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

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WHITECOURT POWER LIMITED PARTNERSHIP V INTERPRO TECHNICAL SERVICES LTD, 2014 ABQB 135 (MASTER MASON)
Rules 1.2 (Purpose and Intention of These Rules), 3.44 (When Third Party Claim May be Filed), 3.45 (Form of Third Party Claim), 7.3 (Summary Judgment), 7.5 (Application for Judgment by Way of Summary Trial) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiff ("Whitecourt") commenced an Action against the Defendant ("Interpro") alleging Interpro caused losses due to repairs it made to Whitecourt's turbine/generator. Almost two years after Whitecourt filed its Reply to Interpro's Statement of Defence, Interpro filed a Third Party Claim against Elliott Turbo Machinery Canada Inc. ("Elliott"). Elliott applied to set aside the Third Party Claim or alternatively for Summary Dismissal of the Third Party Claim. Elliott argued that, pursuant to Rule 3.45, Interpro should have filed and served a Third Party Claim against Elliott within six months of filing its Statement of Defence. Although Interpro's Third Party Claim was filed outside of this period, Interpro had obtained an Order to extend the time to file and serve its Third Party Claim. Master Mason declined to set aside the Order, holding that Elliott had not demonstrated prejudice due to the extension of time since Elliott had received notice of the Order.

Master Mason considered Rule 7.3, stating that the onus is on the party bringing a Motion for Summary Judgment to show "no genuine issue for trial", and that the Court will consider all the evidence to determine whether the Applicant has discharged that onus. Master Mason expressed the test for Summary Judgment as being "plain and obvious or beyond doubt that the claim cannot succeed". Further, if the evidence must be assessed and weighed by a Master or Justice in Chambers, the "plain and obvious" or "beyond doubt" test has not been met. Master Mason considered how *Hryniak v Mauldin*, 2014 SCC 7 should apply in Alberta, and held that, unlike the Ontario Summary Judgment Rule considered by the Supreme Court, Alberta's Rule 7.3 does not permit the Court to weigh evidence to resolve disputed questions of fact. Master Mason concluded that the Supreme Court of Canada's statement with respect to courts being permitted to find the relevant facts was applicable to Summary Trials under Rule 7.5. Master Mason observed that civil procedures must be proportional to the Claim. Proportionality is codified by Rule 1.2, which is the lens through which courts must interpret the Rules, including Rule 7.3.

Master Mason held that, pursuant to Rule 3.44, Interpro's Third Party Claim alleging Elliott to be liable to Interpro for Whitecourt's Claim was a claim for contribution. This portion of the Claim was summarily dismissed pursuant to the *Tort-Feasors Act*, RSA 2000 c T-5. Master Mason held that, other than the portion of Interpro's Third Party Claim for contribution, the parties had outstanding factual disputes to be determined at Trial.

GRAHAM V GRAHAM, 2014 ABQB 615 (LEE J)
Rules 1.2 (Purpose and Intention of These Rules) and 5.25 (Appropriate Questions and Objections)

The parties were husband and wife who agreed to engage in binding Judicial Dispute Resolution ("JDR"). Shortly before the JDR, the wife sought an Order to compel the

husband to provide further Undertakings, which he refused to provide during Questioning. The wife argued that the Undertakings sought were relevant and material to the JDR. The Court determined that Rule 5.25(1) applied. Justice Lee summarized prior authority dealing with the former Rules, concluding that the current Rule 5.25 can be read as a codification of the former Rule 186. Under Rule 5.25, a record is relevant and material only if it could reasonably be expected to:

a) significantly help determine one or more of the issues raised in the pleadings; or

b) ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Lee J. stated that the Rule requires that relevance and materiality is linked to determining the outstanding issues pursuant to the JDR agreement. The Court agreed with the husband's argument that only documents that are "more than minor assistance" in determining the issues raised in the pending JDR need be produced. Further, pursuant to Rule 1.2, the Court must fairly and justly resolve Claims in a timely and effective manner. The Rules should be used to identify real issues in dispute and to decide the quickest means to resolving a Claim at the least expense. In light of the upcoming JDR, the Court only ordered the husband to provide some but not all of the requested Undertakings.

1693737 ALBERTA INC V MID-WEST CONTRACTING LTD, 2014 ABQB 637 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 3.8 (Originating Applications and Associated Evidence) and 13.18 (Types of Affidavit)

The Applicant, 1693737 Alberta Inc. ("169"), was the owner and developer of a commercial condominium project, which entered into a construction contract with JDS Projects Ltd. ("JDS"). Before the construction was complete, JDS defaulted, and a number of builders' liens were registered. An Application was brought under the *Builders' Lien Act*, RSA, c B-7, to set the lien fund.

The evidence regarding the extent of completion of the project was not clear, but Master Robertson considered the evidence before the Court in order to avoid the costs of a further hearing. Master Robertson observed that, because the Application was brought by 169, it had the burden of proof, pursuant to Rule 3.8(2), and hearsay evidence was inadmissible, in accordance with Rule 13.18(3). 169 did not present any evidence to challenge JDS' statement regarding completion of the project, except for a progress inspection report that was not under oath and inadmissible. The only evidence before the Court on the extent of completion was the last invoice, which suggested 85%, and this was the number used to determine the value of the work done. Given that the minimum lien fund was less than the amount left owing on the contract, Master Robertson set the lien fun at the sum left owing on the contract.

CONDOMINIUM PLAN 9812082 V BATTISTELLA DEVELOPMENTS INC, 2014 ABQB 644 (ERB J)
Rules 1.2 (Purpose and Intention of These Rules), 3.45 (Form of Third Party Claim), 11.27 (Validating Service) and 13.5 (Variation of Time Periods)

The Applicant ("Battistella"), Defendant to a multi-party construction deficiency claim involving water damage to a condominium development project, was required to file and serve any Third Party Claims within six months of filing its Statement of Defence in compliance with Rule 3.45. Battistella failed to serve all Third Party Defendants, including the Respondent, Graham Edmunds ("Edmunds"). Five years later, Battistella sought an Order to perfect service, either by extending the time for service, or by deeming service good and sufficient.

The Court stated that the language in Rule 3.45 is mandatory and requires the Third Party Notice to be filed and served within six months of filing the Statement of Defence. Defective service may be validated in certain circumstances in accordance with the discretionary mechanisms set out in Rules 11.27 and 13.5.

Pursuant to Rule 11.27, service may be validated if a "method of service" has been utilized giving notice to the party to be served, and "failure to advance a reasonable

excuse for the delay" will be fatal. The object of service is important. A defective service can be "good and sufficient" if the intended recipient received "knowledge of the general nature of the claim being pressed against him". There was no evidence that Edmunds had knowledge of the nature of the Third Party Claim against it. Madam Justice Erb stated that the test in an Application to extend the time for service is whether there has been inordinate delay, whether there is credible or reasonable excuse for the delay, and whether there is prejudice. Justice Erb concluded that long delays elevate the importance of a credible excuse. If the delay is not justified, the prejudice is presumed and may not need to be proven. In this case, service on Edmunds was simply overlooked, and a "leisurely" pace of litigation is not an acceptable excuse. There was also no evidence supporting an "air of reality" of the Third Party Claim.

Madam Justice Erb concluded that, pursuant to the purpose of the Rules as set out in Rule 1.2, the process of the Court must be respected. Although some Rules are flexible, the Court was not satisfied that there was no inordinate delay, and that there was a credible or reasonable excuse for the delay. Although the prejudice to Edmunds was not particularized, given the purposes and intention of the Rules, prejudice was apparent. Battistella did not show respect for the process. The Application was dismissed.

ERNST V ENCANA CORPORATION, 2014 ABQB 672 (WITTMANN CJ)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options To Deal with Significant Deficiencies), 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff ("Ernst") brought a claim against EnCana Corporation ("EnCana") for contamination of her well water, and against the Energy Resources Conservation Board ("ERCB") and Her Majesty the Queen in Right of Alberta ("Alberta") for failing to properly investigate and remediate the contamination. The claims against the ERCB were dismissed. Alberta then applied to strike all allegations in the Statement of Claim against it for failing to disclose a reasonable cause of action, or alternatively, or for Summary Judgment dismissing the Action against it for having no merit.

Ernst argued that Alberta's Application to strike constituted an abuse of process as it was the second Application brought by Alberta to strike portions of the Claim and the third time Alberta had challenged the pleadings. In this Application, Alberta sought to strike the entire Claim pursuant to Rule 3.68(2)(b). The prior Application was brought pursuant to different subsections, namely Rule 3.68(2)(c) and (d), and sought to strike only certain parts of the Claim. Chief Justice Wittmann stated that it would be most convenient to bring all attacks on a pleading at the same time, and the failure to do so may result in Costs, but held that the second Application to strike the Claim did not constitute an abuse of process.

Alberta submitted that one of the purposes of Rule 1.2 is to ensure that a Defendant is not subject to unnecessary litigation where there is a process which could resolve a claim, such as an Application to strike under Rule 3.68. Alberta argued that the Claim should be struck as it owed no private duty of care, and further, that Alberta was statutorily immune to liability in these circumstances. Wittmann C.J. noted that the test in Alberta for striking a Claim is now whether there is any reasonable prospect that the Claim will succeed, while reading the Claim generously in order to permit novel claims to proceed. Chief Justice Wittmann held that, while a private duty of care owed by Alberta may be a novel claim, there was a reasonable prospect that Ernst would succeed in the circumstances. Further, the immunity clauses relied on by Alberta apply to individuals acting pursuant to the legislation, such as employees, but do not apply to the Alberta government as a whole. Accordingly, the Claim against Alberta was not struck.

Chief Justice Wittmann went on to consider the alternative Summary Judgment Application. Alberta relied on Rule 7.2(a), which permits the Court to proceed with the Application prior to the Defendant filing a Statement of Defence, and Rule 7.3(1)(b) to argue that there was no merit to the Claim. The Court considered first whether Alberta had fulfilled the evidentiary requirements for

Summary Judgment under Rule 7.3(2), as it had not filed Affidavit evidence. Wittmann C.J. held that Alberta could rely on other evidence as an alternative to an Affidavit, such as admissions in a pleading, but there was an absence of other evidence in the proceedings. On this basis, the Summary Judgment Application failed. In any event, Wittmann C.J. held that Alberta had not satisfied the test for Summary Judgment. Accordingly, the Summary Judgment Application was dismissed.

When determining costs, the Court considered Rules 10.33(1)(a) and 10.33(2)(a): the degree of success of each party, and the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the Action. As Ernst was wholly successful in responding to the Application, and Alberta could have raised these arguments as part of their first Application to strike portions of the Claim, Chief Justice Wittmann ordered Costs at triple the applicable column in Schedule C.

KENT V MARTIN, 2014 ABQB 687 (TILLEMAN J)
Rules 1.2 (Purpose and Intention of These Rules) and 8.6 (Notice of Trial Date)

The Plaintiff sought an adjournment of a civil jury Trial which had been set down pursuant to a Case Management Order granted by Justice Tilleman. The Defendants consented to the adjournment, and the Plaintiff relied on Rule 8.6, which permits the Court to adjourn or abandon a Trial date. Tilleman J. noted that the parties' consent to an adjournment is not necessarily determinative as per Rule 8.6(4). The Court was reluctant to grant the adjournment as considerable judicial resources had already been devoted to the matter and it would be difficult to reschedule a lengthy civil jury Trial. However, Justice Tilleman noted that the efficient administration of justice needed to be weighed against fairness to the parties, which is inherent in Foundational Rule 1.2. Tilleman J. stated that an important consideration was whether a party had been negligent or diligent in advising the Court of any concerns in a timely fashion. As a whole, the evidence suggested that the matter was progressing and this adjournment was not indicative of any intent to delay. The adjournment was granted.

H ASH & ASSOCIATES LTD V BANHAM, 2014 ABQB 718 (MASTER MASON)
Rules 1.2 (Purpose and Intention of These Rules), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 7.3 (Summary Judgment)

Following the Plaintiff's employment dismissal, the Plaintiff filed a caveat on the Defendant's condominium as security for the repayment of monies loaned by the Plaintiff to the Defendant. The Plaintiff alleged that the advance of funds to the Defendant was a loan repayable with interest. The Defendant defended the Claim stating that the funds were a gift, and also put forward defences based on the *Statute of Frauds*, 29 Car II C 3 [1676] and the *Limitations Act*, RSA 2000, c L-12. The Defendant applied to discharge the caveat and to summarily dismiss the Claim against her. The Plaintiff resisted the Application and cross-applied to allow an Amendment to its Pleadings.

The Court noted Rule 3.65 provides that prior to or after the close of Pleadings, the Court may give permission to amend a Pleading, and that Rule 1.2(a) informs that discretion. The Court also noted the "classic rule" is that a Pleading may be amended, no matter how careless or late. This is subject to four major exceptions: 1) if the amendments cause injustice or prejudice not compensable in costs; 2) if they are hopeless; 3) if a limitation has been missed; or 4) if "there is an element of bad faith associated with the failure to plead the amendments in the first place". Master Mason, upon a review of the facts, determined that none of the exceptions applied. Accordingly, the Amendments to the Pleadings were permitted.

With regard to the Summary Dismissal Application, the Court noted that Rule 7.3(1)(a) permits a party to apply to the Court for Summary Judgment in respect of all or part of a Claim on the ground that there is no "merit" to a Claim or part of it. Master Mason cited *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 for the proposition that Rule 7.3 calls for a holistic analysis of whether a Claim has merit, and noted the longstanding approach that interlocutory decisions which can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication. Master Mason stated that a

party responding to a Summary Judgment Application must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a Trial with respect to the outstanding issues. Master Mason further noted that the Court is not to weigh competing evidence or assess credibility in order to summarily determine an Action.

After reviewing the facts of this case, Master Mason determined that there were conflicts in the evidence on all of the matters at issue, and credibility would be an important factor. In the result, the Applications to discharge the caveat and for Summary Judgment were dismissed.

KOOPMANS V JOSEPH, 2014 ABQB 721 (GRECKOL J)
Rules 1.2 (Purpose and Intention of These Rules), 9.5 (Entry of Judgments and Orders), 9.12 (Correcting Mistakes or Errors), 9.13 (Re-Opening Case), 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.19 (Review Officer's Decision), 10.31 (Court-Ordered Costs Award), 10.36 (Assessment of Bill of Costs) and 10.41 (Assessment Officer's Decision)

The Plaintiff, Koopmans, appealed the Decision of a Provincial Court Judge who dismissed his Claim against a lawyer and his law firm. Greckol J. allowed the Appeal in an earlier Decision, holding that the Plaintiff was entitled to damages for the return of legal fees and Costs. The Respondents applied for certain changes to that Decision, relying on Rules 9.12 and 9.13. Greckol J. cited and explained several Rules which impacted the Application. Justice Greckol noted that Rule 9.12 allows the Court to correct a mistake or error in a Judgment or in an Order arising from an accident, slip or omission. Rule 9.13 allows the Court to vary a Judgment or Order, or if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its Judgment or Order or reasons. A review under Rule 10.9 by a Review Officer involves a decision concerning a dispute between a lawyer and client relating to an account, initiated by either the lawyer or the client. An assessment under Rule 10.36 involves an Assessment Officer making a decision concerning a dispute between two litigants when it becomes the responsibility of one party to pay the Costs of the other and there is a dispute as to the Bill of Costs.

Justice Greckol considered whether the Application under Rule 9.13 was timely (Rule 9.13 provides broad authority to vary Judgments before entry). Greckol J. found that the Formal Judgment Roll had not yet been entered, pursuant to Rule 9.5, and authority was retained under Rule 9.13 to consider the Application on its merits.

The Applicants argued that the award of the return of legal fees was a collateral attack on the Assessment Officer's Order. The Applicants contended that Rule 9.13 should be used to vary the Judgment in order to recognize that the issue of negligence as it related to legal fees was already decided by the Review Officer. Greckol J. held that the Judgment itself distinguished between the issue of negligence considered on Appeal and the issue of quantum of legal fees considered by the Review Officer. The Applicant argued Rules 10.36(1) and 10.41 as the basis for the authority to conduct an Assessment. Justice Greckol distinguished between an Assessment and a Review under the Rules, and noted that, in this case, the Decision of the Review Officer was based upon the Review of the retainer agreement. Such a review is conducted by a Review Officer under Rules 10.9, 10.19(1), and 10.2(1), and involves different considerations. Justice Greckol concluded that there was no collateral attack of the Review Officer's Decision in the Judgment; it remained a review of the quantum of the legal fees whereas the Judgment turned on a finding of lawyer negligence. The Applicants did not show a very high likelihood of error in the Judgment, and therefore failed to meet the threshold required in a Rule 9.13(a) Application. Justice Greckol noted that the objectives in Rule 1.2 could weigh against granting a Rule 9.13(a) Application, and that the threshold for such Applications was high.

In regard to the self-represented Plaintiff's Costs, Greckol J. was satisfied that the Costs award was warranted and specifically permitted by Rule 10.31(5). Finally, the Plaintiff had agreed with the Applicants that the return of legal fees should have been somewhat less than the amount indicated in the Judgment as a result of a reduction by the

Review Officer. Greckol J. therefore directed that the correct amount of damages be reduced and the change be made under Rule 9.12. In the final analysis, Justice Greckol concluded that the Applicants' arguments amounted to a request for reconsideration of the entire Judgment. The Applicants launched substantive arguments that contested the express conclusions drawn in the Judgment in a way that could not be properly addressed without a formal Appeal. Greckol J. observed that no Appeal was available, and for good reasons: the courts do not have the resources for the litigation of small claims cases beyond one level of Appeal. The Application was not properly advanced under Rule 9.13 and was therefore dismissed.

WILSON V BOARD OF TRUSTEES OF ASPEN VIEW REGIONAL SCHOOL DIVISION NO 19, 2014 ABQB 741 (GOSS J)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 1.6 (Changes to These Rules), 4.31 (Application to Deal With Delay) and 4.33 (Dismissal for Long Delay)

The Plaintiff commenced an Action against the Defendant for damages arising from bullying suffered by the Plaintiff over the course of his school years. The Defendant brought an Application to dismiss the Plaintiff's Action for want of prosecution and delay, pursuant to Rules 4.31 and 4.33. The Plaintiff's Next Friend acknowledged that nothing had been done to significantly advance the Action in the past three years, but argued the Court should exercise its discretion to allow continuation of the Action due to the Plaintiff's psychological issues interfering with his ability to advance the Action. The Plaintiff also argued that correspondence between counsel constituted a Stay of Proceedings. The Plaintiff referred to a number of the Foundational Rules in support of the argument that the Court had discretion despite the mandatory language of Rule 4.33.

The Defendant argued that the Court had no discretion to refuse to dismiss the Plaintiff's Claim, as the language in Rule 4.33(1) is mandatory. The Defendant also argued that the Action should be dismissed pursuant to Rule 4.31: continuation of the Action would result in serious prejudice to the Defendant, particularly due to witnesses moving and passing away, and the Defendant's diminishing institutional memory of the matters over time.

The Court referred to a number of cases which confirmed that Rule 4.33 was intended to be a "bright line rule": the Rule is absolute and mandatory, and there is no discretion to refuse a dismissal where the delay has been established under the Rule. The Court held that this mandatory requirement is also consistent with the purpose of the Rules. Goss J. then considered whether the Court could alter or amend Rule 4.33(1) pursuant to its power under Rule 1.6, which states that the Court of Queen's Bench or Court of Appeal may alter and amend any of the Rules or make additional Rules. Noting that the Court must be careful when invoking this power, Goss J. held that Rule 4.33 does not invite the exercise of such power, given its mandatory and directive language and the clear exceptions provided in the Rule.

Goss J. noted that the Court may alleviate the effect of some Rules where there is sufficient evidence to suggest it is appropriate to do so in the circumstances. However, there was insufficient evidence of the Plaintiff's psychological issues and inability to participate in the Action to warrant amending, altering or adding to Rule 4.33(1). Goss J. further noted that an agreement to delay under Rule 4.33(1)(a) needs to be express and demonstrate a mutual intention among the parties. The correspondence between counsel failed to establish such an agreement. The Court granted the Defendant's Application to dismiss the Action.

3S RESOURCES INC V IMPROVISIONS INC, 2014 ABQB 746 (GRECKOL J)
Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 3.36 (Judgment in Default of Defence and Noting in Default), 3.37 (Application for Judgment Against Defendant Noted in Default), 4.22 (Considerations for Security for Costs Order) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiffs sued the Defendants for deficiencies following the renovation of the Plaintiffs' home. The Statement of Defence of the individual Defendant, Mr. Gibeault, was struck for a failure to serve an Affidavit of Records, and that of Improvisions Inc. for failure to produce documents. The Defendants were noted in default pursuant to Rule 3.36 and the Plaintiffs obtained Default Judgments pursuant to Rule 3.37. The Defendants brought an Application to set aside the Default Judgments and Noting in Default, and to permit the Statements of Defence to be filed pursuant to Rule 9.15(3). Justice Greckol referred to Rule 1.3, which gives the Court the power and discretion to provide various remedies.

The Defendants argued that they were unaware of procedural failings by their prior counsel and contended that they had meritorious defences. The Defendants attested to the fact that they were not made aware of the Plaintiff's Applications to strike, the Orders requiring that certain steps be taken, and the Noting in Default. The Plaintiffs argued that, because the Defendants were represented by counsel at all times, they were deemed to have notice of all that occurred. The Plaintiffs argued in the alternative that the Court should grant a Security for Costs Order under Rule 9.15 (and Rule 4.22) in the event the Defendants were successful in their Application.

Greckol J. stated that the test to set aside a Noting in Default is different than setting aside a Default Judgment. To set aside a Noting in Default, a meritorious defence must be shown. To set aside a Default Judgment, the Applicant must demonstrate a higher threshold than that there is an arguable defence. Upon review of the responses to the allegations contained in the Statement of Claim, the Court held that the Defendants demonstrated they had arguable defences. Greckol J. considered the purposes of the Rules, as set out in Rule 1.2, in balancing the parties' interests in order to reach the ultimate decision. Greckol J. was of the view that the Defendants did not deliberately allow the defaults to occur and had a credible excuse in that their former counsel failed to advise them of the proceedings and take necessary steps to defend. The Defendants did not learn of the procedural deficiencies until they changed counsel. As such, the Default Judgment was set aside. For the same reasons, the Noting in Default was set aside and the Defendants were permitted to file their Statements of Defence.

PADGET ESTATE (RE), 2014 ABQB 750 (GRECKOL J)
Rules 1.2 (Purpose and Intention of These Rules), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 9.5 (Entry of Judgments and Orders) and 9.13 (Re-Opening Case)

The Plaintiff, Donald Padget, was co-executor and co-trustee of his father's estate along with his brother, the Defendant, Stewart Padget ("Stewart"). The Plaintiff filed a Statement of Claim on May 17, 2013 claiming that Stewart, along with Stewart's former wife, had wrongfully taken money before the death of their father. The Plaintiff failed to serve the Statement of Claim within the one-year limitation period. The Plaintiff made an Application in Masters' Chambers to extend the time period for service, which Application was granted. The Defendant successfully appealed the extension of time to serve before Justice Greckol.

The Plaintiff brought the present Application before Justice Greckol pursuant to Rule 9.13, requesting that the Appeal Decision be varied because it was incorrectly determined under Rule 3.27, as opposed to Rule 3.26. The thrust of the Plaintiff's argument in favour of varying the Appeal Decision was that it had been made by erroneously following Rule 3.27. This was incorrect, according to the Plaintiff, because the Application to extend time for service was made within one year of filing the Statement of Claim, and so the applicable Rule was in fact Rule 3.26.

With regard to Rule 9.13, Justice Greckol noted that, if the Applicant had demonstrated the likelihood of error was very high, the Court had the authority under Rule 9.13 to vary the earlier Decision. After reviewing the case law dealing with Rules 3.26 and 3.27, Justice Greckol stated that the weight of authority indicated that Applications for extension brought within a year of filing the Statement of Claim are dealt with under Rule 3.26, and do not engage the considerations applied under Rule 3.27.

Justice Greckol summarized the guiding principles when making a determination under Rule 3.26: (a) there should be some evidence showing attempts to serve; (b) ideally, there should be some explanation for why the Defendant has not been served; (c) the purpose of renewal cannot be to delay; and (d) there should be no prejudice arising to the Defendant.

After reviewing the facts of this case, the Court was satisfied that the Plaintiff had met the requirements for an extension pursuant to the Rule 3.26. Accordingly, the Court stated that there was a "very high likelihood that the Applicant has correctly identified an error" and varied the earlier Appeal Decision pursuant to Rule 9.13.

CAN V CALGARY (POLICE SERVICE), 2014 ABCA 322 (CONRAD, O'BRIEN AND WAKELING JJA)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment) and 7.5 (Application for Judgment by way of Summary Trial)

The Plaintiff appealed a Queen's Bench Order which summarily dismissed his Claim against the Calgary Police Services for wrongful arrest, false imprisonment, and negligent investigation. The Majority of the Court of Appeal stated that the analyses undertaken by the Court below were correct pursuant to Rule 7.3. Summary Judgment requires a Claim to be "without merit". A Claim is without merit when a Claimant has not established any genuine issue for Trial. The Court noted that the new Rule has not substantively changed the test for Summary Judgment from that under former Rule 159(3). The Court concluded that Summary Judgment in this case was warranted and dismissed the Appeal.

Wakeling J.A., concurring with the Majority in the result, gave further consideration to Rule 7.3. Citing *Hryniak v Mauldin*, 2014 SCC 7, Justice Wakeling stated that the principles of broad interpretation of the Rules were consistent with Alberta's approach to Rule 7.3, but that the Ontario Rule considered by the Supreme Court provided for a process more similar to Summary Trial under Rule 7.5. His Lordship stated that the courts are committed to resolving disputes in the least amount of time and at the lowest possible cost. Summary Judgment is one way in which the courts can accomplish this objective. Wakeling J.A. noted that the Foundational Rules 1.2 and 1.4 support Summary Judgment to resolve disputes quickly and in a cost effective manner. Canvassing recent Alberta Court of Appeal jurisprudence, Wakeling J.A. stated that Summary Judgment is not appropriate unless the Court is satisfied that the matter may be determined justly without the parties having access to all stages of the litigation.

Wakeling J.A. also addressed Rule 6.11(1)(g), stating that the Rules do not contain a provision which expressly precludes a motions Court from hearing oral evidence, but that the Rules may do so by implication. His Lordship concluded that the use of oral evidence is imprudent in Summary Judgment Applications because: the existence of the Summary Trial Rules provide for oral evidence; a Summary Judgment Application is resolved by reference to the Pleadings and Affidavits as contemplated by Rule 7.3(2); the time taken to hear oral evidence defeats the purpose of the expeditious nature of Summary Judgments; and the Summary Judgment process does not need to be distorted to resolve disputes since the other models of summary determination in Part 7 of the Rules are available to do so.

Justice Wakeling concluded that, in Alberta, Summary Judgment is appropriate if the Applicant's position is so compelling that success is highly likely. Wakeling J.A. agreed that the Appeal should be dismissed.

COLEMAN V COLEMAN, 2014 ABCA 452 (WAKELING JA)
Rules 1.2 (Purpose and Intention Of These Rules), 1.7 (Interpreting These Rules), 3.15 (Originating Application for Judicial Review), 3.27 (Extension of Time for Service), 4.33 (Dismissal for Long Delay), 13.5 (Variation of Time Periods), 14.2 (Application of General Rules), 14.16 (Filing the Appeal Record – Standard Appeals), 14.47 (Application to Restore an Appeal), 14.65 (Restoring Appeals) and 15.16 (Transitional Provisions – Part 14)

The Appellant applied to restore his Appeal after it was struck from the list for failure to file the transcripts and appeal digest in time. The Appeal was struck from the list on April 7, 2014. New Rule 14.65(3) came into force on September 1, 2014 and the Appeal was deemed abandoned pursuant to the new Rule on October 6, 2014. The Appellant filed a restoration Application on October 23, 2014 pursuant to Rule 14.47 of the new Rules of Court.

The Court held that the new Rules indeed governed the Application pursuant to Rule 15.16, as the Appeal was struck but still existing as of September 1, 2014. An Appeal only ceases to exist after it is deemed to be abandoned. The Court discussed whether Rule 14.47 required the Appellant to file and serve the materials to restore the Appeal within six months from the date of it being struck, or from when it was deemed abandoned. The Court held that, for the purposes of Rules 14.47 and 14.65(3), the clock begins to run as soon as the Appeal is struck; the restoration Application must be filed, served and made returnable within six months of the date it is struck. On expiry of the deadline, the Appeal is deemed abandoned and the party who initiated the Appeal cannot take a step to advance it. The clock for Rule 14.47 cannot restart simply because it was deemed abandoned under Rule 14.65(3). This would start a never-ending cyclical event which would give eternal life to an Appeal that has been struck.

However, an appellant who misses the deadline may apply for an extension: the Court may invoke Rule 13.5(2) and extend the time specified in Rule 14.47, as there is no express provision which prevents that application of Rule 13.5 to Rule 14.47. In the course of its analysis, the Court referenced Rules 1.2, 1.7, 14.2 and 14.16, and noted that Rule 13.5 does not apply to Rules 3.15, 3.27 and 4.33. In this case, the Court exercised its discretion and extended the time specified in Rule 14.47 to November 27, 2014 – one year after the Trial Judgment was pronounced.

The Appellant filed and served the restoration Application within the extended deadline. However, the Court declined to exercise its discretion to restore the Appeal because the Appellant was given notice of the deadline and there was no reasonable explanation for his inaction. Cogent reasons must be presented in order to justify restoring an Appeal after Rule 14.65(3) is triggered. In addition, the delay prejudiced the Respondent and the likelihood of success of the Appeal was not sufficient to warrant its restoration. The Application was dismissed.

MAZEPA V EMBREE, 2014 ABCA 438 (BERGER, WATSON AND SLATTER JJA)
Rules 1.3 (General Authority of the Court to Provide Remedies), 1.5 (Rule Contravention, Non-Compliance and Irregularities) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff commenced an Action against the Defendant claiming unjust enrichment, exclusive possession of their residence and an Order severing joint tenancy. The Defendant brought a Cross-Application for a Restraining Order and exclusive possession of the residence. The Court of Queen's Bench granted exclusive possession of the residence to the Plaintiff, and spousal support to the Defendant so that she could afford to seek different accommodations. The Plaintiff appealed to set aside the spousal support Order.

The Majority of the Court of Appeal noted that it is a well-established principle that relief should be limited to what is contained in the pleadings, but that this principle is not absolute. The Majority stated that Rule 3.65 limits the effect of this principle because it allows the Court to amend the pleadings at any time. Further, procedural requirements, and any irregularities, do not have any effect on the Court's jurisdiction, pursuant to Rule 1.5(1). Procedural deficiencies are considered to be "irregularities" and are not jurisdictional. The Majority held that the

Order was not rendered a nullity by any limitations in the procedure. The Majority concluded that the original Order was validly made and remained in effect until varied or terminated by the Trial Court.

Berger J.A., concurring with the Majority in the result, stated that because the parties had consented to the remedy at the original hearing, it was unnecessary to consider procedural irregularities. Therefore, Rule 1.3 would apply, allowing the Court to grant any remedy available. The Appeal was dismissed.

BERNUM PETROLEUM LTD V BIRCH LAKE ENERGY INC, 2014 ABQB 652 (PENTELECHUK J)
Rules 1.4 (Procedural Orders), 6.14 (Appeal From Master's Judgment or Order) and 7.3 (Summary Judgment)

The Defendant ("Birch Lake") appealed an Order from a Master awarding Summary Judgment to the Plaintiff ("Bernum"). The parties entered into a joint operating agreement to acquire petroleum and natural gas leases to certain lands. Bernum obtained Summary Judgment with respect to a debt owed by Birch Lake. Birch Lake argued against Summary Judgment on the basis that Bernum was grossly negligent in its operation of the well and in failing to negotiate an extension of the lease. The Master held there was no evidence to support Birch Lake's allegations of gross negligence and awarded Summary Judgment for the debt owed, but held that the issue of extension of the lease should proceed to Trial. Accordingly, the Master ordered that the Judgment in favor of Bernum be stayed pending a determination of the Counterclaim for damages in relation to the failure to extend the lease, as this issue presented an arguable case of set off. Bernum appealed the portion of the Master's Order staying enforcement of the Summary Judgment.

At the Appeal, both parties produced additional evidence under Rule 6.14, which the Court noted was an Appeal *de novo*. The Court invited counsel to provide written submissions on the applicability of Rule 1.4(2)(h) to the circumstances in the event Summary Judgment was granted. The Court addressed the test for Summary Judgment stating that, traditionally, the bar on a Motion for Summary Judgment was high but in light of the recent Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, the Summary Judgment Rules are to be "interpreted broadly, with a focus on proportionality and affordable, efficient and just resolution". The modern test for Summary Judgment, as confirmed by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, requires an examination of the record to see if a disposition that is fair and just to both parties may be made on the existing record. Justice Pentelechuk stated that the test for Summary Judgment is now less stringent. In determining whether there is any issue of merit that genuinely requires Trial, the requirement is no longer "plain and obvious or clear or beyond doubt".

Pentelechuk J. observed that Rule 1.4(2)(h) allows the Court the discretion to grant a Stay if appropriate. Though the Rule does not set out a test for a Stay of execution pending appeal, the longstanding tripartite test should apply: the party applying for a Stay must show that it has an arguable issue, it will suffer irreparable harm if the Stay is not granted, and the balance of convenience weighs in favour of granting the Stay.

After a consideration of the issues, Justice Pentelechuk agreed that there was a genuine issue to be tried in Birch Lake's Counterclaim for damages. However, the Summary Judgment granted in favour of Bernum would not be set-off in relation to Birch Lake's Counterclaim, pursuant to the Canadian Association of Landmen Operating Procedure. Therefore, the Appeal of the Stay was granted, but Birch Lake retained the ability to pursue its Counterclaim.

WALTON V ALBERTA SECURITIES COMMISSION, 2014 ABCA 446 (MARTIN, SLATTER JJA AND NATION J (AD HOC))
Rules 1.4 (Procedural orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 10.30 (When Costs Award May be Made), 10.33 (Court Considerations in Making Costs Award), 14.25 (Contents of Factums), and 14.88 (Cost Awards) and Schedule C

The parties applied for advice and direction about several issues arising out of a Court of Appeal Decision, at 2014 ABCA 273, that partially reversed a Decision of the Alberta Securities Commission. Two of the successful Appellants sought Costs of the Appeal. The Court stated that, under Rule 14.88, the successful party is presumptively entitled to Costs on a scale that applies to the Decision appealed from. Thus, it is generally unnecessary to give any specific direction on Costs. However, Rule 10.30 confirms that Costs can be spoken to at any time, as long as an Application for a determination on Costs is made within two months from the pronouncement of the Decision. The Court noted that, under Rule 14.25(1)(f), the request for directions about Costs needs to be included in the Factum, but the failure to include the request in the Factum can be excused under Rule 1.5(4) if there is no prejudice to the other party.

The Court stated that the Appeals in this case were complex, and involved a number of issues. Taking into consideration the factors set out in Rule 10.33, the Court held that the Appellants were each entitled to Costs of the Appeal based on Column 5 of Schedule C.

The original Decision of the Commission assessed penalties against one of the Appellants, Holtby, who paid the penalties prior to the Appeal being resolved. Holtby argued that in light of the fact that some of the penalties were set aside by the Court, those funds should be returned to him. The Commission resisted, arguing that the matter had not yet been finally decided because of an upcoming Application for Leave to Appeal to the Supreme Court of Canada, and that Holtby was still subject to a penalty after the sanctions were reconsidered.

The Court stated that, although the Commission had not brought a formal Application, it was effectively seeking a Stay of the Judgment under Rule 1.4(2)(h) and s. 65.1 of the *Supreme Court Act*, RSC 1985, c s-26. The Court accordingly treated this Application for Directions as an Application for a Stay, and held that whether a Stay should be granted depends on the "relative strength of the parties' positions, the balance of convenience, and prejudice that might result". The onus of providing justification for a Stay was on the Commission, because the person who stands to benefit from a Judgment was *prima facie* entitled to those benefits. In this case, the Court held that it was appropriate to allow the Commission to continue to hold the disputed funds until the matter was finally resolved and Holtby's sanctions were reconsidered.

BILAWCHUK V BLOOS, 2014 ABCA 399 (BERGER, ROWBOTHAM AND BIELBY JJA)
Rules 2.11 (Litigation Representative Required), 7.3 (Summary Judgment) and 14.5 (Appeals Only With Permission)

The Appellants appealed the Summary Dismissal of their Claim against the Respondent for $23,975. The Claim arose from the Respondent's representation of the Appellants' brother in criminal proceedings and an alleged misapplication of trust funds. The Court noted that the Appellants did not seek or obtain permission to Appeal, as required by Rule 14.5, because the amount in dispute was less than $25,000. Also, one of the Appellants had passed away and no steps had been taken to substitute his personal representative as a party. Regardless of the procedural deficiencies, the Court held it would have dismissed the Appeal on its merits.

In the Summary Dismissal Application, the Respondent argued that the Appellants were never his clients. Their brother had retained the Respondent for an Appeal of his criminal conviction and bail Application. The Chambers Judge granted the Summary Dismissal Application on the basis that the Appellants were not proper parties to the Action against the Respondent, the Action was beyond the two year limitation period, and there was no merit to the Claim.

The Court noted that the Rule 7.3 is somewhat wider than the former Rule which required the Applicant to

demonstrate that there was no genuine issue for trial. The new Rule allows Summary Judgment if a decision can be made on the existing record which is fair and just to both parties. The evidence conflicted on the issue of whether the Appellants paid the retainer monies directly to the Respondent or whether the monies came directly from their brother. However, whether the Appellants were proper parties to the Action was not the only issue. The Action was filed seven years after the Respondent's services were rendered, and therefore well beyond the limitation period. Further, the Appellants' Claim lacked merit as they appeared confused, at best, about what the retainer monies were to be used for. The Appeal was dismissed.

BANK OF MONTREAL V ROGOZINSKY, 2014 ABQB 771 (MASTER SCHLOSSER)
Rules 2.23 (Assistance Before the Court), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff bank sued the Defendant for $27,000 outstanding credit card debt. The Defendant counterclaimed and sought to dismiss the Plaintiff's Action. The Plaintiff bank applied for Summary Judgment under Rule 7.3 and for the Defendant's Counterclaim to be struck pursuant to Rule 3.68. The Defendant's husband spoke for the Defendant in Court pursuant to Rule 2.23, arguing that the debt did not exist at law.

Master Schlosser considered Rule 3.68 and the modern test for striking pleadings as set out in *R v Imperial Tobacco Limited*, 2011 SCC 42. Master Schlosser noted that any pleading can be struck under Rule 3.68 if the Claim or Defence has no reasonable prospect of success. On such an Application, no evidence is required and the pleaded facts are presumed to be true. Master Schlosser then considered Rule 7.3 and the current test for Summary Judgment as summarized in *WP v Alberta*, 2014 ABCA 404 which is whether there is any issue of merit that genuinely requires a Trial, or whether the Claim or Defence is compelling enough that the likelihood of success is such that the matter should be determined summarily. Master Schlosser noted that the law with respect to Summary Judgment is in a state of evolution and refinement, but that Rule 7.3 permits the Court to dismiss claims that have no merit.

Master Schlosser held that the Defendant's Defence and Counterclaim were based on "pseudolegal" arguments. They did not disclose issues of merit requiring a Trial, nor did they have a reasonable prospect of success. The Plaintiff's Application for Summary Judgment was granted and the Defendant's Counterclaim was dismissed.

SKYRIDER HOLDINGS LTD (RE), 2014 ABQB 764 (VEIT J)
Rule 3.15 (Originating Application for Judicial Review)

The Applicant submitted a Proof of Claim to the trustee of her son's bankrupt company, Skyrider. The Claim related to the proceeds obtained from the sale of three properties. The proceeds of those sales were loaned to the Bankrupt Corporation. However, all of the properties had originally been owned by the Bankrupt Corporation and had been transferred to the Applicant for no consideration. The Trustee disallowed the Claim. The Applicant applied for an Order directing the Bankrupt Corporation's Trustee to provide further and better particulars of the reasons for its disallowance of her Claim.

Justice Veit noted that the Applicant's Application was one for Judicial Review of a Decision of a statutory decision maker. Veit J. found that the Application was not in the correct form pursuant to Rule 3.15; however, the Court was not prepared to dismiss the Application on the grounds of improper form since the objectives of Rule 3.15 relating to timing, notice and provision of a return had been met by other means. Her Ladyship reviewed the reasons provided by the Trustee and determined that, in the circumstances, they were reasonable. The Application was dismissed.

RP V ALBERTA (DIRECTOR OF CHILD, YOUTH AND FAMILY ENHANCEMENT ACT), 2014 ABQB 767 (OUELLETTE J)
Rule 3.24 (Additional Remedies on Judicial Review)

The Applicants applied for Judicial Review of a Decision of the Director of Child, Youth and Family Enhancement ("Director") to remove a child from the Applicants' care and home.

The Court noted that the Director's Decision could not be appealed to the Appeal Panel, because it had already been sent to the Appeal Panel, who referred the Decision back to the Director, and the Director confirmed his earlier Decision. Therefore, the appropriate procedure in the circumstances was a Judicial Review pursuant to Rule 3.24(2). Ouellette J. examined the relevant factors to be considered in this matter as set out in the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, and reviewed the Decision of the Director.

In the result, the Application for Judicial Review was granted. The Director's Decision to remove the child from the foster home was set aside. The matter was referred back to the Director (again) for further consideration. Justice Ouellette also ordered that the Director immediately take the necessary steps to obtain an attachment assessment in relation to the child and that the Director's further consideration take into account the results of the attachment assessment pursuant to Rule 3.24(2)(c).

STACEY V FOY, 2014 ABCA 394 (BERGER JA)
Rules 3.37 (Application for Judgment Against Defendant Noted in Default), 3.68 (Court Options to Deal with Significant Deficiencies), 11.20 (Service of Documents, Other than Commencement Documents, in Alberta) and 11.21 (Service by Electronic Method)

The Applicant and the Respondent were in a personal relationship. After the relationship ended, the Applicant was charged with assault, and subsequently brought an Action for malicious prosecution. The Respondent counterclaimed on various grounds including partner support and defamation.

In a procedural Application, the Court directed that the Applicant could be served by email. The Applicant was subsequently notified by email of a case management hearing four days before it was held. The Applicant acknowledged receiving the email, but argued that he did not see the email until the afternoon before the day of the hearing. The Applicant failed to attend the meeting.

With reference to Rules 11.20 and 11.21(1), the Court stated that the electronic service was adequate. The Court concluded that the Applicant had adequate notice of the case management hearing, and there was no evidence of prejudice to the Applicant. The Respondent subsequently successfully applied, pursuant to Rule 3.68(4)(b), to strike the Applicant's Statement of Claim and Defence to the Counterclaim. The Applicant was thus deemed to have admitted to the allegations in the Respondent's Counterclaim. Pursuant to Rule 3.37(1), the Trial Judge granted a Judgment in favour of the Respondent. The Court of Appeal did not find any error in the prior proceedings. The Appeal was dismissed with Costs awarded to the Respondent.

JORDAN V CALGARY (CITY), 2014 ABQB 576 (HAWCO J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants, the City of Calgary, Her Majesty the Queen in Right of Alberta and Her Majesty the Queen in Right of Canada, brought an Application to have the Plaintiff declared a vexatious litigant and to have three Actions struck. The Plaintiff had previously commenced nine separate Actions, eight of which arose from an email he published which led to him being charged with criminal harassment of his former partner. Each Action was commenced against individuals involved in assessment or enforcement, agents of the Federal and Provincial Attorney General's departments, and the Judiciary who were acting in their judicial capacity. The Defendants argued that the proceedings could not succeed and did not have a reasonable expectation of providing relief, and that the Plaintiff was clearly a vexatious litigant. Justice Hawco referred to Rule 3.68 which deals with vexatious proceedings and prior authority which set out the characteristics of vexatious litigants. Hawco J. held that, other than limited proceedings against the Attorney General for Canada as set out in a previous decision of Master Laycock, the Plaintiff's actions simply could not succeed. Justice Hawco was satisfied that the Plaintiff was a vexatious litigant and ordered that the Plaintiff could not institute any further proceedings.

MCNEIL V DUGGAN, 2014 ABQB 659 (MASTER HANEBURY)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiffs brought several claims against the Defendants in relation to an alleged wrongful dismissal. The Defendants applied to strike the Plaintiffs' Statement of Claim pursuant to Rule 3.68. At the outset of the Application, Master Hanebury dismissed the claim of Ms. Mitchell, one of the Plaintiffs, since she admitted during argument that she had no claim.

The Defendants argued that the test under Rule 3.68 to strike a Claim was whether it was "plain and obvious or beyond reasonable doubt" that the Claim could not succeed. The Defendants argued that this test was met because the Court had no jurisdiction to consider the Claims. Master Hanebury considered prior case law, and held that the remaining Plaintiff's Claims were within the exclusive jurisdictions of the Canada Human Rights Tribunal or other statutory bodies. Thus, the Court did not have jurisdiction to hear the Plaintiff's Claims. The Statement of Claim was dismissed.

644036 ALBERTA LTD V MORBANK FINANCIAL INC, 2014 ABQB 681 (BROWNE J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order), 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Plaintiff alleged that the Defendants had conspired to sell a foreclosed property owned by the Plaintiff at an artificially reduced price. The Defendants applied to have the Action struck pursuant to Rule 3.68, or for Summary Judgment against the Plaintiff pursuant to Rule 7.3. The Defendants also applied for a declaration that the Plaintiff's corporate representative was a vexatious litigant and should be restricted from engaging in further litigation. If the Action was not terminated, the Defendants sought a direction that the Plaintiff be represented by counsel, and sought a Security for Cost payment into Court by the representative personally, pursuant to Rule 4.22.

The Defendants sought leave to file pleadings from other related Actions in accordance with Rule 6.11. Browne J. allowed the related pleadings to be filed for the purposes of the Application because many of the same parties were named in the other Actions, and the related proceedings were relevant to place the present Action in its proper context. The Defendants argued further that the Action was an example of vexatious and abusive litigation that satisfied the criteria in Rules 3.68 and 7.3 (1)(b). The Court observed that an Action may be struck under Rule 3.68 where it is plain and obvious, or beyond reasonable doubt, that the Action cannot succeed. A frivolous plea is one that is so palpably bad that the Court needs no real argument to be convinced of that fact. A Pleading is frivolous if its substance indicates bad faith or is factually hopeless. A Court may strike a proceeding that is an abuse of process on that basis, and vexatious litigation may be struck under either Rule 3.68(2)(c) or (d); the term "vexatious" is synonymous with impropriety and abuse of process.

Justice Browne further noted that the current Summary Judgment Rule, Rule 7.3(1), applies the same legal test as the former Rule 159(b), and the bar on a motion for Summary Judgment is high. The Defendant who seeks Summary Dismissal bears the evidentiary burden of showing that there is no genuine issue of material fact requiring Trial. In a Summary Judgment Application, evidence may be entered in Affidavit form or by other evidence pursuant to Rule 7.3(2). Browne J. observed that the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 had recently emphasized an enhanced role for Summary Judgment proceedings since the modern reality of civil litigation places a focus on early resolution of issues in dispute by preliminary procedures rather than at Trial.

Justice Browne found that the record of the Action and the other related litigation provided many examples of vexatious litigation, and found several separate bases to conclude that the Action was an example of vexatious litigation pursuant to Rule 3.68. Her Ladyship held further that there were grounds for Summary Judgment pursuant to Rule 7.3. The entire Action was struck. Browne J. found the Plaintiff's litigation representative to be a vexatious litigant, and restricted him from filing or continuing actions in all Alberta Courts.

HONOURABLE PATRICK BURNS ESTATE MEMORIAL TRUST V P BURNS RESOURCES LIMITED, 2014 ABQB 779 (MASTER PROWSE)
Rules 3.68 (Court Option to Deal With Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff commenced an Action against the corporate Defendants claiming shareholder oppression. The Defendants, pursuant to Rule 3.68, subsequently moved to strike part of the Action as it related to the documentation of an offer by the Defendants to purchase the shares owned by the Plaintiff. The Plaintiff responded by seeking and obtaining leave to amend its Pleadings with respect to the same documents; the Defendants' Application to Strike was dismissed. The Defendants then applied under Rule 7.3 to summarily dismiss the Action. The Plaintiff responded by seeking production of the Defendants' Affidavit of Records, and by seeking to compel Questioning. The Defendants moved to set aside the appointments for Questioning.

Master Prowse stated that the Rules with respect to Summary Judgment may as well not exist if a respondent is entitled to insist on the usual production of documents and Questioning before the hearing of a Summary Judgment Application. With respect to the Plaintiff's fears that the Defendants would advance the Summary Dismissal Application based on erroneous Affidavit evidence, Master Prowse suggested that the Plaintiff should provide some specific evidence in response. Master Prowse concluded that the Plaintiff was not entitled to the production of documents or Questioning with respect to the documents at issue. The Appointments for Questioning of the Defendants' Affiant were set aside.

ANGUS PARTNERSHIP INC V SALVATION ARMY, 2014 ABCA 423 (ROWBOTHAM, VELDHUIS JJA AND HUGHES J (AD HOC))
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 13.6 (Pleadings: General Requirements)

The Appellants brought two Appeals, one of which was from the Case Management Judge's refusal to allow amendments to the Statement of Claim. The Case Management Judge denied amendments to certain paragraphs because they were not relevant to the Appellants' allegations.

The Court of Appeal stated that, pursuant to Rule 13.6(2) and Rule 3.68(2)(c), relevance is the foundation of pleadings, and is a ground for denying an amendment to a pleading. The Court of Appeal held that the Case Management Judge did not err in law, but some of the proposed amendments ought to have been permitted because they were relevant. The Appeal was allowed in part.

SHERWOOD STEEL LTD V ODYSSEY CONSTRUCTION INC, 2014 ABCA 320 (COSTIGAN, WATSON AND BROWN JJA)
Rules 3.72 (Consolidation or Separation of Claims and Actions) and 7.3 (Summary Judgment)

The Defendant, Odyssey Construction Inc. ("Odyssey") was the general contractor for a condominium project. Odyssey sub-contracted the excavation and concrete work to 706740 Alberta Ltd. ("Edmonton Concrete"). Edmonton Concrete contracted with the Plaintiff, Sherwood Steel Ltd. ("Sherwood Steel") for the supply of rebar for the project. When Edmonton Concrete failed to pay Sherwood Steel and other subcontractors, Sherwood Steel obtained Summary Judgment against Edmonton Concrete for the outstanding debt. Having obtained judgment against Edmonton Concrete, Sherwood Steel then sued Odyssey in a separate Action for the same amount, alleging breach of an oral contract relating to Edmonton Concrete's debt. The Chambers Judge granted Odyssey's Application for Summary Dismissal of Sherwood Steel's Action on the basis that it was barred by the doctrine of merger: when a Court gives Judgment on an Action, the cause of action on which it is based is exhausted. Sherwood Steel could not bring another lawsuit based on the same cause of action. Sherwood Steel appealed, arguing that the doctrine of merger did not apply.

The Court of Appeal agreed with Sherwood Steel and held that Sherwood Steel was not re-litigating the same cause of action against Odyssey as it did against Edmonton Concrete. The two Actions did not involve the same parties; and, though the relief sought and the subject matter were

the same, the Actions were not the same with respect to the agreements between the parties and did not have the same factual underpinnings. The Court of Appeal also held that the Action against Odyssey did not constitute an abuse of process: while the obligations of Odyssey and Edmonton Concrete may be co-extensive, they are separate and distinct, and civil procedure permits multiple Actions for the same damage and separate Actions may be addressed by consolidation under Rule 3.72. The mere fact of multiple potential Judgments for the same loss is not an abuse of process or potential abuse of process. The Appeal was granted.

STACEY V FOY, 2014 ABCA 420 (BERGER JA)
Rules 4.22 (Considerations for Security for Costs Order), 4.23 (Contents of Security for Costs Order) and 14.67 (Security for Costs)

The Applicant applied for Security for Costs in an Appeal brought by the Respondents. The Court stated that an Order for Security for Costs is discretionary under Rules 4.22, 4.23 and 14.67. The Court considered each of the five factors set out in Rule 4.22, and stated that although the Respondents have assets in Alberta, they may not be enough to pay for the total Costs award from the Courts below. Furthermore, the Court of Appeal drew an adverse inference from the Respondent's failure to adduce meaningful evidence of his financial status, and his failure to pay the Costs award from proceedings prior to Trial. Thus, even assuming that the Appeal had arguable merits, the Court concluded that the Respondent had not made out that his ability to pursue his Claim would be barred from an Order for Security for Costs. The Court held that it was just and reasonable for Security for Costs to be ordered, failing which, the Appeal would be struck.

MANSON INSULATION PRODUCTS LTD V CROSSROADS C&I DISTRIBUTORS, 2014 ABQB 634 (POELMAN J)
Rules 4.23 (Contents of Security for Costs Order), 5.27 (Continuing Duty to Disclose), 5.31 (Use of Transcript and Answers to Written Questions) and Schedule C

Justice Poelman addressed a continuing series of disputes between the parties regarding procedural and evidentiary matters. The current dispute concerned, *inter alia*, the amount to be posted as Security for Costs and a claim for privilege over solicitor-client communications.

With respect to the Security for Costs Application, the party from whom security was sought consented to the payment into Court. The Court was left to determine the appropriate amount for security, which was contested. The Court looked at several factors in determining what the proper amount should be. One of the issues which arose was whether the amount to be posted should only include anticipated Costs going forward from the time of the Application, or should also include all Costs since the party required to post security became involved in the Action. The Court noted that determining an amount for Security for Costs was highly discretionary. In this instance, the Court determined that the appropriate amount would include Costs dating back to the time the paying party first became involved. The Court further noted that an Order for security for costs is appropriate where a party enters into a transaction which affects its ability to answer for costs.

The other points of difference between the parties in respect of the calculation of Costs related to what, if any, multiplier should be applied to the appropriate column in Schedule C to the *Rules of Court* and whether second counsel fees at Trial should be included. The Court settled on twice column 5 of Schedule C, and with respect to Trial fees stated "counsel fees for trial should be based on attendance of first counsel for all scheduled thirty-nine days; and second counsel fees for an additional fifteen days".

Next, the Court considered the Plaintiffs' Application for an Order that the Defendant disclose written legal opinions it obtained from its solicitors in 2009 regarding a distribution agreement, and answer questions about related communications with its solicitors. In discussing the issue of solicitor-client privilege, the Court noted that there were some "weaknesses" in the evidence. A correcting Affidavit required by Rule 5.27 was promised but not provided. Namely, the Defendant improperly sought to rely on its own witnesses' Questioning evidence, which is prohibited by Rule 5.31 and the relevant authorities. The Court also

noted that the Questioning evidence of a party's witness may only be used against the party pursuant to Rule 5.31. In the result, the issues with the evidentiary record were not determinative and disclosure of the privileged communications was not ordered.

OMAR V ALI, 2014 ABQB 599 (VEIT J)
Rules 4.24 (Formal Offers to Settle), 4.29 (Cost Consequences of Formal Offer to Settle), 10.31 (Court-Ordered Costs Award) and Schedule C

Shortly after the relationship between the parties broke down, the Applicant applied to vary a Court Order concerning parenting time. Prior to the Application being heard, the Applicant sent the Respondent a Formal Offer to Settle that dealt with all of the issues in dispute between the parties. The Respondent did not respond to the Offer. The Order received by the Applicant was more favourable than what he would have received if his Offer was accepted. The Applicant argued for double Costs pursuant to Rule 4.29. Justice Veit stated that while Courts should support the sound policy underpinning this Rule, double Costs should not be awarded unless the litigant can comply strictly with the requirements under Rule 4.29(1) or (2). Justice Veit determined that Rule 4.29 requires that the result must be equal to or better than the Offer in its entirety. Because the Application only dealt with two of four issues between the parties, the Applicant did not satisfy the requirements of Rule 4.29.

The Applicant argued that the Respondent should have made a counter-offer to specifically address the two issues heard during the Hearing when it became clear that the Hearing would not deal with all four issues. Veit J. dismissed this argument, stating that unless the offeror includes a counter-offer mechanism into the Offer itself, the offeree can only accept the Offer or do nothing. The Rule does not anticipate a counter-offer.

The Court further considered the Applicant's entitlement to double Costs based on Rule 10.31. Justice Veit concluded that the discretion to award "appropriate costs" must be exercised judicially, considering ordinary Cost outcomes. Although Rule 4.29(1) establishes a presumption in favour of ordering double Costs, the Court held that the Judgment simply did not equal or better the Applicants Offer. Moreover, although Rule 4.29(4)(e) could be interpreted to mean that the litigant is entitled to double Costs under a "special circumstance" when he or she failed to comply with the "equal or better" requirement by a minimal amount, the Applicant here did not even come close. The Applicant did not have a "real" Offer in this case, and was only entitled to party and party Costs pursuant to Schedule C.

KON CONSTRUCTION LTD V TERRANOVA DEVELOPMENTS LTD, 2014 ABQB 665 (ROOKE ACJ)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 10.30 (When Costs Award may be Made) and 10.33 (Court Considerations in Making Costs Awards)

Associate Chief Justice Rooke issued a decision on Costs in *Kon Construction Ltd v Terranova Developments Ltd*, 2014 ABQB 625, indicating reasons would follow. With respect to Rule 10.30(1), Rooke A.C.J. noted that "the ordinary rule applies, namely that costs follow 'the event'". Justice Rooke further noted that, normally, it is only the successful party to a proceeding that is entitled to a Costs award, but that the successful party need not succeed on every point and a finding of "substantial success" is sufficient.

Justice Rooke examined whether the successful party, Kon, was entitled to double Costs, pursuant to a Formal Offer it had submitted. His Lordship noted that, pursuant to Rule 4.24 and Rule 4.29, double Costs will be awarded when a Formal Offer is made for the steps taken from the date of the Formal Offer until the end of Trial, and in some cases for "further activity after the trial until a decision is made" and in additional cases for "steps taken until the Judgment Roll is settled". In this case, Justice Rooke awarded Kon double Costs for all fee portions of Costs awarded, up to the end of Trial.

Kon sought enhanced Costs pursuant to Rule 10.33, alleging that the Defendant's counsel's conduct unnecessarily lengthened the Trial. The Court stated that

extending a Trial beyond what is reasonable may result in an increased Costs award. However, Rooke A.C.J. declined to grant increased Costs in this case since it was not clear that the lengthening of the Trial was an abuse of process. His Lordship awarded Costs in accordance with the prior decision.

COGENT GROUP INC V ENCANA LEASEHOLD LIMITED PARTNERSHIP, 2014 ABQB 593 (JONES J)
Rule 4.29 (Costs Consequences of Formal Offer to Settle), Rule 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff, Cogent, commenced an Action against the Defendant, EnCana, for breach of a contract related to the construction of the Bow Office Tower in Calgary. Jones J. dismissed Cogent's Claim and directed the parties to provide written submissions if they were unable to agree on Costs. EnCana sought Costs to be determined in accordance with Column 4 of Schedule C to the Rules of Court. EnCana also submitted fees for second Counsel. Both parties used second Counsel at Trial. Cogent opposed EnCana's request for Costs; specifically, EnCana's request to double its Column 4 Costs, and double Costs in respect of items attributable to the period after EnCana submitted an Offer to Settle.

EnCana had served an Offer on Cogent for $50,000, plus taxable Costs and disbursements for all steps taken in the Action to the date of the Offer. The Offer was served two months prior to the commencement of Trial, but Cogent did not respond. Jones J. held that the Offer was made in compliance with Rule 4.29. EnCana was entitled to double Costs, computed with reference to Column 4 but with no multiplier added, and only in respect of Items 10(2) and 11 of Schedule C. Jones J. declined to award Costs in respect of EnCana's summary of closing argument, which was merely an outline of EnCana's closing submissions. The Costs associated with that document were already subsumed in the items in Schedule C for Trial preparation and Trial attendance. Jones J. also held that an award of fees for second Counsel was appropriate in the circumstances.

VALLIERES V VOZNIAK, 2014 ABCA 384 (SLATTER, O'FERRALL AND VELDHUIS JJA)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May Be Made) and 14.88 (Cost Awards)

The parties requested a Ruling on the Costs consequences that should follow from the disposition of their Appeal. The Trial Judge found in favour of the Respondents. In subsequent reasons the Appellants were ordered to pay the Respondents their assessed Costs on Column 3 of Schedule C, doubled after the date of a Formal Offer, but the Respondents' claim for solicitor and client Costs was rejected. The Appeal was subsequently allowed and the Respondents were ordered to pay damages to the Appellants. The Court stated that departures from the presumptions in Rule 14.88 are sometimes required, for example where the Trial Judgment is reversed, or Formal Offers have been made, or where other circumstances dictate a different Costs Order. Preliminary directions as to Costs, such as those found in the Reasons resolving the Appeal, can be varied if further information is brought forward, for example the existence of Formal Offers. Costs can be spoken to at any time pursuant Rule 10.30(1). The Appellants were successful on the Appeal, and there was no basis on which to deny them their assessed Costs. Further, since the Trial Decision was reversed, the Appellants were also entitled to Costs of the Trial in accordance with Rule 10.29.

The Appellants argued that they were entitled to solicitor and client Costs based on a covenant in a real estate contract which was at issue. The parties had agreed that the contract provided that the successful party may claim solicitor and client Costs on a full indemnity basis. The Court agreed and concluded that, since the Appellants were entitled to solicitor and client Costs, it was not necessary to assess the impact of any offers that were made pursuant to Rule 4.29(4)(a).

CHARIK CUSTOM HOMES LTD V SARA DEVELOPMENT INC, 2014 ABQB 63 (MASTER ROBERTSON)
Rule 4.33 (Dismissal for Long Delay)

The Defendants applied for dismissal of the Plaintiffs' Claim for long delay pursuant to Rule 4.33. The Plaintiffs filed and served the Statement of Claim nearly four years prior. Shortly after the Statement of Claim was served, the Defendants' counsel advised that he was acting and requested the usual courtesy of taking no default proceedings without reasonable prior notice, to which the Plaintiffs' counsel agreed. Then the Claim remained dormant. The Plaintiffs' counsel relied on Rule 4.33(1)(a) and argued that the parties had agreed to the delay and the exchange of correspondence was a "standstill" Agreement. Master Robertson noted that there are three stated exceptions to the "drop dead" rule, the first of which is where "the parties to the Application expressly agree to the delay".

Master Robertson reviewed the leading authorities and observed that the law in Alberta is clear: when the Defendant's counsel asks for reasonable notice before the Plaintiff takes default proceedings, and the Plaintiff agrees, Rule 4.33(1)(a) does not come into play. The exception is in reference to a delay of three or more years. A request for a courtesy, by itself, is not an agreement to a delay of three years without a significant advancement in the Action. If the Plaintiff does not follow up with the request for a Statement of Defence, there is no need for the Defendant to deliver one, and after three years of inactivity the Defendant may bring an Application for long delay. In the result, the Application to Dismiss was granted.

TUREK V OLIVER, 2014 ABCA 327, (PICARD, WATSON AND SLATTER JJA)
Rule 4.33 (Dismissal for Long Delay)

The Defendants appealed a Decision to dismiss their Application to strike the Action for long delay pursuant to Rule 4.33. Over time, the Plaintiff had granted repeated courtesies to the Defendants in extending the agreed deadline to produce their Affidavit of Records. The Defendants did not serve their Affidavit of Records but brought an Application to strike instead.

The Court of Appeal stated that the purpose of Rule 4.33 is to end Actions that have become inactive and should be deemed to be abandoned. The Rule was not intended encourage an ambush by a party who is in default of the Rules and their undertakings after numerous courtesies by the other party. An agreement between counsel may be sufficient to advance an Action depending on the facts and circumstances. Here, it was not unreasonable for Plaintiff's counsel to rely on the repeated excuses advanced by Defendants' counsel. The Appeal was dismissed.

CARROLL V ATCO ELECTRIC LTD, 2014 ABCA 364 (CÔTÉ, BROWN AND SULYMA JJA)
Rule 5.2 (When Something is Relevant and Material), 5.3 (Modification or Waiver of This Part), 5.8 (Records for Which There is an Objection To Produce) and 5.17 (People Who May be Questioned)

The Defendant, ATCO, was ordered by a Master to attend for one day of Questioning. ATCO's executive, Ms. Southern, did not wish to be questioned, and ATCO appealed to a Justice of the Court of Queen's Bench. The Chambers Judge, Justice Shelley, dismissed the Appeal. Ms. Southern then was ordered to attend for one day of Questioning in Calgary. ATCO appealed to the Court of Appeal, arguing that the Chambers Judge failed to apply the "relevant and material" test, found at Rule 5.2.

The Court of Appeal stated that a Defendant or its representative cannot escape Questioning simply by arguing that he or she is not liable or did not do what the Statement of Claim alleges. A Plaintiff is entitled to have the Defendant or its representative pledge his or her Oath to their statements. Ms. Southern was not named as a party, but was to be examined as an officer or an employee. The Court observed that the additional test in Rule 5.17(1) was whether she had or appeared to have relevant and material information that was acquired because of the office she held or her employment. The Plaintiff swore that the Defendants did have such information. The Defendants

produced some evidence to the contrary on a few issues, but they adduced no complete contradiction. The Court noted that Rule 5.8 contained language that suggested that contradictions and uncertainty was to be expected before Questioning.

ATCO's Factum contained argument for an exemption from Questioning under Rule 5.3(1). The Court stated that there was no evidence to support the exemption in Rule 5.3(1)(a), which is about abusive, oppressive, improper or tediously lengthy disclosure processes. Rule 5.3(1)(b) is about expense, delay, danger or difficulty in giving disclosure grossly disproportionate to the likely benefit. The Court observed that the language is strong, and being busy does not begin to meet that test. In the result, the Appeal was dismissed, and directions were given with respect to Questioning.

CCS CORPORATION V PEMBINA PIPELINE CORPORATION, 2014 ABCA 390 (CÔTÉ, SLATTER AND WAKELING JJA)
Rules 5.15 (Admissions of Authenticity of Records), 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment), 13.18 (Types of Affidavit) and 14.75 (Disposing of Appeals)

The Plaintiff, CCS, commenced an Action against the Defendants for building a dehydration plant near one of Pembina's pipeline terminals in order to compete with CCS. Pembina, one of the many Defendants, applied to the Case Management Judge to have most of the suit summarily dismissed against it. A large part of the dispute before the Case Management Judge was whether CCS's Affidavit evidence was admissible. The Case Management Judge struck much of CCS's Affidavit in response to the Summary Dismissal Application, and then granted Summary Judgment on the basis of the remaining record. CCS appealed.

The Majority of the Court of Appeal reviewed CCS's evidence which was submitted to defend the Summary Judgment Application, and found it to be, *inter alia*, "very skimpy". The Majority noted that even when directed to a Summary Judgment Application, second-hand, bald or speculative Affidavits with scant details and no corroboration have low weight. The Court noted that a party resisting Summary Judgment must put its best foot forward for the Application. The Majority stated that whether the Appellant's evidence was admissible or not was academic since it would not change the result. Thus, the part of the Appeal respecting admissibility ought to be dismissed pursuant to Rule 14.75(2). The Appeal was dismissed.

Slatter J.A., concurring in the result, noted that Rule 6.11(1)(d) permitted the use of an admissible record disclosed in an Affidavit of Records. His Lordship stated that this provision "is clearly intended to permit the use of something, and it remains an open question whether it merely repeats the presumptions of authenticity found in R 5.15". Further, Slatter J.A. noted that Rule 13.18 permits the use of hearsay found in affidavits based on information and belief for some purposes, "so long as the source of the information is disclosed". However, Justice Slatter observed that it remained an open question as to whether information and belief based on some sources was inadmissible or merely affects the weight of the evidence.

1400467 ALBERTA LTD V ADDERLEY, 2014 ABQB 635 (VEIT J)
Rule 5.29 (Acknowledgement of Corporate Witness's Evidence)

The Plaintiffs sought determination of several pre-Trial disclosure issues, including whether, pursuant to the provisions of Rule 5.29, the Corporate Defendant Jico, having answered that it neither adopted nor rejected the evidence given by two of its employees, must advise why that evidence was not adopted and what Jico's information was on the questions that had been asked. Justice Veit considered leading authority under former Rule 214 and observed that the guiding principles to interpreting Rule 5.29 remained the same. In the result, Veit J. concluded that "there are only limited circumstances in which an employee's evidence can be rejected", and that the Defendants must explain their reasons for doing so. The Plaintiffs' Application was granted.

ORLECKI V CHALLENGE INSURANCE GROUP INC, 2014 ABQB 664 (MASTER SCHLOSSER)
Rules 5.31 (Use of Transcripts and Answers to Written Questions) and 5.33 (Confidentiality and Use of Information)

The Plaintiff commenced an Action against the Defendants for compensation arising from an employment agreement. The Defendants denied the Plaintiff's claim, stating that the Plaintiff was paid according to an amended agreement. The Plaintiff denied there was an amended agreement. In a separate non-competition Action arising from the same employment arrangement, the Plaintiff admitted to the amended agreement. The Defendants applied to relax the express undertaking in order to allow the transcript from the non-competition Action to be used as evidence to support the compensation Action. Rather than just using the admission to impeach the Plaintiff's credibility, the Defendants applied to use it as an admission against interest.

Master Schlosser stated that Rule 5.33(1)(c) applies to using evidence from one Action to impugn credibility in another. The applicable Subrule for using evidence from one Action to establish liability or a defence in another is Rule 5.33(1)(a). Master Schlosser considered prior case law, and stated that public policy does not support claims that are inconsistent with sworn testimony in other Proceedings. The admission was relevant and material to the compensation Action, and there did not appear to be any prejudice. The Court held that the Defendant was free to treat the admission as admissions against interest in the compensation Action. The Plaintiff could respond by way of an Affidavit, or by operation of Rule 5.31(3), relying on other parts of the non-competition Action's transcripts that may explain or quantify the admission.

MUNRO (RE), 2014 ABQB 636 (VEIT J)
Rule 6.8 (Questioning Witness Before Hearing)

The Applicants sought to lift the Respondents' bankruptcy Stay on the grounds that the Applicant's claim would survive the bankruptcy but their recovery on the Judgment would be prejudiced by delay if the Stay was not lifted. Further, if they could proceed and get a Judgment against the Respondents, they would be in a position to access the Real Estate Fraud Prevention Fund. The Application was contested on the basis that the Applicants did not meet the very low threshold required to establish that there was some evidence of some substance to the allegations of fraud.

Veit J. found that the Applicants had not provided sound reasons for granting the Stay. In particular, the Applicants had not established that their Claim would survive bankruptcy. Further, access to the Real Estate Fraud Prevention Fund engaged the same concerns as the claim of fraud, and therefore in these circumstances the potential access was not a reason to lift the Stay. Veit J. found no independent evidence to support the Applicants' claim of fraud or misrepresentation. Justice Veit observed that the Applicants took the relatively unusual step of using Rule 6.8 to examine the Respondent, Sally Munro. Evidence obtained under Rule 6.8 was evidence "of the examiner". Veit J. was not surprised that the evidence of Ms. Munro was that she did nothing improper. In the result, Veit J. denied the Plaintiffs' Application to lift the bankruptcy Stay.

CHANDOS CONSTRUCTION LTD V BUILDTECH FRAMING INC, 2014 ABQB 597 (MASTER ROBERTSON)
Rules 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 7.4 (Proceedings After Summary Judgment Against Party)

Chandos Construction Ltd. ("Chandos"), a general contractor, brought an Application under section 48 of the *Builders' Lien Act*, RSA 2000 c B-7, but styled it as a Summary Judgment Application by referring to Rules 7.2, 7.3 and 7.4. The Application was to reduce or eliminate the security provided by Chandos who had secured a lien claim registered by the Respondent framing contractor, Buildtech Framing Inc. ("Buildtech").

The parties disputed the amount of back charges Chandos had charged to Buildtech. Chandos argued that counsel for Buildtech had failed to cross-examine Chandos' representative about the back-charges, and then put evidence before the Court in their reply Affidavit. The issue

for the Court was whether the rule in *Browne v Dunn*, 6 R 67 (HL 1863) applied to Summary Judgment Applications: must the Respondent to the Application cross-examine the Applicant's witness first before filing a contradictory Affidavit?

Master Robertson held that the rule in *Browne v Dunn* did not apply to Summary Judgment. It exists for the benefit of weighing evidence, which the Court does not do on a Summary Judgment Application. Where the evidence is contradictory and the credibility of a witness is part of the real dispute, a Trial is necessary. In this case, regardless of the applicability of the rule in *Browne v Dunn*, it was clear that the claims for the back charges were in dispute and a Trial was necessary. Master Robertson held that the existing record left too many questions unanswered and dismissed the Application for Summary Judgment.

BARRETT ESTATE V KASHA, 2014 ABQB 12 (EIDSVIK J)
Rule 7.3 (Summary Judgment)

The Plaintiffs sold a quarter section of land to the Defendants, but reserved ten acres to subdivide into three acreages. To facilitate the transaction closing, the parties entered into an option to purchase for the three lots. A dispute arose over the location of the acreages and the Plaintiffs applied for Summary Judgment pursuant to Rule 7.3(1) arguing that there was no defence to the Claim and no triable issue.

Eidsvik J. noted that the test to obtain Summary Judgment was whether there was a genuine issue for Trial. Eidsvik J. held that this matter was appropriate for Summary Judgment as the dispute involved an interpretation of a contract and the facts necessary to resolve that dispute were not in conflict. While both parties had hoped that the three originally proposed locations would be approved, there was no evidence of a guarantee or an agreement that the proposed lots could not be changed. When the Defendants signed the Option, they were bound by it in the absence of fraud or misrepresentation, even though they may not have read or understood it. The Summary Judgment Application was allowed and the Option was held to be enforceable.

AGRICULTURAL FINANCIAL SERVICES CORPORATION V FELKER, 2014 ABQB 587 (LITTLE J)
Rule 7.3 (Summary Judgment)

The Plaintiff sought Summary Judgment against the Defendants in relation to an outstanding loan amount, plus interest and costs. The Plaintiff and each of the Defendants submitted Affidavits in respect of the Summary Judgment Application. Little J. commented that some of the evidence was contradictory.

Justice Little noted that much of the case law cited in connection with Summary Judgment under the former Rules stated that the Application cannot be successful if there are competing Affidavits. However, Little J. noted that since those decisions, the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd.*, 2014 ABCA 108, has interpreted Rule 7.3 more broadly, stating that the modern test requires that the Court "examine the record to see if a disposition that is fair and just to both parties can be made on the existing record". Little J. also cited *Hryniak v Mauldin*, 2014 SCC 7 in which the Supreme Court of Canada outlined the process for determining a motion for Summary Judgment. Little J., awarded Judgment in favour of the Plaintiff, noting:

> I am persuaded that a trial judge, particularly because fraud and trust principles were not pled which might require an assessment of credibility determinable only by seeing and hearing the witnesses, would not be in a better position to assess the evidence in this case than a motions judge reviewing the extensive material filed. That material allows me to make the necessary findings of fact, to apply the law to those facts, and to determine that Rule 7.3 is the appropriate mechanism for a timely and just adjudication of this claim.

RBC LIFE INSURANCE COMPANY V HERITAGE INSURANCE & CONSULTING LTD, 2014 ABQB 595 (NIELSEN J)
Rule 7.3 (Summary Judgment)

The Plaintiff commenced an Action claiming directly against the Defendant insurance agent for breach of duties owed to the Plaintiff insurer, and contribution relating to breach of duties to the Plaintiff's clients for losses incurred when a life insurance policy was changed. A Master granted the Defendants' Summary Judgment Application, and dismissed the Plaintiff's Claim. The Plaintiffs appealed.

Justice Nielsen observed that the test for Summary Judgment was considered by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7. That Court held that the Summary Judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. Further, Summary Judgment is appropriate where there is no genuine issue to be tried, and there will be no genuine issue when the Court can reach a fair and just determination on the merits. Rule 7.3 requires a more holistic analysis of whether the Claim has merit and is not confined to the test contained in the prior Rules.

Nielsen J. concluded that the necessary findings of fact could be made, the law could be applied to the facts and the findings were proportionate, expeditious, and less expensive than having this matter proceed to Trial. His Lordship was satisfied that, after applying a holistic analysis, that there was no merit to the Claim as it was barred by the limitation period. The Appeal was dismissed.

DHILLON V ANDERSON, 2014 ABQB 609 (MASTER ROBERTSON)
Rule 7.3 (Summary Judgment)

Master Robertson considered whether or not a new Regulation which required insurers to advise claimants of a pending limitation date applied to claims that were under discussion before the Regulation came into force. Master Robertson also considered the issue of whether the limitation period is waived or suspended while parties negotiate a possible resolution. The motor vehicle accident occurred in March 2011, and the Plaintiff and representatives of the insurer had their first contact in May 2011. In June 2013, a representative of the insurance company told the Plaintiff that the limitation had run and unless he had a Statement of Claim "processed", the insurer could not deal with the Claim. The Plaintiff sought legal counsel and eventually filed the Statement of Claim well past two years after the motor vehicle accident. The Defendant's insurance company argued that the Plaintiff was out of time. In reply, the Plaintiff relied on section 5.3 of the *Fair Practices Regulation*, AR 128/2001 and the doctrine of promissory estoppel.

Master Robertson, following the principles set forth in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, noted that in Summary Judgment Applications each party is required to put their best foot forward. There was no evidence to infer an intention by the insurer to waive or suspend the limitation period, and nothing in the nature of a promise or assurance upon which the Plaintiff relied. The Plaintiff simply assumed that his case would be settled. Further, the *Fair Practice Regulation* was not in force when the Plaintiff first advanced his Claim to the insurer so it did not apply to the Plaintiff's claim. In the result, Master Robertson dismissed the Action.

ACCESS MORTGAGE CORPORATION (2004) LIMITED V ARRES CAPITAL INC, 2014 ABCA 280 (MARTIN, WAKELING JJA AND NATION J (AD HOC))
Rule 7.3 (Summary Judgment)

The Defendant Appellant appealed a Summary Judgment Order and an Order granting leave to file a Writ of Enforcement in a debt Action. The motions Judge granted Summary Judgment on the basis that, on the evidence presented, the Plaintiff Respondent did not forgive the Defendant Appellant's debt. The Court of Appeal considered Rule 7.3 and stated that a court may grant Summary Judgment if there is no defence to a claim or part of it. The Court noted the change in the language of the current Rule 7.3 as compared to prior Rule 159. The Court also

observed that Summary Judgment is a "valuable option in the dispute resolution process". The Court concluded that the Defendant Decision granting Summary Judgment for the amount of the unpaid debt was appropriate.

MAXWELL V WAL-MART, 2014 ABCA 383 (FRASER, SLATTER AND BIELBY JJA)
Rule 7.3 (Summary Judgment)

The Plaintiff appealed a Decision which granted Summary Dismissal of his claims against two of the Defendants. Summary Dismissal was granted pursuant to Rule 7.3(1)(b). The Court of Appeal stated that Rule 7.3(1)(b) allows a party to apply for Summary Dismissal when there is no merit to the Claim. The Chambers Judge held that it must be "plain and obvious" that a Claim cannot succeed before Summary Dismissal can be granted. The Court, citing *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108, stated that the test had been widened. The current test stipulates that if a court is able to make a fair and just determination on the merits of a case without a Trial, then no genuine issue for Trial exists, and Summary Dismissal will be granted. While the Appellant argued that the Chambers Judge made erroneous findings of fact, the Court of Appeal concluded that the Chambers Judge made a fair disposition based on the evidence before him. Accordingly, the Appeal was dismissed.

WP V ALBERTA, 2014 ABCA 404 (COSTIGAN, WATSON AND BROWN JJA)
Rule 7.3 (Summary Judgment)

The Appellants appealed the dismissal of their proposed Class Action as being beyond the "ultimate" limitation period set out in section 3(1)(b) of the *Limitations Act*, RSA 2000, c L-12. The Appellants argued that limitations issues are "overwhelmingly" decided by a full Trial rather than by Summary Judgment. Further, the Appellants argued that the Legislature had created what amounted to a statutory "direction" that all other matters are to be held in abeyance pending Certification. The Court did not accept these arguments, noting that the *Class Proceedings Act*, SA 2003, c C-16.5 does not preclude a Judge from exercising his or her discretion to hear and decide a Summary Judgment Application prior to Certification.

The Court further noted that "the mere fact that a claim is advanced by way of a class proceeding does not endow it with special status allowing it to survive where the same claim would otherwise be doomed". More particularly, the Claim "remained" subject to all the tools furnished by Part 7 of the *Rules of Court* for resolving claims without a full trial, including summary judgment". With respect to the test for Summary Judgment, the Court noted that Summary Judgment is no longer to be denied solely on the basis that the evidence discloses a triable issue. The question to be applied is whether there is any issue of merit that *genuinely* requires a Trial, or whether the Claim is so compelling that the likelihood of success is such that summary determination is suggested. The Appeal from the Chambers Judge's Decision on Summary Judgment was dismissed.

PARADIGM QUEST INC V MOSER, 2014 ABQB 747 (MASTER SCHLOSSER)
Rules 9.35 (Checking Calculations: Assessment of Costs and Corrections) and 10.26 (Appeal to Judge)

The Plaintiff applied for a review of an Assessment Officer's decision in respect of Costs in a foreclosure Action. The Order allowed solicitor and client Costs to be assessed. The mortgage at issue provided for Costs on a full indemnity basis. Master Schlosser observed that there was no record other than the Review Officer's notes and counsel's letter. There was no basis to permit a detailed review of the reduction of the account, or the principals invoked by the Assessment Officer in declining to raise the account.

Master Schlosser noted that this was not an Appeal to a Judge of a Review Officer's Decision under Rule 10.26, which is an Appeal on the Record. Rule 9.35(4) is comparatively more open, and is silent about the nature of the process. Master Schlosser treated this as a *de novo* Application, as Masters do not hear Appeals. Master Schlosser found that the considerations which apply to an Appeal under Rule 10.26 also apply to a Costs determination under Rule 9.35(4). Master Schlosser noted

that there was some peripheral work relating to the file that was not captured by the tariff items or the time directly related to them. In the circumstances, Master Schlosser was willing to adjust the actual time to the amount allowed by the Assessment Officer.

STUBBARD V HAJDUK GIBBS LLP, 2014 ABQB 632 (GERMAIN 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), 10.18 (Reference To Court), 10.19 (Review Officer's Decision) and 10.41 (Assessment Officer's Decision)

The Plaintiff applied for a review of her legal fees incurred with respect to a matrimonial dispute, but after the Review Officer felt there were serious questions of fact and law raised by the retainer agreement, the Review Officer directed a reference to the Court under Rule 10.18(1)(a). The law firm was retained in 2005. In 2010, the firm discovered they did not have a signed copy of the original retainer, so took steps to switch the agreement to a lower fee agreement and contingency, making it retroactive to 2005. The new agreement purported to oust the consumer protection provision in old Rule 613 (new Rule 10.2(1)) regarding payment for improper or wasted work. The parties did not execute an agreement setting out a contingency arrangement in compliance with the Rules of Court.

The Plaintiff submitted that the proposed fee agreement was harsh and unconscionable, contrary to the public protection contained in old Rule 613 (new Rules 10.2 and 10.9), as she was billed $71,000 despite receiving no forward momentum or benefit. She further argued that the attempt by the law firm to turn the arrangement into a contingency agreement failed because it would not be enforceable under old Rule 616(2). The Defendant law firm argued that the time spent on the file was productive and the husband's aggressive response to the Plaintiff's claim was primarily to blame for lack of forward progress. It further argued that the 2010 retainer was valid and enforceable, or alternatively, the original retainer applied.

Justice Germain noted that Rule 10.2(1) concords with former Rule 613, but includes the ability to contract out of its impact. However, this does not include the ability to contract out of consumer protection provisions or ethical rules of the profession. The new Rules imply that there should be resistance to law firms running up large legal fees with no oversight.
It was clear that the parties intended to enter into a new contingency agreement in 2010 and that the old agreement would no longer be in force. However, at the time of this arrangement, the technical formalities in the old Rules governed and those were not complied with. As such, the new agreement was unenforceable. Therefore, Germain J. directed the Review Officer to ignore both the original retainer and the 2010 agreement, and to tax the account based on the criteria set out in former Rule 613.

MS V DM, 2014 ABQB 702 (YUNGWIRTH J)
Rules 10.2 (Payment for Lawyer's Service and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyer's Non-compliance With Contingency Fee Agreement), 10.18 (Reference to Court) and 15.5 (Contingency Fee Agreements)

The Plaintiff's legal guardian, TS, sought an Order to confirm the settlement of the personal injury claim of the Plaintiff, MS, who was a minor. TS also sought an Order confirming the legal fees of MS' counsel based on a 25% contingency fee retainer agreement (the "Agreement") that was entered into in 2005. The Public Trustee of Alberta was opposed to the confirmation of the legal fees, arguing that the legal fees should be reduced substantially for failure to comply with the Rules.

The Court stated that the applicable requirements for contingency fee agreements are set out in Rule 10.7. Rule 10.8 stipulates that if counsel does not comply with Rule 10.7(1) to (4) and (7), they are is only entitled to charges determined in accordance with Rule 10.2, as if there had been no contingency fee agreement. However, the Agreement was entered into before the current Rules came into effect so the Court considered transitional Rule

15.5(1). According to Rule 15.5(1), contingency fee agreement requirements under Rule 10.7(2) do not apply to an agreement entered into before the current Rule came into effect, if the agreement complies with old Rules 615 to 620. Thus, the Court was required to determine whether the Agreement complied with the old Rules. If not, it would need to be determined if the Agreement was enforceable pursuant to the current Rules.

With respect to the Court's jurisdiction in deciding cases involving contingency fee agreements, Justice Yungwirth cited prior case law and concluded that the Court had the jurisdiction to interpret and enforce contracts, and had exceptional jurisdiction under former Rule 619(4) to "vary, modify or disallow the agreement". Further, former Rule 619(4) corresponds to current Rule 10.18(3)(b). Yungwirth J. held that the Agreement did not comply with the former Rules. To be enforceable, a contingency agreement needed to contain the particulars and statements as required under Rule 616, and the Agreement did not conform to the requirements in Rule 616(2), 616(7), and 616(3). Because the Agreement did not comply with the old Rules, new Rule 10.7(2) applied. The Court noted that Rules 10.7(2)(e) and (f) are very similar to former Rules 616(2)(e) and (f). Yungwirth J. held that the agreement also did not comply with the current Rules, and was not enforceable.

Her Ladyship noted that, pursuant to Rule 10.8, counsel is only entitled to lawyer's charges determined in accordance with Rule 10.2. The Court considered Rule 10.2, relevant case law, and the nature, importance, and urgency of the matter. The Court considered factors including MS' financial circumstances, the manner in which counsel performed its services, and the benefits received by MS and his family from the counsel's willingness to take the matter on a contingency fee basis. The Court confirmed the overall settlement amount, and held that counsel was entitled to a reasonable and reduced fee of $65,000, plus GST and repayment of an advance that counsel provided to the Plaintiff.

ROYAL BANK OF CANADA V LEARMONTH, 2014 ABQB 756 (NIELSEN J)
Rule 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review)

The Plaintiff appealed a Master's Decision to grant Costs on a full indemnity basis in relation to a redemption Order in foreclosure proceedings. The Master found that a term in the mortgage which provided for full indemnity costs was an attempt to contract out of consumer protection legislation and Rule 10.9. The Master concluded that the Court should always retain its jurisdiction to review Costs.
On Appeal, Justice Nielsen found that the Royal Bank of Canada always contemplated that its claim for Costs on a full indemnity basis would be reviewed by a Review Officer, having regard to the form of the Order, which referred to a review by the Assessment Officer prior to the entry of the Order and provided that the Costs would be "assessed at a future date". Nielsen J. noted that there was no basis for the Master to conclude that the Royal Bank of Canada sought to oust the jurisdiction of the Court to review its claim for Costs. In the result, Nielsen J. allowed the Appeal and ordered Costs on a full indemnity basis, subject to review by a Review Officer.

SWEETGRASS FIRST NATION V RATH & COMPANY, 2014 ABCA 426 (BERGER, MCDONALD AND VELDHUIS JJA)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review) and 10.18 (Reference to Court)

The Plaintiff retained the Defendant law firm over several years for a variety of legal matters. It then sought the review of several accounts, and the Review Officer granted reductions. The Defendant law firm appealed the Review Officer's Decision to a Justice of the Court of Queen's Bench, who then sent the accounts back to a different Review Officer for a further rehearing. The Plaintiff appealed the Court of Queen's Bench Decision to return the accounts for a further review. The Court of Appeal considered whether the Justice of the Court of Queen's Bench erred in finding that the Review Officer proceeded without jurisdiction by improperly interpreting a contingency fee agreement.

The Majority noted that Rule 10.9 allows a Review Officer to review a retainer agreement or legal fees for reasonableness, but that they have no jurisdiction to interpret the terms. Rule 10.18(1)(a) specifies that questions concerning the terms of a retainer agreement must be referred to the Court. The Majority held that comments made by the Review Officer that "reasonableness is to be read into the clause…" were not an interpretation of the agreements and that the Review Officer was merely complying with the Rules of Court. Although the Review Officer's review did not exceed his jurisdiction under the Rules, the Majority held that the Justice of the Court of Queen's Bench properly held that most of the amounts reduced by the Review Officer were inordinately high, demonstrating an error in principle.

McDonald J.A., dissenting, found that the Review Officer's reductions were reasonable and that the lower Court's Decision was in error. His Lordship would have allowed the Appeal and reinstated the Decision of the Review Officer.

SKREPNEK V KROCHAK, 2014 ABQB 699 (READ J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The parties disputed four issues of interest and Costs arising from prior Reasons for Judgment. One of the issues in dispute was whether the Plaintiff's Expert's Costs should be reduced. The Plaintiff's Expert was not called as a witness at the Trial by agreement, but the Expert's Report was made an Exhibit and the Court used it in reaching its conclusions. Read J. considered Rule 10.31 and the factors in Rule 10.33 in determining whether reimbursement for the Expert's fees was reasonable and proper. Read J. stated that the time to assess the reasonableness of obtaining an Expert's opinion is at the time the expense was incurred. On that basis, there was little doubt that the retainer for the expert was reasonable. Notwithstanding that the Expert's Report was helpful to the Court, the cost of the opinion seemed disproportionate to the complexity of the legal issue and the factual nature of Action. As well, the opinion took too long to obtain and delayed the Trial preparation. Justice Read ordered payment of the Expert's costs but concluded that the cost of the Expert's Report should be reduced.

RFG PRIVATE EQUITY LIMITED PARTNERSHIP NO. 1B V VALUE CREATION INC, 2014 ABQB 738 (STREKAF J)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Consideration in Making Costs Award) and 10.34 (Court-Ordered Assessment of Costs)

The Plaintiffs sought enhanced Costs which were incurred as a result of an Application by the Defendant for leave to file an additional Expert's Report. The parties were scheduled to attend Trial immediately after the Application. The dispute arose over an agreement between counsel with respect to the filing of Expert's Reports. The Plaintiffs submitted that they should be entitled to solicitor-client Costs due to the conduct of the Defendant who, it was alleged, had knowingly breached an agreement reached between counsel. The Plaintiffs also sought Costs incurred by their Experts in reviewing and preparing Responses to the Defendant's Expert's Reports. The Defendant submitted that the Costs should be awarded on a party and party basis, and that Costs for the Plaintiffs' Experts should be in the cause.

Justice Strekaf stated that Costs are always a matter for the Court's discretion, pursuant to Rule 10.31, having regard to the enumerated consideration set out in Rule 10.33, including: the success of each party; the amount claimed; the importance of the issues; the complexity of the Action; the conduct of a party which caused delay; the party's denial or refusal to admit any matter that could have been admitted; whether any Application for proceeding in an Action was unnecessary; and whether a party engaged in misconduct. Her Ladyship noted that Courts generally award solicitor-client Costs only in exceptional circumstances where there has been some form of misconduct, deception of the Court, or other inappropriate behaviour. Strekaf J. observed that the Defendant's conduct was not sufficiently egregious to justify an award of full solicitor-client Costs against them. However, Her Ladyship was of the view that an elevated award of Costs was appropriate. After considering several factors justifying such an award, Justice Strekaf awarded the Plaintiffs two thirds of the solicitor-client Costs which were reasonably and properly incurred by them in responding to the Defendant's Application to introduce further evidence by way of the

Expert's Report. Justice Strekaf ordered that if the parties were unable to agree on the amount of Costs, that they would be determined by an Assessment Officer pursuant to Rule 10.34.

IWANYSHYN V CINCIRUK, 2014 ABCA 360 (CÔTÉ, ROWBOTHAM AND SULYMA JJA)
Rules 10.31 (Court-Ordered Costs Award) and 14.5 (Appeals Only With Permission)

In an estate dispute, the estate was awarded Costs as the successful party. The unsuccessful party appealed the Costs award. The Court of Appeal noted that an award of Costs is discretionary. Therefore, a very clear error must be shown on the part of the Judge who awarded the Costs. The Appellant failed to identify any error of law or fact, and moreover, failed to obtain Leave to Appeal as to Costs alone, as required by the Rules. Accordingly, Appeal was dismissed.

CONDOMINIUM PLAN NO 052 6233 V SEEHRA, 2014 ABQB 588 (LEE J)
Rules 10.33 (Court Considerations in Making Costs Award) and 10.34 (Court-Ordered Assessment of Costs)

The Applicant sought a full indemnity award of Costs from the Respondent. The Applicant had been forced to take legal action as a result of the Respondent's tenant who had been operating a marijuana grow operation in the Respondent's condominium unit. The Applicant claimed entitlement to Costs on a solicitor-client basis pursuant to the Condominium Bylaws and in accordance with the *Condominium Property Act*, RSA 2000 c C-22 ("CPA").

Lee J. reviewed the Condominium Bylaws and the relevant sections of the CPA, and stated that the provisions of Rule 10.33 applied. Justice Lee held that the Applicant was, in fact, entitled to full indemnity solicitor-client Costs. However, the Court also ordered that an assessment of costs be conducted by an Assessment Officer, pursuant to the provisions of Rule 10.34.

NELSON ESTATE (RE), 2014 ABQB 765 (SULLIVAN J)
Rule 10.33 (Court Considerations in Making Costs Award)

This was an Application by the Defendant for Costs on a full indemnity basis arising from the Decision of Justice Sullivan, cited at 2014 ABQB 413, which found that the deceased was in an adult interdependent relationship with the Defendant at the time of his death. The Plaintiff, the brother of the deceased, disputed that relationship. Sullivan J. found nothing in the Surrogate Rules to shelter a losing party from ordinary Schedule C Costs or ordinary Costs principles. Rather, Surrogate Rule 90(h) made it clear that an unsuccessful claim might be liable for penalty Costs if the conditions in the Rule were found to apply. Sullivan J. noted the comments of Justice Clark in *Anderson Estate*, 2013 ABQB 517, regarding the factors to consider in making a Costs award as enumerated by Rule 10.33.

Sullivan J. concluded that, if there was ever a time when the position of the Plaintiff was reasonable, that time had terminated when the Defendant filed her Affidavit setting out the extent and the detail of her relationship with the deceased. In the result, the Plaintiff's Cross-Application for Costs was denied. The Defendant, being the successful party, was entitled to Costs; however, Sullivan J. was not satisfied that this matter reached the status of full indemnity Costs, although it was close. Sullivan J. therefore awarded a portion of Costs on an enhanced basis, fixed at $50,000.

ALBERTA V AUPE, 2014 ABCA 326 (PICARD, VELDHUIS AND BROWN JJA)
Rules 10.33 (Court Considerations in Making Costs Award) and 14.88 (Cost Awards)

The Court of Appeal allowed an Appeal, in part, from the Decision of a Chambers Judge which had found the Alberta Union of Public Employees (AUPE) in contempt and imposed certain obligations respecting, and restrictions upon, AUPE's communications to its members regarding their legal strike. The Chambers Judge had also awarded solicitor-client Costs against AUPE.

While the Chambers Judge's finding of contempt was affirmed, the Court of Appeal held that certain portions of the Order limited AUPE's freedom of expression in a manner that could not be justified under Section 1 of the *Charter of Rights and Freedoms*. AUPE sought an Order that the Respondent, the Government of the Province of Alberta (Alberta), repay one-half of the solicitor-client Costs that had originally been awarded to Alberta by the Chambers Judge, and that each party bear its own Costs of the Appeal. AUPE referred to Rule 10.33 and submitted that the importance of the values underlying the Charter in general, and the right to free expression in particular, justified a departure from the usual rule that Costs follow the event.

The Court of Appeal noted that the discretion rests with the courts to apportion Costs on an issue-by-issue basis, but the Court declined to exercise that discretion. The Court agreed with the lower Court's conclusion that solicitor-client Costs were appropriate. As to the Costs on Appeal, the Court referred to Rule 14.88(3), which provides that, unless otherwise ordered, the scale of Costs in an Appeal shall be the same as the scale that applies to the Order or Judgment appealed from. The presumption is that where solicitor-client Costs were warranted below, solicitor-client Costs should also be imposed on Appeal, unless the Court states otherwise. There was nothing in the history of the proceedings to warrant departing from that presumption.

LYMER (RE), 2014 ABQB 674 (MASTER SMART)
Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Respondent, Mr. Lymer, was a second time bankrupt. The Trustee's report disclosed proven unsecured creditors of $21,148,026.95 and assets of $6,308,008.00. Mr. Lymer applied to have his bankruptcy annulled. A number of Mr. Lymer's creditors (the "Objecting Creditors") opposed Mr. Lymer's annulment Application. The Objecting Creditors sought additional information on the status of Mr. Lymer's companies (the "Lymer Companies") via Examination of Mr. Lymer and Examination of Records from the Lymer Companies under s. 163(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

Mr. Lymer filed an Affidavit of Records on his own behalf, and obtained an extension to file an Affidavit on behalf of his companies. Master Smart granted an Application by the Objecting Creditors requiring Mr. Lymer to provide a further and better Affidavit of Records for himself, and issued further directions for Mr. Lymer to prepare an Affidavit of Records for the Lymer companies. The Affidavits were not filed on time, and the Objecting Creditors brought the present Application, seeking, *inter alia*, that Mr. Lymer and the Lymer Companies be declared in contempt; and that Mr. Lymer's Application to have his bankruptcy annulled be struck.

The Court noted that to find contempt the Applicants must prove beyond a reasonable doubt: an existing requirement of the Court; notice to the person alleged to be in contempt; and an act that constitutes a breach of the requirement. The Court further noted that a "[f]ailure to abide by the terms of a court order without reasonable excuse is contempt" and that if a litigant fails to exercise due diligence or properly delegate, that is also basis for contempt. In addition, "an attempt to indirectly frustrate a court order is contempt of court".

Master Smart observed that the remedy of striking Pleadings for contempt was drastic but appropriate where the contemptuous litigant does not correct their misconduct despite being given many chances and where the misconduct is persistent, intentional and blocks the Action. Master Smart concluded that "Mr. Lymer and the Lymer Companies breached the Oct. 2, 2013 Production and Examination Order" and were therefore in contempt. Master Smart further noted that Mr. Lymer's goal was to block and end inquiry into his business activities and financial history. The evidence presented satisfied the test for the absence of a reasonable excuse. In the result, Master Smart found Mr. Lymer and the Lymer Companies to be in contempt and Mr. Lymer's annulment Application was struck.

BAKER V BAKER, 2014 ABQB 710 (MASTER SCHLOSSER)
Rules 10.52 (Declaration of Civil Contempt) and 13.38 (Judge's Fiat)

Two matters came before the Court by way of Applications for Fiats. Due to the incapability of the Defendant to provide Dower consent to a Transfer of Land, a Fiat was granted authorizing the Transfer without Dower consent. The Land Titles Office refused to file the document. A Fiat was then granted allowing a certified copy of an Enduring Power of Attorney to be filed at the Land Titles Office, rather than the original. The Registrar refused to file the copy, requiring the Fiat to be on the back of the document rather than on the Notarial Certificate which was attached to the Power of Attorney.

Master Schlosser stated that a Fiat is an Order of the Court, in accordance with Rule 13.38 (and former Rules 338 and 393). The refusal to file the documents in accordance with the Fiat was a refusal to obey an Order of the Court, which was *prima facie* contempt, per Rule 10.52. In both instances the failure to follow these Orders meant that Counsel had to re-attend in Chambers, which harmed a member of the public by causing them to incur additional legal fees. It also squandered the Court's time. Like any other Order, an Application could have been made to set a Fiat aside. However, simply refusing to follow an Order was not an option. Master Schlosser stated that Costs or a Form 47 - Order to Appear would follow if the Registrar of the Land Title Office refused to file the documents again.

KRC V AMT, 2014 ABCA 355 (O'FERRALL JA)
Rules 13.1 (When One Judge May Act in Place of or Replace Another), 14.5 (Appeals Only With Permission) and 15.2 (New Rules Apply to Existing Proceedings)

At the conclusion of a Trial which resulted in a consent Judgment, the Judge awarded solicitor-client Costs to the mother on the basis that she was substantially successful and because the Trial Judge was of the view that the father's conduct in advancing his case was reprehensible. The father was granted Leave to Appeal the Costs award pursuant to Rule 505(3) of the Rules of Court before the new Appeal Rules came into force. Because the Judge who made the Costs Order retired shortly after making the Order, the Application for Leave to Appeal was heard by another Judge.

The mother applied to the Court of Appeal to have the Leave to Appeal Decision heard afresh in light of the new Appeal Rules; or in the alternative, permission to Appeal the Leave to Appeal Decision granted to the father. The Court noted that, prior to September 1, 2014, Appeals of Judgments with respect to Costs only were governed by Rule 505(3). As of September 1, 2014, Appeals of "decisions as to costs only" are governed by Rule 14.5(1)(e). The Court observed that the new Court of Appeal Rules require permission from a Court of Appeal Justice for Appeals of Decisions as to Costs only.

The Court referred to Rule 15.2(2), and stated that in light of this Rule "there can be no attack on the jurisdictional validity of the Queen's Bench order granting leave to appeal". The Court thus declined to grant the mother's Application to have the Leave to Appeal heard afresh, stating that the Justice's Decision was validly made pursuant to the Rules at the time.

With respect to the mother's Application for permission to appeal the previous Leave to Appeal Decision, the Court noted that "the practice of this Court and many other courts is not to entertain appeals of applications for leave to appeal". However, the Court found that in this instance the grounds for Leave to Appeal appeared problematic, and so granted the mother's Application to Appeal the Leave to Appeal Decision. Both Appeals were to be consolidated or heard at the same time.

DBD CONSTRUCTION LTD V TENFOLD CONTRACTING LTD, 2014 ABQB 773 (MASTER LAYCOCK)
Rule 13.5 (Variation of Time Periods)

The Plaintiff applied under s. 48 of the *Builder's Lien Act*, RSA 2000, c B-7 (BLA) for the removal of the Defendant's liens filed on two properties located in Calgary. By Consent Order, Master Mason directed the discharge of the liens upon payment into Court. The Order also provided

directions regarding the deadlines to file an Affidavit proving lien and commencement of the Action to enforce the lien claim. The Plaintiff subsequently applied for the return of its security because of the Defendant's failure to comply with the terms of the Consent Order and the 15 day deadline in the *BLA*.

The Defendant filed an Application for an extension of time to file an Affidavit proving the lien. The Plaintiff argued that the Defendant lost its lien as a result of failing to file and serve an Affidavit providing particulars of the lien claim. The Defendant argued that, upon granting the Consent Order, all procedural steps thereafter were governed by the Rules of Court and not by the *BLA*. The Defendant argued further that the Court had the authority to extend time limits set out in procedural Orders, relying upon Rule 13.5(2).

Master Laycock agreed with the Defendant's submission that, if the Court orders the filing of an Affidavit proving lien, it would be a procedural Order to which the Rules of Court would apply. If the Order was silent as to a Notice to Prove Lien and the Applicant served a Notice to Prove Lien, the *BLA* would apply and the consequences of not filing an Affidavit would be determined by the *BLA*.

Master Laycock considered the effect of the particular wording of the Consent Order with respect to the late filing of the Affidavit proving lien and held that, in this case, the Plaintiff and Defendant consented to this matter continuing to be governed by the provisions of the *BLA*. The Defendant stated that he was not informed by his lawyer about the time limit. When it came to his attention, the Affidavit was filed immediately. The Defendant further deposed that the Plaintiff would not suffer prejudice by an extension of time. The Plaintiff provided no evidence with respect to prejudice. Master Laycock was satisfied with the Defendant's explanation and the lack of evidence of prejudice suffered by the Plaintiff. An extension of time for filing an Affidavit proving lien was granted.

HARRISON V XL FOODS INC, 2014 ABQB 720 (ROOKE ACJ)
Rule 13.18 (Types of Affidavit)

Upon request by the parties to a proposed Class Action, Associate Chief Justice Rooke provided further decisions and reasons on matters related to the Certification Application, including an Application to strike the Representative Plaintiff's Affidavit in support of Certification. The Defendant argued that the Affidavit was irrelevant, but even if relevant to some extent, its probative value was far outweighed by the prejudicial effect to the Defendant. One of the issues was that it was purportedly based on hearsay. The Representative Plaintiff argued that the evidence was admissible and relevant to Certification, and cited Rule 13.18 in support of their argument.

His Lordship stated that the Rule permits hearsay evidence at the procedural Certification stage because there is no formal finding of fact. Rooke A.C.J. held that portions of the Affidavit evidence may be relevant as some basis in fact that delay was an issue. If established at the common issues Trial, the issue of delay could impact on the class definition. Rooke A.C.J. further stated that the Plaintiff should be given some "Leeway" to establish "some basis in fact" and allowed portions of the evidence.

JH DRILLING INC V ALBERTA (NATURAL RESOURCES CONSERVATION BOARD), 2014 ABCA 312 (VELDHUIS JA)
Rule 14.5 (Appeals Only with Permission)

The Applicant applied for permission to appeal a Decision of a single Justice of the Court of Appeal, pursuant to former Rule 505. Veldhuis J.A. considered the old Rule and new Rule 14.5, observing that there were no decisions under the new Rule, but that the test under the old Rule was well established. Justice Veldhuis, citing prior leading authority, articulated the test under former Rule 505: Leave to Appeal the Decision of a single Appellate Justice will be granted on a serious question of general importance. Without such a question, the test becomes whether there is a possible error of law, discretion has been unreasonably exercised, or the Decision was based on a misapprehension of important facts. Her Ladyship held that

the Applicant did not demonstrate that a serious question of general importance was raised. The Applicant also failed to demonstrate an error of law, unreasonable exercise of discretion, or misapprehension of important facts. The initial Decision granting leave to re-argue was not a final Order, nor was it determinative of any rights as between the parties; rather, it provided the parties the opportunity to ensure that the granting or denial of Leave to Appeal was based on a full review of the facts and law. The Application for Leave to Appeal was denied since it was contrary to the philosophy of the Rules to facilitate potentially endless Applications, and no further Appeal was allowed. Veldhuis J.A. further noted that the request for Leave to Appeal should have been heard by the same Justice who made the Decision, but an exception was made because the original Justice was unavailable and all parties consented.

PWM LOSS PREVENTION SERVICES INC V LAY, 2014 ABCA 376 (MCDONALD JA)
Rule 14.5 (Appeals Only With Permission)

The Respondent, Mr. Lay, filed a complaint with Employment Standards regarding unpaid wages after being terminated from his employment. The Director of Employment Standards granted a 1 year extension to Mr. Lay's complaint and the employer brought an Application for Judicial Review of that Decision. That Application was dismissed by the reviewing Judge and the employer sought leave to Appeal that Decision. Leave was required pursuant to Rule 14.5(1)(g) as the amount at issue was under $25,000.

McDonald J.A. noted that the test for leave to Appeal under Rule 14.5(1)(g) is that there must be a reasonable prospect of success on the Appeal itself, and cited a number of factors to consider. Ultimately, his Lordship held that there was neither an arguable case nor a question of law or importance to the public. The Application was dismissed.

CHUTSKOFF ESTATE V BONORA, 2014 ABCA 444 (SLATTER JA)
Rules 14.5 (Appeals Only With Permission), 14.8 (Filing a Notice of Appeal) and 14.44 (Application for Permission to Appeal)

The Plaintiff sought leave to appeal three Decisions, including an Order declaring him a vexatious litigant. Slatter J.A. noted that, under Rule 14.5(1)(j), vexatious litigants must obtain permission to launch any Appeal, including Appeals from a vexatious litigant Order. The Court concluded that there was no basis for granting leave to appeal any of the lower Court Decisions. The Applications fell outside of the one month time period from the pronouncement of the Decisions as required under Rules 14.8(2) and 14.44. Justice Slatter also held that there was no merit to the proposed Appeals. The Applications were dismissed.

STACEY V FOY, 2014 ABCA 447 (BERGER JA)
Rule 14.5 (Appeals Only With Permission)

The Plaintiff sought leave to appeal a prior Decision by Berger J.A. arising from the same Action. Berger J.A. stated that Rule 14.5, specifically Subrules 14.5(1)(a) and 14.5(2), is similar to former Rule 505(6). Berger J.A., following prior analysis on a similar issue in *Prefontaine v Canada (M.N.R.)*, 2001 ABCA 288, held that the Application for Leave to Appeal must be heard by another Justice of the Court of Appeal, and not the Justice who granted the original Decision. Berger J.A. directed the Application for Leave to Appeal to be heard by the assigned duty Justice.

EDMONTON (CITY) V EDMONTON (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2014 ABCA 340 (WAKELING JA)
Rule 14.26 (Format of Factums)

This was an Application by the Urban Development Institute for permission to intervene in an Appeal brought by the City of Edmonton in respect of a Decision of the Subdivision and Development Appeal Board. At issue in the Appeal was the validity of a Board Decision to delete a condition

attached to a subdivision permit granted to HVNine Ltd. by the Subdivision Authority. The outcome of the Appeal would affect the funding model for future light rail transit expansion through undeveloped land in Edmonton.

Wakeling J.A. found that the Applicant could offer special insight and perspective, which would assist the Court in its deliberations. The Applicant's interests were directly and significantly affected by the outcome of the Appeal, and the extra costs associated with granting the Institute intervener status would not exceed the benefits of hearing from the Institute.

The Institute was granted permission to intervene in the Appeal. Pursuant to Rule 14.26(2)(b), the Institute could file a Factum up to 30 pages in length. Wakeling J.A. said that the Factum could not contain arguments substantially the same as those made by HVNine Ltd., and so ordered that the Institute could have an additional two business days to file its Factum after the Factum of HVNine Ltd. was due. Finally, the Institute was entitled to make an oral submission of up to 30 minutes in length after the Respondents' oral presentations, unless the Panel hearing the Appeal directed otherwise.

CKS V OSS, 2014 ABCA 416 (BERGER, WATSON AND SLATTER JJA)
Rule 14.38 (Court of Appeal Panels)

The Applicant applied to have new evidence introduced during his Appeal of a Child Support Order under Rule 14.38(2)(b). The Court specified that, in order for fresh evidence to be admitted on Appeal, a number of requirements must be met. The evidence must satisfy the test in *Palmer v The Queen*, [1980] 1 SCR 759: the fresh evidence must have been admissible at Trial, it should be evidence that makes a difference even if post-Trial and the evidence should be material, cogent and of compelling significance. The Court held that the new evidence was not fresh or new, and was not dispositive in the case or likely to have affected the result. As a result, the Application to adduce fresh evidence on Appeal was denied.