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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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GJERGJI V HYATT MITSUBISHI, 2017 ABQB 500 (MAH J)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies) and 4.33 (Dismissal for Long Delay)

The self-represented Plaintiff appealed the Decision of a Master dismissing his Action for long delay pursuant to Rule 4.33. The Plaintiff commenced the litigation following a single vehicle rollover collision which he claimed was caused by a faulty tire.

Justice Mah confirmed the Master's finding that the last action taken in the litigation by any of the parties was on July 13, 2013. The Plaintiff suggested that at all times he was willing and available to resume proceedings but that the Defendants had failed to contact him. The Plaintiff argued that the Master had erred in applying Rule 4.33 in isolation, and that the Master failed to consider Rules 1.1, 1.2, and 1.3.

Justice Mah noted that Rule 4.33 provides that the Court, on Application, must dismiss an Action where three or more years have passed without a significant advance, absent certain exceptions. Mah J. stated that Rules 1.1 and 1.3 provided no additional insight into how Rule 4.33 should be applied in this case. Regarding the connection between Rule 1.2 and Rule 4.33, Justice Mah, following prior leading Alberta authority, noted that Rule 1.2 does not "override the clear mandatory language of rule 4.33", and the Plaintiff must take the initiative to actively advance its claim.

His Lordship noted that Rule 1.1(2) was relevant to the Plaintiff's position that the standards under Rule 4.33 should be relaxed because he was not a lawyer and his argument before the Master was "substandard". Mah J. stated that the Court may not bend or ignore the Rules for self-represented litigants as that would be

> ...tantamount to having one set of rules for litigants with counsel and a different set for self-represented litigants, a situation that no coherent system of justice could tolerate and which would be clearly contrary to Rule 1.1(2).

Justice Mah held that the Master did not err with respect to applying Rule 4.33 to strike the claim for delay, nor with respect to Costs. The Appeal was dismissed.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2017 ABQB 377 (THOMAS J)
Rules 1.2 (Purpose and Intention of These Rules), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 3.75 (Adding, Removing or Substituting Parties to Originating Application), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

A number of individuals, who argued that their status as beneficiaries under a trust would be affected by proposed changes to the trust, applied to be added as parties in order to protect their interests. The Action had been commenced by way of Originating Application, and was for advice and direction in the administration of the trust. One of the main issues in the underlying Action was whether the trustees should (or could) alter the definition of "beneficiary" under the trust.

The trustees, Respondents to the Application, argued that the Applicants were "third parties" and thus were barred by the operation of Rule 3.74. Justice Thomas noted that in an Originating Application, it is less clear than in an Action commenced by Statement of Claim exactly who qualifies as a third party, and less clear exactly when pleadings close. His Lordship thus declined to dismiss the Application on that basis. However, Justice Thomas noted that Rules 1.2 and 3.75(3) do apply, and found that the Court must be satisfied that the Order should be made and that doing so would not cause prejudice. Thomas J. noted that this Action had been underway for nearly six years, during which time the parties and Justice Thomas, as Case Management Judge, had worked to narrow the issues in dispute. His Lordship noted that granting this Application would have the opposite effect and broaden the issues. Additionally, the Applicants might not be able to satisfy any costs awards that may be made against them, which meant that the trust would be left to pay the bill. Consequently, Thomas J. held that the Respondents would suffer prejudice that would not be remediable by a costs award, and dismissed the Application.

In considering the Costs of the Application, Justice Thomas noted that several of the Applicants did not have a real intention to contribute to the advice and direction Application and had no intention of paying for their own litigation Costs, hoping instead to offload them onto the trust. Thomas J. noted that, even in the event the Applicants were successful, such a Costs outcome was impermissible. Noting that Rule 1.2 encourages cost-effective litigation, and that Rules 10.29 and 10.33 encourage positive litigation practices, Justice Thomas ordered all but one of the Applicants to pay solicitor-and-client Costs to the trustee; the remaining Applicant was ordered to pay Costs on a party-and-party basis.

MORRISON V GALVANIC APPLIED SCIENCES INC, 2017 ABQB 514 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 3.9 (Service of Originating Application and Evidence), 4.31 (Significant Delay in Prejudice) and 4.33 (Dismissal for Long Delay)

The Defendant, Galvanic Applied Sciences Inc ("Galvanic") applied to strike the Plaintiffs' Claim for delay under Rules 4.31 and 4.33. The Plaintiffs, dissenting shareholders in an amalgamation transaction, commenced the Action by way of an Originating Application filed October 17, 2013. The Action was commenced to determine the fair-market value of the Plaintiffs' shares. The affidavit in support of the Originating Application was not filed until October 19, 2016.

Master Robertson reviewed the factors to be considered when applying Rule 4.31, and noted that the purpose of the Rule is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way. Rule 1.2(2) expressly states that the Rules are intended to "facilitate the quickest means of resolving a claim at the least expense" and "to oblige the parties to communicate honestly, openly and in a timely way". Master Robertson referred to recent leading authority on striking claims for delay and stated that the Court must approach the determination of such applications by answering six questions: 1) has the respondent attained the same point on the litigation spectrum during the time of review as a reasonable litigant; 2) does the time differential qualify as inordinate; 3) if the delay is inordinate, is there an explanation and does it justify the delay; 4) if the delay is inordinate and inexcusable has the applicant demonstrated significant prejudice; 5) is the presumption of prejudice under Rule 4.31(2) rebutted by the respondent; and 6) if the criteria under Rule 4.31(1) are met, is there a compelling reason not to dismiss the action?

Master Robertson stated that in an Originating Application the applicant's case is normally set out in their supporting Affidavit. This is not just convention: Rule 3.9 specifically requires the supporting Affidavit to be served ten or more days before the date scheduled for the hearing of the application. In this case, Master Robertson concluded that the delay in providing supporting evidence for an Originating Application was inordinate and inexcusable. Master Robertson found that the Respondents violated Rule 3.9, that some participants had passed away, and that all of the evidence was at least three years old. Master Robertson held that Galvanic would suffer prejudice if the Action continued, and found no compelling reason not to dismiss the Plaintiffs' Action. The Application was granted.

NOVA POLE INTERNATIONAL INC V PERMASTEEL CONSTRUCTION LTD, 2017 ABQB 521 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of these Rules), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff commenced two Actions against the Defendants for breach of contract, which were over 12 years old and had been proceeding side-by-side. The Defendants applied to dismiss the Actions for long delay under Rule 4.33, with a Rule 4.31 Application in aid. The main issue in both Actions was damages, which required expert evidence. The Plaintiff argued that it had difficulties obtaining expert opinion evidence, but that expert reports had been obtained and the only remaining step was to set the Actions down for Trial.

With respect to the Rule 4.33 Application, the Plaintiff argued several events constituted a significant advance in the Action such that no three year gap occurred: conditional

provision of an expert report; answering an undertaking by stating that the records requested had been destroyed; and obtaining an Order directing that the Actions be tried concurrently. Master Schlosser applied a functional analysis to determine if the events raised by the Plaintiff constituted a significant advance, and whether the events accomplished one of the goals set out in Rule 1.2. Master Schlosser held that the conditional expert report and the undertaking response did not constitute a significant advance. However, the Court noted that the parties obtained a Consent Order to direct that the two Actions be tried concurrently after the Plaintiff filed an Application to consolidate the Actions. Master Schlosser held this to be a significant advance that facilitated the quickest means to resolve the claims at the least expense to the public resources, and that avoided the possibility of inconsistent results for the two closely linked Actions. Because the Plaintiff's consolidation Application and subsequent Consent Order were within the three year time period for a significant advance, the Defendants' Rule 4.33 Application was dismissed.

Master Schlosser considered Rule 4.31 and noted that the Court needed to consider whether the delay that was the basis for the Application was "inordinate and inexcusable in context of litigation". The nature of the claims in an Action determined whether it required a quicker pace, or whether delays would lead to prejudice. The Court held that the "10 year gap created by the *Limitations Act* might pose a useful 'best-before' date". It was also important to consider "whose fault the delay was". With these principles in mind, Master Schlosser applied the test for a Rule 4.31 Application which asked: whether the non-moving party had failed to advance the Action to the point on the litigation spectrum that a reasonable litigant would have attained within the same time frame; whether the delay was inordinate; whether the inordinate delay was justified; whether the inordinate and inexcusable delay impaired a sufficiently important interest of the moving party to constitute significant prejudice; and, if the moving party relied on the presumption of prejudice created by Rule 4.31(2) and whether the non-moving party rebutted that presumption. The final step of the test also asked whether, if the moving party had met the criteria for granting relief under Rule 4.31(1), if there was a compelling reason not to dismiss the non-moving party's Action.

In this case, Master Schlosser held that the Plaintiff's delay was inordinate and could not be justified. However, the Defendants did not demonstrate significant prejudice, notwithstanding a presumption of prejudice on the facts. Because this case was a "documents case" where the expert opinion evidence, which was now available, occupied the central point in the Actions, the presumption of prejudice had been narrowly rebutted. The Defendants' Rule 4.31 Application was accordingly dismissed.

YUILL V ALBERTA (WORKER'S COMPENSATION APPEALS COMMISSION), 2017 ABQB 523
(BAST J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendants applied to strike the Plaintiff's Statement of Claim and Reply for Demand for Particulars under Rule 3.68 because they disclosed no reasonable claim; or alternatively, to dismiss the Plaintiff's Claim under Rule 7.3.

The Plaintiff had suffered injuries while at a work site and had engaged the Workers' Compensation Board ("WCB") processes to receive compensation. The WCB allowed her initial claim and then allowed a second claim based on injuries that it ruled were "secondary". The Plaintiff then made a third claim based on chronic pain she alleged was also as a result of the initial injury which claim was denied. The Plaintiff exhausted the appeals mechanisms within the WCB and applied for a judicial appeal of the WCB decision, which was also denied. The Plaintiff then filed a Statement of Claim, naming the WCB as a Defendant.

Justice Bast reviewed the distinction between the remedies of striking and Summary Judgment and noted that the Court may order all or part of a Claim struck out pursuant to Rule 3.68 where it discloses no reasonable claim. Bast J. noted that no evidence is to be considered on an Application pursuant to Rule 3.68(3), and that the facts plead in the Claim at issue are presumed to be true.

Rule 7.3, by contrast, permits a Court to dismiss an Action where "there is no merit to a claim or part of it". A Rule 7.3 Application must be supported by an Affidavit or other evidence. A Court may dismiss one or more claims in the Action, pursuant to Rule 7.3(3)(a). Her Ladyship reviewed leading authorities and noted that Summary Judgment is appropriate when there is no genuine issue requiring a Trial, that is, whether the decision-maker is able to reach a fair and just determination on the merits. This is the case where the process allows the Court to (1) make the necessary findings of fact, (2) apply the law to the facts, and (3) where Summary Judgment is a proportionate, more expeditious and less expensive way to achieve a just result. Summary Judgment rules must be interpreted broadly, favouring proportionality, and fair access to timely and just adjudication of claims. Rule 1.2 informs the application of both Rule 3.68 and Rule 7.3, and that there is an obligation on the parties to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense.

Justice Bast struck the Plaintiff's Claim pursuant to Rule 3.68 including the claims against the WCB for negligence due to the statutory immunity clause in the WCB's enabling legislation. Other claims, including "false pretences" and invasion of privacy, were struck for failing to disclose a cause of action. Many other causes of action, such as abuse of public office, were struck for a failure to plead any supporting facts. In the alternative, Justice Bast dismissed the entirety Claim under Rule 7.3 because a fair and just determination of the Claim was possible from the record and it could be determined that there was no merit to the Plaintiff's claims. The Defendants' Application was granted.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2017 ABQB 530 (THOMAS J)
Rules 1.2 (Purpose and Intention of These Rules), 2.11 (Litigation Representative Required), 2.14 (Self-Appointed Litigation Representatives), 10.29 (General Rule for Payment of Litigation Costs) and 10.50 (Costs Imposed on Lawyer)

Following an unsuccessful Application for intervenor status by Mr. Maurice Stoney ("Stoney") Justice Thomas requested submissions on Costs and ordered further evidence and a hearing on whether Stoney's lawyer, Ms. Kennedy, should be personally liable for Costs for pursuing the Application.

Justice Thomas noted that Costs awards against lawyers are governed by Rule 10.50 which states, "[i]f a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order". Thomas J. referred to recent leading authority which states that that there are two scenarios when Costs awards of this nature are appropriate: "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or "dishonest or malicious misconduct on his or her part that is deliberate". Justice Thomas confirmed that this analysis replaces the former test which required demonstrated "bad faith, or deliberate misconduct, or patently unjustified actions, although a formal finding of contempt is not needed". Thomas J. also confirmed that a lawyer's conduct is governed by Rule 1.2 which states the purpose of the Rules is to facilitate fair and just resolution of claims "in a timely and cost-effective way."

Thomas J. stressed that any analysis of a Costs award against a lawyer should be contextual, but there are certain "ground rules" that all lawyers should be expected to know and follow. His Lordship observed that some conduct by a lawyer may attract a Costs award: futile actions and applications such as collateral attacks on a case that has been argued and ruled upon; breaches of duty including conducting litigation on behalf of non-clients; special forms of litigation abuse such as booking a hearing time for an application that is obviously inadequate; and delay.

Justice Thomas noted that the Affidavits presented by Kennedy which purported to allow Stoney to represent his brothers and sisters, or to allow Kennedy to act on their behalf did not contain any documentation which would support such representation. Justice Thomas observed that, under Rule 2.11, an individual who lacks capacity may have a self-appointed Litigation Representative pursuant to Rule 2.14, but only after filing proper documentation. In this case, that "did not occur".

Justice Thomas ordered Costs against Kennedy personally on the basis that she conducted futile litigation that was a collateral attack of a prior unappealed Decision of a Canadian Court, and conducted litigation on behalf of persons who were not her clients.

SCARLETT V SINCLAIR, 2017 ABQB 582 (MASTER SCHLOSSER)
Rules 1.8 (Interpretation Act), 4.33 (Dismissal for Long Delay), 11.5 (Service on Individuals), 11.6 (Service on Trustees and Personal Representatives), 11.7 (Service on Litigation Representatives), 11.15 (Service on Person Providing an Address for Service), 11.20 (Service of Documents, other than Commencement Documents, in Alberta), 11.22 (Recorded Mail Service) and 11.31 (Setting Aside Service)

The Plaintiff commenced an Action against members of the Edmonton Police Service, including the Chief of Police, on the basis that he was the victim of racial profiling. The Plaintiff filed the Statement of Claim in early June of 2014 and the Defendants filed Statements of Defence on June 19 and 23, 2014. The Statements of Defence were delivered to the Plaintiff's address for service and signed for on June 26, 2014 by the Plaintiff's tenant. The Defendants applied to dismiss the Claim for long delay, pursuant to Rule 4.33.

The Plaintiff argued that proper service was not effected as he did not receive the Statements of Defence, and that he was therefore entitled to the full adjuster's year in Rule 4.33(4). Master Schlosser noted the difference between service of commencement documents and non-commencement documents, specifically that under Rule 11.5(2)(b) service for commencement documents through recorded mail is effected on the date "signed by the individual to whom it is addressed". However, this language is absent for the service of non-commencement documents. Under Rule 11.22(2)(b), service of non-commencement documents occurs when "acknowledgement of receipt is signed". If the receipt is not signed, then service is deemed after seven days. Master Schlosser observed that while this interpretation of Rule 11.22(2)(b) is consistent with the *Interpretation Act*, RSA 2000, c I-8, Rule 1.8 expressly excludes the *Interpretation Act* from applying to the service Rules.

Master Schlosser noted that both Rules 11.15 and 11.22 are "out of step" with the available methods of recorded mail, given that the underlying principle of service is giving proper notice to the party served. Master Schlosser stated that if an individual is served by recorded mail, the wording of Rule 11.15(2)(b) should be read in. The rationale is that service cannot be deemed effective if someone other than the addressee signed for the recorded mail. Master Schlosser also declined to deem effective service through Rule 11.2, noting that none of the required conditions were present.

Master Schlosser stated that the Court is permitted to set aside service under the circumstances set out in Rule 11.31. Service was set aside as the Plaintiff did not personally receive the Statements of Defence. As such, the Defendants' Application was dismissed.

LUFT V TAYLOR, ZINKHOFER & CONWAY, 2017 ABCA 228 (SLATTER, VELDHUIS AND GRECKOL JJA)
Rule 2.2 (Actions By or Against Partners and Partnerships)

The Defendants appealed a trial Judgment in which damages were awarded to former clients of a disbarred lawyer due to breach of duty and negligence. The Defendant lawyer had counterclaimed against the Plaintiffs for repayment of amounts advanced under a loan and retainer agreement. At Trial, Justice Martin disallowed the Counterclaim, in part because the Counterclaim was brought by the Defendant in his individual capacity. The loan and retainer agreement was entered into by the disbarred lawyer's former law firm, and thus the Defendant as an individual was not the proper party to bring the Counterclaim. Her Ladyship indicated that the wording of Rule 2.2 supported this conclusion, which states: "[a]n action by or against 2 or more persons as partners may be brought using the name of the partnership."

On appeal, the Court of Appeal allowed the Counterclaim. The Court noted that Rule 2.2 is permissive, rather than mandatory. The Rule thus allows an action to be brought

by a partnership using the name of the partnership, but does not require it. The Court also noted that there was no harm in coming to this conclusion, as the law firm was a party to the Action, and no prejudice resulted by virtue of the Defendant bringing the Counterclaim in his individual capacity.

PACIFIC INVESTMENTS & DEVELOPMENT LTD V WOOD BUFFALO (REGION), 2017 ABQB 469 (FEEHAN J)
Rules 3.3 (Determining the Appropriate Judicial Centre) and 3.5 (Transfer of Action)

The Plaintiffs appealed a Master's Decision that ruled that the Plaintiffs' Action had been commenced in the wrong judicial centre, Calgary, and should be transferred to Fort McMurray.

Justice Feehan confirmed the Master's finding that that the Rules had undergone significant transformation, and summarized the history of the Rule and the choice of venue proscribed by the Rules. Justice Feehan noted that the test under Rule 3.3 was as stated in *325303 Alberta Ltd v Prime Property Management Ltd*, 2011 ABQB 817, confirming the approach from cases which considered the former Rules:

1. A statement of claim must be filed in the judicial centre that is nearest to the residences or places of business of all of the parties to the action (R 3.3(1)(a));

2. If a plaintiff carries on business in more than one location in Alberta, the plaintiff's place of business for the purposes of the Rule is deemed to be the one closest to the location that is nearest to the location at which the matters in issue arose or were transacted (R 3.3(2));

3. When there is no single judicial centre nearest to the residences or places of business of all the parties to the action, a plaintiff must file in the judicial centre that is closest to the Alberta residence or Alberta place of business of one of the parties, selected by the plaintiff (R 3.3(1)(b)); and

4. The parties may agree on a judicial centre, unless the court otherwise orders (R 3.3(3)).

Justice Feehan found that the determinative considerations were that: the litigation related to the development of land in Fort McMurray; Pacific, while based in Calgary, carried on business in Fort McMurray; the relief sought in the litigation was inextricably connected to the policies, procedures, and governance of Wood Buffalo; and there was a resulting significant connection between Pacific and Fort McMurray.

With respect to transferring an action from one judicial centre to another, Feehan J. considered earlier Rules and jurisprudence which set out different tests. His Lordship concluded that the "appropriate test is the balance of convenience test" rather than a test which gave "a literal or plain meaning to the word "unreasonable"". Following prior leading authority, the factors to consider include: the number of parties or witnesses in each judicial centre; the nature of the issues in the lawsuit; the relationship between the parties in respect of those issues; the parties' respective financial resources; the stage of proceedings; the convenience of location for pre-trial motions; and the location of relevant assets.

The Plaintiffs argued that the witnesses were located in multiple jurisdictions and that transferring the Action to Fort McMurray would impose expense and hardship on all parties. The Defendant argued that all its employees resided in Fort McMurray, including one which was described as a "pivotal witness", that the relevant records were located in Fort McMurray, the lands at issue were in Fort McMurray, and all relevant interactions between the parties occurred in Fort McMurray.

Justice Feehan dismissed the Appeal, and held that that the balance of convenience favoured transferring the Action to Fort McMurray.

CANADA NORTH GROUP INC (COMPANIES' CREDITORS ARRANGEMENT ACT), 2017 ABQB 550 (TOPOLNISKI J) Rules 3.9 (Service of Originating Application and Evidence), 9.15 (Setting Aside, Varying, and Discharging Judgments and Orders) and 11.14 (Service on Statutory and Other Entities)

With respect to the priority of security interests in an Application relating to restructuring under the *Companies' Creditors Arrangement Act* ("CCAA"), the Canada Revenue Agency ("CRA") sought to vary the prioritization of charges made in favour of certain individuals, and argued that there was a statutory deemed trust in its favour which gave it a proprietary interest in the Debtors' assets, which could not be subordinated; or, if the CRA was a secured creditor, that it should be placed ahead of other priority charges.

Prior to its submissions respecting its deemed trust, the CRA argued that it had standing to make its Application because it had applied pursuant to Rule 9.15(1), and it had not been adequately served in the initial receivership proceedings. Justice Topolniski noted that, under Rule 9.15(1) the Court may set aside, vary, or discharge an Order or Judgment to correct a mistake or if there was not adequate notice of a Trial, or if it was made without notice to an affected individual. With respect to service, Justice Topolniski reviewed Rule 11.14(1)(b), which governs service upon statutory entities and noted that it is effective through recorded mail addressed to the entity at the entity's principal place of business. Pursuant to Rule 11.14(2)(b), "recorded mail" includes courier delivery, which was the method used in this case.

Topolniski J. also noted that under Rule 3.9, an Originating Application and supporting Affidavit must be served more than 10 days prior to the return date. Her Ladyship held that the Debtors "effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient". Justice Topolniski noted that short service was common in insolvency proceedings and that the CRA was a "seasoned and sophisticated player" in the insolvency arena. Topolniski J. also noted that the CCAA is more concerned with balancing interests than technical compliance. As such, the Court had the jurisdiction to hear the CRA's variance Application, but ultimately held that the CRA's interest was subordinate to the other priority charges.

BADGER V CANADA, 2017 ABQB 457 (SHELLEY J) Rules 3.12 (Application of Statement of Claim Rules to Originating Applications), 3.68 (Court Options to Deal with Significant Deficiencies), 3.71 (Separating Claims) and 10.29 (General Rule for Payment of Litigation Costs)

Mr. Badger and another Respondent (together, the "Respondents") brought a *habeas corpus* Application respecting their detention in administrative segregation. The Attorney General of Canada, representing the Applicant Crown and Correctional Manager of Segregation, applied to strike the Application pursuant to Rule 3.68. Additionally, an issue emerged as to whether the Application to Strike should be heard in one proceeding, or continue as two separate proceedings pursuant to Rules 3.12 and 3.71. The Attorney General argued that the proceedings should be split, while the Respondents argued that their matters should be heard together to use Court resources more efficiently, as their matters were "practically identical".

Referring to recent authority, Justice Shelley held that, in the absence of exceptional circumstances, the Court should not hear joint *habeas corpus* Applications because such Applications challenge a single Decision and relate to individual rights. Additionally, it was noted that joint *habeas corpus* may result in "logistical complications" which could harm time-sensitive proceedings, and that they "may result in a non-lawyer effectively directing or guiding a proceeding, putting applicants at risk of negative consequences such as costs award…". Justice Shelley noted that one of the two Respondents appeared to be directing the actions of both Respondents, as the formatting and handwriting on the hand-written documents was very similar, making the risks associated with non-lawyers directing proceedings very real. As such, Shelley J. held that the proceedings should be split.

With respect to the Application to Strike, Justice Shelley noted that it is well established that Applications must not rely on "bald allegations". *Habeas corpus* Applications cannot be based only on "vague suggestions" of unfairness

in a Decision or procedure, and must, at the very least, provide sufficient detail respecting the state actor involved and contain specific complaints of alleged illegal conduct. If the Application does not meet this threshold, it should be struck pursuant to Rule 3.68. Justice Shelley warned the Applicants that their individual *habeas corpus* Applications must specify the cause of their lost liberty and reasons as to why they allege it was unlawful.

Finally, Justice Shelley noted that the Court may order Costs respecting unsuccessful *habeas corpus* Applications, and that pursuant to Rule 10.29(1), the successful party should receive Costs. Although the Attorney General was successful in its Application and was entitled to Costs, Justice Shelley stayed the payment of Costs until the Respondents' individual *habeas corpus* Applications were heard. Justice Shelley struck out the Applicants' *habeas corpus* Application.

SINGH V KALER, 2017 ABCA 275 (SLATTER, ROWBOTHAM AND GRECKOL JJA)
Rules 3.12 (Application of Statement of Claim Rules to Originating Applications) and 14.16 (Filing the Appeal Record – Standard Appeals)

At the Trial of a real estate Action, the Trial Judge held that the claims of one Plaintiff, Mr. Sihota's were time barred by operation of by the *Limitations Act*, RSA 2000, c L-12, but the claims by the other Plaintiff, Ms. Singh, were not out of time. The underlying dispute related to whether the Plaintiffs were lenders or investors in real estate. Both Plaintiffs appealed the Trial Judge's Decision. The Defendants cross-appealed on Costs, and on the basis that even if a resulting trust arose Ms. Singh's claim was statute barred.

In order to determine the limitations issue, Rowbotham and Greckol J.J.A. considered the procedural history of the case, which was commenced by Statement of Claim and consolidated with a parallel Action which had been commenced by Originating Application. Mr. Sihota was then granted an Order that he was "at liberty" to file a Statement of Claim to "stand in the place of" the Originating Application, which he did. Justices Rowbotham and Greckol noted that Rule 3.12 applied in the circumstances. Pleadings which have the effect of converting an Originating Application to a Statement of Claim should be filed in the existing Action, but such a filing does not start a new proceeding. Because Mr. Sihota's "Statement of the Claim" was a continuation of the Originating Application, it was filed in time, and Mr. Sihota's Appeal on this point was allowed. The Court ultimately held, Slatter J.A. dissenting in part, that the Plaintiffs were beneficiaries of a resulting trust and the Plaintiffs' respective Actions were brought in time and were not limitations barred. The Cross-Appeal was dismissed.

With respect to Costs, the Trial Judge held that each party should bear their own Costs for the Trial. The Court of Appeal allowed Costs to Mr. Sihota and Ms. Singh for Trial and the Appeal, but noted that the Appellants had failed to file electronic transcripts as required by Rule 14.16(1)(c), so disbursements for photocopying the transcripts was disallowed.

MACKINNON V BOWDEN INSTITUTION, 2017 ABQB 574 (MANDERSCHEID J)
Rules 3.15 (Originating Application for Judicial Review), 3.16 (Originating Application for Judicial Review: Habeas Corpus), 3.68 (Court Options to Deal with Significant Deficiencies), and 10.29 (General Rule for Payment of Litigation Costs)

The Applicant, Mackinnon, sought Judicial Review by way of Originating Application of a decision of Correctional Service Canada ("CSC") pertaining to his involuntary transfer to a Maximum Security Penitentiary. Justice Manderscheid stated that, in Alberta a *habeas corpus* Application is initiated by filing an Originating Application for Judicial Review, per Rules 3.15 and 3.16(1). Once filed, *habeas corpus* applications tend to receive special priority treatment due to the timeliness requirement integral to the function of this special remedy. Manderscheid J. noted that an individual who applies for relief via *habeas corpus* must identify: a loss of freedom, and a basis on which to allege that the loss of freedom was unlawful.

Manderscheid J. determined that Mackinnon's Application contained several serious defects and predominantly

consisted of open-ended assertions and indefinite bald allegations. His Lordship explained that one way in which pleadings may be defective is where the pleadings fail to meet an informational threshold so that the responding party and Court may evaluate and answer the alleged claim. An application that fails to identify: the relevant decision and associated record; and the specific complaint of alleged illegal conduct should be struck out under Rule 3.68, with costs against the *habeas corpus* applicant. Mackinnon's Application was therefore dismissed. Justice Manderscheid noted that, pursuant to Rule 10.29(1), the successful party in a civil action is presumptively due Costs. Accordingly, Costs were awarded to the Respondent.

ALBERTA COLLEGE OF PHARMACISTS V SOBEYS WEST INC, 2017 ABCA 306 (BERGER, MCDONALD AND STREKAF JJA)
Rule 3.22 (Evidence on Judicial Review)

The Respondent, Sobeys West Inc. ("Sobeys") brought an Application for Judicial Review of the Alberta College of Pharmacists' ("College") adoption of a policy into its Code of Ethics which restrained the ability of pharmacies to implement loyalty programs, including Air Miles rewards program. The reviewing Judge had permitted Sobeys to enter additional affidavit evidence which was not considered by the College when the impugned policy was adopted. The additional evidence included evidence which both pre and post dated the College's decision to adopt the policy. On Appeal, the College asserted that the reviewing Judge erred by admitting Sobeys' Affidavit, because, pursuant to Rule 3.22, Affidavit evidence is not generally permitted on an Application for Judicial Review.

The Court of Appeal confirmed the general position that evidence which was not before the tribunal whose decision is under review is not permitted without the leave of the Court. The Court also noted that allowing evidence which arose after the impugned decision on judicial review "has the potential to extend the review process indefinitely and is simply unworkable". The Court of Appeal held that the reviewing Judge erred by allowing Sobeys' Affidavit evidence to be admitted, and by relying upon it. The Appeal was allowed.

CONDOMINIUM PLAN NO 7920829 V ACADEMY CONTRACTORS INC, 2017 ABQB 583 (MASTER SCHLOSSER)
Rules 3.43 (How to Make Claim Against Co-Defendant), 3.45 (Form of Third Party Claim) and 5.17 (People Who May be Questioned)

One of the Defendants, Abalon Construction, sought to question a Co-Defendant who refused to be examined. Abalon Construction then sought to file a Third Party Notice against the Co-Defendant. Master Schlosser noted that the Statements of Defence had been filed almost two and a half years prior, and a Third Party Notice must be filed within six months of the Defence being filed pursuant to Rule 3.45(c)(i). Master Schlosser also noted that Rule 3.43(2) allows a defendant to file a Notice of Contribution against another defendant twenty days after a defence is filed. Master Schlosser observed that, in this case, the only prejudice that the proposed third party Defendant could point to was the expiration of the six month period set out in Rule 3.45(c)(i). Master Schlosser held that the Third Party Notice could be issued against the Co-Defendant.

Master Schlosser also reviewed the leading authority regarding parties adverse in interest, as well as the relevant sections in the *Tort-Feasors Act*, RSA 2000, c T-5 and the *Contributory Negligence Act*, RSA 2000, c C-27. Master Schlosser referred to Rule 5.17(1)(a), which provides that a party is entitled to question each of the other parties who are adverse in interest. Master Schlosser determined that the Co-Defendants were adverse in interest and therefore the Defendant seeking to question the Co-Defendant could do so. The Application was granted.

CARROLL V ATCO ELECTRIC LTD, 2017 ABQB 426 (MAH J)
Rules 3.59 (Claiming Set-Off) and 13.6 (Pleadings: General Requirements)

In a prior Decision in an employment law matter, Justice Mah found that the Plaintiff was entitled to judgment as against the Defendant for bonus payments during the notice period, but the Plaintiff had been overcompensated as a result of payments made by the Defendant to the Plaintiff

and mitigation income. Mah J. reserved Judgment with respect to whether the remedy of "set-off" was available to the Defendant who had not pleaded set-off in their Statement of Defence or Counterclaim.

Mah J. noted that Rule 3.59 is permissive; it states that "[a] matter that might be claimed by set-off may be claimed by counterclaim or by pleading set-off as a defence." This language differs from the prescriptive language contained in the former Rule 93(2) which stated, "[a]ll matters which might be pleaded by way of set-off shall if it is desired to set the same up in the action, be pleaded by way of counterclaim." Moreover, set-off is not included in the list of claims that are required to be pleaded pursuant to Rule 13.6(3). Mah J. observed that, apart from set-off not being specifically listed in Rule 13.6, the claim for set-off by the Defendant would not have taken the Plaintiff by surprise. The Plaintiff had been advised of the Defendant's position by letter correspondence some four years earlier. Therefore, there would be no prejudice in allowing the Defendant's claim for set-off.

Mah J. determined that set-off was available to the Defendant notwithstanding that they had not pleaded the remedy in their Statement of Defence or Counterclaim.

FITZPATRICK V PHYSIOTHERAPY ALBERTA COLLEGE, 2017 ABQB 453 (MASTER ROBERTSON)
Rules 3.62 (Amending Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Defendants applied to summarily dismiss or strike the Plaintiff's claim. The Plaintiff had sued the College of Physical Therapists of Alberta ("College") and several members of the disciplinary committee and appeal panel on the basis that she was unfairly and specifically targeted during disciplinary proceedings relating to allegations that she over-diagnosed patients for personal gain. At the College disciplinary hearing, the Plaintiff was found guilty on four counts. The Plaintiff unsuccessfully appealed this result to the College Council, which upheld the finding of guilt. The Plaintiff appealed to the Court of Appeal, which partially reversed the decision, noting that more was required to sustain an allegation of over-diagnosis than mere departure from the statistical average likelihood of a treatable diagnosis. The Court of Appeal ruled that findings with respect to individual patients must be made, and referred the matter back to the discipline committee. The Plaintiff then appealed to the Court of Appeal a second time with respect to the specific sanctions imposed, which Appeal was largely dismissed except for variations to Orders of the College Council.

The Plaintiff relied on hearsay information in Questioning but did not disclose the source of the information. The Defendants argued this was contrary to Rule 13.18(2), but the Court noted that this Rule applied to Affidavits. The Court ruled the hearsay evidence admissible, noting that counsel for the Defendants had the opportunity to – and did – Question the Plaintiff extensively on the contested point.

In seeking Summary Judgment pursuant to Rule 7.3, the Defendants argued that the Plaintiff's Claim was limitation-barred, an improper collateral attack, and that the allegations were *res judicata*. The Court noted that parties are required to put their best foot forward on a Summary Judgment Application. On that basis, the claims against all but three individuals and the College were dismissed, as there was no evidence supporting any cause of action against them.

In response to the Defendant's Application for Summary Dismissal or to strike the Claim, the Plaintiff had applied to amend her pleading to introduce new allegations. Master Robertson held that the amendments were not limitations barred, stating that proposed amendments must have some foundation in fact. Master Robertson found that the facts as stated in the original statement of claim were "sufficient to support an argument that the investigation was done in a negligent fashion" and therefore provide a factual foundation for the proposed amendments. The Plaintiff's Application to amend was allowed, except for those parties who had the Claims dismissed against them.

GEOPHYSICAL SERVICE INCORPORATED V SUNCOR ENERGY INC, 2017 ABQB 465 (EIDSVIK J)
Rules 3.62 (Amending Pleading) and 7.3 (Summary Judgment)

The Defendant applied for Summary Judgment to dismiss some of the claims brought by the Plaintiff. The Application was one of a series of Summary Dismissal Applications brought in a number of related Actions. Justice Eidsvik outlined the law of Summary Judgment and stated that Summary Judgment is appropriate if a disposition that is fair and just to both parties can be made on the existing record. If material facts are in serious dispute, the record will not support a fair and just disposition by Summary Judgment.

One preliminary issue before the Court was whether, for the purpose of a limitations argument, the Plaintiff's amendments to its original claim took effect on the date of the original claim. The Court reviewed Rule 3.62(1)(a) and prior leading case law, and held that a party may amend its pleadings without the Court's approval as long as the pleadings have not closed, and the general rule is that amendments take effect as if they were filed on the date of the original Claim. However, if an amendment raises the possibility of a limitations argument, the amending party should seek leave of the Court. In this case, the Eidsvik J. noted that the added claims did not relate to the original Claim, and were based on an alleged breach that had occurred after the original Claim was filed. Justice Eidsvik held that Plaintiff's claim should not have been amended to include the allegations that arose after the original Claim. Accordingly, any limitations analysis had to be conducted using the date the new claims were added, and not the date of the original Claim.

Based on this finding and the facts of this case, the Defendant was granted Summary Judgment with respect to some of the claims brought by the Plaintiff.

BIRSS V TIEN LUNG TAEKWON-DO CLUB, 2017 ABQB 518 (MASTER SMART)
Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 7.3 (Summary Judgment)

The Plaintiff, ("Mr. Birss") and the Crown commenced a Claim against the Defendants after Mr. Birss suffered a subdural hematoma following a test organized and run by the Defendants. The Plaintiff sought to amend the Statement of Claim to add allegations of breach of fiduciary duty. The Defendants sought Summary Dismissal of the Plaintiffs' Action on the grounds that the proposed amendment lacked merit, and that an implied consent and waiver of liability agreement provided complete defences to the Plaintiff's claims of battery and negligence.

Master Smart explained that Rules 3.62 and 3.65 both allow the Court to permit amendments after the pleadings have closed. The threshold for allowing such an amendment is very low. The classic rule is that "an amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is repaired". Master Smart stated that there are four exceptions to the classic rule, and in this case the exception to consider was whether the amendment revealed a cause of action, or was inconsistent with the record such that it could be described as hopeless. An Applicant does not have to demonstrate that the amendment will be proven at Trial, but must provide some minimal evidence in order to justify the amendment. Given that the overarching threshold for allowing an amendment is low, the threshold for finding that an amendment is hopeless is relatively high. Master Smart, referring to the possibility of fiduciary duties due in a teacher-student relationship where there is a heightened risk, as in a taekwon-do school, granted the amendment to the Statement of Claim.

The Defendants sought Summary Dismissal pursuant to Rule 7.3(1)(b). Master Smart considered whether there was merit to the allegations of a breach of fiduciary duty. Given the low threshold to reject a claim for Summary Dismissal, Master Smart noted that the authorities indicated the existence of fiduciary obligations arising in sporting or

recreational activities, therefore, there was some merit to the allegations of a breach of fiduciary duty. Master Smart held that, based on the factual record before the Court, a fair and just determination could not be made. Accordingly, the Defendant's Application for Summary Dismissal was dismissed.

CHAMPAGNE V SIDORSKY, 2017 ABQB 557 (JONES J) Rules 3.62 (Amending Pleading), 3.66 (Costs), 7.3 (Summary Judgment) and 10.29 (General Rule for Payment of Litigation Costs)

The Defendant applied for partial Summary Dismissal of some of the Plaintiffs' claims on the basis that they were statute barred by the limitation period.

Justice Jones confirmed that Rule 7.3 allows a party to apply to dismiss all or part of a Claim on the grounds that there was no merit to the Claim. Jones J. confirmed the modern test for Summary Judgment required that the Court "examine the record to see if a disposition that is fair and just to both parties can be made on the existing record". His Lordship confirmed that there is no genuine issue for Trial if the Court can apply the law to the record before the Court and reach a fair and just determination on the merits.

Justice Jones granted the Application for partial Summary Dismissal as the Plaintiffs had actual knowledge of breaches of a construction agreement more than two years prior to filing the Claim. The Court dismissed the claims and stated that simplifying the case in this way "is a proportionate, more expeditious and less expensive means than trial to achieve a just result".

SAUVAGEAU V ALBERTA (JUSTICE AND SOLICITOR GENERAL), 2017 ABQB 448 (MASTER SCHLOSSER) Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.66 (Costs) and Schedule C

The Plaintiff, Dr. Sauvageau, applied to amend the Statement of Claim for the fifth time. The Defendant agreed to some amendments, but opposed others. The Action related to the Defendant's failure or refusal to renew Dr. Sauvageau's term as Chief Medical Examiner, and claimed for damages totalling approximately $3.1 million. The proposed amendments increased the Claim to over $7.5 million, on the basis of alleged representations by Dr. Sauvageau's predecessor who was not a party to the Action.

Master Schlosser noted that the law respecting amendments to pleadings is well settled. Referring to prior Alberta authority, Master Schlosser explained that even careless or late amendments should be permitted unless they would cause serious and non-compensable prejudice to opposing parties; the requested amendment is "hopeless"; the amendment is to add a new party or claim after the limitations period has expired; or there was "an element of bad faith" in failing to plead the proposed amendment at the outset. The Defendant argued that Dr. Sauvageau's amendments would cause prejudice, that there was no reason for the amendments not to have been sought earlier, and that the new claims were hopeless.

Master Schlosser agreed that the disputed amendments were "late and careless", but that it was not enough to refuse the amendment. With respect to the "hopelessness" of the new claim, Master Schlosser noted that the claims were "optimistic and legally agile but not, at this stage, hopeless". In addition, Master Schlosser held that, with respect to prejudice, any harm caused by the late amendment was compensable through Costs.

Master Schlosser observed that an Applicant may be required to bear the Cost consequences of amending pleadings, even if the Applicant is entitled to the Costs of the Application pursuant to Rule 3.66. Master Schlosser stated that the Costs of the amendment Application should be in the cause, but Dr. Sauvageau should be required to pay the Cost consequences of the amendments forthwith on a multiple of Schedule C, Column 5.

Finally, Master Schlosser commented that the style of cause should not include honorifics that describe status or qualifications, and ordered that the "Dr." be removed from the style of cause in the amended Pleading.

CONDOMINIUM CORPORATION NO 0321365 V PRAIRIE COMMUNITIES CORP, 2017 ABQB 396 (HALL J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

One of the individual Defendants, (the "Applicant") applied to have the pleadings against him struck out pursuant to Rule 3.68, or alternatively for Summary Dismissal of the claims against him.

The Applicant sought to have the Claim struck on the basis that the claims were insufficiently pleaded. However, Hall J. noted that the Applicant had not served a Request for Particulars, and such a request would almost certainly be upheld by the Court. His Lordship observed that "[a]ny deficiency in the pleading is in respect to a lack of particulars, which may be remedied by a demand by the Applicant as to these particulars". Justice Hall was not persuaded that the pleadings disclosed "no reasonable prospect of success", and accordingly dismissed the Application to strike the pleadings.

Justice Hall considered the Applicant's alternative Application for Summary Dismissal pursuant to Rule 7.3, in which the Plaintiffs sought to pierce the corporate veil to find the Applicant personally liable for the alleged wrongful acts underlying the Action. Justice Hall considered the test for lifting the corporate veil, and applied the test from *Hyrniak v Mauldin*, 2015 SCC 7 and *Canadian Pacific Railway Ltd*, 2014 ABCA 108 which established that the Court must "examine the record to see if a disposition that is fair and just to both parties can be made on the existing record". Justice Hall held that, on the record before the Court that it was not possible to conclude that there was no genuine issue requiring a Trial. The Summary Dismissal Application was dismissed.

TORRANCE V CALGARY CATHOLIC SCHOOL DISTRICT NO 1, 2017 ABQB 488 (HOLLINS J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Defendant school district applied to have the Plaintiff's Claim struck out under Rule 3.68 or alternatively, summarily dismissed pursuant to Rule 7.3(1). The Plaintiff claimed in defamation for the release of records held by the Defendant in relation to the Plaintiff's son which referred to the Plaintiff. The Plaintiff had previously sued in relation to the same set of facts in *ET v Rocky Mountain Play Therapy Institute Inc*, 2015 ABQB 396, appeal dismissed 2016 ABCA 320.

Hollins J., referencing Rule 3.68(2)(b), noted that the Court may strike out a pleading if the Pleading constitutes an abuse of process. Her Ladyship found that the Plaintiff was attempting to re-litigate issues that had previously been determined by the Court and on this basis held that the Claim could be struck under Rule 3.68(2)(b).

Justice Hollins further determined the Claim could be summarily dismissed under Rule 7.3(1)(b) which allows the Court to grant Summary Dismissal when the Claim is without merit. Hollins J. referred to leading Alberta authority which provided that a Decision which may "resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication".

Hollins J. concluded that while there was no doubt the Plaintiff felt genuinely aggrieved by the conduct of the Defendant, that conduct did not constitute a claim in law for which the Plaintiff could successfully recover damages. The Defendant's Application for Summary Judgment was granted, and the Plaintiff's Action was dismissed under Rule 7.3(1)(b).

STANFIELD V SCHNEIDER, 2017 ABQB 543 (MASTER ROBERTSON)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

Three Defendants (the "Counsel Defendants") sought to have the claims against them struck pursuant to Rule 3.68(2)(b). After the Plaintiff and another Defendant, Ms. Schneider, agreed to settle a dispute, they failed to "close" the settlement. The Plaintiff accused Ms. Schneider and the Counsel Defendants who represented her of purposely undermining the deal and claimed against the Defendants

for breach of the settlement contract. In addition to other arguments relating to striking the claims against them, the Counsel Defendants argued that the Statement of Claim did not particularize the serious allegations of intentional torts, as required by Rule 13.7.

Master Robertson noted that in an Application under Rule 3.68, no evidence is submitted. Master Robertson also noted that the bar on considering evidence did not preclude the Court from reviewing the Pleadings as a whole, or considering "the underlying litigation context of a claim" in order to determine whether a Claim had a reasonable prospect of success. The analysis should be conducted under the assumption that the facts as pleaded are true.

Master Robertson concluded that the allegations were insufficiently pleaded: the Statement of Claim set out a claim of inducement of breach of contract but that the Plaintiff's complaints did not create a cause of action against the Counsel Defendants. Accordingly, the claim against the Counsel Defendants was struck.

WAQUAN V CANADA (ATTORNEY GENERAL), 2017 ABCA 279 (ROWBOTHAM, GRECKOL AND STREKAF JJA)
Rule 3.68 (Court Options To Deal with Significant Deficiencies)

The Plaintiffs Appealed the Decision of a Chambers Judge to strike the Plaintiff's Action on the basis that the Plaintiffs lacked standing. The Plaintiffs had commenced an Action on their own behalf and on behalf of the Mikisew Cree First Nation ("MCFN") which contained many of the same allegations which had been at issue in an Action brought in 1996 by the MCFN, and resolved in 2009 pursuant to a settlement agreement and resulting Consent Judgment ("1996 Action"). The Plaintiffs' Action also contained several allegations concerning the conduct of counsel for both the Defendants and Plaintiffs in the 1996 Action.

The Chambers Judge had held that the Plaintiffs' Claims related to collective rights held by the MCFN and the Plaintiffs lacked the authority to represent the entire MCFN. The Chambers Judge further held that it would offend certainty and public policy to set aside the settlement agreement and Consent Judgment. The Court of Appeal confirmed that Decisions to strike a Claim under Rule 3.68(1) are subject to deference, absent an extricable error in law and that in applications pursuant to Rule 3.68, Courts must "err on the side of generosity", allowing "novel, but arguable, actions to proceed".

The Court held that the Chambers Judge erred in finding that the Plaintiffs' Claims on their own behalf disclosed no reasonable cause of action, as the Claims were novel and there was very little law on the point, such that it was not "plain and obvious" that the Claims disclosed no cause of action. However, the Court held that the Chambers Judge did not err in finding that the Plaintiffs had no standing to pursue derivative Claims on behalf of the MCFN. The Court also dismissed the Plaintiffs' Appeal respecting Claims asserted against counsel for the Defendants in the 1996 Action, holding that such claims are "interpreted strictly" and that there is no general duty of care owed by a lawyer for a defendant in an Action to the Plaintiff in that suit.

The Appeal was therefore allowed in part.

TLH V MGD, 2017 ABQB 408 (MAHONEY J)
Rules 4.14 (Authority of Case Management Judge) and 9.4 (Signing Judgments and Orders)

The parties were involved in a high conflict family matter. The parties sought the determination of eight issues at a Case Management Hearing, including issues related to the childrens' care and control and division of time, child support, tax credits, allegations of contempt, and a determination of how previous Costs Orders were to be paid. There were two outstanding Costs Orders against the Defendant which had not been paid. The Defendant argued that the Costs Orders were unwarranted, and that he could not afford to pay them. Mahoney J. noted that the Defendant had not appealed the Cost Orders, and stated that the Court could not review or vary the Costs Orders. Given the highly contentious dispute between the parties, Mahoney J., exercising the Court's broad authority under Rule 4.14, directed that the two Costs Awards be payable by the Defendant to the Maintenance Enforcement Program as child support, as opposed to directly to the Plaintiff.

Justice Mahoney determined each Application, with mixed results for the parties, and directed that the Court's Case Management Counsel prepare the Orders flowing from the Case Management Hearing for Mahoney J.'s review and endorsement. Mahoney J. invoked Rule 9.4(2)(c), which provides that approval of the Order is not required by either of the parties.

ET V ROCKY MOUNTAIN PLAY THERAPY INSTITUTE INC, 2017 ABQB 475 (HUGHES J)
Rule 4.22 (Considerations for Security for Costs Order)

The Defendants applied for a Declaration that the self-represented Plaintiff was a vexatious litigant and for an Order requiring the Plaintiff to post Security for Costs.

With respect to the Order for Security for Costs, Hughes J. considered the factors set out in Rule 4.22 as well as the two-step test set out in *Attila Dogan Construction & Installation Co v AMEC Americas Ltd*, 2011 ABQB 175 which states that a Court must:

(1) Determine whether factors listed in Rule 4.22 "are weighted in favour of granting the application for security for costs"; and

(2) Determine whether, based on the factors in Rule 4.22, it is "just and reasonable to grant an application for security for payment of a costs award..."

Justice Hughes held that the factors in Rule 4.22 "clearly" weighed against the Plaintiff and that it was just and reasonable for the Court to grant the Order. Hughes J. specifically noted that the Plaintiff had: failed to pay outstanding Costs Awards; admitted an inability to pay future Costs; and presented no evidence of substantial assets in Alberta.

Justice Hughes granted the Defendants' Application declaring the Plaintiff a vexatious litigant and the Order requiring the Plaintiff to post security for Costs.

KUGLER V NEWMAN, 2017 ABQB 536 (MASTER PROWSE)
Rules 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Defendants in an Action brought pursuant to the *Personal Information and Privacy Act*, SA 2003, c P-6.5 ("PIPA") applied to summarily dismiss the Action, or alternatively for Security for Costs.

Master Prowse held that it was not certain that the Plaintiff's Claim was barred by a release signed at the time he settled his earlier employment Action against the corporate Defendant, or that the limitations argument by the Defendants would be successful. Accordingly, the issues were not suitable for summary determination. However, the claims against the individual Defendant were not sustainable under PIPA, and the individual's Application for Summary Dismissal was granted.

Master Prowse considered the factors for a Security for Costs Application as set out in Rule 4.22. The Defendants conceded that there was no evidence to suggest that the Plaintiff would not be able to pay a Costs award which might be made against him. Instead, the Defendants only relied on one of the Rule 4.22 factors, being the merits of the Action. Master Prowse stated that the "most important factor in a security for costs application is whether the plaintiff will be able to pay costs which might be awarded against him"; the merits consideration was secondary. In the result, Master Prowse concluded that Security for Costs were not required.

VAILLANCOURT V CARTER, 2017 ABCA 282 (O'FERRALL JA)
Rules 4.22 (Considerations for Security for Costs Order), 14.67 (Security for Costs) and 14.68 (No Stay of Enforcement)

The Plaintiff sought Security for Judgment and Security for anticipated Appeal Costs in the Defendants' Appeal following the Trial of a commercial matter. The relief was being sought as a precondition to the Appeal.

In the 11 years to arrive at Trial, the individual Defendant took a number of steps to move assets out of the Defendant corporation into a limited partnership which he controlled. The Plaintiff obtained Judgment for just over $1 million against the corporation and the individual Defendant at Trial. The Defendants filed a Notice of Appeal, and the Plaintiff filed the Application for Security for Judgment and Security for Costs.

O'Ferrall J.A. held that the Defendant's disclosure in his Form 13 financial statement of debtor was inaccurate, incomplete and misleading. Due to the inaccurate and misleading disclosure, O'Ferrall J.A. awarded Security for Judgment in the amount of $1 million.

Noting the factors set out in Rule 4.22, His Lordship found it just and reasonable to award Security for anticipated Appeal Costs in the amount of $25,000. Justice O'Ferrall noted that Security for Costs is a discretionary remedy which balances a number of considerations, including the reasonable expectations and rights of the parties. His Lordship noted that the Orders were very unlikely to prejudice the Defendants' ability to continue the Appeal. The Applications were granted.

ESB V SDB, 2017 ABQB 522 (JONES J)
Rules 4.29 (Cost Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Awards) and 10.33 (Court Considerations in Making Costs Award)

In a dispute related to the imputation of income for the purposes of determining child support in a family law matter, both parties argued that the other had failed to accurately disclose changes in their incomes after their divorce. Jones J. made determinations with respect to both parties' incomes, and then requested that the parties submit written submissions respecting the proper form of Order, after the parties prepared two "very different forms of Order" for endorsement. After the Order, which was close to the form of Order drafted by SDB, was issued, His Lordship directed the parties to make submissions as to Costs. SDB sought full indemnity solicitor and client costs on the basis that ESB did not negotiate reasonably, failed to honour child support obligations, coerced and bullied SDB, and acted in bad faith. Alternatively, SDB sought Costs calculated pursuant to Column 3 of Schedule C, doubled due to a Calderbank Offer. In the further alternative, SDB sought double Costs after she served a Formal Offer pursuant to Rule 4.29(1).

ESB argued that it was SDB who had acted poorly, and that the parties should bear their own Costs on the basis that the parties had enjoyed mixed success. Further, SDB's Formal Offer was open for acceptance for an "unreasonably short" time. He also argued that his behaviour was not scandalous, outrageous, or reprehensible, and that as such, solicitor and client Costs were not warranted.

In coming to a decision, His Lordship noted that Rule 4.21 entitles an Applicant to double Costs "for all steps taken in relation to the action or claim after service of [an] offer, excluding disbursements", if a Formal Offer is not accepted and the subsequent Order or Judgment is more favourable to the Applicant than the Formal Offer. Jones J. also reviewed the applicable Rules in determining a Costs award and noted that Rule 10.29 provides that a successful party is generally entitled to a Costs award against the unsuccessful party, subject to the Court's discretion. Justice Jones also noted that, pursuant to Rule 10.31, the Court's general discretion to award Costs should take the factors listed in Rule 10.33(1) and (2) into account. Jones J. ultimately concluded that the parties did not enjoy mixed success. It was SDB who was successful. However, on the facts, ESB had not acted unconscionably, egregiously, or in bad faith. As such, full indemnity and solicitor and own client Costs were not appropriate; nor was an award for double Costs after ESB's receipt of the Calderbank Offer. Instead, Costs were awarded in accordance with Column 2 of Schedule C, doubled respecting steps taken after November 15, 2016, when SDB submitted a Formal Offer.

HUMPHREYS V TREBILCOCK, 2017 ABCA 232 (COSTIGAN, WATSON AND WAKELING JJA)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 4.31 (Application to Deal with Delay) and 14.88 (Costs Awards – Appeals)

The parties sought a determination on Costs following a Decision by the Court of Appeal with respect to an Application for dismissal for delay pursuant to Rule 4.31. The Court noted that a complicating factor in the determination of Costs was that the Appellants, the Defendants in the underlying Action, had served the Respondents with a Formal Offer while the motion to dismiss the Claim was still before the Court of Queens's Bench. That motion was initially dismissed by the Court of Queen's Bench but was reversed on appeal.

The Court of Appeal noted that it has the jurisdiction to consider Costs awards of both the Court of Queen's Bench and the Court of Appeal. Given that the Appeal resulted in a complete reversal of the Trial Decision, the Court of Appeal exercised its jurisdiction and awarded double costs from the date of the Formal Offer to the date of the Queen's Bench Judgment.

However, the Court was not persuaded that the double Costs award from the Queen's Bench Judgment should be carried forward to the Appeal in light of Rule 14.88(3). The Court therefore awarded ordinary Costs for Appeals according to Schedule C, Column 5 for the Appeal because the Formal Offer was not revived, and no further offer was made during the Appeal.

221198 ALBERTA LTD V DOBRESCU, 2017 ABQB 460 (SHELLEY J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

Following a Master's dismissal of the Defendants' Application to dismiss two Actions pursuant to Rules 4.31 and 4.33, the Defendants appealed. The Defendants argued that there had been no significant advance of the Actions since their commencement. They submitted that the Plaintiffs had only provided two answers to undertakings as well as a purported expert report in that time, and that neither had significantly advanced the litigation.

Shelley J. summarized the relevant principles established by Alberta's Court of Appeal in regards to a Dismissal Application pursuant to Rules 4.31 and 4.33. Her Ladyship confirmed that Rule 4.31 is prejudice-based, and relies on a finding of significant prejudice to a party rather than any specific delay in an Action. Conversely, dismissal is mandatory under Rule 4.33 if there has been no significant advance of the Action for three years. The only exception to this is if the defendant opposing the Application participated in steps after the expiry of the three years to such an extent that it would be unjust to grant the Application.

Shelley J. rejected the Defendants' submission that the undertaking responses and purported expert report did not significantly advance the Actions. Further, Justice Shelley rejected the Defendants' submission that delay had caused them prejudice. The purported prejudice consisted merely of a potential witness' indication that she may no longer be willing to testify. As Shelley J. noted, the witness would still be compellable with a Notice to Attend. Moreover, it was the Defendants who had been a principal cause of the delay. The Plaintiffs' counsel had attempted for some time to set a date for Trial but was stymied by the Defendants' counsel and later the Defendants themselves. For these reasons, Shelley J. dismissed the Defendants' Appeals.

VAN FOSSEN V EDMONTON (CITY), 2017 ABQB 503 (MASTER SMART)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendants applied to dismiss the Plaintiff's Action pursuant to Rules 4.31 and 4.33. The personal injuries giving rise to the claims occurred in 2005, the Statement of Claim was filed in 2007 and was served on the Defendants in 2008. The Plaintiff served her Affidavit of Records in 2016.

Master Smart considered Rules 4.31(1) and 4.31(2), and the progress of the Action from the beginning to the date

that the Application was made. Master Smart noted that nothing had occurred to advance the Action for long periods during the litigation. The Plaintiff argued that she had an excuse for the delays, and had made efforts to obtain medical records from physicians and clinics the results of which were then provided to the Defendants. Master Smart observed that the letters to the physicians and clinics only referenced injuries that arose out of later accidents. Master Smart also found that the Plaintiff had provided a number of medical records to the Defendants without any attempt to review their relevance and materiality. The delays were therefore inexcusable. Master Smart stated that Rule 4.31 presumes that there has been prejudice to the Defendants when there is inordinate and inexcusable delay, noting that the individual Defendant driver had passed away, and that there would be difficulty locating witnesses. Master Smart also remarked that Questioning had not yet begun and that a Trial would still be a number of years away. Though the presumption of prejudice can be rebutted, Master Smart held that the Plaintiff had provided no evidence to rebut the presumption.

Master Smart considered Rule 4.33 which stipulates that if three or more years have passed without a significant advance in an Action, the Court must dismiss the Action. The Plaintiff argued that serving the Affidavit of Records in 2016 was a significant advance in the litigation, however Master Smart stated that the authorities are clear that the performance of a mandatory task under the Rules does not, in and of itself, constitute a significant advance in the Action. The Court must adopt a functional approach. Master Smart determined that the activities of the Plaintiff over the previous three years, including service of the Affidavit of Records, was not sufficient to have significantly advanced the Action.

Master Smart therefore granted the Application dismissing the Action pursuant to Rule 4.33, and held that the Action would have also been dismissed under Rule 4.31.

MCCARTHY V SCHINDELER, 2017 ABQB 511 (MASTER SCHLOSSER)
Rule 4.31 (Application to Deal with Delay)

The Defendants applied to dismiss the Plaintiff's Action for delay pursuant to Rule 4.31. Referring to the recent leading authority in Alberta for such Applications, *Humphreys v Trebilcock*, 2017 ABCA 116, and noting the principles laid out in *R v Jordan*, 2016 SCC 27 Master Schlosser observed that in the civil context, "a Plaintiff should not be held accountable for periods attributed to institutional delay" and that delay should be assessed in context on a case-by-case basis. Master Schlosser stated that the 10 year cap found in the *Limitations Act* RSA 2000, c L-12 "forms a kind of presumptive ceiling beyond which delay can be presumed to be inordinate and unreasonable without a compelling explanation".

Master Schlosser considered the progress of the Action and held that the Plaintiff had failed to reasonably advance the Action; the delay was inordinate; the Plaintiff lacked reasonable justification for the inordinate delay; and that there was actual prejudice due to witnesses' "fading memories". Master Schlosser noted that when there is evidence which raises a genuine doubt as to whether prejudice exists, the presumption of prejudice is not sufficient to meet the onus of proving prejudice. Master Schlosser also stated that the Plaintiff's "'wait and see' approach is not a sufficient excuse for delay when there are criminal charges and civil claims", and observed that the allegations may be such that the Plaintiff has an obligation to advance the Action expediently.

In the result, Master Schlosser allowed the Defendants' Application for long delay and dismissed the Action.

THE OWNERS: CONDOMINIUM PLAN NO 982 6403 V CPI CROWN PROPERTIES INTERNATIONAL CORPORATION, 2017 ABQB 562 (SHELLEY J)
Rule 4.31 (Application to Deal with Delay)

Four of the Defendants and the Third Parties (the "Applicants") applied to have the Action dismissed for inordinate and inexcusable delay pursuant to Rule 4.31.

The events at issue in the Action occurred in 1998 and 1999, the Statement of Claim was filed in March 2003, and the Application was heard in November 2016.

Justice Shelley stated that inordinate delay is a delay that exceeds what is reasonable given the issues and particular circumstances in the specific case. If an Applicant establishes inordinate delay, then the onus shifts to the Respondent to show that the delay was excusable. Where the delay is found to be inordinate and inexcusable, the presumption of significant prejudice is engaged and the Respondent then has to onus to prove that there was no significant prejudice. Further, Shelley J. noted that several authorities suggest that 10 years is an appropriate benchmark to use when assessing whether delay is inordinate.

While determining whether there had been inordinate delay in the Action, Justice Shelley considered the Respondents' argument that they should not be penalized for delays which occurred before they were assigned an interest in the Action. Justice Shelley stated that it is well-established in law that an assignee takes no better position than the assignor. Shelley J. considered the Action as a whole, not only the time following the assignment to the Respondents. Justice Shelley noted that while there was no hard and fast "ten year" rule in assessing inordinate delay, the length of time since the Action was commenced as well as the number and length of the various periods of delay are highly relevant to the analysis of inordinate delay. Justice Shelley also rejected the Respondents' arguments about their unsuccessful attempts to schedule settlement meetings in an effort to excuse the delay. With respect to prejudice, Shelley J. noted that the weakening of witness' memories or the death of a witness does not need to relate to a period of specific delay before it can constitute prejudice.

Justice Shelley concluded that there had been inordinate and inexcusable delay and found that the Applicants had suffered actual prejudice. As a result, the Application was granted and the Action was dismissed as against the Applicants.

DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2017 ABQB 486 (MASTER PROWSE)
Rules 5.18 (Persons Providing Services to Corporation) and 6.8 (Questioning Witness Before Hearing)

The Defendants applied for the removal of the Plaintiff's counsel on the basis that he would likely become a witness in upcoming proceedings.

Master Prowse confirmed that there were three ways in which counsel for a party could be called as a witness: under Rule 6.8 which allows for Questioning before an Application; at Questioning; or at Trial. Master Prowse clarified that Rule 6.8 is likely to be used more often than the former Rule 266 because the examination is in the form of cross-examination as opposed to direct examination.

Master Prowse noted that Plaintiff's counsel's prior involvement in the disputed transactions meant he could also be questioned pursuant to Rule 5.18 which allows a person who has provided services to a corporation to be questioned if the relevant and material information can't be obtained from an officer, employee or former employee; it would be unfair to proceed to Trial without allowing the Questioning; and, no undue hardship expense or delay would be caused to another party or to the person questioned.

Master Prowse allowed the Application and held that Plaintiff's counsel's involvement in the matter prior to the dispute meant he had relevant and material information and therefore could be a witness.

BOURQUE V TENSFELDT, 2017 ABQB 519 (MICHALYSHYN J)
Rules 5.24 (Oral and Written Questioning Limitations), 5.28 (Written Questions), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.8 (Questioning Witness Before Hearing), 6.11 (Evidence at Application Hearings), 6.14 (Appeal from Master's Judgment or Order), 6.15 (Appointment for Questioning Under this Part), 6.16 (Contents of Notice of Appointment), 6.17 (Payment of Allowance), 6.18 (Lawyer's Responsibilities), 6.19 (Interpreter), 6.20 (Form of Questioning and Transcript) and 10.53 (Punishment for Civil Contempt of Court) and Schedule C

The Defendant applied to have the Plaintiff's Statement of Claim struck for failure to purge ongoing Civil Contempt. The Plaintiff was found in Civil Contempt for failing to attend Questioning on Affidavits filed in support of several Applications, but could purge the Contempt by attending Questioning by July 30, 2017. The Plaintiff failed to attend arguing physical and cognitive impairments. The Plaintiff insisted that she did not refuse to be Questioned as she maintained that she would answer written interrogatories instead. Justice Michalyshyn noted that the Questioning at issue was under Part 6 of the Rules. There is no equivalent in Part 6 to Rule 5.28 which allows for written interrogatories; however, Rule 5.24 provides that Questioning must be oral unless the Parties agree or the Court otherwise orders. Michalyshyn J. noted that Rule 6.11(1)(c) specifically allows the Court to consider evidence given by written answers to questions under Part 5. That Rule did not address whether written answers to questions under Part 6 would be admissible in a Part 6 Application.

Justice Michalyshyn found that the Plaintiff had refused to attend the court-ordered Questioning, yet failed to establish that she was medically unable to attend for oral Questioning. The remaining question was which punishment under Rule 10.53 was appropriate. Michalyshyn J. applied the factors set out in *Demb v Valhalla*, 2016 ABCA 172 which are: 1) whether the failure to comply with the Court Order was deliberate or inadvertent; 2) the role of counsel; 3) where the failure is in giving discovery, the object is more to secure discovery rather than to punish; 4) whether there were attempts to purge contempt or apologize; 5) the entire history or context of the litigation; 6) the amount of reasonable thrown-away costs incurred; 7) the nature of the contempt; and 8) the degree of culpability of the contemnor.

Michalyshyn J. held that all of the factors weighed in favour of a serious punishment. Notably, the Plaintiff's Contempt was found to be based on a deliberate refusal to attend oral Questioning, which was unwavering and unapologetic. Regarding the entire context of the litigation, Michalyshyn J. held that the Action itself faced several arguable defences. While the refusal to attend Questioning on an Affidavit was found to be analogous to discovery, Michalyshyn J. found that it was unlikely that the Plaintiff could be persuaded to follow Court Orders or "engage appropriately in the litigation" through a lesser sanction. Accordingly, the sanction set out on Rule 10.53(1)(i), striking the Claim with Costs was appropriate. The Plaintiff's Claim was accordingly struck. Costs were awarded to the Defendant on double Column 5 of Schedule C.

AMIK OILFIELD EQUIPMENT & RENTALS INC V BEAUMONT ENERGY INC, 2017 ABQB 427 (CAMPBELL J)
Rules 5.31 (Use of Transcript and Answers to Written Questions), 6.6 (Response and Reply to Application), 6.8 (Questioning Witness Before Hearing) and 7.3 (Summary Judgment)

The Defendants in a contractual dispute appealed two Decisions of a Master that granted Summary Judgment to the Plaintiff under Rule 7.3. Among other things, the Court noted that in the second Decision, the Master did not consider one of the Affidavits filed by the Defendants, because it was filed late contrary to Rule 6.6(2) and Practice Note 2. Justice Campbell observed that an Appeal before a Justice was a *de novo* hearing of the case where new evidence may be considered. Campbell J. allowed the new evidence proposed by the Defendants, including the previously refused Affidavit and the Transcript from Questioning under Rule 6.8 as it was relevant and material information which related to the issues to be decided.

Justice Campbell applied the test for Summary Judgment under Rule 7.3, and held that pursuant to prior leading

authorities, Summary Judgment may be granted "if a disposition that is fair and just to both parties can be made on the existing record", where each party to the Application is expected to put its strongest case forward. Whether further Questioning was needed to make a fair and just determination was an issue before the Court in this case. Among other things, the Defendants argued that the Court could not consider certain information provided by the Plaintiff's representative in a Summary Judgment Application.

The Court reviewed the evidence in question, and noted that there was a difference as to the use that can be made of the evidence adduced under Part 5 of the Rules, and Questioning on an Affidavit or Questioning for the purpose of an Application under Part 6 of the Rules. Specifically, answers to Undertakings given during Questioning are subject to Rule 5.31 which provides that such evidence is only the evidence of the Questioning party which may be used against the party who was Questioned. It is not evidence that can be used generally in the Application.

Relying on the available evidence, including evidence from one of the Plaintiff's witnesses' questioning on an Affidavit and Rule 6.8 Questioning, the Court upheld the Master's Decisions, and dismissed the Defendants' Appeal.

KERICH V VICTORIA TRAIL PHYSIOTHERAPY LTD, 2017 ABQB 471 (MASTER SCHLOSSER)
Rules 5.31 (Use of Transcript and Answers to Written Questions), 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiffs commenced a Claim against Victoria Trail Physiotherapy Ltd ("Victoria Trail") and the Workers' Compensation Board ("WCB") after a physiotherapist at Victoria Trail allegedly worsened the individual Plaintiff's injury obtained on the job. Both Defendants applied for Summary Dismissal of the Claim against them.

Master Schlosser noted that the Court must rely on expert opinion evidence as to the cause of the Plaintiff's injury, and such evidence is admissible in Summary Dismissal proceedings pursuant to rule 6.11(1)(a). Master Schlosser also noted that expert evidence should be treated the same way in Summary Dismissal Applications as at Trial: the Court must asses the expert's qualifications, information, assumptions and opinion. Further, an expert's Affidavit should also conform to Form 25 in a Summary Dismissal Application. Because the WCB had tendered their expert's Affidavit which contained "a gap in the evidence", Master Schlosser held that it was not determinative with respect to causation.

Regarding Victoria Trail's expert opinion Affidavit, Master Schlosser held that it complied with Form 25. However, the Plaintiffs objected to the assumptions and information contained in the report as the expert had referred to a transcript of Questioning from its own witness. Master Schlosser considered Rule 5.31, and held that the Plaintiffs' objection could not be sustained. The Affidavit did not use the transcript as evidence, but rather had put the information within the transcript to the expert as a hypothetical fact upon which the expert could provide an opinion. This was found to be an "exemplary rather than an impermissible use of questioning transcripts".

Master Schlosser noted that Summary Judgment Applicants are required to "have personal direct first-hand evidence" pursuant to Rule 13.18(3). The WCB had not tendered direct evidence from the Plaintiff's WCB case manager respecting its claim of statutory immunity which created a gap in the evidence making the WCB's position "less than entirely satisfactory."

Finally, Master Schlosser reviewed the "six-step process" that Courts follow during Summary Dismissal Applications: (a) "presume that the best evidence from both sides is before the Court"; (b) ask whether negative inferences may be drawn from the evidence; (c) make a finding respecting admissibility of the evidence; (d) determine whether there is conflicting evidence and whether that evidence is self-serving or has been resolved; (e) examine the sufficiency, admissibility and reliability of the evidence; and (f) determine if all of the elements of a Cause of Action or Defence have been proven, or if "critical elements of proof" are missing.

Master Schlosser concluded that the gaps in the evidence made it clear that the best evidence was not before the Court. As such, the Summary Dismissal Applications were dismissed.

473440 ALBERTA LTD V LENACO HOMES MASTERBUILDER INC, 2017 ABQB 538 (FEEHAN J) Rules 5.33 (Confidentiality and Use of Information), 6.11 (Evidence at Application Hearings), 8.17 (Proving Facts), 9.22 (Application that Judgment or Order Has Been Satisfied), 10.51 (Order to Appear), 10.52 (Declaration for Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Plaintiffs alleged that the Defendants had moved assets out of a corporation to exclude the Plaintiffs from the business. The Action was one of nine Actions between the same or similar parties. In a receivership hearing, the parties agreed to a preservation Order and a production Order requiring the disclosure of one the corporation's financial records. The Orders contemplated a confidentiality agreement, but it was not consummated. The parties exchanged communications and records and agreed that the communications were protected by an implied undertaking. As the litigation continued, counsel discussed whether it was appropriate to amend the terms of the production Order or to deem it satisfied pursuant Rule 9.22. A 48-page report containing receivership records came into the possession of counsel in one of the other related Actions. Counsel for 473440 Alberta Ltd. ("473440") and Reid Worldwide Corporation ("Reid") unsuccessfully attempted to file and rely upon the report. Two of the Defendants then applied to hold 473440 and Reid and their counsel in civil contempt for breaching Rule 5.33 and the terms of the confidentiality provision in the production Order.

Justice Feehan noted that no Applications were made with respect to Rule 9.22 nor Rule 6.11 in order to use evidence taken from one Action in another. Feehan J. referred to leading authorities and noted that Courts have inherent jurisdiction to deal with contempt of their Orders. The modern test for civil contempt requires proving three elements beyond a reasonable doubt: (1) that the Order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) that the alleged contemnor must have had actual, or inferred, knowledge of it or have been wilfully blind to the Order; and (3) that the alleged contemnor must have intentionally done the prohibited act, or intentionally failed to do the required act.

Justice Feehan noted that the *mens rea* necessary to be held in contempt was simply an intention to commit the prohibited act, or intentional, wilful, or reckless failure to perform a required act. His Lordship further noted that Rule 10.52(3)(a) also informs this analysis in that a person may be held in civil contempt if they knowingly and "without reasonable excuse" do not comply with an Order. Feehan J. noted that the case law is unresolved with respect to what the onus is with respect to a "reasonable excuse", given that Rules 10.51 and 10.52 require that the alleged contemnor must appear to "show cause" why they should not be held in contempt. Further, despite any onus that may lay on an Applicant in a contempt Application, Feehan J. noted that where the Applicant fails to make its case for contempt, a Court may still invoke its inherent jurisdiction to make a contempt Order where justice and "respect for an undertaking of confidentiality" demands a sanction.

In this case, His Lordship found that the Applicant failed to prove the first and second elements of contempt beyond a reasonable doubt, but did satisfy the third element. Justice Feehan also stated that, while the Respondents actions were "sloppy" in failing to make an Application to receive relief from Rule 5.33, to vary the Order under Rule 9.22, or to make use of the evidence under Rule 6.22, there was a reasonable excuse for the disclosure in that the production Order was insufficiently precise.

Feehan J. dismissed the contempt Application but noted that some procedural relief was required in the circumstances to "create an even playing field as the action continues, and to uphold the rule of law, and the dignity and processes of the Court". His Lordship considered the potential relief available in a contempt Application pursuant to Rules 10.52 and 10.53, and ordered that the report be subject to a sealing Order, that it be struck from the record in any Actions in which it was improperly filed, and that no

further use of it could be made in those Actions until an Application under Rule 5.33, 6.11 or 9.22 was granted.

COFFEY V NINE ENERGY CANADA INC, 2017 ABQB 417 (MASTER FARRINGTON)
Rules 6.44 (Persons who are Referees), 6.46 (Referee's Report), 7.3 (Summary Judgment) and 7.5 (Application for Judgment by Way of Summary Trial)

The Plaintiff applied for Summary Judgment against the Defendant employer for wrongful dismissal. At issue was the nature of Summary Judgment Applications, and whether Masters have jurisdiction to decide on them in the context of a wrongful dismissal Action.

The Court first noted that, among other things, actions may end by a successful Summary Judgment Application under Rule 7.3, or by a Summary Trial under Rule 7.5. Master Farrington noted that, pursuant to prior authorities and the *Court of Queen's Bench Act*, RSA 2000, c. C-31, even with the consent of the parties, Masters cannot try actions or resolve disputed questions of fact if oral evidence is required.

The Court noted that a common theme that has developed in leading cases such as *Hryniak v Mauldin*, 2014 SCC 7, is that in order to succeed at a Summary Judgment Application, a party must show an "unassailable" case. Master Farrington noted that the Court should not weigh evidence in a Summary Judgment Application brought under Rule 7.3, unlike applications under Ontario's Rule 20.04(2.1), as considered by the Court in *Hryniak v Mauldin*, which was more comparable to Alberta's Rule 7.5. The Court summarized the nature of Rule 7.3 Summary Judgment Applications:

> [...] when a court grants summary judgment, it is finding that the probability distribution for the possible set of results in a matter is skewed so significantly in favour of a certain result (either in favour of the plaintiff or the defendant), that a trial is not a worthwhile exercise. In other words, the moving party has shown an "unassailable" case in which a trial would very likely lead to the same result.

Most wrongful dismissal cases, including this case, involved the consideration and weighing of various factors in determining the appropriate notice period, which was akin to a Trial. Given the Court's conclusion that a decision maker at a Summary Judgment Application would be determining whether the result of a case appears "sufficiently certain that a trial is not worthwhile", it would be inappropriate to assess notice periods on Summary Judgment Applications. While Summary Judgment Applications may be used in employment law matters to determine issues of liability, the actual assessment of damages fell outside the scope of a Summary Judgment Application. Instead, notice periods were more appropriately determined under the Summary Trial process.

Master Farrington noted the express wording of Rule 7.3(3)(b) "issue to be tried" in relation to the amount of an award, and stated that this language was an "acknowledgment that a determination of damages in that context is in the nature of a trial". Further, although Rule 7.3(3)(b) allowed a Referee to assess damages under Rules 6.44, the Referee had no ability to finally dispose of the matter, and in any event, the Referee's report must go back to the referring party for consideration and adoption under Rule 6.46. As a result, the Court would be unable to delegate tasks to a Referee beyond its own jurisdiction. Master Farrington ultimately held that it was inappropriate to grant Summary Judgment, and dismissed the Plaintiff's Application.

ALBERTA V SUNCOR INC, 2017 ABCA 221 (BERGER, WATSON AND GRECKOL JJA)
Rule 6.45 (References to Referee)

An employee of the Respondent, Suncor, was fatally injured at a work site. Immediately after the accident, the Respondent began an internal investigation, and "threw a privilege blanket" over all information relating to its investigation. The Appellant, the Crown, filed an Originating Application in response to the Respondent's claims of privilege, and sought an Order for the Respondent to provide the purportedly privileged materials, or at least provide further particulars about the claims of privilege.

In assessing whether the Respondent had sufficiently justified its claims of privilege, the Chambers Judge found that the dominant purpose of the investigation was in contemplation of litigation. The Chambers Judge directed the Respondent to meet with Case Management Counsel, who would assess whether the claims of privilege were justified. Case Management Counsel would act as a referee under Rule 6.45, and provide recommendations to the Court, because the Chambers Judge could not make a determination about the privilege of each particular document due to the large volume of documents. The Appellant appealed.

As a preliminary issue, the Court of Appeal noted that, absent material error of law or principle, the Chamber Judge's exercise of procedural discretion to invoke Rule 6.45 is entitled to deference. However, in this case, the Chambers Judge erred in finding that the dominant purpose of the investigation was in contemplation of litigation, and that materials relating to the investigation would be generally covered by litigation privilege. The Court held that the Chambers Judge further erred in finding that the documents were described with sufficient particularity for an assessment of the privilege claims. The Court of Appeal agreed with the Appellant that, as a result of these erroneous findings, an assessment by the referee under Rule 6.45 was "illusory" because the finding that the investigation was generally in contemplation of litigation was binding on the Referee, or was prejudicial to the assessment. The Court of Appeal allowed the Appeal in part, and varied the Formal Order under Rule 6.45.

CARDINAL V ALBERTA MOTOR ASSOCIATION INSURANCE COMPANY, 2017 ABQB 487 (LEE J)
Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 7.4 (Proceedings after Summary Judgment against Party)

The Plaintiff, Ms. Cardinal, commenced an Action against the Defendant on the basis that the Defendant denied her claim for insurance coverage following a motor vehicle accident. The Defendant denied coverage on the basis that Ms. Cardinal was in a stolen vehicle during the accident. The Defendant successfully applied for Summary Dismissal of the Claim, and the Plaintiff appealed the Master's Decision. The Plaintiff argued that her knowledge of whether the vehicle was stolen created a genuine issue for Trial.

Lee J. considered Rules 7.2, 7.3 and 7.4, particularly Rules 7.3(1)(b) and 7.3(3)(a), and noted that, procedurally, the Court must ask whether examination of the existing record can lead to a fair and just adjudication for the parties. Substantively, the Court must ask whether there is any issue of merit that genuinely requires a Trial, or whether the Claim or Defense is so compelling that the likelihood of its success means that it should be determined summarily. His Lordship noted further that Summary Judgment is not possible when the evidence about material facts, conflicts, and complex legal issues may be sufficient to defeat a Summary Judgment Application.

Lee J. observed that there were two or more reasonable interpretations of the relevant section of the insurance policy, and also held that the law was unsettled in Alberta with respect to the relevance of a claimant's knowledge of a stolen car in similar circumstances. Lee J. therefore held that the Defendant insurance company had not proven that there was no genuine issue for Trial and allowed the Appeal.

GEOPHYSICAL SERVICE INCORPORATED V PLAINS MIDSTREAM CANADA ULC, 2017 ABQB 462 (EIDSVIK J)
Rule 7.3 (Summary Judgment)

The Plaintiff, Geophysical Service Inc. ("GSI"), applied for partial Summary Judgment against two Defendants, Plains Midstream Canada ULC and BP Canada Energy Group ULC (the "Defendants"). Eidsvik J. considered Rule 7.3 and the leading Alberta authorities on Summary Judgment. Eidsvik J. noted that if a Respondent to a Summary Judgment Application has evidence that could defeat the Applicant at Trial then Summary Judgment will not be granted. GSI and the Defendants agreed that there were no material facts in dispute; however, the Defendants argued that the evidence showed that their defence to GSI's claim was strong and therefore GSI's Application for Summary Judgment should be dismissed.

Eidsvik J. held that GSI had not proven that it had suffered any damages caused by BP Canada Energy Group ULC, and that Plains Midstream Canada ULC appeared to have a complete defence to GSI's claim. Justice Eidsvik therefore dismissed GSI's Application for Summary Judgment as against the Defendants.

WEIR-JONES TECHNICAL SERVICES INCORPORATED V PUROLATOR COURIER LTD, 2017 ABQB 491 (SHELLEY J)
Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of the Plaintiff's claim on the basis that the Plaintiff failed to bring the claim within the applicable two-year limitations period.

Shelley J. stated that Summary Judgment is no longer determined on the basis of triable issues. The question to be determined by the Court is whether there is an issue of merit that requires a Trial; or conversely, whether the defence is so strong that it is highly likely to succeed at Trial. Though a claim should not be dismissed unless it is beyond doubt that the claim will not succeed, the Court should not refrain from a careful examination of whether this is the case even in the face of complex facts. Following a review of the applicable legislation and the facts of the case, Justice Shelley held that there was sufficient evidence for a determination that the limitations defence of the Applicants was highly likely to succeed.

The Application was granted.

ORR V ALOOK, 2017 ABQB 458 (BURROWS J)
Rules 7.8 (Objection to Application for Judgment by Way of Summary Trial) and 7.9 (Decision After Summary Trial)

In an Action for breach of contract, the Defendants objected to the Plaintiff's Application for Judgment by way of Summary Trial. Burrows J. noted that Rule 7.8(1) governs when a Respondent may object to such a Judgment and Rule 7.8(3) applies when an objection to such judgment must be dismissed.

The Defendants argued that the Plaintiff's claim was too complex for Summary Trial. Burrows J. held that the complexity of the issues relating to the proper parties to the contract and the amount of damages did not make the issues "unsuitable for determination in a summary trial".

Burrows J. noted that the litigation had begun six years prior, and was "outstanding and unresolved for far too long"; His Lordship held that Summary Trial was appropriate in the circumstances. However, Justice Burrows noted that Rule 7.9(2)(b) and (c) allows the Court to decide, after the Summary Trial has been heard that the Court is not able to make findings of fact necessary to decide the issues, or the Court may determine that it would "be unjust to decide the issues on the basis of a summary trial". Burrows J. dismissed the Defendants' objection.

OOMMEN V CAPITAL REGION HOUSING CORPORATION, 2017 ABCA 283 (CRIGHTON JA)
Rules 9.4 (Signing Judgments and Orders), 14.41 (Responses to Applications to Single Appeal Judges) and 14.90 (Sanctions)

The Applicant had previously applied for, and was denied, an extension of time to appeal. The Respondent, the Capital Region Housing Corporation ("CRHC"), sought Costs and the invocation of Rule 9.4(2)(c), which would allow for the Court clerk to sign a Judgment or Order if the Court directed that approval of the form of the Order or Judgment by a party was not required.

Justice Crighton noted that ordinarily the successful party in an Application is entitled to Costs. However, a party is not entitled to Costs when it fails to meet a procedural step unless the Court orders otherwise. Her Ladyship referred to Rule 14.41, which requires a Respondent to file materials more than 5 days prior to an Application before a single Judge, and Rule 14.90, which provides that parties who do not comply with a deadline are not entitled to recover Costs or disbursements, unless the Court makes an Order to the contrary. CRHC argued it should be entitled to Costs because the Applicant had not confirmed counsel's availability to hear his Application before scheduling it, and because the Applicant insisted on service by process server,

rather than email. Crighton J.A. noted that the Applicant had complied with the *Rules of Court* in providing the minimum notice required, and CRHC did not have difficulty serving him.

As such, Justice Crighton held that Rule 9.4(2)(c) should be invoked, but that both parties should bear their own Costs.

LALL V ALBERTA (CHIEF ELECTORAL OFFICER), 2017 ABQB 570 (TILLEMAN J)
Rule 9.13 (Re-Opening Case)

The Plaintiff, Lall applied to vary a prior Judgment which found that Lall was in breach of the Election Finances and Contributions Disclosure Act (the "Act"), and was therefore banned from pursuing public office for a period of five years. Justice Tilleman confirmed that the Judgment had not yet been entered. His Lordship considered Rule 9.13 which provides the criteria for varying a Judgment or Order and noted that before re-opening a decision, the Court must be satisfied that there is good reason to do so. The test requires that the Court consider: whether the evidence, if presented at trial, have changed the result; and could the evidence have been obtained before the conclusion of the trial by the exercise of reasonable diligence? Tilleman J. stated that, under Alberta's Rule 9.13 the criteria for re-opening a Judgment were as follows:

1. Could the evidence have been obtained earlier if due diligence had been observed? That the evidence was available to the applicant but not looked for because it was hard to access and because other matters pressed, is fatal to the Application.

2. Is the evidence credible?

3. Would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced? A debatable matter of opinion is not sufficient. Nor is controvertible evidence which would open up an extremely complex and convoluted exercise.

4. Is the evidence in its present form admissible under the ordinary rules of evidence?

Justice Tilleman reviewed the new evidence introduced by Lall including Lall's newly disclosed and self-diagnosed depression and noted that, in the usual course, where physical or mental health matters are in issue, evidence from an appropriate health professional is expected. However, the Province had changed the Act following Lall's initial Application. Though this legislative change was not retroactive, Lall would not be offside of the Act as presently in force. Given the apparent legislative direction on the matter, and in the absence of a position taken by the Respondent Chief Electoral Officer, the Court granted Lall's Application to vary the Judgment with the result that Lall had made his financial disclosure filing in time.

STANFIELD V SCHNEIDER, 2017 ABQB 528 (MASTER ROBERTSON)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 13.6 (Pleadings: General Requirements) and Schedule C

Following the Defendants' successful Application to strike the Plaintiff's Claim and the unsuccessful Cross-Application to amend, Master Robertson directed that the parties make submissions on Costs.

In determining the appropriate quantum of Costs, Master Robertson noted that the amendments requested by the Plaintiff pleaded evidence in violation of Rule 13.6, were filed in response to an Application to strike the Claim but did not address the issues raised in the Application to strike, and included ill-advised pleadings of fraud. Master Robinson held that an elevated award of Costs was appropriate, but not solicitor client Costs. Following Schedule C, the Costs to each Defendant would be $1,500 plus disbursements. Master Robinson awarded $3,000 to the Defendant lawyers (prior counsel to the Defendant), and $1,750 including disbursements to the Defendant.

MCCARGER V METIS NATION OF ALBERTA ASSOCIATION, 2017 ABCA 240 (STREKAF JA)
Rules 10.29 (General Rule for Payment of Litigation Costs), 14.48 (Stay Pending Appeal) and 14.68 (No Stay of Enforcement)

The Applicant sought a Stay of an award of solicitor-client Costs ordered against him following the dismissal of his Application. The Applicant sought the Stay pending the hearing of an Application for Judicial Review.

Strekaf J.A. confirmed that Rule 14.68 provides that filing an Appeal does not stay enforcement of the Decision under Appeal unless otherwise ordered. Strekaf J.A. confirmed that to obtain a stay pending appeal, the Applicant must establish that: there is an arguable issue to be determined on appeal; the applicant would suffer irreparable harm if the stay was not granted; and, the balance of convenience favours granting the stay. Justice Strekaf noted that, in general, the unsuccessful party to an interlocutory Application is required to pay Costs forthwith to the successful party pursuant to Rule 10.29, and that "[h] aving to pay money alone is not irreparable harm". Strekaf J.A. dismissed the Application for a Stay of the Costs award pending Appeal.

IFP TECHNOLOGIES (CANADA) INC V ENCANA MIDSTREAM AND MARKETING, 2017 ABCA 269 (FRASER, WATSON AND ROWBOTHAM JJA)
Rules 10.31 (Court-Ordered Costs Award) and 14.88 (Costs Awards) and Schedule C

The Parties sought directions with respect to the form of Judgment, Costs and security paid by the Appellant ("IFP") following its Appeal. IFP sought Costs for both the Trial and Appeal on a solicitor-client basis. The Respondents argued that the Trial Judge should determine Costs for both the Trial, and Appeal after a determination on damages had been made; or alternatively, that the Court of Appeal only make a determination regarding Costs for the Appeal.

The Court held that it was not in a position to assess Trial Costs in this case, as the amount of the ultimate Judgment was still unknown. Further, the Trial Judge was in a better position to assess the Respondents' claims for set off for expert fees since the expert evidence consumed considerable Trial time and resources. The Court noted, however, that Appeal Costs can be assessed despite the final Judgment amount being unknown, particularly since the Respondents acknowledged that the Judgment amount, once determined, would be greater than the $1.5 million contemplated by Column 5 of Schedule C.

IFP asserted it was entitled to solicitor-client Costs on account of a contractual provision in an agreement between the Parties. The Respondents argued that the same agreement also contained a limitation of liability provision which purported to cap the Respondents' liability. The Court concluded that the interaction of the contractual provisions was best addressed by the Trial Judge. The Court observed that Rule 10.31 directs that Costs are at the discretion of the Court, and although a Court will generally exercise its discretion in accordance with a contractual provision which speaks to Costs, a Court is not obligated to do so.

Finally, the Court held that Costs for an Appeal are typically awarded on the same basis as Costs at Trial, though Rule 14.88 allows the Court of Appeal discretion in awarding Costs. The Court exercised its discretion and awarded Costs to IFP at 1.5 times Column 5 of Schedule C.

OSBORN V GAGNE, 2017 ABQB 438 (VEIT J)
Rules 10.49 (Penalty for Contravening Rules), 10.50 (Costs Imposed on Lawyer), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 12.41 (Notice to Disclose Documents)

The Plaintiff wife in a divorce proceeding applied for an Order to impose a $50.00 per day fine on the Defendant husband under Rule 10.49 until he completed his disclosure obligations previously ordered by the Court following an Application pursuant to Rule 12.41.

Veit J. noted that Rule 12.41 provides that "any other remedy the Court considers appropriate" may be granted where the disclosure is not provided when required. Justice Veit also stated that Rule 10.49 clearly contemplates financial sanctions for misbehaviour. However, Her Ladyship

also noted that the Rules do not provide for a daily fine, and that monetary penalties which are not set out in the Rules are not typically imposed.

Justice Veit considered the former Rule 599.1, and the kinds of penalties contemplated by Rule 10.49, and noted that there was a great deal of overlap between Rule 10.49 and Rule 10.52 which governs the penalties for civil contempt. However, the contempt Rule has a number of procedural safeguards that Rule 10.49 does not. While imprisonment may be ordered as a result of civil contempt Her Ladyship noted that the imposition of a high fine may have nearly as draconian an effect. Consequently, the imposition of fines under Rule 10.49 may require the equivalent of personal service with a clear direction of the penalty being sought.

Veit J. noted that an Application under Rule 10.49 requires an assessment of how the misbehaviour interferes with the proper and efficient administration of justice. This is not occasioned by a mere failure to follow a Court's direction. Her Ladyship referred to authorities in which Rule 10.49 was applied, including: (i) litigants who challenge the authority of the Court, such as Organized Pseudolegal Commercial Argument (OPCA) litigants; (ii) late adjournments of Trials or Appeals, particularly where the adjournment of an Appeal requires a different panel to become familiar with the material; and (iii) failing to transcribe oral reasons, necessitating inconvenient, last-minute transcription by Court staff. Veit J. also noted that the fines levied under this Rule were modest.

Her Ladyship dismissed the Application, on the basis that Rule 10.49 provides that any penalty imposed under that Rule must be paid to the Court Clerk, not to a litigant; the breach of the *Rules* in this case was not the sort that interfered with the proper and efficient administration of justice; and the Defendant husband was not advised of the penalty being sought. Finally, Justice Veit noted that, while Rule 10.53 allows an award of Costs up to and including full indemnity Costs, this was not a case where such an award was appropriate. The impugned behaviour must be "reprehensible, scandalous or outrageous" before such an award should be made.

ARTHUR BISCHOFF RRSP PLAN NO 7856 V MCCARGAR, 2017 ABCA 226 (WAKELING, GRECKOL AND CRIGHTON JJA)

Rules 10.52 (Declaration of Civil Contempt), 14.8 (Filing a Notice of Appeal) and 14.74 (Application to Dismiss an Appeal)

The Appellant/Defendant, Donald McCargar ("McCargar") sought, among other things, to extend the time to file an Appeal of a Chambers Judge's Decision in which McCargar's Application to have Plaintiff's counsel declared in Contempt of Court was dismissed.

The Court of Appeal confirmed that the test for extending the filing period for an Appeal requires the Applicant to demonstrate that: there was a *bona fide* intention to appeal by the filing deadline; the Applicant "offered an explanation for the late filing that excuses or justifies the lateness"; it would not be unjust to disturb the lower Court's Decision; that the Applicant has not benefitted from the Judgment; and there is a chance the Appeal would be successful.

The Court held that there was no reasonable chance of success. In particular, the relief sought by McCargar was discretionary. Rule 10.52(3) allows a Judge to declare a person to be in civil contempt if the alleged contemnor has not complied with a Court Order that was properly served, or of which the person has actual notice. The Court referred to recent leading authority, and confirmed that to prove contempt McCargar had to prove beyond a reasonable doubt that the alleged Contemnor had actual knowledge of the Stay Order that was the subject of his Application, and that the alleged Contemnor acted contrary to the Order's terms. However, the Stay Order was never served by McCargar and there was no evidence that the alleged contemnor was made aware of it by other means. McCargar's Application to extend the time to appeal was dismissed.

The Respondents had also applied to dismiss McCargar's Appeal pursuant to Rule 14.74 on the basis that it was frivolous, vexatious, without merit and improper. The Court noted that, because of the panel's Decision to dismiss McCargar's Application to extend the time to file an Appeal, the Respondents' Application was moot.

KOCH V KOCH, 2017 ABCA 310 (PAPERNY, WAKELING AND GRECKOL JJA)
Rule 10.52 (Declaration of Civil Contempt)

The Defendant, Mr. Koch was held in civil contempt for failing to comply with a Court Order. The Order required Mr. Koch to deposit proceeds of the sale of a property formerly owned by him and his spouse into a trust account for the purpose of division of matrimonial property. Mr. Koch instead deposited the money into his personal account and used it for his own purposes. Mr. Koch appealed the contempt Order.

The Court of Appeal referred to Rule 10.52 and noted that Mr. Koch had admitted that service of the contempt Order, as required by Rule 10.52(1), was not in issue. The issues were whether the Case Management Judge had erred in exercising the Court's discretion to find that contempt was proven beyond a reasonable doubt. In the result, the Court of Appeal held that the Case Management Judge had correctly considered the test for contempt and did not err in the exercise of discretion. The Appeal was therefore dismissed.

CLARK V PEZZENTE, 2017 ABCA 220 (VELDHUIS JA)
Rules 13.5 (Variation of Time Periods), 14.47 (Application to Restore an Appeal), 14.65 (Restoring Appeals) and 14.67 (Security for Costs)

The Applicant, Clark, sought to have his Appeal restored after it was deemed abandoned pursuant to Rule 14.67(2) because he failed to post Security for Costs as ordered by the Court. Justice Veldhuis noted that Rule 14.65(1) permits a single Appeal Judge to hear an Application to restore an Appeal, and Rule 14.47 requires that such an Application be filed and returnable within six months of the Appeal being deemed abandoned. However, the Application was late, it was not filed until two days after the deadline, though Justice Veldhuis noted that the time to file the Application could be extended at the Court's discretion under Rule 13.5.

Justice Veldhuis confirmed that the test for restoring an Appeal is whether the interests of justice allow the Appeal to proceed considering:

(a) Whether the applicant intended in time to proceed with the appeal;

(b) The applicant's explanation for the defect or delay that cased the appeal to be struck or deemed abandoned;

(c) Whether the applicant moved with reasonable promptness to cure the defect and have the appeal restored;

(d) Whether the appeal has arguable merit; and

(e) Whether the respondents have suffered any prejudice (including taking into consideration the length of the delay).

Veldhuis J.A. noted that although the timeline to file the Application could be extended under Rule 13.5, the Applicant's failure to comply with the six month deadline set out in Rule 14.47 was a factor which weighed against restoring the Appeal. Justice Veldhuis considered whether the Appeal had arguable merit, noting that the present Appeal was an Appeal from a Decision which struck the Applicant's claim on the basis that it was identical to an Action which the Applicant had unsuccessfully brought to trial in 2012, and had subsequently lost on Appeal to the Court of the Appeal and which had not been granted leave at the Supreme Court of Canada. Justice Veldhuis found that the Action before the Court was identical to the original proceedings which had been thoroughly litigated. As such, the Appeal lacked arguable merit.

The Application was dismissed.

ALBERTA HEALTH SERVICES V WANG, 2017 ABCA 261 (SLATTER JA)
Rules 14.4 (Right to Appeal), 14.5 (Appeals Only With Permission) and 14.8 (Filing a Notice of Appeal)

The Applicants, Wang, applied for an extension of time to appeal five Orders of the Court of Queen's Bench which were pronounced in 2015. A single Judge of the Court of Appeal granted an extension of time with respect to one

issue only. The Applicants then sought leave under Rule 14.5(1)(a) to appeal the Decision of the single Judge to a full panel of the Court of Appeal. The underlying issue in the Queen's Bench action concerned the right of inspectors from Alberta Health Services ("AHS") to inspect rental units and whether AHS was required to obtain permission from the property owner, or the tenants, or both.

Slatter J.A. noted that, pursuant to Rule 14.8(2)(a)(iii), Orders of the Court of Queen's Bench must be appealed within one month of their pronouncement. The Applicants were out of time with respect to all five Orders they sought to appeal. Slatter J.A. stated that permission to appeal a Decision of a single Appeal Judge cannot be on the grounds that the Applicant wishes to reargue the motion before a full panel. The Applicant, under this rule, must demonstrate a reviewable and material issue of law worthy of review and must demonstrate that it is in the interests of Justice that this further level of review is warranted.

Justice Slatter determined that while the Applicant's Memorandum of Argument contained several concerns with the conduct of the Public Health Inspectors, they offered no explanation as to why they waited two years before launching their Appeal. His Lordship concluded that providing some acceptable explanation for the delay is critical to obtaining relief. The Application was dismissed.

STARKE CAPITAL CORP V STRATEGIC ACQUISITION CORP, 2017 ABCA 217 (STREKAF JA)
Rule 14.5 (Appeals Only With Permission)

The Plaintiff was awarded damages for the breach of a right of first refusal by some of the Defendants after a three-week Trial. Costs of the Trial were awarded after the substantive Decision was issued and after an Appeal of the substantive Decision was filed. Following the Appeal, three of the Defendants (the "Applicants") filed two separate Applications at the Court of Appeal for permission to appeal the Costs Award.

Strekaf J.A. referred to Rule 14.5(1)(e) and confirmed that permission is not required to appeal a Costs Award if a related substantive Decision is also being appealed, even in a case where the Costs Award was delivered separately from the substantive Decision, and the Appeal of the Costs Award is not being heard at the same time as the Appeal of the substantive Decision. Justice Strekaf granted the Applications.

BRILL V BRILL, 2017 ABCA 235 (STREKAF JA)
14.5 (Appeals Only With Permission)

The Plaintiff sought permission to appeal a Costs Award pursuant to Rule 14.5(1)(c) following an unsuccessful Application to oppose an accelerated Trial related to child custody.

Strekaf J.A. noted that the test for permission to appeal a Costs Award under the former appellate Rules continues to apply under the current Rules. Permission should be granted sparingly. The purpose of the predecessor of Rule 14.5(1)(c) was "to bring finality to cost orders and to conserve this Court's time by screening out hopeless appeals on the issue of costs alone". Justice Strekaf noted that the standard to be applied when reviewing a Costs Award is "highly deferential", and concluded that the Chambers Judge properly awarded the Costs of the Application to the successful party.

In the result, Justice Strekaf dismissed the Application for leave to appeal, upholding the Chambers Judge's Decision that Costs of the Application should follow the event, not in the cause.

KURE V KURE, 2017 ABCA 215 (STREKAF JA)
Rules 14.8 (Filing a Notice of Appeal) and 14.47 (Application to Restore an Appeal)

Justice Strekaf considered the Plaintiff Appellant's Application to restore her Appeal that had been struck under Rule 14.8(2)(iii) because the Appeal Record was not filed in time, and extend the time to file a Notice of Appeal. Strekaf J.A. noted that the factors to consider for the restoration of an Appeal was set out in *Composite Technologies Inc v Shawcor Ltd*, 2016 ABCA 350, and included:

(a) arguable merit to the appeal;

(b) an explanation for the defect or delay which caused the appeal to be taken off the list;

(c) reasonable promptness in moving to cure the defect and have the appeal restored to the list;

(d) intention in time to proceed with the appeal;

(e) lack of prejudice to the respondents (including length of delay).

The factors that a Court should consider to extend time to file a Notice of Appeal is as set out in *Cairns v Cairns*, [1931] 4 DLR 819, including:

(a) a *bona fide* intention to appeal held while the right to appeal existed;

(b) an explanation for the failure to appeal in time that serves to excuse or justify the lateness;

(c) an absence of serious prejudice such that it would not be unjust to disturb the judgment;

(d) the applicant must not have taken the benefits of the judgment under appeal; and

(e) a reasonable chance of success on the appeal, which might better be described as a reasonably arguable appeal.

Strekaf J.A. stated that the factors to be applied in determining both Applications were similar, and observed that the Applicant had failed to establish a *bona fide* intention to proceed with her Appeal during the 1-month appeal period. Her Ladyship stated that it is well established law that an Order of the Court "takes effect from the time that it is granted and if a party is unsure of which order is going to be filed but has a genuine intention to appeal [...] then that notice of appeal should have been filed and could always be abandoned later". Uncertainty about a final form of Order is "not a sufficient excuse" for a failure to file the Appeal within the period designated by the Rules. In addition, the Applicant had failed to establish the merits of her Appeal. The Order that the Applicant sought to appeal was a discretionary interim Order in a family law matter and orders of this sort were granted "considerable deference".

In the result, Justice Strekaf dismissed the Applications.

ONISHENKO V CHOLOWSKI, 2017 ABCA 238 (GRECKOL JA)
Rule 14.8 (Filing a Notice of Appeal)

The Applicant, Onishenko sought to extend the time to file an Appeal of a Trial Decision concerning child guardianship, parenting time, and child support. The Applicant was represented by a Legal Aid lawyer at Trial, and had inquired after Trial about coverage by Legal Aid for an Appeal. However, Legal Aid informed the Applicant that its decision with respect to coverage could take up to 30 days. The Applicant did not file the Notice of Appeal immediately as she could not afford to order transcripts, but sought and received three *ex parte* orders from the Court of Queen's Bench, which collectively purported to extend the time to Appeal to June 9, 2017. Coverage of the Appeal by Legal Aid was confirmed in early June, 2017.

Greckol J.A. noted that, under Rule 14.8(2)(iii), the time to file an Appeal expired one month after the date of Decision, and the Orders of the Court of Queen's Bench purporting to extend the time to file an Appeal were ineffective because only the Court of Appeal was empowered extend the time to Appeal.

Justice Greckol stated that the considerations relevant to an Application to extend the time to Appeal are whether there is: (i) a *bona fide* intention to Appeal while the right existed, (ii) an explanation to justify or excuse the delay, (iii) the absence of serious prejudice to the Respondent, (iv) the absence of the Applicant taking the benefit of the Judgment being appealed, and (v) a reasonable chance of success on Appeal. Individually, none of the conditions are strictly necessary, as the Court has the discretion to extend time even if not all of the factors are met.

Justice Greckol considered each of the factors in the context of the facts in the Application, and held that, although the delay was explained in large part by processes out of the Applicant's control, and no prejudice was occasioned by the delay, the proposed Appeal did not have a reasonable prospect of success. In the result, the Application to extend the time to appeal was dismissed.

1438725 ALBERTA LTD V GREEN, 2017 ABCA 296 (BERGER JA)
Rules 14.26 (Format of Factums), 14.45 (Application to Admit New Evidence) and 14.70 (No New Evidence Without Order)

The Appellant applied to strike portions of the Respondent's Factum pursuant to Rule 14.70 on the basis that the material included fresh evidence and that the Factum appended counsel's submissions which were misstatements and were not in evidence. Justice Berger noted that Rule 14.70 provides that unless an Order is granted under Rule 14.45 permitting the reliance of new evidence, Appeals will be decided on the record before the Court appealed from. Further, Rule 14.45(1) provides that an Application to admit new evidence must be filed and served prior to the filing of the Applicant's factum. Rule 14.26(3) provides that factums must contain precise references to the location, page numbers, and paragraph numbers or lines of the Appeal Record, extracts of key evidence, and authorities referred to. The Respondent's position was that the chronology appended to the factum was simply there to aid the Court, and the submissions appended to the factum were specifically requested by the Judge in the Court below.

Berger J.A. determined that the paragraphs and appendices in the factum at issue were generally "procedural niceties" and that because the evidence that was stated in them was publically available and could be accessed through the Court record, the materials did not constitute fresh evidence, and that Rule 14.70 was not at issue. Berger J.A. dismissed the Appellant's Application.

LEE V IYER, 2017 ABQB 420 (KHULLAR J)
Rule 14.37 (Single Appeal Judges)

The Defendant Applicant was convicted on 33 counts of fraud, and restitution Orders were granted to the victims, including the Respondents. The Respondents obtained a Writ of Enforcement and registered it on properties owned by the Applicant after he had appealed his conviction. The Applicant sought an Order striking the Writ of Enforcement and discharging its registration, arguing that the Order for restitution was stayed pursuant to either s 689(1) or s 683(5) of the *Criminal Code*, RSC 1985, c C-46.

Justice Khullar noted that Rule 14.37 provides that a single Judge of the Court of Appeal has the jurisdiction to decide any Application incidental to an Appeal, and held that as a result of the Rule the Court of Queen's Bench did not have jurisdiction to hear the Application to determine the effect of the stay pending Appeal. The Application was dismissed.

CCS CORPORATION V PEMBINA PIPELINE CORPORATION, 2017 ABCA 260 (SLATTER JA)
Rules 14.37 (Single Appeal Judges), 14.38 (Court of Appeal Panels), 14.50 (Time Limits for Oral Argument) and 14.74 (Application to Dismiss an Appeal)

The Applicant, CCS Corporation, sought to appeal a Decision which summarily dismissed certain of its claims against the Respondent, Pembina. In the interim, the Applicant applied for summary determination of one of the issues raised on Appeal. The Application initially requested a determination by a single Judge of the Court. The Applicant subsequently acknowledged that the Application for summary determination was not "incidental to an appeal" and thus was outside the jurisdiction of a single Judge of the Court to hear, in accordance with R. 14.37(1). Slatter J.A. confirmed, referring to Rules 14.38(2)(a) and 14.74 that is well established that "any determination of the merits of an appeal must be made by a full 3 judge panel of the Court".

The Applicant then applied to have the Application for summary determination adjourned to the full panel applications Court. Slatter J.A. dismissed both the

adjournment Application and the underlying Application for summary determination of an issue on Appeal on the basis that "the full panel applications court is not logistically well equipped to deal with matters of this complexity" particularly given the time constraints on oral argument set out in Rule 14.50(a). Further, apart from the procedure set out in Rule 14.37, the Court has no established procedure for summary determination of Appeals. An Application for a summary determination of an issue would require a procedure equivalent to a full appeal hearing and a subsequent full appeal hearing may be additionally required to determine other issues in the Appeal.

CANADIAN CENTRE FOR BIO-ETHICAL REFORM V GRANDE PRAIRIE (CITY), 2017 ABCA 280 (SCHUTZ JA)
Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

The Applicant, the Justice Centre for Constitutional Reform, sought leave to intervene in an Appeal to make submissions on the freedom of expression under the *Canadian Charter of Rights and the Freedoms,* the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. The Appeal concerned a Judicial Review of the City of Grand Prairie's denial of anti-abortion advertisements on public transportation buses. The Court of Queen's Bench held that the City's decision was a reasonable limit on freedom of expression.

Schutz J.A. held that Rules 14.37(2)(e) and 14.58 permit a single Judge to consider an Application to intervene, and to impose conditions. Pursuant to Rule 14.58(3), the Intervenor may not raise or argue issues not raised by the other parties to the Appeal, unless the Court orders otherwise. Referring to recent authority, Justice Schutz stated that a single Appeal Judge may grant permission to intervene if the Applicant may be "directly and "specially" affected by the outcome of the appeal" or if they have "special expertise or a unique perspective relating to the subject matter of the appeal that will assist the Court". The Court may further consider whether: the presence of the intervenor is necessary for the Court to properly decide on the matter; the intervenor's interest in the proceedings are fully protected by the parties; the intervention will unduly delay the proceedings; there is possibly prejudice to the parties if intervention was granted; intervention will widen the dispute between the parties; and the intervention will "transform the court into a political arena". Schutz J.A. noted that granting intervenor status is discretionary, and ought to be sparingly exercised.

Justice Schutz observed that the Applicant conceded that it was not "specially affected" by the Appeal. Instead, the Applicant argued that it should be granted intervenor status because of its special expertise in freedom of expression. After considering the Applicant's proposed submissions, Justice Schutz held that the Applicant's contribution would not be relevant, useful, different, or bring a particular expertise necessary to determine the issues on Appeal. The Application was accordingly dismissed.

1368276 ALBERTA LTD V GROTSKI, 2017 ABCA 230 (BERGER, MARTIN AND ROWBOTHAM JJA)
Rule 14.38 (Court of Appeal Panels)

The Applicant, 1368276 Alberta Ltd., applied for permission to reargue its Appeal pursuant to Rule 14.38(2)(c) on the basis that the Court had misapprehended or overlooked certain evidence. The Applicant argued that the Court had misapprehended the wording of a mortgage amendment when determining whether payment under that mortgage was mandatory.

The Court noted that permission to re-argue an Appeal is available only in exceptional circumstances. When the allegation is that the Court overlooked or misapprehended evidence during the Appeal, the Applicant must demonstrate that the evidence would have changed the outcome. However, where the Appellant disagrees with a finding of fact, the appropriate procedure is to appeal the Decision to a higher court. The Court held that the issue of the interpretation of the mortgage amendment was fully canvassed in both the factums and oral argument and that the Applicant merely disagreed with the Court's conclusion on the evidence.

The Court dismissed the Application.

THORNE V WOOD BUFFALO (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2017 ABCA 241 (GRECKOL JA)
Rule 14.40 (Applications to Single Appeal Judges)

The Applicants sought leave to appeal a decision of the municipal subdivision and development Appeal Board of Wood Buffalo. A preliminary issue was whether the Applicants had properly filed an Affidavit summarizing what they believed to be the relevant evidence for their Appeal.

The Court noted that, although Rule 14.40(1)(b) allowed the Applicants to file a supporting Affidavit, it should not contain evidence that was not before the Appeal Board, subject to certain limited exceptions not applicable in this case. The Court accordingly did not take into consideration evidence from the Applicants' Affidavit that was not clearly derived from the existing record. The Application for leave to appeal was ultimately dismissed.

ALBERTA ENERGY REGULATOR V GRANT THORNTON LTD, 2017 ABCA 278 (WAKELING JA)
Rule 14.48 (Stay Pending Appeal)

The Alberta Energy Regulator ("AER") sought a Stay of Enforcement of the Decision in *Orphan Well Association v Grant Thornton Ltd*, 2017 ABCA 124. The issue before the Court was whether or not a single Judge of the Court of Appeal has the jurisdiction to grant a Stay after a party has filed an Application for leave to appeal under Rule 25 of the Rules of the Supreme Court of Canada and Sections 40 and 58(1)(a) of the *Supreme Court Act*, RSC 1985, c S-26.

Justice Wakeling stated that Rule 14.48 of the Alberta Rules do not apply to an Application for a Stay of a panel Decision pending appeal to the Supreme Court of Canada. Rule 14.48 applies to Decisions of the Court of Queen's Bench of Alberta pending appeal to the Court of Appeal and therefore had no application in this case. The Application was dismissed.

MIKOVA V MIHALIK, 2017 ABQB 507 (HALL J)
Rule 14.68 (No Stay of Enforcement)

The Defendants obtained an Order dismissing the Action against them, partly because the Plaintiff did not attend an Application. Funds which were previously held pending the resolution of the Action were disbursed to the Defendants. The Plaintiff successfully applied to set aside the Order dismissing her Action arguing that she had not been properly served. The Plaintiff then applied to add the lawyer and the law firm who had disbursed the funds as additional Defendants in the Action, claiming a breach of trust.

Justice Hall noted that, pursuant to Rule 14.68 when an Action is dismissed "it has reached 'resolution' even if the appeal period has not yet passed" unless a stay is obtained. Hall J. stated that the lawyer who had released the trust funds would have understood that the Action had been resolved based on the Defendant providing the Order dismissing the Action. Hall J. stated that, for the Plaintiff to succeed against the lawyer, the Plaintiff would have to establish that the lawyer knew that he had a duty to hold the funds in trust notwithstanding that there was an Order dismissing the Action. Justice Hall held that there was no evidence that the lawyer had any knowledge that the Order dismissing the Action was obtained improperly, and therefore the claim against the lawyer had no chance of success. The Plaintiff's Application to add the lawyer and the law firm as Defendants to the Action was dismissed.