being contrary to the Defendants' assertions "some of the evidence before the Court is not inconsistent with the Defendants' position". As such, a fair and just determination could not be made, given the competing claims of the parties. Procedurally, the resolution of the matters required a credibility assessment upon hearing *viva voce* evidence. Goss J. concluded that, given the evidential ambiguity, the Plaintiff's position was not "clearly unassailable on the facts and the law". The Application for Summary Judgment was dismissed.

LAY V LAY, 2017 ABQB 29 (MILLAR J)
Rule 7.3 (Summary Judgment)

The parties were estranged family members who were involved in a long-standing series of transactions and related disputes about a family-owned company. The Plaintiffs ultimately commenced a Claim against the Defendants, alleging, among other things negligence, misrepresentation, and breach of duty. The Defendants denied the Plaintiffs' Claim in its entirety, and brought a Summary Dismissal Application under Rule 7.3. The Defendants alleged that the Claim was statute barred by the *Limitations Act*, RSA 2000, c L-12, and that the Claim was extinguished by an earlier mutual release signed by all parties.

Justice Millar considered Rule 7.3, and noted that the test for Summary Judgment requires the Court to determine whether there is sufficient evidence to make a decision on the basis of Affidavit evidence alone. If the Affidavit evidence before the Court is sufficient for the issues to be adjudicated fairly and justly without a Trial, then the Court may decide the issues on their merits. The onus is on the Defendant to establish that there is "no merit" to the Plaintiff's Claim. After this onus is discharged, the evidentiary burden shifts to the Plaintiff to refute or counter the Defendant's evidence, "or risk summary dismissal". In this case, Millar J. stated that there were no material and

relevant factual disputes that required *viva voce* evidence. Therefore, the Court was satisfied that it was fair and just to decide the issues on their merits.

Millar J. held that the Plaintiffs ought to have known that they had a claim two years before filing the Statement of Claim in this case. The Defendants' limitations defence was "so compelling that the likelihood it will succeed is very high". Similarly, the mutual release between the parties was valid, and the Defendants had shown that there was no merit to the Claim which was extinguished by the mutual release. Justice Millar held that the claim ought to be summarily dismissed on both grounds, and granted the Defendants' Application accordingly.

CANADIAN IMPERIAL BANK OF COMMERCE V MCDOUGALD, 2017 ABQB 124 (MASTER SCHULZ)
Rules 7.3 (Summary Judgment) and 10.29 (General Rule for Payment of Litigation Costs)

The Plaintiff bank sued the Defendant and applied for Summary Judgment pursuant to Rule 7.3 after the Defendant failed to make payments on his credit card and accumulated significant debt. The Defendant unsuccessfully attempted to use "pseudolegal schemes" sold by "UK scam artists" online to clear the debt.

At the Summary Judgment Application, Master Schulz considered prior leading authorities, and confirmed that Summary Judgment can be granted if a fair and just disposition to both parties can be made out on the existing record. The question the Court needs to answer is whether there is an "issue of 'merit' that genuinely requires a trial," or the claim is "so compelling that the likelihood it will succeed is very high such that it should be determined summarily". Master Schulz noted that parties are obligated to put their best foot forward in Summary Judgment Applications, and that only the Plaintiff bank had filed an Affidavit in support of its position. After reviewing the facts available on the record, Master Schulz rejected the Defendant's arguments, and granted Summary Judgment in the Plaintiff's favour.

The Court considered Costs pursuant to Rule 10.29, and held that since the Plaintiff bank was entirely successful in the Action, under Rule 10.29(1) it was presumptively owed Costs. The Court held that elevated Costs were appropriate in this case, because the Defendant's arguments had no merit and they were futile attempts to evade and retaliate against the collection of a legitimate debt.

KRACZKOWSKI ESTATE (RE), 2017 ABQB 175 (JONES J)
Rule 7.3 (Summary Judgment)

A grant of probate Application was brought by the son-in-law of the deceased, Charles. The deceased's surviving daughter, Lucy, filed an Application alleging undue influence and a lack of testamentary capacity in connection with the preparation of her mother's last will. Charles cross-applied for Summary Dismissal of Lucy's Application, pursuant to Rule 7.3 of the Rules of Court and Rule 64(1)(b) of the *Surrogate Rules*, AR 130/1995.

Lucy and her two sons received nothing in the last will; all property was left to Charles with the residual estate going to his two children. In essence, Charles argued that Lucy was estranged from her mother and she specifically wanted to exclude Lucy from the will. Lucy alleged that Charles put forth an erroneous family narrative and there were suspicious circumstances regarding the execution of the last will.

Jones J. held that the evidence demonstrated that the deceased was fully capacitated when she made her will and there was no credible evidence of undue influence. Further, the evidence showed that the deceased: did not believe Lucy was attentive to her needs and expressed the view that she could not trust Lucy; was not suffering from a mental or physical disability that would impact her judgment; and, had consistent views as reflected in her prior will. The Application for Summary Dismissal was therefore granted.

BROOKFIELD RESIDENTIAL (ALBERTA) LP (CARMA DEVELOPERS LP) V IMPERIAL OIL LIMITED, 2017 ABQB 218 (GRAESSER J)
Rule 7.3 (Summary Judgment)

The Plaintiff commenced and Action for damages arising from the contamination of the Plaintiff's land due to an oil well drilled and operated by the Defendants in 1949-1950. The Defendants applied for Summary Dismissal of the Plaintiff's Claim on the basis that the Plaintiff's Claim was unmeritorious.

Referring to Rule 7.3(1)(b), Graesser J. noted that recent leading authorities have set a high standard for Summary Judgment. The applicable test for Summary Dismissal is whether there is a genuine issue requiring a trial or no merit to the claim. Graesser J. stated that the Court must examine the record to determine if a disposition can be made which will be fair and just to the parties. Further, the parties are expected to "put their best foot forward".

The Defendants asserted that the Plaintiff's claim was limitation barred. Graesser J. agreed. Because of this, and because the Plaintiff failed to show that the Defendants had a continuing obligation to the Plaintiff to remove the contamination, Graesser J. held that the Plaintiff's claim had no merit. Accordingly, the Defendants' Application for Summary Dismissal was granted.

ASHRAF V SNC LAVALIN ATP INC, 2017 ABCA 95 (COSTIGAN, MARTIN AND CRIGHTON JJA)
Rule 7.3 (Summary Judgment)

The Appellant, Ashraf, appealed three decisions of the Queen's Bench Case Management Justice. The first was the Justice's decision to allow the Respondent, SNC Lavalin ATP Inc., to make a second Summary Judgment Application. The second was the decision to refuse the Appellant's request for an adjournment of that Summary Judgment Application. The third was the Summary Judgment Decision.

The Court of Appeal emphasized that Case Management Justice's Decisions are to be given deference. A Summary Judgment Application had previously been heard on the matter, was appealed to the Court of Appeal, and the Court of Appeal subsequently restored the Action. The Respondent had applied again for Summary Judgment. The Appellant argued that the Summary Judgment issue was res judicata. The Court of Appeal held that the doctrine of res judicata did not apply, and that the Rules provided that a Summary Judgment Application can be considered at any time. The Court of Appeal held that there was no binding authority which would prevent the Case Management Justice from hearing the second Summary Judgment Application.

The Court of Appeal dismissed the Appeals of the first two decisions of the Case Management Justice. In addressing the Appeal of the Summary Judgment decision itself, the Court of Appeal did not find errors in the Case Management Justice's findings on Summary Judgment. However, the Court of Appeal held that the Case Management Justice did not have sufficient evidence to make a determination on the merits as to the common law notice period, and this was a genuine issue for Trial. Therefore, the Case Management Justice's Decision with respect to Summary Judgment on the length of the common law notice period was set aside, and the other two Appeals were dismissed.

BOTAR V BRADEN EQUITIES INC, 2017 ABQB 21 (MICHALYSHYN J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant failed to defend a Claim brought by the self-represented Plaintiff who claimed $1 million for alleged unlawful entry of his rented premises and assault, among other things. The Plaintiff noted the Defendant in default, and immediately sought and obtained an *ex parte* Default Judgment against the Defendant in the amount of $8,500. The Defendant applied to have the Default Judgment set aside.

The Defendant argued that the overarching principle that the Court should consider in an Application to set aside a Default Judgment is fairness. Michalyshyn J. noted that there was no material difference between the former Rules

and current Rule 9.15(3). The three part test that a party must meet to set aside a Default Judgment is: (1) an arguable defence; (2) some excuse for the default; and (3) a prompt Application to set aside the Default Judgment has been made. Michalyshyn J. also stated that the absence of wilful delay, as well as the absence of prejudice to the Plaintiff would factor largely in the outcome of an Application to set aside a Default Judgment.

Michalyshyn J. held that the Defendant had an arguable defence, there was conflicting evidence and a need for a credibility assessment, there was evidence of an excuse for the default, and the Defendant's Application to set aside Default Judgment was brought in good time. The Defendant's Application to set aside the Default Judgment was therefore granted.

SAUNDERS V SAUNDERS, 2017 ABQB 163 (ROOKE ACJ)
Rules 10.20 (Enforcement of Review Officer's Decision), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

In a family law Action, the Defendant applied to have the Plaintiff declared in Contempt for failure to comply with various Costs awards and for a failure to give effect to a Consent Order between the parties for joint custody of the parties' child.

Associate Chief Justice Rooke noted that Rule 10.52(3)(a)(i) provides that contempt may be declared for failure to comply with an Order "other than an order to pay money". As a result, the unpaid Costs awards could not ground a finding of Contempt. With respect to the second ground for contempt, Rooke A.C.J. noted that contempt is a discretionary Order, and, quoting prior leading authority, certain factors must be considered for such an Order:

> To find civil contempt, the applicant must provide the following things beyond a reasonable doubt: (1) an existing requirement of the court; (2) notice of the requirement to the person alleged to be in contempt; and (3) an intentional act (or failure to act) that constitutes a breach of the requirement…"without adequate excuse"…

The parties agreed that the first two factors were satisfied. Rooke A.C.J. held that sufficient evidence did not exist to determine who was to blame for the failure to follow the terms of the joint custody Order, noting that an Order must be clear, precise and unambiguous to ground a finding of Contempt. In this case, Rooke A.C.J. found that it was not clear on which days and at what times each parent was to have custody of the child. His Lordship found that while it was clear the Order was not followed, it was not clear why. As a result, Associate Chief Justice Rooke denied the Application for Contempt.

1891868 ALBERTA LTD V CENTRAL FUND OF CANADA LTD, 2017 ABQB 40 (STREKAF J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award may be Made), 10.31 (Court-Ordered Costs Award), 10.32 (Costs in Class Proceeding) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

Following an Application in which the Plaintiff unsuccessfully applied for relief related to a shareholders' meeting, and unsuccessfully sought the further hearing of an Application for relief from oppression, the parties appeared before the Court with respect to Costs.

The Plaintiff acknowledged that it was unsuccessful, but argued that there was no reason to depart from the party-party Costs in accordance with Schedule C. The Defendant directors argued for Costs under Column 5, plus disbursements and an additional lump sum of $50,000 on the basis that this additional sum reflected the degree of success, importance of the issues and complexity of the matter pursuant to Rule 10.31(1)(b)(ii). Further, they argued that the Court should use its discretion to award Costs under Column 5 at a four times multiplier given the economic significance of the Application, and the lack of urgency to seek such serious and extreme relief. The corporate Defendant argued that they should be awarded approximately 40-50% of reasonable solicitor-client Costs, given the unwarranted and serious allegations against the directors, and the improper use of the Court to achieve a business purpose. Alternatively, the corporate Defendant

sought Costs at four times Column 5 for the complexity of the Application, plus disbursements.

Justice Strekaf reiterated that Costs are within the discretion of the Court, to be determined in accordance with Rules 10.29 – 10.33. Strekaf J. held that an enhanced Costs award was justified in the circumstances because this was costly commercial litigation involving high stakes, which was conducted on an expedited basis and involved issues of moderate complexity. However, the Costs sought by the corporate Defendant were excessive, particularly in light of a lack of Affidavit evidence in support of such Costs. The Defendant corporation and directors were each awarded four times the tariff amount under Column 5 and the additional sum of $50,000, for a total award of $62,000 plus disbursements.

CASSAR V ANDERSON, 2017 ABQB 229 (MASTER SCHLOSSER)
Rules 10.42 (Actions Within Provincial Court Jurisdiction) and 11.27 (Validating Service)

The Plaintiff applied for Summary Judgment on a Judgment from the Superior Court of Quebec and the Defendant cross-applied for Summary Dismissal. The Action in Alberta originated in Provincial Court, but was transferred to Queen's Bench.

The Plaintiff and Defendant were embroiled in estate litigation in Texas and Quebec. The Quebec Action was for defamation after the Defendant's counsel in Texas forwarded Pleadings from the Texas Action to the National Bank of Canada. Notifying the bank about the Action was common practice in Texas, since the Action involved contesting the will of a deceased who had accounts with National Bank. The Texas pleadings contained allegations against the Plaintiff including "'undue influence', 'fraudulent inducement', 'tortious interference with inheritance rights', 'greed', and willful, wanton and malicious actions".

The Quebec Superior Court had validated service of the defamation claim and granted Judgment against the Defendant for $5,000 plus interest. The Defendant contested the importation of the Quebec Judgment into Alberta on the basis that it was contrary to the principles of fundamental justice for the Quebec Superior Court to validate a form of service which failed to provide adequate notice, alleging that the failure to abide by the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention")* was a fatal defect.

Master Schlosser examined the equivalent Alberta Rules for service, and noted that Rule 11.27(4) allows the Court to accept a method of service despite its non-conformity with the Rules, and despite the fact that the *Hague Convention* applies to the service of that document. Master Schlosser commented that the purpose of Rule 11.27 is to validate a method of service if the Court is satisfied that the document has been brought to the attention of the person served. Upon review of the Quebec Judgment, Master Schlosser found that the Quebec Court properly validated service after finding that the methods used were sufficient to bring the matter to the attention of the Defendant. Master Schlosser held that Section 138 of the Quebec *Code of Civil Procedure* was similar to Rule 11.27, and that the Alberta Court would have made a similar Order. Master Schlosser also commented that effecting substitutional service on a lawyer was not a "first choice", but that "it is sometimes done". Master Schlosser held that the Defendant had failed to demonstrate that the Quebec Court acted contrary to the principles of natural justice in validating service. The Plaintiff's Application was granted and the Cross-Application dismissed.

Master Schlosser reduced Costs in accordance with Rule 10.42, which provides that a matter within the jurisdiction of the Provincial Court is to have Costs assessed, if at all, not more than 75% of the amount specified in Column 1 of the tariff in Division 2 of Schedule C.

CUNNINGHAM V SEVENY, 2017 ABCA 4 (PAPERNY, SCHUTZ AND STREKAF JJA)
Rules 12.41 (Notice to Disclose Documents) and 12.42 (Request for Financial Information)

The Appellant, Cunningham, in a family law matter appealed a Court of Queen's Bench Decision relating to retroactive child support. Following the Appellant's Application to disclose records under the *Family Law Act*, SA 2003, c F-4.5 ("FLA"), the Appellant alleged that the Respondent, Seveny, had been dishonest about his income and expenses while practicing as a lawyer.

The Court noted that one of the factors in the Appeal was the Respondent's income information, and referred to Rule 12.42 which provides that, where a written request for financial information has been made under the applicable sections of the FLA, that information must be provided within one month after the request is received. Further, Rule 12.42(2) lists the documents that may be requested under Rule 12.42.

The Court explained that in family matters, although the disclosure obligations are modified as to the method of disclosure in accordance with Rule 12.41 by replacing the standard Affidavit of Records with the Notice to Disclose, the basic disclosure obligation under Part 5 of the Rules is the same. The Court reviewed the applicable authorities and legislation and found that the Respondent had not fully complied with his disclosure obligations.

The Court allowed the Appeal, and the matter was remitted to the Court of Queen's Bench for a re-hearing of the Appellant's Application.

HARTLEY V DEL PERO, 2017 ABQB 1 (READ J)
Rule 12.51 (Appearance Before the Court)

At the beginning of Trial, the Plaintiff in a family law Action submitted that the only issue to be resolved was in respect of child support. However, the unrepresented Defendant, who had failed to provide any information about what he considered to be in issue during Case Management, argued that parenting issues as well as spousal support issues should be determined at Trial.

In ascertaining which issues were properly before the Court, Read J. held that Rule 12.51 "gives the Court wide powers and discretion". Noting that a Case Management Order contemplated that the issues to be determined at Trial included child support and parenting arrangements, Read J. accepted that parenting issues were properly before the Court in addition to child support issues. However, Read J. held that issues concerning spousal support would not be resolved at Trial, as the Defendant failed to bring an Application for the determination of that issue, and the late addition of spousal support to the issues to be determined at Trial would prejudice the Plaintiff. The issues were mostly resolved in the Plaintiff's favour.

CAROLL V PURCEE INDUSTRIAL CONTROLS LTD, 2017 ABQB 211 (PENTELECHUK J)
Rule 13.6 (Pleadings: General Requirements)

At a Trial involving a claim of wrongful dismissal, the main issue before the Court was whether the Plaintiff was dismissed, or had resigned from his employment with the Defendant companies. The Defendants also argued that the Plaintiff had repudiated the employment agreement. The Plaintiff objected to this argument because, although the Defendants pleaded that the Plaintiff had "abandoned his employment … entirely" in their Statements of Defence, they did not plead that the employment contract had been "repudiated". Justice Pentelechuk noted that the concepts of abandonment and repudiation are distinct concepts in employment law.

Citing Rule 13.6, Pentelechuk J. noted that a cause of action itself need not be expressly pleaded in a Statement of Claim, as long as the facts giving rise to the cause of action are pleaded. On a "plain reading" of Rule 13.6(2), an alleged repudiation of the employment contract should have been pleaded as it was a matter which may defeat or raise a defence to the Claim.

Justice Pentelechuk held that, pursuant to Rule 13.6(3), a Pleading must include "any matter on which a party intends

to rely that may take another party by surprise." Although Rule 13.6(3) lists a number of circumstances in which an issue must be specifically pleaded, Her Ladyship noted that the list is not exhaustive. Since a claim of repudiation of the employment contract is not routine, and was unlikely to have been anticipated by the Plaintiff, it should have been included in the Statement of Defence. Justice Pentelechuk also noted that this finding was consistent with the principle that parties to an Action are entitled to know the case against them prior to Trial. Since the Defendants had not applied to amend their Statements of Defence to include the issue of repudiation, Justice Pentelechuk declined to consider it.

HAYDEN V ALBERTA UNION OF PROVINCIAL EMPLOYEES, 2017 ABCA 62 (ROWBOTHAM JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant, Hayden, sought leave to appeal Justice Rowbotham's earlier decision which denied the Applicant's Application to restore her Appeal after it was struck for failing to file the Appeal Record in time. Justice Rowbotham noted that Hayden applied pursuant to Rule 14.5(1)(a).

Rowbowtham J.A. stated that permission to appeal a Decision of a single appellate Judge will only be granted where the Applicant can demonstrate that: the issue to be appealed raises a serious question of general importance; the appellate Judge committed an error of law, jurisdiction, or principle; the appellate Judge unreasonably exercised their discretion; or, the Decision being appealed was based on a misapprehension of important facts. The chances of success of the proposed Appeal, the standard of appellate review, and the ensuing delay, are additional factors to be considered in an Application under Rule 14.5.

Justice Rowbotham emphasized that the role of the appellate Justice hearing an Appeal under Rule 14.5 was that of "gate keeper", and the Justice must be persuaded that the issue warrants the attention of a three member panel. Rowbotham J.A. held that Hayden's Application was a rehearing of the previously dismissed Application and Hayden had failed to demonstrate that any of the circumstances warranting a three member panel were present. The Application was therefore dismissed.

PAQUIN V LUCKI, 2017 ABCA 79 (STREKAF JA)
Rule 14.8 (Filing a Notice of Appeal)

The Applicants, (the "Paquins") applied for an extension to file their Notice of Appeal. They had attempted to file their Notice of Appeal about 25 days beyond the date prescribed by Rule 14.8(2)(a)(iii), which was one month after the date of the Order the Paquins sought to appeal. Justice Strekaf noted that, in such Applications, the Court considers whether: (i) there was an excuse or justification for the delay; (ii) the other side is prejudiced by the delay; (iii) the Applicant has not taken the benefits of the Judgment from which Appeal is sought; and (iv) the Appeal has a reasonable chance of success.

Here, the Applicants' lawyer stated that he had incorrectly diarized the date of Appeal due to inadvertence, but that the Applicants had a *bona fide* intention to Appeal the Order. The Court held that a mistake by counsel cannot constitute a reasonable explanation for the delay. However, there was no prejudice to the Respondents and the Appeal raised an arguable issue. As such, the extension of time to Appeal was granted.

MACLEOD V ALBERTA (COLLEGE OF SOCIAL WORKERS), 2017 ABCA 11 (WAKELING JA)
Rules 14.15 (Ordering the Appeal Record), 14.16 (Filing the Appeal Record – Standard Appeals), 14.20 (Contents of Appeal Record – Appeals from Tribunals), 14.37 (Single Appeal Judges), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Applicant, MacLeod, sought an Order restoring her Appeal after it had been struck by the Registrar for failing to file the Appeal Record in time. The Court noted that the Applicant had properly applied to have her Appeal restored under Rule 14.47 by making the Application returnable within six months of it having been struck. The Court observed that Rule 14.37(1) provided that a single Appeal

Judge had the jurisdiction to decide this Application on the basis that the Application was considered incidental to the Appeal.

Wakeling J.A. set out the criteria that the Court should consider when contemplating the restoration of an Appeal:

1. Is there any reason to conclude that the applicant, at any time after filing the notice of appeal, did not intend to prosecute the appeal? …

2. Has the applicant provided an explanation for the deficiency that prompted the Registrar to strike the appeal? If so, is the explanation consistent with an intention on the part of the applicant to advance the appeal?

3. Has the applicant moved with sufficient expedition to cure the defect, taking into account the nature of the defect?

4. Are there arguable grounds in support of an appeal? Is the likelihood of success high enough to conclude that it is not a frivolous appeal? …

5. Will the restoration of the appeal cause the respondent any prejudice? If so, is it appropriate to require the respondent to endure this prejudice?

In this case, the Applicant had not filed an Affidavit stating that she had an intention to prosecute her Appeal and also did not explain why the Appeal Record was not filed on time. Further, the Court noted that Rule 14.20(1)(b) established that the Applicant only needed to submit existing transcripts and such transcripts had been provided to the Applicant two months before the deadline for filing the Appeal Record. While Rule 14.47 permitted this Application to be returnable within six months, it weighed against the Applicant that she, without good reason, waited a month before filing her Application to have the Appeal restored. Wakeling J.A. held that the Applicant's Appeal was arguable and not frivolous, and that restoring the Appeal would not prejudice the Respondent, but these two findings were not sufficient to convince the Court to restore the Appeal.

The Court observed that compliance with the Rules was of critical importance and was mandatory. Based on all of these factors, the Application and the restoration of the Appeal was denied.

ABDI V ASKI CONSTRUCTION LIMITED, 2017 ABCA 68 (SCHUTZ JA)
Rules 14.23 (Filing Factums – Standard Appeals), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Applicants' Appeal was struck by the Registrar, pursuant to Rule 14.64(b) because they failed to file their Factum within the time required by Rule 14.23(1). They then applied to restore the Appeal pursuant to Rule 14.65. The Applicants argued that they did not understand that the deadline was two months after the Appeal Record was filed, but thought that the Factum was due six months after the Notice of Appeal was filed. Here, the Appeal was filed in a timely fashion, but the subsequent step of filing the Factum was inadvertently missed.

Justice Schutz noted that the Court of Appeal retained the discretion to extend time periods provided by the Rules of Court. Upon the Applicants realizing their error, they had moved promptly to restore their Appeal. Schutz J.A observed that the Appeal was not categorically hopeless or frivolous; the Applicants' language barriers necessitated some procedural fairness; that it was interests of justice to allow the Appeal to proceed; and, there was no resulting prejudice to the Respondents. Schutz J.A. directed that the Appeal be restored.

DATTA V DATTA, 2017 ABCA 9 (STREKAF JA)
Rule 14.37 (Single Appeal Judges)

The Applicant in a family matter sought an extension of time to file a Notice of Appeal. The Court stated that a single Appeal Judge may extend the time to file an Appeal pursuant to Rule 14.37(2)(c). The Court considered prior authorities, and held that the relevant test is whether the interests of justice supports granting this relief. To meet this test, the Application must show that:

a) there was a bona fide intention to appeal while the right to appeal existed;

b) there was an explanation for the failure to appeal in time that justifies the lateness;

c) the respondent was not seriously prejudiced;

d) the appellant has not taken the benefits of the judgment from which the appeal is sought; and

e) the appeal would have a reasonable chance of success if allowed to proceed.

In this case, the Applicant failed to satisfy the Court that the Appeal would have had a reasonable chance of success if allowed to proceed. As a result, the Application was dismissed.