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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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MILAVSKY V LASHYN, 2016 ABQB 410 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 5.13 (Obtaining Records from Others), 5.30 (Undertakings), 6.3 (Applications Generally), 6.37 (Notice to Admit) and 13.6 (Pleadings: General Requirements)

The Plaintiff, Ms. Milavsky, commenced proceedings against the executors of her ex-husband's estate, trustees of family trusts he had established and companies which were related to his businesses in order to resolve matrimonial property disputes. Ms. Milavsky applied to compel the production of historical records from some of the Defendants, and from certain companies who were not named as parties to the litigation. The parties also each sought Undertaking Responses from one another and argued over objections at Questioning and the Plaintiff's response to a Notice to Admit.

Ms. Milavsky argued that certain trusts were shams; however, this allegation was not pleaded. Master Robertson observed that Ms. Milavsky had sworn statements in relation to the trusts, where she asserted that she did not understand what she had signed. The Court stated that Rule 13.6(3) would require Ms. Milavsky to plead *non est factum* in her Claim, which had not been done. Master Robertson noted that pleadings are not meaningless ritual incantations, rather they fulfill the first rule of natural justice: knowing the case against one.

Master Robertson considered Ms. Milavsky's Application to compel certain records from the Defendants and non-parties. Master Robertson held that the corporations were not required to produce the requested records as they were non-parties to the litigation, and the Application did not mention or rely on Rule 5.13. The Court stated that, according to Rule 6.3(2)(d), an Applicant is required to specify which Rules they are going to be relying on at an Application. Master Robertson noted that Rule 5.13 "is to be used as a 'last resort' way to get at relevant and material records". The records should be provided by the litigants themselves.

The Court also considered the Undertaking refusals in a detailed fashion, and ruled on whether each of them should be answered.

With respect to the Notice to Admit Facts served on Ms. Milavsky from the Estate, the Court noted that Ms. Milavsky's counsel wrote back to counsel for the Estate stating that Ms. Milavsky would not be responding to the Notice to Admit Facts. Ms. Milavsky did not expressly deny or admit the facts in the Notice to Admit, and did not apply to set it aside. The Estate argued that, pursuant to Rule 6.37, the result of failing to respond to a Notice to Admit Facts is that everything in the Notice to Admit is presumed to be admitted. Master Robertson reviewed Rule 6.37 and noted that, although the letter by Ms. Milavsky's counsel may approach a response contemplated by Rule 6.37(3)(b), it was not an appropriate response since many of the paragraphs in the Notice to Admit Facts were clearly relevant and material admissible facts. However, Master Robertson stated that Rule 6.37 does not contemplate that a Master in Chambers would be permitted to question the assessment of admissibility made by the responding party. The Court concluded that, even though Ms. Milavsky's reply did not conform with the purpose of the Rule, since the Notice to Admit Facts was not ignored but rather reasons were given for not admitting the facts, that no admissions were deemed to have been given.

MAXIM POWER CORP V ACE INA INSURANCE, 2016 ABQB 539 (HALL J)
Rules 1.2 (Purpose and Intention of These Rules) and 1.4 (Procedural Orders)

The Applicant insurance company and the Respondent power corporation were parties to an insurance contract which insured the Respondent's directors and officers. The Respondent sought damages for expenses that the Applicant insurer had failed to reimburse. The Applicant sought a Stay of the Action pending a determination of a related matter before an American Court. Justice Hall considered the Applicant's argument that Rule 1.4(h) provides that a Court has authority to adjourn or stay all or any part of an Action, Application or proceeding in order to advance the purpose and objectives of the Rules as laid out in Rule 1.2.

Hall J. determined that granting the Stay would cause an injustice to the Respondent who was entitled to timely reimbursement of expenses incurred under the insurance contract, and that by not paying in a timely manner, the Applicant was in breach of the insurance contract. The Application for the Stay was dismissed.

CANADA (ATTORNEY GENERAL) V DELORME, 2016 ABCA 168 (BERGER, MCDONALD AND SCHUTZ JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

In an Action against Canada and Alberta for aboriginal title, breach of fiduciary duty and other claims, the Defendant, the Attorney General of Canada ("Canada") and the Queen in Right of Alberta ("Alberta"), unsuccessfully sought to have the Action dismissed for long delay under Rule 4.33. They appealed the Decision to the Court of Appeal.

The Action was delayed between late 2009 and late 2013 due to two internal ethical conflict issues at the Plaintiffs' law firm. In August 2012 a Consent Order was entered, restricting the conflicted lawyer from working on the Plaintiffs' file, but the Order did not resolve the law firm's internal client conflict. The Chambers Judge held that the Order had "significantly advanced" the litigation pursuant to Rule 4.33.

Justices McDonald and Schutz held that the August 2012 Order did not significantly advance the Action, emphasizing that the purpose of Rule 4.33 is to expedite and bring lawsuits that have not been pursued to a conclusion. The Court noted that the Rule requires a "significant advance in an Action", and not merely a "material advance" as was required in the old Rule 244.1. Further, a functional approach should be used to determine whether a step constitutes "significant advance in the action" in accordance with the decision in *Nash v Snow*, 2014 ABQB 355 and Rule 1.2. The Court stated that Rule 4.33 must be applied contextually and purposively. A resolution of a particular dispute is required to significantly advance the Action rather than a formal step leading towards a trial. This requires the Court to qualitatively consider the events during the entire three year period, which involves assessing factors including the "nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred". The list of factors is not closed.

In dissent, Berger J.A. agreed that a functional analysis of what constitutes a significant advance requires the resolution of a dispute – but opined that the Order obtained in August 2012 constituted a significant advance in the Action because it clarified the Parties' positions and resolved one of their disputes. The context of the step is as important as the outcome.

In the result, the Appeals were allowed and the Action against Canada and Alberta was dismissed.

ELAN CONSTRUCTION LIMITED V SOUTH FISH CREEK RECREATIONAL ASSOCIATION, 2016 ABCA 215 (FRASER, MARTIN AND WATSON JJA)
Rules 1.2 (Purpose and Intention of These Rules), 5.1 (Purpose of This Part) and 13.6 (Pleadings: General Requirements)

The Plaintiff appealed a Trial Judge's Decision with respect to damages for breach of contract.

In its Statement of Defence, the Defendant merely asserted their defence to breach of contract through a single boilerplate paragraph denial of damages. The Court of Appeal noted that this paragraph was insufficient to meet the requirements of Rules 13.6 and 1.2 which collectively worked to facilitate a fair and effective Trial by providing parties with notice of the real issues in dispute. The Defendant's failure to identify and particularize losses precluded the Defendant from raising this argument as a defence at Trial.

The Court also rejected the Defendant's argument that the Plaintiff had an obligation to request documents related to the Defendant's interaction with a third party contractor in the absence of a sufficiently clear Pleading. The Court stated that the modern Rules, particularly, Rules 5.1 and 1.2 when read in conjunction, require Defendants to be forthcoming with relevant documents without being asked. The Defendant's position that the subject documents could not have been disclosed or produced because of the third party contractor's assertion of privilege over them was rejected. The Court held that parties are still required to disclose and describe documents over which privilege is claimed in the Affidavit of Records to provide an opposing party notice of them and the opportunity to dispute the privilege claim. The Appeal was allowed.

TRDMS SERVICES INC V CONDO CORP 0425913 (THE NEW CAMBRIDGE LOFTS), 2016 ABQB 527 (SHELLEY J)
Rules 1.4 (Procedural Orders), 3.44 (When Third Party Claim May be Filed), 3.45 (Form of Third Party Claim), 6.11 (Evidence at Application Hearings) and 13.5 (Variation of Time Periods)

The Appellant condo corporation appealed a Master's Decision which denied the extension of time to file the Appellant's Third Party Claim. Shelley J. noted that Rules 1.4(2)(h) and 13.5 provided the basis upon which the Court could extend time periods, and Rules 3.44 and 3.55 provide the requirements for filing a Third Party Claim. In an Application to take a further step in an Action, the Court must consider whether: there was inordinate delay; the inordinate delay is inexcusable; and the defendants are likely to be seriously prejudiced by the delay.

The Appellant cited Rule 6.11 in support of their argument that the Court should not consider the merits of the Third

Party Claim unless there is evidence of an inexcusable delay and serious prejudice, which it argued did not exist in this case. The Respondent, the proposed Third Party, argued that there was inordinate delay in bringing the Third Party Claim, and that significant prejudice would occur for him and the Plaintiff if the Appellant was able to bring in a new party. The Action had advanced relatively swiftly and Questioning was almost complete. The Respondent also argued that there was no air of reality to the proposed Third Party Claim.

Justice Shelley held that there had been an inordinate delay with no reasonable excuse, particularly because the Appellant had been aware of the facts underlying the Third Party Claim for some time. Shelly J. did not agree with the Appellant's argument that the merits of the Third Party Claim should not be considered, since an extension to issue a Third Party Claim should not be granted unless there is an air of reality to the Third Party Claim. The Appellant had failed to provide sufficient evidence to meet the air of reality test. The Appeal was therefore dismissed.

CONDOMINIUM CORPORATION NO 0213028 V PASERA CORPORATION, 2016 ABQB 477 (STREKAF J)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Plaintiff applied to add four architectural and building specialist Defendants to the Action, and sought to add particulars to the Claim in relation to the added Defendants. Three of the four proposed additional Defendants opposed the Application. The underlying dispute related to construction of a 49 unit condominium building, and subsequent issues with water ingress that resulted in having to replace a wall system at a cost of $1.7 million.

Strekaf J. noted that, pursuant to Rule 3.74, parties may be added after the close of Pleadings, and the "classic rule" is that this amendment may be done at any time, no matter how careless or late, subject to four exceptions: (i) the amendment would cause serious prejudice not compensable in costs; (ii) the amendment is hopeless; (iii) unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; and (iv) there is an element of bad faith associated with the failure to plead the amendment originally. If no exception applies, the amendment may be made.

Justice Strekaf permitted the addition of the first Defendant who did not oppose the Application because, even though the limitation period had expired, it had sufficient knowledge of the Claim such that it would not be prejudiced. Strekaf J. did not permit the addition of the remaining three proposed Defendants due to the expiry of the limitations deadline, or because the proposed Defendant did not exist at the relevant time. Her Ladyship noted that, with respect to the fourth proposed Defendant, the name plead was a misnomer, so an amendment to the Application was allowed pursuant to Rule 1.5. Nonetheless, Justice Strekaf held that the Plaintiff could have identified this Defendant's involvement in the matters at issue had it exercised reasonable diligence. Consequently, the claims against this Defendant were hopeless and defending the Claim would cause serious prejudice.

PARK AVENUE FLOORING INC V ELLISDON CONSTRUCTION SERVICES INC, 2016 ABCA 211 (ROWBOTHAM JA)
Rules 1.9 (Conflicts and Inconsistencies with Enactments), 2.23 (Assistance Before the Court), 15.1 (Definitions), 15.2 (New Rules Apply to Existing Proceedings) and 15.6 (Resolution of Difficulty or Doubt)

Following the Plaintiff's Appeal being struck, the Plaintiff applied to the Court of Appeal to: (i) permit a non-lawyer to represent the corporation; (ii) restore its Appeal; and (iii) to strike portions of an Affidavit filed by the Defendant.

When the Action commenced in 2007, the Court of Queen's Bench granted an Order to permit a non-lawyer to represent the Plaintiff. Justice Rowbotham noted that the former Rule provided that the Court may permit an agent, other than a solicitor, to represent a person. The combined effect of the new Rules of Court and the *Legal Professions Act*, RSA 2000, c L-8 ("LPA"), is that a non-lawyer cannot represent a corporation. Rule 2.23 allows someone to offer limited

assistance to a party, but section 106 of the LPA prohibits a person who is not an active member of the Law Society of Alberta from representing a corporate entity.

The Plaintiff relied on transitional Rules 15.1 and 15.2 in support of its argument that Orders made under the old Rules remain valid and of the same effect under the new Rules. The Plaintiff argued further that Rule 15.6 gives the Court discretion to modify the new Rules or choose to apply the old Rules where difficulty arises in applying the new Rules to an Application commenced under the old Rules. However, Rowbotham J.A. noted that Rule 1.9 governs the application of the transitional Rules. Because section 106 of the LPA conflicts with the Order made under the old Rules, the LPA must prevail over that Order and the Court's discretion under the transitional Rules. Rowbotham J.A. noted that the lower Court Order did not bind the Court of Appeal. Justice Rowbotham held that the proposed non-lawyer could not represent the Plaintiff corporation. Because of this ruling, Her Ladyship held that the remaining Applications did not require consideration.

REAL ESTATE STRATEGIES GROUP INC V PRAIRIE COMMUNITIES CORP, 2016 ABCA 286 (PAPERNY JA)
Rules 2.22 (Self-Represented Litigants) and 2.23 (Assistance Before the Court)

The Applicant, Real Estate Strategies Group Inc. ("RESG"), brought two Applications: the first, was an Application to allow RESG to be represented by an individual who is not a member of any Canadian law society; the second was to allow RESG to appeal after it had failed to comply with the timing for filing as provided by the Rules of Court. The second Application could only be heard if RESG was successful on the first as RESG's agent would otherwise not be permitted to file any Court Applications on RESG's behalf, nor represent RESG on the Appeal.

Paperny J.A. noted that Rule 2.22 provides that only individuals can be self-represented, requiring corporations to be represented by a member of a Canadian law society. Rule 2.23(1) allows an individual who is not a member of a Canadian law society to provide assistance to a party before the Court so long as that assistance does not include speaking for the party and does not contravene section 106(1) of the *Legal Professions Act*, RSA 2000, c L-8 ("LPA"). Section 106(1) of the LPA prohibits those who are not a member of the law society from acting as a barrister or solicitor, this includes appearing in Court or leading evidence on behalf of a party, as well as bringing Applications on behalf of a party. Accordingly, corporations must be represented before the superior Courts of the province by a person authorized to practice under the LPA, and the Court has no common law or inherent jurisdiction to permit such representation outside of that already provided for in the Rules of Court or the LPA.

RESG argued without authority that the "natural persons powers" granted to corporations under the *Business Corporations Act*, RSA 2000, c B-9 should prevail over the LPA. RESG's principle also argued that requiring RESG to be represented by a member of the law society would contravene his rights under section 7 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, because RESG is a source of income to him. Justice Paperny, referring to prior leading authority, held that section 7 of the *Charter* was not a guarantee of financial prosperity or economic security.

In the result, Paperny J.A. concluded that RESG was not permitted to be represented by an individual who was not a member of the Law Society, and accordingly, both Applications were dismissed.

NOSCENCO V BAGAYEVA, 2016 ABCA 242 (WATSON JA)
Rules 2.23 (Assistance Before the Court) and 14.5 (Appeals only with Permission)

The Appellant, Mr. Noscenco, sought to appeal a Security for Costs Award awarded against him in the Court of Queen's Bench.

Not being represented by Counsel, Mr. Noscenco was not aware of Rule 14.5, and that he could only bring his Appeal with permission. The Respondent sought to strike the Appeal. Watson J.A. noted that Mr. Noscenco did not have a clear understanding of the Rules of Court, and so

provided him with an adjournment to file his evidence so that permission to appeal could be sought pursuant to Rule 14.5(h). Mr. Noscenco filed his materials and the Application proceeded.

Watson J.A. held that there was no issue with the Security for Costs Order made by the Case Management Judge who was entitled to significant deference. Further, although Mr. Noscenco owned a house in Calgary, it was unlikely that he would be able to pay the Security for Costs amount of $25,000; moreover, he had already failed to pay other fairly modest Costs Orders in the Court of Queen's Bench. Accordingly, Mr. Noscenco's Appeal was struck.

Justice Watson also noted that Mr. Noscenco had some assistance from a non-lawyer friend in making submissions before the Court. His Lordship noted that it allowed this rather unorthodox proceeding because counsel for the proposed Respondent had no objections; however, the Court was not setting a precedent in this regard and did not suggest that the procedure followed was an appropriate interpretation or application of Rule 2.23.

CANAPEN (PHIPPS-MCKINNON) LTD V EDMONTON (CITY), 2016 ABQB 501 (JERKE J)
Rules 3.8 (Originating Applications and Associated Evidence), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.18 (Types of Affidavit)

The Applicant, Canapen (Phipps-McKinnon) Ltd. ("Canapen"), applied for leave to appeal a decision made by the municipal Composite Assessment Review Board ("the Board"), and filed an Affidavit in support of its Application. The Defendant, City of Edmonton, objected to the use of the Affidavit. It sought to strike it under Rule 3.68(4) as improper and irrelevant. Justice Jerke considered when Affidavit evidence was allowed to be used to support the Application for leave to appeal, and second, whether any parts of this particular Application were objectionable. Jerke J. first discussed when Affidavit evidence may be used to support an application for leave to appeal under the *Municipal Government Act* ("the *Act*") by interpreting section 470.1(1) of the *Act*. The City of Edmonton argued that the *Municipal Government Act* ("the *Act*") did not allow for new evidence to be used to support an Application for leave to appeal on questions of law or jurisdiction. Jerke J. stated that the relevant section referred to Appeals themselves, not Applications for leave to appeal. Further, the City's literal interpretation of the relevant legislation could unfairly shield certain errors of law from Appeal, including breaches of the rules of natural justice and reasonable apprehension of bias. Since Canapen's Claim included allegations that the Board breached the rules of natural justice, Jerke J. held that new evidence relating to breaches of natural justice should be admissible.

Jerke J. reviewed the general requirements for Affidavits under the Rules, noting that, pursuant to Rule 3.8, an Affidavit supporting an Originating Application must contain only statements of facts in the personal knowledge of the person swearing the Affidavit; and any other evidence that the person swearing the Affidavit may adduce at Trial. Pursuant to Rule 13.18, Affidavits for such Applications may either be sworn on the basis of personal knowledge or personal belief.

Canapen argued that the Affidavit was not objectionable, but Justice Jerke held that some sections constituted "nothing more than a summary of the proceedings". Although His Lordship held that some portions of the Affidavit should be admitted because they introduced evidence relating to Canapen's claim, the remaining portions of the Affidavit were found to be of little value. Jerke J. granted Canapen leave to file a different Affidavit and supplementary Brief.

WALL V JUDICIAL COMMITTEE OF THE HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES, 2016 ABCA 255 (PAPERNY, ROWBOTHAM AND WAKELING JJA)
Rule 3.15 (Originating Application for Judicial Review)

The Plaintiff, Mr. Wall, brought an Originating Application for Judicial Review of the Defendants' decision to expel him from their congregation. The Plaintiff alleged that the expulsion affected his civil and property rights and it affected his livelihood as a realtor since more than 50% of his clients were Jehovah's Witnesses who no longer communicated with him as a result of the expulsion.

He further alleged that the Court of Queen's Bench had jurisdiction to review the Defendants' decision because he had exhausted all internal avenues of appeal, and further, that the process used by the Defendants did not accord with the principles of natural justice. Upon hearing the original Application, the Chambers Judge directed that the matter follow a bifurcated process where the first question to be determined was whether the Court of Queen's Bench had jurisdiction to review the decision made by the Defendants. A different Justice heard the jurisdiction Application. The Justice concluded that the Court had jurisdiction to hear the Judicial Review Application because the expulsion had an economic impact on the Plaintiff and there were concerns about whether the Defendants' processes adhered to the requirements of natural justice. The Defendants appealed.

The majority of the Court of Appeal held that Courts have the authority to conduct a Judicial Review of a self-governing organization where either the organization's internal processes do not meet the requirements of natural justice or where the aggrieved party has exhausted the organization's internal processes. Because the Plaintiff had alleged breaches of the rules of natural justice, the Court of Queen's Bench had jurisdiction to hear the Application. Further, because the Plaintiff had exhausted all avenues of appeal within the Defendant's organization, jurisdiction could be found on that basis as well. The majority of the Court of Appeal also held that finding jurisdiction based on the economic impact of the Plaintiff's disfellowship was a reasonable result, given the evidence before the Chambers Judge.

In dissent, Justice Wakeling held that the Court of Queen's Bench did not have jurisdiction to conduct a Judicial Review. His Lordship opined that, even if the Plaintiff's assertions regarding the economic impact the disfellowship had on him were true, that the Court cannot compel individuals to do business with the Plaintiff, and that the Plaintiff does not have a property interest in his client base in these circumstances. Wakeling J.A. also noted that Rule 3.15 stipulates that a respondent in a Judicial Review Application must be "a person or body whose decision, act or omission is subject to judicial review". Because the Defendants were an unincorporated and private association, Judicial Review over its internal governance decisions was not available. Justice Wakeling observed that, unless tied to some other form of breach recognizable at law, the membership disputes of religious associations do not fall within the jurisdiction of the Court.

The Appeal was dismissed.

GRUMAN V CANMORE (TOWN), 2016 ABQB 441
(RAWLINS J)
Rule 3.23 (Stay of Decision)

The Respondent town passed a bylaw changing the zoning designation of certain lands, permitting their development. The Applicant objected to the re-zoning and applied for Judicial Review and an interim Stay of the operation of the bylaw was put in place. The Applicant sought an extension of the Interim Stay, pending the hearing of the Judicial Review Application. The Respondent cross applied under Rule 7.1 to have the Applicant's Claim dismissed.

The parties agreed that the appropriate test under Rule 3.23 is the tripartite test articulated in *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117. Under the first branch of the test, whether the issue is a serious question to be tried, the parties agreed that the threshold is low, only requiring a serious question, as opposed to a frivolous or vexatious one. Of the Applicant's five grounds for Judicial Review, Rawlins J. found that all but one did not meet the low threshold required to constitute a serious issue, and thus, granted the Respondent's Cross Application with respect to those grounds. Rawlins J. also held that, despite the Applicant's interpretation of the bylaw being "strained" and his arguments weak, they were not frivolous and vexatious. Justice Rawlins reluctantly found that the Applicant met this portion of the test.

In considering whether a failure to grant the Stay would result in irreparable harm, the parties again agreed that the applicable standard is whether there is a clear and non-speculative risk of harm not compensable by costs. Rawlins J. held that irreparable harm would be suffered because the developer of the lands was prepared to proceed with the development.

Rawlins J. concluded that the balance of convenience favoured the Applicant, given the nature of the potential harm, and the fact that the Judicial Review hearing was scheduled for only 5 months from the hearing of the Stay Application. Accordingly, the Applicant satisfied the tripartite test, and the Stay was granted. The Respondent's Cross Application with respect to this ground therefore failed.

STREMICH V PEFANIS, 2016 ABQB 397 (MACLEOD J)
Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 3.28 (Effect of Not Serving Statement of Claim in Time)

The Appellant, Ms. Stremich, was an unrepresented litigant who filed a Claim alleging professional negligence against her former lawyer and law firm. She hired a process server, who attended at the law firm to serve the Claim four days before time for service was set to expire under Rule 3.26. Service was unsuccessful due to a miscommunication, so the process server returned 10 days later and personally served the respondent lawyer. Master Robertson dismissed the Statement of Claim pursuant to Rule 3.26 because the Respondent lawyer was not served within the one year service period set out in Rule 3.26. Ms. Stremich appealed to a Justice of the Court of Queen's Bench, seeking an extension.

Justice Macleod held that Rule 3.26(1)(c) applied in this case to allow the Court to grant an extension of time for service. Justice Macleod noted that there is a two part test for analyzing Rule 3.27(1)(c): first, special or extraordinary circumstances must exist regarding the lack of service. The special circumstances must be the result of conduct by the Defendant or a person who is not a party to the Action, and not the Plaintiff. Second, the Court must consider whether or not it is appropriate to extend time for service in the circumstances. In the second branch of the test, the Court should consider the policy relating to limitations periods, as well as prejudice to the Defendant as a result of the time extension.

Justice Macleod considered whether an extension for time of service would prejudice the Defendant. The considerations include (a) whether or not an extension would prejudice the defendant, whether the (b) plaintiff or (c) defendant can prove or disprove such prejudice, (d) whether the defendant failed to do something it ought to have done, and (e) whether or not the prejudice was actually caused by the delay. His Lordship held that, although the process server was an agent for Ms. Stremich, he was still not a party to the Action. Justice Macleod observed that the process server's conduct was "careless, if not negligent". Since Ms. Stremich was reliant on the process server to reasonably perform his job, his carelessness constituted a special circumstance. Justice Macleod also found that an extension of time under Rule 3.27(1)(c) would not prejudice the Defendants as they were served only a few days after the one year expiry date set out in Rule 3.26. As such, the Appeal was granted.

GOODHART V ALBERTA ENERGY REGULATOR, 2016 ABQB 469 (MACLEOD J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Alberta Energy Regulator ("AER") and Energy Resources Conservation Board ("ERCB") applied to strike the Plaintiffs' Claim on the basis that it did not disclose a private duty of care owed by the regulators to the Plaintiffs, and that the Claim was barred by section 27 of the *Responsible Energy Development Act*, SA 2012 c R-17.3 ("*REDA*").

MacLeod J. held that the pleadings did not disclose a private duty of care. His Lordship explained that the test for striking pleadings for setting out no cause of action under Rule 3.68(2)(b) is "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed". MacLeod J. noted that Alberta Courts have previously found that both the AER and ERCB do not owe a private duty of care to individuals, that there was no proximity between the Plaintiffs and the Respondent Regulators, and that *REDA* contemplates the public interest, rather than the individual interests of the Plaintiffs. MacLeod J. therefore held that there was no reasonable prospect that the Claim could succeed.

Alternatively, His Lordship found that the Claim was bound to fail due to section 27 of the *REDA*, which bars proceedings against the AER and its affiliates "in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment". The Application to strike the Claim was therefore allowed.

IRWIN V BUOTE, 2016 ABQB 530 (MACKLIN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff successfully appealed the suspension of his veterinary license, and commenced a Claim in negligence and bad faith against the Defendants for damages related to the suspension. The Defendants applied to Summarily Dismiss the Plaintiff's Claim, or Strike out the Statement of Claim pursuant to Rule 3.68 on the basis that the majority of the claims were barred by the express wording to the *Veterinary Profession Act*, RSA 2000, c V-2 ("VPA"), and that any allegations in the Statement of Claim not barred by the VPA were inadequate to support those claims.

Macklin J. noted that no evidence may be submitted on an Application to Strike a Claim or portions of a Claim pursuant to Rule 3.68. His Lordship stated that, pursuant to Rule 3.68(2)(b) the Court may order that all or any part of a Claim be struck out if the commencement document or pleading discloses no reasonable claim. Claims may only be struck under Rule 3.68(2)(b) if it is plain and obvious that the pleading discloses no real cause of action. The facts pleaded are deemed to be true for the purposes of the Application.

Macklin J. reviewed the *VPA* and determined that it was clear that the claims advanced by the Plaintiff for negligence were barred by section 65.1. It was therefore plain and obvious that the Statement of Claim disclosed no reasonable claim in negligence and that these claims must be struck out pursuant to Rule 3.68(1) and 3.68(2)(b). This left only the allegations of bad faith by the Plaintiff. Justice Macklin held that the allegations of bad faith should also be struck out as the Pleading was inadequate. Macklin J. considered Summary Judgment as an alternative to striking the allegations. His Lordship noted that Summary Judgment may be granted when there is no genuine issue requiring a Trial. Justice Macklin concluded that, even if striking the bad faith allegations pursuant to Rule 3.68 was incorrect, Summary Dismissal of those claims was warranted.

EMEREX OIL AND GAS LTD V DROVER, 2016 ABQB 420 (MCCARTHY J)
Rule 4.22 (Considerations for Security for Costs Order)

The Plaintiff commenced an Action against the Defendants for breach of fiduciary duty. The Defendants filed a Counterclaim against the Plaintiff and its officers for negligent statements, oppressive conduct, breach of duty, conspiracy and defamation. The Defendants by Counterclaim applied for an Order for Security for Costs, pursuant to Rule 4.22, with respect to the Counterclaim.

Justice McCarthy noted that Rule 4.22 and section254 of the *Business Corporations Act*, RSA 2000, c B-9 provided the framework for the analysis in this case. Rule 4.22 is applicable to individuals. His Lordship stated that Rule 4.22 requires that the Court analyse the appropriateness of Security for Costs in two steps, and must consider: all the factors outlined in Rule 4.22; and whether ordering Security for Costs is just and reasonable. No one factor in Rule 4.22 is determinative. Justice McCarthy held that, based on the outcomes of each of the enumerated factors, and the overall reasonableness of an Order for Security for Costs in the circumstances, the Defendants' Security for Costs Application should be granted in the amount of $40,000.

PINTO VENTURES LTD V SOOST, 2016 ABQB 454 (JONES J)
Rules 4.22 (Considerations for Security for Costs Order), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The parties were involved in a complex corporate commercial dispute. The Plaintiff obtained a Mareva Injunction and an Attachment Order effectively freezing the Defendants' assets. The parties re-appeared before Justice Jones for the determination of four Cross-Applications.

Among other things, the Defendants applied for Security for Costs, and the Plaintiff cross-applied to find the Defendants in civil contempt for an alleged breach of the Attachment Order.

The Defendants' argued that Security for Costs should be granted pursuant to the overlapping tests enumerated in Rule 4.22 and contained in section 254 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "ABCA"). The Defendants stated that both statutory provisions connect with the common purpose of avoiding the mischief of a limited company with few assets to "enjoy the proceeds to a lawsuit if it wins and walk away if it loses". The Plaintiff argued that the more stringent test under section 254 of the *ABCA* was applicable, and that the Defendants had not satisfied the Court "that the Plaintiff 'will be' unable to pay costs".

Justice Jones considered the test under both enactments and prior leading authority, and stated that the tests under Rule 4.22 and section 254 ABCA were discrete. Jones J. held that the test under section 254 of the *ABCA* was applicable because the Plaintiff is a corporation. However, His Lordship was sufficiently concerned about the Plaintiff's ability to discharge Costs, so directed the Plaintiff to post Security for Costs regardless.

With respect to the Plaintiff's Application for civil contempt, the Court considered Rule 10.52(3) and Rule 10.53, and considered the test for contempt: whether there is an existing prohibition of the Court; whether there was notice of it to the contemnor; and, whether there was an intentional act which constitutes a breach of the Order. Jones J. held that in this case, the circumstances did not justify such a finding, as there was reasonable doubt that the Defendants were in breach of the Order. The Plaintiff's Application for contempt was therefore dismissed.

RATHORE V SINGH, 2016 ABQB 498 (STREKAF J)
Rules 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of an Action brought against them by their son-in-law who was seeking to recover proceeds from the sale of two properties and damages for pain and suffering allegedly inflicted on him. In the alternative, they sought an Order for Security for Costs against the Plaintiff. The Defendants counterclaimed for damages against the Plaintiff for mental anguish.

With respect to the claim related to the proceeds from properties, Strekaf J. noted that there was conflicting Affidavit evidence which required credibility findings with respect to, *inter alia*, the nature of the transactions involving the properties, the properties' beneficial owner, and who contributed to the purchase and renovation of the properties. As such, Her Ladyship held that the Claim relating to the properties could not be dismissed.

However, Strekaf J. summarily dismissed the Claim related to the Plaintiff's allegations of pain and suffering. Justice Strekaf held that the Plaintiff had failed to provide evidence to satisfy the elements of the tort of intentional infliction of mental suffering. Further, after a review of the authorities, Strekaf J. held that it was inappropriate to extend the tort of intentional infliction of mental suffering to this case.

Strekaf J. considered whether Security for Costs should be ordered as the Action was not dismissed in its entirety. Her Ladyship noted that the test for Security for Costs involves two steps: the Court must consider the factors outlined in Rule 4.22, and then should consider whether ordering Security for Costs is just and reasonable in the circumstances. Considering all the factors listed in Rule 4.22, Strekaf J. held that factors in Rule 4.22(a)-(d) militated in favour of granting Security for Costs; however, the Counterclaim militated against it. Although the Counterclaim sought damages for mental anguish, the Plaintiff had not applied to dismiss it. So long as it was outstanding, it would not be just and reasonable for the Plaintiff to post Security for Costs, as he would have to participate in the Trial of the Counterclaim. Justice Strekaf observed that, if the Counterclaim were discontinued, Security for Costs would be appropriate for future steps. Strekaf J. did not grant the Application for Security for Costs, but ordered Security for Costs in the event the Counterclaim was discontinued within two months from the date of the Judgment.

1529771 ALBERTA LTD V JOHN BOSCO CHILD AND FAMILY SERVICES FOUNDATION (BOSCO FOUNDATION), 2016 ABQB 378 (MASTER SCHLOSSER)
Rules 4.24 (Formal Offers to Settle) and 4.29 (Costs Consequences of Formal Offer to Settle) and Schedule C

A Rule 4.24 Formal Offer was made by the Defendants on November 3, 2015, wherein the Defendants offered to agree to a Discontinuance of the Action without Costs. The Offer was open for acceptance until January 5, 2016 and during this time period, the Statement of Defence was filed and the offerors provided documents in support of their position. The offerors also indicated that if the Offer was not accepted they would bring a Summary Judgment Application. The Defendants were successful in their Summary Judgment Application and sought Double Costs for their early Formal Offer under Rule 4.29.

Master Schlosser, referring to prior leading authority, stated that a Formal Offer must be genuine to be effective. It must be "reasonable and realistic" and incorporate an element of compromise. The times for assessing the reasonableness of the offer are when it was served and when it was open for acceptance. In this case, the Defendants' Costs would have been nominal at the time the offer was made; however, over the time the offer was open, the offerors filed their defence and produced documents. While the element of compromise within the Offer was prospective at the time it was made, it became real as the Defendants were required to take steps over the time the Offer was open for acceptance. The Court also noted that the Plaintiff did not have a case against the Defendants when the Action commenced and could not put one together for the Summary Judgment Application. Further, Double Schedule C Costs would not indemnify the Defendants for their expenses. Master Schlosser awarded the Defendants Double Costs for all steps taken after service of the Formal Offer.

581257 ALBERTA LTD V AUJLA, 2016 ABQB 509 (MANDERSCHEID J)
4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 10.33 (Court Considerations in Making Costs Award)

In a previous decision, Manderscheid J. held that the Defendants, Balwinder Aujla ("Balwinder") and Harwinder Aujla ("Harwinder"), were liable for $165,254 and $9,019, respectively, for monies stolen from the Plaintiff. In obtaining Judgment against the Defendants, the Plaintiff beat a formal settlement offer (the "Offer"), which the Defendants had refused.

Manderscheid J. applied Rule 10.33 to limit Costs against Harwinder, and ordered Double Costs against Balwinder pursuant to Rule 4.29, for all steps taken after the service of the Offer, including the cost of experts. The Defendants tried to defeat the Plaintiff's entitlement to Double Costs, arguing that the Offer was not a true offer under Rule 4.24 as it was an offer subject to joint acceptance. The Defendants argued that neither one of them could accept and act upon the Offer independently of the other; therefore, the Offer was not a true offer under the Rules. Manderscheid J. rejected this argument, and held that any one of the Defendants could have accepted the Offer without commitment from the other.

Justice Manderscheid awarded the Plaintiff $1,000 in additional Costs against each of the Defendants pursuant to Rule 10.33(2)(b). Rule 10.33(2)(b) allows the Court to vary Costs when a party refuses to admit something which should have been admitted. Here, the Defendants refused to admit bank records for the truth of their contents, despite the fact that this case stemmed from a re-Trial and the Defendants had admitted the bank records in the first Trial, and that the Defendants were best positioned to "determine the accuracy of their own bank records". Accordingly, Manderscheid J. awarded the Plaintiff additional Costs for the time and inconvenience of preparing Affidavits to admit the bank records.

Manderscheid J. considered whether it was appropriate to depart from the Double Costs Rule pursuant to Rule

4.29(4)(e). Since Balwinder would pay more in Costs than actual damages, the Defendants argued that this would undermine the public's confidence in access to justice. Rule 4.29(4)(e) provides that the Double Costs Rule does not apply if, in special circumstances, the Court so orders. However, the Defendants failed to cite any special circumstances. Thus, His Lordship upheld the Double Costs award against Balwinder.

HAYMOUR V CONDOMINIUM PLAN NO 802 2845, 2016 ABQB 393 (ROSS J)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.5 (When Affidavit of Records Must be Served)

Ross J. dismissed the Plaintiff's Action as against all of the Defendants for abuse of process, but also considered whether the Action ought to be struck pursuant to Rule 4.31.

The Plaintiff, a self-represented litigant, was described as being "his own worst enemy" in the Action. The Court noted extensive problems with respect to serving the Plaintiff, as well as the Plaintiff's lack of compliance with Court Orders and the Rules of Court. Since filing his Statement of Claim, the Plaintiff had done nothing to advance the Action, including serving his Affidavit of Records, which was overdue by nearly one year. Ross J. noted that Rule 4.31 can be used when the three-year time limit in Rule 4.33 has not yet passed.

Ross J. noted that the emphasis on Rule 4.31 is whether the delay causes prejudice to a litigant. Where the delay is inordinate and inexcusable, it is presumed to cause prejudice to the party bringing an Application under Rule 4.31. Such delay is that which "exceeds what is reasonable having regard to the nature of the issues and the circumstances of the case". Ross J. held that the delay in serving the Affidavit of Records was inordinate, noting that it was highly likely that the Plaintiff had all of the records in his possession, and that nothing suggested an extension was necessary. Ross J. also noted the Plaintiff provided no explanation or evidence regarding the delay, and it was thus inexcusable. Justice Ross also dismissed the Action for delay pursuant to Rule 4.31.

1301540 ALBERTA LTD V XLT TRANSPORT LTD, 2016 ABQB 467 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 13.18 (Types of Affidavit)

The Plaintiff commenced an Action following a motor-vehicle collision in 2008 which had not resulted in any injuries. The Action had progressed to answers on Undertakings in July of 2013, which the parties agreed had significantly advanced the Action. The Plaintiff had applied for a procedural Order respecting a Litigation Plan on June 15, 2016 which was shortly before the three year mark from the delivery of Undertaking Responses, and served their sworn Affidavit of Records on June 30, 2016, which it argued significantly advanced the Action. The Defendants disagreed and cross-applied to strike the Action for long delay.

Master Schlosser noted that a number of recent cases have clarified Rule 4.33 Applications, all of which stipulate that a functional approach is to be taken with respect to whether events constitute a "significant advance". An event which is mandated by the Rules is not, by that fact alone, a significant advance. Master Schlosser held that the Affidavit of Records significantly advanced the Action, as did the Plaintiff's Application, as success thereon would have been likely. Master Schlosser also noted that an email from defence counsel stating they had no further records to produce may also have significantly advanced the proceedings.

Master Schlosser noted that the Affidavit filed by the Defendants in support of the strike Application was improper. It was an Affidavit sworn by a legal assistant that was based on information and belief. Master Schlosser noted that Rule 13.18(3) is mandatory and thus renders such evidence impermissible in a "final" Application to strike under Rules 4.31 and 4.33. Master Schlosser held that the delay in the Action was not inexcusable or inordinate, as required by Rule 4.31, as it had "a reasonably strong pulse for most of its existence". Further, Master Schlosser noted that there was no prejudice to the Defendants, rebutting the presumption in Rule 4.31(2). The Application for the Litigation Plan was granted and the Cross-Application for dismissal for long delay was dismissed.

DANEK V LEVINE, 2016 ABQB 422 (JONES J)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff commenced an Action against her counsel who represented her in a personal injury matter. The Action against the lawyers was struck for long delay by a Master, and the Plaintiff appealed. The only issue on appeal was whether steps taken in the related personal injury Action could significantly advance the Plaintiff's Claim.

The Appellant acknowledged that more than three years had passed in her Action against her prior counsel, but argued that the personal injury Action was "inextricably linked" to the Action against the lawyers. The Respondent argued that the Master did not err in finding that the Actions were not "inextricably linked".

Justice Jones observed that the Actions were linked, but not inextricably so. The connections between the Actions did not relieve the Plaintiff from the obligation to diligently and reasonably pursue the Action against her counsel. The Plaintiff's Appeal was therefore dismissed.

SERVUS CREDIT UNION LTD V BRB BUILDING CORP, 2016 ABQB 428 (MASTER HANEBURY)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff, Servus Credit Union Ltd. sued various Defendants to enforce two commercial mortgages granted by the Defendant BRB Building Corp. The Statement of Claim was filed on August 6, 2010 and Statements of Defence were filed for some, but not all, of the Defendants. In 2010, counsel for the few Defendants who did not file Statements of Defence wrote to the Plaintiff's counsel asking that they "not to take any further steps without prior notice to our offices". The Court granted an Order confirming the sale of the mortgaged property on April 20, 2012. In March 2015, the same Defendants retained new counsel, who also wrote to the Plaintiff's counsel asking that no steps be taken without prior reasonable written notice. Subsequently, all the Defendants brought an Application to dismiss the Action for long delay. The issue before the Court was whether an open-ended request by a Defendant that a Plaintiff take no further steps in an Action constituted an express agreement to delay the application of Rule 4.33 was amended a few days prior to the Application being heard; however, all parties agreed that the Application would be considered under the un-amended Rule.

Master Hanebury stated that it was clear that the Court must look back from the date of the Rule 4.33 Application and if less than 3 years had elapsed since the date of the last significant advance in the Action Rule 4.33 did not apply. In making its determination, the Court was required to take a functional approach in examining the real issues in dispute, and to take a "macro view" of what occurred during the three year period. The focus must be on the substance of what was done and its effect; the Court must analyse whether what was done moved the Action towards a resolution.

Master Hanebury considered whether the Mediation and discussions between the parties that occurred in a related Action was something that significantly advanced the Plaintiff's Action. Master Hanebury held that the Mediation did not resolve anything or advance the Action. Master Hanebury also considered what constituted an "express agreement" to delay under Rule 4.33, and noted that a standstill agreement could not be implied by conduct: evidence was needed to establish the basic elements of an agreement. In this case, Master Hanebury held that the evidence did not clearly demonstrate that there was an express agreement to hold the Action in abeyance. Further, there was no discussion about stopping or suspending the procedural steps or requirements of the Action. As a result, the discussion between the parties' counsel did not meet the requirements for an express agreement.

With respect to the correspondence which requested that no steps be taken, the Court noted that Rule 4.33 was designed to bring an end to Actions that had become inactive and should be deemed abandoned. The Rule requires an express agreement with respect to a timeline or a temporal boundary. An open-ended request that no steps be taken was insufficient. Master Hanebury held that the original letter of 2010 was not a standstill agreement, as it had no temporal boundary. Regarding the second letter sent

in 2015, the Court held that this was also an open-ended request and therefore, not a standstill agreement. Further, Master Hanebury noted that when a Defendant makes an open-ended request for time near the end of the drop dead period, fairness requires that he or she cannot bring an Application under Rule 4.33 for a reasonable period of time. The Application of the Defendants to dismiss the claim for long delay was granted.

PRECISION LABEL LTD V MILBURN, 2016 ABQB 481 (MASTER PROWSE)
Rule 4.33 (Dismissal for Long Delay)

The Defendant applied for an Order dismissing the Action pursuant to Rule 4.33 because the last significant advance was Questioning which took place on September 28, 2012. The Plaintiff argued that it provided Answers to Undertakings within three years, on September 25, 2015, and that this significantly advanced the Action. The Defendant replied that the Undertaking Responses were perfunctory and of marginal relevance, and therefore did not constitute a significant advance. The Defendant argued further that the Plaintiff had delayed answering the Undertakings until the last possible moment in order to drag out the lawsuit. Master Prowse noted that, even Undertaking Responses provided in an "arguably tardy fashion" can significantly advance an Action as long as the party providing them is not delivering them in a "'year-by-year' scenario where the plaintiff is deliberately stretching out the three year drop dead period". The Court determined that, while none of the Answers to Undertakings were of critical importance, they were responsive to the Undertakings requested and the answers significantly advanced the Action. Accordingly, Master Prowse declined to dismiss the Action pursuant to Rule 4.33.

ALEXANDER V SUN LIFE ASSURANCE COMPANY OF CANADA, 2016 ABQB 445 (MANDERSCHEID J)
Rule 5.2 (When Something is Relevant and Material)

The Plaintiff commenced an Action against the Defendant insurer on the basis that the Defendant had failed to pay long term disability payments. The Plaintiff sought to compel the production of the Defendant's records which the Defendant had refused to produce through its Undertaking responses. The Defendant argued that the records sought by the Plaintiff were not relevant.

Manderscheid J. reviewed the records in question and considered whether they were relevant and material under Rule 5.2(1). His Lordship considered prior leading authorities which provide that, in order for the evidence to be relevant and material, the party needs only to show a plausible line of argument regarding the probative value of the records. Manderscheid J. determined that the records were relevant to the Plaintiff's claim of bad faith because they would show how insurance case managers were expected to deal with the Plaintiff's claim; further, the records were material because they would assist in evaluating whether the long term disability claim was dealt with in accordance with the Defendant's best practices. Justice Manderscheid agreed that the records at issue met the criteria of relevance and materiality under Rule 5.2(1), and ordered that the Defendant produce them.

GAULT ESTATE V GAULT ESTATE, 2016 ABCA 208 (SLATTER, ROWBOTHAM AND O'FERRALL JJA)
Rules 5.17 (People Who May Be Questioned), 5.37 (Questioning Experts Before Trial), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application) and 6.8 (Questioning a Witness Before Hearing)

Following her husband's death, Mrs. Gault commenced litigation claiming unjust enrichment on the basis that Mr. Gault had not contributed to household expenses proportionate to his means, as required by a prenuptial agreement between them. Mrs. Gault subsequently passed away, and the litigation continued as between the two estates.

Mr. Gault's estate sought Summary Dismissal on the basis of a limitations defence, and Mr. Gault's estate demanded to question Mrs. Gault's lawyer and accountant prior to the Application under Rule 6.8, to ascertain Mrs. Gault's knowledge of a potential claim (or lack thereof). Mr. Gault's estate argued that the matters sought to be questioned on were matters of fact and not subject to privilege. The Case

Management Judge held that the lawyer and the accountant could not be Questioned pursuant to Rule 6.8, and Mr. Gault's estate appealed. Mr. Gault's estate also appealed the Case Management Judge's Decision with respect to legal fees paid by Mr. Gault's estate. The Appeals were heard together.

The Court of Appeal held that Questioning pursuant to Rule 6.8 was not permitted in this case as the matters sought by Mr. Gault's estate were protected by solicitor-client privilege. The Court ruled that the death of a party is not the basis to set aside privilege, particularly where the estate of that person is involved in the litigation. The Court also noted that Rule 6.8 is not a substitute for Questioning persons who are not listed in Rule 5.17. The Court also stated that examination of experts under Rule 6.7 is only allowed on non-privileged matters and in the limited circumstances specified in Rule 5.37. On the matter of Mr. Gault's estate's legal fees, the Court found no reviewable error on the part of the Case Management Judge. The Court dismissed both Appeals.

BRIGGS V ORLOWSKI, 2016 ABQB 476 (MASTER SCHLOSSER)
Rules 6.11 (Evidence at Application Hearings) and 7.1 (Application to Resolve Particular Questions or Issues)

The Plaintiff, Briggs, brought an Application under Rule 7.1 to determine whether or not he was time barred from bringing an Action for the division of quasi-matrimonial property based on a remedial constructive trust.

Both parties put forward evidence in the form of Affidavits which consisted largely of accusations and counter-accusations. Master Schlosser held that this did not allow for a proper assessment of credibility, and therefore stated that the dispute, and similar matrimonial disputes are "unsuited to Motions Court" because credibility "cannot be determined on paper evidence". Master Schlosser emphasized that for Applications under Rule 7.1, it is the Applicant's burden to prove the issue should be determined in their favour on a balance of probabilities, and that once a Rule 7.1 Application is made the issue cannot later be reopened or re-litigated. The Court could not assess any of the issues without making determinations about credibility.

Master Schlosser noted that, unless the door to admitting oral evidence at Application Hearings under Rule 6.11(1)(g) is "opened up", the inability to make credibility findings "may be the greatest impediment to giving Masters matrimonial jurisdiction". Master Schlosser therefore dismissed the Application, but noted that the Parties could return again under Rule 7.1 to Apply for a credibility finding on oral evidence in order to determine the limitations issue without a Trial.

SABEY V WHIDDEN, 2016 ABQB 487 (STREKAF J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff commenced an Action against the Defendant doctor on the basis that he negligently performed plastic surgery on the Plaintiff. The Defendant unsuccessfully applied for Summary Dismissal of the Action before a Master, and appealed the Decision to Justice Strekaf. Strekaf J. noted that the Master had identified the correct legal test for Summary Judgment, and had observed that a party applying for Summary Judgment must put their best foot forward, which required that the party "present evidence to show sufficient 'merit' to establish a genuine issue requiring a trial" and "speculating that evidence might be available at a trial is not sufficient". Strekaf J. noted that the Master could not dispose of the Action by way of Summary Dismissal based on the record before the Court at the time.

On Appeal, the Defendant sought leave to adduce two additional Affidavits pursuant to Rule 6.14(3). Justice Strekaf considered prior leading authorities, and stated that the test under Rule 6.14(3) for adducing new evidence on Appeal from a Master's Decision is "very lax", but the evidence must be, in the opinion of the Court, relevant and material. Her Ladyship held that the additional evidence in this case was relevant and material, and therefore it was admitted. Following the consideration of the substance of the Defendant's Appeal, Justice Strekaf allowed it in part, but held that some of the issues were better decided at Trial.

GEMBA FUND ONE LLC V TOLOSA DEVELOPMENT CORP, 2016 ABCA 241 (SLATTER, ROWBOTHAM AND O'FERRALL JJA)
Rule 6.25 (Preserving or Protecting Property or its Value)

The Respondent, Gemba Fund One LLC, had obtained an Injunction and an Attachment Order preventing the Appellant from dissipating property that was claimed by both parties. The Appellant appealed on the basis that the Chambers Judge erred in making the Order by: (1) misapplying section 17 of the *Civil Enforcement Act*; (2) misapplying the common law test from *Canadian Imperial Bank of Commerce v Credit Valley Institute of Business and Technology*, [2003] OJ No 40 (QL) ("*Credit Valley*"); and (3) generally misweighing the evidence.

The Court noted that Rule 6.25(1)(a) gives the Court the authority to make an Order for the preservation of property that is in dispute or may be evidence in an Action. The Majority of the Court of Appeal held that the Chambers Judge properly applied section 17 of the *Civil Enforcement Act*, and that the Chambers Judge's decision (that considered the test under *Credit Valley and* held that the Respondent had established a *prima facie* case for their proprietary interest in all of the funds) was reasonable. The Court noted that the purpose of the test in *Credit Valley* is to ensure a Defendant is able to fund its defence – but here, the Appellant sought the funds for outstanding legal fees from a previous Action. The Claim was therefore not congruent with the purpose of the test in *Credit Valley*. The Appeal was therefore dismissed.

O'Ferrall J.A. agreed concurred in the result, but observed that a distinction should be made between past and current legal fees, as both types of fees are Court ordered. O'Ferrall J.A. emphasized that the four-step test from *Credit Valley* applies when at least some of the funds in question are not subject to the Claim – whereas in this case there was a presumption that the Respondent had an interest in all of the funds.

BLANKENSHIP V JENKS-COCHRANE PROPERTIES LTD, 2016 ABQB 461 (READ J)
Rules 6.37 (Notice to Admit) and 13.6 (Pleadings: General Requirements)

This Action was commenced by the Plaintiff for the recovery of a debt. The Plaintiff was induced to lend money to a corporation. Rather than repay the loan, the corporation purported to issue preferred shares and grant a mortgage. This corporation then became insolvent and was controlled by the Defendants.

The Plaintiff had provided a number of documents as evidence to the Defendants as part of a Notice to Admit Facts. The Defendants did not respond to the Notice within the 20-day period after service as stipulated by Rule 6.37. The Defendants applied to withdraw the deemed admissions but ultimately abandoned the application. Consequently, Read J. found that the Defendants effectively admitted the facts set out in these records.

The Defendants argued that the shares were issued to the Plaintiff without the express consent of the Defendant Mr. Taylor, who was a director and shareholder of the Defendant corporation. The Court noted a number of problems with this argument, including that lack of authority must be expressly pled under Rule 13.6(3)(n), which was not done and thus could not be argued at Trial. In the result, Justice Read held that the preferred shares were properly issued and were valid. The Plaintiff was both a shareholder and a creditor of the Defendant corporation.

1042063 ALBERTA LTD V MCLEAN, 2016 ABQB 436 (HOPKINS J)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiffs brought an Action against the Defendants alleging that they had entered into an enforceable option agreement for the purchase of a parcel of commercial land held by the Defendants. The Defendants applied for Summary Dismissal arguing that there was no such option agreement, and that this was a complete defence to the Claim.

The Defendants argued that the option agreement that the Plaintiffs sought to enforce had not been delivered to the Defendants, nor signed by them. The Defendants' evidence was that they had only seen the option agreement executed by the Plaintiffs for the first time during the litigation. The Plaintiffs claimed that there was an oral agreement between the parties, and sought to adduce parol evidence. The Plaintiffs argued that the evidence differed substantially between the parties and, therefore, the Action was inappropriate for Summary Judgment.

Hopkins J. considered Rule 7.3 and noted that there is no need for a Trial based on *viva voce* evidence unless there is a genuine issue which cannot be summarily determined against the non-moving party. On the evidence before the Court with respect to the option agreement, Justice Hopkins held that a fair and just determination could be made without the need for a viva voce hearing. Hopkins J. held that there was no merit to the Plaintiffs' Claim; as a result, the Application was granted and the Action dismissed. Since the considerations under Rule 7.3 were dispositive, the issues raised under Rule 7.2 did not need to be considered.

COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK BA (RABOBANK INTERNATIONAL) V LIEBIG & KEOWN LLP, 2016 ABQB 417 (SULLIVAN J)
Rule 7.3 (Summary Judgment)

The Plaintiff appealed two Masters' Decisions, both of which related to Summary Dismissal Applications by the Defendants. The Masters' Decisions granted substantial relief in favour of the Defendants.

With respect to the test for Summary Judgment, Sullivan J. noted that Summary Judgment can be given if disposition that is fair and just to both parties can be made on the existing record. Summary Judgment can be granted if in light of what fair and just process reveals, there is no merit to the Claim. Justice Sullivan observed that the existing record was complete except for the expert evidence. Justice Sullivan noted that, in order for the Respondent's case to have merit there must be a genuine issue of potentially decisive material facts.

After reviewing the test for Summary Judgment, the applicable case law on negligent misrepresentation, and the facts of the case, the Court dismissed the Appeals.

BALAN V WARSHAWSKI, 2016 ABQB 488 (MASTER WACOWICH)
Rules 7.3 (Summary Judgment) and 9.4 (Signing Judgments and Orders)

The Defendants sought an Order for Summary Dismissal of the Plaintiff's claim on the basis that there was no merit to the claim. The Plaintiff was alleging medical malpractice by the Defendants, so the Defendants submitted expert evidence establishing that all of the Defendants met the required standard of care.

Master Wacowich noted that matters involving special skill or knowledge required expert opinion evidence to allow the Court to draw inferences from the facts in evidence. On an Application for Summary Judgment in a medical malpractice Action, the Court was required to dismiss the Action if the Plaintiff was unable to present any expert evidence that supported the allegations of negligence. It was not enough for the Plaintiff to argue that the Defendants and their experts "might not be believed". In this case, the Plaintiff did not adduce any expert evidence in support of their Claim; therefore, Master Wacowich summarily dismissed the Action.

SETO V WENDY'S RESTAURANTS OF CANADA INC, 2016 ABQB 493 (MASTER SMART)
Rule 7.3 (Summary Judgment)

The Plaintiffs sued the Defendants, including Wendy's Restaurants of Canada Inc. ("Wendy's"), alleging a number of causes action related to the termination of a franchise agreement. The Plaintiff franchisees fell behind in payments owed to Wendy's and the Canada Revenue Agency. Wendy's initially entered into a forbearance agreement with the Plaintiff franchisees, but later elected to terminate the franchise agreement. Around the same time, the Plaintiff franchisees received an offer to purchase the franchise, which fell through as a result of the termination of the franchise agreement. Wendy's

counterclaimed for outstanding debts owed by the franchisees.

Master Smart noted that the test for Summary Judgment included whether, upon review of the Affidavits, there is sufficient evidence before the Court to determine the issues in the Claim on the merits. Master Smart noted that the parties did not dispute the facts, and no *viva voce* testimony was necessary. Master Smart noted that the absence of relevant factual disputes between the parties permitted him to decide the claim on its merits.

Master Smart held that the termination of the franchise agreement by Wendy's was allowed. Master Smart further found that the causes of action of unjust enrichment, intentional interference with economic relations, and breach of the duties of fair dealing and good faith were not made out. Consequently, Summary Dismissal of the Plaintiff's claims was warranted. Master Smart further held that the debts claimed by Wendy's under the franchise agreement were valid and owing, and granted Judgment on Wendy's Counterclaim.

SLUGOSKI V SLUGOSKI, 2016 ABQB 423 (LANGSTON J)
Rule 7.5 (Application for Judgment by way of Summary Trial)

The Plaintiff and Defendant were involved in a dispute about the division of matrimonial property and spousal support and they proceeded to Summary Trial by agreement. In his Application for Summary Trial, the Defendant asserted that he would only be relying on his Affidavit. However, when the parties made submissions at the Summary Trial, counsel for the Defendant proposed to tender as evidence Read-Ins from the Plaintiff's discovery for the purpose of attacking the Plaintiff's credibility.

Justice Langston considered Rule 7.5, and stated that the Summary Trial process is designed to facilitate a resolution in a fair and expeditious matter. To achieve this goal, the parties and the Court need to be cognisant of all relevant evidence prior to the commencement of the Summary Trial. His Lordship also noted that the Defendant counsel's conduct thwarted the process, and amounted to an "ambush, disguised as trial advocacy". The need for Read-Ins could have been dealt with well in advance of the Trial date. As a result, Langston J. held that the proper approach was to determine the issues in dispute without any reference to the Read-Ins. Langston J. considered the substantive issues in dispute, the outcome of which was mixed.

WINSHIP V STANTEC CONSULTING LTD, 2016 ABQB 468 (GOSS J)
Rule 8.20 (Application for Dismissal at Close of Plaintiff's Case)

The Plaintiff brought an Action against the Defendants for breach of contract and negligence. At the close of the Plaintiff's case at Trial, the Defendants applied for a Non-Suit pursuant to Rule 8.20. Justice Goss considered the Rule and held that the test for a Non-Suit Application is whether the Plaintiff adduced some evidence on each of the essential elements of the Claim. In making this assessment, the Trial Judge must assume that the Plaintiff's evidence is true, and draw reasonable inferences from it, instead of weighing the evidence or assessing the parties' credibility. Goss J. considered the circumstances in this Action, and found that the Plaintiffs had not made out their case against the Defendants. As a result, the Defendants' Non-Suit Application was allowed, and the Plaintiffs' Action was dismissed with Costs.

ENMAX ENERGY CORPORATION V TRANSALTA GENERATION PARTNERSHIP, 2016 ABCA 263 (PAPERNY, SLATTER AND MCDONALD JJA)
Rules 9.2 (Preparation of Judgments and Orders), 13.5 (Variation of Time Periods) and 14.88 (Costs Awards)

The Parties applied for directions concerning the form of the Formal Judgment to be entered following Appeal, as well as the Costs consequences of the Appeal.

The Court of Appeal noted the default Rule under Rule 14.88 that Costs of an Appeal follow the result at the same scale as that awarded at the Trial Court. Further, the Information Note to Rule 14.88 states that a request for specific direction to Costs must be made within two

months of the pronouncement of the Decision. The request for a ruling on Costs in this instance was received eight months after Reasons for Judgment in the Appeal were filed. The Court observed that the two month time limit in the Information Note can be relaxed pursuant to Rule 13.5(2), however, the Appellant's assertion that the delay was caused by the Respondent's Leave to Appeal to the Supreme Court of Canada was not a sufficient reason to delay finalizing the proceedings. Regardless of the outcome in the Application for Leave, the proceedings must be finalized in the Court of Appeal.

Because the time limit for seeking direction with respect to Costs had expired, the Costs of the Appeal must be assessed solely on the presumptions in the Rules, which is that the successful Appellant is entitled to their Costs on the applicable column in Schedule C. The Court granted permission under Rule 9.5(2) to enter the Judgment.

SHELL CANADA PRODUCTS V SUNTERRA BEEF LTD, 2016 ABCA 250 (O'FERRALL JA)
Rules 9.14 (Further or Other Order After Judgment or Order Entered), 9.16 (By Whom Applications are to be Decided) and 9.33 (Sale to Plaintiff)

Sunterra was the registered owner of land subject to a vendor's lien registered by Shell. The vendor's lien was for the unpaid balance of the purchase price owing on the sale of the land by Shell to Sunterra. The Court of Queen's Bench declared that Shell had a valid vendor's lien for the unpaid purchase price and also ruled that Shell was "entitled to proceed to apply for such further relief as it sees fit bearing in mind the relief granted". These declarations were affirmed by the Court of Appeal. Sunterra sought leave to appeal to the Supreme Court of Canada and, by way of a Consent Order granted by O'Ferrall J.A., Shell agreed to stay enforcement of the lien in exchange for Sunterra's consent to "further relief". Leave to appeal to the Supreme Court was denied.

The terms of the Consent Order set out that Sunterra was to either immediately pay the total amount owing to Shell pursuant to the Court of Queen's Bench Judgment Roll, or was to use its best efforts to expedite sale of the lands to satisfy the total amount owing under the lien. Sunterra did not immediately pay the total amount owing to Shell and agreed that the land could be listed for sale at a price that would offset the vendor's lien. Sunterra objected to Shell's claim that the Consent Order permitted the land to be returned to Shell if no sale was consummated, and argued that this amounted to a variation of the Consent Order. Sunterra felt that any order requiring the sale or transfer of the land to Shell if it was not sold at the listed price would be beyond the jurisdiction of the Court by virtue of Rule 9.14(a). The parties applied to Justice O'Ferrall to make a further Order to provide a remedy to the party entitled to a remedy under the original Consent Order.

O'Ferrall J.A. stated that the Consent Order could not reasonably be interpreted to mean that agreeing to a stay of enforcement of the lien meant that Shell forever gave up its right to get the land back if it could not be sold for a price that satisfied the lien. The Consent Order was to be interpreted in light of the remedies ordinarily available to the holder of an unpaid vendor's lien. Rule 9.33(1) provided that a Plaintiff-Vendor could apply for an Order directing sale of the secured property to it. In determining whether to sell the property to the Plaintiff-Vendor, the Court was required to consider several factors, including the value of the secured property and the amount owed to the Plaintiff. Suggesting that the Consent Order did not permit Shell to insist on return of the land in the event that Sunterra failed to sell the land would "have the effect of undermining the judgment of the Court below declaring Shell's lien valid". O'Ferrall J.A. ordered that the property be listed for sale for one year; Sunterra was to seek approval from Shell before any offer could be accepted if it was less than what was owed to Shell; and, if the property did not sell by the end of the listing, Shell was entitled to a transfer of the property to it in full satisfaction of the amount owed under the lien.

GRISBROOK V GRISBROOK, 2016 ABQB 455 (MACLEOD J)
Rules 10.30 (When Costs Award May be Made), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The parties in divorce proceedings attended a binding JDR and subsequently applied to the Court to determine Costs. Ms. Grisbrook sought solicitor and client Costs for the JDR proceeding. Macleod J. noted that Rule 10.31(2)(c) sets out that reasonable and proper Costs do not include Costs related to a JDR, unless a party engages in serious misconduct during the JDR. Macleod J. observed that the Court had a general policy of not awarding Costs to either party when they participate in JDR because "a JDR benefits both parties and if it succeeds, both parties have succeeded with respect to the JDR".

Costs were awarded to Ms. Grisbrook for a contested Application that was eventually resolved by way of a Consent Order. Mr. Grisbrook argued that Consent Orders should not attract Costs, but Justice Macleod noted that Rule 10.30 contemplates Costs for applications which are settled. Macleod J. held that this matter was "hard fought" and ordered Costs based on Column 5. Considering the factors in Rule 10.33, Ms. Grisbrook was entitled to enhanced Costs and the Court awarded her double the amounts on the Bill of Costs and the contested Application. Disbursements and other charges were also awarded.

JAMA V JAMA, 2016 ABQB 379 (VEIT J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Plaintiff successfully obtained an Emergency Protection Order ("EPO") without notice against the Defendant, who was the Plaintiff's sister. The Defendant contested the EPO, and applied to vacate it. The Plaintiff did not appear at the oral hearing, and the Court vacated the EPO. The Defendant sought Costs against the Plaintiff. Justice Veit referred to a recent Alberta Court of Appeal Decision and stated that, pursuant to Rule 10.33(1)(c), the Court may consider the importance of the issues in the matter in awarding Costs for the review or appeal of an EPO. Upon consideration of the facts of this case, and provisions in the *Protection Against Family Violence Act*, RSA 2000, c P-27, Justice Veit held that the Defendant was entitled to Costs of $500 in this case.

TLY V MLY, 2016 ABCA 264 (SLATTER, ROWBOTHAM AND MCDONALD JJA)
Rules 10.36 (Assessment of Bill of Costs), 13.5 (Variation of Time Periods) and 14.88 (Cost Awards)

The Parties made an Application seeking a ruling on the Costs arising from a Decision in the Action that the Court of Appeal had issued eight months prior. The Court cited Rule 14.88, which specifies a presumption that the successful party on an Appeal is entitled to Costs from the unsuccessful party, and the scale of Costs should be the same as the scale that applies to the Order or Judgment appealed from. The Court also noted that the Information Note provided under Rule 14.88 stipulates that the Court of Appeal will not make a specific direction about Costs unless an exception is to be made to the presumption in Rule 14.88(1).

The Court of Appeal also remarked that the Information Note provides that any requests to the Court for specific direction on Costs must be made within two months of the pronouncement of the Decision from the Court of Appeal. The Court of Appeal acknowledged that while the time limit in the Information Note may be varied under Rule 13.5, which allows Courts to extend time periods, there was no reason put forward by the Parties as to why they should do so. Therefore, the Court of Appeal held that the Costs of the Appeal had to be assessed based on the presumption in the Rules. If the Parties could not come to an agreement as to what this amount should be, they could have the costs award assessed by an Assessment Officer under Rule 10.36.

LYMER V JOHNSON, 2016 ABCA 271 (SCHUTZ JA)
Rules 10.44 (Appeal To Judge) and 14.88 (Cost Awards)

A Registrar of Bankruptcy held the Applicant, Lymer, in contempt, and the Court of Queen's Bench and Court of Appeal upheld the Registrar's finding of contempt on appeal. The Court of Appeal ordered Costs, and an Assessment Officer applied Rule 14.88 and assessed the

Costs at the Court of Appeal on the same scale of Costs as those awarded to the Respondents in the Court of Queen's Bench. The Applicant sought permission to appeal the Assessment Officer's Decision.

Schutz J.A. noted that the Applicant did not appeal the Court of Queen's Bench Costs award. Her Ladyship held that the Application was an attempt to impermissibly disturb the operation of Rule 14.88. Justice Schutz observed that

> The assertion that a vexatious litigant finding (later overturned) somehow impacted the Court of Queen's Bench costs award is an impermissible collateral attack on the costs order. Moreover, a contemnor ought to bear a substantial portion of the costs directly relating to their contempt …

The Assessment Officer correctly applied Rule 14.88; as such, the Application for permission to appeal the Assessment Officer's Decision was denied.

MELLA V 336239 ALBERTA LTD (DAVE'S DIESEL REPAIR), 2016 ABCA 226 (SCHUTZ JA)
Rules 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 14.48 (Stay Pending Appeal)

The Plaintiff had sued the Defendants for fraudulently misappropriating funds, and obtained an Attachment Order directing the Defendants to limit their monthly expenditures. The Defendants were found in contempt of the Attachment Order for having used more money than permitted, and for not providing adequate expenditure records. After Judgment was obtained, the Court of Queen's Bench again found the Defendants in contempt: the Defendants had failed to pay the monetary sanctions imposed, but also failed to comply with other parts of the first contempt Order, including limiting household expenditures and producing financial records. The Defendants appealed the second contempt Order, and applied for a Stay of the second contempt Order pursuant to Pursuant to Rule 14.48.

With respect to the Stay Application, Schutz J.A. first considered whether there was a serious question to be tried, including whether the Defendants had failed to comply with the first contempt Order. Justice Schutz noted that Rule 10.52(3)(a)(i) does not exclude the use of the contempt power to punish a party for defiance of a mandatory injunction explicitly limiting household expenditures and requiring production of financial records. It is not determinative that the first contempt Order also required money to be paid. Rule 10.53 also expressly authorizes the imposition of fines, imprisonment and costs. Ultimately, the Defendants failed to demonstrate any error in the Court below and Justice Schutz held that the Appeal had no possibility of success. The Stay was denied.

GEOPHYSICAL SERVICE INC V JEBCO SEISMIC UK LTD, 2016 ABQB 402 (MASTER FARRINGTON)
Rule 11.25 (Real and Substantial Connection)

Geophysical Service Inc. ("GSI") commenced an Action against Jebco Seismic UK Ltd., Jebco Seismic LP, and Jebco/SEI Partnership Ltd. (the "Applicants") and an Alberta-based entity claiming breach of copyright among other things. The Applicants were served pursuant to an Order for service *ex-juris* in September 2013.

The Applicants sought to set aside service, or alternatively, to dismiss or stay the Action on three grounds: (1) that there was not a "real and substantial connection" to Alberta; (2) that GSI had not demonstrated that a "reasonable cause of action" existed pursuant to Rule 11.25; and (3) that the commencement document was not "accompanied" by an Affidavit or other document setting out the grounds for extraterritorial service pursuant to Rule 11.25(2)(a).

On the first ground, Master Farrington held that GSI met the two-part test for a "real and substantial connection" set out by the Supreme Court of Canada in *Van Breda v Village Resorts Ltd*, 2012 SCC 17. Master Farrington held that a "real and substantial connection" existed in the present case because the Defendant was a necessary party to the Action brought against another person served in Alberta, as set out in Rule 11.25(3)(i), and that Alberta was the proper forum to hear GSI's copyright arguments.

On the second ground, Master Farrington held that a "reasonable cause of action" and material issue did exist. Master Farrington noted that the former Rule 30 required that Applications for service *Ex Juris* be accompanied by an Affidavit swearing to the deponent's belief that a "reasonable cause of action" existed. Although this requirement is not set out explicitly under the new Rule 11.25, Master Farrington held that an Affidavit which is satisfactory to the Court is still required under Rule 11.25(2)(b). Master Farrington further held that the hurdle of presenting a "reasonable cause of action" still remains under the new Rule, but observed that the Courts should not "delve too deeply into the merits of the dispute" at such an early stage.

On the third ground, Master Farrington noted that Rule 11.25(a) requires that service of commencement documents be "accompanied" by a document or Affidavit setting out the grounds for service outside of Canada. Master Farrington stated, however, that the Rule is not clear as to whether the word "accompanied" required the document be served on the opposing party, or merely filed. Since no party was "misled by the service", Master Farrington held that GSI's failure to serve the Affidavit under Rule 11.25(2)(a) amounted to a "curable irregularity". As a result, service *ex-juris* was appropriate and the Order was upheld.

DAM V JLH, 2016 ABCA 252 (WATSON JA)
Rules 12.70 (Powers of Court on Appeal), 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court), 14.5 (Appeals only with Permission), 14.17 (Filing the Appeal Record – Fast Track Appeals) and 14.64 (Failure to Meet Deadlines)

The Applicant, DAM, in a family law dispute first sought permission under Rule 14.5(1)(i) to appeal the Decision of Martin J. of the Court of Queen's Bench. Rule 14.5(1)(i) provides that a party requires permission to appeal any decision of the Court of Queen's Bench sitting as an Appeal Court under Rule 12.71. Rule 12.71 applies to appeals heard by the Court of Queen's Bench pursuant to the *Family Law Act*, SA 2003, c F-4.5. Martin J. dismissed DAM's Appeal and confirmed the Order of Judge Cook-Stanhope from the Provincial Court restricting DAM's access to his child. Justice Watson noted that the Decision may not be appealed to a panel of the Court of Appeal unless the Appeal is a question of law or jurisdiction, and unless the party has permission from a single Justice of the Court of Appeal.

Watson J.A. stated that a Justice of the Court of Queen's Bench had powers under Rule 12.70 to allow the Appeal or to make any Order that the original Provincial Court Judge could have made. Watson J.A. determined that there had not been any mistake in law or jurisdiction, and held that there was no basis to grant DAM permission to appeal to a panel of the Court of Appeal.

DAM also sought an Order restoring an Appeal that had been struck. The Case Management Officer at the Court of Appeal had delivered a letter striking the Appeal. The letter made reference to Rule 14.17, which applies to timelines in fast track Appeals, and Rule 14.64, which allows a Registrar to strike the Appeal if the Appellant has failed to meet certain deadlines. Watson J.A. dismissed the Application to restore the Appeal, and stated that procedural errors on the part of unrepresented litigants are not an excuse for missing deadlines. Watson J.A. observed that the Rules of Court govern the Courts' processes, and there is no different set of rules for self-represented litigants.

NOVIA DEVELOPMENTS LTD V CALERON PROPERTIES LTD, 2016 ABQB 406
(HUNT MCDONALD J)
Rule 13.6 (Pleadings: General Requirements)

As part of a subdivision plan, Caleron Properties Ltd. divided a parcel of land into two parts – one smaller strip of land, and one larger. After several real estate transactions, a dispute arose as to who owned the smaller strip of land. Novia Developments Ltd ("Novia") commenced an Action against Caleron Properties Ltd. and other titleholders for the lands for Novia's losses relating to being sold an unregisterable parcel of land.

At Trial, Novia argued in its closing submissions that the previous titleholders breached a trust in favour of Novia; essentially, a trustee relationship was created when the titleholders held legal title to the smaller strip of land. The Defendants responded that, pursuant to Rule 13.6(3), a claim for breach of trust must be pleaded with full particulars in the Statement of Claim, and that Novia had not done so.

Novia admitted that breach of trust was not pleaded in its Statement of Claim and that no particulars were provided, but argued that the omission was a "curable irregularity" because the underlying facts of the breach of trust were present in the Statement of Claim. Justice Hunt McDonald held that it was too late to argue the claim for breach of trust in closing arguments at Trial. Hunt McDonald J. held further that, even if the cause of action was properly pleaded, a trust relationship did not exist in this case because the parties never intended to create one.

ALBERTA TREASURY BRANCHES V CONSERVE OIL 1ST CORPORATION, 2016 ABCA 213 (ROWBOTHAM JA)
Rules 14.5 (Appeals Only With Permission) and 14.8 (Filing a Notice of Appeal)

The Defendant applied under rule 14.5(1)(a) for permission to appeal part of an earlier Court of Appeal Application Decision to a full panel of the Court of Appeal. In that Decision, the Court dismissed two Applications by the Defendant to seek Leave to appeal a Receivership Order under section 193(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and to extend the time to appeal under section 31(1) of the *Bankruptcy and Insolvency General Rules*, CRC, c 368 ("BIA Rules"). Rowbotham J.A. first noted that an Application for permission to appeal the decision of a single Appellate Judge was not a rehearing. The Applicant must demonstrate an error of law, jurisdiction or principle; that discretion was exercised unreasonably; or that the decision was based on a misapprehension of important facts. The Court, at the Application for permission to appeal, could also consider the Appeal's chance of success, the standard of appellate review and any ensuing delay. In this case, the Application raised no serious questions of law, jurisdiction or principle. Further, Justice Rowbotham found that the proposed grounds of Appeal were not of overall importance to the bankruptcy practice.

The Defendant argued that the Court erred in law in not granting the time extension, and that the Court must extend the time to appeal under rule 31(1) of the *BIA*. Rowbotham J.A. noted that a common consideration to both the Leave Application under the *BIA* and time extension under rule 31(1) of the *BIA Rules*, was whether the proposed Appeal had a reasonable chance of success. Justice Rowbotham held that the Defendant's argument was not frivolous, and had some reasonable merit. However, when considered in the context of the importance of the issue to the Bankruptcy practice, Her Ladyship was not persuaded to grant Leave. Even though the Defendant's argument had some reasonable merit, there was not enough of a chance of success to warrant a hearing by a full panel.

The Defendant argued further that the Court must extend the time for Leave to appeal because the Court had made a decision on the Leave Application. Rowbotham J.A. stated that this was a technical argument which ignored the practical reality of the situation. Based on the circumstances, Rowbotham J.A. refused permission to appeal to a full panel.

Finally, Justice Rowbotham considered the relevant time period for commencing the present Application. The Decision was issued on March 31, 2016, and the Defendant filed its Application on April 28, 2016. The Appellant argued that rule 14.8(2)(a)(iii) gave it one month after the date of the Decision by which to apply. The Plaintiff argued that it should have been brought within the ten-day period contemplated by *BIA* Rules, rule 31(1). Rowbotham J.A. noted that there was a potential for mischief if the *BIA* Rules, rule 31(1) did not apply; however, this issue did not need to be decided, given the Court's earlier conclusions. Rowbotham J.A. stated that, where a party fails to bring a Leave Application within ten days, and then files to obtain an extension of time, it can further delay the process by waiting a month rather than ten days to apply for permission to appeal to a full panel of the Court. The Defendant's Applications were dismissed.

KIKINO METIS SETTLEMENT V METIS SETTLEMENT APPEAL TRIBUNAL, 2016 ABCA 260 (WAKELING JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant, Kikino Metis Settlement, applied, pursuant to the *Metis Settlement Act*, RSA 2000, c M-14 ("MSA") and Rule 14.5(1)(f), for permission to appeal questions of law arising from an Order by the Metis Settlement Appeal Tribunal which set aside a membership decision by the Kikino Metis Settlement Council (the "Council"). The Court noted that, to be granted permission to appeal, the MSA requires that the Applicant's question must be a question of law or jurisdiction. Further, the resolution of the question must be of sufficient importance to the Metis community.

The Court of Appeal considered Rule 14.5 and the MSA, and held that the issues on appeal, regarding whether the Council validly exercised its jurisdiction in denying membership, were questions of law and of sufficient importance to the Metis community. As such, permission to appeal was granted.

STYLES V CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS, 2016 ABCA 218
(MCDONALD JA)
Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

The Canadian Association of Counsel to Employers ("CACE") applied to intervene in an Appeal brought by an employer regarding a dispute about the employee's rights pursuant to a long term incentive plan. CACE is a not for profit corporation and association of employment lawyers. Its mandate is to ensure that advancements in Canadian law adequately reflect the interest of employers in many different contexts.

Justice McDonald noted that Rules 14.37(2) and 14.58 govern the authority to grant intervener status in an Appeal and to impose any conditions. As per Rule 14.58(3), the intervener is not permitted to raise or argue issues not raised in the Appeal, unless specifically permitted. The test for intervener status is whether the Applicant: (i) is directly and significantly affected by appeal; and (ii) has experience and a fresh perspective on the subject matter of the Appeal that is useful for its resolution.

In analyzing the factors to consider, McDonald J.A. held that CACE has no more direct interest in the outcome of the Appeal than do employment lawyers generally. Precedential value of a case does not constitute a direct interest justifying intervener status. Further, counsel for the employer may simply argue what principles CACE intended to address on the Appeal. As such, CACE would not bring a unique or fresh perspective to the Appeal. Intervener status was therefore denied.

ORPHAN WELL ASSOCIATION V GRANT THORNTON LIMITED, 2016 ABCA 238 (MARTIN JA)
Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

Four entities sought leave to intervene in a Constitutional Appeal. Martin J.A. noted that Rule 14.37 gives a single Appeal Judge the jurisdiction to grant permission to intervene. Similarly, Rule 14.58(3) provides that Intervenors cannot raise new issues on appeal. None of the Applicants attempted to raise new issues.

Martin J.A. outlined the two step test for granting intervener status that was enumerated in *Pendersen v Alberta*, 2008 ABCA 192. First, the Court must consider the subject matter of the Appeal. Second, the Court should assess the proposed Intervenor's interest in that subject matter. This analysis is conducted to determine (1) when the Appeal's outcome will significantly impact the proposed Intervener, and (2) to assess the unique viewpoints or knowledge that the proposed Intervener could convey on appeal.

Justice Martin noted the factors that should be considered in granting intervenor status, including: the direct affect an Intervenor might have on the Appeal; whether the Intervenor's presence is necessary to properly decide the issues; whether or not the Intervenor's interest in the proceedings fully protects the parties; whether intervention might unnecessarily delay the proceedings; and whether the intervention could transform the Court into a political battle. Although the power to intervene is discretionary

and should be granted sparingly, His Lordship noted that intervenor status is often granted in cases that have far-reaching policy implications, and where complex constitutional issues are raised. In such cases, the unique perspective an Intervenor could bring is important.

Since all four Applicants would be significantly affected by the outcome of the Appeal, and each Applicant would provide unique perspectives in resolving the Appeal, all Applicants were granted permission to intervene.

SUNCOR ENERGY INC V UNIFOR LOCAL 707A, 2016 ABCA 265 (PAPERNY JA)
Rules 14.37 (Single Appeal Judges) and 14.58 (Intervenor Status on Appeal)

Several companies applied for leave to intervene in an Appeal from a Judicial Review of the Random Alcohol and Drug Testing Policy Grievance Arbitration, submitting that they would be "directly and significantly" affected by the outcome of the Appeal, and that they could provide the Court with important and unique assistance. The Applicant Intervenors were employer organizations involved in promoting work site safety in the industrial construction, mining, electrical and upstream oil and gas industries. The arbitration Decision concluded that the business interest served by random testing was insufficient to override the employee's right to privacy. The reviewing Judge quashed the panel's Decision and sent the matter to be reheard.

The Court noted that, under Rules 14.37(2)(e) and 14.58, an Appeal Judge is authorized to grant permission to any person to intervene in an Appeal and can impose terms and conditions on the intervention. The Court is required to consider the subject matter of the Appeal and determine whether the proposed Intervenor's interest warrants granting intervenor status. The proposed Intervenor must demonstrate an ability to provide special expertise or a fresh perspective, which would bring some benefit to the proceedings. In this case, the Court noted that the subject of the Appeal was narrow; however, it was likely to engage larger policy issues that could be useful if they were informed by the perspective offered by the industry representatives. Further, the fact that two of the Applicants were granted intervenor status in the lower Court was an additional factor that militated in favour of the Applicants. Paperny J.A. noted that Intervenors in the lower Court were not automatically parties to the Appeal. The Court had jurisdiction to control its own process and was entitled to determine whether and to what extent an intervention was to be allowed on Appeal.

Paperny J.A. considered the leading authority and the relevant factors for determining whether to grant Intervenor status: will the Intervenor be directly affected by the Appeal; is the presence of the Intervenor necessary for the court to properly decide the matter; might the Intervenor's interest in the proceedings not be fully protected by the parties; will the Intervenor's submission be useful and different or bring particular expertise to the subject matter of the Appeal; will the intervention unduly delay the proceedings; will there possibly be prejudice to the parties if intervention is granted; will intervention widen the *lis* between the parties; and will the intervention transform the Court into a political arena. Her Ladyship observed that there was an additional factor which militated in favour of granting intervenor status: the role taken by the Intervenors in the Court below; whether the submission of the Intervenors were necessary or helpful in informing the decision being reviewed; whether the issues in the Appeal were the same as in the Court below, or whether the issues as framed on appeal could continue to impact the Applicants' interest; and whether the particular perspective of the Applicants can continue to inform the discussion as framed on appeal.

The Court granted permission for the Applicants to intervene on the conditions that they were limited to filing one Joint Factum of 20 pages, but were not granted leave to make oral submissions, unless the panel hearing the Appeal determined otherwise.

BERGSTROM V BEAUMONT (TOWN), 2016 ABCA 221 (WAKELING JA)
Rules 14.40 (Applications to Single Appeal Judges), 14.45 (Application to Admit New Evidence) and 14.70 (No New Evidence Without Order)

The Applicant, Bergstrom, sought permission to appeal the Decision of the Respondent town's Subdivision and Development Appeal Board under Section 688(2) of the *Municipal Government Act*, RSA 2000, c M-26 ("MGA"). The Respondent had revoked the Applicant's permit for a home-based business, issuing brief Reasons for Decision after a Hearing which the Applicant did not attend. The Applicant challenged the sufficiency of those reasons.

The Applicant submitted an Affidavit in support of her Application pursuant to Rule 14.40(1)(b). Wakeling J.A. noted that, while 14.70 of the Rules of Court and Section 689(1) of the MGA collectively state that the Record on Appeal will consist of only the evidence before the Board, those rules do not apply to an Application for Permission to Appeal. Affidavit evidence is permissible on an Application for Permission to Appeal for two distinct purposes: first, to set out facts challenging the procedural fairness of the process, including allegations of bias; and second, to establish that a question of law for which the Applicant seeks permission to appeal is of importance to the Applicant or to the community. Justice Wakeling determined that the Applicant's Affidavit was merely an attempt to introduce evidence that could have been presented to the Board, and thus was an attempt to circumvent Rule 14.70. In order to do this, the Applicant would have had to file an Application under Rule 14.45 for permission to adduce new evidence. The Affidavit was therefore inadmissible, as it was submitted for an improper purpose.

Wakeling J.A. held that the Applicant failed to meet the test set out in Section 688(3) of the MGA, and therefore the Application was denied.

ELAN CONSTRUCTION LIMITED V SOUTH FISH CREEK RECREATIONAL ASSOCIATION, 2016 ABCA 220 (FRASER, MARTIN AND WATSON JJA)
Rule 14.88 (Cost Awards) and Schedule C

The successful Appellant, Elan, sought direction from the Court of Appeal on the Costs of the Trial and Appeal. Elan argued that, for the Trial and Appeal Costs, a multiplier of 1.6 should be used to bring the amounts in Schedule C up to date with current money values, given that Schedule C had not been revised since 1998. Elan further argued for enhanced Costs due to alleged unnecessary delay and expense due to the Respondent's conduct. The Respondent submitted that its conduct during the litigation did not cause extensive problems and it did not act in bad faith.

The Court of Appeal noted that deferring the issue of Trial Costs to the Court of Appeal presents problems, as the Court does not have the benefit of the opinion of the Trial Judge as to the implications and effect of any strategies and conduct prior to the Appeal, and whether the parties' conduct led to unnecessary Costs and delay. A Trial Judge is better situated to consider whether a multiplier should be used, as opposed to the default Rule 14.88 for the Court of Appeal. Nonetheless, the Court determined that a multiplier of 1.5 of Schedule C, Column 4 was appropriate in this case.

GAULT ESTATE V GAULT ESTATE, 2016 ABCA 254 (SLATTER, ROWBOTHAM AND O'FERRALL JJA)
Rule 14.88 (Costs Awards) and Schedule C

The Parties applied for a ruling on the Costs consequences of the Court's Decision in *Gault Estate v Gault Estate*, 2016 ABCA 208. The Parties agreed that the successful Respondents were entitled to Costs in accordance with Rule 14.88; however, there was a dispute as to the scale of Costs.

The Court noted that the default rule is that Costs of the Appeal are awarded on the same scale as the Costs awarded by the Trial Judge. In cases where that is not applicable, the next default rule is that Costs are set based on the amount in dispute. If no amount is in dispute, Costs are awarded on Column 1 of Schedule C.

The Appellant argued that it had obtained some partial success in the Appeal since the Appeal was necessary to clarify the reach of some of the observations made by the Chambers Judge. However, the Court stated that, while this might be a relevant consideration, Costs are generally awarded based on the ultimate outcome and are not apportioned based on the outcome of a particular issue. The Court held that in this case the appropriate scale of Costs was Column 3 and awarded assessable fees of $5,000 plus reasonable disbursements to the Respondents.