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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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BAKER V DROUIN, 2017 ABQB 204 (JEFFREY J)
Rules 1.1 (What These Rules Do) and 3.15 (Originating Application for Judicial Review)

The Applicant, Baker, sought Judicial Review by way of Originating Application of a decision of the Alberta Workers' Compensation Appeals Commission ("AWCAC"), in which the AWCAC held that Baker was not entitled to an increase of his "permanent clinical impairment rating" due to insufficient evidence. The AWCAC argued that the Application should be struck because it was not properly served. Although Baker had filed his Application within six months of the decision, it was not served within the deadline on the AWCAC or any other party.

Justice Jeffrey first noted that there was a six month deadline to file and serve an Application for Judicial Review, pursuant to both Rule 3.15(2), and section 13.4 of the *Workers' Compensation Act*, RSA 2000, c W-15. Additionally, Rule 3.15(3) required that the Attorney General for Canada or Minister of Justice and Solicitor General (or both) be served, along with the administrative body whose decision was being reviewed. Justice Jeffrey explained that the six month deadline set out under Rule 3.15 is strictly applied; this ensures that administrative decisions had finality. The Rules did not provide the Court with discretion to extend the deadline for service.

Justice Jeffrey considered whether the Court had the inherent jurisdiction to extend the deadline. His Lordship

noted that inherent jurisdiction should be exercised sparingly, and can be limited by statute. Since both the Rule 3.15(2) and the *Workers' Compensation Act* specifically disallowed extensions of the six month deadline, His Lordship held that the time limit could not be extended. Baker's Originating Application for Judicial Review was dismissed.

1985 SAWRIDGE TRUST V ALBERTA (PUBLIC TRUSTEE), 2017 ABQB 299 (THOMAS J)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules), 5.13 (Obtaining Records from Others), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Sawridge First Nation ("Band"), within the context of Case Management, sought a Cost Award for an abandoned Rule 5.13 Application as against the Public Trustee who was brought into the proceedings to represent the interests of potential beneficiaries of a trust, which was set up by the Band in 1985 ("Trust"). The Band was not a party to the Action.

The Band argued that in 2015 it had successfully obtained an adjournment to certain Applications which the Public Trustee opposed. The Band argued further that the Public Trustee abandoned their Rule 5.13 Application after the Band had disclosed its records. The Band argued that it was forced to prepare written materials in response to the Application, and maintained that Costs were justified as Rule 5.13(2) amounts to an obligation of the Public Trustee to pay for records produced under Rule 5.13. Ultimately, the Band argued that based on Rules 1.1, 1.2 and 10.29, the Court should use Costs to "encourage efficient litigation", and that a successful party should receive Costs.

Thomas J. noted that Rule 10.29(1) creates a "presumption" that the successful party in an application will receive Costs, and the Court has "exceptionally broad authority to make cost orders as they see fit", in accordance with Rules 10.31 and 10.33. Thomas J. reviewed the Public Trustee's actions "in a global sense", and noted that the Court's approach should be "consistent with the general purpose served by cost awards". Noting that the overarching litigation was not adversarial, but rather intended to protect the rights of the beneficiaries of the Trust, Justice Thomas denied the Cost Award against the Public Trustee.

Justice Thomas noted that the purpose of Rule 5.13(2) is to limit the financial burden imposed on a party who has been ordered to produce documents pursuant to a Court order. In this case, the Trust was going to indemnify the Band for its involvement in the Action. Thomas J. held that it was unnecessary to order payment to the Band pursuant to Rule 5.13(2).

JORDAN V ATTORNEY (JUSTICE AND ATTORNEY GENERAL), 2017 ABQB 293 (MASTER MASON)
Rules 1.2 (Purpose and Intention of these Rules), 3.33 (Reply to Defence), 3.62 (Amending Pleading), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.5 (Variation of Time Periods)

After he was acquitted of criminal charges, the Plaintiff commenced proceedings against a variety of individuals and government bodies, including the Attorney General of Canada. The Plaintiff initially made a number of allegations against the Defendants, but by the time the within Applications were heard, only the claim for malicious prosecution remained. The Attorney General applied to summarily dismiss the Plaintiff's Claim pursuant to Rule 7.3 Alternatively, it sought to strike the allegation under Rule 3.68, as constituting an abuse of process. The Plaintiff cross-applied to amend his Amended Amended Statement of Claim.

Master Mason first noted that if an Application for Summary Judgment and an Application to amend Pleadings are heard together, the "general rule" is that the Application to amend is heard first. The Court cited Rule 3.33 as the basis for filing a Reply to a Statement of Defence, but noted that pursuant to Rule 3.33(3), this must be done within 10 days. However, it had been approximately four years since the Attorney General served its Statement of Defence on the Plaintiff. Master Mason considered whether the time period could be extended under Rules 13.5(2) and (3) and noted that the decision to extend time is discretionary, but

that certain factors should be considered, including: "the length of the delay; the explanation for the delay; and the relative prejudice to the parties." If the delay is significant, explanatory evidence is required. Master Mason also noted that the Court should not "act without purpose" in extending a time period.

Master Mason considered Rule 1.2, and opined that the Rules of Court should be used to facilitate the fastest ways to resolve legal claims, identify the true issues in dispute, and encourage Parties to resolve issues amongst themselves. Since the Plaintiff's Application to amend his Pleadings would not clarify issues or help to resolve the dispute, and due to the almost four year delay, his Application was dismissed.

In considering the Attorney General's Application to summarily dismiss the Plaintiff's Claim, the Court considered Rule 7.3 and observed that the decision to dismiss a claim summarily is based on whether there is a meritorious issue that genuinely requires a Trial, or whether the defence is "so compelling … such that it should be determined summarily". The onus is on the applicant to demonstrate why it is entitled to summary judgment, however, both parties are presumed to have put their "best foot forward". The standard that must be met is whether the Judge has confidence that the facts can be properly determined and applied to the law.

Master Mason held that the Claim against the Attorney General for malicious prosecution was without merit: the Attorney General was not vicariously liable for the conduct of the Calgary Police Service investigation that the Plaintiff complained about. As such, the Court dismissed the Plaintiff's Claim. Accordingly, the Court did not consider the Attorney General's alternative Application to strike the Claim.

1406998 ALBERTA LTD V DORBANDT, 2017 ABQB 321 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of These Rules), 4.16 (Dispute Resolution Processes), 4.17 (Purpose of Judicial Dispute Resolution), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.2 (When Something is Relevant and Material), 6.11 (Evidence at Application Hearings) and 8.4 (Trial Date: Scheduled by Court Clerk)

The Defendants applied to dismiss the Plaintiff's Action for delay under Rule 4.33 and 4.31. Master Schlosser's analysis focused on whether certain steps taken in the litigation advanced the Action for the purposes of Rule 4.33. The steps in question were: certain answers to Undertakings and further production, a Judicial Dispute Resolution procedure ("JDR"), and an Expert Report. Master Schlosser noted that the Court is to apply a functional approach when applying Rules 4.31 and 4.33 in order to determine if the steps in the litigation significantly advance the Action.

Master Schlosser stated that there are two categories of events in a lawsuit, primary and ancillary steps. Master Schlosser provided that primary steps are those which are not optional, such as of Pleadings, which are meant to frame the issues as mandated by Rule 1.2, and Questioning. Master Schlosser stipulated that ancillary steps are less easy to categorize and will require more analysis.

Master Schlosser held that, in this case, providing responses to Undertakings cannot be significant just because they were requested. Master Schlosser noted that JDR under Rule 4.16(1) and Rule 8.4(3)(a) was no longer required as it is currently suspended, and determined that JDRs are a "grey area" between primary and ancillary steps. Master Schlosser also noted that Rule 4.17 provides that the purpose of a JDR is to provide a party-initiated framework for a Court to actively facilitate a process in which the parties may resolve all or part of a Claim by agreement, and that Rule 4.16(1) only requires good faith participation. In this case, good faith participation in the JDR between the parties constituted a significant advance in the Action even though not all of the issues in the Action

were resolved. Master Schlosser held that, even though the provision of expert reports is not mandated by the Rules, they are useful to the Court. Master Schlosser referred to Rule 6.11, which provides that expert reports are available for use at a trial or during an application. Master Schlosser determined that the question to be asked in determining if an expert report is a significant step is: whether the report is "of any significant assistance in determining any of the issues in the pleadings". Master Schlosser determined that the Expert Report in this Action did not significantly advance the lawsuit.

Master Schlosser held that no significant steps had occurred in over three years; therefore the Defendant's Application under Rule 4.33 was granted. In the circumstances, the Court did not consider Rule 4.31.

VERWOERD V VERWOERD, 2017 ABQB 272 (RENKE J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.66 (Costs), 5.31 (Use of Transcript and Answers to Written Questions), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In a lengthy and complex dispute over land between family members, the Plaintiff alleged, among other things, breach of fiduciary duty and unjust enrichment. The Plaintiff applied to amend its Statement of Claim at Trial, citing Rules 3.65(1) and 3.65(4) which provide the Court with broad discretion to amend a pleading before or after the close of pleadings. Renke J. noted that a pleading may be amended no matter how careless or late, subject to four major exceptions, and determined that the amendments requested by the Plaintiff were generally only clarifying in nature. Justice Renke permitted the amendments.

Renke J. observed that Rule 3.66, which provides that costs, if any, which result from an amendment to a pleading are borne by the party filing the amendment unless the Court otherwise orders. Renke J. noted that Rule 10.33 sets out the factors the Court may consider when making a costs award, but did not award Costs to the Plaintiff for the successful Application to amend the Claim.

Justice Renke also considered the issue of read-ins. His Lordship applied Rule 5.31 which sets out the requirements for the use of transcript evidence from Questioning, and determined that the evidence from one of the Defendants did not admit any factual propositions advanced by the Plaintiff, nor was the Defendant precluded from contradicting the Plaintiff's propositions.

Following mixed results between the parties with respect to the substantive issues, Renke J. considered Costs between the parties and determined that, based on Rule 10.31(4), the Court may adjust the amount payable between the parties by way of deduction or set off if the party liable to pay Costs is also entitled to receive Costs.

HOMERSHAM V NEW URBAN (RAMSAY EXCHANGE) GP LTD, 2017 ABQB 384 (POELMAN J)
Rules 1.4 (Procedural Orders), 10.6 (Void Provisions) and 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges)

The Applicant, Homersham commenced a Review Application alleging that his clients, the Respondents had failed or refused to pay accounts rendered. The Review Officer referred several questions relating to the terms of the retainer agreement and the timeliness of the Review to a Justice of the Court of Queen's Bench for determination.

On the issue of timeliness, the Respondents objected to the review of accounts issued more than six months prior to the date the Review Application was filed on the basis of Rule 10.10(2). Justice Poelman rejected this argument, stating that "the six-month time limit does not apply to interim accounts as interim accounts can be changed and are not subject to taxation". Justice Poelman determined that the accounts in question were interim accounts because the retainer agreement provided for potential reductions in accordance with a cap on fees such that fees owed were not finally determined until year end.

Moreover, Poelman J. held that, even when Rule 10.10(2) does apply, the Court has jurisdiction pursuant to Rule 1.4(2) to extend the time period to bring an Application for Review. Justice Poelman applied the Court's jurisdiction

to grant an extension. In light of the "difficulties" arising between the parties, His Lordship held that it was reasonable for Homersham to wait until the end of the three-year term of the retainer agreement drew near to pursue the unpaid accounts. Further, there was no suggestion that an extension of time for Review would prejudice the Respondents.

MCKERNESS V WHITSON, 2017 ABCA 207 (SLATTER JA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 12.61 (Appeal from Provincial Court Order to Court of Queen's Bench), 12.63 (Transcripts), 12.65 (Non?Compliance by Appellant), 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court) and 13.5 (Variation of Time Periods)

A Decision of the Provincial Court granting a parenting Order in a family matter was appealed by the Plaintiff Mother to the Court of Queen's Bench who was granted an extension to properly file and serve her Notice of Appeal. The Defendant Father applied to the Court of Appeal for permission to appeal the Court of Queen's Bench's extension. Justice Slatter noted that Rule 12.61 allowed an Appeal as of right from the Provincial Court to the Court of Queen's Bench in family matters, but pursuant to Rule 12.71(1), there is no further appeal to the Court of Appeal, except with permission of the Court, on a question of law or jurisdiction.

Justice Slatter noted, among other things, that the Plaintiff Mother had failed to comply with: Rule 12.63(1)(b) by failing to file proof that the transcript had been ordered with her Notice of Appeal; and, Rule 12.63(2) by failing to file the transcript within three months of filing the Notice of Appeal. Although the Application for permission to appeal was unopposed, Justice Slatter considered the test for obtaining permission to appeal, since consent of the parties did not discharge the "judicial gate-keeping function of requiring permission to appeal". His Lordship noted that the test for obtaining permission to appeal varied depending on the subject matter and overall context, and included a number of overlapping factors, such as: whether there is an important question of law; whether there is a reasonable chance of success; and whether the delay will cause undue prejudice.

Justice Slatter observed that, in this case, some of the Father's grounds of appeal were weak. The Mother's failures to comply with Rules 1.5 and 13.5 were not sufficiently important to warrant a further Appeal, and the likely outcome of an Appeal would have been a direction that the Application be re-heard by the Court of Queen's Bench, causing further expense and delay. Rule 12.63(2) only permitted an extension of time for filing the transcripts within three months from filing, and Slatter J.A. observed that the Court has no jurisdiction to extend that time. However, Justice Slatter noted that Rule 13.5 allowed the Court to increase any period of time within the Rules. While the Father proposed to argue that Rule 13.5 did not apply, the reasons for that argument were not clear. Justice Slatter stated that it seemed that the Court could dismiss an appeal under R. 12.65(1) for failing to file the transcripts in time, but could "then immediately reinstate it under 12.65(2)".

Given the law and the parties' circumstances, the Court held that it was not appropriate to grant permission to appeal in this case. The Application was dismissed.

KOR MACHINING AND MECHANICAL LTD V KOR WELDING AND MACHINING INC AND SICO WELDING AND FABRICATION INC, 2017 ABQB 290 (MASTER ROBERTSON)
Rules 1.7 (Interpreting these Rules), 5.27 (Continuing Duty to Disclose), 6.6 (Response and Reply to Application) and 9.24 (Fraudulent Preferences and Fraudulent Conveyances)

This was an Application for a declaration that a transfer of chattel from the Defendant to the Respondent was a fraudulent conveyance. The Plaintiff had brought a debt Action for approximately $215,000 against the Defendant, and then a Summary Judgment Application, which was granted. Although this fact was not learned until much later, the Defendant executed an asset purchase agreement with the Respondent, SICO Welding and Fabrication Inc. ("SICO") on the eve of the hearing of the Summary Judgment Application, conveying all of the assets of the Defendant, including the interest in various business contracts, to SICO for some $24,000, to be paid in $500 monthly installments. This purchase agreement was discovered during an examination in aid of execution.

In response to the Plaintiff's Application, the Defendant's sole director, Mr. Tremblay, who was also the sole director of SICO, filed an Affidavit attesting that the value of the conveyed assets was $24,175. The Master rejected this evidence as suspicious. An appraisal was prepared in response to the present Application and it was attached as an exhibit to Mr. Tremblay's Affidavit. The appraiser did not provide any sworn testimony. The appraisal was not done until seven months after the conveyance and was prepared five days after the Plaintiff's Application was filed. Finally, the Master noted that it was not used as the basis of the transaction; it was clearly prepared in connection with the defence of the Application.

Mr. Tremblay also gave conflicting evidence with respect to how the $24,000 payment from the Respondent to the Defendant was carried out. It was clear the evidence given at the examination in aid of execution was, or became untrue. Master Robertson observed that Rule 5.27 applies to examinations in aid of execution as a result of the "analogy rule" Rule 1.7, and ordered that Mr. Tremblay provide a correcting Affidavit once the truth of the matter became known.

The Master also held that Mr. Tremblay's Affidavit had been filed late, essentially on the eve of the Application. Master Robertson noted that Rule 6.6 permitted the Court to disregard the evidence, but Master Robertson declined to do so, as it formed the basis of the finding that the conveyances were fraudulent.

The Defendant argued that it was not insolvent at the time of the transfer and thus the conveyance could not be fraudulent. Master Robertson noted that the Defendant was facing Summary Judgment for a substantial sum, and it had conveyed all, or substantially all of its assets so that Mr. Tremblay could essentially carry on the same business with the same assets. Master Robertson also noted that it was no answer that the Plaintiff had not yet obtained Judgment at the time of the transfer, as Rule 9.24 provides that where the intention of a transaction is to defeat creditors, it is not necessary for a Judgment to have been obtained prior to the transfer.

Because the transfer was between non-arm's-length parties, the onus shifted to the transferor to prove the transfer was not done with the intention to defeat creditors. Having failed to do so, the Master held that the conveyances were fraudulent.

STRATUM PROJECTS ALBERTA INC V AMAN BUILDING CORPORATION, 2017 ABQB 351 (MASTER SCHLOSSER) Rules 2.10 (Intervenor Status), 3.59 (Claiming Set-Off) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Applicant, The Guarantee Company of North America, sought to participate in proceedings where the Plaintiff had commenced an Action against a company, who subsequently became bankrupt, and the Trustee in bankruptcy declined to defend. The Applicant's surety was in respect of a lien bond which replaced the builders' liens filed by the Plaintiff, bringing the matter within the joint purview of the *Builders Lien Act*, RSA 2000, c B-7, and the Rules of Court.

Master Schlosser noted that Rule 3.74 is somewhat more restrictive than the joinder provision under the former Rules. Former Rule 38 granted the Court wide powers to add parties with or without the Application of any Party; whereas, current Rule 3.74(2)(b) requires that an Application to add any party who is not a plaintiff must be "made by a party". Master Schlosser held that this created "a technical bar to the Guarantee's application".

As for Intervenor status pursuant to Rule 2.10, Master Schlosser pointed out that the term "Intervenor" is not defined by the Rules. The technical meaning was developed through the common law, which grants the Intervenor standing but on a lesser basis than a full Party.

Master Schlosser considered the factors for granting Intervenor status as set out in *Suncor Energy Inc v Unifor (Local 707 A)*, 2014 ABQB 555:

1) Will the proposed interveners be specially or directly affected by the decision of the Court…;

2) Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court…;

3) Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties…;

4) Will the proposed Interveners presence 'provide the court with fresh information or a fresh perspective on a constitutional public issue' …. [citations omitted].

Master Schlosser added that the considerations included whether granting the right to intervene would unduly prejudice a party. Master Schlosser held that the Applicant's rights would be affected by the outcome of the Action and that their interest would not be fully protected or argued. However, Master Schlosser noted that the Applicant did not bring any special expertise, insight, or fresh information, and that "mere financial interest usually isn't enough". Master Schlosser ultimately held that the unique circumstances of this case were not suitable for the application of Rule 2.10.

Master Schlosser granted the Application to add the Applicant to the Action for the limited purpose of promoting the defence of the Defendant since there was no real prejudice, and it would fulfil a "natural justice component" by giving a voice to the Defendant's position.

MATTHEWS V MATTHEWS, 2017 ABQB 260 (VEIT J)
Rules 3.8 (Originating Applications and Associated Evidence), 3.11 (Service and Filing of Affidavits and Other Evidence in Reply and Response) and 10.33 (Court Considerations in Making Costs Award) and Schedule C

The parties could not agree on Costs following a contested morning Chambers Application in which the Respondent, Mr. Matthews, was successful. The Respondent argued that he should be entitled to Costs under tariff item 1(1) for filing an Affidavit, in addition to the Costs under tariff item 7(1) for the contested Application. Justice Veit stated that Schedule C employs a "block tariff" approach. Veit J. noted Rules 3.8 and 3.11 as examples where the Affidavits referred to in Schedule C item 1(1) are necessarily connected to the commencement documents or pleadings: an Affidavit must accompany an Originating Application, pursuant to Rule 3.8, and an Affidavit may be filed in lieu of a Statement of Defence in response to an Originating Application, pursuant to Rule 3.11. In this case, the Application was not a commencement document, and therefore, the Respondent was not entitled to Costs under tariff item 1(1).

The parties also disputed the appropriate Schedule C column upon which to calculate Costs. The Respondent argued that Costs should be calculated on column 3 since the Originating Application sought an Order that the proceeds of sale, valued at $180,000, be held in trust. The Applicant argued that the Application sought declaratory and injunctive relief; therefore, column 1 was appropriate because no monetary amount was claimed for.

Justice Veit held that, if the results of a declaration are clear and measurable, the Court may apply the appropriate monetary column. As such, Costs were awarded on column 3 since the declaration of trust was easily calculated at $180,000. Finally, the Respondent argued that Costs should be increased by a factor of 1.5% since he was given short notice of the Application. Veit J. held that, despite the formal Application being filed and served the day prior to the Hearing, the Respondent had been advised verbally of the intended Application within the time set in the Rules. Therefore, no increase in the Costs award was granted.

TRAN V COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA, 2017 ABQB 337 (ROSS J)
Rule 3.22 (Evidence on Judicial Review)

The Applicant, Tran, sought to introduce fresh Affidavit evidence in a Judicial Review of a Decision of the Respondent, the Complaint Review Committee of the Alberta College of Physicians and Surgeons. The Respondent had dismissed the Applicant's complaints against two physicians regarding the care they had provided to the Applicant's mother. In her Affidavit, the Applicant reiterated concerns which had been expressed before

the Respondent; made arguments with respect to the sufficiency of the reasons contained in the Respondent's Decision; and criticised the procedural fairness of the Respondent's complaint process.

Ross J. noted that Rule 3.22 provides the Court with the discretion to allow relevant affidavit evidence on an Application for Judicial Review, but that it is exercised only in exceptional circumstances. In particular, where the Affidavit evidence is "intended to alter or supplement the factual record used by the tribunal to decide the issue" such evidence cannot be introduced. Justice Ross found that much of the Affidavit did intend to alter or supplement the record before the Respondent at first instance. Portions of the Affidavit were ruled inadmissible. However, the portion of the Affidavit concerning the complaint process itself, including the delayed provision of the Investigation Report were found to be admissible for the limited purpose of determining the fairness of the proceeding before the Committee.

In the result, however, the Application for Judicial Review was dismissed.

AL-GHAMDI V ALBERTA, 2017 ABCA 208 (SLATTER JA)
Rules 3.28 (Effect of Not Serving Statement of Claim in Time), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 13.5 (Variation of Time Periods)

The Plaintiff, Al-Ghamdi, sought to appeal a Decision by the Case Management Justice, but the Appeal was struck for failure to comply with the filing deadlines for Fast Track Appeals. Al-Ghamdi argued that he was not aware that the Appeal was a Fast-Track Appeal, and that his Appeal had sufficient merit that it should be reinstated.

Justice Slatter noted that the Court should consider several factors when determining whether to reinstate an Appeal, specifically: whether there is arguable merit to the Appeal; whether there is an explanation for why the Appeal was taken off the list; whether the Appellant moved promptly to cure the defect and have the Appeal restored; whether there was an intention to proceed with the Appeal; and whether there was prejudice to the respondents.

Al-Ghamdi argued that several of the Respondents had failed to comply with strict filing deadlines for briefs for the Application which resulted in the Decision being appealed. Slatter J.A. noted that Rule 13.5 gives the Court wide discretion to extend timelines. Al-Ghamdi's objection that the Respondents had failed to file applications to extend the time to file their briefs was a highly technical objection, and did not aid Al-Ghamdi in showing that there was merit to the Appeal in question. Al-Ghamdi argued further that it was improper for the Case Management Justice to set aside the Defendants' Noting in Defaults. Slatter J.A. noted that Rule 9.15(3) permits a Court to set aside a Noting in Default on any terms it considers just. Justice Slatter stated that, broadly speaking, there are two bases on which a noting in default can be set aside:

(a) In circumstances where the defendant should not have been noted in default in the first place, usually because there was not good service of the statement of claim; and

(b) In circumstances where the defendant was properly noted in default, but in the circumstances it is fair and just to allow that defendant an opportunity to defend the claim on the merits.

Justice Slatter stated that the Case Management Justice correctly held that the overall goal was fairness and therefore concluded that it was appropriate to allow the Defendants the opportunity to defend on the merits. Slatter J.A. further observed that setting aside a Noting in Default is a discretionary matter and it was not an error for the Case Management Justice to decide that the Defendants who had been noted in default should be allowed to defend given the complex nature of the eight inter-related Actions with over one hundred Defendants.

Al-Ghamdi also sought to appeal the Costs awards made against him in the Application below. Justice Slatter noted that Costs are highly discretionary and were appropriate in this case. In sum, Slatter J.A. declined to reinstate the Appeal.

STANFIELD V SCHNEIDER, 2017 ABQB 381 (MASTER ROBERTSON)
Rules 3.33 (Reply to Defence), 3.67 (Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 6.3 (Applications Generally), 13.5 (Variation of Time Periods) and 13.6 (Pleadings: General Requirements)

The Plaintiff applied to amend his Statement of Claim (the "Amendment Application"), providing only informal notice to the Defendants on the day before their scheduled hearing to strike the Statement of Claim pursuant to Rule 3.68 (the "Striking Application"), on June 8, 2017. At the time the Amendment Application was filed, the Clerk also filed the amended Statement of Claim in error (the "Amended SOC"), despite the fact that the pleadings had closed. Master Robertson directed that the Amended SOC be struck as it was not filed pursuant to an Order, nor consent of the parties.

Master Robertson heard the Plaintiff's submissions with respect to amending the Statement of Claim, treating the Amended SOC as a proposed Statement of Claim. Noting that an Application to amend a Statement of Claim must be heard before an Application to strike pursuant to Rule 3.68, Master Robertson adjourned the Striking Application.

Master Robertson stated that Rule 6.3 governs the amount of notice that parties ought to provide in respect of an Application. The Court may shorten the amount of notice required by abridging the time for service pursuant to Rule 13.5. However, there was no reason that the Amending Application was brought on such short notice given that the Striking Application was filed months earlier.

No Affidavit was filed in support of the Amending Application. Instead, the Plaintiff referred to other evidence, including an Affidavit filed December 20, 2016 (the "December Affidavit"). Master Robertson held that the Amended SOC was "almost a complete reproduction" of the December Affidavit, and therefore "an attempt to plead both evidence and argument". This raised the question as to whether the Plaintiff was attempting to circumvent Rules 3.68(3) and 3.68(2)(b) in the context of the Striking Application, through the Amended SOC. Master Robertson held that the Plaintiff contravened Rule 13.6(2)(a), which mandates that evidence is not to be plead, by quoting the December Affidavit "almost exactly". In addition, Master Robertson held that the Amended SOC did not clarify the Claim; accordingly, there was no reason to amend the Statement of Claim. Ultimately, Master Robertson dismissed the Amending Application.

STEFANYK V STEVENS, 2017 ABQB 402 (HOPKINS J)
Rules 3.43 (How to Make Claims Against Co-Defendant), 3.45 (Form of Third Party Claim) and 7.3 (Summary Judgment)

One of the Defendants, First Capital (Eastview) ("First Capital") appealed the Decision of a Master who had granted Summary Dismissal of the Plaintiff's claims as against the Defendant, Sobeys Capital Incorporated ("Sobeys"). First Capital also applied for leave to file Notice to Co-Defendant and/or a Third Party Claim against Sobeys as well as against the other Co-Defendants, Chris Martin ("Martin") and Kyle Stevens ("Stevens").

Hopkins J. considered Rule 7.3 and recent authority, and outlined the principles which are applicable in a Summary Judgment Application:

A. Summary Dismissal can be granted if a disposition that is fair and just to both parties can be made on the existing record.

B. Summary Dismissal can be granted where there is no merit to the claim. To have merit, there must be a genuine issue of a potentially decisive material fact.

C. There is no genuine issue requiring a trial when the fair and just process allows for the necessary findings of fact and allows the law to be applied to the facts in a proportionate, expeditious and less expensive manner that achieves a just result.

D. The key is whether the circumstances require viva voce evidence in order to properly resolve the case, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily.

E. The Respondent must put its best foot forward at the Summary Dismissal application.

Justice Hopkins also noted that Summary Judgment is appropriate when the "non-moving party's position is without merit". His Lordship allowed the Appeal of the Master's Decision on the grounds that Sobeys had failed to show that the Plaintiff's claims against it were without merit as required by Rule 7.3. Sobeys' status in the Action was as an occupier for the purposes of the *Occupier's Liability Act* RSA 2000, c O-4, and its common law obligations to the Plaintiff remained in dispute based on the existing record.

Hopkins J. also granted First Capital leave to file Notice to Co-Defendant and/or a Third Party Notice against Sobeys. Despite the fact that the filing deadlines required by Rules 3.43 and 3.45 had been missed, the length and reason for the delay was held to be reasonable, and His Lordship determined that Sobeys would not suffer any prejudice as a result of the late filing.

However, Hopkins J. denied First Capital's Application for leave to file Notice to Co-Defendant and/or Third Party Notice against the other Co-Defendants, Martin and Stevens. No reason was provided for the delay in filing against Martin and Stevens. Justice Hopkins held that Martin and Stevens would suffer significant prejudice if leave was granted as neither individual had been served with the Application.

RICCIONI V LAW SOCIETY OF ALBERTA, 2017 ABQB 261 (MASTER ROBERTSON)
Rules 3.62 (Amending Pleading), 3.67 (Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 6.3 (Applications Generally), 6.6 (Response and Reply to Application) and 13.6 (Pleadings: General Requirements)

The Defendants applied to strike the Plaintiff's Amended Statement of Claim pursuant to Rule 3.68, arguing that: the Plaintiff had no cause of action against the Defendants; the Action was frivolous; and the Claim was an abuse of process. The Plaintiff cross-applied to amend his Amended Statement of Claim and to add four more Defendants to the Claim in place of some of the "John Doe" Defendants.

Master Robertson noted that pursuant to Rule 3.67, the pleadings had closed almost a year prior to the Plaintiff's Cross-Application, and that the Plaintiff initially filed the Amended Amended Statement of Claim without the consent of the Defendants or without the approval of the Court, which was in violation of Rule 3.62. Master Robertson determined that, based on the violation of Rule 3.62 alone, the Amended Amended Statement of Claim should be struck.

Master Robertson noted that the parties had not addressed Rule 6.3(3) which requires that the proposed new parties to the Amended Amended Statement of Claim be served with the Application at least five days before the Application. Further, the parties had not addressed Rule 3.74, which sets out the requirements for adding, removing or substituting parties after the close of pleadings. Master Robertson noted that Rule 6.6 provides that the Respondent to an Application must serve their Affidavit on the Applicant in a reasonable time before the Application, and that the Affidavit should not be considered unless the Court rules otherwise. In this case, Master Robertson determined that the Respondent's Affidavit should be taken into account, even though it was not served on the Applicant in a reasonable time before the Application.

Master Robertson determined that the Court should first consider the Plaintiff's Cross-Application to amend before considering the Defendants' Application to strike the Claim. Master Robertson stated that some modest evidence is required for amendments, with an increase in the level of evidence required when allegations of fraud or malicious conduct are made. Further, the Court is entitled to refuse an amendment when the proposed cause of action was limitation barred, or when there is "an element of bad faith associated with the failure to plead the amendment in the first instance". Master Robertson held, though the Plaintiff's amendments were obscured by heavy and indiscriminate underlining, that no proper claims were proposed by the amendments and dismissed the Plaintiff's Cross-Application to amend the Amended Statement of Claim.

Master Robertson considered the Defendants' Application to strike the Plaintiff's Claim, noting that Rule 3.68 sets out the Court's options on such Applications. Master Robertson observed that evidence may be reviewed on Applications to strike under Rule 3.68, except when the Application is made pursuant to Rules 3.68(2)(b) and 3.68(3). Master Robertson noted that the Plaintiff's Claim made broad allegations against all Defendants, and that while it is permissible to plead broad allegations in a Statement of Claim, the Pleading is required to include facts upon which a party relies pursuant to Rule 13.6(2). The Plaintiff's Amended Amended Statement of Claim did not include such facts. Master Robertson therefore struck the entire Claim.

HUMPHREYS V TREBILCOCK, 2017 ABCA 116 (COSTIGAN, WATSON AND WAKELING JJA)
Rules 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes) and 4.31 (Application to Deal with Delay)

The Defendants appealed an Application pursuant to Rule 4.31 in which the Defendants sought to dismiss the Plaintiff's Action for long delay. The Action was commenced in 2006, and the Court of Appeal noted that it probably would not be tried until 2020. The Court of Appeal thoroughly reviewed Rule 4.31, including its history and its interpretation.

The Court opined that litigation delay is a long-standing and corrosive problem for justice and the rule of law. Litigation delay has the potential to, and often does inflict substantial harm on the parties. The panel noted that Courts have mechanisms to address delay, but often choose not to use them. The new Rules implemented in 2010 were meant "to facilitate the quickest means of resolving the claim at the least expense". The Court noted that foundational Rules 1.2(1) and 1.2(2)(d), 4.1, and 4.2 inform the Court's analysis under Rule 4.31. A Court considering a Rule 4.31 Application should balance the moving party's interest in an expeditious resolution with the non-moving party's interest in having a just determination of the dispute.

In interpreting how to apply Rule 4.31, the Court noted that neither "delay" nor "significant prejudice" is a defined term in the Rules. The Court noted that a thorough analysis of the meaning of these terms had not been undertaken since as far back as 1969, when the first iteration of Rule 4.31 was enacted. The Court stated that delay is a "relative concept", and it is:

> [T]he product of a comparison between the point on the litigation spectrum that the nonmoving party has advanced an action as of a certain time and that point a reasonable litigant acting in a reasonably diligent manner and taking into account the nature of the action and stipulated timelines in the rules of court would have reached in the same time frame. …

The litigant is thus compared against the "reasonable litigant" advancing the same Claim under comparable conditions. Where the differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable, the delay becomes inordinate. Minor or trivial delay does not justify depriving a plaintiff of the right to a judicial determination of its dispute. What constitutes inordinate delay may be informed by the nature of the allegations. Where the allegations are serious, in particular where a plaintiff makes allegations of fraud, it may be under a heightened obligation to prosecute the action with expediency. The Court noted that any delay in the prosecution of a fraud allegation runs the risk of being characterized as inordinate.

The Court noted that prejudice in the context of the Rule means "injury or damage suffered by the moving party as a result of the non-moving party's dilatory prosecution of its action". It is not necessary that the injury or damage be to the defendant's ability to present a full answer and defence to the allegations – any injury is prejudicial. "Prejudice" includes both litigation and non-litigation prejudice, and can be suffered just as much by individuals as by corporations. The Rule requires that the prejudice be "significant". Significant, for the purpose of Rule 4.31, means that which is more than minor or trivial. It must be important enough to ground the serious consequences of a successful Rule 4.31 Application.

The Court noted that Rule 4.31(2) creates a rebuttable presumption: proof of inordinate and inexcusable delay is proof of significant prejudice. That is, that once the Court is satisfied of the basic fact that inordinate and inexcusable delay is a feature of the Action, the presumed fact that significant prejudice has occurred must be found unless the non-moving party proves on the balance of probabilities that no significant prejudice has been suffered.

Finally, the panel stated that a Court must consider six "essential Rule 4.31 queries":

> First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
>
> Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
>
> Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?
>
> Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?
>
> Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action? …

In the present case, the Court of Appeal held that the Chambers Judge had failed to explain the finding that inordinate and inexcusable delay was not a feature of the Plaintiff's Action. The Court of Appeal also found that the Chambers Judge did not consider the required factors for a Rule 4.31 Application, and did not analyse whether there had been inordinate delay; rather, it began with the question of whether delay had caused the Defendants prejudice in the litigation. Further, the Chambers Judge had failed to address the Defendants' complaints about non-litigation prejudice. The Court of Appeal held that the record demanded the dismissal of the Plaintiff's Action.

The Plaintiff had attempted to explain their delay as resulting from of a number of changes in counsel, after their first lawyer was appointed to the bench in October of 2012. However, the Court of Appeal opined that this was not an adequate excuse: the Plaintiff was responsible for the conduct of their counsel. The Court found that there was no valid excuse for the Plaintff's delay.

The Court also observed that the Defendants had suffered significant litigation and non-litigation prejudice. The Statement of Claim sought damages of $3.5 million and alleged fraud. The Court found this had had significant deleterious effects on the Defendants in the business community. The Court held that the interest of the Plaintiffs in getting a judicial determination of their claims no longer outweighed the interests of the Defendants in carrying on business without the allegations of fraud lingering over their heads. Further, the witnesses who had not yet been questioned would be questioned on events which had occurred between 2003 and 2006.

In the result, the Court granted the Appeal and dismissed the Plaintiff's Action.

CONDOMINIUM CORPORATION NO 0321365 V PRAIRIE COMMUNITIES CORP, 2017 ABQB 359 (HALL J)
Rule 4.14 (Authority of Case Management Judge)

James Cuthbert and two related corporate Defendants (the "Applicants"), applied to the Case Management Judge to exclude or limit the use of an Expert Report at an upcoming Trial. The Applicants applied pursuant to Rule 4.14 which, Justice Hall noted, gives a Case Management Judge the same powers as a Trial Judge to adjudicate any issue prior to Trial.

The Applicants argued the Expert Report should be excluded or limited because it: addressed issues outside of the author's expertise; expressed opinions on the very matters in dispute before the Trial Judge; and contained information that was irrelevant to the matters in issue. The Respondent Plaintiff conceded that the Expert Report did contain some irrelevant information but argued an assessment of the Report's admissibility should be left to the Trial Judge. Hall J. stated that a Case Management Judge has the jurisdiction under Rule 4.14 to consider the admissibility of expert evidence even though the Rule is not express in this regard. Further, it is appropriate for a Case Management Judge to exclude all or part of an Expert Report in certain circumstances. A party should not be required to incur the costs of replying to an Expert Report that is clearly inadmissible. However, a Case Management Judge should exercise deference if a Trial Judge is better positioned to make a ruling on an Expert Report.

In this case, Justice Hall held that the Expert Report was clearly inadmissible as it opined on matters of law. However, His Lordship concluded that issues relating to the Expert's qualifications, as well as contested matters of relevance should be determined by the Trial Judge. Therefore, Justice Hall ordered the Respondent Plaintiff to produce a new Expert Report devoid of legal opinions and irrelevant information.

BECHIR V GOWLING LAFLEUR HENDERSON LLP, 2017 ABQB 214 (JEFFREY J)
Rules 4.22 (Considerations for Security for Costs Order) and 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

The Plaintiffs commenced a Claim against the Defendants alleging, among other things a breach of international law, negligent investigation, fraudulent withholding of shares in a corporation, abuse of process, and breaches of contract and trust. The Defendants applied for Security for Costs, with supporting Affidavits. In cross-examination on the Affidavits, the affiants refused to answer some questions and produce further records. The Plaintiffs applied unsuccessfully before a Master to compel the Defendants to provide the information, and subsequently appealed the Master's Decision.

Justice Jeffrey noted that Rule 6.7 entitles the Plaintiffs to cross-examine the Defendants' affiants, but the scope of the examination is restricted to what is relevant and material to the underlying Application.

The Plaintiffs argued that they were entitled to the requested information on the basis of either: (i) Rule 4.22(c), the "merits of the Action"; or (ii) Rule 4.22(e), "any other matter the Court considers appropriate". An assessment of the merits under Rule 4.22(c) varies depending on how far the litigation has progressed at the time of the Application for Security for Costs is brought. This factor does not determine which case is stronger; if both parties establish a reasonably meritorious case based on the pleadings and available evidence, it is a neutral consideration. The Defendants conceded that the Plaintiffs' Claim met the threshold for the purposes of the Security for Costs Application. Therefore, the requested information did not need to be provided in order for the Plaintiffs to satisfy Rule 4.22(c). Further, at this preliminary stage, Justice Jeffrey held that the defences met the requisite threshold of having a genuine air of reality. The requested information would not undermine the degree of merit of the defences raised and was therefore not material to Rule 4.22(c).

In respect of Rule 4.22(e), the Plaintiffs argued that public policy considerations were engaged by the information sought, namely, the interplay between investigations of private firms and international law. The Plaintiffs alleged that the Defendants breached international law through the governmental means used to investigate the firm; therefore, His Lordship held that this was not an "other matter" warranting separate consideration.

The Plaintiffs also argued that the requested information was connected to the Plaintiffs' financial position and the Defendants' conduct, and that this should be a consideration under Rule 4.22(e). Justice Jeffrey noted that any connection between the Plaintiffs' financial situation and the Defendants' conduct was relevant, particularly if the Defendants' wrongful conduct was alleged to be the cause of the Plaintiffs' impecuniosity. However, the requested information would not further inform any connection between the Plaintiffs' means and the impugned conduct of the Defendants. The Plaintiffs could prove their financial means without the information sought from the Defendants. The Appeal was dismissed.

THOMPSON V INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO 995, 2017 ABCA 193 (SCHUTZ JA)
Rules 4.22 (Considerations for Security for Costs Order), 10.29 (General Rule for Payment of Litigation Costs) and 14.5 (Appeals Only With Permission)

The Applicant, Thompson, unsuccessfully sought leave to appeal two Orders granted against him by the Case Management Judge: one which declared him a vexatious litigant and another which required him to post security for Costs. In the course of litigation against a local and an international union, the Applicant "filed a voluminous amount of documents, numerous and repetitious applications, and has launched unsuccessful complaints" which related to opposing counsel and several members of the judiciary.

Justice Schutz stated that Rule 14.5(4) "expressly precludes an appeal from an order denying leave to institute or continue proceedings". Her Ladyship noted the general test for leave to appeal under Rule 14.5 is whether: (a) there is an important question of law; (b) the proposed appeal has a reasonable chance of success; and (c) the delay will not unduly hinder the action or cause undue prejudice. While Rule 14.5(1)(j) requires that a vexatious litigant obtain permission to appeal any decision, it does not deny the right to appeal outright. Rather, the general test for permission to appeal under Rule 14.5 applies, with the additional burden on the Applicant "to show the case does not amount to an abuse of process".

The Applicant argued that the Case Management Judge was not entitled to order interim Costs because the terms of the Respondent union's collective agreement "stated that no legal costs are to be paid until a dispute is resolved". Schutz J.A. noted that Rule 10.29 provides that a successful party to an Application is entitled to Costs subject to various factors. The factors did not include collective bargaining agreements or other contractual relationships.

Rule 4.22 sets out the factors to consider when considering whether a party must post security for costs. With respect to the Application for permission to appeal the security for Costs Order, Justice Schutz held that the Case Management Judge had considered the applicable factors as the Order provided for payment of the security in two installments prior to Trial. In the result, Justice Schutz held that the Applicant had not raised any issues of general importance that had a reasonable chance of success on Appeal; therefore, the Applications for permission to appeal the vexatious litigant Order and the Security for Costs Order were denied.

LAY V LAY, 2017 ABQB 279 (MILLAR J)
Rules 4.24 (Formal Offers to Settle) and 10.33 (Court Considerations in Making Costs Award)

The Defendants were successful in having the Plaintiff's claim Summarily Dismissed and were awarded Costs. The parties then sought an Order regarding quantum of the Costs. The Plaintiff's Claim advanced multiple causes of action, including fraud and deceit, and sought damages of $2 million, including $250,000 of punitive damages. The Defendants had served a Formal Offer under Rule 4.24,

offering to pay $10,000 for a Discontinuance without Costs, which was not accepted.

The Defendants sought either: full indemnity Costs; in the alternative two thirds partial indemnity costs; or in the further alternative, party and party Costs of three times Column 5 of Schedule C. The Plaintiffs argued that no multiplier was warranted, and that the Column 5 amount of Schedule C was appropriate.

Justice Millar found that, though the litigation did not proceed at a "robust pace", the Plaintiffs' conduct was not "reprehensible, scandalous or outrageous", and therefore an award of full indemnity Costs was not warranted. Justice Millar also declined to award partial indemnity Costs, and held that the case was not complex, and that partial indemnity Costs awards were "reserved for cases that are overly complex and protracted".

Millar J. considered the factors enumerated in Rule 10.33(1), and noted the Claim included allegations of fraud. Further, the Defendants were wholly successful in their Application for Summary Dismissal; the amount sought in the Action was $2 million; the issues raised had potentially significant consequences for the Defendants; the underlying facts of the Action dated back to 2002 and multiple causes of action had complicated the Action; no liability was found as against the Defendants; the Defendants had shortened the Action by providing a Formal Offer and by applying for Summary Dismissal. Justice Millar held that, given the factors from Rule 10.33, and the allegations of fraud, a multiplier of three times Column 5 was appropriate.

Justice Millar held that the Formal Offer was genuine and contained a sufficient element of compromise since it constituted a significant amount, and was made in light of a complete defence being maintained. Further, by the time the Formal Offer was served, multiple steps had occurred in the Action. Accordingly, His Lordship doubled the Costs that were incurred after the Formal Offer was served.

PILLAR RESOURCE SERVICES INC V PRIMEWEST ENERGY INC, 2017 ABCA 141 (MCDONALD, BIELBY AND WAKELING JJA)
Rules 4.29 (Cost Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 14.59 (Formal Offers to Settle) and 14.88 (Cost Awards)

The Defendant and Respondent to the Appeal ("PrimeWest"), applied for Costs following the Plaintiff/Appellant's ("Pillar") unsuccessful Appeal. Pillar's Appeal was related to Trial Costs which were awarded to PrimeWest on a full indemnity basis.

The Court of Appeal noted that Rule 14.88(3) creates a rebuttable presumption that Costs of an Appeal are awarded on the same basis as the Judgment appealed from. The Court noted that the parties had cited conflicting authority on whether full indemnity Costs should follow an Appeal where there was no misconduct of the unsuccessful party on the Appeal, but there had been misconduct meriting such Costs in the Decision appealed from. The Court observed that where the conduct is of a sufficiently egregious nature that the party is held in contempt, full indemnity Costs should also follow on Appeal. However, the Court held that Pillar's conduct fell short of that standard, and, referring to leading prior authority, ruled that this was a case where the schedule of Costs on the Appeal should be varied from that at Trial.

The Court then noted that the Respondent had served a Formal Offer, which was bettered in the result. The Court of Appeal noted that Rule 4.29 applies to appeals through the operation of Rule 14.59(4), and that all steps subsequent to the service of the Formal Offer were therefore doubled.

Finally, Pillar argued that it had been successful on two interlocutory Applications within the Appeal and should be entitled to a setoff for those Costs. With respect to the Application for permission to appeal, the Court ruled that no setoff was appropriate; if it were otherwise, every unsuccessful Appellant would get Costs of their leave Application no matter how unlikely the Appeal. Further, without the successful leave Application, there would have been no Appeal, and thus no Costs. With respect to Pillar's

Application relating to permissible evidence in the Appeal, the Court noted that Costs were reserved at the time of the Application to be determined by the panel on the full Appeal. The Court interpreted the direction as Costs in the cause. Since Pillar ultimately lost on Appeal, it should not be awarded the Costs for the Application.

PARAGON CAPITAL CORPORATION LTD V WORTHINGTON PROPERTIES INC, 2017 ABQB 397 (MASTER PROWSE)
Rule 4.33 (Dismissal for Long Delay)

The Defendants applied to strike six Actions commenced by the Plaintiffs, Paragon Capital Corporation Ltd ("Paragon"). In five of the six Actions, Paragon had served an Affidavit of Records within the three year period provided for in Rule 4.33, but in the sixth Action, Paragon did not provide an Affidavit of Records until three years and three months after service of the Statement of Defence.

The Defendants argued that, using the functional approach to dismissal Applications, the mere provision of an Affidavit of Records did not materially advance an Action, particularly where the Affidavit of Records only contained copies of the records that had previously been provided. Master Prowse noted in this case that the provision of an Affidavit of Records did constitute a significant advance in the Actions despite the Defendants already having copies of the records since the provision of an Affidavit of Records contains several admissions such as the assertion that there are no other material records, as well as admissions about the authenticity of documents in the Affidavit of Records. Master Prowse observed that the same considerations do not necessarily apply to a Supplemental Affidavit of Records, the provision of which would only constitute a significant advance "if the newly disclosed documents were functionally significant".

Regarding the sixth Action, Master Prowse accepted the Plaintiff's argument that a Summary Dismissal Application in that Action had significantly advanced the Action because the Affidavits and the subsequent Cross-Examinations in support of that Application had narrowed the issues in dispute, even though the Application was ultimately abandoned. The Applications to Dismiss all six Actions for long delay were dismissed.

GEOPHYSICAL SERVICE INCORPORATED V NWEST ENERGY CORP, 2017 ABQB 232 (NIXON J)
Rules 5.1 (Purpose of this Part), 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

The Applicant, Geophysical Service Incorporated ("GSI") appealed a Master's Decision in which the Master held that one of the Defendants was not required to answer undertakings sought by GSI. Nixon J. stated that Rule 5.1 sets out what the purpose of disclosure of information is under the Rules of Court. Justice Nixon stated that, when considering what information is to be produced, the starting point is the pleadings in the action. The pleadings define what is relevant and material. Nixon J. distinguished between primary relevance, secondary relevance and tertiary relevance, stating that information that has primary or secondary relevance may be produced, but information that that has tertiary relevance is not required to be produced. Nixon J. considered Rule 5.2, and noted that it governs when something is relevant and material; specifically, Rule 5.2(1)(a) frames what is of primary relevance and Rule 5.2(1)(b) frames what is of secondary relevance. Justice Nixon referred to Rule 5.25(1)(a) which provides that during Questioning, a party is only required to answer questions that are relevant and material.

His Lordship reviewed the Master's Decision within the framework of Rules 5.1 and 5.2, and determined that the Defendant was not required to answer the undertakings sought by GSI. The Appeal was dismissed.

DEMB V VALHALLA GROUP LTD, 2017 ABQB 256 (JONES J)
Rules 5.2 (When Something is Relevant and Material) and 10.53 (Punishment for Civil Contempt of Court)

The individual Defendants were held in Civil Contempt, pursuant to Rule 10.53, due to failures in their documentary production obligations. The Court of Appeal referred the determination of the appropriate penalty for Civil Contempt back to Justice Jones as Case

Management Judge. The Claim arose from outstanding loans and investments made by the Plaintiffs, and included allegations of fraud against the individual Defendants. The Defendants had repeatedly failed to produce sufficient and fulsome financial information and records, which led to the Contempt Order. However, just prior to the Appeal, individual Supplemental Affidavits of Records were served. The records were not put before the Court of Appeal nor drawn to the Court's attention by either party. Nonetheless, the Plaintiffs argued that the Supplemental Affidavits of Records still failed to produce all the relevant documents, and as such, the individual Defendants' Statement of Defence should be struck. The Defendants argued that they had purged the Contempt and sought to have the Application for a penalty for contempt dismissed.

Justice Jones noted that the purpose of Civil Contempt is to compel compliance rather than punish, and that severe punishment, such as the striking out of a Statement of Defence, was normally reserved for persistamt non-compliance. Justice Jones held that there was no deliberate defiance of the Order to file a further and better Affidavit of Records, and the Plaintiffs and Individual Defendants were not cooperating and were both responsible for delay in addressing production matters. Further, the individual Defendants took steps to purge their Contempt prior to the Appeal, and Justice Jones held that the most recent Supplemental Affidavits of Records indeed purged their Contempt. The documents included a general accounting ledger with supporting invoices and records, which were the relevant and material documents in accordance Rule 5.2(1). Ultimately, Jones J. ordered the individual Defendants to pay: a fine of $1,000 as a penalty for the Civil Contempt, and the Plaintiffs' Costs.

DEMB V TAYLOR, 2017 ABQB 257 (JONES J)
Rules 5.4 (Appointment of Corporate Representatives), 5.6 (Form and Content of Affidavit of Records), 5.10 (Subsequent Disclosure of Records), 5.13 (Obtaining Records from Others) and 10.52 (Declaration of Civil Content)

The Plaintiffs applied for an Order declaring the Defendant, Taylor, in contempt of Court, or in the alternative, an Order to compel further production and answers to questions refused during Questioning. Jones J. considered Rule 10.25, and noted that the standard of proof required in a contempt Application is "proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice". His Lordship considered the Order at issue, and observed that Taylor had provided a sufficient Supplemental Affidavit of Records. Jones J. held that Taylor was not in contempt of Court.

With respect to the Plaintiff's Application ordering that Taylor provide answers to questions refused during Questioning, Justice Jones noted that many of the questions related to documents that may or may not have been in Taylor's control. Jones J. considered Rule 5.13 which provides that, if a party is seeking to obtain documents from a non-party to the litigation they make an application to the Court. Jones J. noted further that Rule 5.6 provides that a party is required to disclose all records that are relevant and material to the issues in the Action, and Rule 5.10 provides that if a party later finds relevant and material documents in their control, they must serve a Supplementary Affidavit of Records. Even though many of the documents sought by the Plaintiff had been produced in a parallel Action, Taylor was still required to produce the documents in an Affidavit of Records pursuant to Rule 5.6.

Jones J. concluded that Taylor was not required to obtain and produce records of a non-party unless Taylor had the right to access them. Taylor was questioned in his personal capacity and not as the corporate representative of any of the corporate Defendants and he therefore did not have an obligation to inform himself as would be required under Rule 5.4. Justice Jones concluded that Taylor was required to disclose records under his control that were relevant and material pursuant to Rule 5.6, even if they had previously been produced in the parallel Action.

NOV ENERFLOW ULC (NOV PRESSURE PUMPING ULC) V ENERFLOW INDUSTRIES INC, 2017 ABQB 334 (MCCARTHY J)
Rules 5.8 (Records for Which There is an Objection to Produce), 5.11 (Order for Record to be Produced) and 13.8 (Pleadings: Other Contents)

The Defendants (Applicants) in an Action for misrepresentation and breach of contract, applied for an Order compelling the Plaintiffs (Respondents) to produce additional records and answer questions related to outstanding undertakings. The Respondents claimed privilege over the records at issue.

Before considering the specific outstanding undertakings, McCarthy J. considered whether the Court ought to review contested records over which privilege had been claimed. Justice McCarthy considered Rule 5.11, and held that, while the Court has discretion to inspect such records, this discretion ought to be exercised sparingly. It is not "common practice", as the Applicants had suggested, for the Court to review contested records to determine whether privilege has been properly claimed. His Lordship observed that it is "preferable to assess a privilege claim on the basis of admissible affidavit evidence when available".

Justice McCarthy considered whether the Respondents' corporate representative's Affidavit was admissible to support the response to the Application. The Applicants argued that the Affidavit was inadmissible on multiple grounds, including that the Respondents' corporate representative failed to disclose the source of his information pursuant to Rule 13.18, and that the corporate representative did not have personal knowledge of the evidence contained in his Affidavit. McCarthy J. agreed with the Respondents that corporate representatives may establish personal knowledge per Rule 13.18 by familiarizing themselves with the corporate records. His Lordship noted that Rule 5.8 requires a party to identify the type of privilege asserted. Since the corporate representative had familiarized himself with the Respondents' records, and his Affidavit asserted the type of privilege that the Respondent was relying on, Justice McCarthy held that the Affidavit was admissible evidence for the Application. The outstanding Undertaking was then reviewed and the Court made specific conclusions with respect to each based on the Respondents' corporate representative's Affidavit.

JANELA V JANELA, 2017 ABQB 331 (BURROWS J)
Rule 5.13 (Obtaining Records from Others)

In an Action relating to the division of matrimonial property, and following an Application for the Third Party corporations to produce certain records, the Plaintiff sought a determination of the amount to be paid to the third party corporations (which her husband previously had an interest in) pursuant to Rule 5.13. The Order to produce records did not speak to recovery of expenses incurred in producing the documents. One of the Third Parties, ("Ryan's") had invoiced the Plaintiff for the costs incurred in assembling and producing the records. The other Third Party corporations, (collectively "Janela Corporations"), consented to produce their records but advised the Plaintiff that they required payment of $28,600.00 in order to do so.

The Plaintiff argued that the Janela Corporations' cost claim was unreasonable. In response, the Janela Corporations provided Affidavit evidence that they had incurred $18,883.28 in responding to the Consent Order and much of that amount was incurred in opposing the Plaintiff's Application for the production of the records. The Court noted that Rule 5.13(2) was applicable, but that there was no established test to determine how much must be paid to a third party that is required to produce relevant and material records. Justice Burrows held that the purpose of Rule 5.13(2) is to compensate non-parties for reasonable expenses relating to the production of records, not the cost of opposing the Application for production of records. Justice Burrows interpreted the Consent Order as intending that neither the Plaintiff nor the Janela Corporations were required to pay Costs, and held that the cost of obtaining legal advice and opposing the Plaintiff's Application was not compensable.

Burrows J. held that the Costs payable by the Plaintiff to the Janela Corporations was $500. In doing so, His Lordship emphasized that a significant portion of the Costs

claimed by the Janela Corporations was not recoverable, that its initial claim for $28,600 was "obviously inflated", and that the Court did not have a reliable estimate of the Costs actually incurred. The Court held that Ryan's was not entitled to payment pursuant to Rule 5.13(2).

ROTZANG V CIBC WORLD MARKETS INC, 2017 ABQB 354 (HUNT MCDONALD J)
Rules 5.31 (Use of Transcript and Answers to Written Questions), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiffs (the "Appellants") appealed a Master's Order granting Summary Dismissal of their Claim against the Defendants (the "Respondents"). The Master had granted Summary Dismissal on the basis that the Appellants' Claim was filed outside the limitation period. On Appeal, the Appellants sought to include additional portions of the transcript from Questioning and to adduce fresh evidence.

Regarding the request to include additional portions of the transcript, Justice Hunt McDonald noted that Rule 5.31(3) provided an exception to the general rule that a party cannot use its own Questioning Transcript. Hunt McDonald J. adopted and applied the test as set out in *410675 Alberta Ltd v Trail South Developments Inc*, 2011 ABQB 151 which provided that Rule 5.31 cannot be used to introduce every statement a witness has made on a particular topic; it is "limited to adding the rest of a specific answer or clarifying a passage which has been taken out of context or may be misleading".

Justice Hunt McDonald also considered the test under Rule 6.14(3) for permitting additional evidence on an Appeal of a Master's Judgment or Order. Her Ladyship held that the Respondents' argument that the fresh evidence was self serving did not make it inadmissible. The alleged facts were still relevant and material to issues raised in the Pleadings.

After allowing the Appellants to include additional portions of the Questioning transcript and reviewing their fresh evidence, Justice Hunt McDonald upheld the Master's decision that the Claim was out of time. The Appeal was dismissed.

FIRST CAPITAL (LAKEVIEW) CORPORATION V KITCHEN PANTRY LTD, 2017 ABQB 324 (MASTER ROBERTSON)
Rules 6.9 (How the Court Considers Applications), 10.48 (Recovery of Goods and Services Tax) and 13.18 (Types of Affidavit) and Schedule C

The Plaintiff had applied for Summary Judgment with respect to the liability of a former tenant. Master Robertson reserved making a final determination regarding the quantum of damages given concern over inadequate evidence on the existing record relating to the issue of mitigation. The Plaintiff had seized the contents of the subject premises, but had not provided evidence of what it had done with those contents. The parties then provided further Affidavit evidence and written submissions with respect to mitigation, and sought a ruling on Costs, pursuant to Rule 6.9(1)(c) which allows the Court to hear an Application by a process involving documents only.

The Plaintiff referred to evidence concerning the disposal of equipment contained in the Affidavit in support of the Summary Judgment Application. Master Robertson held that this evidence was inadmissible pursuant to Rule 13.18(3) which requires Affidavits used in support of an Application to dispose of all or part of a Claim to be sworn on the basis of personal knowledge. Furthermore, the Affidavit did not disclose the source of the information upon which the statement was based, contrary to Rule 13.18(2). On the evidence presented by the parties, Master Robertson held that the Plaintiff had failed to properly or effectively mitigate its losses and reduced the damages owed by the Defendant.

Regarding Costs, Master Robertson held that the Plaintiff was entitled to solicitor client Costs, as that relief was provided in the subject lease. Master Robertson reduced the Costs, holding that neither party was entitled to Costs on the present Application to address the mitigation issue as it may not have been necessary if proper details regarding the value of the seized equipment been presented in the original Summary Judgment Application. Master Robertson also found that the Plaintiff was likely entitled to an input tax credit and thus, pursuant to Rule 10.48(2) was not entitled to claim GST on its Costs. Master Robertson held that the Defendant was entitled to party

and party Costs against the Third Parties in the proceedings under Column 2 of Schedule C despite the fact that the amount ultimately awarded was less than the Provincial Court level because the amount claimed in the Action was approximately $125,000.

PRICE-GOULET V TRANSAMERICA LIFE CANADA, 2017 ABCA 156 (FRASER, ROWBOTHAM AND CRIGHTON JJA)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Appellant, one of many Defendants in an Action advanced by Transamerica Life Canada ("TLC"), was granted Summary Dismissal of the Claim against her, pursuant to Rule 7.3. The Decision was overturned on Appeal to a Justice of the Court of Queen's Bench. The Appellant appealed.

The Claim against the Appellant was for failing to report the alleged wrongdoing of the other Defendants. Based on the evidence before the Court, the Chambers Justice held that a fair and just determination could not be made on the merits. The Appellant argued that the Chambers Judge erred by admitting additional evidence, and misconstrued the test for Summary Judgment. The Court of Appeal noted that additional evidence may be included in an Appeal from a Master's decision to a Justice, pursuant to Rule 6.14. However, the Court of Appeal did not consider the additional evidence as the lower Court's Decision was supported by the remaining evidence. Further, the Chambers Justice correctly stated and applied the test for Summary Judgment: Summary Judgment may be granted if a fair and just process reveals that there is no merit to the Claim. The Appeal was dismissed.

COMPOSITE TECHNOLOGIES INC V SHAWCOR LTD, 2017 ABCA 160 (WATSON, WAKELING AND SCHUTZ JJA)
Rules 6.14 (Appeal from Master's Judgment or Order), 7.3 (Summary Judgment), 9.13 (Re-Opening Case) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiffs appealed a Decision upholding a Master's Order which had summarily dismissed their Claim. The Plaintiffs alleged that the Defendants unlawfully used the Plaintiffs' technology to manufacture flexible composite pipe. The Defendants had applied for Summary Judgment on the basis that two of the Plaintiffs, Wolfe and Composite Technology Inc., had no interest in the disputed intellectual property and the other, Proflex Pipe Corporation, had been struck from the Corporate Registry and was not a legal entity when the Claim was filed, or at the time of the Application.

The Court considered Rule 7.3, and noted that the Court may grant Summary Judgment if there is no merit to the Plaintiff's Claim. The test is whether the moving party's position is unassailable: if the "likelihood of success is very high and the nonmoving party's prospects of success are very low". Additionally, each party must present its strongest case. Importantly, a Defendant who moves for Summary Judgment can rely on arguments not raised in the Statement of Defence, as the wording of Rule 7.3 permits an Application for Summary Judgment to be made before a Statement of Defence is filed.

The Court upheld the Decision affirming the dismissal of the Plaintiffs' Claim. The Appeal was dismissed.

1218388 ALBERTA LTD V REIFEL COOKE GROUP LIMITED, 2017 ABQB 236 (MASTER PROWSE)
Rules 6.37 (Notice to Admit), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

In an Action concerning the failed purchase transaction for a parcel of land, the Plaintiff ("1218388") sued for damages arising from the failure to close the sale, and the Defendant ("RCG") counterclaimed for the return of its deposit. RCG applied for Summary Judgment on its Counterclaim, asserting that conditions precedent to the sale were not met, thus causing the purchase and sale agreement to terminate and entitling it to a refund of its deposit.

RCG did not file an Affidavit in support of its Application, rather, chose to rely on a Notice to Admit Facts served under Rule 6.37. Master Prowse noted without deciding, that a Notice to Admit Facts constituted "other evidence" required by Rule 7.3(2) to support a Summary Judgment

Application. Master Prowse noted that the issue with this approach was that the Notice to Admit Facts only produced admissions that various pieces of correspondence were sent and received, but it did not seek nor receive admissions regarding the truth of the assertions made in the correspondence. Master Prowse held that, just as hearsay could not be relied upon in an Affidavit in support of an Application for Summary Judgment under Rule 13.18, hearsay could not be relied upon using "other evidence" under Rule 7.3(2). Master Prowse therefore held that the mere fact that correspondence was sent or received was insufficient to support RCG's Application for Summary Judgment, without proving the truth of the assertions contained in that correspondence. Accordingly, the Application for Summary Judgment was dismissed.

MORIN V TRANSALTA UTILITIES CORPORATION, 2017 ABQB 409 (GRAESSER J)
Rules 6.37 (Notice to Admit), 10.49 (Penalty for Contravening Rules) and 10.50 (Costs Imposed on Lawyer) and Schedule C

The Plaintiffs claimed against the Defendants for trespassing on certain lands owned by the Enoch Cree Nation. The Plaintiffs appealed the Decision of a Master which dismissed the claims of seven of the Plaintiffs in the Action, as there was evidence that five of them were deceased at the time the Action commenced and that the estates of those deceased Plaintiffs had not authorized the commencement of the Action. There was further evidence that two of the named Plaintiffs were not holders of the relevant land certificates. As a result of the Master's Decision, only one named Plaintiff, Mr. Morin, remained. One of the Defendants had served a Notice to Admit on all of the Plaintiffs seeking an admission that five of the nine Plaintiffs were deceased and that two of the Plaintiffs were not certificate holders. The Plaintiffs did not deny the facts set out in the Notice to Admit nor did they state an objection to the Notice to Admit pursuant to Rule 6.37(3). Therefore, at the time of the Application before the Master, the contents of the Notice to Admit were deemed to be true.

The Plaintiffs filed a Notice of Appeal, seeking a stay pending the Appeal. However, no Stay was pursued.

The Plaintiff then abandoned the Appeal at the outset of the Appeal before Justice Graesser. A number of the Defendants sought Costs of the Appeal, and AltaLink sought Costs against the Plaintiffs' counsel personally pursuant to Rules 10.49 and 10.50. Justice Graesser noted that Rule 10.49 provides that a Court may order a party, lawyer or other person to pay the Court a penalty if that party, lawyer or other person fails to comply with the Rules of Court, Practice Note or a direction of the Court; or has interfered with or may interfere with the proper or efficient administration of justice. The Defendants argued that Plaintiffs' counsel had engaged in "serious misconduct", and had commenced proceedings without authority. Plaintiffs' counsel provided no information that he had been retained by any of the other Plaintiffs other than one, but the Appeal had been filed on behalf of all of the Plaintiffs.

Graesser J. determined that the evidence showed that Mr. Morin had instructed the Plaintiffs' counsel to commence the Action but that Plaintiffs' counsel had not shown that he had authority to act for the other Plaintiffs besides Mr. Morin. In addition to acting without authority, counsel had acted discourteously. Justice Graesser determined that, in the circumstances, it was fair to award Costs against Plaintiffs' counsel personally, but observed that:

> Costs under Rule 10.50 are subsumed within the costs otherwise ordered under Schedule C; if there is a tariff item a multiplier might be used; if there is no tariff item then the Court should come up with an appropriate amount. I do not see that costs under Rule 10.50 are an add-on in themselves, to be imposed in addition to Schedule C.

Graesser J. held that Plaintiffs' counsel was to pay $1,000 into Court for his contravention of the Rules of Court, and His Lordship ordered that counsel pay Schedule C costs of four times Column 1 to the Defendants who sought Costs against him, pursuant to Rule 10.50.

IMPERIAL OIL V FLATIRON CONSTRUCTORS CANADA LIMITED, 2017 ABCA 102 (BERGER, SCHUTZ AND MARTIN JJA)
Rules 7.1 (Application to Resolve Particular Questions or Issues), 7.5 (Application for Judgment by Way of Summary Trial) and 7.8 (Objection to Application for Judgment by Way of Summary Trial)

The Plaintiffs, Imperial Oil and Suncor Energy Products Partnership (collectively the "Appellants"), appealed an Order granting leave to the Defendant, Flatiron Constructors Canada Limited ("Flatiron"), and Third Party, AltaLink Management Ltd ("AltaLink") (collectively the "Respondents"), to proceed to Summary Trial on the discrete issue of whether AltaLink had statutory immunity from damages in the Third Party Claim under the *Electric Utilities Act*, RSA 2003, c E-5.1. Flatiron had not objected to the proposed Summary Trial before the Chambers Judge, and gave no indication of what evidence, if any, it would rely on at a Summary Trial. The Appellants however, objected to the matter proceeding by way of Summary Trial on the basis that a decision respecting damages in the Third Party Claim could prejudice their position on damages in the main Action; Questioning in the respective Actions was incomplete; and no experts' reports respecting damages had been exchanged. The Chambers Judge held that the Appellants would not be prejudiced by the outcome of the Summary Trial because the result would not be binding on the Appellants unless they intervened; the Summary Trial Decision would not be binding on the Trial Judge in the main action; and the Trial Judge in the main Action would be able to distinguish the Decision in the Summary Trial.

Regarding the appropriateness of directing a single issue to be heard by way of Summary Trial, the majority stated that "the summary trial rules are not intended to encourage litigation of an action in slices". The majority held that proceeding by way of Summary Trial on the limited issue granted by the Chambers Judge was "not an intended or suitable use of the summary trial rules" because severing the statutory immunity issue would still leave several overlapping and connected issues to be resolved at Trial.

The Court confirmed that the test for determining the appropriateness of a Summary Trial is twofold: 1) whether the Court can decide the disputed questions of fact on Affidavits or by any of the other proceedings authorized by the Rules for Summary Trials; and 2) whether it would be unjust to proceed by way of Summary Trial. The Court held that the Chambers Judge erred in finding that there was a sufficient evidentiary basis to proceed by way of Summary Trial, and in determining that a Summary Trial would be fair and just to all parties. The decision to proceed by way of Summary Trial in the absence of evidence respecting damages from the Appellants was unreasonable, particularly so given that the Appellants' damages substantially flowed through to the Respondents. Further, the Court held that it was prejudicial to the Appellants to require them to either take part in a process they objected to, or to be excluded from proceedings which would be final on an issue which considered the categorization of their own damages.

Justice Berger, dissenting, stated that the issues were "readily resolvable" at a Summary Trial, and that requests for discrete Summary Trial dispositions should not be avoided in order to discourage "litigation by slices". His Lordship noted that:

> On the contrary, limited judicial resources in the Court of Queen's Bench favour early resolution when appropriate in order to minimize bloated trials and, indeed, to enhance the prospect of early resolution.

The Appeal was allowed.

FAST INDUSTRIES LTD V SPARTA ENGINEERING LTD, 2017 ABQB 240 (TOPOLNISKI J)
Rule 7.3 (Summary Judgment)

The Defendant appealed a Master's Decision in which Summary Judgment was granted against it. Justice Topolniski reviewed Rule 7.3 and commented that legal disputes must be resolved in the "most cost-effective and timely method available, provided the process selected ensures fairness between the parties". Topolniski J. stated that Summary Judgment is available when there is no genuine issue of merit requiring a Trial because a fair and

just disposition may be made on the existing record. This will be the case when Summary Judgment allows the Court to make findings of fact; allows the application of the law to the facts; and is a proportionate, expeditious and cost-effective means to achieve a just result. A case has "no merit" if the moving party's position is "so compelling that the likelihood of success is very high", or in other words, a non-moving party's case will only have merit when there is a genuine issue of a "potentially decisive material fact" that "cannot be summarily found against the non-moving party on the record". The non-moving party's mere assertion of a position or the hope that evidence will turn up at Trial does not suffice. Ultimately, the key is whether viva voce evidence is required to properly resolve the case.

Topolniski J. held that the Master correctly concluded that the matter may be fairly and justly decided on the existing record by way of Summary Judgment. The Plaintiff's position was so compelling that the likelihood of its success was very high, and the Defendant's case was unmeritorious because there was no genuine issue of a potentially decisive material fact. The Defendant's Appeal was dismissed.

RUDICHUK V GENESIS LAND DEVELOPMENT CORP, 2017 ABQB 285 (MASTER ROBERTSON)
Rules 7.3 (Summary Judgment), 13.6 (Pleadings: General Requirements) and 13.18 (Types of Affidavit)

The Plaintiffs in a wrongful dismissal sought damages against their former employer and applied for Summary Judgment.

Master Robertson noted that, generally in a Summary Judgment Application, if the Applicant meets the initial burden of proof, the onus shifts to the Respondent to present evidence which refutes that of the Applicant. Master Robertson noted that only one of the Plaintiffs had filed an Affidavit in support of the Summary Judgment Application. No Affidavit was filed by the individual Defendant, who was a director and officer of the corporate Defendant and had personal knowledge of the facts of the Plaintiffs' dismissal, but was not a Respondent to the Application. Instead, the corporate Defendant's Affidavit was sworn by another director, who did not have any first-hand knowledge of the Plaintiffs' dismissal.

Master Robertson considered the parties' evidence and arguments, and stated that Rule 7.3 did not require each Applicant in a Summary Judgment Application to swear an Affidavit. Instead, the Applicants may proffer Affidavit evidence from one deponent in order to give the necessary evidence to satisfy the Applicants' collective burden of proof. In this case, the requirements under Rule 7.3 had been satisfied. Master Robertson observed further that Rule 13.18 allows the use of hearsay evidence in an Affidavit response to a Summary Judgment Application.

Master Robertson stated that each party in a Summary Judgment Application must put their best foot forward. The lack of evidence from the individual Defendant entitled the Court to draw an inference that the individual Defendant would not have contradicted the Plaintiffs' evidence, and that the Defendants did not put their best foot forward. It was not enough for the corporate Defendant to argue that more evidence would be heard at Trial.

Despite the corporate Defendant's argument that the Plaintiffs had not properly pleaded estoppel, Master Robertson held that the Plaintiffs had done so in the Reply to the Statement of Defence. In accordance with Rule 13.6 and prior leading authority, the Plaintiffs were not required to plead responses to hypothetical defences in their Statement of Claim. The reason for specifically pleading estoppel is to avoid surprise, pursuant to Rule 13.6(3). In this case, the Defendants could not complain that they were surprised when the issue was raised in the pleadings. The Court ultimately held that the evidence did not support the Defendants' arguments that the Plaintiffs were dismissed with just cause. The corporate Defendant had not satisfied its burden of proof; the Plaintiffs' Application for Summary Judgment was accordingly granted.

FUNK V WAWANESA MUTUAL INSURANCE COMPANY, 2017 ABQB 308 (SIMPSON J)
Rule 7.3 (Summary Judgment)

The Defendant insurer applied for Summary Dismissal of the Plaintiff's Statement of Claim, pursuant to Rule 7.3, alleging that the Plaintiff had no insurance coverage. The Plaintiff cross-applied for Summary Judgment, and an Order to set a hearing for an assessment of damages.

The Defendant insurer had denied coverage to the Plaintiff after the Plaintiff claimed for a vehicular collision in which the other driver and vehicle were unknown, and the Plaintiff had settled with the Motor Vehicle Accidents Claim Fund for the statutory limit of $200,000.

Justice Simpson noted that the test under Rule 7.3 was whether the Court could come to a disposition that is fair and just for both parties based on the existing record. His Lordship held that the insurance policy was clear and unambiguous, but the provision was unjust and unreasonable. In such a case, section 545(1) of the *Insurance Act*, RSA 2000, c I-3, would normally apply to prevent the provision from being binding on the insured. However, this section was not in force at the time of the accident and did not apply retrospectively. Nonetheless, Simpson J. held that the impugned insurance clause was contrary to public policy, and was therefore unenforceable.

The Defendant insurer's Application for Summary Dismissal was denied and a declaratory Order was granted in favour of the Plaintiff to the effect that he had insurance coverage. However, the Court denied Summary Judgment for the Plaintiff with respect to liability. The matter was directed to a Trial to determine liability and damages.

TOK TRANSIT ALBERTA LIMITED V WOOD BUFFALO (MUNICIPALITY), 2017 ABQB 352 (MASTER MASON)
Rule 7.3 (Summary Judgment)

The Plaintiff in an Action for breach of contract applied for Summary Judgment in part against the Defendant on the ground that there was no defence to a portion of the Plaintiff's claim, pursuant to Rule 7.3(1)(a). Master Mason cited prior leading authority, and stated that the Court will consider, in addition to whether there is an issue of merit which genuinely requires a Trial, whether an examination of the existing record can lead to a fair and just adjudication for both parties. Master Mason noted that:

> The standard for fairness is not whether the process is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles…

The parties must "put their best foot forward", and the Court is to presume that the best evidence from each of the parties is before it. The non-moving party's assertion of a position or the mere hope that something will appear at Trial do not suffice, although the onus remains on the Applicant to present "uncontroverted facts and law which entitle it to judgment". The question before the Court is "whether the circumstances require *viva voce* evidence in order to properly resolve the case".

Master Mason reviewed relevant provisions in the contract and the parties' evidence, and concluded that the Court could not confidently grant Summary Judgment based on the record before it. Further *viva voce* evidence, and having the totality of evidence at Trial were necessary conditions for a final determination of the issues. The Plaintiff's Summary Judgment Application was therefore dismissed.

1468717 ALBERTA LTD V WOOD, 2017 ABQB 393 (MICHALYSHYN J)
Rule 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment as against the Defendants. The Action was commenced to rectify a Certificate of Title. Michalyshyn J. noted that Rule 7.3 provides that a party may apply to the Court for Summary Judgment if there is no defence to a Claim or part of it; there is no merit to a Claim or part of it; or, the only real issue is the amount to be awarded.

Michalyshyn J. confirmed Summary Judgment is not possible if the opposing parties' Affidavits and evidence conflict on material facts. Moreover, a full Trial is required

when the existing record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts. Justice Michalyshyn found that there was no evidence that conflicted significantly, and there were no complex legal issues before the Court that could not be resolved on a summary basis. Justice Michalyshyn granted the Application.

BAIM V NORTH COUNTRY CATERING LTD, 2017 ABCA 206 (MCDONALD, SCHUTZ AND MARTIN JJA)
Rule 7.3 (Summary Judgment)

In a dispute involving contractual interpretation, the Respondent, Baim, was granted partial Summary Judgment by a Master in Chambers. The Court of Queen's Bench upheld the Master's Decision on Appeal. The Appellants appealed.

The Court of Appeal confirmed that, pursuant to Rule 7.3(1)(a) a party may apply for Summary Judgment of all or part of a Claim on the basis that there is was defence; further, "[p]artial summary judgment is expressly contemplated by the words of rule 7.3". The Court of Appeal observed that, in this case, partial Summary Judgment could be granted so long as the issue of contractual interpretation could be decided discretely and fairly.

Finding that the contractual matter at issue was discrete, the lower Court's interpretation of the contract was reasonable. Contrary to the Appellants' position there were no triable issues to be determined before interpreting the contract. The Court of Appeal dismissed the Appeal.

CLARKE V SYNCRUDE CANADA LTD, 2017 ABQB 244 (MACLEOD J)
Rules 9.14 (Further or Other Order After Judgment or Order Entered) and 10.31 (Court-Ordered Costs Award)

The Defendant applied to recover the fees related to work completed by its experts which was not used at Trial (the "Expert Work"). The Defendant was successful at Trial, and a Costs Application was subsequently heard. The Defendant did not raise the fees related to the Expert Work at the Costs Application.

The Plaintiff argued that the Court could not now award Costs for the Expert Work, maintaining that as a Judgment had been entered, Macleod J. was *functus officio*; the Costs for the Expert Work were not raised at the Costs hearing; and pursuant to Rule 10.31 expert fees are only awarded if the Court so orders.

Justice Macleod stated that, in limited circumstances Rule 9.14 allows the Court to enter a further Order after a Judgment is rendered, but in this case, the significant fees related to the Expert Work should have been argued at the Costs Hearing. In particular, Macleod J. held that there was a "real issue" with respect to whether the fees would have been allowed at the time of the Costs Hearing. Further, expert fees are not a taxable disbursement unless so ordered by the Court. The Defendant's Application was dismissed.

ERYN B LOGIE FAMILY LAW V WEST, 2017 ABQB 339 (SULLIVAN J)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 13.5 (Variation of Time Periods) and 13.38 (Judge's Fiat)

The Plaintiff law firm represented the Defendant, West, in highly contested divorce proceedings. A standard retainer agreement was executed on August 21, 2013. The Plaintiff firm sent periodic accounts to West for three years, until the Plaintiff terminated the retainer agreement and served West with a Notice of Withdrawal of Lawyer of Record. The final bill totalled $309,668.47; of that, West had paid $305,032.98.

Soon after, West sought a review of all accounts alleging that his instructions were not followed, that there were trust accounting discrepancies, and that he was overbilled. On September 22, 2016, a Master granted a Fiat to extend the time available to review the accounts, pursuant to Rules 10.10 and 13.5. The Plaintiff (who did not receive notice of West's Application for a Fiat) appealed.

Sullivan, J. noted that, pursuant to Rule 10.9 the reasonableness of a retainer agreement entered into with a lawyer is subject to review, but, pursuant to Rule 10.10, the review must occur within 6 months of the termination of the retainer agreement. His Lordship also noted Rule 13.5(2) permits the Court to shorten or extend the period for review, and that Rule 13.38 allows a Master to grant a Fiat authorizing the review of an account notwithstanding the fact that the account is more than 6 months old.

His Lordship considered the six non-exhaustive factors set out in *Attila Dogan Construction and Installation Co Inc v Bennett Jones LLP*, 2015 ABQB 407 (*"Attila"*), in order to assess whether to extend the time period regarding taxation of a lawyer's file. Justice Sullivan considered each: delay; prejudice; timing of the "first intent to tax"; evidence of overcharging; agreement as to amount; and the client and lawyer's relationship. Sullivan J. also considered whether the client was sophisticated, and whether the law firm in question "voluntarily reduced a number of accounts for an overall fee reduction".

Sullivan J. observed that allowing for taxation of a lawyer's account benefits both the client, and the lawyer as it allows clients to independently confirm that the fees they must pay make sense, and provide lawyers the ability to justify the fees charged. His Lordship also noted that the relationship between lawyer and client when it comes to fee payment, is one of trust and dependence. As such, Sullivan J. held that the threshold for Courts to extend the time period to review a lawyer's file is low: the discretion to extend the period should be exercised where there is "some evidence" that the account should be reviewed. Since the Respondent was less sophisticated, did not have counsel to help him negotiate legal fees, and his bill for a three-week trial was over twice as much as the estimate represented to him, Sullivan J. held that the time period for review should be extended.

LEACH V LEACH, 2017 ABQB 284 (MACKLIN J)
Rule 10.31 (Court-Ordered Costs Award) and Schedule C

Following a matrimonial property and spousal support Trial, the Plaintiff sought Costs on Column 3 of Schedule C, including for the Interlocutory Applications for which the Plaintiff had previously been awarded Costs on a lower scale.

The Defendant asserted that no costs were payable because most issues had been resolved prior to Trial, and the Parties had mixed success. Alternatively, the Defendant argued that Column 1 of Schedule C was the appropriate Column. Justice Macklin held that the Trial was still necessary to bring the matter to resolution, and thus, Costs were appropriate. Justice Macklin noted that a result where the Plaintiff did not obtain the full sum sought did not constitute 'mixed success'. Denying Costs would penalize the Plaintiffs for advancing Claims for damages which were greater than what was ultimately awarded. The Parties were found to have had mixed success on the matrimonial property issues, but Justice Macklin held that the Plaintiff was more successful on balance.

Regarding the Plaintiff's claim to additional Costs from Interlocutory Applications on which Costs Awards had already been given, Justice Macklin held that the amount awarded at the time of the Application was all the Plaintiff was entitled to recover. Regarding the appropriate column of Schedule C, Justice Macklin noted that the comments to Schedule C make it clear that a successful litigant is entitled to Costs on at least Column 1, but the Court always has discretion to determine appropriate Costs in any particular case, and the Court is not bound by Schedule C.

Despite the fact that the total sum of the amount awarded to the Plaintiff was unknown at the time of the Costs Decision, because the spousal support claim was ongoing, Justice Macklin held that the Court could be confident that the total amount would exceed $50,000, but not that it would necessarily exceed $100,000. Thus, the Court held that Column 2 of Schedule C was appropriate. Justice Macklin also held that no inflationary factor should be applied to the Schedule C amounts as the Plaintiff did not establish that the Schedule C amounts were inordinately low due to inflation. The Plaintiff was awarded Costs on Column 2 for all steps in the litigation up to and including the Trial, but excepting the Interlocutory Applications for which Costs Awards had already been granted.

MADORE V MADORE, 2017 ABQB 391 (GATES J)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.50 (Costs Imposed on Lawyer) and Schedule C

Following an Application in which the Defendant in an Action pursuant to the *Matrimonial Property Act*, RSA 2000, c M-8 successfully applied for dismissal for long delay, the parties appeared before the Court with respect to Costs. The Applicant sought enhanced Costs, as well as Costs against the Respondent's counsel personally pursuant to Rule 10.50.

Justice Gates first considered the appropriate Column of Schedule C and rejected the Respondent's argument that Column 1 was appropriate because a divorce action involves no monetary amount. Justice Gates reviewed the evidence of the value of the matrimonial property and determined that Column 5 of Schedule C was appropriate. Gates J. noted that Rule 10.33 sets out the list of factors to consider when making a Costs award. His Lordship mentioned the Respondent's delay and misconduct, noted that the Plaintiff had made several *Calderbank* offers in the course of the litigation, and observed that the Defendant had failed to follow the terms of an Order pronounced June 18, 2016. Gates J. awarded double Costs from the date of a *Calderbank* offer dated October 15, 2015, and triple Costs from the date of the June 18, 2016 Order.

Justice Gates considered whether it was appropriate to award Costs against the Defendant's solicitor personally pursuant to Rule 10.50. Gates J. confirmed that an award of Costs against counsel personally is an extraordinary award, and there must be a finding of misconduct on the part of counsel to justify such an award. There was no evidence of bad faith or deliberate misconduct and Gates J. declined to award Costs against the solicitor personally.

AL-GHAMDI V ALBERTA, 2017 ABCA 151 (WATSON JA)
Rules 10.35 (Preparation of Bill of Costs) and 14.88 (Cost Awards) and Schedule C

The Applicant, Al-Ghamdi, resisted an award of Costs to the Respondents following his unsuccessful Application for Leave to Appeal a Decision of a single Appeal Judge to a Panel of the Court of Appeal. Al-Ghamdi argued that the Respondents, who were each represented by one Counsel, were not entitled to an award of Costs under Schedule C based on Rules 10.35 and 14.88.

The Court noted that Al-Ghamdi had misinterpreted Rule 14.88: the Rule "does not set a pre-condition for the presumptive entitlement to costs". Further the two-month time-limit for a party to apply for an Order with respect to Costs applied in a situation where a party applied for a different Costs award than the presumptive structure that Schedule C provides. As to whether a Bill of Costs was required, the Court explained that the purpose of a Bill of Costs under Rule 10.35 is to permit the party liable for Costs to object to specific line items. In this case, the only Costs sought were the Costs for steps as set out in Schedule C.

The Court observed that, though some authorities opined that Costs under Schedule C are too low, there was no apparent basis to reject the Respondents' claim for a single award of Costs. The Court accordingly granted the Respondents' request for Costs.

MILBURY V MILBURY, 2017 ABQB 251 (VEIT J)
Rules 10.52 (Declaration of Civil Contempt), 11.5 (Service on Individuals) and 11.21 (Service by Electronic Method)

The Plaintiff and Defendant applied and cross-applied for various relief with the Plaintiff seeking, among other things, a Declaration for Civil Contempt against her ex-husband. Justice Veit noted that Contempt proceedings are quasi-criminal in nature, which justifies the unique process stipulated by Rule 10.52. In this case, the Plaintiff had failed to serve a Form 27 by personal service or a substitutional service Order.

Veit J. noted that the content of a Contempt Application is set by the common law, not by the Rules. The Applicant must clearly state what the alleged contemnor has done wrong; prove that the alleged contemnor had actual knowledge of the allegedly contravened Order; and prove the alleged contemnor intended to breach the Order. Her Ladyship also noted that Contempt Applications are

effectively bifurcated into a "liability phase" and a "penalty phase", which necessitates two distinct hearing dates, and given the over-burdened Court system, the Applicant should anticipate the need for two dates well in advance. Finally, despite the language of Form 47 being that the contemnor must "show cause" why he or she should not be held in contempt, Justice Veit noted that the burden is on the Applicant throughout the process. Justice Veit concluded that the Plaintiff was not entitled to the Order of imprisonment for contempt she sought, and the Application was dismissed.

OOMMEN V CAPITAL REGION HOUSING CORPORATION, 2017 ABCA 143 (MCDONALD, WAKELING AND GRECKOL JJA)
Rules 10.52 (Declaration of Civil Contempt) and 14.45 (Application to Admit New Evidence)

The self-represented Appellant, Oommen, appealed a Decision which held him in Contempt, after he was ordered (and failed) to produce a number of Undertakings from Questioning. The Order required Oommen to complete various Undertakings, and to write to his doctors to request copies of medical charts by December 4, 2015. The Chambers Judge held that Oommen had provided some of the information, but not all of it, and therefore was in Civil Contempt.

The Court of Appeal noted that Oommen referenced materials that did not form part of the record before the Chambers Judge on Appeal, without applying to admit new evidence pursuant to Rule 14.45. As such, the Court of Appeal did not consider that material. The Court of Appeal reviewed the test for Civil Contempt pursuant to Rule 10.52(3)(a)(i) and noted that three elements must exist for Civil Contempt to be established: clarity, knowledge, and intent to disobey. Each of the three elements must be demonstrated beyond a reasonable doubt. Since the Order in question was clear, the Appellant was aware of its terms (and in fact assisted in finalizing the Order), and the record demonstrated that the Appellant intended to disobey several terms of the Order, Ommen's Appeal was dismissed.

Oommen argued that the accelerated Costs awarded against him by the Chambers Judge were unreasonable. In Chambers, the Judge had noted that the contempt Application was straightforward, and therefore some of the requested Costs were disallowed. The Court of Appeal held that Chambers Judges have broad discretion to award Costs; moreover, the lower Court's Decision respecting Costs appeared to be "eminently reasonable".

CAMERON V BENKIE, 2017 ABQB 346 (JEFFREY J)
Rules 12.68 (Evidence on Appeal Under the Family Law Act) and 12.70 (Powers of Court on Appeal)

Following a Trial in Provincial Court, the father in a family law matter appealed rulings with respect to parenting time and decision making. Jeffrey J. considered Rule 12.70, which sets out the Court's options when reviewing the Decision of the Provincial Court in a family matter. His Lordship noted that Rule 12.70 provides that, after hearing the Appeal, the Court may: confirm the Order of the Provincial Court; set aside the Order of the Provincial Court; make any Order that the Provincial Court would have made; or direct the Provincial Court to conduct a new hearing. Jeffrey J. stated that, on appeal, the Court should give substantial deference to the findings of Provincial Court Judges in family law cases.

The Appellant, arguing that the Trial result was not in the best interest of the child, sought to submit a new Affidavit from a 'parenting expert'. Justice Jeffrey noted that Rule 12.68 provides that the documents provided by the Provincial Court form the record in the Appeal, and that no other or new evidence can be considered unless otherwise ordered by the Court. However, in prior hearings, the Court of Queen's Bench had allowed the new affidavit evidence to be admitted. Jeffrey J. therefore determined that the new evidence did form part of the Appeal Record, but stated that it should not have been admitted at Trial before the Provincial Court Judge.

Jeffrey J. dismissed the Appeal and confirmed the Order of the Provincial Court with the exception of a "possible slip" by the Provincial Court Judge, but held that the issue should be sent back to the Provincial Court Judge who heard the Trial as permitted under Rule 12.70.

WANDLER V CRANDALL, 2017 ABCA 115 (MCDONALD J)
Rules 12.70 (Powers of Court on Appeal), 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court) and 14.37 (Single Appeal Judges)

The parties obtained a Decision from the Provincial Court on a family matter concerning their child following a Trial. The father successfully appealed the Trial Decision to the Court of Queen's Bench under the *Family Law Act*, SA 2003, c F-4.5. The mother sought permission to appeal to the Court of Appeal pursuant to Rule 12.71. The Court of Appeal considered the procedural history of the case, and noted that, following a finding that the Provincial Court had erred, Rule 12.70 was invoked by the Court of Queen's Bench to allow the parties to submit Affidavits in support of their submissions on one of the issues between them.

With respect to the Application for permission to appeal, the Court of Appeal stated that Appeals from the Court of Queen's Bench acting as an Appeal Court under the *Family Law Act* are governed by Rule 12.71(1). Pursuant to that Rule, only questions of law or jurisdiction may be appealed to the Court of Appeal with permission. The Applicant must demonstrate that:

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

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

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

The Applicant in this case was also out of time to file the Application for permission to appeal with respect to one of the Orders from the Court of Queen's Bench. The Court noted that, under Rule 14.37(2)(c), the Court may extend the time to file an Application for permission to appeal if the interests of justice support granting relief. The Appellant must show that:

1. there was a *bona fide* intention to appeal while the right to appeal existed;
2. there was an explanation for the failure to appeal in time that serves to excuse or justify the lateness;
3. the respondent was not seriously prejudiced;
4. the appellant has not taken the benefits of the judgment from which the appeal is sought; and
5. the appeal would have a reasonable chance of success if allowed to proceed…

The Court granted the extension to apply for permission to appeal the Court of Queen's Bench Order. The Order in question was not final, and the continuation of proceedings is an acceptable explanation for the failure to apply for permission to appeal on time. The Respondent was also not seriously prejudiced by the delay. The Court held further that the Application for permission to appeal satisfied the test: the issues to be appealed appeared to be questions of law, reviewable for correctness; and the Applicant had a reasonable argument for appealing. The Court also noted that the Respondent would not be unduly prejudiced by the continuation of the current arrangements with the child while the Appeal proceeds. The permission to appeal was granted.

TIGER CALCIUM SERVICES INC V SAZWAN, 2017 ABCA 172 (GRECKOL JA)
Rules 14.1 (Definitions), 14.8 (Filing a Notice of Appeal), 14.12 (Contents and Format of Notices of Appeal and Cross Appeal), 14.57 (Adding, Removing or Substituting Parties to an Appeal) and 14.87 (Requirements for All Documents)

The Plaintiffs were successful in obtaining Anton Pillar Orders and Mareva Injunction Orders against the Defendants. Some Defendants appealed and challenged parts of the Orders affecting each of them because the provisions were binding on the other Defendants; the Orders were not extricable. The other Defendants, known as the Smokey Creek Ranch group, did not Appeal the Orders, but instead applied to set aside the Orders. Notwithstanding the fact that the Smokey Creek Ranch group indicated that they would not be party to the Appeals, they ultimately filed a Factum. The Plaintiffs applied to strike the Factum filed

by the Smokey Creek Ranch group on the basis that they were not proper parties to the Appeals and should not be permitted to present submissions. The Smokey Creek Ranch group argued that their legal interests were affected by the Appeals, and as such, they should be able to participate.

Greckol J.A. held that the Rules supported the filing of a Factum by the Smokey Creek Ranch group in the circumstances. The Smokey Creek Ranch group were parties to the Action below and they were properly named and served as parties to the Appeals pursuant to Rules 14.8(2)(b), 14.12(2)(a) and 14.87(1)(b). Further, Rule 14.1(1)(m) defines "Respondent" as a person named as a Respondent to an Appeal; there is no requirement of an adverse interest. Justice Greckol also noted that if the Plaintiffs objected to the status of the Smokey Creek Ranch group, they could have applied under Rule 14.57 to have them removed as parties. They did not make such an Application. The Application to strike the Factum of the Smokey Creek Ranch group was accordingly dismissed.

BELWAY V LALANDE-WEBER, 2017 ABCA 108 (MARTIN JA)
Rule 14.5 (Appeals Only With Permission)

The self-represented Plaintiff applied for permission to appeal a Case Management Justice's Decision, in which he was denied leave to apply to vary child support. Permission to Appeal was required pursuant to Rule 14.5(1)(j) because the Applicant had previously been declared a vexatious litigant.

In determining whether to grant permission to Appeal, Justice Martin reviewed the test for obtaining permission to Appeal pursuant to Rule 14.5. The Applicant must show that an important question of law or precedent exists; that the Applicant has a "reasonable chance of success" in the Appeal, and that the delay would not cause undue prejudice or unduly hinder the progress of the Action. Her Ladyship also noted that because the Applicant had been declared a vexatious litigant, the test under Rule 14.5 must operate along with the test pursuant to s. 23.1(7) of the *Judicature Act*, RSA 2000, c J-2 which requires an Applicant to have an arguable case. Justice Martin noted that the test for an arguable case under s. 23.1(7), and the test for a reasonable chance of success under Rule 14.5 are the same.

Ultimately, Her Ladyship held that the Applicant had demonstrated a material change in circumstances and a significant question of law and precedent, and that he had met the "low bar" for an arguable case. Additionally, the elements of potential injustice or delay were not at issue. The Application for permission to appeal was granted.

LC V ALBERTA, 2017 ABCA 133 (GRECKOL JA)
Rules 14.5 (Appeals Only With Permission) and 14.90 (Sanctions)

The Plaintiffs filed a Class Action against Her Majesty the Queen in Right of Alberta ("Alberta") for holding numerous children in its custody, away from their families, without lawful authority. The Case Management Judge certified the Class Action ("Certification Order") and granted the Representative Plaintiff advance Costs to continue with the class proceedings ("Costs Order"), holding that: (i) the Representative Plaintiff was impecunious and would not be able to proceed without advance Costs; (ii) the case was *prima facie* meritorious; and (iii) the issues raised were of public importance and had not been resolved in previous cases. Alberta appealed the Certification Order, and applied for permission to Appeal this Order pursuant to Rule 14.5(1)(e). In turn, the Representative Plaintiff applied for advance Costs to oppose Alberta's Appeal of the Certification Order.

The Court of Appeal noted that permission to Appeal a Costs Order is to be granted sparingly. The threshold for such permission is high and the burden is on the Applicant. To be able to Appeal a Costs Order, the Applicant must establish: (i) a good arguable case having sufficient merit to warrant scrutiny by the Court; (ii) issues of importance to the parties and in general; (iii) the Costs Appeal has practical utility; and (iv) no delay in proceedings will be caused by the Costs Appeal.

Greckol J.A. held that Alberta failed to show a meritorious argument regarding the findings on the impecuniosity and public importance factors. Alberta did not challenge

the finding that the claims were *prima facie* meritorious; therefore, Alberta had not established an error in the Costs Order that would warrant appellate intervention. Further, the public importance of an advance Costs ruling in this case was circumscribed by the unique and exceptional facts and legal issues. Justice Greckol held that, even if the issues were of general importance and practical utility, and the delay was insignificant, Alberta still failed to show any merit to the Appeal, let alone a good, arguable case with sufficient merit to warrant scrutiny by the Court. The Application for permission to Appeal was denied.

The Court of Appeal considered whether to award advance Costs for the Appeal of the Certification Order. In defending the Application, Alberta argued that advance Costs were at least partially foreclosed because the Plaintiff's Appeal Factum was late. Rule 14.90(1)(a)(i) provides that a party is not entitled to Costs for a late Factum, even if the Appeal is successful. Greckol J.A. ultimately held that the Representative Plaintiff fulfilled the necessary criteria and advance Costs for the Appeal was granted in the amount of $20,000.

PRAIRIES COMMUNITIES CORP V REAL ESTATE STRATEGIES GROUP INC, 2017 ABCA 149 (O'FERRALL JA)
Rules 14.8 (Filing a Notice of Appeal) and 14.65 (Restoring Appeals)

The Case Management Judge declined to summarily dismiss all of the third party claims against Real Estate Strategies Group Inc. ("RESG"), and RESG appealed. The Appeal was deemed to be abandoned under Rule 14.65(3), since more than three months had passed since the Appeal was struck and no Application to restore had been filed. RESG then applied to restore the Appeal and for an extension of time to Appeal.

O'Ferrall J.A. noted that the remedies sought by RESG were discretionary. The Court must consider: the merits of the Appeal; whether the Applicant has demonstrated an unwavering intention to prosecute the Appeal; whether there is an explanation which fairly justifies or excuse the delay; and, whether the Respondent is unduly prejudiced by the delay.

When RESG first filed a Notice of Appeal, it was advised immediately that the Appeal was filed out of time, pursuant to the time period specified in Rule 14.8, and an extension would be required. However, no steps were taken at that time to seek the extension. After filing the Appeal record, the Appeal was struck for not filing the Factum in time. It was subsequently deemed abandoned as RESG failed to file an Application to restore the Appeal. RESG did not in fact apply to restore the Appeal for approximately six months. Justice O'Ferrall held the delay to be unreasonable considering that the Appeal was a Fast Track Appeal. His Lordship also noted that restoring the Appeal could interfere with the parties' preparation for the upcoming Trial, as it could not properly be heard and decided before the Trial. Finally, O'Ferrall J.A. was not persuaded as to the merits of the Appeal. Both Applications by RESG were dismissed.

CANADA (ATTORNEY GENERAL) V ANDRONYK, 2017 ABCA 139 (WATSON JA)
Rule 14.37 (Single Appeal Judges)

The Respondent, Andronyk, commenced an Originating Application for Judicial Review to challenge the Decision of the Minister of Justice under the *Extradition Act*, SC 1999 c 18 who had decided to unconditionally surrender the Respondent to the Unites States. The Respondent had been granted a Judicial Interim Release Order pending his Application for Judicial Review. The Attorney General advanced a multi-faceted Application seeking: an Order to rescind the Interim Release Order on the basis that the Respondent had breached it, a warrant for the Respondent's arrest, a certificate referral to the Bail Forfeiture Court, and dismissal of the Respondent's Application for Judicial Review.

Watson J.A. reviewed Rule 14.37 and determined that a single Appeal Judge had the authority to dismiss an Application for Judicial Review under Rule 14.37(2)(b). The Rule allows a single Appeal Judge to declare an Appeal to be struck, dismissed, or abandoned where an Appellant fails to comply with a mandatory Rule or prior Order or direction of the Court. Justice Watson held that this was consistent with sections 57(10) of the *Extradition Act*, and

section 482(1) of the *Criminal Code*, RSC 1985 c C-46 which each provide that provincial Rules of civil procedure apply, provided they are not inconsistent with the provisions of those enactments respectively.

Justice Watson held that the Respondent had seemingly defaulted of the terms of his Interim Release Order, which gave the Court the authority to dismiss his Application for Judicial Review. The Attorney General's Application was granted in full.

AL-GHAMDI V ALBERTA, 2017 ABCA 159 (SCHUTZ J)
Rule 14.88 (Cost Awards)

The Applicant, Al-Ghamdi unsuccessfully sought to restore his struck Appeal (the "Leave Application"). The Court of Appeal did not make an express direction with respect to Costs in the Leave Application. The successful Respondents drafted a form of Order which included an award for a single set of Costs and provided it to the Applicant. The Applicant objected to the form of Order, and the Respondents sought the Court's direction to settle the terms of the Order.

Schutz J.A. held that, in the circumstances there was no reason to depart from Rule 14.88, which mandates that the successful party in an Application before the Court of Appeal is entitled to Costs as against the unsuccessful party. Schutz J.A. reviewed the form of Order drafted by the Respondents and held that it was appropriate. An award of single Costs in favour of the Respondents was therefore approved.