JSS BARRISTERS RULES JANUARY 2018
Jensen Shawa Solomon Duguid Hawkes LLP Volume 2 Issue 8

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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STREMICH V PEFANIS, 2017 ABCA 383 (FRASER, BIELBY AND CRIGHTON JJA)

Rules 1.1 (What These Rules Do), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 3.28 (Effect of Not Serving Statement of Claim in Time)

The Plaintiff ("Ms. Stremich") filed a Statement of Claim alleging professional negligence against her former counsel and law firm ("Pefanis"). The Master struck the Claim pursuant to Rule 3.28 on the basis that it was served outside the one year time limit provided in Rule 3.26. Upon Appeal, the Chambers Judge granted Ms. Stremich an extension of time for Service of her Statement of Claim under Rule 3.27(1)(c). Ms. Stremich argued that the delay in service was due to failures by her process server.

The Court (Crighton J.A. dissenting) held that a process server hired by a plaintiff may be "a person who is not a party to the action" within Rule 3.27(c). The Court considered whether there were "special or extraordinary circumstances" under Rule 3.27(c) which were connected to the lack of service to support the granting of an extension for service. The Court observed that the failure to effect service in a timely fashion in this case was the result of the process server's conduct. Further, although Ms. Stremich did not provide evidence relating to attempted service by alternate means, or apply for an extension of time for Service prior to the expiry of the Statement of Claim, Ms. Stremich was limited in her efforts by her physical disabilities which the Court observed would have been "readily apparent" when Ms. Stremich appeared before the lower court. The Court of Appeal held that the Chambers Judge's Decision to extend the time for Service was a reasonable and valid exercise of discretion, and dismissed the Appeal

Crighton J.A. would have allowed the Appeal, stating that the words "special" and "extraordinary" in Rule 3.27 must be construed narrowly to achieve the legislative intent of the Rules and to eliminate procrastination and delay. Justice Crighton stated that the Rules of Court govern the behaviour of all litigants, whether or not they are represented pursuant to Rule 1.1. Crighton J.A. observed that the evidence on the Record demonstrated that Ms. Stremich was aware of the failure to effect Service before the expiry of the Statement of Claim, but failed to address whether the process server had been notified of the precise

date the Statement of Claim expired and the reasons for the failure to attempt alternate means of Service or apply for an extension of time to Serve the Statement of Claim.

PR CONSTRUCTION LTD V COLONY MANAGEMENT INC, 2017 ABQB 600 (SULYMA J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

In the context of construction litigation, the Defendants by Counterclaim Kevin Lacroix ("Lacroix") and 0989842 BC Ltd. (collectively the "Applicants") applied to strike portions of the Colony Management Inc.'s ("Colony") Counterclaim on the basis that it did not disclose a cause of action known to law and that Colony's allegations of fraud were advanced without the particulars required by Rules 13.6 and 13.7.

Justice Sulyma noted that Rule 3.68 provides that the Court may order that all or any part of a claim, defence, or pleading be struck out. In addition, Rule 3.68, though similar to the former Rule 129, must be viewed through the lens of the foundational Rule 1.2. Sulyma J. stated that the test for striking pleadings includes a determination of whether there is any reasonable prospect that the claim will succeed, assuming the facts pleaded are true, while erring on the side of generosity in permitting novel claims to proceed.

Justice Sulyma held that the Applicants did not establish that the Counterclaim had no reasonable prospect of success. Her Ladyship determined that Lacroix's conduct as alleged in the Counterclaim was central to Colony's primary defence to the Plaintiff's Claim, and therefore the impugned Pleadings in the Counterclaim were not an abuse of process.

Sulyma J. noted that portions of Colony's Counterclaim made broad allegations against the Applicants pertaining to theft, fraud, and unjust enrichment. Justice Sulyma noted that while it is permissible to plead broad allegations in a counterclaim, the pleading is required to include facts upon which the party relies. Sulyma J. struck out the paragraphs of the Counterclaim that did not provide a factual basis, but otherwise dismissed the Application.

GOGAN V ATTORNEY GENERAL OF CANADA, 2017 ABQB 609 (GILL J)
Rules 1.2 (Purpose and Intention of These Rules) and 10.29 (General Rule for Payment of Litigation Costs)

The Applicant, Gogan applied for *Habeas Corpus* after being remanded into custody for violating the terms of his conditional release. The Attorney General successfully applied to strike the *Habeas Corpus* Application on the ground that Gogan failed to establish adequate particulars of a deprivation of liberty. Gogan was granted leave to re-apply, which he did, by re-filing the same Notice of Application with a new supporting Affidavit. The Attorney General successfully applied to strike the Application again.

In assessing costs, Gill J. noted that a *Habeas Corpus* Application is a civil Application and the successful party is presumptively granted its Costs pursuant to Rule 10.29. His Lordship also noted that all parties to civil litigation are to conduct themselves in accordance with Rule 1.2, that is, in a timely and cost-effective manner. This obligation includes not pursuing futile applications and disposing of claims in a manner that keeps expense down for all parties and for the Court. Justice Gill noted that the jurisdiction to grant costs for unsuccessful *Habeas Corpus* Applications is well-established, and that the special nature of this Application demands that its misuse will be met with condemnation by the Court. Gill J. thus awarded $1,000 in Costs payable to the Attorney General by Gogan.

BARLOT V EISNER, 2017 ABQB 636 (TILLEMAN J)
Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibility of Parties to Manage Litigation), 4.7 (Monitoring and Adjusting Dates), 4.10 (Assistance by the Court), 4.31 (Application to Deal with Delay), 4.32 (Agreement About Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff, Barlot appealed a Master's Order dismissing Barlot's Action for delay pursuant to Rules 4.31 and 4.33. The parties entered a litigation plan by consent on

November 21, 2013, pursuant to which: (1) assessments by medical experts were to be scheduled by January 15, 2014; (2) the Defendants were to serve any rebuttal expert reports within two months of receipt of the Plaintiff's expert reports; and (3) the parties were to set the matter down for Trial by June 30, 2014. Though the Plaintiff wrote to the Defendants on January 15, 2014 about the medical assessments, and subsequently about expert reports, and a Formal Offer was served on October 27, 2014, no expert reports were served until after the Defendants' Application for delay.

Justice Tilleman noted that Rules 1.2 and 4.1 inform the interpretation of Rules 4.31 and 4.33, and Rule 4.33 acts as a "limitations period". His Lordship considered Rule 4.33 and the leading authorities related to the Rule, and determined that the steps taken subsequent to entering the litigation plan did not constitute a significant step. Justice Tilleman held that the January 15, 2014 correspondence could not constitute a significant step as, at best, it signalled a tentative satisfaction of the commitment to schedule expert reports. The Formal Offer did not constitute a significant step, as it contained no legal or factual details and was not a constructive step toward advancing the Action. His Lordship noted that the test was a "significant" advance, not a mere advance, and it was correct that the Action was dismissed pursuant to Rule 4.33.

The Plaintiff argued that the Consent Order obtained to enforce the litigation plan on November 21, 2013 constituted an "agreement about delay" pursuant to Rule 4.32. Justice Tilleman noted that Rule 4.32 allows parties to agree to delay, but the agreement must be served and must set out the nature and extent of the delay. The requisites for an agreement for delay was not followed in this case.

Justice Tilleman agreed that the Action should be dismissed pursuant to Rule 4.31, and noted that delay is a relative concept. For the purposes of Rule 4.31, the delay must be inordinate in comparison with delay which might ordinarily and reasonably occur in litigation. Tilleman J. noted the rebuttable presumption that inordinate delay, when proven, causes significant prejudice and that Rule 4.31 is a discretionary rule, aimed at allowing a judge to consider the Action comprehensively to determine whether it should continue.

The Defendant argued that not only was there inexcusable delay, but that significant prejudice had been suffered. Justice Tilleman again noted Rule 4.1 and stated that it is the responsibility of Plaintiff's counsel to make use of whatever resources it has to manage the risk of delay, noting that Applications under Rule 4.7 or 4.10 may have been available but were not used. Consequently, Justice Tilleman dismissed the Appeal in its entirety.

PIIKANI NATION V RAYMOND JAMES LTD, 2017 ABQB 681 (NATION J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.38 (Judge's Fiat)

The Defendant, Liliana Kostic ("Kostic"), applied for a Fiat to obtain leave to file an Application in which Kostic sought an Order declaring that the Respondent, the Piikani Nation ("Piikani"), was contractually obligation to defend and hold harmless Kostic against any and all legal proceedings arising out of threatened or actual legal action.

The Piikani argued that the Fiat should be refused pursuant to Rules 1.2 and 3.68(2) because, among other things: (1) the indemnity provisions within the contract did not apply; (2) the Court is *functus officio* as the prior Case Management Justice had already dealt with the issue in an earlier proceeding; and (3) the existence of a limitations argument. The Piikani argued further that Kostic's Application would not lead to a resolution of the real issue in dispute or facilitate the quickest means of resolving the claim at the least expense pursuant to Rule 1.2.

Nation J. noted that a Fiat should not be granted if the Application had no chance of success. Justice Nation concluded, following a review of the contractual terms between the parties, that Kostic's argument that the Piikani had a duty to defend and so should be subject to a declaration to pay for Kostic's counsel had no chance of success. The Application for a Fiat was dismissed.

AL-GHAMDI V ALBERTA, 2017 ABQB 684 (GOSS J)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 2.11 (Litigation Representative Required), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 3.28 (Effect of not Serving Statement of Claim in Time), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court), 11.1 (Service of Original Documents and Copies), 11.2 (Service not Invalid), 11.5 (Service on Individuals), 11.7 (Service on Litigation Representatives), 11.16 (Service on Lawyer), 11.17 (Service on Lawyer of Record), 11.18 (Service on Self-Represented Litigants), 11.21 (Service by Electronic Method), 11.22 (Recorded Mail Service), 11.27 (Validating Service) and 13.7 (Pleadings: Other Requirements)

The Respondent, Al-Ghamdi commenced more than a dozen Actions against various Defendants, lawyers, and their law firms. The Defendants in three different Actions applied to strike the Claims pursuant to Rule 3.68, summarily dismiss the Claims under Rule 7.3, or sought that no further proceedings could be taken against them under Rule 3.28. One group of Defendants also sought an Order under Rules 10.52 and 10.53 declaring Al-Ghamdi to be in contempt of Court for failing to comply with the Court's Orders.

Al-Ghamdi applied to adjourn the Applications under Rule 1.4(2)(h) on the basis that the Applicants' Affidavits were not properly served. Justice Goss found that although one of the Affidavits was minimally delayed, the delay was not material or significant, and dismissed Al-Ghamdi's Application for an adjournment. Al-Ghamdi also applied to strike certain Affidavits pursuant to Rules 11.18 and 11.21 as he claimed to have not seen the Affidavits sent to him by email. The Court validated service of the Affidavits pursuant to Rule 11.27, as counsel sent the Affidavits to an email address that was frequently used to communicate with Al-Ghamdi.

Justice Goss noted that, under Rule 3.68, the test for striking a Claim is whether "there is a reasonable prospect of success". An Application under Rule 3.68 requires that the pleadings set out material facts, not bald assertions, while still adhering to the formal requirements of Rules 13.1 through 13.12. Further, Goss J. observed that, usually for the purposes of a Rule 3.68 Application all allegations must generally be taken as proved, this is not the case if the Claim makes bare allegations or cites speculative facts. A commencement document that is frivolous, irrelevant, or improper may also be struck. The concepts of frivolous and vexatious litigation are related. Goss J. held that it is an abuse of process to pursue judicial proceedings without first exhausting administrative options. Parties should not proceed to Court until the administrative process has concluded.

With respect to the Applications for Summary Judgment, Justice Goss noted that Summary Judgment is appropriate where there is no genuine issue requiring a Trial and the Court can make a fair and just determination on the merits. Justice Goss, referring to prior leading authority, summarized the requirements in a Summary Judgment Application as:

- The applicant for summary dismissal will have an unassailable position if its likelihood of success is very high and the respondent's prospects for success are very low … ;
- Each party must put forth their strongest case, described as a "bet-the-farm" application … ; and
- An applicant for summary dismissal need not have pleaded the argument raised in the application in its statement of defence, and in fact can bring an application to dismiss without having filed defences …

Goss J. also noted that pursuant to Rule 13.7, an applicant must provide particulars when alleging defamation.

Al-Ghamdi argued that should the Court find his Pleadings deficient, he should be granted the opportunity to amend his Amended Statement of Claim pursuant to Rule 3.68(1)(b). Justice Goss held that although Applications to Amend are generally heard before Applications to Strike, in cases where the pleading is fundamentally flawed,

the Court may hear the Applications in a different order. Here, Al-Ghamdi was served with several Applications to Strike in December of 2016, yet he did not seek to amend the Amended Statement of Claim until the date of the Defendants' Applications. Rule 1.2 provides that the Rules are intended to facilitate the quickest means of resolving a claim, and allowing Al-Ghamdi to use the Rules to delay the proceedings would be counter to the purpose of the Rules. In the result, Justice Goss struck out or summarily dismissed many of the claims in Al-Ghamdi's Actions.

Several Defendants applied for an Order that Al-Ghamdi was not to take any further proceedings under Rule 3.28 because he had not properly served the Defendants with the Statement of Claim. Goss J. noted that Rule 3.28 provides that where a Statement of Claim is not served in time, no further action may be taken against the unserved defendant. Rule 3.26 provides that the time limit for service is one year from the date that the Statement of Claim was filed. Justice Goss observed that the "regime for service under the Rules of Court is a complete code" and referring to the specific Rules relating to service in Part 11, held that Al-Ghamdi had failed to properly effect service. Al-Ghamdi was advised to provide notice or apply for substitutional service but did not do so, and did not seek any extension for the time for service. The Defendants' Applications under Rules 3.28 were granted.

Several Defendants applied for a declaration that Al-Ghamdi's conduct constituted contempt of court under Rule 10.52 due to Al-Ghamdi's failure to follow a previous Court Order. Al-Ghamdi argued that he was never served with the Order, and thus could not be in contempt. Goss J. held that since the Order resulted from Al-Ghamdi's own Application, he could not argue that he was not served with the Order. Al-Ghamdi had not only disregarded the Order, but he also appeared ex parte before another Justice in an attempt to enter Judgments based on invalidly obtained Notices of Default, while failing to advise the Court about the prior proceedings and Order. Justice Goss granted the Application for a declaration of contempt, and also struck the Pleadings against those Defendants.

ACCIONA INFRASTRUCTURE CANADA INC V POSCO DAEWOO CORPORATION, 2017 ABQB 707 (MACLEOD J)
Rules 1.2 (Purpose and Intention of These Rules), 11.25 (Real and Substantial Connection) and 11.27 (Validating Service)

Posco Daewoo Corporation ("Daewoo"), a firm headquartered in South Korea, applied to set aside three Orders of the Alberta Court of Queen's Bench ("ABQB") relating to validating service and appointing arbitrators in an arbitration between the parties. The Plaintiff, Acciona/Pacer Joint Venture ("APJV") contracted with the City of Edmonton to carry out the construction of the Walterdale Bridge in Edmonton, Alberta (the "Project"). APJV in turn subcontracted with Daewoo to supply materials for the Project (the "Subcontract").

The Subcontract provided that all disputes arising from the Subcontract would be resolved by arbitration. In November of 2016, APJV issued a notice to submit disputes to arbitration. Following Daewoo's failure to properly respond to the arbitration commenced by APJV, APJV served an Originating Application on counsel for Daewoo and concurrently attempted to serve Daewoo in accordance with the Hague Convention on the Service Abroad of Judicial and Extra-Judicial documents in Civil or Commercial Matters (the "Hague Convention").

Daewoo attempted to set aside three of the Court's Orders including: the Order validating service of the Originating Application pursuant to Rule 11.27; the Order appointing arbitrators in the arbitration reportedly commenced by APJV; and the Order consolidating the arbitrations of the Parties. Daewoo asserted that APJV had not complied with the Rules of Court, specifically, the service *ex-juris* requirements set out in Rule 11.25. Daewoo further argued that Rule 11.25 constitutes the complete code for service of documents outside Canada and APJV's failure to comply with this Rule meant the impugned Orders were invalid.

Macleod J. noted that one of the main purposes of Rule 11.25 is to allow the Court to make a preliminary determination as to whether it is appropriate for the Court to take jurisdiction over a proposed defendant. Rule 11.25

allows the Court, prior to service, to satisfy itself that there is a real and substantial connection between Alberta and the facts on which the claim in the action is based. Macleod J. stated, referring to Rule 1.2, that the Rules should be interpreted in such a way that timely justice is served and not denied. His Lordship found that Rule 11.27(1) allows the Court to make an order validating the service of a document, served inside or outside Alberta, if the Court is satisfied that the method of service used is likely to have brought the document to the attention of the party to be served.

Justice Macleod concluded that the Court has jurisdiction over Daewoo by virtue of the agreements signed by the Parties. As such, it was unnecessary for APJV to comply with Rule 11.25 relating to service out of the jurisdiction and, accordingly, it was entirely appropriate for the Court to validate service under Rule 11.27. Justice Macleod held further that the two arbitration notices were properly consolidated. Macleod J. dismissed the Application and affirmed the Court's previous Orders.

FEUERHELM V ALBERTA (JUSTICE), 2017 ABQB 709 (EAMON J)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 3.14 (Originating Application Evidence), 5.13 (Obtaining Records from Others), 5.17 (People who may be Questioned), 5.21 (Appointment for Questioning), 5.23 (Preparation for Questioning), 6.8 (Questioning Witness Before Hearing), 6.11 (Evidence at Application Hearings), 6.16 (Contents of Notice of Appointment), 6.28 (Application of this Division), 6.32 (Notice to Media), 6.38 (Requiring Attendance for Questioning), 8.8 (Notice to Attend as Witness at Trial), 8.9 (Requiring Attendance of Witnesses) and 8.17 (Proving Facts)

The Applicant, Mr. Feuerhelm applied to set aside a Restraint Order and to stay a property disposal proceeding commenced under the *Victims Restitution and Compensation Payment Act*, SA 2001, c V-3.5. The police had seized cash which was allegedly acquired by the Applicant by illegal means or was an instrument of illegal activity. In obtaining the Restraint Order, the Minister of Justice and Solicitor General for Alberta ("Minister") used information from a telephone wiretap which was authorized by the *Criminal Code*, RSC 1985, c C-46. The Applicant claimed that the police were required to obtain advance judicial authorization on notice to him to provide the Minister with the wiretap evidence.

Justice Eamon held that the Court had inherent jurisdiction and broad powers pursuant to Rules 1.2 and 1.4 to remedy abuses of process. Eamon J. noted that not every mechanism for access to information in civil actions require judicial authorization. His Lordship observed that differing opinions by the parties over the manner in which the Minister acquired the wiretap information was no reason to draw an adverse inference against the Minister or police. It was up to Mr. Feuerhelm to make an Application to compel disclosure under Rules 3.14(1)(c) or 6.8.

In assessing the reasonableness of disclosure in civil Actions, Justice Eamon noted that Alberta has provisions in the Rules for records disclosure by third parties including Rule 5.13. Further, Rules 6.8, 6.16, 6.38, 8.8 and 8.9 permit the Court to order the attendance of a third party to be questioned under oath as a witness in order to use a transcript of the evidence at a hearing of an Application, or to testify at Trial.

Eamon J. concluded that, on the evidence no inference could be made that the wiretap evidence was improperly or unlawfully given to the Minister. The Application was dismissed.

FLOOD V BAKER, 2017 ABQB 757 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules) and 3.15 (Originating Application for Judicial Review)

The Defendants appealed a Decision of the Alberta Residential Tenancy Dispute Resolution Services ("RTDRS"). The Defendants owned an apartment which they had leased to the Plaintiff on a fixed term lease for a term expiring on May 31, 2017. The Plaintiff gave notice that she would be leaving a month early in mid-March of 2017. The Defendants denied her request to leave early, as they believed that they could hold the Plaintiff to the terms of the lease. The Plaintiff vacated the apartment on May 1, 2017 and, in response, the Defendants refused to return the Plaintiff's security deposit.

The Plaintiff commenced proceedings for the return of the security deposit ($1,800.00). The Dispute Officer at the RTDRS Hearing found that the Defendants had failed to mitigate their damages and therefore awarded the Plaintiff her security deposit of $1,800.00 plus $75.00 in Costs. The Defendants attempted to Appeal the Decision of the RTDRS by providing new evidence as to when the Defendants had commenced efforts to mitigate.

Graesser J. found that, under the procedure for an Appeal under the *Residential Tenancies Dispute Resolution Service Regulation*, AR 98/2006 ("RTDRS Regulation"), the Alberta Court of Queen's Bench ("ABQB") is not entitled to review questions of mixed fact and law. Justice Graesser emphasized that questions of mixed fact and law cannot be heard on appeal unless the question contains an extricable legal question.

Graesser J. held that the ABQB did not have jurisdiction to hear the matter, and stated that the Appellants could have applied for Judicial Review of the RTDRS' Decision by filing an Originating Application under Rule 3.15 of the Rules. Although the Appellants had failed to bring such an Application; His Lordship noted that the test in a Judicial Review would have been on the evidence heard by the Dispute Officer and whether or not the Dispute Officer's Decision was within the range of justifiable possible outcomes. Justice Graesser observed that the Decision met the test. Justice Graesser concluded that, because the Court did not have the jurisdiction to hear the matter, the Appeal was dismissed.

KAMETANI V HOLMAN, 2017 ABQB 758 (BAST J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.34 (Stay of Proceedings on Transfer or Transmission of Interest) and 6.11 (Evidence at Application Hearings)

The Defendant, Holman, appealed a Master's Decision which denied her Application to dismiss the Action for delay pursuant to Rule 4.31 and, instead, granted the Plaintiff's Application to continue the Action under Rule 4.34.

The Plaintiff commenced the Action in May 2012, and the parties agreed that the last advance in the Action was the service of the Plaintiff's Affidavit of Records in September 2012. The Plaintiff died on June 10, 2014, and the Action was automatically stayed by operation of Rule 4.34(1). The Defendant applied to dismiss for long delay on July 8, 2015 and the Plaintiff's Estate cross-applied to continue the Action under Rule 4.34 on July 10, 2015. The Applications were not heard until March 2016.

Justice Bast considered Rules 1.2, 4.31 and 4.34 and applied the six considerations set out in *Humphreys v Trebilcock*, 2017 ABCA 116: 1) has the Respondent failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review; 2) is the shortfall or differential of such a magnitude to qualify as inordinate; 3) if the delay is inordinate has the Respondent provided an explanation for the delay and if so, does it justify inordinate delay; 4) has the Applicant demonstrated significant prejudice; 5) if the Applicant relies on the presumption of significant prejudice created by Rule 4.31(2), has the Respondent rebutted the presumption of significant prejudice; and 6) if the Applicant has met the criteria for granting relief under Rule 4.31(1), is there a compelling reason not to dismiss the Action?

Justice Bast noted that the Plaintiff was advancing a claim for fraudulent misrepresentation, and therefore bore a heightened obligation to ensure the Action was advanced in a reasonably diligent manner. Bast J. noted that a reasonable litigant would have advanced the Action past the point of serving their Affidavit of Records between the period of September 6, 2012, and July 8, 2015. Bast J. held that the delay in this case was "unreasonable and therefore 'inordinate'", noting that the period of delay which accrues after an automatic Stay under Rule 4.34 is still to be considered as part of the overall delay.

The Plaintiff's Estate argued that the delay was justified; however, Justice Bast observed that none of the justifications were supported by sworn evidence as required by Rule 6.11. Bast J. observed that the Plaintiff should

have sought a standstill agreement with the Defendant or Applied for an Order staying the Action. The Defendant provided evidence that several key witnesses had died or had moved outside the country and could not be located. Justice Bast held that this constituted significant litigation prejudice as a result of the delay, and that the Plaintiff had not rebutted the prejudice.

In the result, Justice Bast granted the Appeal and dismissed the Claim under Rule 4.31.

MARTIN V WALSH, 2017 ABQB 793 (MILLER J)
Rules 1.2 (Purpose and Intention of These Rules), 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Expert's Reports), Rule 5.36 (Objection to Expert's Report), 5.37 (Questioning Experts before Trial), 5.38 (Continuing Obligation on Expert), 5.39 (Use of Expert's Report at Trial without Expert) and 5.40 (Expert's Attendance at Trial)

The Plaintiff applied for an Order under Section 17(2) of the *Jury Act*, RSA 2000 c J-3, seeking to have the trial heard by a civil jury. The Plaintiff argued that he had met the required *prima facie* grounds to have a jury trial and that the issues in dispute had already, or would be, reduced to the point that a jury would not be too inconvenienced in hearing the civil trial.

The Defendants argued that the Action was "too inconvenient" for a jury trial due to the voluminous expert evidence that would be required. Miller J. noted that the current Rules provide considerable tools for Counsel and the Court to streamline the litigation process. Specifically, Rules 1.2(3) and (4) place a high onus on Counsel to work collaboratively to get to the real issues. Further, much could be done to reduce the number of expert witnesses required. For example, Rule 5.39 allows the report of an expert to be admitted without the need for the expert to testify. Miller J. concluded that many of the issues in Rules 5.34 to Rule 5.40 needed to be addressed in order to determine the number of expert witnesses, the length of the Trial, and the amount of material that would be required for the Trial. His Lordship directed Counsel to consider Part 5, Division 2 of the Rules and collaborate as required by Rule 1.2 to address the issue of the expert reports. The Application was therefore adjourned *sine die*.

BRINTON V COISH, 2017 ABCA 334 (SLATTER, O'FERRALL AND VELDHUIS JJA)
Rules 1.2 (Purpose and Intention of These Rules), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 13.5 (Variation of Time Periods)

The parties in a personal injury Action obtained a Consent Order which set procedural deadlines. The Appellant, Brinton, served his expert report late and following demands from the Respondents, but refused to attend an independent medical assessment ("IME") as requested by the Respondents. The Court of Queen's Bench granted the Respondents' Application to extend the procedural deadlines in order to serve their response expert report, and ordered the Appellant to attend the IME. The Appellant attended the IME, but concurrently appealed the Order to extend time for service of the Respondents' expert report.

The Court of Appeal noted that litigation schedules are designed to fulfil the objectives of Rule 1.2, but that plans and schedules must be not be allowed to overcome the objective of deciding the litigation on the merits. Rule 1.5(4) helps provide the required flexibility in schedules because it allows non-compliance to be cured in the absence of irreparable harm and where curing the non-compliance is not contrary to the interests of justice. Because the Trial was scheduled so far in the future, (in 2020) there was no harm in having the IME conducted and the response expert report delivered later than the date stipulated in the Consent Order.

Further, Rule 9.15 was not applicable because Rule 13.5(2)(b) permits the Court to extend a time period specified in an Order or Judgment. The Court's discretionary decision to extend the time period could not be disturbed unless it was "wholly unreasonable". The Appeal was therefore dismissed.

STONEY TRIBAL COUNCIL V CANADIAN PACIFIC RAILWAY, 2017 ABCA 432 (PAPERNY, WAKELING AND GRECKOL JJA)
Rules 1.2 (Purpose and Intention of These Rules), 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 7.4 (Proceedings After Summary Judgment Against Party)

The Stoney Tribal Council ("Stoney") appealed an Order granting Summary Judgment against it, in favour of the Canadian Pacific Railway ("CPR"). The Court of Appeal dismissed Stoney's Appeal.

Justice Paperny for the majority, referring to Rule 7.3 and the jurisprudence related to the Rule, noted that the test for Summary Judgment is as set out in *Hryniak v Mauldin*, 2014 SCC 7 and *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 and observed that there was "no reason to add to the description of the test set out in those authorities". The test requires Courts to determine whether a disposition that is "fair and just to both parties" can be made on the existing record. Other expressions of the test for Summary Judgment, such as those "call[ing] for an assessment of the relative strength of the positions of the moving and non-moving party", risk confusing the issue and should not be adopted.

Justice Wakeling concurred in result, but held that the disparity in strength of the parties' positions was "of key importance" to determining whether the Action should be summarily dismissed. Justice Wakeling considered two questions: was Stoney's action against CPR doomed to fail, and if so, should the Court nevertheless exercise its discretion to decline granting Summary Judgment under Rule 7.2?

His Lordship began by reviewing the history of Summary Judgment in common law countries, and the purpose and intention of the *Rules of Court*, as set out in Rule 1.2, to explain that Summary Judgment enhances access to justice, avoids wasted resources, saves expense, and is in the interest of justice. In this case, Stoney sought the return of petroleum, natural gas, and related hydrocarbons from CPR; however, CPR had no legal interest in the petroleum, natural gas, or hydrocarbons that Stoney sought the return of. Stoney's other claims were statute-barred. As such, Justice Wakeling held that the decision to summarily dismiss Stoney's claim was "without a doubt, correct". Wakeling J.A. considered whether there was a compelling reason, pursuant to Rule 7.2, to "deny summary judgment to which the moving party is otherwise entitled to". His Lordship held that even though Rule 7.2 does not expressly introduce this qualification on the use of Summary Judgment, it does state that Summary Judgment is a discretionary remedy. As such, the Court may decline to issue Summary Judgment if doing so were in the interest of justice. However, because Summary Judgment has many benefits, the Court should only decline to summarily dispose of the claim if there is a compelling reason to. Justice Wakeling concluded that there was no reason (compelling or otherwise) to deny CPR's Application for Summary Judgment.

CANEXUS CORPORATION V MEG ENERGY, 2017 ABQB 739 (MASTER PROWSE)
Rules 1.4 (Procedural Orders) and 3.62 (Amending Pleadings)

The Plaintiff, Canexus applied to amend its Statement of Claim to particularize certain facts already pleaded, and include claims relating to consequential losses it alleged were suffered as a result of the Defendant's conduct ("Consequential Loss Amendments"). The original Statement of Claim simply requested "damages in an amount to be proven at Trial". The Defendant resisted the amendments on the basis that there was insufficient evidence, and the entire Claim was hopeless.

Master Prowse found that most of the requested amendments required no evidence and they merely particularized facts already pleaded. Master Prowse also found that the Consequential Loss Amendments were particularizations of the damages and not "new substantive facts" requiring evidence in support. In the alternative, Master Prowse held that the Plaintiff's Affidavit provided sufficient evidence to support the amendments, noting the low evidentiary threshold required.

Master Prowse held that the Defendant was effectively trying to convert the Amendment Application to a Summary

Dismissal Application by arguing that the amendments were hopeless because the entire Claim was hopeless. Master Prowse noted that the Defendant had no evidence to support Summary Dismissal, "let alone evidence that the claim of Canexus was highly likely to fail (which is the onus of proof required for summary dismissal)". The Plaintiff's Application to amend its Statement of Claim was allowed.

The Defendant cross-applied for a Stay of the amended Claims which it claimed were inextricably linked to an Arbitration which was underway between the parties. Master Prowse dismissed this Application on the basis that the Defendant failed to demonstrate that the Arbitration would answer any of the issues raised in the Plaintiff's Amended Claim. The Defendant also applied for a Stay of the Decision pending Appeal on the basis that as a public company, it would be compelled to disclose the amount of the Amended Claim pursuant to its reporting obligations. Master Prowse dismissed this Application on the basis that the grounds opposing the amendment were "extremely weak" and that, not only did the Defendant produce no evidence pertaining to the actual effect of the Decision on the Defendant's reporting obligations, but also that "it is very unwise for the Court to involve itself in 'live' reporting issues". The Defendant's Cross-Applications to Stay the Claim were dismissed.

PIIKANI NATION V KOSTIC, 2017 ABCA 350 (STREKAF JA)
Rules 1.4 (Procedural Orders), 13.5 (Variation of Time Periods), 14.64 (Failure to Meet Appeal Deadlines) and 14.65 (Restoring Appeals)

The Defendant, Kostic, applied to extend the deadlines in eight out of her nine fast-track Appeals from interlocutory Decisions made by a Case Management Judge.

Justice Strekaf noted that Rule 14.64 directs that the Registrar strike an Appeal if the Appellant has not filed the Appeal Record and Factum within the required time period, or a fast track Appeal has not been placed on the hearing list within six months of filing the Notice of Appeal. If an Appeal is struck, it can only be restored on Application pursuant to Rule 14.65. The intention of the established timelines is to ensure that appeals proceed in a timely manner; however, if the Appellant has taken steps to progress the Appeal during the time of delay the overall objective of the Rules is still achieved. Justice Strekaf noted the factors that the Court may consider during an Application for an extension of time: the reason for the delay, the prospects of moving ahead with the Appeal, prejudice to the other party, and the potential merit of the Appeal. Her Ladyship stated that none of the factors are determinative but are weighed to determine if it is in the interests of justice for the Appeal to proceed. The burden is on the Applicant to show that the Appeal is not "frivolous".

Strekaf J.A. held that, that there was no meritorious reason for the delay. With respect to the prospects of the Appeals moving ahead, Strekaf J.A. stated that the Applicant would be required to file materials in accordance with the Rules if her Application was granted. Regarding prejudice, Her Ladyship agreed with the Piikani Nation that "indefinite" delay would cause prejudice; however, a limited extension would not result in an indefinite delay or cause prejudice. Justice Strekaf granted the Application for a limited extension of time but with conditions attached. Namely, the Court required the Applicant to comply with the deadlines for ordering the Appeal Record, filing the Appeal Record, filing Factums, filing Extracts of Key Evidence and filing Books of Authorities with respect to each of the eight Appeals.

MURFIN V BARNES, 2017 ABCA 441 (VELDHUIS JA)
Rules 1.4 (Procedural Orders), 13.5 (Variation of Time Periods) and 14.64 (Failure to Meet Deadlines)

The Applicant, Ms. Murfin sought an extension of time to file her Appeal of a child custody Decision arguing that there were delays in securing funding from Legal Aid Alberta.

The Court noted that, in general Rule 14.64 directs the Registrar to strike an Appeal if the Appellant has not filed the Appeal Record and Factum within the required time period. However, the Alberta Court of Appeal may excuse non-compliance and grant an extension if "there are 'unique and special circumstances' and it is in the interests of justice to do so". The pertinent factors to consider when

applying Rule 14.64 include (1) the reason for the delay; (2) the prospects of moving ahead with the appeal; (3) prejudice to the other party; and (4) the potential merit of the appeal.

Veldhuis J.A. noted that a delay in securing funding from Legal Aid Alberta which was not the fault of the Applicant would constitute special circumstance that justified granting an extension of time. However, Veldhuis J.A. concluded that the Applicant's Appeal was without merit as the Trial Judge had made a well-reasoned Decision which was due a high degree of deference and could not easily be overturned on Appeal. Justice Veldhuis concluded that it was not in the interest of justice to grant the Application.

MCIVER V ALBERTA (ETHICS COMMISSIONER), 2017 ABQB 695 (EAMON J)
Rules 2.10 (Intervenor Status), 3.15 (Originating Application for Judicial Review), 3.44 (When Third Party Claim may be Filed), 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings) and 3.75 (Adding, Removing or Substituting Parties to an Originating Application)

The Speaker of the Legislative Assembly of Alberta applied under Rule 3.75(2)(b) to be added as a Respondent to a Judicial Review Application filed by an elected member of the Alberta Legislature, McIver. The Originating Application related to a Decision by the Ethics Commissioner against McIver for a breach of the *Conflicts of Interest Act*, RSA 2000, c C-23. Justice Eamon noted that Rule 3.75(2)(b) provides that a Respondent may be added to a Judicial Review Application where the Court is satisfied that the Order should be made, and Rule 3.15(3)(c) provides that an Application for Judicial Review must be served on every person or body directly affected by the Application.

Justice Eamon noted that there were few cases that interpreted Rule 3.75 in which a Respondent sought to be added to the Application against the wishes of the Applicant. Eamon J. considered the historical context of Rule 3.75 and noted that Rule 3.75 along with Rule 3.74, which provides for the adding, removing or substituting of parties after the close of pleadings, are successors to the old Rule 38. Justice Eamon determined that the test under the old Rule 38 was helpful to the interpretation of Rules 3.74 and 3.75: the Applicant must have a legal interest in the outcome of the proceedings; it must be just and convenient to add the Applicant as a party; and the Applicant would not be adequately protected unless it was allowed to participate in the proceedings. Eamon J. also noted that a party may be added to an Action pursuant to Rule 2.10, which provides that a Court may grant status to an Intervenor, but it is not necessary to join Intervenors as parties.

Eamon J. considered the legal rights and obligations of the Speaker, and determined that the Speaker would be significantly affected by some of the issues that could arise on Judicial Review. Further, it would be just and convenient to allow the Speaker to participate and that the Speaker's interests would not be adequately protected if he was not allowed to participate in the Judicial Review Application. The Application was granted.

EXP MINING EQUIPMENT RENTALS INC V CATERPILLAR FINANCIAL SERVICES LTD, 2017 ABCA 364 (MCDONALD JA)
Rules 2.23 (Assistance Before the Court), 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings), 14.23 (Filing Factums – Standard Appeals) and 14.64 (Failure to Meet Deadlines)

The Applicants, EXP Mining Equipment Rentals Inc. ("EXP") and Gordon Chaban ("Chaban") applied to restore their Appeal after it was struck pursuant to Rule 14.23(1) and 14.64(b).

McDonald J.A. noted that the Notice of Appeal was prepared and filed by Chaban on behalf of himself and EXP, though Chaban was not a lawyer and was not a party in the Court of Queens Bench proceedings. At the time of the Application, EXP was represented by counsel. Justice McDonald stated that, while Rule 2.23 allows a non-lawyer to assist a party before the Court with limited support, it does not allow the non-lawyer to breach the *Legal Professions Act*, RSA 2000 c L-8. His Lordship noted that the Legislature could have allowed the directors of a closely

held corporation to represent the corporation, but it did not do so. Justice McDonald held that the Notice of Appeal as it pertained to EXP was not a nullity, but Chaban had no status in the Appeal.

McDonald J. noted that the decision to restore an appeal is discretionary, and reviewed the non-determinative factors a Court considers when deciding whether to restore an appeal, including:

(a) arguable merit to the appeal;

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

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

(d) whether there was a timely intention to proceed with the appeal; and

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

His Lordship concluded that, while EXP met some of the factors, it failed to show that there was arguable merit to the Appeal. As such, the Application to restore the Appeal was dismissed.

ODLAND V ODLAND, 2017 ABCA 397 (BERGER, ROWBOTHAM AND GRECKOL JJA)
Rules 3.3 (Appropriate Judicial Centre) and 3.5 (Transfer of an Action to Another Judicial Centre)

The Defendant's Application to transfer divorce proceedings from Calgary to Edmonton was dismissed, and he appealed. The Alberta Court of Appeal considered Rule 3.3 in the context of determining the issue of who bore the onus of establishing that the Plaintiff's choice of venue was reasonable.

The Court noted that Rule 3.3 provides that the appropriate judicial centre is either: (a) the closest judicial centre, by road, to the Alberta residence or place of business of all the parties, or (b) if a single judicial centre cannot be determined, the closest judicial center to the party commencing the Action. The Court stated that, if the Plaintiff's selection of judicial centre is in compliance with Rule 3.3 then the onus of proving the Plaintiff's choice was unreasonable is on the Defendant; however, if the Plaintiff's selection does not comply with Rule 3.3 then the onus shifts to the Plaintiff.

The Court found that the Plaintiff's selection of Calgary was not in compliance with Rule 3.3. As such, the onus shifted to the Plaintiff to justify the reasonableness of her selection of the judicial centre. The Court referred to leading authority which provided that reasonableness is determined on the balance of convenience. The factors that the Court may consider include: (a) the number of parties or witnesses in the current and proposed judicial centres; (b) the nature of the issues in the lawsuit; (c) the relationship between the parties in respect of the issues in the lawsuit; (d) the parties' financial resources; (e) the stage of proceedings; (f) the convenience of location for pre-trial motions; and (g) the location of relevant assets.

The Court applied the factors to the facts and allowed the Appeal, concluding that the appropriate judicial centre was Edmonton. The Court outlined two different approaches for transferring the Action available to the Defendant: (1) the Defendant could apply to have the Action transferred under Rule 3.5, and (2) the Defendant could apply for a Declaration that the Action was not commenced in compliance with Rule 3.3 and, then the Defendant could apply to transfer the Action to a different judicial centre.

AL-GHAMDI V COLLEGE AND ASSOCIATION OF REGISTERED NURSES OF ALBERTA, 2017 ABQB 685 (GOSS J)
Rules 3.15 (Originating Application for Judicial Review), 3.22 (Evidence on Judicial Review), 3.28 (Effect of Not Serving Statement of Claim in Time), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

Mr. Al-Ghamdi commenced a number of Actions against various parties including the College and Association of Registered Nurses, and the law firms who had represented Al-Ghamdi and the Defendants. The Defendants in four of the Actions applied to strike Al-Ghamdi's Claims pursuant to Rule 3.68 and to summarily dismiss his Claims pursuant to Rule 7.3.

In Action 1404-00719, Al-Ghamdi sought Judicial Review of the Decision of the Complaint Review Committee of the College and Association of Registered Nurses of Alberta ("CARNA"). CARNA sought to summarily dismiss the Claim against it pursuant to Rule 7.3(1)(b) which allows a party to apply for summary dismissal where there is no merit to a Claim or part of it. Goss J. granted CARNA's Application, and held that there was no merit to Al-Ghamdi's Claim that the reasons for CARNA's Decision was unfair, biased, or that it lacked procedural fairness.

In Action 1504-00592, the Respondent sought Judicial Review of a Decision of one of the Applicants (the College of Physicians and Surgeons). The Applicant argued that the Originating Application for Judicial Review did not name the proper parties and that the proper parties had not been served pursuant to Rule 3.15(3). Goss J. considered Rule 3.15 which provides that, subject to Rule 3.16, an Originating Application for Judicial Review to set aside a decision or act of a person or body must be filed and served within six months after the date of the decision. Goss J. reviewed the authorities that considered Rule 3.15 and the previous Rule 753.11, and determined that regardless of what time period the Respondent was calculating from, the Respondent was out of time to seek Judicial Review of the decision. Goss J. also determined that the Application was not properly served on the persons specified under Rule 3.15(3), which stipulates who is required to be served in a Judicial review Application.

Justice Goss noted that in Action 1504-00215, Al-Ghamdi sought what appeared to be Judicial Review of the Decision of the Canadian Medical Protective Association ("CMPA"). CMPA applied for Summary Dismissal of the Originating Application arguing that Decisions by the CMPA are not subject to Judicial Review. In Action 1504-00687, Al-Ghamdi claimed against the former managing director of CMPA, individual lawyers and law firms alleging negligence, breach of trust and fiduciary duties, conspiracy and making false statements. Each of the Defendants applied to strike the Claims or for Summary Dismissal.

With respect to CPMA's Application for Summary Dismissal and Striking Al-Ghamdi's Judicial Review Application in both Actions 1504-00687 and 1504-00215, Goss J. granted both Applications determining that, pursuant to Rule 7.3 there was no genuine issue for Trial, and further, pursuant to Rule 3.68 the Actions should be struck as the CMPA Decision was not subject to Judicial Review. Al-Ghamdi sought to rely on new affidavit evidence in the two Judicial Review Applications. Goss J. referred to Rule 3.22 which sets out what evidence the Court may consider on Judicial Review. The Rule provides that a reviewing Court can only consider a certified copy of the record of proceedings of the person or body that is the subject of the Application, if questioning was permitted under Rule 3.21, a transcript of that questioning, and anything permitted by any other Rule or enactment, and any other evidence permitted by the Court. Justice Goss noted that while the authorities state that other documents may sometimes be admitted, this should only be done so in limited situations. Al-Ghamdi's Application to adduce new affidavit evidence was dismissed.

With respect to the Application by the two Defendant law firms to strike Al-Ghamdi's claims against them pursuant to Rule 3.68, Goss J. held that the Pleadings did not assert any reasonable cause of action against the law firms. Goss J. noted that in an Application under Rule 3.68(2)(b) no evidence is admissible. Her Ladyship concluded that Al-

Ghamdi had failed to particularize his allegations against the Defendant law firms in the Pleadings as required. As a result, the Defendant law firms' Applications to strike were granted.

The individual Defendant, McKall also applied to strike the Respondent's Claim pursuant to Rule 3.68. Justice Goss held that, unlike a number of the claims made against the other Applicants, this Claim raised a hint of a reasonable claim. Goss J. allowed Al-Ghamdi leave to apply within 30 days to amend the Pleadings, but emphasized that the Court was only granting leave to apply to amend the Pleadings under Rule 3.62 and Rule 3.65, and that the leave was not granted automatically, as the Pleadings had closed. Goss J. stated that if Al-Ghamdi did not apply to amend the Pleadings in the stipulated time frame, the Claims against the Applicant would be struck.

The individual Defendant, Johnson sought an Order under Rule 3.28 that no further action be taken against him as he had not been properly served with the Statement of Claim. Goss J. held that Al-Ghamdi had not served Johnson, set aside the Default Notice and declared that no further action be taken against Johnson because he was not served within one year of the Statement of Claim being filed.

MCCARGAR V MÉTIS NATION OF ALBERTA ASSOCIATION, 2017 ABQB 692 (TOPOLNISKI J)
Rules 3.15 (Originating Application for Judicial Review), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 9.1 (Form of Judgments and Orders), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant, McCargar sought leave to amend his Amended Originating Application. Following the filing of an Amended Originating Application, a 3 day special chambers hearing was scheduled from October 18, 2016 to October 21, 2016. On the morning of the hearing, the Applicant served the Respondents with a form of his Amended Amended Originating Application and also presented the form to the Court. As a result, the hearing was adjourned and rescheduled for November 10, 2017. On November 9, 2017, the Applicant wrote to the Court and proposed additional changes to the Amended Amended Originating Application, which would have reframed the Application to one of Judicial Review.

Topolniski considered Rule 3.15 and stated that, except for Judicial Review for habeas corpus Applications, a Notice of Application for Judicial Review "must be filed and served within six months after the date of the impugned decision". In addition, Affidavits in support of such Applications "must be filed and served one month or more before the scheduled hearing".

Topolniski J. noted that amendments of pleadings pursuant to Rule 3.65 are subject to limited exceptions, including a determination of whether the proposed amendments were hopeless. A pleading is hopeless only when it is "clear and obvious that there is no triable issue". In determining whether the Applicant's Originating Application was hopeless, Topolniski J. reviewed the proposed amendments, and held that, since the Applicant had reframed the Amended Amended Originating Application to one of Judicial Review, whether the Applicant was entitled to Judicial Review was vital in determining whether the Application was hopeless. Topolniski J. held that the Métis Nation of Alberta Association was not a body subject to Judicial Review, and as such, the Applicant's Application was hopeless.

With respect to thrown away Costs for the adjourned Application, Justice Topolniski stated that the award of Costs is discretionary, and is generally governed by the considerations in Rules 10.31 and 10.33. While Topolniski J. found that the Applicant's conduct constituted "litigation by ambush", Her Ladyship was not prepared to award solicitor-client Costs to the Respondents based on the Applicant's conduct. Instead, Topolniski J. awarded enhanced costs of 1.5 times Schedule C, Column 1 for Special Applications with written submissions.

PREDIGER V CALGARY (CITY), 2017 ABQB 755 (KENNY J)
Rule 3.15 (Originating Application for Judicial Review)

The Applicant Representative Plaintiff in a Class Action sought a declaration that the Respondents' closing of a mobile home park was a breach of both the *Mobile Home Tenancies Act*, RSA 2000 c M-20 and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982. The Respondents argued that the Application was more appropriately characterized as an Application for Judicial Review, and therefore was governed by Rule 3.15(2) and should be dismissed as it was outside the six month limitation for bringing such an Application.

Kenny J. held that the Respondents correctly characterised the Application as an Originating Application for Judicial Review because both the Originating Application and the Applicant's submissions showed that the underlying issue was the decision made by Calgary City Council to close the mobile home park. Kenny J. held that the Originating Application was actually an Application for Judicial Review and was barred by the six months limitation period set out in Rule 3.15(2). Despite the Originating Application being limitations barred, Kenny J. considered the merits of the Applicant's Application and held that the Applicant was not able to prove bad faith on the part of the Respondents, nor had there been a violation of the *Charter*. As such, the Respondents' decision to close the mobile home park was legally valid.

SIKSIKA HEALTH SERVICES V HEALTH SCIENCES ASSOCIATION OF ALBERTA, 2017 ABQB 683 (MACLEOD J)
Rule 3.23 (Stay of Decision)

Siksika Health Services ("Siksika") applied for a Stay of an Order of the Alberta Labour Relations Board regarding certification of the Health Sciences Association of Alberta as bargaining agent for ambulance drivers employed by Siksika, pending Judicial Review. The Defendant Alberta Health Sciences Association argued that the Application should be dismissed on the basis of *res judicata*.

Macleod J. considered Rule 3.23 and the three part test for a Stay which involved a consideration of whether there is a serious question to be tried; whether the applicant will suffer irreparable harm if the relief is not granted; and what is the balance of convenience between granting and refusing the remedy.

Justice Macleod held that the test was met for a Stay, and granted Siksika's Application.

LEE V BLONDIN, 2017 ABQB 800 (SHELLEY J)
Rules 3.25 (Contents of Statement of Claim), 3.68 (Court Options to Deal with Significant Deficiencies), 11.25 (Real and Substantial Connection) and 11.28 (Substitutional Service)

The Applicant, Lee applied without notice for an Order for substitutional service of a Statement of Claim. The Applicant is serving a life sentence for the first degree murder of the Defendants' family member and alleged that the victim's family caused Lee mental suffering and emotional distress.

The Court declined to deal with the issues raised by Lee, and held that, if any tort was committed, it was committed in Ontario so the Applicant should have applied for both substitutional service and service *ex juris*. Justice Shelley concluded that, whether or not the Court had jurisdiction, there was no factual foundation to Lee's claims, and the claims were not reasonable. As such, the Statement of Claim was struck under rule 3.68.

HICKE V DREFKO, 2017 ABQB 795 (MASTER HANEBURY)
Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 6.6 (Response and Reply to Application) and 7.3 (Summary Judgment)

The Plaintiff, Drefko sued the Defendants, Dr. Hicke, a chiropractor, and his professional corporation ("Hicke") for negligence. The Defendants applied to Amend the Statement of Defence to include a defence under the *Limitations Act*, RSA 2000 c L-12, and the *Limitations of Actions Act*, RSA 1980 c L-15.

The Application to amend was initially supported by an Affidavit sworn by a legal assistant. Drefko filed an Affidavit in response, and Hicke swore and filed an Affidavit in reply. Drefko argued that Hicke's Affidavit did not comply with Rule 6.6(2)(b) and should be struck. Master Hanebury held that the second affidavit did not comply strictly with the Rule, and it would have been prudent for Hicke to file his own Affidavit at the outset of the Application, not in response. Master Hanebury noted that Rule 6.6(3) provides that "it is the lack of notice that leads to the Court refusing to consider the affidavit", and held that timing was not an issue between the parties, nor was either party caught by surprise with new information. As such, Master Hanebury held that all of the filed material would be considered to ensure that the Application was determined on the merits.

Drefko opposed the Application to amend the Statement of Defence on the basis that the amendment was hopeless, and would cause prejudice. Master Hanebury noted that Rule 3.65(1) provides that the Court may grant permission to appeal before or after the close of pleadings, and that an amendment may be allowed, no matter how late. There are, however, four exceptions: a "hopeless" amendment; an amendment which would cause serious prejudice to the opposing party not compensable in costs; an amendment which would add a new party or cause of action after a limitation period had expired; and where there is an element of bad faith in failing to plead the amendment at first instance. Master Hanebury confirmed that the threshold for considering whether an amendment is hopeless is the same as that on an Application to strike, not that used for Summary Judgment. Drefko asserted that the limitation period did not begin until the results of an MRI confirmed a serious injury. Master Hanebury found that the issue was arguable, and therefore, was not hopeless.

Drefko also argued that the amendment would cause prejudice as it was 16 years after the filing of the original Statement of Defence, document production had occurred, and Questioning had closed. Master Hanebury stated that the limitations defence should have been raised earlier, but that the correction of slips and oversights may be allowed to ensure that justice was ultimately done. The Application to Amend the Statement of Defence was allowed.

GLENN V DAGHER, 2017 ABQB 443 (NIXON J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.6 (Pleadings: General Requirements)

The Defendant/Appellants, Glenn and Glenn Law Office ("Glenn"), appealed a Master's Order which struck portions of the Statement of Claim against them, but two pleadings remained. The Plaintiff/Respondent, Dagher had claimed against Glenn, his former counsel, for breach of contract and negligence causing economic loss. Glenn argued that the remaining pleadings should also be struck out on the basis that the Action was moot, without merit and properly disposed of by way of Summary Judgment.

Justice Nixon reviewed the principles of Summary Judgment as outlined in Rule 7.3, and noted that the rules relating to Summary Judgment should be interpreted broadly, in order to favour "proportionality and fair access to the affordable, timely and just adjudication of claims", where there is no genuine issue for trial.

Justice Nixon noted that the scope of the pleadings define the case; while legal conclusions need not be plead, pursuant to Rule 13.6(3) pleadings must include a "a statement of any matter on which a party intends to reply so that the other party is not taken by surprise". The Court may order that a claim be struck in whole or in part if it fails to disclose a reasonable claim, pursuant to Rule 3.68(2)(b).

Justice Nixon reviewed the Pleadings, and found that they disclosed no reasonable claim. His Lordship considered the entire context of the Pleadings, but noted that no evidence was admissible pursuant Rule 3.68(3). Justice Nixon concluded that the Pleadings disclosed no reasonable cause of action and granted Glenn's Appeal on that basis. Nixon J. noted that the claims could also be dismissed pursuant to Rule 7.3(1)(b), as they had no merit.

ONISCHUK (RE), 2017 ABQB 553 (ROOKE ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Applicant, Ms. Onischuk filed an Amended Application in relation to her bankruptcy. The Amended Application alleged conspiracy, malice, negligence, and bad faith and requested an array of remedies as against the Respondents including leave to take legal action against the Respondents, an Order designating the Action to be in the public interest and insulating the Applicant and her husband from all Costs, hundreds of thousands of dollars in aggravated and punitive damages, and leave for the Applicant's husband (a non-lawyer) to file documents and temporarily provide representation before the Court.

Rooke A.C.J. struck out the Amended Application on the basis of Rule 3.68. His Lordship stated that Rule 3.68 authorizes the Court to strike out pleadings in whole or in part where the Court has no jurisdiction, where a claim or defence is fatally flawed, or where a pleading is an abuse of process. The Amended Application represented a clear abuse of process in light of the relief requested and how the Applicant's husband, who was previously declared a vexatious litigant, was using his wife's Action to seek relief and circumvent the Court's Orders. The Application was dismissed.

CARYK V ALBERTA (ALBERTA WORKS), 2017 ABQB 737 (MASTER SCHULZ)
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 on the basis that the Claim disclosed no cause of action; was frivolous or improper; and represented an abuse of process. In the alternative, the Defendants asked for Summary Dismissal of the portions of the Claim that predated its filing by more than two years.

Master Schulz noted that Rule 3.68 allows the Court to strike pleadings where no cause of action is disclosed; where claims are frivolous or improper; or where claims represent an abuse of process. Master Schulz stated that a cause of action must be disclosed in pleadings, the pleadings must "stand on their own" and provide sufficient particulars to found a cause of action recognized by law. The Court must determine whether there is a reasonable chance that the claim will succeed assuming the facts are true as pleaded.

Master Schulz discussed the meaning of "frivolous" and "abuse of process" in the context of Rule 3.68. Abuse of process includes a "collateral attack" on administrative decisions made by decision makers of administrative agencies. An appeals process must be followed where it is present; the Court will not allow a litigant to side-step an appeals process by seeking a different result before a Master or Judge. Master Schulz held that the Plaintiff's Claim failed on all three of these grounds. There was no cause of action disclosed in the Pleadings despite the use of terms such as "conspiracy" and "breach of trust"; the Claim was frivolous given the damages claimed were manifestly out of step with similar jurisprudence; and the Claim represented an abuse of process and collateral attack as the Plaintiff had not exhausted the statutory appeals process available to him. The Claim was struck out.

Master Schulz held that, although the determination was not required since the Claim was struck out in its entirety, the portions of the Claim that occurred more than two years prior should be summarily dismissed. The Defendants' Application was granted.

CLARK V HUNKA, 2017 ABCA 346 (FRASER, BIELBY AND CRIGHTON JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff, a chartered accountant, sought relief against a lawyer and her firm (the "Defendants") for an alleged malicious prosecution arising from advice the Defendant lawyer gave as independent counsel to a discipline tribunal during discipline proceedings against the Plaintiff by the Institute of Chartered Accountants. The Defendants sought to have the Statement of Claim struck pursuant to Rule 3.68.

The Application to Strike the Claim was dismissed by a Master but granted on Appeal to a Justice of the Court of Queen's Bench. The Plaintiff appealed to the Court of Appeal.

The Court of Appeal reviewed the test under Rule 3.68 and noted that to be successful, the Applicant must demonstrate that it is beyond doubt that the Claim will fail, even when the allegations in the Statement of Claim are treated as true. The Court of Appeal held that the Justice did not err in finding that the Statement of Claim should be struck because it did not plead facts which supported the allegation related to the tort of malicious prosecution.

The Court of Appeal dismissed the Appeal.

GOODSWIMMER V CANADA (ATTORNEY GENERAL), 2017 ABCA 365 (COSTIGAN, SLATTER AND VELDHUIS JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff Sturgeon Lake Indian Band ("Band") commenced an Action against the Defendant Attorney General of Alberta and Her Majesty the Queen in Right of Alberta (the "Crown") in 1987 which the parties settled through a Treaty Land Entitlement Settlement Agreement. A subsequent Statement of Claim was filed by the Plaintiff Band and individual Band members ("Appellants") in 1997 which the Crown argued contained claims which had been previously settled. The Crown successfully applied to strike or summarily dismiss significant portions of the Statement of Claim. The Appellants appealed on the basis that the Case Management Judge had summarily dismissed the Action before considering the Appellant's Application to amend their Pleadings.

The Court of Appeal reviewed and the test for Summary Judgment and for striking Pleadings, and held that the Case Management Judge, who had been managing the Action for 15 years did not make any reviewable error in deciding to summarily dismiss or strike out portions of the Statement of Claim prior to determining any amendments. No part of the struck or dismissed portions could have been saved by the proposed amendments.

The Appellants also argued that the Crown had relied on inadmissible hearsay evidence in its Affidavits, and that the claims should not have been summarily dismissed in the face of conflicting Affidavits. The Court of Appeal considered Rule 13.18(3), which provides that if an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit. The Court of Appeal compared the former and current Rules related to hearsay Affidavits, and noted that Rule 13.18(3) provided that hearsay Affidavits cannot be used to obtain final relief. The Court further stated that case law has long recognised that some flexibility is required in interpreting the Rule on the use of hearsay evidence in affidavits. To apply the Rule strictly would preclude Summary Judgment by big organizations. The Court of Appeal also noted that historical aboriginal claims pose a particular "problems of proof" as many of the people who were present during treaty negotiations are no longer alive. Therefore the parties to the litigation have to rely on documents found in their business records that are then attached as exhibits to their Affidavits.

The Court of Appeal observed that there were some authorities which warn of the dangers of summary judgment in the face of conflicting Affidavit evidence. However, the Court of Appeal stated that the modern authorities mark a cultural shift away from Trial as the "default method of proving disputed facts". The Rules permit a Judge to make findings of fact in a Summary Judgment Application, and conflicting evidence on the record does not mean that the Court cannot make a "fair and just adjudication".

The Court of Appeal determined that the Appellants had not shown that the Case Management Judge had made a reviewable error, and the Appeal was dismissed.

TWINN V TWINN, 2017 ABCA 419 (PAPERNY, VELDHUIS AND MARTIN JJA)
Rule 3.75 (Adding, Removing or Substituting Parties to Originating Application)

The Appellants, Patrick and Shelby Twinn and Deborah Serafinchon appealed the result of their unsuccessful Application to be added as parties to litigation regarding the 1985 Sawridge Trust.

The Court noted that Rule 3.75 provides a discretionary procedure for addition of parties to litigation commenced by Originating Application. To justify adding a party under this Rule, the Court must be satisfied that the Order should be made and that it would not result in prejudice that cannot be remedied through a Costs award or otherwise.

The Court noted that under the Rule, two questions are engaged: (1) Does the proposed party have a legal interest that will be affected directly by the order; and (2) Can the issue be resolved completely without the addition of the proposed party as a party?

In this case, the Court held that the Appellants had failed to establish that their interests would not be represented without an Order adding them as parties. The interests of two of the Appellants, as current Beneficiaries, were found to be already represented by the Trustee. Additionally, the Appellants' submissions failed to disclose the positions they intended to advance, making it impossible for the Court to determine that their positions would not be heard in the course of the Action. Noting that deference is owed to Case Management Justices in such cases, the Court dismissed the Appeal with respect to adding the Appellants as parties to the underlying Action.

BEAZER V TOLLESTRUP ESTATE, 2017 ABCA 430 (BERGER, ROWBOTHAM AND O'FERRALL JJA)
Rules 3.77 (Subsequent Encumbrancers Not Parties in Foreclosure Action), 6.5 (Notice of Application in Foreclosure Action), 9.4 (Signing Judgments and Orders), 9.32 (Offer for Sale of Secured Property) and 9.33 (Sale to Plaintiff)

This was a decision concerning two of eight Appeals arising out of a foreclosure Action concerning a rural property near Lethbridge. The central issue under appeal was whether the Case Management Judge had properly ordered a sale of the property.

In the first Appeal, the mortgagees of the property were chiefly concerned with the process of the foreclosure Action. They alleged the Justice, in making the sale Order, committed a number of breaches of procedural fairness, had assumed case management of the proceedings, despite not having been appointed, and had deprived the Appellant mortgagees of their interests. The Court of Appeal noted that allegations of bias were woven throughout the grounds of appeal.

The Court noted that Rules 3.77, 6.5 and 9.32 govern the proceedings in foreclosure actions. Rule 9.32 grants the Court discretion to determine the manner of sale. Rules 3.77 and 6.5 provide that, once the foreclosing mortgagee commences the foreclosure Action, the process is governed by the Court, not the foreclosing mortgagee. As a result, it is not necessary for every subsequent encumbrancer to file a separate Action. The Court also noted that the right of the foreclosing mortgagee to select amongst the remedies offered by Rule 6.5 is subject to the Court's equitable jurisdiction to protect subsequent encumbrancers.

The Court observed that, here there was no redemption period required, and an Application was made and granted for an Order for sale. The Appellant mortgagees did not want a sale, they wanted foreclosure and possession of the property. The Court of Appeal found that the mortgagees were kept apprised of every step in this process, and were permitted to, and did, bid on the property pursuant to Rule 9.33. Accordingly, the Court found there had been no breach of procedural fairness.

The Appellants in the second Appeal had an Action claiming specific performance of an agreement and a one-third interest in the Property. They asserted in their Appeal that the Justice had prejudiced their Action by giving the buyers clear title. The Appellants' grounds of Appeal were similar to those in the first Appeal, with the addition that it was unfair that the Justice had invoked Rule 9.4(2)(c), waiving the need for all parties to sign the Order. The Court

of Appeal noted that Rule 9.4(2)(c) is discretionary and was appropriate in this case given the need to move the proceedings forward at the least cost to the parties. The Court noted that, in the result, there was no prejudice to the Appellants.

The Appeals were dismissed and the sale Order was confirmed.

JABNEEL DEVELOPMENT INC V LAMONT (TOWN), 2017 ABQB 566 (LEE J)
Rules 4.22 (Considerations for Security for Costs Order) and 6.14 (Appeal from Master's Judgment or Order)

The Defendant town of Lamont appealed a Master's Decision which dismissed their Application for Security for Costs against the Plaintiffs.

Lee J. reviewed the factors that the Court considers when determining an Application pursuant to Rule 4.22, including the ability of the Defendant to enforce a Costs award; the ability of the Plaintiff to pay a Costs award; the merits of the Action; any undue prejudice to the Plaintiff; and any other matters that the Court considers appropriate.

In dismissing the Security for Costs Application, the Master had concluded that the Plaintiff possessed an asset in Alberta which exceeded the Costs sought by the Defendant. Lee J. referred to Rule 6.14(3), which provides that the Appeal from a Master's Judgment or Order is an Appeal on the record of the proceedings before the Master, and may also be based on additional evidence, if the evidence is relevant and material. Lee J. concluded, on the basis of the evidence before the Court, that the Plaintiffs had no assets in Alberta. Lee J. considered the remaining criteria under Rule 4.22, and determined that Security for Costs in an amount sufficient to complete Questioning was appropriate in the circumstances. Lee J. set aside the Master's Decision and granted the Defendant's Appeal.

BECHIR V GOWLING LAFLEUR HENDERSON LLP, 2017 ABQB 667 (MASTER ROBERTSON)
Rules 4.22 (Considerations for Security for Costs Order) and 10.48 (Recovery of Goods and Services Tax)

The Plaintiffs, diplomats from Chad who resided in South Africa, commenced an Action in defamation, oppression and claims relating to the Plaintiffs' tarnished reputation. Three of the five Defendants applied for Security for Costs (the "Applicants"), arguing that the Plaintiffs owned very few assets in Alberta; and that the Claim would require approximately 30 days of Questioning, as well as the potential production of thousands of documents and interlocutory Applications relating to the issue of privilege. The Applicants sought Security for Costs in the amount of $492,187.50.

Master Robertson reviewed the factors that the Court may consider when determining whether Security for Costs should be posted, as listed in Rule 4.22:

> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

The Plaintiffs owned a condominium in Edmonton which they admitted they would be selling soon, and for which they owed condominium fees and property taxes. The Court could not assess the Plaintiffs' ability to pay the Cost award, or whether such payment would unduly prejudice them, because the Plaintiffs refused to disclose details of

any their assets outside of Alberta. Master Robertson held that it would be difficult to enforce an Order against assets in Alberta.

Master Robertson held that the factor in Rule 4.22(e), which provides the Court with discretion to consider other matters, was important. Master Robertson noted that the Plaintiffs had already "expended significant funds trying to protect their claims", and one of the Defendants was a large corporation which appeared to have taken steps to make international service more difficult and costly for the Plaintiffs. Master Robertson also noted that oppression actions are "entitled to protection from the requirement to post security for costs".

Master Robertson also noted that the amount sought by the Defendants for Security for Costs was based on a forecasted 30 days of questioning, using the amounts set out in Schedule "C" multiplied by three. However, the figure included $23,437.50 in GST. Master Robertson held that, pursuant to Rule 10.48(2), the Applicants should not have included GST.

Master Robertson concluded that Security for Costs should be awarded, but that the Court should use its discretion to reduce the amount by 35%. Master Robertson directed that the Action be stayed until Costs were posted, and a previous unpaid Costs award was to be included in the amount set for Security for Costs.

JOHN BARLOT ARCHITECT LTD V ATRIUM SQUARE INVESTMENTS LTD, 2017 ABQB 749 (HOLLINS J)
Rules 4.22 (Considerations for Security for Costs Order), 4.31 (Application to Deal with Delay), and 4.33 (Dismissal for Long Delay)

The Applicant, Atrium Square Investments Ltd, applied for an Order dismissing the Respondent's claim for delay under both Rules 4.33 and 4.31.

The Respondent argued that several steps had significantly advanced the Action for the purposes of Rule 4.33, including finalizing a consent Order for the payment of money out of Court, and service of an Affidavit of Records which included additional supporting documents for a damages quantification. Hollins J. held that finalizing a consent Order could not constitute a significant advance. However, the production of documents which assisted the parties in understanding the extent of the damages claimed by the Respondent constituted a significant step in the Action. Justice Hollins considered whether the Applicant's service of its Affidavit of Records after the three year deadline constituted "participation" as contemplated by Rule 4.33(2)(b). Her Ladyship held in obiter that the Courts do not encourage moving parties to further delay matters or lull the non-moving parties into believing that delay has been waived. Justice Hollins observed that service of the Affidavit of Records would not have constituted a waiver of delay under Rule 4.33(2)(b) had that ben an issue. The Rule 4.33 Application was dismissed.

With respect to Rule 4.31, Justice Hollins stated that the Court may dismiss an Action if the delay has resulted in significant prejudice to the Applicant due to inordinate and inexcusable delay. In applying the test set out in recent Alberta Court of Appeal authority, Hollins J. held that the pace of the Action must be assessed "in the context of the claims, its complexity and its history". Justice Hollins held that the delay was inordinate and inexcusable. However, the Applicant had not suffered prejudice as a result of the delay since no witnesses had disappeared and the Applicant's director maintained a clear memory of the facts. The Rule 4.31 Application was dismissed.

The Applicant also applied for an Order requiring the Respondent to post Security for Costs to continue its claim. The Applicant argued that Security for Costs was justified because the Respondent had financial difficulties in 2009. Justice Hollins held that, while Security for Costs is not an automatic alternative for a dismissal for delay Application, in the circumstances, it was appropriate to order the Respondent to pay Security for Costs.

ASKI CONSTRUCTION LTD V MARKOS, 2017 ABCA 341 (SCHUTZ JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The self-represented Appellants were successful in restoring their Appeal, and the Respondents, ASKI Construction Ltd. ("ASKI") subsequently sought, among other things, Security for Costs for the Appeal.

Schutz J.A. noted that an Order for Security for Costs is discretionary, and such an Order must balance "the reasonable expectations and rights of the parties to come to a just and reasonable conclusion". Justice Schutz noted that, pursuant to Rules 14.67(1) and 4.22, a single Appeal Judge may order Security for Costs. Schutz J.A. reviewed the Court's considerations in awarding Security for Costs as listed in Rule 4.22(a) to (e):

a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;

b) the ability of the respondent to the application to pay the costs award;

c) the merits of the action in which the application is filed;

d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action; and

e) any other matter the Court considers appropriate.

Schutz J.A. noted that the Applicant bears the burden of proving that the factors listed in Rule 4.22 weigh in favour of ordering Security for Costs. If the Appellant has only a modest prospect of success, and the Court is concerned about its ability to pay costs, that may be enough to grant Security for Costs. On the other end of the spectrum, Courts have not awarded Security for Costs where there is a risk of prejudice, and where the Application for Security for Costs "has not been made promptly", especially if the delay is unexplained.

Justice Schutz observed that the Appellants had previously been "granted indulgences" by allowing them to take further steps to restore and "regularize" their Appeal. A significant sum of damages and costs remained outstanding to ASKI following Trial, and the Appellants had not clearly set out the errors that they argued were committed by the Court below in their materials. Her Ladyship referred to prior leading authority and noted that "[a]ccess to justice does not equate to access to civil processes without fear of cost consequences".

Schutz J.A. held that questions of merit and financial considerations favoured granting Security for Costs, but ASKI's delay in applying for Security for Costs was "significant, essentially unexplained, and likely prejudicial" to the Appellants, which would likely result in delay given that the Appeal was to be heard in less than two months. Additionally, Security for Costs is generally ordered in relation to future Costs and is not generally used to secure payment of Costs already incurred. Schutz J.A. observed that many steps leading to the Appeal had already occurred; as such, ASKI's Application for Security for Costs was dismissed.

ACCESS MORTGAGE CORPORATION (2004) LIMITED V ARRES CAPITAL INC, 2017 ABCA 373 (ROWBOTHAM JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Defendant, Arres Capital Inc. ("Arres") was adjudged bankrupt and a bankruptcy Order was issued against it. Arres appealed. Access Mortgage Corporation (2004) Limited ("Access"), who was a Judgment Creditor and Respondent to the Appeal applied for Security for Costs for the Appeal in the amount of $14,750.

Justice Rowbotham reviewed Rules 14.67 and 4.22 which related to Security for Costs, and specifically considered whether the requirement of "special circumstances" in former Rule 524. Rowbotham J.A. observed that former Rule 524 was repealed on September 1, 2014, and the current Rule 14.67 did not include the "special circumstances" language which meant that prior authorities referencing the test which included "special

circumstances" were no longer applicable to Applications for Security for Costs in an Appeal. However, Rowbotham J.A. stated that special circumstances might be considered under Rule 4.22(e), if the Court deemed such consideration appropriate.

Justice Rowbotham considered the factors set out in Rule 4.22, and determined that the Application should be granted since the Respondent to the Application had no exigible assets, was not able to pay a costs award, was bringing an Appeal based on facts not law which would be reviewed for palpable and overriding error, and had submitted no evidence regarding prejudice.

STONEY V TRUSTEES FOR THE 1985 SAWRIDGE TRUST, 2017 ABCA 437 (WATSON, SLATTER AND BIELBY JJA)
Rules 4.22 (Considerations for Security for Costs Order), 9.4 (Signing Judgments and Orders) and 14.67 (Security for Costs)

The Appellant, Maurice Stoney and his siblings had engaged in litigation for 17 years in an attempt to establish his right to be a member of the Sawridge First Nation which would entitle him to certain funds held in a trust. Mr. Stoney applied to the Case Management Justice to intervene in an Action, which Application was dismissed. Mr. Stoney was also declared to be a vexatious litigant and Costs were ordered against him. Mr. Stoney appealed and the Respondents, the Sawridge First Nation and other parties, applied for Security for Costs in the Appeal.

The Court noted that Rule 4.22 applies to Appeals through Rule 14.67. Further, Rule 4.22(d) requires that the Court considers whether a Security for Costs Order "would unduly prejudice the respondent's ability to continue the action". The Appellant was on a fixed income, had few assets, and had failed to pay previous costs awards. Additionally, the Court stated that the merits of the Appeal were questionable. When determining whether an Order for Security for Costs would unduly prejudice the Appellant's ability to continue the Action, the Court noted that concerns about depriving the Appellant of his day in court were diminished because he had engaged in many previous unsuccessful attempts to succeed in his Claim, and "given that his application was dismissed based on issue estoppel his right to further pursue the same arguments on appeal is severely limited". The Court granted the Order for Security for Costs in the amount of $10,000.

PETZ V DUGUAY, 2017 ABQB 577 (SULLIVAN J)
Rules 4.24 (Formal Offers to Settle) and 4.29 (Cost Consequences of Formal Offer to Settle) and Schedule C

The parties were unable to agree on issues concerning the appropriate Costs award to be granted following a Trial in a personal injury Action in which one of the Plaintiffs, Petz, received a Judgment in the amount of $76,028 for general damages, loss of income, and special damages.

The Defendant served two Formal Offers to settle on Petz pursuant to Rule 4.24 which sets out the requirements for Formal Offers to settle. Both of the Formal Offers were in the proper form as prescribed in Rule 4.24(2) and exceeded the Judgment awarded after Trial. The Plaintiff acknowledged service of both Formal Offers. Justice Sullivan noted that even though the Plaintiff succeeded at Trial, the award granted was less favourable than either of the Defendant's Formal Offers to settle. Sullivan J. noted that Rule 4.29 provides that when a defendant makes a Formal Offer to settle that is not accepted and a Judgment or Order in the Action is made that is equal to or more favourable to the Defendant than the Formal Offer, the Defendant is entitled to Costs for all steps taken in the Action after service of the Formal Offer.

Sullivan J. held that, while Costs are always discretionary, and there is no absolute entitlement to the Costs set out in Schedule C, there was no reason to deviate from Rule 4.29(2) and therefore awarded Costs to the Defendant from the date of the first formal offer to settle.

CARROLL V ATCO ELECTRIC LTD, 2017 ABQB 641 (MAH J)
Rule 4.29 (Costs Consequences of Formal Offer to Settle) and 10.41 (Assessment Officer's Decision)

The Parties sought directions on Costs following Trial in a wrongful dismissal Action. The Plaintiff received Judgment of $72,000 for unpaid bonuses. The remainder of the Plaintiff's claims were dismissed. Justice Mah noted that the Plaintiff's actual salary paid during the notice period, together with a with-prejudice payment made by the Defendant and the Plaintiff's mitigation income exceeded the payment due in lieu of notice. The Defendant sought to set off the amounts received by the Plaintiff which exceeded the amount payable for the notice period (the "excess amount").

The Defendant, prior to Trial, had issued several Formal Offers, none of which were beaten by the Plaintiff at Trial. The Parties agreed that the Plaintiff was entitled to his Costs up to the date of the first Formal Offer, and the Defendant was entitled to Costs from the date of the first Formal Offer through to Trial. However, the Defendant asserted it was entitled to double Costs from the date of the second Formal Offer it made because the second Offer was accompanied by the with-prejudice payment which made up the bulk of the excess amount. Justice Mah considered the Defendant's argument that the set-off effectively dismissed the Plaintiff's Action for the purpose of Rule 4.29(3)(b), but held that the Plaintiff had achieved a Judgment, but had only been prevented from collecting due to set-off. The Action was not dismissed. Accordingly, Justice Mah held that the Defendant was not entitled to double Costs because Rule 4.29(3)(b) was not satisfied.

The Plaintiff disputed the amount claimed by the Defendant for its expert witness, arguing the amounts were exorbitant and not sufficiently particularized. Justice Mah agreed with the Plaintiff that the expert's invoice did not provide enough information in order to determine whether any of the amounts were excluded under Rule 10.41(2)(e). Justice Mah set the recoverable amount at $40,000.

STEIN V GREENE, 2017 ABQB 590 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant applied to have the Plaintiffs' Action dismissed for delay pursuant to Rule 4.31. The Defendant was served with a Statement of Claim in this Action on September 4, 2013 (the "Present Action"). Additionally, the Defendant was also named as a Third Party Defendant in a related Action involving the same Plaintiffs which was dismissed on June 29, 2017 (the "Original Action"). The events giving rise to both Actions occurred in 2007.

Master Robertson reviewed the leading authorities related to Rule 4.31 and stated that the Court must ask "whether there has been a delay", "whether there has been significant prejudice", and "whether there is a compelling reason, in the circumstances of the case, to militate in favour of allowing the claim to proceed".

Master Robertson considered the fact that the events giving rise to the dispute occurred over 10 years ago. Additionally, the Present Action was essentially a "back-up plan" to the Original Action that was dismissed on June 29, 2017. When considering the Action as a whole, Master Robertson found that the only potential advancement in the Present Action was an unsuccessful Summary Dismissal Application by the Defendant. Further, Master Robertson stated that the Plaintiffs could have applied to consolidate the Actions, but did not do so. Finally, Master Robertson noted the policy rationale behind the delay Rules, including the issue of fading memories, which was present in this Action.

Master Robertson observed that there was a "compelling reason" not to dismiss the Claim because much of the delay occurred in the Original Action, as opposed to the Present Action. However, Master Robertson concluded that there had been significant prejudice to the Defendant as a result of the Original Action which he should not have to bear. Further, the Pleadings had not closed and no Questioning was complete in the Present Action. The Action was therefore dismissed for delay under Rule 4.31.

GOLDRING V BLUE CROSS LIFE INSURANCE COMPANY OF CANADA, 2017 ABQB 618 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff commenced an Action against the Defendant insurance company after the Defendant terminated the Plaintiff's disability benefit payments. The Defendant applied to dismiss the Action under Rule 4.31 for delay and consequential prejudice.

Master Robertson referenced the recent Court of Appeal decision in *Humphreys v Trebilcock*, 2017 ABCA 116 for the questions that the Court should consider when reviewing an Application under Rule 4.31 as follows:

1. has the respondent reached 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 considered the questions in turn. In the analysis for whether there were other compelling reasons to not dismiss for delay, Master Robertson noted that Rule 4.33(2)(b) allows an Action to continue, even if three years had elapsed without activity, when an Application had been filed and the Applicant had participated in proceedings after the delay which warranted continuing the Action. While Rule 4.33(2)(b) does not directly apply to an Application under Rule 4.31, Master Robertson observed that the concept of waiver was analogous. Master Robertson observed that the Defendant was aware of, or should have been aware of, many of the elements of prejudice it alleged, but the Defendant allowed the case to proceed with no complaint about delay, even to the point of counsel suggesting in 2016 that the matter be scheduled for Trial.

Master Robertson held that, although there had been delay and there was some prejudice to the Defendant, the overall prejudice was exaggerated. Master Robertson concluded that the claim should not be struck but that it should proceed to Trial. The Application was dismissed.

MIDDLETON ENERGY MANAGEMENT LTD V TRANSCANADA PIPELINES LIMITED, 2017 ABQB 669 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay) and 13.18 (Types of Affidavit)

The Defendant, TransCanada Pipelines Limited applied to have the Plaintiff's Claim dismissed pursuant to Rule 4.31. The Statement of Claim was filed in 2004, shortly before the expiry of the limitation period, and was served almost a year later. The Plaintiff did not request a Statement of Defence for almost 4.5 years. Once the Defence was filed, the Plaintiff did not provide its Affidavit of Records until September 2012. The Defendant provided an Affidavit of Records in September 2013, and Questioning of both parties took place in November 2014. While the Defendant delivered its responses to Undertakings in March 2015, the Plaintiff did not deliver responses to Undertaking until January 2016. The Plaintiff provided an expert report on damages in April 2016, although damages could have been assessed as early as 2007.

Master Robertson, referring to recent leading Alberta authority on Rule 4.31, determined that little had happened in 13 years, and the delay was inordinate, inexcusable and thus the presumption of prejudice applied. Master Robertson noted that the Defendant had provided evidence of non-litigation prejudice in the form of failing memories and a loss of electronic data through the Plaintiff's computer failure. However, Master Robertson

stated that having to explain the Claim to auditors or causing executives to be drawn away to deal with the Claim did not constitute non-litigation prejudice.

Master Robertson concluded that the Action should not have taken 13 years to get close to setting down for Trial, the delay was inordinate, inexcusable and the presumption of prejudice was not rebutted in this case. The Claim was dismissed for delay.

994552 NWT LTD V BOWERS, 2017 ABQB 741 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendants applied to strike a Claim for long delay pursuant to Rule 4.33. The Claim related to theft of two million dollars by one of the Defendants. Criminal proceedings dealing with the same subject matter were ongoing.

The steps that had occurred in the Action were: on July 15, 2013, a Consent Order was entered requiring one Defendant to provide Answers to Undertakings by July 31, 2013; by July 31, 2013, Answers to Undertakings were provided by two Defendants; on August 9 and 13, 2013; Answers to Written Interrogatories were accidentally filed by three Defendants (and subsequently "un-filed" pursuant to a Consent Order in March, 2015); on September 6, 2013, a Consent Order was entered to set a deadline for Undertaking Responses of another Defendant; on July 29, 2016, a Notice to Admit Facts was served on some of the Defendants; and counsel for three of the Defendants filed a Notice of Withdrawal on August 2, 2016.

Master Schlosser noted that, pursuant to Rule 4.33(2), if an advancement in an Action against one party "advances the Action as a whole, it is an advancement against all." The Consent Order of July 15, 2013, did not significantly advance the Action. Master Schlosser noted first that the Defendant had never actually, provided Answers to Undertakings in accordance with the Order, and was *prima facie* in contempt of Court. Just as Parties cannot rely on their own delay to strike an Action pursuant to Rule 4.31, individuals in breach of Court Orders that, if completed, could have significantly advanced an Action, cannot rely on Rule 4.33 to strike the Action for long delay. However, even if the Defendant had provided answers to Undertakings in accordance with the Order, it would not have significantly advanced the Action, as the evidence sought would not have been of significant assistance in determining any issues in the lawsuit.

The Consent Order of September 6, 2013, also compelling Answers to Undertakings, also did not significantly advance the Action. Master Schlosser noted that Consent Orders respecting Answers to Undertakings generally do not significantly advance an action. Nevertheless, the "functional approach" should be used in determining whether there was a significant advance. Here, the Defendant that was the subject of the Order did not answer the Undertakings and subsequently became bankrupt. As such, the Action against her was stayed, and it was not possible to tell whether her responses would have been a significant advance.

Master Schlosser held that filing and then "un-filing" of Interrogatory Answers, the Notices to Admit Facts, and the filing of Notices of Withdrawal of some counsel, did not constitute advances in the Action. The concurrent criminal proceedings also did not advance the Action, though Master Schlosser noted that it was possible for an advancement in the closely related criminal proceedings proceeding to count as an advance in this case if it was "determinative of one of the issues in the instant case in order to count as an advance".

As such, Master Schlosser held that the Action was not significantly advanced between July 31, 2013, and July 31, 2016. Since Rule 4.33 requires that the Court dismiss an Action against the Applicants if there had not been a significant advance in three years, Master Schlosser dismissed the Action against the Applicant Defendants.

The Action was not dismissed as against Terrance Bowers, 1121052 Alberta Inc. and D. Caer Management Inc. as their materials were filed late in breach of a prior Order.

SLOVAK V CANADA (ATTORNEY GENERAL), 2017 ABQB 761 (MASTER ROBERTSON)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 13.18 (Types of Affidavit)

The Defendants applied to dismiss the Claim against them for long delay, pursuant to Rule 4.33. The Plaintiff, Slovak, argued that it had been less than three years since the Action was significantly advanced, and alternatively as provided by Rule 4.33(2)(b), the Defendants had participated in proceedings since the delay such that the Action should continue.

The Action began in May, 2012, and Questioning occurred on September 16, 2013. After Questioning, counsel communicated occasionally by letter, phone, and email about potential settlement. Then, shortly before September 16, 2016 (three years after Questioning had occurred), there was further communication between counsel, including the provision of a document that the Plaintiff had undertaken to produce three years prior. That document did not contain new information. Master Robertson held that the communication between counsel prior to September 16, 2016, did not significantly advance the Action. The information provided was not new or consequential.

Slovak argued that the term "proceeding" should be interpreted broadly to include the communications, because it is not defined in the Rules. Master Robertson noted that the word "proceedings" was not defined in the Rules, and held that counsel had not "participated" in any "proceedings" as contemplated in Rules 4.31(2)(b) and 4.33, when they communicated about settlement after the three-year period had passed. The word "proceedings", in this context, should be interpreted to refer to activity that significantly advances the Action which did not occur in this case.

Master Robertson considered whether it was appropriate for Slovak to swear an Affidavit in response to the Application. The Defendants argued that Slovak did not have personal knowledge of the steps that were taken by his counsel. Master Robertson noted that Rule 13.18 allows an Affidavit to be sworn on the basis of belief; only sub-rule 13.18(3), which refers to Affidavits "used in support of an application that may dispose of all or part of a claim" requires personal knowledge. As such, Slovak was an appropriate deponent.

The Action was dismissed for long delay pursuant to Rule 4.33.

CHAK V SUN MEDIA CORPORATION, 2017 ABQB 614 (MASTER SCHLOSSER)
Rule 4.33 (Dismissal for Long Delay)

The Defendants applied to dismiss the Plaintiff's defamation Claim for long delay, pursuant to Rule 4.33. Master Schlosser noted that Rule 4.33(2) or (5) did not apply "so as to suspend the running of the drop-dead period".

Master Schlosser noted that a related event in another Action, must be "legally or factually determinative of an issue in the primary action", to be considered an advancement in the Action for the purposes of Rule 4.33. The Plaintiff argued that his Action and a number of other ongoing defamation lawsuits were linked, though the parties were not the same in each.

Master Schlosser observed that Rule 4.33 deals with the timing of an Action, not the merits; and the Rule is a "bright-line rule". As such, Master Schlosser dismissed the Action for delay.

BENCHMARK CONSTRUCTION & DEVELOPMENTS LTD V BRENNAN, 2017 ABQB 633 (SHELLEY J)
Rule 4.33 (Dismissal for Long Delay)

Some of the Defendants by Counterclaim successfully applied to a Master to have the Counterclaim against them dismissed pursuant to Rule 4.33. The Plaintiffs by Counterclaim appealed the Master's Decision, arguing that their prior Application to have the Plaintiff's builders' lien vacated significantly advanced the Counterclaim Action.

Shelley J. referred to prior authorities and noted that determining whether there had been a significant advance in an Action requires a functional approach, which

considers whether the step in question moves the lawsuit forward, with a focus on substance rather than form.

Although Justice Shelley noted that the *Builder's Lien Act* RSA 2000, c B-7 can affect the procedures to be followed in litigation, in this case the Plaintiff did not take any action within the time limits set out in the *Builder's Lien Act*. Therefore, discharge of the Lien did not advance this Action because the Lien was not in any way affecting the conduct of the Action. The Application to discharge the lien after it expired was successful due to the Plaintiff's inaction. Shelley J. dismissed the Appeal.

DIRECT HORIZONTAL DRILLING INC V NORTH AMERICAN PIPELINE INC, 2017 ABQB 653 (MASTER SMART)
Rule 4.33 (Dismissal for Long Delay)

The Defendant applied to dismiss the Plaintiff's Claim on the basis of long delay, pursuant to Rule 4.33. In their Agreed Statement of Facts, the Parties agreed that more than three years had passed without a significant advance in the Action, Master Smart stated that the Action must be dismissed unless an exceptional Rule applied.

The Plaintiff argued that two exceptions did apply: there was an express agreement to delay, pursuant to Rule 4.33(1)(a), and there was a significant advance in a parallel "inextricably linked action". The Plaintiff, following the Defendant's filing its Statement of Defence and Counterclaim, sought agreement that the Defendant would not take any adverse steps in respect of the Counterclaim without prior written reasonable notice. The Court held that extending this "usual courtesy" did not mean that the parties had expressly agreed to delay, as envisioned by Rule 4.33. Additionally, in this case the "usual courtesy" was extended in respect of a Counterclaim, without any suggestion that the Plaintiff was not required to move forward its Claim.

Master Smart explained that a significant advance in another action may constitute a significant advance in the primary action if the secondary action is "inextricably linked" to the primary action. The Court should consider four factors to determine whether such an inextricable link exists: (1) if the related action would be "legally or factually determinative" of the issues in the primary action; (2) if the issues in the related action would be "relevant and binding" in the primary action; (3) if the related action materially advanced the primary action, and (4) if the decision in the related action could be a "barrier in law" to the Court's adjudication of the primary action. In this case, Master Smart held that the two Actions commenced by the Plaintiff were distinct, even though the assertions raised by the Defendants in the Defences and Counterclaim were identical. Though there was a "clear and identifiable link" between the two Counterclaims, their determinations would not "advance the claims … for amounts alleged to be due to [the Plaintiff] … in either Action". Master Smart held that it was not necessary to consider the sufficiency of the material filed in opposition to the Application for Summary Judgment in the parallel Action. The Plaintiff's Claim was dismissed pursuant to Rule 4.33.

Master Smart noted that, while the Defendant sought Costs on an indemnity basis, there was no evidence to support such a Decision. Costs were awarded pursuant to Column 5 of Schedule C.

MCKAY V PROWSE, 2017 ABQB 694 (MASTER SCHULZ)
Rules 4.33 (Dismissal for Long Delay) and 5.10 (Subsequent Disclosure of Records)

The Plaintiff commenced an Action in 2009 against his counsel for breach of contract and breach of duty of care relating to a patent infringement. The Plaintiff served an Affidavit of Records and a Supplemental Affidavit of Records in 2010, a response to a Notice to Admit on July 12, 2013, and a second Supplemental Affidavit of Records on November 13, 2015. The Defendants filed an Application to dismiss for delay pursuant to Rule 4.33 on November 24, 2016.

Master Schulz reviewed Rule 4.33 and the Court's functional approach to Applications pursuant to Rule 4.33. Master Schulz stated that the Court must determine if there has been a "significant advance in the action that actually moves the lawsuit forward in a meaningful way considering

its nature, value, importance and quality". The Court should consider "the substance of the step taken and its effect on the litigation, rather than on its form".

Master Schulz noted that, with respect to production of documents in the context of Rule 4.33, disclosing newly-found records as required by Rule 5.10 is obligatory but not a discrete procedural step. The analysis under Rule 4.33 requires consideration of whether the additional records narrow the issues or move the matter closer to resolution. Upon a review of the records which were produced in the November 13, 2015 Affidavit, Master Schulz determined they did not advance the Action.

The Plaintiff argued that there had been settlement discussions which had advanced the Action. Master Schulz stated that unsuccessful settlement discussions which do not narrow the issues, or which do not obtain agreement on some factual issues such as quantum or liability, do not significantly advance the Action for the purposes of Rule 4.33. Master Schulz noted that counsel engaging in settlement discussions must keep a watchful eye on the requirement of the *Rules of Court*.

In the result, the Application was granted and the Action was dismissed pursuant to Rule 4.33.

KEHEW CONSTRUCTION LTD V KEHEWIN CREE NATION, 2017 ABQB 763 (MASTER SCHLOSSER)
Rule 4.33 (Dismissal for Long Delay)

Kehewin Cree Nation's ("Kehewin") unsuccessfully applied to strike for long delay pursuant to Rule 4.33 ("first delay Application") and then appealed. The Court held in the first delay Application that the last significant advance was on November 5, 2014. With an Appeal pending and no stay in place, Kehewin applied again for dismissal for delay as three years had passed from November 5, 2014 ("second delay Application"). The return date for Kehewin's second delay Application was six months prior to the hearing of the Appeal. Kehew Construction Ltd ("Kehew Construction") applied for a procedural Order seeking, among other things, an Order that time be suspended from the date of the second delay Application until the determination of the second delay Application.

Master Schlosser considered whether the time between the date of a Rule 4.33 Application and the date of the hearing count as delay. Referring to prior leading authority, Master Schlosser noted that the proceedings should be examined as at the date of the Application, and the time between the date of the Application and the hearing should not count. Master Schlosser also considered whether the time between the Application and date of the Court's Decision counted for the purposes of a delay Application under Rule 4.33. Master Schlosser held that the time should not count towards a calculation for delay in this case. There was effectively a standstill in place from the date of the Notice of Application to the date of the Court's Decision.

As a result of the findings with respect to the elapsed time, Master Schlosser held that the Action should not be put on hold pending Appeal.

STEWART V TIMBER BEAR DEVELOPMENTS LTD, 2017 ABQB 594 (MASTER WACOWICH)
Rules 5.1 (Purpose of this Part), 5.2 (When Something is Relevant and Material), 5.17 (People Who May be Questioned) and 5.18 (Persons Providing Services to a Corporation)

This was an Application to compel further and better records, to compel witnesses to attend Questioning, and to compel answers to Undertakings. The underlying Action was with respect to a share purchase agreement between the Plaintiff, as vendor, and the Plaintiff's brothers, as purchasers. The dispute chiefly concerned the interpretation of an option clause in the agreement which had been changed during the course of negotiation of the sale.

The Plaintiff sought to compel one of the Defendants to re-attend Questioning for a third time, but provided no authority to do so and very limited arguments why such an Order should be made. Master Wacowich noted that Rule 5.1 dictates that the purpose of Questioning is to narrow the issues in dispute and to discourage conduct which

unnecessarily lengthens the proceedings. Given that the issue in dispute was narrow, specifically the interpretation of one clause of the agreement, Master Wacowich held that the Defendant being compelled to attend Questioning for a third time did not achieve the objectives under the Rules and declined to make the requested order.

The Plaintiff also sought to compel an accountant who had provided services to the corporation to attend Questioning pursuant to Rule 5.17 or 5.18, and sought full access to the accountant's records. The Plaintiff argued that the accountant was an "auditor" under the meaning of Rule 5.17(1)(e). Master Wacowich ruled that, while the accountant may be an auditor, ultimately the evidence sought to be gained was not relevant and material pursuant to Rule 5.2, as it would not "significantly help determine one or more of the issues in the pleadings".

The Master also held that Rule 5.18 was not satisfied in respect of the accountant, as the evidence sought to be obtained was already the subject of Undertakings requested of an officer of the Defendant corporation. Consequently, the Questioning would only cause additional expense and delay. The Master noted that unrestricted access to discovering non-parties to the litigation leads to "discovery abuse, increased costs, delay and unfairness to the non-parties", and therefore also applied Rule 5.1 to bar the Questioning.

Finally, the Master determined that the Undertakings sought to be compelled by the Plaintiff were either satisfied or were not relevant. Master Wacowich therefore dismissed the Application in its entirety.

STRINGAM DENECKY LLP V SUN MEDIA CORPORATION, 2017 ABQB 687 (BROWNE J)
Rules 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

The Plaintiff law firm commenced a defamation Action against the Defendant media corporation and two individual employees of the media corporation following the publication of three editorials. Master Schlosser granted the Plaintiff's Application compelling the Defendant newspaper columnist to answer questions that would reveal the identity of his source. The Defendants appealed.

Browne J. referred to Rules 5.2 and 5.25 and leading authorities, and noted that the Defendant was only required to answer questions that were relevant and material. When considering what was relevant and material, Justice Browne noted prior leading appellate authority which provided that "relevance is primarily determined by the pleadings, whereas materiality relates to whether the information can help, directly or indirectly, to prove a fact in issue".

Justice Browne reviewed the pleadings and evidence and determined that information regarding the source's identity was not relevant and material. Whether the source acted with malice was irrelevant to whether the Defendants had acted with malice as there was no indication that the Defendant columnist was aware of, or influenced by his source's motives. Additionally, the reliability of the source was not relevant as it was not related to the reliability of the allegations in the Affidavit. Because of the Court's conclusions on relevance and materiality, it was unnecessary to consider the further issue of journalist-source privilege. Browne J. granted the Appeal.

SCOTT & ASSOCIATES ENGINEERING LTD V GHOST PINE WINDFARM, LP, 2017 ABQB 626 (JONES J)
Rules 5.12 (Penalty for Not Serving Affidavit of Records) and 7.3 (Summary Judgment) and Schedule C

The Plaintiff, after a bidding dispute, sought a constructive trust over an engineering project and lands associated with the project. The Defendants applied for Summary Dismissal of the Action and the Plaintiff cross-applied for Costs on the basis that four of the Defendants filed their Affidavits of Records late, and for thrown away Costs for time spent reviewing documents that were inadvertently disclosed by one of the Defendants.

Jones J. noted that a number of issues in the Parties' Applications had been resolved in separate proceedings in which the Court held that the Plaintiff did not have an interest in the lands. On the basis of that Decision, Jones J. dismissed the Plaintiff's claims relating to lands and for

knowing receipt of trust property. His Lordship considered whether the Plaintiff's claims for breach of confidence and unjust enrichment should also be summarily dismissed. Jones J. noted that the Court may grant Summary Dismissal if there is no genuine issue requiring a Trial, and if the Court is able to make necessary factual findings and apply the law to those facts justly and fairly. Similarly, Summary Dismissal is appropriate where the facts and law are uncontroverted, and where it is very unlikely that the Plaintiff could succeed. Justice Jones held that key elements of both the breach of confidence and unjust enrichment claims had not been established, and dismissed the claims.

Jones J. considered the Plaintiff's Application for double Costs on Column 5, because some of the Defendants' Affidavits of Records had been served days late. Jones J. noted that Rule 5.12, which allows the Court to impose a penalty for Affidavits of Records that are served late, is "less punitive" than the former Rule 190 which reflected "a shift away from the mandatory language of double costs to a more permissive, discretionary determination with respect to costs". The Plaintiff sought Costs under Column 5 but Jones J. held that the Plaintiff's Claim did not specify a dollar amount; instead, it claimed for "constructive trust, accounting for profits, or damages". As such, the Court awarded double Costs as set out in Column 1 of Schedule C, totalling $1,000.

In respect of the Plaintiff's Application for "thrown away costs" of more than $25,000, comprising 110 hours spent reviewing documents inadvertently disclosed to his Counsel, Justice Jones accepted that additional work was performed as a result of the Defendants' error, but did not agree that 110 hours were spent. The Court awarded Costs of $10,000.

MANOLAKOS V MANOLAKOS, 2017 ABCA 390 (FRASER, MCDONALD AND MARTIN JJA)
Rule 5.13 (Obtaining Records from Others)

The Appellant, Ms. Manolakos appealed a Decision by the Case Management Judge, who declined to compel production of documents by non-parties, or to order that the non-parties answer certain interrogatories.

The Appeal was allowed in part. The Court observed that the Appellant sought production of the documents in order to establish which assets were matrimonial assets, but not to attack the Respondent's credibility. The Court confirmed that ordering non-parties to produce documents pursuant to Rule 5.13 does not require exceptional circumstances, and non-parties may be subpoenaed to give evidence at Trial and to attend with the requested documents in hand. The Court observed that discovering documents at that late stage may lead to delay. The Court was satisfied that there was a sufficient factual foundation to meet the requirements of Rule 5.13, and ordered that the documents be produced.

The Court of Appeal noted that the question of whether a Case Management Judge has the jurisdiction to order non-parties to answer interrogatories was not raised before the Case Management Judge, nor was the issue argued at the Appeal. As a result, the Court declined to order that the non-parties answer the interrogatories.

SECURE 2013 GROUP INC V TIGER CALCIUM SERVICES INC, 2017 ABCA 316 (BERGER, MCDONALD AND STREKAF JJA)
Rules 6.4 (Applications Without Notice), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

The Plaintiffs applied *ex parte* to the Court of Queen's Bench for a Mareva Injunction and attachment Order against four individuals and seven corporate entities, and six Anton Piller Orders against some of the same parties and three third party providers (the "Orders"). The Orders were granted. The Action was then transferred from Calgary to Edmonton. The Defendants challenged the Orders before a Justice in Edmonton who held that the Defendants would have to challenge the Orders by way of an Appeal.

The Court of Appeal held that Anton Piller Orders and Mareva Injunctions are governed by Rule 6.4(b). As a result, a party seeking an *ex parte* Anton Piller order or a Mareva injunction has a duty to disclose all detrimental facts, and no relevant adverse information may be withheld.

The Court determined that the Court below erred in stating that *ex parte* orders must be challenged by way of an Appeal. Rule 9.15 should be read in conjunction with Rule 9.16, which states that Applications to vary or discharge a Judgment or Order must be decided by the Justice who heard the original Application. However, in this case, the venue changed from Calgary to Edmonton, which made it difficult for the original Justice to hear the Application. As a result of the change of venue, the Court held that the appropriate forum to address concerns with the *ex parte* Orders was the Court of Queen's Bench. Absent exceptional circumstances, the Court of Appeal would not hear an Application to vary or discharge an Order granted *ex parte*. The Orders were overturned, with the exception of two Mareva Injunction/attachment Orders which were not the subject of the Appeal.

ATM CASH SYSTEMS (CANADA) LTD V VANSHAW ENTERPRISES LTD, 2017 ABQB 622 (MASTER ROBERTSON)
Rules 6.6 (Response and Reply to Application) and 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment against a number of the Defendants (the "Respondents"), claiming breach of contract and that liquidated damages were payable to the Plaintiff. The Respondents did not deny that there was a breach of contract, but argued that the Summary Judgment Application was premature.

The Respondents argued that the Plaintiff had failed to produce certain documents which would show that that there was a conspiracy between the Plaintiff and the other Defendants. The Plaintiff initially refused to produce the documents, but following the hearing of the Application the Plaintiff provided the documents outside of an Affidavit. The Plaintiff insisted that there be no Questioning on the documents, to which the Respondents objected. Master Robertson held that the documents were not properly in evidence, and even if they had been submitted in an affidavit, Rule 6.6(3) provides that if the party trying to rely on the evidence does not give reasonable notice, that party is not entitled to rely on the evidence unless the Court so permits. Therefore, the Plaintiff was not entitled to rely on the evidence. Master Robertson also noted that all of the parties were in violation of Practice Note 2.

Master Robertson decided the Application as though the documents had not been provided at all, and determined that allowing Summary Judgment would be premature since the impugned documents were likely relevant and material. Master Robertson dismissed the Application and noted that if the documents were properly produced, the Plaintiff was entitled to apply again for Summary Judgment.

EXCHANGE-A-BLADE LTD V BER-ZEL BUILDING MATERIALS LTD, 2017 ABQB 648 (MASTER ROBERTSON)
Rule 6.6 (Response and Reply to Application) and Schedule C

The Plaintiff sued the Defendants for conspiracy, breach of non-competition agreements, and wrongful solicitation of the Plaintiff's business opportunities. Three of the Defendants (the "Radkie Defendants") applied to sever the Claims against them from the other three Defendants (the "Storteboom Defendants"), and for a change of judicial centre. The Storteboom Defendants applied for further particulars.

The afternoon before the hearing, which had previously been adjourned for three weeks, the Plaintiff served a 111 page Affidavit on the Defendants. The Defendants argued that the Court should disregard the Affidavit for contravening Rule 6.6(1), or that Costs should be imposed pursuant to Rule 6.6(3). Master Robertson dismissed the Defendants' Applications and noted that ordinarily, each group of Defendants would pay half the Plaintiff's Schedule C Costs. However, in this case due to the Plaintiff's service of a lengthy Affidavit at the last minute which may have resolved the Applications, and because counsel for the Radkie Defendants had to travel to Calgary from Edmonton for the Hearing, Master Robertson awarded to each group of Defendants half the costs for a contested Application under Schedule C, plus $50 each for filing fees, plus all the reasonable travel costs for counsel for the Radkie Defendants.

PLAMONDON V PLAMONDON, 2017 ABQB 672 (KHULLAR J)
Rule 6.8 (Questioning Witness Before Hearing)

The Defendant applied pursuant to Rule 6.8 to compel the Plaintiff, Ms. Plamondon's former legal counsel to answer written questions. Ms. Plamondon objected to the Application on the basis of solicitor and client privilege. The Defendant argued that Ms. Plamondon had waived privilege by deposing to her conversations with her former counsel in an Affidavit which was filed in response to the Defendant's Application to declare the Plaintiff in contempt.

Justice Khullar noted that the Application pursuant to Rule 6.8:

> …is similar to a subpoena *duces tecum* and that a party wishing to examine a witness must establish that the evidence from the witness may be relevant and material in order to compel the witness to attend. The onus is then on the witness to object as to why he or she does not have to attend.

The Court reviewed the Affidavit in issue and found that it contained four paragraphs related to the Plaintiff's knowledge of events relevant to the Defendant's contempt Application, and those four paragraphs contained information about the Plaintiff's conversations with her counsel. On that basis Khullar J. concluded that the Plaintiff had waived privilege with respect to the communications with her former counsel, but the waiver extended only to the particular topics of conversation set out in the Affidavit. Justice Khullar noted that the Defendant's questions were "broad and inappropriate". As such Her Ladyship allowed the Application and permitted only a narrow line of questions for the Plaintiff's former counsel.

LNR V MOUNTVIEW PHARMA CORP, 2017 ABQB 730 (PHILLIPS J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The individual Plaintiff and her corporation commenced an Action against the Defendants, a pharmacy and pharmacist, alleging professional negligence in dispensing one generic form of the Plaintiff's hair loss medication, rather than the form of drug previously dispensed. The Defendants applied for Summary Dismissal on the basis that they were protected from liability by section 6(2) of Schedule 19 to the *Health Professions Act*, RSA 2000, c H-7 (*"HPA"*). Master Farrington denied the Application and the Defendants appealed.

Justice Phillips reviewed recent case law on the test for Summary Judgment pursuant to Rule 7.3 and confirmed that Summary Judgment should be granted where a disposition that is fair and just to both parties can be made on the existing record, but that a full Trial will be required where the Court is not confident that the matter can be fairly decided on the record "where legal issues are unsettled, complex or intertwined with facts".

Phillips J. held that the legal and factual issues were too intertwined to be fairly decided summarily, and that the law regarding the relevant sections of the *HPA* was unclear. Thus the dispute regarding the appropriate statutory interpretation should be decided with the benefit of a full record. The Appeal was dismissed.

ALBERTA TREASURY BRANCHES V EXALL ENERGY CORPORATION, 2017 ABQB 602 (NIXON J)
Rules 7.2 (Application for Summary Judgment) and 7.3 (Summary Judgment)

The Defendant, Exall went into receivership, and following the sale of its assets, an amount was held as security for creditors' or lienholders' Claims against the Defendant. Some of the creditors and lienholders applied to release the amounts held as security with each of the creditors or lienholders claiming that they had priority with respect to payment.

Nixon J. considered whether two of the prior lienholders whose liens had been discharged should have their Claims summarily dismissed. Justice Nixon reviewed the leading authorities and stated that pursuant to Rule 7.3, an Applicant is entitled to Summary Dismissal if there is no merit to a Claim or part of it. Nixon J. determined that the

Claims of the two prior lienholders could be determined summarily since the evidence surrounding these Claims consisted only of records, and Rule 7.2(b) provides that an Affidavit is sufficient to prove the authenticity of records it contains. Nixon J. found that no *viva voce* evidence was necessary in this case and, in addition to determining how the amount of security should be distributed, summarily dismissed the prior lienholders' Claims for part of the security amount.

CHIEF CONSTRUCTION COMPANY LTD V ROYAL BANK OF CANADA, 2017 ABQB 589 (MASTER PROWSE)
Rules 7.3 (Summary Judgment) and 9.32 (Offer for Sale of Secured Property)

In a claim for breach of contract and negligence, the Plaintiff construction company applied for Summary Judgment, and the Defendant bank cross applied for Summary Dismissal. The Plaintiff had purchased a property following foreclosure proceedings that were commenced by the Defendant, who was the lender on the property. The Plaintiff argued that it did not receive the benefits of the property under the Court Order approving the sale of the property to the Plaintiff. Master Prowse noted that lenders such as the Defendant will generally commence foreclosure proceedings and will ask that the property be sold under the Court's authority pursuant to Rule 9.32(1), which allows the Court to offer a secured property for sale at a time, place, in a manner and at a price that Court considers appropriate.

Master Prowse held that the Plaintiff's right to obtain a real property report from the Defendant had been breached, and therefore held that the Plaintiff was entitled to Summary Judgment in the amount of $3,245. However, Master Prowse held that the Plaintiff's remaining claims, including claims with respect to obtaining possession of the property in substantially the same condition as it was in when its offer was accepted, and to have the risk of loss or damage lie with the seller until the purchase price was paid, could not be determined because the evidence was not sufficiently clear. Master Prowse therefore concluded that the remaining claims for breaches of contract and in negligence should proceed to Trial. The Plaintiff's Application for Summary Judgment was therefore dismissed. Master Prowse dismissed the Defendant's Cross-Application for Summary Dismissal.

BUSSEY SEED FARMS LTD V DBC CONTRACTORS LTD, 2017 ABQB 598 (MASTER ROBERTSON)
Rule 7.3 (Summary Judgment)

The Plaintiffs commenced an Action against the Defendant following the termination of a lease agreement which allowed the Defendants to lease lands and remove gravel from the lands upon payment of a royalty to the Plaintiffs. The Plaintiffs claimed that royalty payments were owed. The Defendant contractors counterclaimed for damages resulting from being ejected from the lands. The Plaintiffs applied for Summary Judgment.

Master Robertson noted that Rule 7.3 allows the Court to grant Summary Judgment to an applicant if there is no defence to a claim or a part of a claim. Master Robertson held that the lease in question was not ambiguous, and that the Plaintiffs' silence for nearly two years while the Defendants' default accumulated did not give rise to an estoppel. The Defendant argued that the Claim and Counterclaim should be tried together because there could be a set-off of damages. Master Robertson noted that the Defendant had failed to provide any evidence to support their Counterclaim for damages, therefore there was "no reason not to grant judgment for that which has been shown to be owing".

The Application was allowed and Judgment was granted.

RAINMAKERS MARKETING GROUP INC V AS AMERICA INC, 2017 ABQB 624 (MASTER MASON)
Rule 7.3 (Summary Judgment)

The Plaintiff was the exclusive distributor of the Defendants' plumbing fixtures in Alberta. Both parties asked the Court to approve its interpretation of a contract for sales commissions and grant Summary Judgment.

Master Mason reviewed prior leading authorities and noted the test for Summary Judgment was whether there is any issue of merit that genuinely requires a Trial or, on the other

hand, whether the Claim or Defence is "so compelling that the likelihood it will succeed is very high such that it should be determined summarily". The Court may also examine the existing record to determine if it can make a disposition that is fair and just to both parties.

In this case, the parties agreed that the issue was appropriate for summary determination. Master Mason noted that contractual interpretation questions are often appropriate for summary procedure, and considered the factual matrix and language of the contractual clause at issue. In the result, Master Mason granted Summary Judgment in favour of the Plaintiff.

WHISSELL CONTRACTING LTD V CALGARY (CITY), 2017 ABQB 644 (MACLEOD J)
Rule 7.3 (Summary Judgment)

The Plaintiff, Whissell Contracting Ltd. applied for partial Summary Judgment against one of the Defendants, SNC-Lavalin ("SNC") in an Action related to construction of a light rail transit line in Calgary.

Macleod J. noted that Rule 7.3 provides that Summary Judgment may be granted where there is no defence to a Claim or part of it, and that Summary Judgment ought not to be denied on the basis that the evidence discloses a triable issue. Rather, Justice Macleod emphasized that the question is whether there is a question of merit that *requires* a Trial, or, whether the Claim is so compelling and its likelihood of success so high that it should be determined summarily.

Following a detailed consideration of the evidence before the Court, including whether the evidence showed that the contractual relationship between the parties was sufficiently clear to permit Summary Judgment, Macleod J. held that the record was insufficient to support Summary Judgment. The Application was dismissed.

STEER V MAWJI, 2017 ABQB 762 (MASTER PROWSE)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiffs commenced an Action following their purchase of a newly constructed home from the Defendant builder and the building company's principal. The Plaintiffs claimed that there were defects in the home, and alleged negligence with respect to the construction of the building, and a breach of the representations and warranties contained within the purchase contract.

The Plaintiffs adduced evidence in an Affidavit with respect to the presence of mould in the home which consisted of a lab report and a physician's report. Master Prowse held that these records were hearsay, and were inadmissible in an Application for Summary Judgment pursuant to Rule 13.18(3).

The individual Defendant attested that he had no knowledge of any facts which rendered the property dangerous or unfit for habitation. Master Prowse noted that in an Application for Summary Judgment, the Respondent's evidence is presumed to be true for the purposes of the Application only. Given the individual Defendant's assertion, the Plaintiff's Claim for breach of contract therefore could not succeed on an Application for Summary Judgment. Master Prowse held that a determination could not be made regarding the Defendants' negligence in the absence of expert evidence.

The Plaintiffs' Application for Summary Judgment was dismissed.

COLE V BROWER, 2017 ABQB 766 (JERKE J)
Rule 7.3 (Summary Judgment)

The Plaintiff sued the Defendant lawyer for negligence in preparation of a matrimonial property agreement and her ex-husband's Will. The Plaintiff also sued her ex-husband's estate and the Personal Representative thereof, seeking rectification of the matrimonial property agreement and Will, and other equitable relief. The Defendants applied for

Summary Dismissal of the Plaintiff's claims against them, arguing that the claims were barred by the *Limitations Act*, RSA 2000, c L-12.

Justice Jerke referred to leading authorities on the interpretation of Rule 7.3 and determined that an examination of the existing record could lead to a fair and just disposition of most of the claims, specifically the claims in negligence and those for rectification. However, the equitable claims could not be decided fairly on the record, and in any case the Defendants did not seriously argue that the equitable claims were barred. As a result, Jerke J. granted the Application for Summary Dismissal of the negligence claims and rectification claims, but declined to dismiss the equitable claims.

PRECISION DRILLING CANADA LIMITED PARTNERSHIP V YANGARRA RESOURCES LTD, 2017 ABCA 378 (PAPERNY, O'FERRALL AND VELDHUIS JJA)
Rule 7.3 (Summary Judgment)

This case arose out of a dispute about "knock for knock" or "no-fault" provisions in a contract between the parties that purported to exclude or limit liability of the Respondent ("Precision") driller for the failure of the Appellant's ("Yangarra") well. A Master had granted Summary Judgment to Precision finding that Yangarra's set-off Defence and Counterclaim were barred by the no-fault clause of the contract. The Master's Decision was upheld on Appeal to a Justice of the Court of Queen's Bench. Yangarra appealed to the Court of Appeal.

The Court noted that Rule 7.3 allows a party to apply for Summary Judgment when there is no defence to a claim, or part of it, and that "[t]here will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits". Yangarra argued that Precision's conduct amounted to fraudulent misrepresentation and that the Court below neither identified nor applied the proper test for fraud. The Court noted and followed recent appellate authority with respect to evidentiary matters in a Summary Judgment Application:

> … The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are difficult questions of fact or law that cannot fairly be resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

The Court assessed the available evidence with respect to fraud, and considered whether the Court of Queen's Bench applied the proper test for fraudulent misrepresentation. The Court of Appeal, Paperny J.A. dissenting, overturned the Court of Queen's Bench Decision, and held that a Trial Judge would be in the best position to assess whether the evidence with respect to the allegations of fraud would "warrant the intervention of public policy".

OOMMEN V CAPITAL REGION HOUSING CORPORATION, 2017 ABCA 360 (CRIGHTON JA)
Rules 9.4 (Signing Judgments and Orders), 14.5 (Appeals Only With Permission), 14.8 (Filing a Notice of Appeal) and 14.88 (Cost Awards)

The Plaintiff, Oommen's Claim was struck due to a failure to purge his contempt. Oommen filed his Notice of Appeal late, and then applied for leave to extend the time to Appeal, which Application was dismissed. Oommen applied, pursuant to Rule 14.5(1)(a) for permission to appeal the dismissal of an extension of time to a full panel of the Court of Appeal.

Crighton J.A. noted that by virtue of Rule 14.8(2)(a)(iii), an Applicant has one month after the date of the Decision to file his Notice of Appeal but Oommen had failed to do so. Justice Crighton stated that, in order to succeed on an Application to Appeal a decision of a single Court of Appeal Justice to a full panel, the Applicant must demonstrate that a) the question is of general importance; b) there was a possible error of law; c) there was an unreasonable

exercise of discretion; or d) there was a misapprehension of important facts. Crighton J.A. considered the factors as they related to this matter, and dismissed Oommen's Application stating that the Appeal had no prospect of success.

Justice Crighton held that the Respondent was entitled to reasonable costs under Rule 14.88(1), and invoked Rule 9.4(2)(c) which provides that the opposing party need not approve the form of Order prior to entry.

MCAP SERVICE CORPORATION V PATTERSON, 2017 ABQB 742 (MASTER SCHLOSSER)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiff applied to open up a final Order for foreclosure. The subject property had been listed for a 6-month redemption period, in which it was neither redeemed nor sold. The Defendants were a father, who had co-signed for the mortgage, and his daughter, the other co-signor, who was the occupant of the house along with her husband. After the Plaintiff mortgagee took possession, it noticed that the Defendants had removed or destroyed significant portions of the house before vacating it. The Plaintiff sought to open up the final Order for foreclosure and to seek Judgment for the value of the items removed or for the diminished value of the property.

Master Schlosser noted the Court had three options: 1) to refer the file for prosecution, as stripping a mortgaged house is a criminal offence, and the Plaintiff could then apply for an Order for restitution prior to sentencing; 2) to open up the final Order pursuant to Rule 9.15; or 3) to commence an Action for the tort of waste or theft.

Master Schlosser noted, following prior authorities, that there are two situations where the importance of finality of Judgments overrides the interests of the Plaintiff: 1) where an attempt has been made to take some advantage from the Default Judgment; and 2) where the Judgment has been wholly satisfied. Master Schlosser noted that both situations applied to the present case. Master Schlosser also noted that there would be additional difficulty in opening up the Judgment against one of the Defendants but not the other. The Defendant father had filed evidence stating he had nothing to do with the loss, that he had no knowledge of it, and that opening up the Judgment would be prejudicial, which the Master noted was a relevant factor.

Despite the strong public policy favouring the Plaintiff's position, the Master declined to set aside the Judgment, as the quality of the evidence establishing the loss was insufficient to determine the harm. The Master dismissed the Application with leave to re-apply with fresh evidence, if the Plaintiff elected not to pursue the tort Action.

BRETIN V ROSS, 2017 ABCA 389 (MARTIN JA)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 14.37 (Single Appeal Judges)

The Applicant, Mr. Bretin, sought an extension of time to file a Notice of Appeal respecting a procedural Order granted on August 24, 2017 (the "Procedural Order"). The Applicant had filed the Notice of Appeal three days too late. At the same time, the Applicant also filed an Application, which appeared to the Court to either seek the dismissal of the Respondent's Application filed in the Court of Queen's Bench, or seek the dismissal of the Procedural Order. The Procedural Order set out a number of steps "to get the parties in position for a trial in October 2018".

In March 2014, the Surface Rights Board granted AltaLink Management Ltd. ("AltaLink") a right of entry Order on lands owned by the individual Respondents. The Applicant filed a request for a reconsideration, arguing unsuccessfully that he was in adverse possession of a portion of the lands (the "Adverse Lands"), and objecting to AltaLink's entry. The Applicant obtained an Order subdividing the Adverse Lands despite failing to serve Altalink with his Application, and failing to advise the Court of AltaLink's encumbrance on the lands. A provision was added to the subdivision Order which allowed the Appellant to take the Adverse Lands free and clear of encumbrances. When AltaLink became aware of the subdivision Order in early 2016, it applied to set it aside or vary it pursuant to Rule 9.15(2), and to extend time. The Applicant, applied to summarily

dismiss AltaLink's Application on the basis that it was out of time. The Court of Queen's Bench held that fairness dictated that the issue of whether to vary or set aside the subdivision Order should be heard on its merits, and pronounced the Procedural Order.

With respect to the Applicant's Application to extend the time to Appeal, Martin J.A., referred to prior leading authority, and stated that the Applicant must show: (1) a bona fide intention to Appeal when the right exists; (2) an explanation for the failure to appeal in time, justifying its lateness; (3) that there would not be serious prejudice if the decision was disturbed; (4) that the Applicant did not take benefits from the Judgment under Appeal, and (5) a reasonably arguable Appeal. Justice Martin held that, although the Applicant met the first four criteria, his Appeal had no reasonable chance of success.

Martin J.A. considered the Applicant's Application to dismiss AltaLink's Court of Queen's Bench Application which the Applicant contended was brought out of time, and held that the Applicant had no reasonable chance of success on Appeal. Justice Martin noted that while there was confusion between the parties with respect to the issues, the "sole and common issue" between the parties was "whether it was appropriate to extend time under rule 9.15(2)". Her Ladyship noted that despite the improper service of the subdivision Order by the Applicant on AltaLink, AltaLink still managed to bring its Application under Rule 9.15 in a timely fashion.

Justice Martin held that, because the Applicant's Appeal was bound to fail, it would not be in the interests of justice to extend the time to Appeal pursuant to Rule 14.34(2)(c). The Application was dismissed.

TOLIVER V KOEPKE, 2017 ABQB 686 (MACKLIN J)
Rule 10.4 (Charging Order for Payment of Lawyer's Charges)

During the course of a divorce Action, a total of $125,328.00 was paid into Court, and $12,956.13 remained. Three individuals claimed a right to the funds: (1) the Defendant, Koepke; (2) the lawyer who acted for the Defendant, Thomas Plupek ("Plupek"); and (3) June Koska ("Koska"), a former lawyer who acted as Plupek's agent in the Action. The parties each applied to have the funds held in Court paid to them.

Macklin J. considered Rule 10.4, noting that it is the new version of former Rule 625, and reviewed the leading authorities relating to charging liens and charging orders. Macklin J. observed that charging liens are a creation of the common law, while charging orders are essentially a codification of a charging lien. Charging orders are therefore governed by Rule 10.4. His Lordship stated that charging liens have three requirements: (1) a likelihood that the client will be unable to pay the lawyer's costs; (2) the lawyer has conducted some legal work for the client; and (3) property must have been recovered or preserved through the lawyer's efforts. The Court retains the discretion to decline recognize a charging lien or charging order, and may do so where granting the lien or order would be unfair.

Macklin J. concluded that although Plupek met the requirements necessary to establish either a charging Lien or a charging Order, Plupek was not entitled to such a Lien or Order over the entirety of the remaining funds. Plupek did not represent the Plaintiff throughout the Action and had not recovered or preserved the majority of the funds held in Court. Granting a charging Lien or Order to Plupek over the entirety of the remaining funds would be unfair. Plupek's charging Lien or Order was therefore restricted to the property that he had recovered or preserved; the balance of the amounts held in Court belonged to the Defendant. Koska's Application for payment of the funds was dismissed.

KACHUR ESTATE, 2017 ABQB 786 (NIELSEN J)
Rules 10.28 (Definition of "Party") and 10.33 (Court Considerations in Making Costs Award)

Following a Trial which was held to resolve a number of issues arising out of Applications relating to estate litigation, Justice Nielsen considered whether elevated Costs should be awarded as against the son of the deceased for his conduct during the proceedings.

Nielsen J. directed that the issue of Costs should be dealt with at a later date, but provided the parties with the principles relating to Costs. Nielsen J. noted that, generally speaking, the Rules and principles governing civil litigation apply to estate litigation, including with respect to Costs, and the successful party is therefore presumptively entitled to their Costs. His Lordship noted that the Court has wide discretion with respect to Costs, including whether to award or to refuse a Costs award in estate litigation. In particular, His Lordship noted that Costs may be denied to a successful party or be awarded on an enhanced basis against an unsuccessful party who has engaged in litigation misconduct. Finally, Nielsen J. noted that Rule 10.28 provides that any person participating in proceedings is a "party" and may be made subject to a Costs award. In this case, that included the son, even though he had filed no Applications himself in the Action.

EGM V FDM, 2017 ABQB 788 (NIXON J)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Awards) and 13.5 (Variation of Time Periods)

Following a determination of spousal support in a matrimonial Action the husband applied to settle Costs. Justice Nixon considered whether Costs could still be determined by the Court notwithstanding the fact that the 30 days during which the parties could make submissions had expired.

Prior to addressing the issue of timeliness, Justice Nixon confirmed that the Costs of proceedings are at the discretion of the Court, but this discretion must be exercised within certain parameters. The Costs awarded must be reasonable and proper pursuant to Rule 10.31 and the Court may consider the factors listed in Rule 10.33 when making its decision. These factors include the result of the action and the degree of success of each party.

Nixon J. stated that the Court also has discretion pursuant to Rule 13.5 to alter a time period specified in an Order or Judgment. Therefore, the 30-day period set by the Court for the parties to make submissions on Costs was not dispositive of the matter. Referring to jurisprudence, Nixon J. confirmed that a successful party should only be precluded from seeking Costs if the other party has "suffered substantive prejudice". As there was no such prejudice in this case, Justice Nixon awarded Costs to the husband in the amount of $2,500.

TAYLOR V PERKINS, 2017 ABQB 576 (SULLIVAN J)
Rule 10.33 (Court Considerations in Making Costs Award)

Following the Application for the Appointment of a guardian and trustee for a dependent adult which was successfully opposed by the dependent adult and his father (the "Respondents"), the Respondents sought Costs from the Applicants, the dependent adult's mother and aunt.

The Applicants submitted that each party should bear their own Costs. The Respondents each sought full indemnity Costs due to the Applicants' conduct. To determine the Costs payable to the Respondents, Justice Sullivan considered Rule 10.33(1) and (2), and prior judicial authority, and concluded that the "modern rule" to Costs in estate litigation applied in the circumstances. Specifically, that the principles which apply to Costs awards in civil litigation are similar to those in estate litigation. Sullivan J. awarded Costs and disbursements to the dependent adult in the amount of $7,000 and to the father in the amount of $4,000.

1985 SAWRIDGE TRUST V KENNEDY, 2017 ABCA 368 (SLATTER JA)
Rules 10.50 (Costs Imposed on Lawyer) and 14.5 (Appeals Only With Permission)

The Applicant, Kennedy, who was prior counsel for some of the Plaintiffs sought leave to appeal a Case Management Judge's Order holding her personally liable for solicitor client Costs. The Case Management Judge had found the Application filed by Kennedy on behalf of her clients to be "unfounded, frivolous, dilatory or vexatious" and "a serious abuse of the Judicial System".

Slatter J.A. noted that appeals from decisions which only relate to Costs require permission pursuant to Rule 14.5(1)(e). To obtain permission to appeal a Costs award,

an Applicant must show 1) an arguable case which has sufficient merit to warrant review by a full panel of the Court of Appeal; 2) issues of importance to the parties and generally; 3) the Costs Appeal has practical utility; and 4) no delay in proceedings will be caused by the Costs Appeal.

Justice Slatter noted that appeals on the details of Costs awards are "rarely appropriate" but may be justified where the Costs award "raises more general issues, or issues of principle, or large sums are involved". His Lordship stated that where an individual has been subject to an "out of the ordinary costs award" they will often have a legitimate basis for Appeal, and that where there is doubt, permission to Appeal should be granted.

Slatter J.A. noted that with respect to the element requiring a good arguable case, the underlying consideration is whether the issues involved are important enough that a full panel of the Court should hear and determine the Appeal on its merits. This element does not warrant consideration of whether the Appeal is likely to succeed. Justice Slatter observed that there is no direct Appellate authority concerning Rule 10.50, and that issues concerning its application are important both to the Applicant and to the legal community more generally. Justice Slatter also found that the sums involved were quite large. Permission to Appeal was granted.

ENVACON INC V 829693 ALBERTA LTD, 2017 ABQB 623 (ROOKE ACJ)
Rule 10.52 (Declaration of Civil Contempt)

The Plaintiff, Envacon Inc. ("Envacon") applied to have the Defendant, 829693 Alberta Ltd. ("829 Ltd.") held in Contempt of Court for failure to produce financial records as required by Court Order. Envacon sought to have 829 Ltd.'s Statement of Defence struck as a remedy.

Associate Chief Justice Rooke noted that Rule 10.52 governs contempt and the four elements required to establish contempt that an applicant must prove beyond a reasonable doubt are whether: (1) there is a Court Order requiring action by the respondent party; (2) the respondent party has had notice of the Court Order; (3) the respondent party is guilty, through its directors, of an intentional act or failure to act that constitutes a breach of a Court Order; and, (4) on a balance of probabilities, the respondent party has breached the Court Order without adequate excuse.

The Respondent did not challenge that there were Court Orders requiring it to disclose financial records, and that it had notice of the Court Orders. However, the Respondent argued that it was not in breach of these Orders and furthermore that it had adequate excuse insofar as it failed to produce the required financial records. A.C.J. Rooke held that 829 Ltd. was in breach of the Order, and with respect to an adequate excuse, the Respondent was merely "going through the motions" as opposed to making a genuine attempt to comply with a Court Order. There was therefore no justification for the breach and 829 Ltd. was held in contempt.

A.C.J. Rooke noted that striking pleadings is discretionary and is only appropriate when the breach of a Court Order prevents the other party from defending (or prosecuting) an Action, or where the breach flaunts an Order, or demonstrates a persistent failure to obey. His Lordship also observed that a party in contempt cannot be given infinite chances to comply. A.C.J. Rooke ordered that 829 Ltd.'s pleadings would be struck if the required records were not produced within three months.

WANDLER V CRANDALL, 2017 ABCA 391 (MCDONALD, MARTIN AND CRIGHTON JJA)
Rules 12.68 (Evidence), 12.70 (Powers of Court on Appeal) and 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court)

Following a Trial in which the Provincial Court granted a variance of a parenting Order and allowed the child to move to Ontario with the Respondent, Crandall, the Appellant, Wandler appealed to the Court of Queen's Bench. The Court of Queen's Bench referred to Rule 12.70 and directed that the parties submit affidavit evidence prior to appearing for the Appeal. The Trial Judge's Decision was overturned on the basis that there was no material change is circumstance sufficient to vary the Order. Crandall was granted leave to Appeal to the Court of Appeal.

The Court of Appeal clarified that Rule 12.71(1) provides that no appeal lies to the Court of Appeal from a decision of the Court of Queen's Bench sitting as an Appeal Court for decisions under the *Family Law Act*, SA 2003, c F-4.5 except on a question of law or jurisdiction, or both. The Court noted further that, though Rule 12.68 provides that an Appeal Judge may direct that the parties adduce further evidence, an Application for further evidence must provide some basis for why the *viva voce* evidence at Trial was insufficient, and why additional evidence is necessary. The Court stated:

> Whatever procedure ordered by an appeal judge outside the normal process of an appeal on the record should contain sufficient safeguards and direction to produce a fair and just result.

The Court of Appeal concluded that the Trial Judge made no error. As such, the Appeal was granted and the initial Trial Decision restored.

TEMPLANZA V ISIP, 2017 ABCA 410 (MARTIN JA)
Rules 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court) and 14.5 (Appeals Only With Permission)

The Applicant, Templanza sought leave to Appeal a Court of Queen's Bench Decision related to child support payments rendered under the *Family Law Act*, SA 2003, c F-4.5.

Martin J.A. considered Rules 14.5 and 12.71, and stated that in such an Application, leave to appeal can only be granted on a question of law or jurisdiction. Though Justice Martin noted that the situation deserved sympathy, the Applicant did not raise any issues of law or jurisdiction. The Application for leave to appeal was dismissed.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2017 ABCA 418 (WATSON JA)
Rules 14.1 (Definitions), 14.37 (Single Appeal Judges), 14.57 (Adding, Removing or Substituting Parties to an Appeal), 14.58 (Intervenor Status on Appeal), 14.67 (Security for Costs) and 14.71 (Interlocutory Decisions)

Maurice Stoney unsuccessfully applied to be added as a party or intervenor to an Action along with his sisters and brothers with the aim of being recognized as a beneficiary of a trust. The Application was denied by the Case Management Justice, and Costs were awarded against Mr. Stoney ("Stoney Decision"). The Case Management Justice also awarded Costs against Mr. Stoney's counsel, Ms. Kennedy personally ("Kennedy Decision").

Ms. Kennedy applied for party or intervenor status on the Appeal of the Stoney Decision, arguing that she needed to participate in that Appeal in order to properly challenge the Kennedy Decision. Watson J.A. noted that a single Judge has jurisdiction to permit an intervention pursuant to Rule 14.37(2)(e), and Rules 14.57 and 14.58 distinguish between Applications for status as a party or as an intervenor. Rule 14.1(1)(k) provides the definition for "party" which includes an intervenor.

Justice Watson reviewed the leading Alberta case law on the test for intervenor status and determined that Ms. Kennedy did not meet the test for intervenor status. Turning to the issue of full participation rights, Watson J.A. stated that Ms. Kennedy would only be entitled to participation rights in the Appeal of the Stoney Decision if the results of that Appeal "would have an operative legal effect to cabin or crimp" Ms. Kennedy's ability to argue her Appeal of the Kennedy Decision.

Watson J.A. determined that Ms. Kennedy had no personal interest in how the Appeal of the Stoney Decision proceeded, and justice would not be impaired for Ms. Kennedy or Mr. Stoney if intervenor status was denied. As such, the Application was dismissed.

ET V CALGARY CATHOLIC SCHOOL DISTRICT NO 1, 2017 ABCA 349 (MCDONALD JA)
Rule 14.5 (Appeals Only With Permission)

In a family law Action, the Applicant, E.T. was declared a vexatious litigant and had his Action summarily dismissed. The Applicant applied to the Court of Appeal in two separate Applications seeking permission to appeal the lower Court's Decision to summarily dismiss, and to declare him vexatious.

McDonald J.A. noted that pursuant to Rule 14.5(1)(j) a person who has been declared vexatious in the Court from which they seek to appeal must obtain permission to appeal. Justice McDonald referred to the general test for permission to appeal under Rule 14.5:

(a) There is an important question of law or precedent;

(b) There is a reasonable chance of success on appeal; and

(c) The delay will not unduly hinder the progress of the action or cause undue prejudice.

His Lordship stated that "a vexatious litigant bears the further burden of proving that the appeal is not an abuse of process and there are reasonable grounds for proceeding". Justice McDonald noted that the indicia of abuse of process includes:

> …starting proceedings where the issues have already been decided; actions that cannot possibly succeed; bringing proceedings where no person can reasonably expect to obtain relief; or where the grounds and issues have been rolled forward into subsequent actions and repeated…

McDonald J.A. observed that the material filed by the Applicant was "replete with scandalous, baseless and irrelevant allegations". The Applicant had also started proceedings where the issues had already been decided in favour of the Respondent. In the result, Justice McDonald dismissed both Applications for permission to appeal the Court of Queen's Bench Decisions.

ANGLIN V ALBERTA (CHIEF ELECTORAL OFFICER), 2017 ABCA 404 (VELDHUIS JA)
Rule 14.5 (Appeals Only With Permission)

The Appellant applied for permission to appeal a Decision of the Court of Queen's Bench in which his Judicial Review Application was dismissed. The Appellant applied for Judicial Review pursuant to the *Election Act*, RSA 2000, c E-1, as the Respondent had fined the Appellant a small amount for an alleged violation of guidelines regarding election advertisements. The Appellant took the position that he did not require permission to appeal despite the fact that the quantum of the fine was less than $25,000. The Appellant also argued that the Application for Judicial Review was unrelated to the fine and had more to do with powers allocated under the *Election Act*. The Appellant argued in the alternative that, if permission to appeal was necessary, he had met the requirements for leave to appeal. The Court noted that the requirements were that the Appeal must involve an important question of law or precedent, there must be a reasonable chance of success on Appeal, and the delay cause by the Appeal must not unduly hinder the progress of the Action or cause undue prejudice.

Veldhuis J.A. referenced Rule 14.5(1)(g), which provides that permission to appeal must be sought where the Appeal is from a Decision in a matter where the controversy in the Appeal can be estimated in money and does not exceed the sum of $25,000 exclusive of Costs. Veldhuis J.A. determined that even if there were important legal questions arising out of the Application for Judicial Review, the administrative monetary penalty was the matter at issue in the Judicial Review Application. Veldhuis J.A. held that Rule 14.5(1)(g) applied, and therefore permission to appeal was required. Veldhuis J.A. agreed that the Appellant had met the test for leave to appeal and granted the Appellant leave to appeal the Court of Queen's Bench's Decision to dismiss his Application for Judicial Review.

PIIKANI NATION V KOSTIC, 2017 ABCA 399 (STREKAF JA)
Rules 14.8 (Filing a Notice of Appeal), 14.15 (Ordering the Appeal Record), 14.17 (Filing the Appeal Record – Fast Track Appeals), 14.24 (Filing Factums – Fast Track Appeals), 14.27 (Filing Extracts of Key Evidence), 14.30 (Filing Books of Authorities), 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

The Defendant, Kostic, appealed a Decision of a Case Management Justice in which her Application for leave to apply for indemnification, to declare the Piikani Nation as a vexatious litigant, and to add parties (the "Grant Thornton Group") was dismissed.

Kostic applied to extend the time to file appeal materials, the Grant Thornton Group cross-applied to strike the Appeal as against them, and Kostic's former counsel ("SVR") also cross-applied seeking permission to intervene on the Appeal.

Strekaf J.A. considered Rules 14.37(2)(e) and 14.58(3) and the test to intervene in an Appeal, which was articulated as whether the Applicant will be directly and "specially" affected by the outcome of the Appeal or has "special expertise or a unique perspective relating to the subject matter of the appeal" that will assist the Court. Further factors to be considered include:

1. Is the presence of the intervenor necessary for the court to properly decide the matter;
2. Might the intervenor's interest in the proceedings not be fully protected by the parties;
3. Will the intervention unduly delay the proceedings;
4. Will there possibly be prejudice to the parties if intervention is granted;
5. Will intervention widen the dispute between the parties; and
6. Will the intervention transform the court into a political arena?

Following an application of the test to the facts of the case, the Court granted SVR's Application to intervene.

The Grant Thornton Group's Cross-Application to strike was made on the grounds that they were not served with the Notice of Appeal within one month of Case Management Judge's Decision as required by Rule 14.8(1). Justice Strekaf dismissed the Grant Thornton Group's Cross Application to strike, but held that Kostic was allowed to proceed with only one issue on Appeal and she was required to comply with the filing deadlines calculated from the date of the Decision.

KENNEDY V TRUSTEES FOR THE 1985 SAWRIDGE TRUST, 2017 ABCA 439 (WATSON, SLATTER AND BIELBY JJA)
Rule 14.8 (Filing a Notice of Appeal) and 14.74 (Application to Dismiss an Appeal)

The Appellant, former counsel to some of the parties to the litigation appealed the Decision of a Case Management Judge who advised that a copy of the Judgment against the Appellant would be sent to the Law Society of Alberta due to concerns about the Appellant's conduct. The Applicants (Respondents in the Appeal) applied to have the Appeal struck pursuant to Rule 14.74 on the basis that the Decision had already been sent to the Law Society so the Appeal was moot.

The Court applied the factors listed in Rule 14.74 and held that the Appeal should be struck. The Court held that the Appeal was without merit because a Judge is entitled to refer the conduct of a lawyer to the Law Society. Further, the Court of Appeal has jurisdiction to hear an Appeal of a "judgment, order or decision". The Court referred to Rule 14.8 in support, stating that the Rule does not expand the scope of the Appeal to "cover everything "pronounced" in the reasons for the decision". Therefore, the Court of Appeal was without jurisdiction to hear the matter. The Applications were granted and the Appeal was dismissed.

GRAY V MCNEILL, 2017 ABCA 376 (O'FERRALL JA)
Rules 14.15 (Ordering the Appeal Record), 14.16 (Filing the Appeal Record – Standard Appeals) and 14.47 (Application to Restore an Appeal)

The Applicant, McNeill sought to restore his Appeal which was struck because he had not filed his Appeal Record within four months of the date he filed his Notice of Appeal, and because he had taken an additional 5 months to apply for the Appeal to be restored. O'Ferrall J.A. noted that pursuant to Rule 14.47, an Application to restore a standard Appeal must be filed, served, and returnable within 6 months of the Appeal being struck. The Applicant had met that deadline – his Appeal was struck on April 21, 2017, and he filed his Application to restore the Appeal on September 8, 2017. However, Justice O'Ferrall stated that the Court of Appeal has "repeatedly attempted to make it clear" that when an Appeal is struck, an Appellant must move quickly to Apply for its restoration. Waiting until the end of the period to restore an Appeal is generally not acceptable.

O'Ferrall J.A. noted that the Applicant ordered his Appeal Record approximately 28 days after filing the Notice of Appeal. Pursuant to Rule 14.15(1)(a), an Appellant must order or start preparing the Appeal Record within 10 days of filing a Notice of Appeal. Further, the Applicant failed to file his Appeal Record within 4 months, as required pursuant to Rule 14.16(3)(b).

Justice O'Ferrall stated that, to determine whether to restore an Appeal, the Court must consider a number of factors, reframed in recent leading authority as six questions:

> Has the applicant demonstrated an unwavering intention to prosecute the appeal throughout the time period following the filing of the Notice of Appeal?
>
> Did the applicant provide an adequate explanation for both his failure to file the appeal record on time and his failure to promptly apply to restore his appeal when it was struck?
>
> Did the applicant move with sufficient expedition to cure the defect?
>
> What are the prospects of the appeal's success? Does the appeal have any merit?
>
> Will restoration of the appeal prejudice the respondent to an unacceptable degree?

O'Ferrall J.A. held that the Appeal was not "strong". Although the Courts use a low standard to determine whether an Appeal has merit, and while the Applicant's explanation for delay in preparing the Appeal Record was explainable and excusable, the delay in resuming the Appeal was not. O'Ferrall J.A. held that the Applicant did not have an "unwavering intention" to prosecute the Appeal and, along with other factors, it was not in the interest of justice to restore the Appeal. The Application to restore the Appeal was dismissed.

DM V CHILD AND FAMILY SERVICES AUTHORITY, 2017 ABCA 353 (O'FERRALL JA)
Rule 14.16 (Filing the Appeal Record – Standard Appeals) and 14.18 (Contents of Appeal Record – Standard Appeals)

The Applicants applied to restore their Appeal which was struck as a result of their failure to file their Appeal Record within the 4 month period set out in Rule 14.16(1)(3)(b). The Applicants submitted that although their Appeal Record was filed in an improper format, it was filed on time and so their Appeal should be restored. Justice O'Ferrall noted that the factors in the test to restore an Appeal are:

> (a) arguable merit to the appeal;
>
> (b) the explanation for the delay or defect that caused the appeal to be taken off the list;
>
> (c) reasonable promptness in moving to cure the defect and have the appeal restored;
>
> (d) whether there was a timely intention to proceed with the appeal; and
>
> (e) potential prejudice to the respondents (including the length of the delay).

Justice O'Ferrall considered the limited materials filed along with the Notice of Appeal, and held that they did not constitute an Appeal Record pursuant to Rule 14.18. The Application to restore the Appeal was therefore dismissed.

BOURQUE V TENSFELDT, 2017 ABCA 357 (GRECKOL JA)
Rules 14.37 (Single Appeal Judges) and 14.45 (Application to Admit New Evidence)

The Appellant, Bourque, appealed an Order which held her in contempt, and compelled her to attend Questioning in order to purge her contempt (the "Contempt Appeal"). Bourque had previously applied to the Court of Appeal to stay the enforcement of the contempt Order and was unsuccessful. When Bourque failed to purge her contempt, her pleadings at the Court of Queen's Bench were struck out. As such, Bourque also appealed the Order which struck out her pleadings (the "Strike Appeal"). The Court stayed the Contempt Appeal until the Strike Appeal was determined.

Bourque then applied to the Court of Appeal seeking a reconsideration of the Court's earlier Decision dismissing her Application to stay the enforcement of the contempt Order ("Reconsideration Application"), and applied to adduce additional evidence for the Contempt Appeal ("New Evidence Application"). Greckol J.A. noted that Bourque had not applied to admit new evidence prior to the filing of her Factum as required by Rule 14.45. The Respondent, Tensfeldt applied to strike the Reconsideration Application and the New Evidence Applications on the basis that they were moot.

Justice Greckol referred to Rule 14.37 which provides that a single Justice of the Court of Appeal may hear and decide an application incidental to an appeal. Her Ladyship noted that the Reconsideration Application and the New Evidence Application were incidental to the Contempt Appeal. Justice Greckol also held that the Reconsideration Application was moot as the dates set for Questioning had passed. Further, there was "no point" in admitting new evidence for an Appeal which was stayed and which could be struck. The New Evidence Application was stayed with the condition that if the Strike Appeal was allowed and Bourque's pleadings restored, she could reschedule the New Evidence Application.

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