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RULES

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

3.22	**NORTHERN AIR CHARTERS (PR) INC V ALBERTA HEALTH SERVICES,** 2023 ABCA 114
3.23	**ALPHABOW ENERGY LTD V ALBERTA ENERGY REGULATOR,** 2023 ABCA 164
3.26	**RICK BALBI ARCHITECT LTD V CONDOMINIUM CORPORATION NO 0824320,** 2023 ABKB 241
3.68	**MAKIS V MCEWAN,** 2023 ABKB 196
	ALBERTA HEALTH SERVICES V JOHNSTON, 2023 ABKB 209
	DE'MEDICI V WAWANESA MUTUAL INSURANCE COMPANY, 2023 ABKB 210
	2248870 ALBERTA LTD (STACEY'S HAPPY PLACE) V ALBERTA HEALTH SERVICES, 2023 ABKB 368
	ST PIERRE V NORTH ALBERTA LAND REGISTRY DISTRICT (REGISTRAR), 2023 ABCA 153
	PRODANIUK V CALGARY (CITY), 2023 ABCA 165
4.10	**WANG V ALBERTA HEALTH SERVICES,** 2023 ABCA 186
4.29	**JS V JD, 2023** ABKB 288
4.31	**CONDOMINIUM PLAN NO 7920829 V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION),** 2023 ABKB 244
	VASILJEVIC V KOTUR, 2023 ABKB 292
	TORONTO-DOMINION BANK V PALISADE SECURITY GROUP INC, 2023 ABKB 307
4.33	**TAKACS V INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 955, PENSION TRUST FUND,** 2023 ABKB 248
	SWALEH V LLOYD, 2023 ABKB 262
	VASILJEVIC V KOTUR, 2023 ABKB 292
	TORONTO-DOMINION BANK V PALISADE SECURITY GROUP INC, 2023 ABKB 307
	WHITSON CONTRACTING LTD V PACIFIC WEST SYSTEMS SUPPLY LTD, 2023 ABKB 309
	MULHOLLAND V RENSONNET, 2023 ABCA 175
4.36	**ARNSTON V ARNSTON,** 2023 ABKB 328

5.2	**TERRIGNO V BUTZNER,** 2023 ABCA 124
5.6	**HAIRY BULL V BIG SWALLOW,** 2023 ABKB 261
	MBH V CKI, 2023 ABKB 284
5.13	**HAIRY BULL V BIG SWALLOW,** 2023 ABKB 261
	TERRIGNO V BUTZNER, 2023 ABCA 124
5.33	**HAIRY BULL V BIG SWALLOW,** 2023 ABKB 261
	MBH V CKI, 2023 ABKB 284
6.3	**LAY V LAY,** 2023 ABKB 354
6.7	**MBH V CKI,** 2023 ABKB 284
6.14	**BAKER LAW FIRM V CONDOMINIUM CORPORATION NO. 1611047,** 2023 ABKB 330
	JACOBSEN V WAWANESA MUTUAL INSURANCE CO, 2023 ABCA 122
6.28	**MBH V CKI,** 2023 ABKB 284
6.37	**MURRAY V WINDSOR BRUNELLO LTD,** 2023 ABKB 375
7.2	**GORDON ESTATE (RE),** 2023 ABKB 132
7.3	**GORDON ESTATE (RE),** 2023 ABKB 132
	MAKIS V MCEWAN, 2023 ABKB 196
	AG CLARK HOLDINGS LTD V 1352986 ALBERTA LTD, 2023 ABKB 219
	CONDOMINIUM PLAN NO 7920829 V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION), 2023 ABKB 244
	ENVIRONMENTAL DEFENCE CANADA INC ET AL V KENNEY ET AL, 2023 ABKB 304
	MAGNUSON ESTATE, 2023 ABKB 305
	KROETSCH V CHICK, 2023 ABKB 326
	KRISTEL V PAUL, 2023 ABKB 345
	BENNETT V TREIT, 2023 ABKB 348
	CONDOMINIUM CORPORATION NO 062 1161 V PARK PLACE COMMUNITIES LTD, 2023 ABKB 373
7.5	**1218807 ALBERTA LTD V MUSLIM ASSOCIATION OF CANADA LTD,** 2023 ABKB 300
8.8	**KY V BAHLER,** 2023 ABKB 280

8.15	**KY V BAHLER,** 2023 ABKB 280
9.4	**ELLIOTT V ELLIOTT,** 2023 ABCA 191
	UHRIK V TERRIGNO, 2023 ABKB 223
	CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 202
9.13	**CAN V ALBERTA SECURITIES COMMISSION,** 2023 ABCA 202
9.15	**MACK V DATZOFF,** 2023 ABKB 343
10.2	**LEIA V STYLES,** 2023 ABKB 213
	SUNRIDGE NISSAN INC V MCRUER, 2023 ABCA 128
	STANCHFIELD V DOE, 2023 ABKB 273
	MMP V TWZ, 2023 ABKB 355
	BROSSEAU ESTATE V DUBARRY ESTATE, 2023 ABKB 378
10.7	**STANCHFIELD V DOE,** 2023 ABKB 273
	MIKISEW CREE FIRST NATION V RATH, 2023 ABKB 321
10.8	**STANCHFIELD V DOE,** 2023 ABKB 273
	MIKISEW CREE FIRST NATION V RATH, 2023 ABKB 321
10.9	**LEIA V STYLES,** 2023 ABKB 213
10.10	**MIKISEW CREE FIRST NATION V RATH,** 2023 ABKB 321
10.18	**MIKISEW CREE FIRST NATION V RATH,** 2023 ABKB 321
10.29	**UHRIK V TERRIGNO,** 2023 ABKB 223
	LUTZ V LUTZ, 2023 ABKB 224
	JS V JD, 2023 ABKB 288
	LC V ALBERTA (CHILD WELFARE), 2023 ABKB 334
	MMP V TWZ, 2023 ABKB 355
	GHEBREMESKEL V TESFU, 2023 ABKB 356
10.31	**LUTZ V LUTZ,** 2023 ABKB 224
	ELLINGSON V HALL, 2023 ABKB 275
	BAKER LAW FIRM V CONDOMINIUM CORPORATION NO 1611047, 2023 ABKB 330
	BROSSEAU ESTATE V DUBARRY ESTATE, 2023 ABKB 378
10.33	**TERRIGNO V FOX,** 2023 ABKB 190
	RANDHAWA V REHILL, 2023 ABKB 202

10.33 (cont)	**LUTZ V LUTZ,** 2023 ABKB 224
	ELLINGSON V HALL, 2023 ABKB 275
	JS V JD, 2023 ABKB 288
	BAKER LAW FIRM V CONDOMINIUM CORPORATION NO. 1611047, 2023 ABKB 330
	MA V XU, 2023 ABKB 34**6**
	MMP V TWZ, 2023 ABKB 355
	BROSSEAU ESTATE V DUBARRY ESTATE, 2023 ABKB 378
	NT V CLH, 2023 ABKB 379
	SUNRIDGE NISSAN INC V MCRUER, 2023 ABCA 128
	BARKWELL V MCDONALD, 2023 ABCA 183
	SUTHERLAND V SUTHERLAND, 2023 ABCA 185
10.36	**1218807 ALBERTA LTD V MUSLIM ASSOCIATION OF CANADA LTD,** 2023 ABKB 300
10.41	**LEIA V STYLES,** 2023 ABKB 213
10.49	**CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN,** 2023 ABKB 384
10.51	**1254748 ALBERTA LTD V MCBURNEY,** 2023 ABKB 264
10.52	**1254748 ALBERTA LTD V MCBURNEY,** 2023 ABKB 264
	POTTS V MARSCHLIK, 2023 ABKB 362
10.53	**1254748 ALBERTA LTD V MCBURNEY,** 2023 ABKB 264
	FORD V JIVRAJ, 2023 ABKB 331
11.5	**MACK V DATZOFF,** 2023 ABKB 343
11.27	**BH (RE),** 2023 ABKB 392
11.28	**BH (RE),** 2023 ABKB 392
11.29	**BH (RE),** 2023 ABKB 392
12.38	**MBH V CKI,** 2023 ABKB 284
12.59	**BLUME V BLUME,** 2023 ABCA 174
13.1	**STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD),** 2023 ABCA 163
13.5	**BODNARIUK V VINCE,** 2023 ABCA 159
13.6	**ARMSTRONG V GULA,** 2023 ABKB 270
	CANADA (ATTORNEY GENERAL) V 18335898 ALBERTA LTD (WHITECAP ENERGY INC), 2023 ABKB 357

13.6 (cont)	**KLASSEN V CANADIAN NATIONAL RAILWAY COMPANY,** 2023 ABCA 150
13.7	**UHRIK V TERRIGNO,** 2023 ABKB 223
	ARMSTRONG V GULA, 2023 ABKB 270
13.8	**ARMSTRONG V GULA,** 2023 ABKB 270
13.14	**SULTAN MANAGEMENT GROUP (RE),** 2023 ABCA 110
13.15	**SULTAN MANAGEMENT GROUP (RE),** 2023 ABCA 110
13.18	**MAGNUSON ESTATE,** 2023 ABKB 305
14.2	**BODNARIUK V VINCE,** 2023 ABCA 159
	CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 202
14.4	**SCHAFER V SCHAFER,** 2023 ABCA 117
	BLUME V BLUME, 2023 ABCA 174
14.5	**CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN,** 2023 ABKB 384
	WEIDENFELD V ALBERTA (MINISTER FOR SENIORS AND HOUSING), 2023 ABCA 130
	STEENBERG V STEENBERG, 2023 ABCA 132
	STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2023 ABCA 133
	UBAH V UBAH, 2023 ABCA 143
	STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2023 ABCA 163
	WANG V ALBERTA HEALTH SERVICES, 2023 ABCA 186
	ELLIOTT V ELLIOTT, 2023 ABCA 191
	PETROPOULOS V PETROPOULOS, 2023 ABCA 193
	CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 202
14.8	**BLUME V BLUME,** 2023 ABCA 174
	NADARASAH V UTHAYAKUMAR, 2023 ABCA 190
14.27	**SUNRIDGE NISSAN INC V MCRUER,** 2023 ABCA 128
	PETROPOULOS V PETROPOULOS, 2023 ABCA 193
	RUEL V REBONNE, 2023 ABCA 196

14.28	**PETROPOULOS V PETROPOULOS,** 2023 ABCA 193
14.29	**PETROPOULOS V PETROPOULOS,** 2023 ABCA 193
14.37	**STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD),** 2023 ABCA 133
	ALPHABOW ENERGY LTD V ALBERTA ENERGY REGULATOR, 2023 ABCA 164
	QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP, 2023 ABCA 177
	KELLY (RE), 2023 ABCA 181
14.38	**CAN V ALBERTA SECURITIES COMMISSION,** 2023 ABCA 202
14.40	**JOSE V BABY,** 2023 ABCA 137
	PETROPOULOS V PETROPOULOS, 2023 ABCA 193
14.41	**PETROPOULOS V PETROPOULOS,** 2023 ABCA 193
14.42	**BODNARIUK V VINCE,** 2023 ABCA 159
14.46	**ST PIERRE V NORTH ALBERTA LAND REGISTRY DISTRICT (REGISTRAR),** 2023 ABCA 153
14.47	**JOSE V BABY,** 2023 ABCA 137
	BODNARIUK V VINCE, 2023 ABCA 159
	CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 202
14.48	**ALPHABOW ENERGY LTD V ALBERTA ENERGY REGULATOR,** 2023 ABCA 164
14.58	**QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP,** 2023 ABCA 177
14.65	**JOSE V BABY,** 2023 ABCA 137
	BODNARIUK V VINCE, 2023 ABCA 159
14.70	**PETROPOULOS V PETROPOULOS,** 2023 ABCA 193
14.72	**ST PIERRE V NORTH ALBERTA LAND REGISTRY DISTRICT (REGISTRAR),** 2023 ABCA 153
14.77	**CAN V ALBERTA SECURITIES COMMISSION,** 2023 ABCA 202
14.88	**ESFAHANI V SAMIMI,** 2023 ABCA 188
14.90	**SUNRIDGE NISSAN INC V MCRUER, 2023 ABCA 128**

ARMSTRONG V GULA, 2023 ABKB 270

(MARION J)

Rules 1.2 (Purpose and Intention of these Rules), 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 13.6 (Pleadings: General Requirements), 13.7 (Pleadings: Other Requirements) and 13.8 (Pleadings: Other Contents)

The Defendant applied for Summary Dismissal of the Plaintiff's claim, which related to the enforcement of a contract for the purchase of land.

Shortly before the Hearing, Justice Marion wrote to the Parties asking that they provide submissions regarding a provision of the contract which had not been materially addressed in their respective Briefs. The contractual provision related to conditions and their potential waiver.

At the Hearing, the Parties confirmed that there was no evidence regarding the waiver issue identified by Justice Marion. Further, there was a dispute between the Parties as to whether this provision had been properly pleaded by the Defendant.

Thus, at issue in this Decision was: (1) whether the waiver issue was properly pleaded and before the Court; (2) if yes to (1), whether it would nonetheless be procedurally unfair to consider it on the Summary Dismissal Application; and (3) if yes to (2), a consideration of the appropriate path forward.

On the first issue, the Court considered that, pursuant to Rule 13.6(2)(a), only facts should be pleaded, and not evidence. Justice Marion also considered the matters which are required to be specifically pleaded under Rule 13.6(2) and (3), the matters for which particulars are required under Rule 13.7. Finally, Justice Marion observed that pleading "a statement of a point of law" is discretionary pursuant to Rule 13.8(1)(b). Given the nature of the Pleadings in the case, Justice Marion held that the waiver issue had been properly pleaded by the Defendant.

Notwithstanding that finding, Justice Marion held that the Defendant did not specifically raise the waiver issue in its Application or written argument. The Court therefore concluded that it would be procedurally unfair for that issue to be considered, at least without the Parties having had an opportunity to fully address the issue with further evidence, in addition to legal argument.

In considering Rules 1.2, 1.4, and 1.5, Justice Marion determined that the appropriate way forward was to adjourn the Application to allow the Parties to adduce further evidence and make additional argument. The alternatives, opined Justice Marion, opened the door to delay, duplication of proceedings, and wasted resources, all of which ran afoul of the Foundational Rules and the "culture-shift" in favour of summary proceedings.

MBH V CKI, 2023 ABKB 284

(MARION J)

Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 1.7 (Interpreting These Rules), 5.6 (Form and Contents of Affidavit of Records), 5.33 (Confidentiality and Use of Information), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.28 (Application of this Division) and 12.38 (Affidavit of Records)

Following a Case Management conference, the Parties were under procedural direction to resolve certain matters arising from their divorce. The Parties applied before Marion J. to resolve issues of disclosure and sought a restricted Court access Order.

Concerning the disclosure issues, the Court was asked to decide whether: (a) the Plaintiff should be compelled to disclose redacted portions of certain medical records, (b) the Plaintiff should provide medical records not previously produced, and (c) the Court should control the Defendant's access to the Plaintiff's medical records.

Regarding the first issue, Marion J. directed the Plaintiff to produce unredacted copies of her medical records. Counsel for the Plaintiff had redacted certain medical records provided by the Plaintiff as part of her answers to Undertakings at Questioning on Affidavit. Rule 6.7 allows a party to question an Affiant adverse in interest on an Affidavit. Further, by virtue of the Foundational Rules 1.4 and 1.7, the Court has the discretion to order the disclosure of redactions on records arising from Undertaking responses given at Questioning on Affidavit.

Justice Marion canvased the case law on redactions and found that parties are entitled to redact information, including sensitive medical information. However, parties must engage in "redactions of non-privileged irrelevant information from otherwise relevant and material records" only in three circumstances: (1) when the redacted information is clearly irrelevant; (2) as a matter of proportionality under Rule 1.2, where the protection of irrelevant information outweighs the delay or costs associated with the redactions; or (3) when the redactions do not render the rest of the record difficult to understand or misleading. After reviewing the various medical records at issue, Marion J. ordered the Plaintiff to disclose redactions that were relevant and material to the issues raised by the Parties in their Affidavits and parenting Applications.

Regarding the second disclosure issue, Marion J. ordered the Plaintiff to produce further medical records, even if they dealt with the Plaintiff's alcohol intoxication levels, because they were relevant and material to the parenting Applications and the children's best interests. The Plaintiff could have been compelled to produce the records either by a request for Undertakings at Questioning on Affidavit, or under Rule 12.38(2), which states that in family law matters a party must file and serve a notice to produce an Affidavit of Records on the other party before it can compel production of an Affidavit of Records. Justice Marion ordered production of further records under Rule 5.6(1)(b)(ii), which imposes an obligation on a party to prepare an Affidavit of Records and disclose all relevant and material records under that party's control.

With respect to the third disclosure issue, Marion J. found while the Plaintiff's medical records were protected by Rule 5.33 and the implied undertaking common law rule, additional protectional measures were appropriate in this case. Rule 5.33 recognizes that records

produced in an Action are confidential such that they may not be used for collateral purposes, but Rule 5.33 covers information disclosed only under the Part 5 Questioning. Justice Marion clarified that while the implied undertaking rule did not extend to Pleadings, exhibits attached to Affidavits, or exhibits entered on the Court record at Trial, it did extend to records provided as part of Undertaking answers to Questioning on Affidavit. Thus, the Court used the Alberta Court of King's Bench Family Law Practice Note 7 to order additional protectional measures so that the Defendant could access privately disclosed medical records in the Action.

Turning its attention to the Court access issue, Marion J. denied the Plaintiff's request for a restricted Court access Order. The Court has jurisdiction to grant such Orders under Rules 6.28-6.38. However, the Supreme Court of Canada recast the test for discretionary limits on Court openness in *Sherman Estate v Donovan*, 2021 SCC 25. In order obtain a Court access Order, a party must establish that: (1) the Court openness principle poses a serious risk to an important public interest; (2) the Order sought is necessary to prevent a serious risk to the identified interest because reasonable alternative measures will not prevent the risk; and (3) as a matter of proportionality, the benefits of the Order outweigh its negative effects.

The Court found that the Plaintiff satisfied the first step because the protection of the specific sensitive information contained in her medical records gave rise to an important public interest, "namely the best interests, privacy and protection of the Children". However, the Court found that there were reasonable alternatives to the restricted Court access Order, and thus the second step failed. For example, Family Law Practice Note 10 provided a pre-emptive layer of protection which balanced the right to privacy of sensitive information with the open Court principle. Further, and in order to protect children, Courts "sometimes use initials or take other steps to anonymize Reasons for Decision to reduce the risk of the partners or children being identified". Lastly, the Plaintiff did not satisfy the third step. Justice Marion held that the benefits of protecting the Plaintiff and the children's interests through Practice Note 10, and the "anonymization of these Reasons to protect the Children, outweighed the harmful effects to the open court principle".

Costs of the Application were deferred until the parenting Applications were determined.

CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 202

(ROWBOTHAM JA)

Rules 1.2 (Purpose and Intention of These Rules), 9.4 (Signing Judgments and Orders), 9.13 (Re-Opening Case), 14.2 (Application of General Rules), 14.5 (Appeals Only with Permission), 14.38 (Court of Appeal Panels), 14.47 (Application to Restore an Appeal) and 14.77 (Preparation and Signature of Judgments and Orders)

This was an Application pursuant to Rule 9.13 to reopen or re-argue an earlier Application. The earlier Application had been made pursuant to Rule 14.47, to restore Appeals which were struck for failure to meet deadlines. The earlier Application to restore was denied on the basis that the Applicants had failed to adequately explain their failure to meet applicable deadlines or demonstrate their intention to Appeal. After the Application to restore was denied,

the Applicants sought permission to Appeal the Court's determination, pursuant to Rule 14.5, which permission was also denied. The Application to reopen or re-argue the earlier Application to restore was the Applicants' third attempt to rescue their Appeals.

The Respondent argued that the Rules do not contemplate or permit an Application to reopen or re-argue a previous Application in respect of which permission to Appeal has already been denied. The Respondent argued that Rule 14.5, which contemplates Appeals from a single Appeal Judge's Decision to a panel of Appeal Judges, with permission, displaced the right to seek to reopen or re-argue otherwise available pursuant to Rule 9.13. Noting Rule 1.2 and policy concerns as to efficiency, the Respondent further argued that permitting an Applicant to apply to reopen or re-argue an Application after having already been denied permission to Appeal invited abuse and waste of judicial resources.

Noting Rule 9.13's function of affording litigants an opportunity to correct errors or present newly available evidence, and Rule 14.2, which states that, unless otherwise provided, the general Rules govern Appeals, the Court held that Rule 9.13 was available for Applicants to seek to reopen or re-argue an earlier Application in appropriate circumstances. However, having regard to the valid policy concerns noted by the Respondent, the Court held that the test for reopening or re-arguing the Application must be high.

The Court observed that there was a paucity of case law considering requests to reopen or re-argue Applications for which permission to Appeal has previously been refused. Having regard to the nature of the request, the Court held that it was appropriate that the Application be heard by the same single Appeal Judge that heard the earlier Application and the Application for permission to Appeal. Next, the Court held that the request should be considered applying the same factors operative in respect of a request to reopen or re-argue an Appeal, pursuant to Rule 14.38(2)(c);- namely, whether the outcome in the Application sought to be reopened or re-argued resulted from the Court being misled regarding the record before or the nature of the issues, whether the Court overlooked or misapprehended the evidence in a significant respect, or whether patent errors were in the Decision or calculations. The Court emphasized the high burden resting on the Applicant.

Considering the circumstances before it, the Court held that this was not one of the rare cases in which it is appropriate to permit an Application for which permission to Appeal which has previously been denied to be reopened or re-argued. In so concluding, the Court noted that in the earlier Application, the Applicants had failed to satisfy any of the criteria for restoring their Appeal. No evidence was submitted in support and the circumstances did not indicate an appropriate case for restoration. As a result, the Application to restore was denied. In their request for permission to Appeal the determination, the Applicants adduced some evidence; however, that evidence was insufficient and, in any event, did not meet the test for admission of new evidence. In their Application to reopen or re-argue the original Application, the Applicants introduced further evidence to the effect that their counsel had misled them about the status of their Appeal; however, the Court found that that evidence was neither newly available nor reliable. In the result, the Application to reopen or re-argue was denied.

In closing remarks, the Court observed that, had the Orders at issue been entered following their pronouncement, the Court would have been *functus officio* and the only recourse available to the Applicants would have been an Application for leave to Appeal to the Supreme Court of Canada. The Court noted that where a dispute arises between parties as to the form

of an Order, counsel can contact the Court's Case Management Officers, who have authority to settle the form of an Order, pursuant to Rule 14.77(2). The Court reminded that where a party wishes to dispense with the need for approval as to form of Order or Judgment, permission must be sought pursuant to Rule 9.4(2)(c).

STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2023 ABCA 133

(ANTONIO JA)

Rules 1.4 (Procedural Orders), 14.5 (Appeals Only With Permission) and 14.37 (Single Appeal Judges)

The Applicant had filed and scheduled a Judicial Review Application. Right before the Application, and without notice to the Respondents, the Applicant sought an adjournment of that Application. The Chambers Judge made a Costs Order directing the Applicant to pay solicitor-client Costs for the last-minute adjournment and adjourned the application sine die.

Before Antonio J.A., the Applicant sought a stay of the Costs Order pending its Appeal. Justice Antonio found that the Applicant had to first obtain permission to Appeal the Costs Order. She granted the Applicant an extension of time to seek permission to Appeal but ultimately denied the Application for permission to Appeal.

Regarding Appeals to a Court of Appeal Panel, Rule 14.5(1)(b) states that permission to Appeal must be obtained for any pre-Trial Decision respecting adjournments, time periods or time limits. Similarly, Rule 14.5(1)(e) states that permission must be obtained if one wants to Appeal a Costs Decision. However, a Decision is not "as to costs only" if a related substantive Decision is also being appealed.

After canvassing the law, Antonio J.A. found that a decision to adjourn does not qualify as a "related substantive decision" as contemplated by Rule 14.5(1)(e) and held that the Applicant had to obtain permission to Appeal the Costs Order. The Appeal Justice exercised her discretion under Rule 14.37(2)(c) to extend the relevant period during which the Applicant could Appeal because an Application for permission to Appeal must be considered on the merits.

However, Antonio J.A. did not grant the Applicant permission to Appeal. In refusing permission to Appeal, Antonio J.A. explained that the following factors are relevant: (a) whether the Appeal raised an issue of an important question of law or precedent, (b) whether the Appeal had a reasonable chance of success, and (c) whether the Appeal would unduly hinder the progress of the Action or cause undue prejudice. The Applicant had failed to demonstrate a reasonable chance of success on Appeal and thus her leave Application failed. Furthermore, the Chamber Judge's Decision to issue the Costs Order and adjourn the Judicial Review Application sine die was entitled to deference under Rule 1.4.

ARNSTON V ARNSTON, 2023 ABKB 328

(HARRIS J)

Rules 1.4 (Procedural Orders) and 4.36 (Discontinuance of Claim)

Over a decade ago, the Plaintiff had filed a Statement of Claim for divorce and division of matrimonial property. The Defendant had filed a Statement of Defence agreeing to a Divorce Judgment but contested the parenting, child and spousal support, and the division of matrimonial property as proposed by the Plaintiff.

In 2023, the Plaintiff filed a Discontinuance of Claim on the basis that the Parties had settled the Action (the "Discontinuance"). The Defendant applied to set aside the Discontinuance and sought leave to file a Counterclaim because certain issues remained outstanding in the Action.

Justice Harris found that when the Parties agreed to settle their matter, their intention was to execute discontinuances and settle all outstanding issues subject to submitting an uncontested Desk Divorce Application for Divorce Judgment. Other than the submission of the uncontested Desk Divorce Application, there were no outstanding issues between the Parties.

A Plaintiff can, as of right, discontinue an Action under Rule 4.36(1) anytime before a Trial date is set. Under Rule 4.36(2)(a), a Plaintiff can file a discontinuance pursuant to a settlement agreement even after a Trial date has been set if the Parties consent. Justice Harris wanted to give effect to the settlement reached by the Parties and allow them to finalize their divorce. The outstanding question before her was whether the Discontinuance would undermine the issue of divorce.

Justice Harris found that, notwithstanding the wording of Rule 4.36, the Court had jurisdiction to preclude the filing of a discontinuance of Action if the discontinuance was "obstructive, abusive, or unfair". Nevertheless, she held that the Defendant's interest in obtaining a Divorce Judgment could be satisfied without unconditionally setting aside the Plaintiff's Discontinuance. Justice Harris relied on Rules 1.4(2)(b) and (c), which are the foundational Rules bestowing Courts with jurisdiction to set aside a process or pronounce Orders in respect of an Action, to find that a conditional set aside was more appropriate in the circumstances. Accordingly, Harris J. set aside the Discontinuance for the limited purpose of allowing the Parties to submit a Desk Divorce Application.

Given that the Discontinuance was set aside for a limited purpose, the Court did not address the Defendant's Application for leave to file a Counterclaim.

KWADRANS V KWADRANS, 2023 ABCA 203

(STREKAF, HO AND FAGNAN JJA)

Rules 1.5 (Rules Contravention, Non-Compliance, and Irregularities) and 3.2 (How to Start an Action)

The Parties, a divorcing couple, entered into an Arbitration Agreement. Pursuant to this Arbitration Agreement, the Parties were entitled to Appeal the Arbitration Award on questions of law, fact, or mixed fact and law.

The Parties received a written Arbitration Award on July 7, 2021, which Award was dated July 5, 2021. On August 5, 2021, the Appellant filed a Notice to Attend Family Docket Court in the existing Action that the Appellant had commenced prior to entering into the Arbitration Agreement seeking to Appeal the Arbitral Award. On August 30, 2021, the Parties appeared in Docket Court. The presiding Justice issued an Endorsement that the matter be brought in Civil Chambers by way of Originating Application to determine whether the Appeal was out of time. Ultimately, on December 9, 2021, the Parties appeared in Civil Chambers. The Chambers Judge found that the Appeal was not properly commenced as it was not commenced by way of Originating Application; an error that the Chambers Judge held that could not simply be cured under Rule 3.2 as it was not an improper form or technicality.

The Court of Appeal noted that, as the *Arbitration Act*, RSA 2000, c A-43 (the "*Arbitration Act*"), is silent on how to commence an Appeal, Rule 3.2(5) applies, and the Appeal must be made by way of Originating Application.

The Appellant further submitted that the Chambers Judge should have used the authority pursuant to Rule 1.5 to cure the Appellant's noncompliance. The Court of Appeal dismissed this argument, as to cure the noncompliance under Rule 1.5 would have resulted in irreparable harm to the Respondent. Further, the Court of Appeal noted that the extension of a time period that the Court is prohibited from extending, such as the case with the *Arbitration Act*, is not an available remedy under Rule 1.5.

Accordingly, the Court of Appeal dismissed the Appeal.

SCHAFER V SCHAFER, 2023 ABCA 117

(MARTIN, WATSON AND HO JJA)

Rules 1.9 (Conflicts and Inconsistencies with Enactments) and 14.4 (Right to Appeal)

This was an Appeal of a family law dispute that went to Arbitration. The Father appealed a Costs Award in Court, arguing that the Parties had agreed to the right of Appeal as set out in section 44(1) of the *Arbitration Act*, RSA 2000, c A-43 (the "*Act*"). The Mother filed a Cross-Application to strike the Father's Application, submitting that the Parties had agreed to the right of Appeal pursuant to section 44(2) of the *Act*, requiring leave of the Court. Moreover, the Mother argued, the Father failed to file his Application within the 30 day time-frame specified within the Act. The Chambers Judge granted the Mother's Cross-Application,

striking the Father's Application and awarding the Mother $500 in Costs. The Parties were granted permission to Appeal on the question of whether the Court had jurisdiction to hear either or both Appeals. Relying on *Schafer v Schafer*, 2022 ABCA 358, the Court would grant permission to Appeal both Decisions, should it determine granting such a right was within its jurisdiction.

Being a Statutory Court, the Court found that the Court of Appeal's jurisdiction was limited to Appeals provided for in legislation, and its jurisdiction to hear Appeals from a decision of a Court of King's Bench Judge is set out in Rule 14.4(1) of the Rules and section 3(b)(iv)(a) of the *Judicature Act,* RSA 2000, c J-2. The Court of Appeal noted that Rule 14.4 carves out Appeals where the legislature has "otherwise provided". The Court of Appeal also noted that the language "[e]xcept as otherwise provided" has been interpreted to mean that any claimed right to Appeal under Rule 14.4 may be curtailed by another enactment. This is reinforced by Rule 1.9, which provides that an enactment prevails over the Rules to the extent of any inconsistency. Therefore, the right to Appeal under Rule 14.4 may be curtailed by any limitation to a right of Appeal within the *Act*, as legislative enactments supersede the generalized Rules.

The Court of Appeal concluded that the Father did have a right of Appeal under Rule 14.4. The *Act* did not expressly provide the Father with a right of Appeal, nor did it specifically restrict his right of Appeal. This case represented one of the few occasions where Parties were engaged in arbitral proceedings, yet the general right of Appeal was not displaced. In relation to the Father's Application, the Court held that the Chambers Judge did not error in their interpretation of section 44 of the *Act*.

The Court of Appeal granted the Mother's Appeal on the same basis as the Father's. Nonetheless, the Court held that the Chambers Judge had a wide degree of discretion and considered proportionality when awarding Costs; therefore, the Court could find no reviewable error in the Chambers Judge's Cost Award.

In conclusion, both Applications were dismissed, and Parties were to bear their own Costs.

WW V ALBERTA (HUMAN RIGHTS TRIBUNAL), 2023 ABKB 340

(LEE J)

Rule 3.15 (Originating Application for Judicial Review)

The Applicant applied to determine whether the Court could extend the time for filing and service of the Applicant's Originating Application and the Amended Original Application (together the "Documents for Judicial Review") on the Alberta Human Rights Commission and the Law Society of Alberta, notwithstanding Rule 3.15, and more specifically the six-month limitation set out in Rule 3.15(2) (the "Six-Month Time Limit"). The Court noted that the Six-Month Time Limit ended on January 6, 2023.

The Court noted that the Applicant had submitted the Documents for Judicial Review on January 3, 2023, and argued that his filing was delayed after a power outage at the Courthouse (the "Power Failure"). Discussions with the Courthouse had resulted in the Documents for Judicial Review being backdated to January 3, 2023, and the Applicant then served the Documents for Judicial Review on January 19, 2023. The Court concluded that the Power Failure was secondary to the Applicant simply

taking too long to submit the Documents for Judicial Review for filing. More specifically, the Court noted that: (1) the fact the documents were eventually backdated to be filed as of January 3, 2023 was largely irrelevant as the filing of the documents was not affected by the Power Failure in any material way; (2) Court filing dates do not determine whether Rule 3.15 deadlines have been met; (3) the Applicant had failed to comply with the Six-Month Time Limit by failing to serve the documents no later than January 6, 2023.

The Court additionally set out that recent jurisprudence had established that the Court had no discretion or inherent jurisdiction to extend the Six-Month Time Limit. The Court accordingly dismissed the Application notwithstanding arguments by the Applicant asserting that no one had been prejudiced.

2248870 ALBERTA LTD (STACEY'S HAPPY PLACE) V ALBERTA HEALTH SERVICES, 2023 ABKB 368

(MALIK J)

Rules 3.15 (Originating Application for Judicial Review) and 3.68 (Court Options to Deal with Significant Deficiencies)

This was a Judicial Review Application brought by the Appellant, pursuant to an Originating Notice filed in respect to a decision (the "Decision") by the Public Health Appeal Board (the "Board"). The Decision dismissed the Appellant's Appeal of enforcement measures taken by the Alberta Health Services (the "AHS") in respect to various orders issued by the Chief Medical Officer ("CMOH") to address the Covid-19 pandemic.

The AHS filed a Cross-Application to strike the Originating Notice on the grounds that it: (1) constituted an abuse of process and the issues sought to be reviewed were moot; (2) was filed outside the 6-month limitation period; and (3) failed to name the Board as Respondent. The third point had previously been resolved, as the AHS had since been named Respondent.

The AHS argued that as a consequence of the AHS Orders having been rescinded and the re-issuance to the Applicant of a new permit, the Applicant's Application for Judicial Review was moot on the grounds that a "legal controversy between the parties no longer exist[ed], the substratum of the litigation ha[d] disappeared, or a judicial ruling would have no practical effect on the rights of the parties". In addition, the AHS argued that the Application constituted an abuse of process, which should be stricken pursuant to Rule 3.68(2).

The Court applied the two-step test established by the Supreme Court of Canada in *Borowski v Canada (AG)*, 1989 CanLII 123 (SCC). The Court found that, although the Orders had been rescinded, there was still a live issue as Inspection Reports were still available on the AHS website, and therefore, there could be a remedy to be had.

The AHS also submitted that the Originating Notice was filed outside of the 6-month limitation period for filing a Judicial Review Application, pursuant to Rule 3.15(2), arguing that the Rules of Court must be strictly construed and could not be varied or extended. The AHS also relied on its own procedural rules, which stipulated that the 6-month period commenced when the Board communicated its Decision, rather then when it provided its

written Decision. The Appellant argued that they were unable to file an Application until they were fully informed about the merits of the proceeding, which could only reasonably take place following receipt of the full Decision.

The Court, while acknowledging that administrative decision makers are authorized to craft their own procedural rules, stated that administrative decision makers do not have the force of law and cannot affect a party's substantive right to bring an Originating Notice for Judicial Review within a certain period.

For the reasons set out above, AHS' Cross-Appeal was dismissed.

Moving to the Originating Notice, the Applicant sought a declaration that the Decision was unreasonable. As the Applicant's submissions focused on procedural fairness, the Court reviewed if the Board breached its duty of procedural fairness and if the Decision was reasonable.

The Appellant argued that there was a breach of procedural fairness because the Order received was absent of Appeal information. The Court noted that not every procedural irregularity constitutes a material breach of the Applicant's procedural fairness rights. The Court did agree that the Applicant's Order should have included the appropriate Appeal information; however, found that the deficiencies were rectified when the Inspector provided the requisite information to the Appellant upon realizing the Appeal information was missing, so the Applicant could proceed with its Appeal.

In reviewing the reasonableness of the Decision, the Court found the Decision to be justified, intelligible, and transparent. The Court held the Board acted within its jurisdictional limits and identified the issues it was jurisdictionally empowered to answer. The Court accepted that the Inspector was credible and truthful, and considered the evidence used by the Board to be both relevant and material to its final determination.

In the end, the Court dismissed the Appellant's Application for Judicial Review.

TARTAL V ALBERTA (HUMAN RIGHTS COMMISSION), 2023 ABKB 381

(FETH J)

Rule 3.15 (Originating Application For Judicial Review)

The Applicant brought a Human Rights Complaint against a minor hockey association. The Respondent, the Alberta Human Rights Commission ("Commission"), dismissed the complaint in its screening process ("Dismissal"). The Applicant applied for Judicial Review of the Dismissal. Under Rule 3.15(2), an Originating Application for Judicial Review seeking to set aside a decision must be filed and served within six months of the date of that decision, and Rule 3.15(3) requires that the Originating Application must be served on the decision-maker and "every person or body directly affected by the application."

The Applicant sent the Application to the Court prior to the limitation period but did not get it back as filed within the limitation period, so service on the Commission was late. Further, the Applicant never served the Respondent hockey association, and insisted that the Commission was the only affected party. The Court rejected that position.

The Court highlighted some important procedural issues for Judicial Review: (1) the 6 month limitation period to file and serve is a substantive and firm limitation period that cannot be extended, and (2) the Judicial Review Application must be served on both the decision maker whose decision is being reviewed and the other party who was before the original decision maker.

Justice Feth noted that on Judicial Review, the Commission had a role in providing the record and speaking to jurisdiction but does not and cannot make submissions on the merits. The decision being reviewed was a decision made in the hockey association's favour and it was the affected party to speak to the merits of the complaint.

TSUU T'INA GAMING LIMITED PARTNERSHIP V ALBERTA GAMING, LIQUOR AND CANNABIS COMMISSION, 2023 ABCA 135

(FEEHAN, HO AND KIRKER JJA)

Rule 3.15 (Originating Application for Judicial Review)

The Appellants appealed a Chambers Judge's finding that all but one of their claims advanced in their Application (the "Application") were time-barred. The Court found no palpable and overriding error in the Chambers Judge's Decision and dismissed the Appeal.

The Chambers Judge determined that the Application was an Originating Application for Judicial Review pursuant to Rule 3.15 because a decision, act, or omission of a public body or administrative tribunal was being challenged and declaratory relief was sought. The Chambers Judge further found that Rule 3.15(2) requires an Originating Application for Judicial Review to be filed and served within six months of the date of the Decision or act to be reviewed and that this limitation period could not be extended by the Court.

The Chambers Judge found that the Decision being challenged was made on October 1, 2020. The Application was filed on April 7, 2021, outside the six-month limitation period. However, the Chambers Judge found that the six-month limitation period did not apply to jurisdictional questions as the passage of time cannot render an otherwise invalid Decision or act valid. The Chambers Judge concluded that the remaining remedies sought were all time barred, including whether the Respondent acted unreasonably, in bad faith, in a conflict of interest, in breach of statutory and fiduciary duties, and failed to consult.

The Court confirmed that Rule 3.15 provides that an Originating Application for Judicial Review must be filed and served within six months after the date of the decision or act, and that this limitation period may not be stayed, extended, or shortened by the Court. The Court further held that the Chambers Judge's finding on this issue was reasonable and did not display any palpable and overriding error.

NORTHERN AIR CHARTERS (PR) INC V ALBERTA HEALTH SERVICES, 2023 ABCA 114

(KHULLAR, MARTIN AND ROWBOTHAM JJA)

Rule 3.22 (Evidence on Judicial Review)

The Appellant appealed a Chambers Judge's Order (the "Decision") dismissing its Application for leave to admit Affidavit evidence in support of its Application for Judicial Review.

The Court dismissed the Appellant's Appeal. The Court noted that Rule 3.22(a) provides that a certified record of the proceedings is one of a few limited pieces of evidence admissible for Judicial Review Applications and that other evidence can be admitted under Rule 3.22(d). In the Decision, the Chambers Judge relied on the test set out in *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 ("*Alberta Liquor*"). The Court noted that *Alberta Liquor* stands for the proposition that Judicial Review Applications are generally conducted on the record before the administrative body that made the decision under review, and extrinsic evidence may only be admitted in the following four exceptional circumstances: (1) to show bias or a reasonable apprehension of bias, where the facts in support of the allegation do not appear on the record; (2) to demonstrate breaches of the rules of natural justice which are not apparent from the record; (3) background information for other issues such as standing; and (4) when the administrative decision maker makes no record, or an inadequate record.

The Appellant argued that the Chambers Judge applied the wrong test in the Decision and urged the Court to take a more expansive approach to the admission of extrinsic evidence in Judicial Review Applications than that set out in *Alberta Liquor.* Specifically, the Appellant argued that the Court should allow extrinsic evidence which provides necessary background and context to a Judicial Review Application. The Court reviewed several decisions provided by the Appellant and determined that each of them fell within the exceptions in *Alberta Liquor*. The Court therefore declined to apply a more expansive test than that set out in *Alberta Liquor* and determined that the Chambers Judge applied the correct test in the Decision.

The Appellant also argued that the Chambers Judge erred in concluding that the evidence the Appellant sought to introduce was irrelevant. However, the Court found no palpable and overriding error on this point in the Decision.

ALPHABOW ENERGY LTD V ALBERTA ENERGY REGULATOR, 2023 ABCA 164

(WAKELING JA)

Rules 3.23 (Stay of Decision), 14.37 (Single Appeal Judges) and 14.48 (Stay Pending Appeal)

The Appellant applied to stay a decision by the Alberta Energy Regulator (the "Regulator") made under the *Responsible Energy Development Act*, SA 2012, c R-17.3 (the "Decision"). Appeal Justice Wakeling dismissed the Application holding that the Court lacked jurisdiction to stay the Decision because the Appellant never sought permission to Appeal the Decision to the Court of Appeal.

The Appellant argued that the Decision could be stayed pursuant to Rule 14.48. Rule 14.48 provides a Court of Appeal Judge with authority to stay proceedings pending Appeal. However, as Wakeling J.A. noted, Rule 14.48 specifically deals with Applications for stays of decisions made by Judges of the Court of King's Bench. The Decision was not a decision of a Court of King's Bench judge, but of the Regulator. Therefore, the Decision could not be stayed under Rule 14.48.

The Appellant also argued that a stay could be granted under Rule 14.37 because it had filed, unsuccessfully, a request with the Regulator for permission to Appeal the Decision (the "Request"). Rule 14.37 authorizes a Court of Appeal Judge to decide Applications incidental to an Appeal. Applications are incidental to an Appeal if they relate to an Appeal but are subordinate in nature. The Appellant never sought permission from a Court of Appeal Judge to stay the Decision. Instead, the Appellant sought permission from a Court of Appeal Judge to Appeal the Request. Wakeling J.A. found that the Decision and the Request were not incidental to each other and held that it would be questionable to read Rule 14.37 "in a manner that expands the ambit of a single appeal judge's stay jurisdiction under rule 14.48".

Lastly, the Appellant argued that the Decision could be stayed under Rule 3.23(1), which allows a court to "stay the operation of a decision … sought to be set aside under an originating application for judicial review pending final determination of the originating application". As noted by Wakeling J.A., Rule 3.23 is available in cases where the Applicant has filed a Judicial Review Application. Since the proceeding before Wakeling J.A. was not an Originating Application for Judicial Review or an Appeal from one, the Decision could not be stayed under Rule 3.23.

RICK BALBI ARCHITECT LTD V CONDOMINIUM CORPORATION NO 0824320, 2023 ABKB 241

(FEASBY J)

Rule 3.26 (Time for Service of Statement of Claim)

The Appellant applied in Application Judge's Chambers for Summary Dismissal of the Action on the grounds that it had been added as a Party after the expiry of the relevant limitation period. The Application was dismissed, and the Appellant appealed.

Justice Feasby considered whether the limitation period had expired prior to service, being the two-year limitation period under the *Limitations Act,* RSA 2000, c L-12, plus the one year for service provided by Rule 3.26.

The issues alleged in the Statement of Claim were first discovered in late 2014. Reports were obtained from consultants in the fall of 2015 indicating potential liability. The Statement of Claim was filed in September 2016, and was amended to add the Appellant in October 2018. The Amended Statement of Claim was served on the Appellant in November 2018, a little more than three years after the delivery of the reports from the consultants.

Justice Feasby held that there was some evidence that the Respondent had exercised reasonable diligence in attempting to learn the proper Parties to the Action. He found that such steps may not have been possible until after the other Parties defended, which would have been some time after the claim was commenced in 2016. He therefore held that there was a triable issue, and the Appeal was dismissed with Costs.

MAKIS V MCEWAN, 2023 ABKB 196

(GILL J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiffs, a doctor and his professional corporation, had commenced a separate Action against Alberta Health Services alleging the mishandling of certain complaints by Alberta Health Services that resulted in the College of Physicians and Surgeons cancelling the Plaintiff's practice permit (the "AHS Action").

In this Action, the Plaintiffs sought damages exceeding $22,000,000 for loss of an unpaid academic appointment at the University of Alberta (the "UA Action"). The Defendants applied to strike the UA Action under Rule 3.68 and summarily dismiss it under Rule 7.3. Justice Gill granted the Applications, with Costs to the Applicants.

The Court noted that Rule 7.3(1) allows a party to apply for Summary Judgment on all or part of the claim on the grounds that there is no merit to the claim or part of it. Rules 3.68(1) and (2) allow a party to strike out a claim on several grounds, including that it constitutes an abuse of process or that it discloses no reasonable claim. If a party argues that a claim should be struck because it discloses no reasonable claim, Rule 3.68(3) limits the investigations to the language of the Pleadings, without any reliance on evidence.

In granting the Applicants' Applications to strike and summarily dismiss the UA Action, Gill J. found that the UA Action was bound to fail. It was an abuse of process and a collateral attack on certain administrative decisions of the University of Alberta, which ought to have been appealed or judicially reviewed. The Court found that the UA Action was statute barred and duplicative of the claims in the AHS Action.

ALBERTA HEALTH SERVICES V JOHNSTON, 2023 ABKB 209

(FEASBY J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This case involved a claim for defamation against a former mayoral candidate. The Plaintiffs sought a permanent Injunction restraining the Defendant from making defamatory statements, along with an award for damages.

An interim Injunction had been granted by then Associate Chief Justice Rooke pursuant to a prior *ex parte* Application. The Defendant was subsequently found in default for not filing a Statement of Defence. An Application for Default Judgment was made, and that Application was set down for a Special Chambers Application.

As part of his argument at the Special Chambers Hearing, the Defendant claimed that the lawsuit was barred because it amounted to a Strategic Lawsuit Against Public Participation ("SLAPP"). He argued that such Actions are barred under the *Protection of Public Participation Act*, 2015, SO 2015. Justice Feasby held that this legislation had no bearing on the present Action, given the jurisdiction, and that no similar legislation existed in Alberta. However, he considered whether the Court ought to exercise its discretion to dismiss the claim as an abuse of process pursuant to Rule 3.68.

Justice Feasby weighed the public interest in protecting the Defendant's freedom of expression against the public interest in allowing the Action to continue. He found that the latter outweighed the former. The comments of the Defendant placed the individual Plaintiff and her family in the public spotlight and turned them into the subject of public ridicule. Further, given that the Defendant was already noted in Default, it was established that he had no defence. It was therefore found that the individual Plaintiff's claim was not an abuse of process.

DE'MEDICI V WAWANESA MUTUAL INSURANCE COMPANY, 2023 ABKB 210

(NIELSEN ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

In this Action, the Defendants requested the use of Civil Practice Note 7 ("CPN7").

The Court reviewed the substantive law surrounding CPN7, which includes legal tests and limitations outlined in Rule 3.68. These conditions dictate the types of Orders that may be granted and the conditions for making such an Order, including a document being frivolous, irrelevant, or improper; constituting an abuse of process; or having an irregularity that is so prejudicial that it is sufficient to defeat the claim.

The Court examined the limitations of CPN7 and its applicability to specific types of Orders, emphasizing that CPN7 should not rely on Rule 3.68(2)(b), which deals with a document that discloses no reasonable claim or defense to a claim. However, such documents may still be

considered frivolous, vexatious, or abusive of process and subject to CPN7.

Furthermore, the Court stated that CPN7 should only be used in clear cases where the defect in the pleading is obvious on the face of the document. The Court endorsed the Ontario jurisprudence on the subject, which suggests that CPN7 should not be used unless there is a reason to prefer it over other procedures available under the Rules. The Court also provided guidance on initiating CPN7, stating that a written request for an Order to stay or dismiss the proceeding should be a brief explanation, limited to one or two lines, without arguments or indirect references to facts.

The Court emphasized that CPN7 is intended to deal with a commencement document or pleading that is frivolous, vexatious, or otherwise an abuse of process on its face, and is not a venue for dealing with an allegedly vexatious litigant. The Court highlighted that even when a litigant was previously determined to be vexatious, that would not automatically dictate that the present Pleading would be considered vexatious, as each Pleading must be assessed in its own right.

The Court declined to consider the detailed litigation history provided by the Defendants because it was not supported by any Pleadings. Additionally, the Court held that a Pleading or commencement document must be problematic on its face to be captured by CPN7, and therefore declined to consider the Defendants' legal submission.

Accordingly, the Court declined the Defendants' request to dismiss the proceeding under CPN7.

ST PIERRE V NORTH ALBERTA LAND REGISTRY DISTRICT (REGISTRAR), 2023 ABCA 153

(WATSON, MCDONALD AND STREKAF JJA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 14.46 (Application to Reconsider a Previous Decision) and 14.72 (Binding Precedents)

The Court of Appeal considered an Appeal of an earlier Judgment from a Chambers Judge of the Court of Kings Bench which confirmed an earlier Decision of an Applications Judge. The earlier Decision struck the Appellant's claim pursuant to Rule 3.68.

The Court of Appeal was faced with determining whether the Appellant identified any error in the Chamber Judge's Decision that would justify the Court of Appeal's intervention. After identifying that under Rule 3.68 a claim may be struck for one of the enumerated reasons in Rule 3.68(2), the Court of Appeal noted that the Appellant's position on Appeal was a collateral attack on earlier Decision.

Of significance, the Applications Judge and Chambers Judge who rendered the Decisions below found themselves bound by previous jurisprudence of the Court of Appeal; specifically, an earlier Decision of the Court of Appeal removed the basis of the Appellant's argument. The Court of Appeal noted that the Appellant had failed to apply to the Court of Appeal to reconsider this earlier Decision as would be required under Rules 14.46 and 14.72.

The Court of Appeal accordingly dismissed the Appeal.

PRODANIUK V CALGARY (CITY), 2023 ABCA 165

(WATSON, CRIGHTON AND ANTONIO JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant appealed a Decision striking her claims against her employer (the "Employer") and her union (the "Union") under Rule 3.68(2) because of a lack of jurisdiction (the "Decision"). The Chambers Judge had held that the essential character of the dispute was covered by the collective agreement and the labor relations system, and that the Court should not intrude on a residual jurisdiction basis. The Calgary Police Association (the "CPA") cross appealed the Chambers Judge's Decision to permit the Appellant's claim against the CPA to proceed.

The Court held that the Chambers Judge had correctly found that Alberta Courts have no jurisdiction over claims that essentially engage the duty of fair representation and dismissed the Appeal.

The Court found that there are two exclusive jurisdiction areas that were relevant. One was the labor relations system applicable to alleged violation of collective agreements, which permits a residual jurisdiction. The other was the labor relations system applicable to fair representation claims against unions.

The Court affirmed that where a complete statutory labour relations regime exists and a complainant is capable of understanding their rights under the collective agreement, the complainant should not be allowed to circumvent that labor relations process. Furthermore, the Court's residual discretion should only be exercised in exceptional circumstances. The test is whether the dispute resolution procedures provide the remedy required to resolve the dispute.

The Court held that the Appellant's claims were more about a "fair representation" concern, and that the duty of fair representation is "a corresponding obligation" to the Union's role. Accordingly, the Appellant's complaints about fair representation likewise belonged within the labour relations system.

Finding that the Chambers Judge erred in considering the question of residual jurisdiction to the Appellant's claims against the CPA, the Court allowed the cross Appeal. The Court held that the nature of the dispute determines the jurisdictional outcome regardless of the legal nature of the claim. The statutory labour relations regime forecloses the Court's residual discretion where the essential character of the dispute engages the duty of fair representation.

WANG V ALBERTA HEALTH SERVICES, 2023 ABCA 186

(GROSSE JA)

Rules 4.10 (Assistance by the Court) and 14.5 (Appeals Only with Permission)

The Applicants filed an Appeal of an Assessment Officer's decision fixing costs at $300,000 (the "Bill of Costs Appeal"). In another Action, the Court restricted the Applicants' access to the Court which had the effect of cancelling the Bill of Costs Appeal hearing and an Endorsement was later issued in which the Court declined to grant leave to proceed with the Bill of Costs Appeal but did grant leave for a hearing for advice and directions pursuant to Rule 4.10 to address whether the Respondent was obliged to provide information that had been redacted on the Bill of Costs. The Court had noted that at the Rule 4.10 hearing, the Court was entitled to give leave to proceed with the Bill of Costs Appeal, which neither Party ultimately sought.

Later, after Court access restrictions had been vacated, the Applicants applied for an Order setting a special Application date for the Bill of Costs Appeal, which was denied and they were instead directed to apply for leave to extend the time for the Bill of Costs Appeal. The Applicants sought permission to Appeal this decision on the issue of determining whether the Chambers Judge erred in requiring the Applicants to apply for leave to extend the time for the Bill of Costs Appeal (the "Leave to Extend Time Issue").

The Court set out the applicable test in accordance with Rule 14.5(1)(e) for Permission to Appeal a decision as to Costs which requires that: (1) the Applicant must identify a good, arguable case having enough merit to warrant scrutiny by the Court; (2) the issues must be important, both to the parties and in general; (3) the Appeal must have some practical utility; and (4) the Court should consider the effect of delay in proceedings caused by the Appeal.

The Court noted that (1) an error as to the Leave to Extend Time Issue was important to the Applicants, (2) the Applicants may not have been able to satisfy the criteria for leave to extend time and would accordingly lose the ability to challenge the $300,000 Costs award on the merits; (3) the requisite general importance existed with respect to the applicable framework for addressing delay in an Appeal from an Assessment Officer's decision and more generally in ensuring that requirements imposed on parties that could deprive them of an Appeal are justified; (4) the proposed Appeal had practical utility; and (5) the Court was not aware of any proceedings that would be delayed by the proposed Appeal to this Court.

The Application for permission to Appeal was accordingly allowed with respect to the Leave to Extend Time Issue.

JS V JD, 2023 ABKB 288

(BERCOV J)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision on Costs following a mixed success family Trial. Both Parties claimed Costs on the basis that they were substantially successful at Trial, pursuant to Rule 10.29. The Plaintiff sought double Costs for steps taken following service of a Formal Offer, pursuant Rule 4.29.

The Court listed several principles applicable to the determination of Costs Awards, namely: the successful Party is presumptively entitled to Costs, which presumption applies equally to family matters; success in a family matter means substantial success, not absolute success; assessment of substantial success measures ultimate outcomes against relief initially sought; a finding of success may be based on a finding that a Party was successful on the most important issue litigated; enhanced Costs may be awarded where there has been misconduct in the litigation; Rule 4.29 provides for double Costs where a Plaintiff's Formal Offer to settle is more generous than the ultimate outcome and the Plaintiff's Formal Offer is not accepted by the Defendant; Costs Awards are discretionary, subject to principled exercise of the Court's discretion; and Rule 10.33 provides a non-exhaustive list of factors, which help to guide the Court's discretion.

Reviewing the Parties' respective requests for relief and results at Trial, the Court held that neither Party had achieved substantial success. While the Plaintiff was successful in certain respects, the Defendant was successful in others, some of which were significant. Similarly, the Plaintiff's Formal Offer was not more generous than the ultimate outcome, which provided for less parenting time, a less generous division of matrimonial property and a less generous spousal support award, accounting for payments made just prior to Trial. Finally, the Court held that the Plaintiff's allegations of litigation misconduct, which included frequent changes of counsel, failure to accept the truth of certain documents, and other issues the Court had previously indicated it would not consider, were insufficient to justify an award of Costs.

In the result, each Party was responsible for their own Costs. Fees borne by the Plaintiff for an expert assessment in regard to parenting were ordered to be shared equally.

CONDOMINIUM PLAN NO 7920829 V ACADEMY CONTRACTORS INC (ABALON CONSTRUCTION) 2023 ABKB 244

(APPLICATIONS JUDGE SUMMERS)

Rules 4.31 (Application to Deal with Delay) and 7.3 (Summary Judgment)

This was a Special Chambers hearing involving Cross-Applications. The Defendants applied for Summary Dismissal under Rule 7.3, alleging that the Action was not commenced within the limitation period; or alternatively, dismissal pursuant to Rule 4.31, on the basis that there had been inordinate delay, which had significantly prejudiced the Defendants. The Plaintiffs cross-applied for Summary Dismissal of the Defendants' Counterclaim, also under Rule 7.3.

The case involved Abalon Construction, who installed concrete friction piles under the Tudor Manor building to prevent it from settling. The Plaintiff initiated a legal Action in 2010, and successive counsel provided Affidavits of Records between 2013 and 2016. The Defendants found the Plaintiff's document production inadequate. In 2019, the Defendants filed an Application for Summary Dismissal, claiming that they could not remember specifics or timing of events due to the Plaintiff's delayed document production. The Plaintiff filed its own Affidavit of Records nearly a year later, the Plaintiff's materials for a Cross-Application were not provided for over a year, and an Application was brought to force the issue.

The Court first dealt with the Plaintiff's Cross-Application, dismissing it because the Plaintiff did not have an expert report to provide an opinion on the duties of care of the Defendants, whether those duties were breached, and if so, whether those breaches cause the damages claimed by the Plaintiff.

The Court then turned to the Defendants' Rule 7.3 Application. The Defendants argued that the limitation period for the Plaintiff's cause of action started before 2008, leaving to Court to determine whether the Plaintiff had knowledge, constructive or actual, before 2008, through the exercise of reasonable diligence, of the material facts upon which a plausible inference of liability on the part of the Defendants could be drawn.

The Court held that based on the evidence before the Court, it was not able to determine if the Plaintiff had actual or constructive knowledge of the facts that could have reasonably inferred liability on the part of the Defendants. The Court found that the Defendants had not met the test set out in *Weir-Jones Technical Services Incorporated v Purolator Courier, Purolator Inc. and Purolator Freight*, 2019 ABCA 49, and held that there was a triable issue as to whether the Plaintiff commenced the Action within the limitation period. Therefore, the Defendants' Rule 7.3 Application was dismissed.

Turning to the Defendants' Rule 4.31 Application, the Court followed the six-part analysis set out in *Humphreys v Trebilcock* 2017 ABCA 116. The Court found that the Plaintiff failed to advance the case to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review, and the delay was inordinate. The Plaintiff's explanation that the delay was not intentional or willful was of little significance, and the Defendants' contributions to the delay did not outweigh the Plaintiff's inordinate delay. The Court found no compelling reason not to dismiss the Action.

For the reasons set out in the above paragraph, the Court exercised its judicial discretion and granted the Defendants' Application, striking the Plaintiff's claim pursuant to Rule 4.31.

VASILJEVIC V KOTUR, 2023 ABKB 292

(POELMAN J)

Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Appellants appealed their Applications that had been before an Applications Judge for dismissal of the Action or part of the Action on the basis of delay under Rule 4.31 and 4.33 (the "Dismissal Applications"). The Court also considered a second set of Applications which sought the same relief (the "Second Applications"). Both the Dismissal Applications and Second Applications had been dismissed by the Applications Judge.

On Appeal to a Justice of the Court of King's Bench, the Court considered the factors under Rule 4.31, and determined that there had been an inordinate delay of seven years. More specifically, the Court noted that there had been no general Questioning, expert reports, and no efforts to enter the Action for Trial in seven years. The Court additionally noted that the Action was not a complex lawsuit and that the timeline was far longer than one for a reasonably similar lawsuit.

Although the Court determined that the delay was inordinate, it found that it was excusable. The Court noted that the period consumed by the Summary Judgment Application and its aftermath, the need to obtain amended Statements of Defence and then schedule Questioning, all without the cooperation of the Defendants, were an adequate excuse for a significant portion of the delay.

Furthermore, the Court found that the Defendants had not suffered the type of significant prejudice that would justify dismissing the Action. The Court noted that each Defendant asserted in Affidavits: frustration with what they asserted was the Plaintiff's failure to prosecute the Action in a timely and cost-effectively way; inability to move forward with their lives, despite having pleaded guilty and served time in prison; and aspects of their respective family lives were put on hold because of the uncertainty associated with the pending lawsuit. The Court additionally noted that the Defendants were in long term relationships, had families, and had not sought medical attention for stress.

The Court considered Rule 4.33, noting that a deadline cannot be the basis for measuring the relevant period for a significant advance in an Action. The Court found that settling the terms of an Order and filing amended Statements of Defence did not narrow or clarify the issues in the Action.

The Court found that the production of additional Affidavits of Records, each with some new, relevant and material records demanded by the Defendants constituted an advance. The Court specified that one supplementary Affidavit of Records was a significant advance, noting that it included prior and new records, which were in a form with evidentiary significance. The Court accordingly found there had been no period three years without a significant advance.

The Court additionally noted that the amended Pleadings were filed on compulsion of the Respondent and efforts to arrange Questioning without ever settling upon agreed dates, did not constitute participation as contemplated in Rule 4.33(2).

The Court dismissed the Appeals.

TORONTO-DOMINION BANK V PALISADE SECURITY GROUP INC, 2023 ABKB 307

(APPLICATIONS JUDGE SCHLOSSER)

Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicant applied to dismiss the Action for long delay pursuant to Rules 4.31 and 4.33.

The Court dismissed the Application under Rule 4.33, which requires the Court to dismiss an Action against a party if three or more years have passed without a significant advance in the Action. The Court noted that a significant advance in an Action is sufficient for the purpose of Rule 4.33 and that it is unnecessary to have completed a significant advance as against each Defendant. The Court determined that the Respondent obtaining Judgment against another Defendant constituted a significant advance in the Action.

The Court also dismissed the Application under Rule 4.31, which is discretionary and allows the Court to dismiss an Action for long delay that results in significant prejudice to a party. The Court noted that an Applicant can show significant prejudice by either: (1) proving inordinate and inexcusable delay, in which case the Applicant enjoys a rebuttable presumption of significant prejudice; or (2) proving significant prejudice arising from the delay.

The Court found no significant prejudice arising from delay. The Court was not satisfied that the delay in the Action was inordinate and inexcusable. The Court also determined that the death of one of the Applicant's potential witnesses did not constitute significant prejudice as there were other witnesses available that could shed light on the issues concerning that witness. The Court therefore determined that there was no prejudice rising to such a level as to require the Court to dismiss the Action under Rule 4.31.

TAKACS V INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 955, PENSION TRUST FUND 2023 ABKB 248

(MAH J)

Rule 4.33 (Dismissal for Long Delay)

The Plaintiff, Mr. Takacs, applied for an Order that a Judicial Dispute Resolution (JDR) be directed. The Defendant Pension Trust Fund cross-applied for mandatory dismissal of the Action for long delay, pursuant to Rule 4.33.

The Action arose from a discrepancy in the commuted value of Mr. Takacs' union pension plan due to a regulatory change made under the *Employment Pension Plans Act*, SA 2012, c E-8.1. Mr. Takacs filed a Statement of Claim on August 31, 2018 and an Amended Statement of Claim to substitute the Pension Trust Fund as Defendant, rather than the union local, on February 28, 2019. The Pension Trust Fund filed its Statement of Defence to the Amended Statement of Claim on March 7, 2019. Mr. Takacs's and the Pension Trust Fund's Affidavits of Records were filed on August 20, 2019 and October 18, 2019, respectively. Mr. Takacs filed

an Application on September 29, 2022 to set the matter down for Trial, which was eventually dismissed by Justice Mah on January 18, 2023. Mr. Takacs filed the current Application on February 28, 2023, returnable April 5, 2023, requesting that the Court direct a JDR, and the Pension Trust Fund filed a cross-Application returnable the same date seeking dismissal of the Action for long delay. For the purpose of the cross-Application, the Parties agreed that the three-year period in Rule 4.33 was extended by 75 days through Ministerial Order because of the pandemic and lapsed on January 3, 2023.

Justice Mah agreed with the Pension Trust Fund's submission that the long delay Application had to be decided first to see if there was any Action that survived that could go to JDR. He did not make a finding on Mr. Takacs' complaint about deficient service of the cross-Application and concluded that any deficiency had been waived based on Mr. Takacs' desire to proceed with both Applications.

Mr. Takacs argued that his Trial Application should count as a step that advanced the Action. Alternatively, he argued that the Pension Trust Fund acquiesced to his delay by taking part in his Trial Application. On the latter point, given that the Pension Trust Fund's deponent opposed the Trial Application in his Affidavit, Justice Mah held that the Pension Trust Fund was not waiving its position with respect to the delay by simply defending the Application.

Considering Mr. Takacs' first point, Justice D.R. Mah stated that the question was whether functionally the Trial Application had any meaningful effect in advancing the Action. *Citing Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220, Justice Mah held that the dismissed Trial Application was not a significant advance in the Action because nothing was accomplished: the state of knowledge and the positions of the Parties were the same after the Application was heard, and the Court was in no better position to adjudicate - the Action was in the identical state it had been before the Trial Application. In addition, Mr. Takacs' Application for a JDR after January 3, 2023 could not resuscitate his Action.

In the result, the Court granted the Pension Trust Fund's Application under Rule 4.33.

SWALEH V LLOYD, 2023 ABKB 262

(SULLIVAN J)

Rule 4.33 (Dismissal for Long Delay)

The Appellant appealed an Applications Judge's Decision to decline to dismiss the Plaintiff's claim under Rule 4.33.

The Court found no error in the Applications Judge's Decision and dismissed the Appeal. The Appellant argued that the last significant advance in the Action occurred when the Plaintiff served its Amended Statement of Claim. However, Applications Judge Birkett had noted that there had been an Application to further amend the Amended Statement of Claim to add additional Parties and the Appeals of that Decision. The Court found no error in Applications Judge Birkett's reasoning that knowing who the Parties are is a significant advance in the Action as it is something that needs to be determined before the Action can move forward.

WHITSON CONTRACTING LTD V PACIFIC WEST SYSTEMS SUPPLY LTD, 2023 ABKB 309

(APPLICATIONS JUDGE SCHLOSSER)

Rule 4.33 (Dismissal for Long Delay)

The Applicant applied to dismiss a construction lien Claim for delay pursuant to Rule 4.33.

The Court began by surveying the procedural history of two parallel proceedings, which included: (1) the filing of a lien and commencement of a Calgary-based Action by the Respondent; (2) a Edmonton-based Originating Application, filed by the Applicant pursuant to section 48 of the Prompt Payment and Construction Lien Act, RSA 2000, c P-26.4, seeking the removal of the lien from title; (3) the payment into Court of the lien amount, within the Edmonton-based Originating Application and the corresponding removal of the lien from title; and (4) a successful Application for dismissal by one of two Defendants in the Calgary-based Action. No further steps occurred in the Calgary-based Action.

The substance of the Court's analysis focused on the procedural errors which led to this Application being brought within the Edmonton-based Originating Application, and the problems which had arisen accordingly.

Because these proceedings were commenced by Originating Application, there were no Pleadings. The Court noted that the starting point for the delay analysis is to measure progress against the issues defined in the lawsuit, as set out in the Pleadings. Furthermore, Rule 4.33 governs Parties to an "Action", and the Respondent to an Application under Rule 4.33 must be the Party which filed the commencement document.

Here, the Court observed that the Applicant (1) was not a Party to an Action "in the conventional sense"; and (2) was itself the Party which filed the relevant commencement document. The result, per the Court, was that the Applicant was effectively applying to strike out its own Application.

The Court further reviewed Rule 4.33(2), which refers to an absence of "a significant advance in an Action". Again, the Court noted that there was no "Action" here and therefore held that Rule 4.33 had no direct application in the circumstances.

The Court dismissed the Application.

MULHOLLAND V RENSONNET, 2023 ABCA 175

(MARTIN, ANTONIO AND HO JJA)

Rule 4.33 (Dismissal for Long Delay)

This was an Appeal of an Order dismissing an Action for long delay under Rule 4.33.

The Appellant, Ms. Mulholland, filed a Statement of Claim against the Respondent, Ms. Rensonnet, in September 2013. The following year, the Respondent filed a Statement of Defence and a Third Party Claim against the other Appellant, Mr. Uttl. In 2016, Cross-Applications for partial Summary Judgment and Summary Dismissal were dismissed. An Appeal from the dismissal of partial Summary Judgment was dismissed in January 2018.

In January 2022, The Respondent filed a Rule 4.33 Application. Both Appellants filed detailed Affidavits setting out the steps they believed had significantly advanced the Action. The Application was heard in morning Chambers on February 11, 2022, wherein the Chambers Judge granted the Respondent's Application and awarded Costs.

On Appeal, the Appellants asserted that the Chambers Judge committed procedural errors by proceeding in morning Chambers rather than adjourning to a Special Chambers hearing and by not allowing them a full opportunity to be heard. Additionally, the Appellants alleged that the Chambers Judge failed to apply the correct legal test, overlooked evidence, and erred in drawing conclusions of mixed fact and law.

In dismissing the Appellants' claims, the Court of Appeal first noted that a decision to adjourn to a Special Chambers hearing was discretionary and would be reviewed on a standard of reasonableness. Despite the voluminous materials involved in the underlying Action, the evidence on the Rule 4.33 Application was straightforward. Therefore, the Chambers Judge's decision to proceed in morning Chambers was within his discretion and was not unreasonable. Further, the Chambers Judge did not deny the Appellants an opportunity to be heard since both Appellants filed written materials and made oral submissions. The Chambers Judge committed no error by directing Mr. Uttl to focus on relevant issues rather than reciting his prepared submissions or by taking the unusual step of allowing Mr. Uttl an oral sur-reply.

The Court of Appeal also found there was no reviewable errors in the Chambers Judge's conclusion that the following three events did not significantly advance the underlying Action: (1) discontinuance of case management; (2) an *ex parte* Order allowing service by email; and (3) the filing of a Notice to Admit and a Response. This was based on a functional examination of the Notice to Admit and the Response in this case, which revealed that nothing had changed to advance the Action or to narrow the issues. In addition, the Court of Appeal noted that the Chambers Judge's decision to award Costs to the Respondent was discretionary and based on evidence from the entirety of the circumstances.

In the result, the Court of Appeal dismissed the Appeal.

TERRIGNO V BUTZNER, 2023 ABCA 124

(MARTIN, HO AND KIRKER JJA)

Rules 5.2 (When Something is Relevant and Material) and 5.13 (Obtaining Records from Others)

The Appellant brought a defamation claim against the Respondent arising out of an alleged incident between the Parties. Because the Appellant was a Student-at-law at the time of the alleged incident, the matter was investigated by the Law Society and a report was prepared. Here, the Appellant appealed a Case Management Judge's Order for the production of excerpts of the Law Society report in the defamation Action.

The Application for production of the Law Society report was brought under Rule 5.13, which addresses third-party production. The Court may order a third party to produce a record if the record is under control of that person, there is a reason to believe that the record is relevant and material, and the person who has control of the record might be required to produce it at Trial. The test for relevance and materiality is governed by Rule 5.2, both in general and under Rule 5.13.

The Appellant argued that the Case Management Judge applied the wrong legal test by considering whether the Law Society report was "potentially relevant" rather than simply "relevant and material". The Appellant also raised concerns with respect to prejudice, privacy interests, and inefficiencies being introduced into the litigation.

The Court found it clear that the Case Management Judge was alive to the proper requirements regarding relevance, materiality, and privilege. The Court did not agree that the use of the words "potentially relevant" meant that the wrong legal test was applied. The Court found no error in the Case Management Judge's Decision given the content of the Law Society report and the scope of the Pleadings in the defamation Action.

Based on that analysis, the Court dismissed the Appeal.

HAIRY BULL V BIG SWALLOW, 2023 ABKB 261

(SIDNELL J)

Rules 5.6 (Form and Contents of Affidavit of Records), 5.13 (Obtaining Records from Others) and 5.33 (Confidentiality and Use of Information)

The Applicant applied to require the Crown to produce disclosure and police investigation records (the "Crown Disclosure") for a criminal matter in which the Respondent was the accused. The Respondent was previously granted Restraining Orders against the Applicant and the Applicant alleged that the Restraining Orders were made on a basis of fraudulently manufactured evidence.

The Court noted that the Application engaged Rule 5.13, which allows a party to apply for an Order requiring a person who is not a party to produce records.

As a preliminary issue, the Court reviewed decisions describing a "screening procedure"

in which a party is required to disclose the existence of Crown disclosure that is relevant and material to a civil Action in an Affidavit of Records ("AOR"). The Court revised the screening procedure described in those cases to comply with the Rules. The Court noted that this screening procedure was not followed, and no submissions were made as to whether the Respondent should have referred to the Crown Disclosure in an AOR pursuant to Rule 5.6. As such, the Court did not comment on such obligations but noted that Rule 5.33 requires information and records produced in an AOR to be treated as confidential and further provides that such records may only be used by the recipient for the purpose of carrying on the Action.

The Court determined that some but not all of the Crown Disclosure should be produced. Although the Attorney General of Alberta consented to the production of the Crown Disclosure, the Court determined that not all of the Crown Disclosure had been shown to be relevant and material. As such, the Court ordered only the relevant and material parts of the Crown Disclosure to be produced. However, in addition to the confidentiality requirements of Rule 5.33, the Court prohibited the Applicant from making copies of any part of the Crown Disclosure or using such records for any purpose other than this Action.

LAY V LAY, 2023 ABKB 354

(NIXON J)

Rule 6.3 (Applications Generally)

The Applicants sought an Order declaring certain transactions void. The Respondents raised two preliminary issues, one being whether the Applicants could rely on the *Statute of Elizabeth*, 13 Eliz 1, c 5 ("*Statute of Elizabeth*") in their Application. After engaging with Rule 6.3, Nixon J. allowed the Applicants to refer to the *Statute of Elizabeth*.

The Respondents asserted that the Applicants did not plead or refer to the *Statute of Elizabeth* in their Application. They argued that the Application was therefore deficient and asked the Court to disallow reference to the statute.

Justice Nixon held that in most cases he would have agreed with the Respondents. Rule 6.3(2)(d) states that unless the Court permits otherwise, any reference to a provision of an enactment or Rule relied on must be specified in the Application. However, there were three distinguishing factors before Nixon J. that enabled him to allow the Applicants to reference the *Statute of Elizabeth* in the Application.

First, at the outset of the hearing, there was a discussion about an adjournment and the Respondents indicated that they did not want to adjourn. This point was important because the Court has discretion to adjourn Applications if evidence on a key point is not clear, to let the parties obtain better evidence. Justice Nixon held that the same requirement applies to relevant provisions of statues under Rule 6.3(2)(d).

Second, the Respondents had advanced notice of the Applications' intention to rely on the *Statute of Elizabeth*. In fact, the Applicants had raised the *Statute of Elizabeth* in a Brief and the Respondents addressed it at length in their own Brief.

Third, the Respondents acknowledged that the *Statute of Elizabeth* was always raised in conjunction with the *Fraudulent Preferences Act*, RSA 2000, c F-24 ("*FPA*"), and the *FPA* was raised in the Application. Therefore, the *Statute of Elizabeth* did not come as a surprise to the Respondents.

Lastly, Nixon J. noted that the purpose of Rule 6.3(2), which is discretionary in nature, is to ensure that Respondents understand the case they must meet. However, where the Respondents have received written arguments weeks in advance of a hearing, any concerns about prejudice to the Respondents fade, and any such concerns are best dealt with by way of Costs.

BAKER LAW FIRM V CONDOMINIUM CORPORATION NO 1611047, 2023 ABKB 330

(BOURQUE J)

Rules 6.14 (Appeal from Application Judge's Judgment or Order), 10.31 (Court Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Justice Bourque considered an Appeal of a Costs Award made by an Applications Judge, related to an Application to transfer the Action to the Court of Justice (the "Transfer Application"). The Applicant was initially awarded $750 in Costs by Applications Judge Prowse for successfully defending the Transfer Application; however, the Applicant appealed based on the position that it was contractually entitled to solicitor client Costs. Pursuant to Rule 6.14(3), the Respondent submitted an Affidavit to form part of the Appeal Record.

Justice Bourque identified that the Court's obligation in determining Costs consists of considering the factors enumerated in Rule 10.33. Justice Bourque further noted that, subsequent to the consideration of the factors listed in Rule 10.33, the Court must then consider the Award options available in Rule 10.31.

Ultimately, after considering the conduct of the Applicant in the context of the Rule 10.33 factors, Justice Bourque confirmed that Applications Judge Prowse did not err by awarding lump sum Costs in accordance with Rule 10.31. Justice Bourque dismissed the Appeal.

JACOBSEN V WAWANESA MUTUAL INSURANCE CO, 2023 ABCA 122

(SLATTER, HUGHES AND KIRKER JJA)

Rule 6.14 (Appeal from an Applications Judge's Judgment or Order)

The Alberta Court of Appeal considered whether an Appeal of an Applications Judge's Order was filed in time. Kachur J. of the Alberta Court of King's Bench had previously allowed the Respondent's Appeal (the "Decision") of an Applications Judge's Order declining to dismiss the Appellant's claim for inordinate delay under Rule 4.31. The Appellants appealed the Decision.

The Alberta Court of Appeal noted that Rule 6.14 requires a Notice of Appeal from an Applications Judge's Order to be filed and served within 10 days of its entry and service. The Court also noted that Rule 6.14 assumes that the winning party will file and serve the Notice of Appeal. However, in this case, the Applications Judge had directed that the losing Respondent prepare the Order. As such, the Appellants argued that the Notice of Appeal should have been filed within 10 days of the date that the losing Respondent filed the Order rather than the date that the Respondent served the Order on the Appellants.

The Alberta Court of Appeal disagreed and dismissed the Appeal. The Court noted that the Notice of Appeal was filed outside the expectations of the Rules, but in literal compliance with them. As such, the Court found no reviewable error in the Decision.

MURRAY V WINDSOR BRUNELLO LTD, 2023 ABKB 375

(SIDNELL J)

Rule 6.37 (Notice to Admit)

Two days before the Trial commenced, the Defendant, WBL, served a Notice to Admit Facts on another Defendant, AEL. The Plaintiffs applied under Rule 6.37(8) to set aside WBL's Notice to Admit Facts. The Application was granted.

WBL argued that since the admission was only as between WBL and AEL, the Plaintiffs had no standing to apply to set aside the Notice to Admit Facts. Sidnell J. disagreed with that argument. Subsections (2) and (4) of Rule 6.37, in requiring a Notice to Admit be served on all Parties to the Action, show that Rule 6.37 contemplates that a Notice to Admit may be relevant to, and affect, other Parties to the Action.

When determining whether a Notice to Admit Facts can be served after the commencement of Trial, Sidnell J. cited *TS v Stazenski,* 2011 ABQB 508 for the proposition that Rule 6.37 should be read as limiting its use to a period that is at least 20 days before a Trial commences. However, Sidnell J. noted that under special circumstances, a Notice to Admit can be served after the Trial has commenced.

Relying on S*tazenski and Andriuk v Merrill Lynch Canada Inc*, 2011 ABQB 59, Sidnell J found that

the non-exhaustive considerations on an Application to set aside a Notice to Admit under Rule 6.37(8) include whether the Notice to Admit: (a) achieves the intention of the Rules, as set out in Rule 1.2; (b) should be set aside for a reason set out in Rule 1.4(2)(b): for being contrary to law, an abuse of process or is undertaken for an improper purpose; or (c) affects trial fairness or is prejudicial to other Parties.

Sidnell J. found that the Plaintiffs would be prejudiced by the Notice to Admit Facts because it was served, and replied to, on the eve of Trial such that the Plaintiffs were unable to properly prepare for it.

Further, having noted that WBL submitted that if it could not rely on the Reply to Notice to Admit documents, it would call an individual a witness to give evidence, Sidnell J held that if this individual is called as a witness by WBL, the Plaintiffs would have the opportunity to cross-examine him on his evidence. On the other hand, if the Notice to Admit Documents were accepted, this individual's evidence would not be subjected to cross-examination, which plays a very important role in the adversarial system.

Sidnell J. further found that the use of the Notice to Admit documents would preclude some Parties from testing that evidence by cross-examination, which would be contrary to Trial fairness and be prejudicial to those Parties.

GORDON ESTATE (RE), 2023 ABKB 132

(ARMSTRONG J)

Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Applicant sought Summary Judgment dispensing with the Respondent's position contesting the validity of a will. Justice Armstrong noted that Rules 7.2 and 7.3 govern the availability of Summary Judgment. After identifying the relevant jurisprudence, Justice Armstrong stated that the evidentiary record before the Court was comprehensive and adequate to support a Summary Judgment.

After considering the evidence, Justice Armstrong concluded that the will met the formal requirements for validity, that the Respondent was unable to rebut the presumption of testamentary capacity, and that there was no undue influence on the deceased. As a result, Justice Armstrong found that the will was valid and awarded Summary Judgment to the Applicant.

AG CLARK HOLDINGS LTD V 1352986 ALBERTA LTD, 2023 ABKB 219

(APPLICATIONS JUDGE BIRKETT)

Rule 7.3 (Summary Judgment)

In this Pre-Trial Application, a contractor sought a Judgment declaring its liens valid in the amount of its outstanding invoices. The central issue before the Court was whether it was possible to resolve the dispute on a summary basis, given the state of the record and issues, without a genuine issue requiring a Trial.

The dispute in question arose between the Plaintiffs, AG Clark Holdings Ltd. ("Clark Builders") and the Defendant, 1352986 Alberta Ltd. (the "Owner"), over unpaid invoices for services rendered in the renovation of a historical building on Jasper Avenue in Edmonton. Clark Builders had entered into a construction management contract with the Owner in July 2009 and provided services from November 30, 2010, to June 30, 2011, for which invoices remained unpaid.

Clark Builders had registered a builders' lien against the fee simple estate of the Owner and the leasehold interest of the Lessees, which included the Redleaf Defendants (Redleaf Properties Corporation, 1354178 Alberta Ltd., and 1352992 Alberta Ltd.). The Redleaf Defendants disputed the claim, alleging issues with Clark Builders' management of the project and denying that any monies were owing. Clark Builders had previously brought an Application for Summary Judgment against the Redleaf Defendants in September 2015, which was dismissed. However, on November 20, 2020, Clark Builders brought a new Application for a summary disposition pursuant to s. 53 of the *Builders' Lien Act*, RSA 2000, c B-7 (the "*BLA*") against the Redleaf Defendants to declare its liens valid in the amount of the outstanding invoices.

The Court noted that s. 53 of the *BLA* allows for a pre-Trial Application to determine the validity of liens or to direct that any particular issues be determined at Trial. It further states that where the relief sought on a s. 53 pre-Trial Application is final in nature, it is analogous to a Summary Judgment Application. Although the specific requirements of a Rule 7.3 Application may not apply, the principles for Summary Judgment do.

Applying the three-part test in *Hryniak v Mauldin*, 2014 SCC 7, the Court held that it was possible to fairly resolve the builders' lien dispute on a summary basis, and uncertainties in the facts, the record, or the law did not reveal a genuine issue requiring a Trial.

In the result, the Court declared the builders' liens registered against title valid in the amount of the outstanding invoices. Clark Builders was entitled to the Costs of this Application and the Action.

ENVIRONMENTAL DEFENCE CANADA INC ET AL V KENNEY ET AL, 2023 ABKB 304

(INGLIS J)

Rule 7.3 (Summary Judgment)

The Defendants filed an Application for Summary Dismissal pursuant to Rule 7.3, arguing that the alleged defamatory statements were not "of and concerning" the Plaintiffs.

The claim arose from statements made by former Premier Jason Kenney and statements published on Government of Alberta websites regarding the findings of a public inquiry, conducted by Commissioner Steve Allan, to investigate allegations that environmental campaigns against Alberta's oil and gas sector were being funded by foreign interest groups. The Commissioner's final report confirmed the existence of well-funded, decade-long campaigns based on misinformation that had impacted the lives and livelihoods of Albertans.

The Plaintiffs claimed that four statements were defamatory: a Facebook post and an identical tweet posted to Jason Kenney's respective accounts (the "Social Media Post"); statements on the "Inquiry Webpage" and statements in the "Key Findings Document". The Social Media Post did not name the Plaintiffs but contained a link that directed the viewer to an Alberta Government web page titled "Foreign funding hurt Alberta's energy development", which included the Inquiry Webpage that linked directly to the Key Findings Document that incorporated a list of 36 names, including the names of the Plaintiffs.

The Court first cited the key considerations set out in *Weir-Jones Technical Services Inc. v Purolator Courier Ltd*., 2019 ABCA 49, confirming that to succeed in the Application, the Defendants must show that there were no uncertainties in the facts, the record, or the law, and that Summary Dismissal would be appropriate when the Plaintiffs' claim had no merit based on the facts proven on a balance of probabilities.

The Court then dealt with the question of what constituted a defamatory statement and found that the only issue before the Court was whether the alleged defamatory statements referred to the Plaintiffs. The Court further noted that defamatory statements did not need to refer to a Plaintiff explicitly or directly. Whether the statements were "of and concerning" the Plaintiffs would depend on whether a reasonable person, informed of the general context of the statements and the surrounding circumstances of the Plaintiffs and Defendants, would understand that it was the Plaintiff to whom the Defendant referred.

The Defendants argued that the statements did not refer to the Plaintiffs because: (1) the footnote in the impugned sentence of the Key Findings Document referred to the Tar Sands Campaign, not the Plaintiffs; (2) the Plaintiffs were not singled out from the larger group of 36 organizations named in the Key Findings Document; (3) the social media posts and Inquiry Webpage did not identify the Plaintiffs explicitly; (4) because reaching the Key Findings Document from the Social Media posts required following two links, the posts were not sufficiently connected to the list of 36 names in the Key Findings Document; and (5) a reasonable person aware of the surrounding circumstances would not know the statements referred to the Plaintiffs.

On the other hand, the Plaintiffs argued that: (1) the Key Findings Document named each

of them individually; (2) the statements that did not include the names of the Plaintiffs contained links to the Key Findings Document where their names were easily found; and (3) a reasonable person aware of the surrounding circumstances would know that at least some of them were the targets of the public inquiry.

The Court found that the Key Findings Document, when considered as a whole, clearly linked the alleged defamatory statements to the campaigns involving the listed Plaintiffs. Furthermore, the Court determined that social media links allowed a reasonable person to understand to whom the impugned statements referred. When social media posts contained links to another document, allowing a party to separate the defamatory statement from the identity of the defamed and offer a defence of no sufficient connection would defeat defamation law.

In the result, the Application for Summary Dismissal was denied as the Defendants had not established that the impugned statements did not refer to the Plaintiffs.

MAGNUSON ESTATE, 2023 ABKB 305

(FETH J)

Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Applicant applied for Summary Judgment pursuant to Rule 7.3 to void the residual gift under the will in question because he believed the Respondent had caused the testator's death. The Application relied on, among other things, an alleged confession by the Respondent to the RCMP (the "Confession") and a criminal charge against the Respondent set out in an Affidavit.

The Court set out the prevailing principles for Summary Judgment and then reviewed the types of information that may be included in an Affidavit under Rule 13.18, noting that if an Application may "dispose of all or part of a claim", it cannot include hearsay evidence and must be sworn on the basis of the personal knowledge of the Affiant. The Court further noted that (1) hearsay cannot be used to support a final determination unless the evidence would be admissible at Trial through an exception to the hearsay rule to prove the truth of the contents of the statement, and that (2) Rule 13.18(3) should not be read as an absolute bar for the use of hearsay evidence, with a key consideration being whether the underlying source of information is reliable and would be admissible at Trial.

The Court found that the Summary Judgment Application was a final determination of the Applicant's claim which required personal knowledge, that had not been discharged.

The Court more specifically found that (1) no exception to the hearsay rule was applicable; (2) the sparse evidentiary record did not demonstrate that the information was sufficiently reliable and would be admissible at a Trial; and (3) even if the hearsay was admissible for the Application, the Affidavit would need to identify the underlying source of the information and belief. The Court additionally noted the circumstances of the Confession could not be properly determined and that the Confession was also imprecise.

The Court accordingly dismissed the Application, noting that the Applicant did not meet the evidentiary burden but did note that a summary determination could be possible if the Respondent had been convicted of a crime.

KROETSCH V CHICK, 2023 ABKB 326

(MANDZIUK J)

Rule 7.3 (Summary Judgment)

This was an Application for Summary Judgment pursuant to Rule 7.3 concerning a contractual dispute about the purchase and sale of farmland and related issues. The Court set out the applicable principles for Summary Judgment and noted that the case turned on the interpretation of the agreement at issue (the "Agreement") which required the Defendant to apply for subdivision of the Northwest Quarter (the "Land") and sell it to the Plaintiff after subdivision was effected. The Court noted that the Defendant had never applied to subdivide the Land.

The Court found that the language in the Agreement was clear and unambiguous and even if the Agreement were ambiguous it would have come to the same conclusion based on evidence of the Parties' post-contract conduct. Accordingly, the Court determined that it was able to come to a fair and just determination on the merits.

The Court determined that the legal requirements for granting Summary Judgment in favour of the Plaintiff had been met and granted the remedy of specific performance. The Court did find that the Plaintiff's claim for loss profits was an insufficient assertion, and accordingly an issue that could not be decided summarily.

KRISTEL V PAUL, 2023 ABKB 345

(APPLICATIONS JUDGE SUMMERS)

Rule 7.3 (Summary Judgment)

Certain Defendants (the "Lawyer Defendants") applied under Rule 7.3 to summarily dismiss the Action brought against them by former clients. Applications Judge Summers granted the Application after finding that the Court record left the Court with sufficient confidence to conclude that there was no genuine issue requiring Trial and that a summary disposition was fair and appropriate in the circumstances.

The Plaintiffs had alleged that the Lawyer Defendants breached certain duties owed to the Plaintiffs when they acted for the remaining Defendants on a transaction involving the sale of land and assets. The Court found that the Plaintiffs adduced no evidence to show that they suffered damages in respect of their complaints against the Defendants and failed to make out the allegations that the Lawyer Defendants were liable.

BENNETT V TREIT, 2023 ABKB 348

(KUBIK J)

Rule 7.3 (Summary Judgment)

The Respondent/Plaintiff in this Application was acquitted of 11 criminal offenses. Following his acquittal, he filed a civil Claim against various government, Crown, and police Defendants for various torts. The Appellants, who were the Defendants in the Action filed by the Respondent, sought Summary Dismissal of the Action against them.

In deciding the Application, the Court cited governing case law for the proposition that Summary Dismissal may be granted where it is procedurally fair to do so in light of factual and legal questions before the Court, having regard to the four-part test articulated in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*., 2019 ABCA 49. The Court also considered section 3(3) of the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*"), as some of the torts alleged were barred by the 10 year limitation period.

Applying the relevant tests, the Court determined that the Defendants had proven on a balance of probabilities that there was no merit to the Plaintiff's claims because all the claims were either statute-barred by the *Limitations Act* or the Plaintiff had failed to prove one or more elements of the torts alleged. Kubik J. further noted that the Defendants had also proven on a balance of probabilities that a fair, just and cost-effective determination could be made on the record before him and the Plaintiff had raised no issues of fact, law or credibility that required a full Trial. As a result, there was no genuine issue requiring Trial. Summary Dismissal was granted and the Plaintiff's Action against the Defendants was dismissed.

CONDOMINIUM CORPORATION NO 062 1161 V PARK PLACE COMMUNITIES LTD, 2023 ABKB 373

(MAH J)

Rule 7.3 (Summary Judgment)

The Appellant (the "Developer") appealed from an Application Judge's Decision denying its Application for Summary Dismissal based on limitation period expiry. The underlying Action was a suit by the Respondent condominium corporation regarding a leaky roof.

The Court noted that Summary Dismissal may be granted when it is a proportionate, more expeditious and less expensive means to achieve a just result. The test articulated in *Weir Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 should be applied to determine whether the facts, the record or the law revealed a genuine issue to be tried.

The Parties took different views of when the limitation period started to run. On Appeal, the Developer argued that there were three points in time when it could be said that an Action concerning the leaky roof was warranted and that each of these was more than two years

before the date of Statement of Claim issuance in August 2013.

In response, the Respondent contended that the Developer had in 19 instances, between February 2007 and November 2012, represented that it was fixing the roof. In addition, the Developer's conduct conveyed their intention to pay the entire cost of a roof replacement and created the expectation, even though they had never explicitly stated such intention. The Respondent submitted that: (1) an Action was not warranted until the Developer changed its position in November 2012, when it proposed to the board that the cost of the repairs be shared on a 50-50 basis; and (2) alternatively, the representations made by the Developer that it intended to fix the roof constituted a promissory estoppel which could in its legal effect extend the limitation period.

The Court found that there was sufficient evidentiary basis that there were live issues to be tried.

The Court also noted that there were competing objectives at play, including an objective of certainty in business relations, an objective of encouraging parties to work out their issues without litigation, and a policy consideration that an injured party working with the other side in resolving the dispute should not be told, when the process failed, that the claim was time-barred. The Court observed that the identification of that tipping point and how the above competing objectives could be accommodated could only be determined after a full Trial on the facts. It would be necessary, according to the Court, to determine from the evidence whether the Respondent slept on its rights or reasonably relied on the Developer to correct the leakage problem.

The Court further observed that a more definitive statement of law, emerging from a Trial on the facts, was desirable, since the dynamic of a condominium corporation seeking post-construction remediation from a Developer was a common scenario involving interactions that could occur over a period of years as in the case at bar.

In the result, the Court dismissed the Appeal and directed that the issue of whether the limitation period had expired prior to commencement of the Action was to be determined at Trial, at which time the onus of proof would fall on the Respondent to show that the limitation period had not expired.

1218807 ALBERTA LTD V MUSLIM ASSOCIATION OF CANADA LTD, 2023 ABKB 300

(ANGOTTI J)

Rules 7.5 (Application for Judgment by way of Summary Trial) and 10.36 (Assessment of Bill of Costs)

The case involved a lease agreement between the Plaintiff and Defendant, with the latter being unable to pay rent due to the COVID-19 pandemic and government lockdowns. The Plaintiff sought Judgment for unpaid rent, while the Defendant argued that the force majeure clause in the lease excused them from paying rent during this time.

The Parties mutually agreed to a Summary Trial, with the specific issues for resolution outlined in a Court Order. The Court noted that, for a Summary Trial to proceed, the Court must ascertain two things: first, the disputed facts can be resolved through Affidavits, cross-examinations, and any other processes sanctioned by Rule 7.5; second, it would be equitable and

fair for the Parties to resolve the issues this way, as established by *Imperial Oil v Flatiron Constructors Canada Ltd*., 2017 ABCA 102.

The Court was satisfied that any factual matters could be determined on the state of the record before it, which consisted of both Affidavits and cross-examination on Affidavits and provided a sufficient evidentiary basis. Neither Party raised issues of credibility. There were no disputes about the facts, the record, or the law that would render a Summary Trial inappropriate or potentially unfair.

The Court found that the force majeure clause did not apply in this case, as it was triggered by government regulations rather than the pandemic itself. Additionally, the clause did not excuse the Defendant from paying rent.

The Court granted Summary Judgment in favour of the Plaintiff for unpaid rent and dismissed the Defendant's counterclaim for a declaration that they were excused from paying rent under the force majeure clause.

The Court awarded Costs to the Plaintiff in accordance with the lease agreement for both pre-litigation steps and the Action itself. If the Defendant had issues with the amount of Costs claimed, the Court directed the Parties to have an assessment of the Costs payable by an Assessment Officer under Rule 10.36.

KY V BAHLER, 2023 ABKB 280

(RENKE J)

Rules 8.8 (Notice to Attend as Witness at Trial) and 8.15 (Notice of Persons Not Intended to be Called as Witnesses)

This was a Judgment in a medical negligence Action. The Defendant physicians were alleged to have breached the standard of care applicable to them in connection with medical treatment rendered to a pregnant mother and her then-unborn twins. The mother and twins were the Plaintiffs.

In argument, the Defendants urged that an adverse inference be drawn against the Plaintiffs for failing to call witnesses. The Court noted that, pursuant to Rule 8.15(4), an adverse interest may be avoided if a party serves notice on every other party indicating the names of individuals not intended to be called as witnesses and the other party does not respond. The Court added that, even absent compliance with Rule 8.15, the drawing of an adverse interest is subject to the Court's discretion, having regard to whether: (1) there is a legitimate explanation for the failure to call the witness; (2) the witness has material evidence to provide; (3) the witness is the only person or the best person who can provide the evidence; and (4) the witness is within the exclusive control of the party against whom the inference is sought, and is not equally available to both parties.

The Defendants sought that an adverse inference be drawn against the Plaintiffs as a result of their failure to call the Plaintiff mother's mother, who had been present for an important medical examination. The Court noted that notice had not been served pursuant to Rule 8.15 but concluded that an adverse inference should not be drawn since evidence of the examination was otherwise available through the Plaintiff mother. The Court noted that the Defendants could have served notice on the witness pursuant to Rule 8.8(1), which was not done.

The Court also rejected the Defendants' contention that an adverse inference should be drawn in light of the Plaintiffs' failure to call a medical expert who had been consulted in connection with the Plaintiffs' treatment. Again, no notice was served pursuant to Rule 8.15. However, the Court held that the documentary record, which closely documented the expert's fleeting involvement in the events in issue, was sufficient to cover any evidence that the expert might have provided. As a result, the Court held that it was not appropriate to draw an adverse inference.

ELLIOTT V ELLIOTT, 2023 ABCA 191

(SLATTER JA)

Rules 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only with Permission)

The Applicant sought permission, pursuant to Rule 14.5(1)(a), to Appeal a Scheduling Order and extend the time to file that Appeal. The Scheduling Order was granted on March 24, 2021. The Applicant failed to file the Notice of Appeal until April 20, 2023. Justice Slatter, considering the chronology, concluded that the delay was inordinate and that allowing the Appeal would result in further delay, expense, and prejudice to the Respondent.

Justice Slatter also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

MACK V DATZOFF, 2023 ABKB 343

(HARRIS J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.5 (Service on Individuals)

This was an Application to set aside a Default Judgment involving Ms. Mack and Mr. Datzoff, former adult interdependent partners. After their relationship ended, Ms. Mack began a civil Action for unjust enrichment and division of property. Mr. Datzoff failed to respond to the Statement of Claim, which led Ms. Mack to note him in default. Later, Mr. Datzoff applied to set aside the Default Notice and for an Order permitting him to file a Statement of Defence. His Application relied on the argument that he was not correctly served, as per Rule 11.5.

Ms. Mack served her Statement of Claim via recorded mail. This mail was signed for by Mr. Datzoff's new partner, Jennifer Jones, who confirmed that she had hand-delivered it to Mr. Datzoff. The same day, Mr. Datzoff acknowledged service of the Statement of Claim via a text message to Ms. Mack.

Mr. Datzoff's counsel, acting on a limited scope retainer, sent a letter to Ms. Mack's counsel. The letter suggested the Statement of Claim was to preserve a limitation period, assumed

negotiations would move the matter forward, and requested that Ms. Mack's counsel not note Mr. Datzoff in default without reasonable advance notice. This firm then ended its retainer.

Mr. Datzoff was noted in default for failing to file a Statement of Defence or Demand for Notice. Subsequently, Mr. Datzoff hired a new counsel in response to a child support Application and claimed to have learned about the Default Notice then. Negotiations ensued with no progress, leading Ms. Mack's counsel to proceed with litigation. Mr. Datzoff's second lawyer then withdrew. Mr. Datzoff hired a third counsel and filed the current Application, asserting that he assumed his second counsel had addressed the Default Notice.

In the evaluation of Mr. Datzoff's situation, the Court initially deliberated the efficacy of the service as per Rule 11.5. Although Ms. Mack's attempt at service via recorded mail failed to meet the standards set in Rule 11.5(2)(b), the Court held that personal service was achieved under Rule 11.5(1)(a), as Mr. Datzoff did receive the Statement of Claim directly from Ms. Jones.

The Court then evaluated if the Default Notice should be set aside pursuant to Rule 9.15, allowing Mr. Datzoff to file a Statement of Defence. The Court noted that Mr. Datzoff's casual approach to his obligations contributed to his delay in filing a defence. However, in consideration of the principles of fairness, inadvertence of his counsel, and the existence of a plausible defence as suggested by the test set out in *Poloma Investments Ltd. v Yuen*, 2016 ABCA 93 and *Palin v Duxbury*, 2010 ABQB 833, the Court decided to exercise its discretion under Rule 9.15 to set aside the Default Notice.

The Court concluded that Mr. Datzoff was personally served and ordered Mr. Datzoff to file a Statement of Defence within 7 days of the Decision. Ms. Mack was awarded $1,500 in throw away Costs and the Court directed that the Parties enter a Litigation Plan, including setting the Trial within 30 days.

UHRIK V TERRIGNO, 2023 ABKB 223

(BOURQUE J)

Rules 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs) and 13.7 (Pleadings: Other Requirements)

The Court considered whether to impose Court access restrictions on the Respondents, who cross-applied requesting that the Court impose access restrictions on the Applicants.

The Court determined that the Respondents were vexatious litigants and imposed Court access restrictions on them. The Court noted that determining whether to impose Court access restrictions involves consideration of the litigation record of an abusive litigant to evaluate whether that person has engaged in litigation misconduct. The Court reviewed decisions criticizing the Respondents' litigation conduct, including a decision holding that one of the Respondents had advanced bald, unsubstantiated allegations of defamation contrary to Rule 13.7(f).

The Court dismissed the Respondents' Cross-Application to impose Court access restrictions on one of the Applicants. The Court found that the Applicant had a pattern of making offensive, ill-considered statements

and conducting litigation in an inefficient or aggressive manner. However, the Court noted that this conduct was not a consistent or predominant pattern as the Applicant was an important actor in taking steps to identify and mitigate a large-scale fraud. The Court determined that the Applicant's litigation was manageable by steps less extreme than Court access restrictions such as Security for Costs or case management.

The Court determined that the Applicants were presumptively entitled to Costs pursuant to Rule 10.29(1) as they were entirely successful. The Court required the Applicants to prepare an Order and dispensed with the requirement for the Respondents to approve that Order in accordance with Rule 9.4(2)(c).

LEIA V STYLES, 2023 ABKB 213

(DARIO J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review) and 10.41 (Assessment Officer's Decision)

A lawyer sought to Appeal the decision of a Review Officer to reduce his fees. In particular, he argued that the Review Officer erred by applying a student rate to hours billed for research, correspondence, and reporting letters, when a higher rate was agreed upon in the retainer agreement. He argued that the Review Officer also failed in interpreting the retainer agreement.

Justice Dario held that, pursuant to Rule 10.9, Review Officers have the jurisdiction to assess the reasonableness of a retainer agreement. The retainer agreement provided that, where possible, work would be delegated to paralegals and articling students at a lesser rate. Justice Dario found this to be a representation that an articling student would be available when this work arose. The fact that the lawyer did not ultimately have an articling student did not change the accuracy of the Review Officer's findings that some hours should be reduced to the lesser promised rate for work that ought to have been delegated.

The Court further held that, pursuant to Rule 10.9, even where a retainer agreement definitively sets out an hourly rate, a Review Officer has authority to assess the reasonableness of that rate. It is an assessment of the value the client received for the work, regardless of what level of counsel performed the task. Similarly, pursuant to Rule 10.41, a Review Officer can remove line items that are unnecessary to achieve the purpose of the retainer.

Justice Dario looked to Rule 10.2 for the factors to be considered in assessing bills. These include: the time and effort required, the difficulty of the matter, the nature, importance, and urgency of the matter to the client, the client's circumstances, whether some special skill or service was required and provided, the results obtained, the experience and ability of the lawyer, and the client's prior consent to fees.

Ultimately, Justice Dario found no error in the Review Officer's decision, and the Appeal was accordingly dismissed with Costs to the Respondents

STANCHFIELD V DOE, 2023 ABKB 273

(MARION J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements) and 10.8 (Lawyer's Non-Compliance with Contingency Fee Agreement)

This case arose from a minor Plaintiff's involvement in two car accidents, the second of which involved an unidentified driver, and the Administrator of the *Motor Vehicle Accident Claims Act*, RSA 2000, c M-22 became part of the case. On her own behalf and as her son's litigation representative, the mother retained counsel for the lawsuit arising from the second accident. She then applied for the approval of a settlement relating to the second lawsuit under s. 4(2) of the *Minors' Property Act,* SA 2004, c M-18.1.

In the course of this Application, the Plaintiff's counsel also sought Court approval for the payment of his fees out of the settlement funds pursuant to the terms of a Contingency Fee Agreement ("CFA"). The Public Trustee agreed that the settlement should be approved but objected to the amount of fees that the Plaintiff's counsel sought.

The Court found that the CFA was unenforceable because it did not comply with Rule 10.7 and 10.8, which sets out requirements to ensure the terms of a contingency fee are clear and that the client had executed and been provided with a copy of the agreement. The Court noted that the CFA failed to include: a statement that "… no fee, calculated as a percentage or otherwise, may be payable on disbursements or other charges recovered" as required by Rule 10.7(2)(e)(i), and instead stated the opposite; the statements required by Rule 10.7(2)(f) if the lawyer was to receive any amount from a Costs Award, even though it provided that counsel would receive a portion of a Costs Award; a statement regarding the client's notification needed to terminate the CFA as required by Rule 10.7(2)(g), and instead contained an awkwardly-worded provision that only potentially covered a portion of that Rule's requirements; and a statement regarding the review of the CFA and counsel's charges, as required by Rule 10.7(2)(h).

The Court added that the invoice appended as Exhibit G to the mother's updated Affidavit failed to include a statement that at the client's request a Review Officer may determine both the reasonableness of the account and the reasonableness of the CFA, as required by Rule 10.7(7).

The Court also noted that Courts must be careful not to reward counsel, or prejudice clients, for counsel's non-compliance, especially when counsel act on behalf of minor children.

As a result, the Court approved the settlement of the minor Plaintiff's claims but found that the Plaintiff's counsel was only entitled to "a lawyer's charges determined in accordance with Rule 10.2", including goods and services tax and disbursements and other costs, which was around $2,700 less than counsel claimed. No Costs of the Application were awarded.

MMP V TWZ, 2023 ABKB 355

(FETH J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision arising from an unsuccessful Application to relocate the Parties' children to the United States. The Respondent sought Costs while the Applicant asked the Court to decline to award Costs due to her limited financial means. Both Parties received legal representation through Legal Aid Alberta.

The Court noted that the general legal principles for Costs Awards were applicable to family law matters, involving relocation Applications. The Court then referred to Rule 10.29(1), which sets out the general rule that a successful Party is entitled to Costs. The Court also set out Rule 10.33, which lists factors that may guide the Court's discretion in making a Costs Award. In addition, the principles established in *McAllister v Calgary (City)*, 2021 ABCA 25 were cited extensively as the legal framework under which entitlement to and the amount of a Costs award shall be assessed and determined.

In terms of entitlement, the Respondent claimed that he was entitled to Costs on the basis that he had been successful in resisting the relocation Application. The Applicant responded that each Party should bear their own Costs because: (1) her limited financial means should be taken into account; and (2) the Respondent had less need for indemnification as the lawyer's charges were paid out by Legal Aid Alberta.

In dismissing the Applicant's arguments, the Court noted that the unsuccessful Party's current inability to pay was not a factor in gauging Costs entitlement, since their circumstances might change, enabling payment in time. The Court took judicial notice of the notorious fact that the Legal Aid program was a finite public resource with limited funding and held that the involvement of Legal Aid Alberta did not disentitle a Party from receiving Costs, even enhanced Costs.

In terms of the proper amount of Costs, the Respondent asserted that the Applicant's unfounded allegations of family violence and filing of unhelpful third-party Affidavits should attract enhanced Costs. In this regard, Justice Feth noted that the Court should be cautious about enhancing Costs simply because a hearing was marginally longer or more complicated because of a small amount of extraneous evidence that was not wholly unnecessary.

Justice Feth recognized that the family violence allegation was too far removed from the Parties' current situation but found that the Applicant did not unnecessarily raise the issue or engage in misconduct, since the issue was relevant to the best interests of the child analysis. The Affidavits, although replete with hearsay and opinions based on hearsay, did not needlessly expand the issues to which the Respondent must respond. Additionally, they contained evidence about the Respondent's parenting and the child's upbringing, which provided assistance to the Court. Similarly, the Applicant's argument that the Respondent complicated the proceeding by filing several more pages of Affidavit evidence than originally allowed by the oral hearing Order was dismissed. The Court found that the additional pages of Affidavit did not materially lengthen or complicate the proceeding.

However, the Court highlighted the lengthy litigation history between the Parties, including more than 30 appearances in front of Judges

since August 2017, many of which involved parenting disputes and minor matters. The Court emphasized that Costs Awards should not prevent access to justice but should always seek to promote responsible litigation and align with the primary purpose of a Costs Award - a reasonable level of indemnification to the successful Party. The Court noted that the litigation history suggested that a significant Costs Award would be appropriate in this case despite the Applicant's modest means.

The significant Costs Award amount would promote responsible litigation and ensure that both Parties would be encouraged to pursue settlement, compromise, and constructive communications, instead of Court proceedings.

In the result, the Court awarded a lump sum amount of $3,250 to the Respondent, which was less than full indemnity but higher than the general target range of 40-50% indemnification.

BROSSEAU ESTATE V DUBARRY ESTATE, 2023 ABKB 378

(APPLICATIONS JUDGE SCHLOSSER)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision arising from a successful Summary Dismissal Application by one of several Defendants.

The Applicant sought 50% of its actual Costs (a total of approximately $250,000) based on the Decision in *McAllister v. Calgary (City)*, 2021 ABCA 25 ("*McAllister*"). The Respondents objected to that scale of Costs, asserted that Costs should be payable at the conclusion of the entire lawsuit, or sought contribution or indemnity from the unsuccessful Defendants.

The Court observed that *McAllister* did not supplant Schedule C of the Rules with a *de facto* 40–50% indemnity model. Rather, per the Court, *McAllister* is simply a reminder of the variety of choices in awarding Costs, depending on the circumstances of a given case and the considerations under Rules 10.33 and 10.2 (with respect to scale) and Rule 10.31 (with respect to options). The Court emphasized that Costs remain wholly discretionary.

With respect to this particular case, Applications Judge Schlosser observed that the Applicant's ultimate argument on the Summary Dismissal Application was available at the outset of the lawsuit in 2012. The Court did not impugn the Applicant for taking a cautious approach, but found it inappropriate to require the Respondent to pay the expenses related to that approach.

In the result, the Court awarded the Applicant Costs under Schedule C, payable forthwith.

SUNRIDGE NISSAN INC V MCRUER, 2023 ABCA 128

(MARTIN, ROWBOTHAM AND PENTELECHUK JJA)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.33 (Court Considerations in Making Costs Award), 14.27 (Filing Extracts of Key Evidence) and 14.90 (Sanctions)

In the context of a series of Appeals and Cross-Appeals involving multiple Parties, Sunridge Nissan Inc. ("Sunridge") and Ms. McRuer ("McRuer") appealed the Trial Judge's Costs Award. The Trial Judge awarded Sunridge indemnification of 10% of its incurred expenses (and 20% following service of a Formal Offer to Settle). The Trial Judge's Costs Award took into account: Sunridge's success being based on a limitation defence which could have been determined summarily, the aforementioned Formal Offer to Settle, and Sunridge's unproven allegations of fraud against McRuer. After assessment by an Assessment Officer, Sunridge's Costs Award amounted to approximately $28,000.

The Court of Appeal began its analysis by noting that Costs Awards are highly discretionary and afforded considerable deference on Appeal—a Costs Award should only be set aside if the Trial Judge made an error in principle or if the Costs Award is plainly wrong. The Court also noted that the awarding of Costs based on a percentage of solicitor and client fees involves the consideration of many factors, including those set out under Rules 10.2 and 10.33.

Ultimately, the Court stated that although a higher figure could have been awarded, it could not be said that the Costs Award was plainly wrong. The Court therefore dismissed the Appeal and Cross-Appeal.

With regard to the Costs of the Appeals and Cross-Appeals, the Court ordered Costs in Sunridge's favour as the substantially successful Party. However, pursuant to Rule 14.90(1)(a)(ii), the Court refused to award Sunridge the Costs of preparing its Extracts of Key Evidence, as it had done so in a manner contrary to Rule 14.27(1).

MIKISEW CREE FIRST NATION V RATH, 2023 ABKB 321

(GRAESSER J)

Rules 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyer's Non-Compliance with Contingency Fee Agreement), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges) and 10.18 (Reference to Court)

This was a referral to the Court, pursuant to Rule 10.18, from an appointment with a Review Officer challenging contingency fee agreements ("CFAs") made between the Plaintiff First Nation and Defendant solicitor.

The Plaintiff alleged that the CFAs were not properly approved by Band Council and that the CFAs were uncertain and overbroad. The Plaintiff also alleged that the Defendant had failed to prove satisfactory compliance with

the requirements set out in Rule 10.7. As such, the Plaintiff argued that the CFAs were invalid, pursuant to Rule 10.8. The Defendant argued that the CFAs complied with applicable Rules in all necessary respects and were otherwise proper. The Defendant further argued that the Plaintiff was out of time for review of the CFAs pursuant to Rule 10.10 and that the Review was premature since no event triggering payment under the CFAs had yet occurred.

Having concluded there was insufficient evidence that the CFAs were not properly approved, the Court considered the validity of the CFAs in light of applicable Rules. Rule 10.7(3) requires that a CFA be signed and witnessed and that the witness swear an Affidavit of Execution. The Court found that the CFAs were properly signed by the Plaintiff's Chief and Council and that Affidavits of Execution had been sworn. Any irregularities in the Affidavit of Executions were insufficient to invalidate the CFAs.

Rule 10.7(4) requires service of a signed copy of the CFA within 10 days after the date on which the agreement is signed. The CFAs were not served until two-and-a-half months after their execution. However, having regard to the circumstances, which included the Plaintiff's significant experience in legal matters, past dealings with the Defendant, and substantial opportunity to revisit and annul the CFAs following service, the Court held that imperfect compliance had not caused any harm to the Plaintiff and was not fatal to the CFA's validity.

Finally, the Court held that statements in the CFA as to the nature of the claim and circumstances under which fees were to become payable, required pursuant to Rule 10.7(2)(c) and (d), were sufficiently clear to enable enforcement.

As to the Defendant's technical defences, the Court held that the review was not out of time since it was filed within 6 months from the date on which the CFAs were terminated, notwithstanding that review documents were not served on the Defendant within that time. The Court did not agree that the review was premature, since the Plaintiff was entitled to seek clarity as to its obligations prior to a triggering event. Since the CFAs were valid, the Defendant's failure to establish the technical defences argued was inconsequential.

In the result, the CFAs were upheld.

LUTZ V LUTZ, 2023 ABKB 224

(ROTHWELL J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Justice Rothwell issued a Costs Decision following a two-day Summary Trial regarding parenting, child support, and the division of matrimonial property. The Plaintiff did not participate in the Summary Trial or make submissions regarding Costs.

The Court considered Rule 10.29, which sets out the default rule that the successful Party is generally entitled to Costs. Justice Rothwell also considered Rules 10.31 and 10.33, which set out factors which the Court may consider when making a Costs Award and when deciding whether to deny or vary an amount in a Costs Award.

The Court held that the Defendant was entirely successful and took reasonable positions on

the issues, which were issues of great significance to the Parties. Justice Rothwell held that the Plaintiff, on the other hand, deliberately refused to provide and required disclosure and did not cooperate in the proceedings that he had commenced. Justice Rothwell observed that the Plaintiff's refusal to participate needlessly complicated proceedings, necessitated extra steps, and impacted the Court's ability to award an accurate quantum of child support.

In the result, Justice Rothwell ordered partial indemnity Costs in favour of the Defendant, in the amount of $20,000.

LC V ALBERTA (CHILD WELFARE), 2023 ABKB 334

(GRAESSER J)

Rule 10.29 (General Rule for Payment of Litigation Costs)

The issue before the Court was whether witnesses who were non-parties could be held responsible for Costs arising from certain Applications they pursued. Justice Graesser answered in the affirmative.

Previously, several prospective witnesses for the Defendant applied before Graesser J. to cancel or postpone scheduled Questioning on the basis that it was premature for them to be questioned in the lawsuit. The witnesses had filed their own Application and submitted their own Brief. The Defendant, their former employer, took no position on the witnesses' Application. Justice Graesser dismissed the witnesses' Application and directed that Questioning proceed. However, his Decision was silent on Costs.

The Plaintiffs argued that because they were successful on the Application, they were entitled to Costs under Rule 10.29(1), which holds that a successful Party to an Application is entitled to Costs from the unsuccessful Party. The Defendant submitted that witnesses neither pay nor receive Costs when they are involved in other people's litigation.

Justice Graesser found that the Rules dealing with Costs apply only to Parties. Witnesses are not affected by the Costs Rules, as they are entitled "to receive conduct money, witness fees, and reimbursement for reasonable costs of their attendance for travel, accommodation, and meals".

However, the Rules do not expressly make a non-party witness liable for Costs, the common law does.

Justice Graesser referred to Thomas J.'s decision in *Shefsky v California Gold Mining Inc*, 2015 ABQB 525 ("*Shefsky*"), a case that discussed the Court's jurisdiction to award Costs against a non-party in three scenarios: (a) where the non-party was the person ultimately liable; (b) where the non-party was the real instigator of the litigation and the one which would have received the fruits; and (c) where the non-party was guilty of serious misconduct in relation to the lawsuit.

Justice Graesser held that the scenarios outlined in *Shefsky* were not exhaustive and that Costs are always in the Courts' discretion. He found that there was no reason why the non-party witnesses should be exempt from paying Costs after being unsuccessful on their Application. When witnesses involve themselves in the litigation, file their own Applications and submit their own Brief, they are generally pursuing their own interests and not the litigants', thus increasing the actual Parties' Costs.

GHEBREMESKEL V TESFU, 2023 ABKB 356

(SULLIVAN J)

Rule 10.29 (General Rule for Payment of Litigation Costs)

In a complex matter that had been extensively litigated by the Parties, Sullivan J. issued a global Costs Endorsement in July 2022. Since the issuance of the Costs Endorsement, one of the Defendants had repeatedly asked the Court for assistance regarding the Plaintiff's failure to satisfy a Costs Award with funds held in trust by the Plaintiff's lawyer.

Justice Sullivan referenced Rule 10.29, which states that an unsuccessful party to an Action must pay a Costs Award forthwith. To determine what "forthwith" meant, Sullivan J. canvassed the case law and held that it meant "immediately", and Justice Sullivan found that the words in Rule 10.29 meant that "costs are to be paid immediately and that practically courts seem to allow up to a month for that to occur".

Here, the Plaintiff was well outside the one-month time-frame and was directed to satisfy the Costs Award immediately, meaning within two days after the Parties appeared before Sullivan J.

ELLINGSON V HALL, 2023 ABKB 275

(GILL J)

Rules 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Court considered the appropriate Costs Award after dismissing the Plaintiffs' Application for an Interim and Interlocutory Injunction to prevent the Defendants from compelling the Plaintiffs to vacate premises on which some of the Plaintiffs conducted business (the "Decision").

The Court awarded full indemnity Costs to the Defendants. The Court noted that Costs Awards are discretionary under Rule 10.31 and the Court may consider the factors in Rule 10.33 when making a Costs Award. The Court noted that solicitor-client Costs may be awarded where one party has engaged in litigation misconduct. In the Decision, the Court found that the Plaintiffs: (1) failed to establish any of the elements required for injunctive relief; (2) brought an Application that was frivolous and vexatious; (3) proceeded in a non diligent and obstructionist manner; (4) filed repetitive and unnecessarily voluminous materials; and (5) flagrantly disregarded Court policy, the Rules, and directions regarding filing timelines.

As a result, the Court found that Schedule C Costs were not appropriate and did not represent an adequate indemnity of the reasonable and proper Costs of the Defendants.

TERRIGNO V FOX, 2023 ABKB 190

(JONES J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following an Application Judge's Decision on an Application brought by the Respondent for the Applicant's breach of the obligation to produce a satisfactory Affidavit of Records, breach of the implied undertaking rule, and the Appeal from that Decision (the "Appeal Decision").

The Applicant in the underlying proceeding sought party-party Costs on Column 2 of Schedule C of the Rules and a reduction of $1,000.00 in the fees payable because the Respondent failed to provide his proposed Bill of Costs in a timely fashion.

The Respondent in the underlying proceeding sought enhanced Costs and argued that (1) the Applicant's improper conduct necessitated the Application and the Appeal; (2) the Appeal was more complex as new evidence and new issues were involved and argued; (3) the issues considered in the Appeal were important; and (4) while the Respondent did not Appeal the Applications Judge's Costs Award, the Court has jurisdiction to impose enhanced Costs in light of the Applicant's litigation misconduct (abusive and disrespectful communications). The Respondent also sought a stay of the Applicant's Action until any Costs awarded in relation to the Appeal Decision were paid.

The Court rejected the Respondent's request for additional Costs arising from what the Respondent described as a failure of the Applications Judge to account for the Applicant's litigation misconduct, and held that the Justice who hears the Trial in a matter is at liberty to address a broader spectrum of litigation behaviour and to award Costs accordingly. The Court also rejected the reduction requested by the Applicant.

In the result, the Court awarded the Respondent Costs of the Appeal, pursuant to line item 8(1) of Column 2 of Schedule C, and declined to order a stay of the Applicant's Action until the Costs Award was paid.

RANDHAWA V REHILL, 2023 ABKB 202

(JONES J)

Rule 10.33 (Court Considerations in Making Costs Award)

After reviewing written submissions from the Parties, the Court considered the appropriate Costs Award after dismissing the Applicants' Application in Commercial Chambers.

Relying on Rule 10.33, the Respondents sought full indemnity Costs of $5,946.35 or, in the alternative, Costs of $4,130 in accordance with Column 4 of Schedule C.

The Applicants offered to pay what they refer to as enhanced Costs of $2,973.18. The Applicants argued, and Jones J. agreed, that there was no justification for a significant departure

from the normal indemnification of approximately 40% - 50% of solicitor-and-own-client Costs in favour of the successful Party. The Court noted that the Respondents' request for Costs of $4,130 would amount to 69% of the Respondents' alleged solicitor-and-own-client Costs.

Jones J. determined that the Applicants' attempts to resolve the matter were not blameworthy and therefore held that no further enhancement of Costs was appropriate. Though the Application was dismissed, there was no finding on the merits that the Applicants' claims lacked substance or validity. Although Jones J. held that the matter would be inappropriate to be heard in Commercial Chambers, the Applicants were allowed to pursue their requests through the normal civil litigation process which might entail Questioning on Affidavits and a viva voce hearing or Trial.

MA V XU, 2023 ABKB 346

(ANGOTTI J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a family law matter regarding retroactive child support and property division upon divorce. There was a mixed result, but the Plaintiff, Ms. Ma, was substantially successful. Justice Angotti therefore held that she should be awarded Costs pursuant to Rule 10.33. Costs were submitted by Bill of Costs reflecting Costs per Schedule C, Column 1, along with disbursements. Justice Angotti accepted these numbers.

Ms. Ma also sought enhanced Costs of $15,000 for the Defendant's behaviour during the litigation pursuant to Rule 10.33. Mr. Xu refused to comply with Court Orders, causing Ms. Ma to make multiple Applications prior to Trial. Mr. Xu also failed to meet his obligations of disclosure in the litigation, impeding the ability of the Parties to proceed on the merits. Mr. Xu's efforts appeared aimed at enticing Ms. Ma to settle, to her detriment. Mr. Xu was also dishonest throughout the proceedings, failing to disclose financial documents.

Based on what Justice Angotti termed "significant and reprehensible litigation misconduct", she awarded the $15,000 in enhanced Costs.

NT V CLH, 2023 ABKB 379

(YUNGWIRTH J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following an Application to relocate two children shared by the Parties. The Court also made determinations of income for support purposes, ongoing and retroactive child support, and ongoing spousal support.

The Applicant sought Costs in the amount of

$9,150, for steps taken since seeking leave to commence the relocation Application. The Respondent sought Costs in the cause.

The Application to relocate the children was successful. The Respondent was largely successful on determination of spousal support. Success was divided on the other issues. The Court held that, having regard to the factors in Rule 10.33, it was appropriate to award Costs to the Applicant, but at less than the amount claimed. The Court awarded $5,000 in Costs, representing Costs of a Case Conference, Chambers Application, Questioning and Special Chambers Application, all associated with the Application and associated determinations.

BARKWELL V MCDONALD, 2023 ABCA 183

(SLATTER, CREIGHTON AND PENTELECHUK JJA)

Rule 10.33 (Court Considerations in Making Costs Award)

The Parties submitted written Briefs on Costs following an earlier Decision of the Court of Appeal. Specifically, the Parties are a divorcing couple, and a dispute arose related to the family property division. The Court of Appeal noted that a review of Costs necessitates the consideration of the factors enumerated at Rule 10.33. The Court of Appeal considered each of factors in turn and ultimately concluded that the outcome of the litigation placed the dispute within Column 4 of Schedule C.

Further the Court of Appeal noted that the Respondent was the successful Party at Trial, while the Appellant was the successful Party on Appeal. As a result, the Court of Appeal found that the various Orders of Costs may be set off against each other.

SUTHERLAND V SUTHERLAND, 2023 ABCA 185

(WATSON, SLATTER AND KIRKER JJA)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following an Appeal as to the appropriate method for setting guideline income for calculating child support. The maximum amount of child support in issue was approximately $50,000.

Relying on recent case law from the Court of Appeal (*McAllister v Calgary (City)*, 2021 ABCA 25), the successful Appellant sought Costs in the amount of 50% of solicitor-client Costs incurred between the date counsel began preparation for oral argument and the day after oral argument in the Appeal.

Assessing the Appellant's Costs claim, the Court noted that an Award of party and party Costs based on solicitor and client Costs must be justified. Costs claimed must be proportionate

to the amounts in issue. The Court noted that fees incurred is not one of the factors listed in Rule 10.33.

The Court held that, having regard to the amount in issue, the Costs claimed were disproportionate. Accordingly, the Court accepted the Respondent's proposal that Costs be awarded in the amount of $5,000, representing Column 1 of Schedule C Costs, plus 37%.

CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN, 2023 ABKB 384

(NIELSEN ACJ)

Rules 10.49 (Penalties for Contravening Rules) and 14.5 (Appeals Only with Permission)

This was an Appeal of a Review Officer's decision pertaining to litigation Costs associated with a residential foreclosure.

The Appellant, Ms. Hayden, had previously engaged in extensive litigation involving many opposing parties at Alberta's Court of King's Bench, the Alberta Court of Appeal, and on six occasions, sought leave to Supreme Court of Canada. All Supreme Court Leave to Appeal Applications were denied, and Ms. Hayden, in five instances was ordered to pay Costs. As a result, Ms. Hayden was made subject to a Court access gatekeeping Decision in 2020.

The Court's access gatekeeping decision outlined five stringent requirements Ms. Hayden needed to comply with prior to filing any documents with the Alberta Court of King's Bench, including proof that Ms. Hayden had paid outstanding Cost penalties of $11,000, pursuant to Rule 10.49. Ms. Hayden had not paid the outstanding Costs; however, penalties were paid to the Court during the disbursement of funds in the foreclosure Action.

Ms. Hayden sought to Appeal the Review Officer's decision regarding the litigation Costs as assessed, following the foreclosure Action brought by the Canadian Imperial Bank of Commerce (CIBC). However, her grounds for Appeal, as outlined in her 220-page, unsworn and unsigned Affidavit and other documents, largely failed to pertain to the Review Officer's role in examining the legitimacy of billed lawyer expenses and disbursements.

The Court found that Ms. Hayden's issues ranged from complaints about penalties levied by Associate Chief Justice Rooke to alleged misrepresentation of her residence, none of which related to the scope of the Review Officer's mandate, thereby failing to provide a reasonable basis for Appeal. Moreover, as per Rule 14.5, the Court noted that no Appeal would be allowed to the Court of Appeal, as Ms. Hayden had been declared a vexations litigant by the Court.

The Court found that Ms. Hayden's ground of Appeal had largely been litigated and resolved in the past. By seeking to contest these settled issues, Ms. Hayden was engaging in a collateral attack on prior proceedings. Additionally, the transcript of the hearing before the Review Officer revealed that Ms. Hayden sought to re-litigate long settled issues, which was beyond the scope of the Review Officer's function. The Court held that this kind of conduct was considered an abuse of Court processes and represented yet another reason to deny the Leave to Appeal.

The Court noted that it had previously observed that Ms. Hayden was essentially unmanageable, and that the Court lacked the

effective mechanisms to mitigate the harm and waste Ms. Hayden had inflicted with her persistent, repeated, repetitious, and abusive leave requests.

Hence, the Court concluded that Ms. Hayden's proposed Appeal was an abuse of Court processes and rejected her leave to Appeal Application, advising her to seek professional legal assistance and to reconsider her litigation approach.

1254748 ALBERTA LTD V MCBURNEY, 2023 ABKB 264

(LEMA J)

Rules 10.51 (Order to Appear), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

Pursuant to Rules 10.51, 10.52, and 10.53 governing Civil Contempt, the Plaintiff sought a sanction against individual Defendant for failing to produce records which he had been previously ordered to be produced by the Court, contrary to Rule 10.52.

In July 2022, the Defendant was ordered to produce a number of records, despite the Defendant's assertions that he did not possess such records. The Defendant did not produce the ordered records. The Defendant was found in Contempt in November 2022 and was given a further deadline to comply with the original production Order. The Plaintiff sought further Contempt relief in March 2023, the consideration of which was reserved by Justice Lema pending an opportunity for the Defendant to prove his compliance with the production Order.

The Defendant did not adequately prove his compliance with the production Order and the Plaintiff asserted that there had been effectively no compliance, thus leading to this Application and Decision.

The Court therefore held the Defendant in Contempt of three Court Orders. Justice Lema imposed a $1,500 fine payable within a month, and in the absence of such payment, a period of imprisonment the length of which to be set at a further Hearing. Justice Lema further ordered a daily fine of $100 against the Defendant for each day that he remained in non-compliance with the original production Order, as well as Costs in favour of the Plaintiff for this Application.

POTTS V MARSCHLIK, 2023 ABKB 362

(POELMAN J)

Rule 10.52 (Declaration of Civil Contempt)

This was a two-day Summary Trial regarding the parenting time that each Party should have with their child. One of the Parties sought, inter alia, an Order declaring the other Party in civil Contempt of Court for non-compliance with a Court Order. In particular, the Respondent had denied the Applicant Court-ordered parenting time on five occasions. An explanation was provided by the Respondent for each instance where the parenting time was denied, without substantial challenge from the Applicant.

Justice Poelman considered his summary of the law of civil Contempt provided in Ripley v Ripley, 2022 ABQB 295, at paras 47-53. He reiterated that "the contempt power was discretionary, should be used cautiously and with great restraint, is an enforcement power of last resort, is primarily coercive rather than punitive and thus largely concerned with ensuring compliance with court orders". Contempt will not be established if it has not been proved beyond a reasonable doubt that failure to comply with a Court Order is without reasonable excuse. Even in such cases, discretion may still militate against a finding of Contempt.

Justice Poelman held that the elements of Contempt had not been proven beyond a reasonable doubt, given that each instance that parenting time was denied had been explained. Further, he stated that even if the elements were established, he would not use his discretion to impose a contempt Order as the missed parenting days were over a year old, and no purpose would be served by a Contempt finding.

FORD V JIVRAJ, 2023 ABKB 331

(GRAESSER J)

Rule 10.53 (Punishment for Civil Contempt of Court)

The sentencing decision concerned the Defendant, a contemptor (the "Contemptor") who had been found guilty of breaching an Order made in July 2020 restricting him from publishing any comments about the Plaintiff, Ms. Ford (the "Nixon Order"). The Court noted that the Contemptor sent a letter to a media outlet containing derogatory things about Ms. Ford in October 2020 (the "Letter").

The Court noted that the applicable Rule for determining the consequences of civil Contempt is Rule 10.53 and that it had a very wide discretion in determining what is a fit and proper consequence for a contemptor. After reviewing the applicable jurisprudence, the Court noted that it would not impose a period of imprisonment on the Contemptor.

The Court noted that the Contemptor: (1) deliberately set out to circumvent the consequences of the Nixon Order; (2) had commenced a campaign to cause harm to Ms. Ford based largely on jealously of her successful politi-

cal career and his failures; (3) had made an apology to Ms. Ford, which was mitigating; (4) was in poor financial circumstances, but that the Contemptor's claim that the underlying proceedings resulted in him being unemployable was exaggerated; (5) was highly educated which included a law degree and he could not have been said to not understand the Nixon Order or the consequences of committing civil Contempt of Court, which had the effect of removing potential mitigating circumstances; and (6) caused no serious harm to Ms. Ford via the Letter.

The Court found that a fine of $10,000 was appropriate and noted that it would be inappropriate to send the Contemptor to jail for his first offence.

BH (RE), 2023 ABKB 392

(EAMON J)

Rules 11.27 (Validating Service), 11.28 (Substitutional Service) and 11.29 (Dispensing with Service)

This was an Application to dispense with the service required under the *Child, Youth and Family Enhancement Act,* RSA 2000, c C-12 (the "*Act*") in the context of a proposed adoption by the Applicants.

The *Act* requires personal service of the adoption application materials with a notice of objection form on the biological parents of the child. The Applicants had served the child's biological mother, who consented to the adoption, but the child's biological father could not be located except by social media. The evidence before the Court did not clearly support that the social media account belonged to the biological father, and the account holder did not reply to the Applicants' attempted correspondence.

Here, Justice Eamon considered whether the Court had jurisdiction to dispense with the service required under the *Act*.

The Court noted that the *Act* permits the Court to shorten the time for service, direct the manner of service, or approve the manner of service that was made. However, the Eamon J. cited conflicting case law on whether service could be dispensed with entirely.

Justice Eamon observed that the *Act* and its Regulation provide that, with respect to any matter not considered under the *Act* or associated Regulations, the Court may follow the Rules and make directions as to procedure. Justice Eamon considered that the Rules provide for validating service (Rule 11.27), substitutional service where person service is impractical (Rule 11.28), and dispensing with service where service is impractical or impossible (Rule 11.29).

Despite jurisprudence to the contrary, Justice Eamon held that the Act and its Regulation permitted the Court to apply Rule 11.29 to dispense with service. Justice Eamon considered that to find otherwise would "severely hamper some adoptions to the detriment of the child's best interests."

Justice Eamon therefore ordered that a further attempt be made to contact the biological father through the social media account, but that following further evidence of that attempt, the Court could either dispense with service or validate service, as appropriate.

BLUME V BLUME, 2023 ABCA 174

(FEEHAN JA)

Rules 12.59 (Appeal from Divorce Judgement), 14.4 (Right To Appeal) and 14.8 (Filing a Notice of Appeal)

The Plaintiff sought an extension of time to Appeal part of an Order granted in Actions for divorce and division of matrimonial property. This Application was filed one month after the Appeal period had expired. The Court considered the relevant provisions of the *Divorce Act*, RSC 1985, c 3 and the relevant Rules including Rule 14.4(5), 14.8 and 12.59.

The Court applied the test laid out in *Cairns v Cairns*, 1931 CanLII 471 (AB CA) for extension of time to Appeal and determined that the Application fails on the *Cairns* factors. Justice Feehan noted that the counsel for the Applicant erred in determining the Appeal period, which is not a defensible excuse for the delay. Justice Feehan also considered the other factors holistically, and noted there was no overriding principle of justice that compelled the exercise of discretion to allow this Application.

STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2023 ABCA 163

(WAKELING JA)

Rules 13.1 (When One Judge May Act in Place of or Replace Another) and 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal a Decision ordering her to pay $7,500 in thrown-away Costs to another Party (the "Permission to Appeal Application") and (2) an Order staying a $7500 Costs Award pending determination of the Permission to Appeal Application (the "Stay Application").

The Court determined that it was bound by Rule 14.5(2) and was required to adjudicate the Permission to Appeal Application, including any issue that arises in the course of so doing so; and that another Judge probably did not have the jurisdiction to rule on the Permission to Appeal Application, noting that it was doubtful whether Rule 13.1(c) applied at this stage.

The Court noted that the Permission to Appeal Application incorrectly invoked Rule 14.5(1)(e) and found that the applicable provision was Rule 14.5(1)(a), as the Applicant had sought permission to Appeal from a Decision of a single Appeal Judge. The Court found that a single Appeal Judge exercising authority under Rule 14.5(2) to determine whether to grant permission to Appeal must ascertain whether the issue is of general importance to the community or of sufficient importance to the Parties to justify the allocation of private resources (the Parties' legal costs) and public resources (the assigning of three more Judges to hear the Appeal).

The Court set out that (1) an issue is of general importance to the community if the issue presents a legal question the answer to which will be of precedential value in the area of law engaged, (2) a single Appeal Judge may also grant permission to Appeal if the controversy is of sufficient importance to the Parties and the product of misunderstanding of the law or misapprehension of the evidence or both; and that (3) the merit based component of the test can be assessed by considering the prospects of success if permission to Appeal is granted.

The Court found that the Applicant's arguments were not persuasive, specifically noting (1) that the Applicant's decision to ask for an adjournment prior to August 11, 2022 hearing and her obstructive conduct in the period were part of the same strategy; (2) the Court had jurisdiction to make an order as to Costs when the issue came up for determination; (3) the Applicant raised no error in the Court's assessment of the Applicant's conduct as amounting to litigation misconduct; (4) there was nothing unfair or improper about the Court estimating full-indemnity thrown away Costs in the case at issue; and (5) the Applicant did have an adequate opportunity to contest the notion that she had engaged in litigation misconduct.

The Court found that the Permission to Appeal Application was baseless and accordingly relieved it of its obligation to resolve the Stay Application.

BODNARIUK V VINCE, 2023 ABCA 159

(SLATTER JA)

Rules 13.5 (Variation of Time Periods), 14.2 (Application of General Rules), 14.42 (Filing Factums - Fast Track Appeals), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

After failing to meet filing deadlines, the Appellant applied for permission to restore a fast-track Appeal in a family law dispute. Justice Slatter noted that Applications to restore an Appeal are governed by Rules 14.47 and 14.65. Of significance, Justice Slatter noted that despite the mandatory language in Rules 14.47 and 14.65, pursuant to Rules 13.5 and 14.2, the Court can extend the time periods therein if the Application is brought as soon as possible.

Ultimately, Justice Slatter confirmed that restoring an Appeal is an exercise of judicial discretion. Justice Slatter considered the positions and the litigation conduct of the Parties and ordered that the Appeal be restored. Further, Justice Slatter confirmed that the Appellant's Factum must be filed in accordance with Rule 14.24.

CANADA (ATTORNEY GENERAL) V 18335898 ALBERTA LTD (WHITECAP ENERGY INC), 2023 ABKB 357

(APPLICATIONS JUDGE SCHLOSSER)

Rule 13.6 (Pleadings: General Requirements)

The Attorney General of Canada (the "AGC") applied to revive a dissolved corporation to issue a Notice of Assessment in respect of tax amounts owing to the Canada Revenue Agency.

The Court noted that a "creditor" has standing to ask that a dissolved corporation be revived pursuant to s 206.1(a) of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "*ABCA*"). However, the Court determined that the AGC did not have standing to revive the corporation under section 206.1(a) of the *ABCA* because tax liabilities do not become debts until the taxes are assessed and a Notice of Assessment is issued. The AGC was therefore not a creditor because, while an assessment had taken place, no Notice of Assessment had been issued.

The Court then considered whether the AGC was an "interested person" pursuant to s 206.1(d) of the *ABCA*. The Respondent objected to relief being granted under s 206.1(d) as only s 206.1(a) was named as the basis for the AGC's Originating Application. The Court noted that Rule 13.6(3)(r) requires a party to state the provisions of an enactment that may take another party by surprise. However, the Court determined that, absent a requirement to plead a specific enactment, relief supported by the facts pleaded is available even where a wrong statute is pleaded. The Court allowed the AGC's Application.

KLASSEN V CANADIAN NATIONAL RAILWAY COMPANY, 2023 ABCA 150

(SLATTER, WAKELING AND ANTONIO JJA)

Rules 13.6 (Pleadings: General Requirements)

This was an Appeal from a Case Management Decision certifying a Class Action and denying Summary Dismissal of that Action. The Defendant was a railway company. In the Statement of Claim, the proposed class Plaintiffs alleged that the Defendant's sounding of train whistles at grade crossings in the County of Parkland amounted to a private nuisance.

To achieve certification of the Class Action, the proposed Plaintiffs were required to demonstrate, among other things, that the Statement of Claim disclosed a reasonable cause of Action. In that respect, the Court observed that the applicable test is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the Plaintiff's pleaded claims disclose no reasonable cause of action. The Court added that a Court may refer to any documents or facts that are referred to in the Pleadings and that a Statement of Claim must always be assessed against the legal background, noting that the Statement of Claim pleads only facts, pursuant to Rule 13.6(2).

Applying the test, the Court held that the Statement of Claim did not disclose any reasonable cause of Action. As a result, the Appeal was allowed, and the certification Order was set aside. The Court did not consider the Defendant's Appeal of the Summary Dismissal Order, since its conclusion on the certification Order rendered the issue moot.

SULTAN MANAGEMENT GROUP (RE), 2023 ABCA 110

(WATSON, CRIGHTON AND HO JJA)

Rules 13.14 (Endorsements on Documents) and 13.15 (When Document is Filed)

The Defendant appealed from a Decision granting a Bankruptcy Order to the Plaintiff. Having found that there was no merit to the ground of Appeal, the Court dismissed the Appeal.

The Defendant had borrowed substantial funds from the Plaintiff. Upon events of default, the Plaintiff filed a Statement of Claim against the Defendant seeking Judgment for the outstanding amount. The Parties later entered into a Forbearance Agreement acknowledging the debt. A repayment schedule was agreed upon. The Defendant consented to a Judgment against it for the full amount owing in the event of the expiry or termination of the forbearance period.

On November 2, 2020, the Plaintiff informed the Defendant that another default had occurred. Seeing that the Defendant did not cure the default, the Plaintiff submitted a Bankruptcy Application (the "Application") to the Court on July 8, 2021. Due to a processing backlog in the Court of Queen's Bench at that time, the Application was not stamped filed until September 7, 2021. The stamp date was contrary to a confirmation email from the Court on July 8, 2021, which stated: "If accepted, it will be filed with the date that it was received, regardless of processing times".

The Chambers Judge determined that, for the purpose of assessing whether there was an act of bankruptcy during the six-month period set out in section 43(1) of the *Bankruptcy and Insolvency Act,* RSC, 1985, c B-3 (the "*BIA*"), the Application was filed on July 8, 2021. Relying on Rule 13.15, the Defendant argued that the Chambers Judge had erred in making such finding.

The Court found that the Application was a commencement document and therefore was subject to Rule 13.14(1), which requires the Court, upon being presented with a commencement document for filing, to complete the filing process, stamp the Application, and provide a bankruptcy number.

Noting that the delayed filing was caused by a processing backlog, and that the Plaintiff used diligent efforts to follow up with the Court of Queen's Bench, the Court held that there was no error in the Chambers Judge's determination that the filing date was July 8, 2021, which was supported by evidence and the procedural history. Furthermore, dates relied upon by the Plaintiff with respect to the act of bankruptcy and the estimated value of the Defendant's assets in the Application would remain the same and were within six months of either July 8 or September 7, 2021, thus satisfying sections 42(1)(j) and 43(1) of the *BIA*. As such, there was no substantial injustice to the Defendant.

WEIDENFELD V ALBERTA (MINISTER FOR SENIORS AND HOUSING), 2023 ABCA 130

(HO JA)

Rule 14.5 (Appeals Only with Permission)

This was an Application, pursuant to Rule 14.5(1)(j), for permission to Appeal an Order declaring the Applicant a vexatious litigant and imposing Court access restrictions (the "VL Order").

The VL Order arose from an Originating Application brought by the Applicant challenging the constitutionality of the *Residential Tenancies Act*, SA 2004, c R–17.1. Following a successful Application by the Respondent to strike the Originating Application, the Court, on its own motion, initiated a process under the *Judicature Act,* RSA 2000, c J–2, resulting in the VL Order.

The Court of Appeal observed that, in similar Applications, Courts have considered three questions: (1) is there an important question of law or precedent?; (2) is there a reasonable chance of success on Appeal?; and (3) will the delay unduly hinder the progress of the Action or cause undue prejudice? Applying the test, the Court agreed with the Applicant that the Appeal was important because it addressed the circumstances in which a Court may initiate processes to impose access restrictions. The Court also agreed that the Appeal had a reasonable chance of success, in light of the Chambers Judge's reasons and the VL Order's scope, and that denial of permission to Appeal could prejudice the Applicant without corresponding prejudice to the Respondent.

In the result, the Court granted permission to Appeal the VL Order, together with various other Orders to facilitate and frame the ensuing Appeal.

STEENBERG V STEENBERG, 2023 ABCA 132

(ANTONIO JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal two Consent Orders arising from ongoing divorce proceedings. Justice Antonio noted that, under Rule 14.5(1)(d), permission to Appeal is required from any Decision made through the consent of the litigants. Justice Antonio further noted that the onus is on the Applicant to demonstrate that the requested Appeal merits a hearing by the Court of Appeal. In order to demonstrate this merit, Justice Antonio identified the relevant factors as directed by the jurisprudence, and noted that they include whether the Appeal raises an important question of law, whether there is a reasonable probability of success, and whether the Appeal would hinder the progress of the Action.

Justice Antonio ultimately concluded the Applicant failed to satisfy the relevant factors; accordingly, the Application for permission to Appeal was dismissed.

UBAH V UBAH, 2023 ABCA 143

(SLATTER JA)

Rule 14.5 (Appeals Only with Permission)

This was an Application for permission to challenge the constitutionality of certain Decisions of the Court of King's Bench. Since the Applicant had previously been declared a vexatious litigant, permission was required to Appeal, pursuant to Rule 14.5(1)(j).

At first instance, the Applicant also sought to challenge the constitutionality or validity of Rules 14.5(1)(j) and 14.5(4); however, the lower Court had declined to hear the question due to jurisdictional concerns relating to the Rules' applicability to Appeals only.

Regarding the Applicant's challenge to the previous Decisions, the Court of Appeal confirmed the lower Court's conclusion that the Applicant's proposed constitutional challenges to the previous Decisions amounted to an impermissible collateral attack and abuse of process. Accordingly, permission to Appeal was refused.

Regarding the Applicant's challenge to Rules 14.5(1)(j) and 14.5(4), the Court of Appeal held that the lower Court had understated its jurisdiction by declining to hear the Applicant's challenge. Despite the lower Court's error, the Court declined permission to Appeal on the basis that the proposed challenge had no air of reality and that it would be inappropriate to permit the issue to be argued by a self-represented, vexatious litigant.

In the result, the Application was dismissed.

PETROPOULOS V PETROPOULOS, 2023 ABCA 193

(PENTELECHUK JA)

Rules 14.5 (Appeals only with Permission), 14.27 (Filing Extracts of Key Evidence), 14.28 (Record Before the Court), 14.29 (Format of Extracts of Key Evidence), 14.40 (Applications to Single Appeal Judges), 14.41 (Responses to Applications to Single Appeal Judges) and 14.70 (No New Evidence Without Order)

The Applicant applied for permission to Appeal a Costs Award following an unsuccessful Application to remove the Respondents as personal representatives of an estate. The Court set out that the test for permission to Appeal a decision as to Costs only as required by Rule 14.5(1)(e) requires that the Applicant must establish (1) a good arguable case having sufficient merit to warrant scrutiny by a full panel of the Court; (2) issues of importance to the parties and in general; (3) the Costs Appeal has practical utility; and (4) no delay in proceedings will be caused by the Costs Appeal.

The Court found that there was no arguable case noting that (1) there was nothing on the record to ground a finding of "reprehensible, scandalous or outrageous conduct" with

regard to one of the Respondents that compelled an award of solicitor-client Costs to the Applicant; (2) there was a practical issue with the Applicant's claim for solicitor-client Costs as the underlying information for making a determination as to quantum was not provided; (3) Costs were at least in part attributable to the Applicant; (4) although the Applicant's challenge was sufficiently reasonable for a portion of the time, his concerns were later addressed by one of the Respondents such that the Applicant had no reason to continue with the underlying Application; and (5) the testator did not cause the litigation.

The Court also noted that although the Costs Award was important to the Applicant, it did not engage issues of general importance. The Court additionally noted that the Application may have been moot because of the Applicant's stated intention to extend the time to Appeal in related litigation with the Respondents, which would also enable the Applicant to Appeal the Costs award.

The Court accordingly dismissed the Application.

In considering Costs, the Court noted that the volume of the material that had been filed and the arguments represented a level of unfortunate complexity. The Court specified that the filing of Extracts of Key Evidence was unnecessary and that such a document was reserved for Appeals, referencing Rules 14.27-14.29. Conversely, the Court noted that Applications to single Appeal Judges as set out in Rules 14.40 and 14.41 involve filing an accompanying Affidavit, if required. The Court additionally noted that the Applicant was entitled to file new evidence on the Application without an Order, referencing Rule 14.70. The Court found that each Party would bear their own Costs of the Application.

NADARASAH V UTHAYAKUMAR, 2023 ABCA 190

(SLATTER JA)

Rule 14.8 (Filing a Notice of Appeal)

The Plaintiff sought an extension of time to Appeal a Decision granted in a 10 day Trial stemming from a lengthy family litigation. This Application was filed two months after the Appeal period had expired. The Court considered the law surrounding Rule 14.8(2).

The Court applied the test set out in *Li v Morgan*, 2020 ABCA 186 for extension of time to Appeal and determined that the Application failed on several pars of the test. Justice Slatter noted that there had been no satisfactory explanation provided for the delay. Justice Slatter reiterated that the importance of a short Appeal period is to promote finality of litigation, especially in an Action such as this where the litigation has been going on for six years impacting the Parties and the children negatively.

The Application to extend the time to Appeal was dismissed.

RUEL V REBONNE, 2023 ABCA 196

(SLATTER, HUGHES AND FEEHAN JJA)

Rule 14.27 (Filing Extracts of Key Evidence)

The Parties asked the Court for directions on Costs flowing from their Appeal. The Appellant was successful in reducing the damage Award by 26% and was thus entitled to some Costs.

However, the Appellant's Extracts of Key Evidence included 1,298 pages of documents and contained "the entire trial record, including for example, copies in colour of every purchase order". The Court held that Rule 14.27 provides for Extracts of Key Evidence to include only documents "needed to resolve the issues in the appeal". It was inappropriate for counsel to "data dump" the entire Trial Court record on the Appeal Record.

Accordingly, the Court held that the Appellant was not entitled to recover any photocopying charges and disallowed the Appellant's claim for 1,275 colour copies and 3,332 other copies.

QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP, 2023 ABCA 177

(FAGNAN JA)

Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

The Applicant bankers' association applied for leave to intervene in Fast-Track Appeals involving a landowner and three mortgagees as Appellants (the "Appeals"). The Appeals focused on whether a common law super-priority right can exist in favour of a private party in respect of environmental obligations that is capable of subordinating rights of pre-existing secured lenders (the "Environmental Super-Priority Right").

The Court noted that a single Appeal Justice has jurisdiction to render a decision on an Application to Intervene under Rules 14.37(2)(e) and 14.58. The Court also noted that Rule 14.58(3) provides that, unless otherwise ordered, an intervenor may not raise or argue issues not raised by the other parties to the Appeal. The test for intervener status considers: (1) whether the legal interests of the intervenor will be directly or specially affected by the Appeal, or (2) whether the intervenor can provide useful submissions that will bring a unique perspective or special expertise to the subject matter of the appeal that will assist the Court in its deliberations.

The Court granted the Applicant's Application for Leave to Intervene. The Applicant proposed to address the broader implications on the secured lending regime of the Environmental Super-Priority Right. The Court found that the Applicant's legal interests will be directly or specially affected by the Appeals and that the Applicant can provide useful submissions that will bring a different perspective or expertise to the subject matter of the Appeals that will assist the Court in its deliberations. The Court therefore granted the Application subject to conditions.

KELLY (RE), 2023 ABCA 181

(HO JA)

Rule 14.37 (Single Appeal Judges)

The Trustee Applicant applied to strike the Respondent's Appeal pursuant to Rule 14.37(2)(c) on the basis that the Notice of Appeal was filed outside the Appeal Period imposed by the *Bankruptcy and Insolvency General Rules*, CRC c 368 (the "*BIA Rules*").

The Respondent argued that the provision of the *BIA Rules* cited by the Applicant did not apply here because of provisions in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") which provided for an Appeal to the Court of Appeal, but did not impose an Appeal Period.

The Court of Appeal rejected this argument. Justice Ho stated that while the *BIA* addresses when an Appeal lies to the Court of Appeal, the initiation of such an Appeal is governed by the *BIA Rules*.

Despite the Respondent's argument that the time to Appeal should be extended, in the absence of an Application to that effect and evidence in support, the Court held that the Respondent's Notice of Appeal should be struck.

JOSE V BABY, 2023 ABCA 137

(WATSON JA)

Rules 14.40 (Applications to Single Appeal Judges), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

This was an Application pursuant to Rules 14.47(1) and 14.65(1) to restore the Applicant's Appeal of a Chambers Judge's Order determining income and directing child support obligations.

The Notice of Appeal had been struck as a result of the Applicant's failure to file before the deadline. Therefore, the Court considered both the test for permission to extend time for filing and the test for restoring an Appeal.

The Court enumerated four factors to be considered in an Application to extend time, subject to the Court's overriding discretion: (1) whether there was a bona fide intention to Appeal while the right to Appeal existed and there was some special circumstance that would excuse or justify the failure to Appeal; (2) whether there is an explanation for the delay and the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the Judgment, having regard to the position of both Parties; (3) whether the Applicant has taken the benefits of the Judgment from which Appeal is sought; and (4) whether the Appeal would have a reasonable chance of success if allowed to proceed. The Court noted overlap between the test for extending time to Appeal and the test for restoring an Appeal.

Considering the Applicant's position, the Court held that the Appeal did not appear to be viable in light of deference owed to the Chambers

Judge's determination and the Applicant's failure to adduce any, or any sufficient, evidence, as required pursuant to Rule 14.40(1). The Applicant's failure to offer any explanation for his late filing and failure to address the presumed prejudice to the Respondent were also noted. In the result, the Application was dismissed.

ESFAHANI V SAMIMI, 2023 ABCA 188

(PAPERNY, HO AND KIRKER JJA)

Rule 14.88 (Cost Awards)

The Plaintiff successfully appealed a Court of King's Bench Order that directed the Defendant's Application for permission to Appeal an Arbitration Award to be heard at the same time as the Appeal of the Award.

As a result, the Defendant's Notice of Appeal was suspended until he obtained permission to Appeal. The Defendant failed to take steps to obtain permission to Appeal and his Appeal of the Arbitration Award was therefore deemed quashed.

The Plaintiff sought Costs of the Appeal and submitted a Bill of Costs under Column 1 of Schedule C of the Rules. The Court of Appeal awarded Costs under Rule 14.88, in line with the amounts sought by the Plaintiff in the Bill of Costs. Under Rule 14.88, a successful party in an Appeal is entitled to a Costs Award unless otherwise ordered. The Court of Appeal found no reason why it should order otherwise.