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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 fully searchable Rules database containing all past summaries up to, and including, our latest release.

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ALSTON V HAYWOOD SECURITIES INC, 2020 ABQB 107 (EAMON J)
Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibilities of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.4 (Standard Case Obligations), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 6.11 (Evidence at application hearings), 6.37 (Notice to Admit) and 13.18 (Types of Affidavit)

Eamon J. dealt with an Appeal of a Master's Decision to dismiss the Plaintiffs' Action on the basis of delay pursuant to Rules 4.31 and 4.33 (the "Underling Action"). The Master dismissed the Underlying Action pursuant to Rule 4.31 against all Defendants due to the Plaintiffs' delay in moving the Action forward and the resulting prejudice suffered by the Defendants. The Master also would have also dismissed the Underlying Action pursuant to Rule 4.33.

The Appellants raised concerns that the Master had ignored their submissions generally and specifically with respect to the chronology of the Underlying Action contained predominantly in their Response to Notice to Admit Facts. Justice Eamon reviewed the applicable Rules of 6.37, 6.11, 13.18 and rejected this assertion. His Lordship found that a Notice to Admit under Rule 6.37 calls on an opposing party to provide admissions to dispense with proof of specific facts; however, the required explanation is not evidence that can be used against the party seeking the admission. To permit that use would circumvent the requirement for proper Affidavits or other admissible evidence on Applications under Rules 6.11 and 13.18 and defeat the objectives of efficient and fair proceedings under the Foundational Rules 1.1 and 1.2. Justice Eamon found, in essence, that this use of Rule 6.37 would allow a party on whom a Notice to Admit is served to make wide ranging assertions of fact without any means of challenge by cross-examination.

Justice Eamon reviewed the factual history between the parties and concluded that the Appellants had failed to comply with their obligations under each of Rules 4.1, 4.2 and 4.4. Namely, they failed to effectively manage the litigation by failing to disclose various records which they knew the Defendants wanted (Rules 1.2(2)(d) and 4.2(a)), and failed to cooperate in scheduling a records production Application on the special list knowing that the reasonable deadline for discovery (identified by the parties) had long passed (Rule 4.4(1)(b)). Accordingly, Justice Eamon dismissed the Appeal.

FRANIEL V TORONTO-DOMINION BANK, 2020 ABQB 66 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 5.25 (Appropriate Questions and Objections) and 7.3 (Summary Judgment)

This was an Application for an Order to compel the Defendant to answer questions and provide replies to Undertakings from the Questioning of its corporate representative. Before beginning his analysis, Master Robertson noted that it seemed the Defendant's position was that it owed no duty of care to the Plaintiff and that it was not obliged to provide candid answers to the questions that were asked – he noted that if this belief guided the objections to the questions it was an error. The scope of questions that a party is allowed to ask is determined by the pleadings, and there was no Application brought by the Defendant to strike pursuant to Rule 3.68 nor an Application for Summary Dismissal pursuant to Rule 7.3. In addition, Rule 1.2 directs all parties to use the Rules to "to provide an effective, efficient, and credible system of remedies and sanctions to enforce these rules and orders and judgments."

One of the questions the Defendant objected to was regarding who made the decision to refuse the Plaintiff's compensation, claiming that the answer was subject to litigation privilege. Master Robertson explained that the proper grounds of objection were listed in Rule 5.25(2), and amongst them was "any other ground recognized at law". He noted that information to identify a witness is not privileged. Further, case law suggested that if a rational strategy existed for wanting to know the answer to a question, then it should be sufficient, and in this instance there was a rational strategy for wanting to know the answer to the question. Master Robertson found the Defendant's absolute refusal to answer the question troubling and noted that if they continued to assert that the answer was not relevant, they would have a difficult time if they decided to adduce evidence later at Trial.

Master Robertson determined, amongst other things, that an Order would be issued with specific directions regarding the objections that were given to questions and Undertaking requests.

PIIKANI NATION V MCMULLEN, 2020 ABQB 87 (ROOKE ACJ)
Rules 1.2 (Purpose and Intention of These Rules) and 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Application by the Defendant, McMullen, seeking leave to "recuse" Associate Chief Justice Rooke from hearing matters as Case Management Justice in these Actions. The Plaintiff opposed the Application, arguing that it was frivolous, irrelevant or improper, an abuse of process, and that it disclosed no reasonable likelihood of success pursuant to Rule 3.68(2). Associate Chief Justice Rooke agreed, given that the Defendant had mostly provided bare allegations and unsubstantiated conclusory statements.

The Plaintiff also opposed the Application because it did "not go to resolving the real issue in dispute or facilitate the quickest means of resolving the claim at the least expense" and was therefore inconsistent with Rule 1.2. Associate Chief Justice Rooke agreed. The Defendant's Application was dismissed with Costs.

PIIKANI NATION V MCMULLEN, 2020 ABQB 88 (ROOKE ACJ)
Rules 1.2 (Purpose and Intention of These Rules) and 3.68 (Court Options to Deal with Significant Deficiencies)

In two complex Actions jointly managed by Associate Chief Justice Rooke, the self-represented Defendant, McMullen, brought six Applications for leave seeking to challenge the conduct of various law firms and the Court. Associate Chief Justice Rooke decided each Application for leave separately.

In one Application for leave, the Defendant sought disqualification of a law firm acting for parties adverse in interest to him, whether with respect to the Actions generally or with respect to a related disqualification Application brought against another law firm. The Court was not satisfied that the Defendant had offered any evidence or legal proposition to establish a conflict of interest or abuse of process, and noting no reasonable likelihood of success, denied leave. Moreover, Associate Chief Justice Rooke identified the Defendant's pursuit of disqualification as a colourable attempt to induce a conflict of interest on which to ground the disqualification, constituting an abuse of process contrary to Rules 3.68(2) and 1.2.

PIIKANI NATION V MCMULLEN, 2020 ABQB 89 (ROOKE ACJ) Rules 1.2 (Purpose and Intention of These Rules), 3.44 (When Third Party Claim May be Filed), 3.45 (Form of Third Party Claim), 3.68 (Court Options to Deal with Significant Deficiencies) and 4.33 (Dismissal for Long Delay)

The Defendant, McMullen, sought leave to bring a Third Party Claim against several individuals and law firms (the "Proposed Third Parties"). The Case Management Justice denied the leave Application for several reasons including: the Defendant failed to file and serve the Third Party Claims under Rule 3.45(c)(i) within six months of filing his Statement of Defence; the Court found there had been inordinate delay by the Defendant, and there were no credible or reasonable excuses for the delay; and there was no reasonable likelihood of success.

The Defendant attempted to explain the inordinate delay by arguing he "was disinclined to take steps which may have the effect of resetting the three year 'drop dead' clock" pursuant to Rule 4.33, but the Court found that the reasons for the delay *vis-à-vis* the Plaintiff in respect of Rule 4.33 do not have relevance to the delay *vis-à-vis* the Proposed Third Parties.

The Defendant also tried to claim contribution from the Proposed Third Parties under Rule 3.44 but failed to allege a duty owed by the Proposed Third Parties to himself. The Court confirmed that a Third Party Claim cannot be used to enforce duties owed by the Proposed Third Parties to the Plaintiff.

The Court found the Defendant's failure to proceed in a timely basis was an abuse of process under Rule 1.2 and determined it had no likelihood of success under Rule 3.68. Rooke A.C.J. dismissed the Application.

PIIKANI NATION V MCMULLEN, 2020 ABQB 90 (ROOKE ACJ) Rules 1.2 (Purpose and Intention of these Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 5.33 (Confidentiality and Use of Information)

In two complex Actions jointly managed by Associate Chief Justice Rooke, a self represented Defendant ("McMullen") brought an Application for leave (the "TPC Leave Application") to assert a Third Party Claim against several CIBC entities and Blake, Cassels & Graydon LLP ("Blakes").

In response, Blakes brought an Application for leave to strike the TPC Leave Application (the "Strike Leave Application") and Jensen Shawa Solomon Duguid Hawkes LLP ("JSS") brought an Application for leave to find McMullen in contempt of Court (the "Contempt Leave Application").

Associate Chief Justice Rooke stayed the TPC Leave Application until further Court Order, as the Application could not proceed until the substance of the Strike Leave Application and Contempt Leave Application were determined.

In considering the Contempt Leave Application, Associate Chief Justice Rooke found that leave should be granted on an Application if the Application does not conflict with the purposes of the Rules, as outlined in Rule 1.2, and discloses a reasonable likelihood of success pursuant to Rule 3.68. Associate Chief Justice Rooke found that there was some evidence of McMullen's contempt and granted JSS leave to make the Contempt Leave Application.

In considering the Strike Leave Application, Blakes argued that McMullen had relied upon privileged documents and records that are subject to the implied undertaking rule as codified in Rule 5.33. Specifically, Blakes alleged that McMullen relied on information from another Action which McMullen was not a party to, without Court Order and without consent, contrary to Rule 5.33. Associate Chief Justice Rooke found that the argument had some merit and met the requirements for leave under Rules 1.2 and 3.68. His Lordship also granted Blakes leave to make the Strike Leave Application.

PIIKANI NATION V MCMULLEN, 2020 ABQB 92 (ROOKE ACJ) Rules 1.2 (Purpose and Intention), 3.68 (Court Options to Deal with Significant Deficiencies), 4.1 (Responsibilities of Parties to Manage Litigation), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)

The Defendant, Dale McMullen ("McMullen"), brought an Application for leave regarding the underlying Action of *Piikani Nation (Nation) et al v McMullen et al*, QB Action No. 1001 10326 (the "Underlying Action"), to strike or dismiss the Underlying Action pursuant to Rules 4.31, 4.33, 7.3, or 3.68. In the fourth alternative, McMullen sought leave to bring an Application to strike the Underlying Action for breach of a covenant by the Piikani Nation (the "Nation") to cause the Piikani Investment Corporation ("PIC") to take insurance to indemnify McMullen for losses and injury alleged in the Underlying Action (collectively the "Leave Application"). This was the sixth such leave decision in the Underlying Action ("Leave Decision #6").

Rooke A.C.J., as the Case Management Justice, referenced and repeated much of the historical setting giving rise to the other five decisions preceding Leave Decision #6. Reviewing the complex procedural history among the parties, Associate Chief Justice Rooke found that the Underlying Action involved complex matters of fact and law that could not be clearly determined without a complete Trial. His Lordship noted further that the Nation's claims in the Underlying Action were not hopeless under Rule 3.68, as it was not plain and obvious that they could not succeed. Further, Associate Chief Justice Rooke noted that the alleged agreement which McMullen relied upon for the fourth alternative relief was clearly still in issue, as the Nation had denied that the alleged agreement was valid or enforceable. Accordingly, Associate Chief Justice Rooke denied McMullen's Leave Application pertaining to Summary Dismissal under Rule 7.3, abuse of process under Rule 3.68; and the alleged breach of covenant.

Turning to the relief sought under Rules 4.31 and 4.33, Associate Chief Justice Rooke found that there may be "odds taken" on whether McMullen's proposed Applications under these Rules would be successful, and what Costs may flow from a decision on those issues. Accordingly, Associate Chief Justice Rooke concluded by allowing the Leave Application to proceed on these two heads of relief. His Lordship cautioned that all aspects of the Underlying Action continue to interfere with Rule 1.2, and reiterated the obligation of the parties to resolve the real issues in dispute by facilitating the quickest means of resolving the dispute at the least expense and delay.

His Lordship concluded by noting that Leave Decision #6 was stayed until further Order of the Court, with the intent that it would continue to be stayed until the issue of McMullen's other outstanding Application to disqualify Gowlings LLP as the Nation's counsel was determined.

GO COMMUNITY CENTRE V CLARK BUILDERS AND STANTEC CONSULTING LTD, 2020 ABQB 203 (RENKE J) Rules 1.2 (Purpose and Intention of these Rules), 5.1 (Purpose of this Part), 5.4 (Appointment of Corporate Representatives), 5.6 (Form and Contents of Affidavit of Records), 6.6 (Response and Reply to Application), 10.29 (General Rules for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.35 (Preparation of Bill of Costs), 10.48 (Recovery of Goods and Service Tax) and Schedule C

The Defendants successfully appealed from the Decision of a Master dismissing their Application to summarily dismiss the claims against them. Their Appeals were allowed, and the claims against them were summarily dismissed. The parties could not agree as to Costs, so they provided written submissions to Renke J. The Defendants were wholly successful on Appeal and therefore entitled to Costs – but they also sought elevated Costs, Costs respecting an uncontested third-party production Order, extra Costs on account of a "late filed" Affidavit by a witness for the Plaintiff, Costs for second counsel on Appeal, disbursements for a transcript, and repayment of the Costs awarded by the Master in the Decision below. The Plaintiff also questioned whether GST was payable on the Defendants' Costs under Rule 10.48.

At the outset, Renke J. noted that the Plaintiff had either expressly or implicitly conceded that Costs were owed to the Defendants as they had been wholly successful on Appeal, that second counsel Costs on Appeal should be allowed, that the Defendants should recover the Costs they paid pursuant to the Master's Order in the Decision below, and that disbursements for Transcripts should be included. However, the parties could not agree on the elevated Costs sought by the Defendants, Costs respecting an uncontested third-party production Order, or the Defendants' entitlement to extra Costs relating to a "late filed" Affidavit by a witness for the Plaintiff.

Renke J. considered the Plaintiff's assertion that the Defendants were not entitled to GST as part of their Costs. Pursuant to Rule 10.48(2), GST cannot be claimed where the amount is rebate-able or refundable under the *Excise Tax Act*, RSC 1985, c E-15. Renke J. also referenced the warranty under the GST claim in a Form 44 Bill of Costs contemplated by Rule 10.35(1). His Lordship noted that the Defendants had not been able to respond to this assertion, and ordered the Defendants to do so within 45 days, failing which they would be deemed to have conceded that GST was not payable.

Renke J. did not agree with the Plaintiff's assertion that the Defendants should not be awarded Costs relating to an uncontested third-party production Order because the information sought through the Order was "duplicative", and Renke J. therefore awarded those Costs.

His Lordship then considered whether the Defendants were entitled to extra Costs on account of the Plaintiff's "late filed" Affidavit, and noted that pursuant to Rules 6.6(1) and (3), Affidavits (and other evidence) are to be served on the other parties "a reasonable time before the [A]pplication is to be heard or considered", and that "the Court may impose [C]osts on the party who did not give reasonable notice". Renke J. held that the Affidavit had been filed within a reasonable period of time before the Application was heard, and therefore the Defendants were not entitled to Costs relating to it.

Renke J. next considered the Defendants' claims for elevated Costs. Both Defendants claimed for Costs based on Column 5 of Schedule C, with different multipliers. One Defendant also alternatively sought Costs on a partial indemnity basis at 54% of its legal fees. The Plaintiff argued that the Defendants should be entitled to Costs based on Column 4 of Schedule C, with a multiplier of 1.5 to account for inflation. His Lordship noted that the Rules were amended on March 17, 2020 to substitute a new Division 2 tariff for Schedule C, which adjusted the column ranges upward, and which relieved "some of the inflationary pressure motivating different approaches to [C]osts". However, the matter before Renke J. was required to be decided under the unamended Schedule C.

Renke J. reviewed the purposes behind the Costs regime, including that Costs should "justly" be allocated to the unsuccessful litigant under Rule 10.29(1), and that Costs should be proportionate, promote efficiency, and remain in line with the Foundational Rules, including Rule 1.2. His Lordship considered the framework for considering Costs awards described through Rules 10.31 and 10.33, noting that they ask the Court to consider several factors in assessing Costs. His Lordship emphasized that the decision to award Costs is discretionary, but that discretion must be exercised judicially and in line with the factors set out in Rule 10.33. His Lordship further noted that the tariff in Schedule C was set in 1998 and was not revised by the new Rules in 2010. While they were intended to partially reimburse litigants "in the neighbourhood of 30-50% of actual costs", they no longer do so.

His Lordship also considered several policy concerns respecting whether an adjustment for inflation should be made, or any other tools should be used to arrive at a just and fair Costs Award. Renke J. noted that Rules 10.31(1) and (3) expressly permit "an array of tools or mechanisms for arriving at a reasonable costs award", and that previous cases have permitted the use of an "inflationary factor", Costs multipliers, or awards based on a percentage of the actual legal fees incurred by the successful party.

Renke J. noted that the Defendants were "completely successful" and that the Plaintiff's claim was "not significantly above" the Column 5 threshold and the proceedings were not unusually long, but were "at least

moderately [...] complex". Further, His Lordship considered the parties' conduct in the litigation which lengthened the Action, per Rule 10.33(2)(g), and noted the Defendants' concerns that the Plaintiff had withheld some important records until after the Applications before the Master were heard — some of which were disclosed "only about 2 weeks before the appeal". The Plaintiffs argued that their corporate representatives had not intentionally withheld the records, and that the Defendants were partially responsible for their failure to disclose them as they had failed to cross-examine a witness on his Affidavit of Records. Renke J. disagreed and noted that even if the Plaintiff's principals had not intentionally acted improperly, they had acted "unreasonably" and engaged in "misconduct" within the meaning of Rule 10.33(2)(g). Pursuant to Rule 5.1, one of the purposes of Part 5 of the Rules is to encourage early disclosure of facts and records. Pursuant to Rule 5.6(1), an Affidavit of Records is required to disclose all relevant and material records. Further, under Rule 5.4(2) corporate representatives are required to "inform themselves of relevant and material records" and information. Renke J. also considered the Defendants' legal fees, the reasonableness of the Plaintiff's claim, the parties' relative economic imbalances, the Plaintiff's concession respecting inflation, and the reputational impact of the litigation as part of His Lordship's analysis of "any other matter" under Rule 10.33(1)(g). His Lordship ultimately awarded Costs under Column 5 of Schedule C, adjusted for inflation using a 1.5 multiplier, with a further multiplier of 1.5 for certain steps taken in the Action.

NOVA POLE INTERNATIONAL INC. V PERMASTEEL CONSTRUCTION LTD, 2020 ABCA 45 (STREKAF, KHULLAR AND PENTELECHUK JJA)
Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.31 (Application to Deal with Delay) and 5.34 (Service of Expert's Report)

In September of 2016 the Respondents applied to have the underlying Actions dismissed pursuant to Rules 4.33 and 4.31. The Master had refused to dismiss those Actions, and the Chambers Judge allowed the Appeal of the Master's Decision and dismissed the underlying Actions pursuant to Rule 4.31. The Appellants then appealed that Decision of the Chambers Judge.

The Appellants submitted that when the Chambers Judge determined that the Appellants had conceded that the delay was inexcusable, the Judge had erred. They further submitted that this led to the Judge mistakenly presuming that significant prejudice was established pursuant to Rule 4.31(2). The Court determined that whether the Appellants had conceded the point or not was not relevant as the Chambers Judge had undertaken her own analysis.

In assessing whether the Chambers Judge erred in determining whether the delay was inexcusable, the Court noted that the Rules placed an obligation on all parties to "to advance an action in a timely and cost-effective way" and referred to Rules 1.2, 4.1 and 4.2. The Court noted that Rule 5.34 provided that a Trial date could not be scheduled unless expert reports had been exchanged. The Rules did not permit a party to refuse to conduct Questioning until expert reports were provided. In the underlying Actions, the Respondents and the Appellants agreed to delay Questioning until expert reports were provided. The Court determined that the Chambers Judge's failure to consider the role of the Respondents in the arrangement to have expert reports exchanged before Questioning was an error in principle and the Appeal was allowed.

OZARK RESOURCES LTD V TERIC POWER LTD, 2020 ABCA 51 (ANTONIO JA)
Rules 1.2 (Purpose and Intention of these Rules), 6.3 (Applications Generally), 6.4 (Applications Without Notice), 14.5 (Applications Only With Permission), 14.48 (Stay Pending Appeal) and 14.71 (Interlocutory Decisions)

This was an Application to restore an Appeal, to stay a lower Court's Order pending the Appeal, and, in the alternative, for permission to Appeal. All of the Applicant's Applications were dismissed.

The Applicant filed a Notice of Appeal arguing, amongst other issues, that the Chambers Judge erred in failing to hear the Applicant and denying the Applicant's request

for an adjournment, in granting the Order the Respondent sought notwithstanding their failure to comply with Rule 6.3. Rule 6.3 states that an Application must be in an appropriate form, list certain things, and be filed and served on all parties and people affected by the Application five or more days before it was to be heard.

The Applicant argued that permission was not required to Appeal. The Court, however, found that the Appeal from the adjournment clearly fell under Rule 14.5(1)(b), and therefore permission was required. Regardless, the Appeal was moot.

In addressing the Applicant's alternative argument, Her Ladyship considered the test for granting permission to Appeal under Rule 14.5(1)(b). The test asked whether the Appeal raised serious questions of general importance, and whether it had a reasonable chance of success. Justice Antonio noted that the Applicant's argument that the Chambers Judge erred in proceeding notwithstanding the Respondent's failure to comply with Rule 6.3, failed to consider Rule 6.4 which permits Judges to proceed with an Application despite Rule 6.3 if they were satisfied that no notice was necessary, or that serving notice of the Application could cause the Applicant undue hardship. Justice Antonio noted that pursuant to Rule 1.2, the role of a Chambers Judge is to balance timeliness and cost-effectiveness when making a fair determination. Her Ladyship determined that none of the Applicant's arguments had a reasonable chance of success.

The Applicant also sought to have two Orders stayed. Rule 14.48 allows for stays of Applications pending Appeal; however there was no Appeal of one of the Orders, so it could not be stayed. The Applicant had argued that Rule 14.71 allowed the Court to stay an Order despite there having been no Appeal. There was, however, no remaining context in which to consider Rule 14.71, and the Applications for stays were dismissed.

ST ISIDORE CO-OP LIMITED V AG GROWTH INTERNATIONAL INC, 2020 ABQB 94 (FRIESEN J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.6 (Pleadings: General Requirements)

Following success at Trial, the Plaintiff sought leave to amend its Statement of Claim to include a prayer for prejudgment interest. The Court first considered whether an award of prejudgment interest could be granted where that remedy had not been pleaded. In part, the Plaintiff argued the Court's broad authority set out in Rule 1.3 to grant a remedy "whether or not it is claimed or sought". The Defendant argued that Rule 13.6(2)(c)(iii) specifically requires that the particulars of interest be pleaded. The Court held that prejudgment interest must be pleaded where sought.

Turning to the Plaintiff's request for leave to amend, the Defendant argued that the proposed amendment was hopeless. The Court described a hopeless amendment as one that would have been struck if originally pleaded. Justice Friesen considered the conditions for striking a pleading under Rule 3.68, finding that the addition of a prayer for prejudgment interest did not meet those conditions. The Court granted leave to amend the Statement of Claim and ordered prejudgment interest as claimed in the amendment.

TA V ALBERTA (CHILDREN'S SERVICES), 2020 ABQB 97 (DEVLIN J)
Rules 2.11 (Litigation Representative Required), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiffs ("TA" and her children) filed a Statement of Claim against numerous parties after the children were apprehended by Edmonton Children's Services. The Claim made "broad assertions" and sought "broad remedies" relating to child welfare policies involving indigenous children. The Defendants applied to strike the Statement of Claim pursuant to Rule 3.68 as an abusive collateral attack on child protection proceedings which were still

underway, and because it disclosed no cause of action. Two of the Defendants, who were accused of negligence and defamation relating to their findings in a psychological report, also applied for Summary Dismissal of the Action against them.

First, Devlin J. noted that TA brought the Action in her own name and in the names of her six minor children, but that she was never appointed as their litigation representative as required by Rule 2.11. Devlin J. dismissed the Action as it related to the children, without prejudice to it being brought in accordance with the Rules at a future time.

Next, Devlin J. reviewed Rule 3.68. His Lordship noted that the orders complained of in the child protection proceedings were not appealed, and that attempting to relitigate a matter already determined is an abuse of process. Further, Devlin J. determined that the wrongs complained of by the Plaintiff did not create causes of action against the Defendants, and that the remedies she sought were mostly beyond the jurisdiction of the Court. As such, the Statement of Claim was struck in its entirety, except for the defamation claim respecting the psychological report.

Devlin J. then considered the Summary Dismissal Application, and noted that Rule 7.3(b) allows a Defendant to seek Summary Dismissal where there is no merit to all or part of a claim. His Lordship reviewed the framework for determining whether a claim is suitable for Summary Dismissal from *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, and held that Summary Dismissal was appropriate in the circumstances. The Applicants had filed an expert report demonstrating that they had met the standard of care, along with evidence that the report was created in a situation of qualified privilege, which provided a full defence to the defamation claim. TA had not filed any evidence in response. As such, the facts could be proven on a balance of probabilities, and there were no genuine issues requiring a Trial.

FITZPATRICK V COLLEGE OF PHYSICAL THERAPISTS OF ALBERTA, 2020 ABCA 88 (HUGHES JA)
Rules 2.22 (Self-Represented Litigants), 2.31 (Withdrawal After Trial Date Scheduled) and 14.2 (Application of General Rules)

The Plaintiffs, being an individual and her corporation, appealed the Summary Dismissal of their Action. Approximately two months prior to the hearing before the Court of Appeal, Plaintiffs' counsel sought to withdraw for non-payment of fees, seeking the permission of the Court required post-Judgment under Rule 2.31, arguing that Rule 2.31 applied to appellate practice by operation of Rule 14.2.

Drawing on the Supreme Court of Canada's pronouncement in *R v Cunningham*, 2010 SCC 10, Justice Hughes set out to consider several factors, as well as the standards enunciated in the Law Society of Alberta's *Code of Conduct*. The Court ultimately found in favour of withdrawal, notwithstanding the harm to the administration of justice which would be caused upon adjournment of the Appeal Hearing, in the likely event that the allotted time could not be otherwise used by the Court on short notice.

Given that the withdrawal was granted, and given that case law interpreting Rule 2.22 has found that an individual is prohibited from acting on behalf of a corporation, the Court proactively ordered that the corporate Plaintiff's Appeal would be deemed abandoned unless the corporate Plaintiff retained counsel three months before the rescheduled Appeal hearing.

QUAYE V LAW SOCIETY OF ALBERTA, 2020 ABQB 55 (ROOKE ACJ)
Rules 3.15 (Originating Application for Judicial Review), 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders) and 10.29 (General Rule for Payment of Litigation Costs)

The Applicant had previously made an Originating Application seeking Judicial Review, which Associate Chief Justice Rooke had ruled to be an Apparently Vexatious Application or Proceeding ("AVAP") and had ordered, pursuant to Civil Practice Note No. 7 ("CPN7"), that the

Applicant had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. Rooke A.C.J. reviewed the written submissions provided by the Applicant to the Court and determined that the AVAP should be struck pursuant to Rule 3.68.

In addition, Rooke A.C.J. found that the Applicant did not explain why the Application was served on the Respondents weeks after the six-month period provided for filing and serving an Application for Judicial Review in contravention of Rule 3.15(2).

The Court also ordered the Applicant to pay each of the Respondents $1,000.00 in Costs, citing Rule 10.29(1) for the principle that the successful party is presumptively entitled to Costs unless the Court otherwise orders. The Court also dispensed with the Applicant's approval of the form of Order pursuant to Rule 9.4(2)(c).

AL-GHAMDI V COLLEGE AND ASSOCIATION OF REGISTERED NURSES OF ALBERTA, 2020 ABCA 81 (COSTIGAN, WATSON AND FEEHAN JJA)
Rules 3.15 (Originating Application for Judicial Review), 3.28 (Effect of Not Serving Statement of Claim in Time), 3.68 (Significant Deficiencies), and 7.3 (Summary Judgment)

Having been found a vexatious litigant in contempt of Court, the Appellant appealed the entirety of two Decisions rendered by Goss J. In the first Decision, Her Ladyship determined that no further Action could be taken against Defendants who were not served in time, pursuant to Rule 3.28; struck some Actions which had no reasonable prospect of success on the basis of Rule 3.68; and also summarily dismissed some Actions pursuant to Rule 7.3.

In the second Decision under Appeal, Goss J. had dismissed four Actions pursuant to Rule 3.15, as the Originating Application for Judicial Review was neither served nor filed in time; found that other Actions could not move forward as parties were not served in time as required by Rule 3.28; struck some Actions which disclosed no reasonable prospect of success within the meaning of Rule 3.68; and summarily dismissed other claims which lacked merit pursuant to Rule 7.3. Goss J. went on to declare the Appellant a vexatious litigant, referring to various situations of vexation or abuse of process as outlined in Rules 3.68(2)(c) and (d).

In affirming all of Goss J.'s findings, the Court of Appeal noted that Her Ladyship had correctly reviewed the law with respect to Applications to strike pursuant to Rule 3.68, and Summary Dismissal pursuant to Rule 7.3, both with reference to *Hryniak v Mauldin*, 2014 SCC 87.

The Court of Appeal also affirmed Goss J.'s Decisions on Rule 3.15, finding that the Appellant's Application for Judicial Review had not been filed or served in time. The Appeals were dismissed.

WILCOX V ALBERTA, 2020 ABCA 104 (GRECKOL JA)
Rules 3.15 (Originating Application for Judicial Review) and 3.68 (Court Options to Deal with Significant Deficiencies)

An Originating Application filed by the Appellant for *habeas corpus* was processed in accordance with Civil Practice Note No. 7 ("CPN7").

The Chambers Judge ruled the Application to be an Apparently Vexatious Application or Proceeding ("AVAP") and ordered, pursuant to CPN7, that the Appellant had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. The Chambers Judge reviewed the written submissions provided by the Appellant to the Court and determined that the AVAP should be struck pursuant Rule 3.68.

The Appeal Court noted that a lower Court's decision to strike a pleading pursuant to Rule 3.68 is generally entitled to deference absent an error of law, though whether a claim constitutes an abuse of process is reviewed for correctness. The Appeal Court found that the Chambers Judge erred in holding that the pleadings amounted to an abusive, vexatious filing.

The Appeal Court also found that the Chambers Judge erred in holding that the Appellant's *habeas corpus* Application combined incompatible pleadings. The Court underscored that under Rule 3.15(1)(a), Judicial Review and *habeas corpus* are parts of the same process. Greckol J.A. allowed the Appeal.

REYES V DYCK, 2020 ABQB 154 (BURROWS J)
Rule 3.27 (Extension of Time for Service)

Having failed to serve a Statement of Claim in time, the Plaintiff in a personal injury Action sought to extend the service period. The Plaintiff relied upon Rule 3.27(1)(a), which allows for relaxation of the service period where a Defendant causes a Plaintiff to reasonably believe that the Defendant has been served, or that liability was not being contested. At first instance, Master Schulz permitted the extension. On Appeal, Justice Burrows confirmed the extension, finding that the Defendant's adjuster had lulled the Plaintiff's lawyer into believing that either the Defendant had been served, or that liability was not being contested, and that "lulling", even where unintentional, amounts to "causing" for the purposes of Rule 3.27.

OMNIARCH CAPITAL CORPORATION V BISHOP, 2020 ABQB 102 (DILTS J)
Rules 3.37 (Application for Judgment against Defendant Noted in Default), 3.40 (Continuation of Action Following Judgment), 4.31 (Application to Deal with Delay), 4.34 (Stay of Proceedings on Transfer or Transmission of Interest) and 5.13 (Obtaining Records from Others)

The Plaintiffs claimed against several Defendants. After the Plaintiffs settled with some of the Defendants and noted others in default, only one Defendant remained. The Plaintiffs assigned their litigation interests to a new corporation, and the Action was automatically stayed pursuant to Rule 4.34.

This Decision dealt with three Applications: (1) the Plaintiffs applied to continue the Action after it was stayed pursuant to Rule 4.34; (2) the remaining Defendant applied to dismiss the Action against it pursuant to Rule 4.31; and (3) the Plaintiffs also sought to proceed with an oral hearing to asses their damages claimed against the Defendants who had been noted in default.

Dilts J. first considered whether the Action should be permitted to continue under Rule 4.34 and explained that pursuant to the Rule, an Action is automatically stayed when the interest or liability of a party is transferred to another person, and may be re-started upon the Plaintiff's Application. In assessing whether an Action may be continued, the Court should consider whether there were valid reasons for the assignment, and whether there are policy or other concerns to suggest that the Action should not be continued. No such concerns existed, and Dilts J. ordered that the Action be continued as a whole.

Her Ladyship also explained that under Rule 4.34(4), if an Application to lift the Rule 4.34 stay is not made within a reasonable period of time, the Defendant may apply to dismiss the Action for delay pursuant to Rule 4.31. It was through this mechanism that the remaining Defendant applied pursuant to Rule 4.31 to dismiss the Action. Dilts J. explained that under Rule 4.31, the Court must assess whether delay in prosecuting the Action as a whole resulted in significant prejudice to a party. If the Applicant demonstrated inordinate and inexcusable delay, then significant prejudice is presumed and the burden shifts to the Respondent to rebut the presumption. Dilts J. found that there had been delay in the Action, but no inordinate or inexcusable delay since the delay was not "much in excess" of what was reasonable in the circumstances.

Further, Dilts J. held that the delay did not result in significant prejudice to the remaining Defendant. The remaining Defendant argued that it had not been notified of the Plaintiffs' settlement with some of the other Defendants, and as a result it was prejudiced because it had lost the opportunity to obtain a procedural Order to claim contribution or indemnity from the settling Defendants, and would be unable to question or obtain records from certain witnesses. Her Ladyship noted that the remaining Defendant still had the right to apply for an Order requiring production of third party records pursuant to Rule 5.13, and that even if the remaining Defendant had suffered prejudice, it was not as a result of litigation

delay – rather, it was as a result of "the action or inaction of the Plaintiffs and their former counsel". Her Ladyship concluded that the Action should not be dismissed for delay pursuant to Rule 4.31.

Finally, Dilts J. held that the Plaintiffs could proceed with an assessment of damages against the Defendants that had been noted in default. The remaining Defendant objected to the assessment on the basis that it could be prejudiced by "any determination of the Plaintiffs' losses without its full participation". Her Ladyship accepted the Plaintiffs' arguments that Rules 3.37 and 3.40 expressly allow a Plaintiff to engage in a damages assessment against only some Defendants, while continuing the Action against others. Further, Dilts J. noted that allowing the Plaintiffs to proceed with a damages assessment against the defaulting Defendants would assist them in recovering their losses without undue delay, and would not cause unfairness to the remaining Defendant as any damages against it could be assessed independently on a more complete record after document production, Questioning, and Trial.

WEST EDMONTON MALL PROPERTY INC V PROCTOR, 2020 ABQB 161 (MAH J)
Rules 3.56 (Right to Counterclaim), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 9.2 (Preparation of Judgments and Orders)

The Plaintiffs sought an Injunction against a former tenant preventing her from defaming them. The Plaintiffs also sought to strike the Defendant's pleadings under Rule 3.68, and sought Summary Judgment of a Statement of Claim and a Counterclaim brought by a non-party pursuant to Rule 7.3. The Plaintiffs also sought a declaration under Civil Practice Note 7 that the Defendant was a vexatious litigant.

The Defendant had added a non-party to the list of Defendants. Justice Mah found that, pursuant to Rule 3.56, a Counterclaim made by a non-party is a nullity. Further, the Court found that the Defendant was essentially seeking to relitigate something for which a final Court Order had already been issued, and that this amounted to an abuse of process pursuant to Rule 3.68(2)(d). In addition, the Court found that no cause of action underlay the Counterclaim for monetary damages of $35 million. For these reasons, the Court struck the Counterclaim.

In considering Rule 7.3, the Court found that the record was complete and allowed the Court to make the necessary findings of fact, and held that there was no genuine issue requiring a Trial. Mah J. granted the Plaintiff's Application for Summary Judgment.

Lastly, the Court ruled that, with respect to the Order from this Decision the Defendant's approval was not required pursuant to Rule 9.2(4)(c). The Court did not find it necessary to decide if the Defendant was a vexatious litigant as the Court had already struck the Defendant's pleadings.

SNAYCHUK V EDMONTON (CITY), 2020 ABQB 1 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2020 ABQB 6 (NATION J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

PricewaterhouseCoopers Inc. ("PWC") was the Trustee in bankruptcy of the estate of Sequoia Resources Corp. PWC filed a Statement of Claim declaring an asset transaction to be void as against the Trustee, or in the alternative, seeking Judgment in excess of $217 million. The Defendants were Perpetual Energy Inc. and a number of its related entities,

and one of Perpetual Energy Inc.'s directors. Sequoia Resources Corp. was formerly Perpetual Energy Operating Corp., a related entity of the Defendants.

The Statement of Claim raised four different claims: (i) a claim under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "BIA") for the undervalued asset transaction; (ii) an oppression claim; (iii) a public policy claim; and (iv) a claim against the director.

The Defendants filed an Application to have the claims struck or summarily dismissed under Rules 3.68(2)(b) and 7.3(1)(b).

Justice Nation noted that in accordance with Rule 3.68(3), no evidence may be submitted when making an Application under Rule 3.68(2)(b). The Court must accept the allegations in the Statement of Claim as true for the purposes of the Application unless they are assumptions, speculation, patently ridiculous, or incapable of proof. Justice Nation also noted that although no evidence may be submitted, a Court may consider the content of any document referred to in the Statement of Claim. A Court may also consider the circumstances and litigation history to determine whether the pleading discloses a reasonable claim.

In considering an Application pursuant to Rule 7.3(1)(b), Justice Nation noted that the Defendants "need to establish there is no merit to the particular claim" and that Summary Judgment or Summary Dismissal is only appropriate when a Court can make necessary findings of facts and apply the law, and the process is a proportionate, expeditious, and less expensive means of achieving a just result.

In considering these Rules, Justice Nation found that the oppression claim disclosed no reasonable claim and was struck pursuant to Rule 3.68. Her Ladyship came to this conclusion as PWC (as the Trustee) was not a proper "complainant" for the purposes of the BIA. Justice Nation also struck the public policy claim under Rule 3.68 as Her Ladyship determined that it disclosed no cause of action. The claims brought against the director were barred by a release executed between the parties, and therefore Justice Nation determined that the claims should be struck under Rule 3.68 for disclosing no reasonable claim, and summarily dismissed under Rule 7.3.

The claims under the BIA were allowed to stand and were not struck or dismissed pursuant to Rules 3.68 or 7.3, respectively.

SMITH V MOORE-JUZWISHIN, 2020 ABQB 49 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Court determined that the Statements of Claim filed by the Plaintiff were Apparently Vexatious Applications or Proceedings because they had many elements suggesting they may be hopeless and abusive. The Plaintiff had made bald, unsupported allegations, and requested excessive, impossible or disproportionate remedies for which the Statements of Claim contained no factual foundation.

The Court determined that both Statements of Claim should be reviewed pursuant to Civil Practice Note No. 7 ("CPN7") to determine whether they should be struck under Rule 3.68, and the Court requested written submissions from the Plaintiff pursuant to CPN7. The Court directed the Clerk of the Court to prepare and serve an interim Order staying the Actions pursuant to Rule 9.4.

SMITH V MOORE-JUZWISHIN, 2020 ABQB 108 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Plaintiff had previously filed two Statements of Claim which the Defendants referred to review under Civil Practice Note No 7 ("CPN7") as constituting Apparently Vexatious Applications or Proceedings ("AVAPs"). Associate Chief Justice Nielsen conducted the review, concluding that the Statements of Claim were AVAPs, and ordered that the Plaintiff had 14 days to provide the Court with written submissions to "show cause" why the AVAPs should not be struck pursuant to Rule 3.68.

The Plaintiff provided written submissions with respect to each of the Statements of Claim. Associate Chief Justice Nielsen reviewed the written submissions and determined that the Statements of Claim should be struck pursuant Rule 3.68. The Court also dispensed with the Plaintiff's approval of the Order granted pursuant to Rule 9.4(2)(c).

JRB'S WELDING SERVICES INC V FAMILY DIVISION, 2020 ABQB 126 (NIELSEN ACJ)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders) and 13.7 (Pleadings: Other Requirements)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to His Lordship to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. In part, the Court noted that an allegation of misrepresentation had not been pleaded with sufficient particularity as required by Rule 13.7.

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

YAREMKEVICH V JACULA, 2020 ABQB 175 (MICHALYSHYN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Court in this case had previously determined that the Statement of Claim filed by the Plaintiff was an Apparently Vexatious Application or Proceeding because it had made bald, unsupported allegations that did not provide a basis for the Defendant or the Court to respond. The Plaintiff was given 14 days to file a written submission setting out how her Statement of Claim provided an adequate basis for the Defendant and the Court to make a meaningful response. The Plaintiff submitted written submissions as per the previous Court Order.

The Court considered the Plaintiff's written submissions and found the Plaintiff had failed to show that her Statement of Claim was not hopeless, and struck the Statement of Claim under Rule 3.68. The Court was to prepare and serve an interim Order staying the Actions which did not require the Plaintiff's endorsement pursuant to Rule 9.4.

RUDICHUK V GENESIS LAND DEVELOPMENT CORP, 2020 ABCA 42 (VELDHUIS, STREKAF AND PENTELECHUK JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiffs appealed a dismissal of their Summary Judgment Application, and one of the Defendants cross-appealed a dismissal of his Application to strike the Plaintiffs' Statement of Claim.

The Plaintiffs in this case were two former employees of Genesis Land Development Corp. ("Genesis") who filed a claim for wrongful dismissal against their former employer. The employees also brought claims against the Chair of the Board of Directors ("Griggs") for negligence and inducing breach of contract.

The Plaintiffs had applied for Summary Judgment pursuant to Rule 7.3 against Genesis for wrongful dismissal. A Master had granted Summary Judgment, but that holding was overturned on Appeal to the Court of Queen's Bench. Before the Court of Appeal, the Plaintiffs argued that the Chambers Judge had made a palpable and overriding error in concluding there was a credibility contest which would require a Trial. The Court of Appeal found no such error. The Court of Appeal held that there were sufficient inconsistencies in the evidence for the Chambers Judge to make that finding. The Plaintiff's Appeal was dismissed.

Separately, Griggs brought an unsuccessful motion to strike a claim under Rule 3.68(1)(a) and (2)(b), which he then appealed. The Court of Appeal cited *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 for the principle that a claim should only be struck when, assuming the facts pleaded to be true, the pleading discloses no reasonable cause of action. The Court found that Griggs had failed to demonstrate the facts pleaded did not disclose a reasonable cause of action. The Court of Appeal dismissed Griggs' cross-Appeal.

PROSPER PETROLEUM LTD V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2020 ABQB 128 (ROMAINE J)
Rule 3.75 (Adding, Removing or Substituting Parties to Originating Application)

Romaine J. heard an Application by a third party to have it added as a Respondent to the Action commenced by Originating Application. Rule 3.75 provides that the Court may add a person as a Respondent to an Originating Application "if the Court is satisfied the order should be made."

The Court determined that there were no legally-recognized interests of the third party that would be affected by the Application, nor would its legal rights be affected. Furthermore, the Court found that adding the third party would cause cost, complexity and delay and it was not just and convenient to add the third party to the Action. Lastly, the Court confirmed that the third party had not established that it had an interest that needed to be protected. The Court denied the Application.

CONOCOPHILLIPS CANADA OPERATIONS LTD V 1835651 ALBERTA LTD, 2020 ABQB 14 (MASTER ROBERTSON)
Rules 4.22 (Considerations for Security for Costs Order) and 10.48 (Recovery of Goods and Services Tax)

The Plaintiffs brought an Application for Security for Costs in each of two related Actions which concerned entitlement to mineral interests as between lessors, active lessees, and a top lessee. The Respondent was the top lessee and a corporate entity, prompting the Court's consideration of section 254 of the *Business Corporations Act*, RSA 2000, c B-9, which provides for a Security for Costs award against a corporate Plaintiff.

Master Robertson noted conflicting authority on the interplay between Rule 4.22, respecting Security for Costs generally, and section 254. While section 254 was technically not in issue as the Respondent corporation was a Defendant and not a Plaintiff, Master Robertson was nonetheless prepared to read section 254 and Rule 4.22 together.

Master Robertson also noted conflicting authority as to the proof of a Respondent's inability to pay which shifts the evidential onus to the Respondent. The Court did not require proof on a balance of probabilities, but rather "a reasonable basis to show, or at least there is enough evidence to infer, that the respondent Alberta-based litigant has insufficient assets, the burden then shifts to the respondent to demonstrate that it does have sufficient assets."

The Court then applied the factors set out in Rule 4.22 to the circumstances. There was enough evidence for the Court to be satisfied of the Respondent's impecuniosity, shifting the onus to the Respondent, but little evidence on any other key point. The Court saw fit to draw an adverse inference against the Plaintiffs, assuming the strength of the Respondent's position, ultimately declining to grant Security for Costs. In passing, the Court observed that the Plaintiffs' claim for GST was inappropriate, as Rule 10.48 "prevents the recovery of GST in a costs award where the party claiming the costs receives an input tax credit under the *Excise Tax Act*".

PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2020 ABCA 36 (VELDHUIS JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Plaintiff's claims had been summarily dismissed and/or struck. On Appeal, the Defendants sought Security for Costs.

As the Plaintiff was a body corporate, the Court noted the unsettled authority respecting whether Security for Costs is to be assessed against Rule 4.22, as referred to in Rule 14.67 for the purposes of Appeal, or section 254 of the *Business Corporations Act*, RSA 2000, c B-9 (the "*Business Corporations Act*"). Justice Veldhuis declined to resolve the relation between Rule 4.22 and section 254, finding that both tests thereunder were satisfied in favour of the Defendants in the circumstances. The Plaintiff's Trustee in bankruptcy had refused to provide current financial disclosure to rebut the dated evidence of impecuniosity advanced by the Defendants.

With respect to quantum, the Court was not satisfied that Costs estimated on a solicitor-client basis were appropriate, but did elect to grant Costs estimated on an enhanced basis to account for the volume of evidence in the Appeal Record and the Plaintiff's intention to seek leave to file a 50-page Factum. The Costs award was then reduced by 20%, reflecting the proportion of the Plaintiff's claim which Justice Veldhuis characterized as relating to oppression, in light of the prohibition in section 243 of the *Business Corporations Act* on awarding Security for Costs against a complainant of oppression.

PIIKANI NATION V RAYMOND JAMES LTD, 2020 ABCA 41 (STREKAF JA)
Rules 4.22 (Considerations for Security for Costs Order), 14.37 (Single Appeal Judges), 14.38 (Court of Appeal Panels), 14.40 (Applications to Single Appeal Judges), 14.41 (Responses to Applications to Single Appeal Judges), 14.55 (Responsibility of Parties to Manage an Appeal), 14.56 (Orders to Facilitate Appeal) and 14.67 (Security for Costs in Appeal)

The Court granted the Respondents' Application for Security for Costs, and dismissed a cross-Application by the Appellant seeking various forms of relief including: seeking to disqualify counsel from acting for the Respondents, to set aside or vary previous Orders of the Court, and a stay of the Security for Costs Application.

The Appellant characterized her Application as being for advice and direction. The Court confirmed that while the Appellant could seek advice and direction related to the Appeal pursuant to Rule 14.56 and Rule 14.55 (by which a Judge or the Case Management Officer could grant procedural or other Orders to ensure an Appeal is managed properly), ultimately the cross-Application was not the appropriate forum for the Appellant to seek the requested relief.

The Court confirmed that pursuant to Rules 14.37 and 14.38, Applications brought before a single Judge in the context of an Appeal must be for the purpose of addressing matters incidental to the Appeal, provided such matters were not required to be heard by a panel of the Court of Appeal. The Court determined the Appellant's Application was not incidental to the Appeal and, in regard to seeking to set aside or vary previous Court Orders, the Application was more appropriate for a panel, not a single Appeal Judge.

The Court suggested that the Appellant could pursue an Application to disqualify the Respondents' counsel at a later date as long as the parties filed their materials, as contemplated in Rules 14.40 and 14.41, by a date directed by the Court.

Regarding the Respondents' Security for Costs Application pursuant to Rule 14.67(1), the Court ordered that the Appellant provide Security for Costs. The Court considered the factors listed in Rule 4.22 and determined that it was unlikely that the Respondents would be able to recover their Costs of the Appeal from the Appellant if the Appeal was dismissed; there was no evidence that the Appellant's ability to continue the Appeal would be unduly prejudiced by an Order for Security for Costs; and it was appropriate to require Security for Costs to be posed by the Appellant.

PACER HOLDINGS CONSTRUCTION CORPORATION V RICHARD PELLETIER HOLDINGS INC, 2020 ABCA 47 (O'FERRALL JA)
Rules 4.22 (Considerations for Security for Costs Order), 4.23 (Contents of Security for Costs Order) and 14.67 (Security for Costs)

The Respondent in the Appeal, Pacer Holdings Construction Corporation ("Pacer"), sought an Order directing the Appellant, Richard Pelletier Holdings Inc. ("Pelletier"), to pay Security for Costs, and to lift the statutory stay of the Bankruptcy Order granted to Pelletier.

In applying Rules 14.67(1) and 4.22, which set out the Court's considerations in assessing whether Security for Costs should be ordered, the Court found that: (a) it was uncertain whether Pacer would be able to enforce an Order or Judgment against Pelletier's assets in Alberta; (b) Pelletier had no assets to pay a Costs Award; (c) the merits of Pelletier's Appeal were questionable; and (d) a Security for Costs Order would not unduly compromise Pelletier's ability to continue the Appeal. O'Ferrall J. A. considered the above factors and found that Security for Costs was warranted.

Next, the Court addressed which column in Schedule C would be appropriate for the Security for Costs. The Court noted that if the appealed Bankruptcy Order was ultimately found to be valid, assets exceeding $1.5 million (the Column 5 amount) may ultimately become recoverable. Therefore, the Court awarded Security for Costs reflective of Column 5 of Schedule C.

The Court was prepared to order that the Security for Costs strictly comply with Rule 4.23, but gave the parties an opportunity to try to agree on their own arrangement first.

In regard to the Application to lift the statutory stay of the Bankruptcy Order, the Court found that "the appeal is not a strong one and…the applicant will be prejudiced if the stay is not lifted and the respondent will not." The Court found that it was in the interests of justice to lift the stay.

POOLE V CITY WIDE TOWING AND RECOVERY SERVICE LTD, 2020 ABCA 102 (FEEHAN JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

This was an Application by the Plaintiff for a stay pending the Appeal of an Order, and a Cross-Application by the Defendant for Security for Costs. Justice Feehan explained that the applicable Rules for Security for Costs were Rule 4.22 and 14.67. Feehan J. A. explained that an Applicant bears the burden of establishing that on a balance of probabilities, granting an Order for Security for Costs would be just and equitable, and that Rule 14.67 provides that where a party does not provide Security when ordered, that an Appeal is deemed to be abandoned.

In deciding whether to make such an Order, the Court must take into consideration the elements contained within Rule 4.22. Justice Feehan explored the Rule 4.22 factors in relation to the facts of the case. The Plaintiff's dire financial situation and other unpaid Costs Orders weighed in favour of granting a Security for Costs Order. The merits of the Appeal and potential prejudice against the Plaintiff being able to pursue the Appeal if an Order was granted weighed against granting the Order. Justice Feehan determined that on a balance it would not be just and reasonable to grant an Order for Security for Costs and dismissed the Application, and dismissed the Defendant's Application.

The Plaintiff's stay Application was granted in respect of only part of the Order that was being appealed.

DIRK V TOEWS, 2020 ABQB 16 (ASHCROFT J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 8.16 (Number of Experts), 10.33 (Court Considerations in Making Costs Award) and 10.34 (Court-Ordered Assessment of Costs)

The Plaintiff applied for solicitor-client Costs or enhanced Costs, and full disbursements following her success at Trial.

The Plaintiff claimed, among other things, that she was entitled to double Costs from the date of a Formal Offer issued pursuant to Rule 4.29. The Court, however, found there was no compromise in the Formal Offer and therefore it did not fall under Rule 4.29 and double Costs were not appropriate.

The Court considered the Costs in light of the factors in Rule 10.33 and found that solicitor-client Costs were not warranted, but instead awarded Costs on a party-and-party basis and applied an inflation adjustment factor to account for Schedule C being out of date.

Regarding the disbursements, the Defendant objected to several of the Plaintiff's expert fees and pointed to Rule 8.16(1) which states that "unless the Court otherwise permits, no more than one expert is permitted to give opinion evidence on any one subject on behalf of a party." The Court agreed with the Defendant and disallowed several expert fees that it considered to be duplicative.

The Court directed all remaining issues regarding fees and disbursements to the Assessment Officer pursuant to Rule 10.34.

DAY V WOODBURN, 2020 ABQB 75 (RENKE J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision regarding costs following Renke J's dismissal of the Plaintiff's Action. The main issue on the Application was whether the Defendant ("EPS") should receive double Costs for litigation steps following its Formal Offer to Settle, pursuant to Rule 4.29. The Court determined that, although the Plaintiff's Action was defeated, EPS should not be awarded double Costs, as its Formal Offer to Settle was not "genuine" enough, as defined by the case law.

The parties agreed that an award of Costs falls within a Trial Judge's discretion, pursuant to Rules 10.29(1), 10.31 and 10.33. The parties also agreed that an offer to settle must be "genuine" for it to attract double Costs. The Court reviewed the criteria for a "genuine offer", citing Shelley J. in *Bruen v University of Calgary*, 2018 ABQB 650.

Amongst other factors, a genuine offer to settle should: (1) contain an element of compromise; (2) realistically reflect the merit of the parties' relative positions at the time of the offer; and (3) be made with a reasonable expectation of acceptance rather than solely to invoke double Costs later. An offer to settle is likely to be found genuine where at the time of offer, the offeror has already incurred substantial legal costs, and where the Action has no obvious merit. An offer to waive Costs is less likely to be genuine when it is "made at an early stage of litigation, where there has been minimal disclosure and questioning".

In its assessment of genuineness, the Court asked whether the Formal Offer to Settle in this case reflected an objective view of the relative merits of the parties' positions. The Court found that EPS' offer to settle did not properly reflect the merits of the parties' positions at the time of offer. Amongst other things, the admissibility of certain evidence had not yet been resolved, there was video evidence that could have supported the Plaintiff's contentions, and on the evidence, one reasonable potential outcome of the Trial could have been that the Plaintiff's claim was meritorious: "when the offer was made and while it was open, the outcome of the case was unpredictable and dependent entirely on evidence, credibility of witnesses, and fact-finding at trial".

Ultimately, the Court found that a genuine offer would have included some compensation beyond EPS foregoing its Costs. The Court did not award EPS double Costs, but did award Costs to EPS under Column 2 of Schedule C.

STALZER (ESTATE) V STALZER, 2020 ABQB 160 (LOPARCO J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision regarding Costs following a Summary Trial regarding the final division of matrimonial property. Justice Loparco explained that Rule 10.29(1) provides that a successful party is entitled to Costs against an unsuccessful party and that Rule 10.33(1) provides several factors that the Court may consider in making a Costs Award.

The Applicant sought double Costs, as Rule 4.29 provides that a party who beat their Formal Offer to Settle is entitled to double Costs after the Formal Offer is made. The Applicant had made a Formal Offer to Settle on the basis that the Respondent would keep some of the assets in exchange for a payment of $100,000. The Judgment arising from the Summary Trial held that the equalization payment due from the Respondent was $105,524.25.

Justice Loparco had to consider whether one party was substantially successful, or, whether there was divided success leading to no Costs being awarded. Justice Loparco found that no party had been substantially more successful than the other. Her Ladyship also found that the final equalization payment did not meet the high degree of certainty that would entitle the Applicant to double Costs pursuant to Rule 4.29. Justice Loparco did, however, order the Respondent to pay the Applicant $2,500 for not

responding to a request to set matters down for a hearing in a timely fashion and for delays in finalizing an outstanding issue pursuant to Rule 10.29(g).

LOFSTROM V RADKE, 2020 ABQB 122 (GRAESSER J)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

This was an Application to dismiss two Actions for delay pursuant to Rule 4.31 and Rule 4.33. The Actions arose from the collapse of a common law relationship between Mr. Lofstrom and Ms. Radke. Mr. Lofstrom's first Action was for guardianship rights over Ms. Radke's biological children (the "Parenting Claim"), and the second Action was for division of common law property (the "Property Claim").

With regards to the Parenting Claim, Justice Graesser first considered Rule 4.33, which requires the Court to dismiss the Action on Application if three or more years have passed without significant advance in the Action. Justice Graesser found that significant steps had been taken by Mr. Lofstrom to advance the Parenting Claim since August 26, 2016. Specifically, Mr. Lofstrom had made an Application for an interim parenting Order in 2017, which was a "significant step" for the purposes of Rule 4.33. Justice Graesser then turned to consider Rule 4.31. Rule 4.31 requires an Applicant to prove that the Plaintiff has failed to significantly advance the Action as a result of inordinate, inexcusable delay and that the Applicant has been significantly prejudiced by the delay. Justice Graesser found that two years of inaction was inordinate in the context of parenting and contact Applications. His Lordship further noted that the relationship had ended more than five years prior and as such, there was presumed prejudice to Ms. Radke and her children. Justice Graesser could find no reason to allow the Parenting Claim to proceed and therefore dismissed the Parenting Claim pursuant to His Lordship's discretion under Rule 4.31.

With regards to the Property Claim, Mr. Lofstrom relied on the advances in a criminal proceeding to argue that the Property Claim was being advanced. Mr. Lofstrom also filed a new Affidavit of Records but retracted previously disclosed records. Justice Graesser found that neither the criminal proceedings nor the new Affidavit of Records significantly advanced the Action. After reviewing the proceedings of the Property Claim, Justice Graesser found that none of Mr. Lofstrom's activities after August 26, 2016 constituted a significant advance of the Property Claim. Specifically, Mr. Lofstrom's failure to produce records and proceed to Questioning, as directed by the Case Management Justice, showed that no significant step had been taken to advance the Action. Justice Graesser granted Ms. Radke's Application to dismiss the Property Claim for delay under Rule 4.33. Justice Graesser then considered Rule 4.31 in the alternative. Justice Graesser found the delay on the Property Claim to be inordinate and that Mr. Lofstrom had no reasonable excuse for the delay, but that there had no significant prejudice to Ms. Radke. Therefore, Justice Graesser noted that he would not have granted the Application to dismiss the Property Claim under Rule 4.31.

ATWAL V GILL, 2020 ABQB 146 (MASTER PROWSE)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant applied to dismiss the Action for delay pursuant to Rules 4.31 and 4.33. Master Prowse rejected the Application to dismiss the Action pursuant to Rule 4.33, but agreed to dismiss the Action for delay pursuant to Rule 4.31.

Pursuant to Rule 4.33, Master Prowse found that a Decision in a separate Action involving an issue common to the Action had removed one of the litigation issues in the Action, and therefore constituted a significant advance.

In assessing Rule 4.31, Master Prowse determined that there had been an inordinate delay because despite eleven years passing, the matter had not been set for Trial. Furthermore, he determined that the delay was inexcusable, mostly the fault of the Plaintiffs, and noted that the Plaintiffs did not rebut the presumption of significant prejudice arising from Rule 4.31(2). As Master Prowse found there was no compelling reason not to dismiss the Action for delay, he dismissed the Action against the Defendant pursuant to Rule 4.31.

BEHM V HANSEN, 2020 ABQB 52 (LEMA J)
Rules 5.13 (Obtaining Records from Others), 13.13 (Requirements for all Filed Documents) and 13.19 (Requirements for Affidavits)

The Trial of the Action had been adjourned in order to provide the Plaintiff with an opportunity to obtain further evidence as to the Defendant's possible interest in a business. Following the adjournment of the Trial, the Plaintiff filed an Application seeking, *inter alia*, an Order against a third-party individual, Dr. Elloumi, under Rule 5.13, which provides a procedure to obtain records from non-parties to litigation. Dr. Elloumi had previously signed an Affidavit purporting some knowledge of the Defendant's business interest.

Service of Dr. Elloumi had been an issue: the Affidavit previously sworn by Dr. Elloumi included the Defendant's counsel's address for service as the party filing the document. Justice Lema noted that Rule 13.19(1) requires that Affidavits must include all enumerated aspects under Rule 13.13. Rule 13.13(2)(f) requires an address for service for the affiant, and Rule 13.19 requires that the Affidavit be in Form 49. His Lordship noted that the template of the form includes a section for the address and service of the party filing the document, which His Lordship found could be a different address than required in Rule 13.13(2)(f).

Justice Lema found that Dr. Elloumi could not be served through the Defendant's counsel. As there was no address for service for the third-party affiant included in the Affidavit, His Lordship suggested that alternative attempts at service should be attempted before filing an Application to validate service.

1490703 ALBERTA LTD V CHAHAL, 2020 ABQB 33 (MASTER MASON)
Rules 5.15 (Admissions of Authenticity of Records), 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Plaintiff corporation purchased residential real estate which, upon transfer of title, remained subject to an encumbrance that was ultimately enforced through foreclosure. The Plaintiff brought an Action against several lawyers that it had retained to administer the conveyance (the "Conveyance Lawyers"). The Conveyance Lawyers brought an Application for Summary Dismissal on the ground that the Action had been filed outside the limitation period.

In considering the Summary Dismissal Application, Master Mason relied on several Affidavits and cross-examination transcripts. The parties also referred to a filed "Book of Documents" which contained the Plaintiff's Affidavit of Records. Master Mason noted that the records contained in the Affidavit of Records had been deemed authentic through passage of time, as provided for in Rule 5.15, and that admissible records disclosed in an Affidavit of Records could be considered in the Application pursuant to Rule 6.11, but not as evidence of the truth of the records' contents.

The Court held that there was sufficient undisputed evidence to inform the limitations issue and applied the test for Summary Dismissal set out in Rule 7.3 and clarified by the Court of Appeal of Alberta in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49. Master Mason determined that injury arising in the course of conveyance had been objectively discoverable more than two years prior to the filing of the Action. The Action was dismissed against the Conveyance Lawyers.

COUNTY OF VULCAN V GENESIS RECIPROCAL INSURANCE EXCHANGE, 2020 ABQB 93 (GRAESSER J)
Rules 5.15 (Admissions of Authenticity of Records), 5.29 (Acknowledgment of Corporate Witness's Evidence), 5.31 (Use of Transcript and Answers to Written Questions), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

Genesis Reciprocal Insurance Exchange ("Genesis") and the County of Vulcan ("Vulcan") appealed the Decision of Master Birkett under Rule 7.3 dismissing Genesis' Application for Summary Dismissal of the Action and Vulcan's Application for Summary Judgment of its claims against Genesis (the "Appeals"). The Appeals related to whether insurance coverage existed under an insurance policy for Vulcan (the "Policy") in relation to errors allegedly committed by its former chief financial officer. Master

Birkett had dismissed both Applications holding that more evidence was needed to properly decide the issues.

As a preliminary matter, Vulcan argued that the record was insufficient for Genesis' Summary Dismissal Application because Genesis was relying on hearsay evidence in its Application with reference to its corporate representative under Rules 5.29 and 5.31 (the "Corporate Representative") and the Corporate Representative's understanding of various records in evidence. Vulcan cited, among other things, Rule 13.18(3) which says that only direct evidence can be used in Applications seeking final relief. Justice Graesser addressed this argument by reviewing the seminal decision of *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 and by explaining that the ability of a corporate representative to be able to review documents in the possession of the corporate body and summarize them or to be able to introduce such documents into evidence is a practical necessity.

Justice Graesser also reviewed the admissibility of a legal opinion and various emails and letters written by and among councillors of Vulcan, its employees, and its former Reeve, which Vulcan argued were also hearsay. Justice Graesser expressly noted that the hearsay argument was contrary to the "documents in possession" doctrine and Rule 5.15, and concluded that this evidence formed some of the evidence of Vulcan. Graesser J. emphasized that it is not necessary to have direct evidence of the senders or recipients of business records to make them admissible.

Justice Graesser reviewed the principles of Summary Judgment under Rule 7.3 and found that the case was suitable for summary procedures. Graesser J. noted that the case turned largely on the interpretation of the Policy and that the facts were not significantly in dispute. His Lordship added that the Applications were made after document production and Questioning by each party.

After an extensive review of the facts before the Court, Justice Graesser concluded by finding that there were enough facts to fairly and justly conclude, among other things, that Vulcan had not complied with Policy and that any coverage, if it existed at all, was not available to it. Accordingly, Justice Graesser granted Genesis' Application for Summary Dismissal of Vulcan's claims and dismissed Vulcan's Application for Summary Judgment.

NEXEN ENERGY ULC V ITP SA, 2020 ABQB 83 (NIXON J) Rules 6.10 (Electronic Hearing), 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

The Applicant, a Swiss company, applied to set aside an Order for service *ex juris* on the basis that the Plaintiff failed to comply with its disclosure obligations in obtaining the *ex parte* service *ex juris* Order. It also sought to strike, dismiss, or stay the Action against it, arguing that the Court either did not have jurisdiction to hear the Action against it, or alternatively that it should decline to exercise its jurisdiction to do so.

Prior to entering into any contracts, the Applicant had provided the Plaintiff with a "Proposal" which contained a forum selection clause in favour of the Courts of Lausanne, Switzerland. The parties had also entered into four Agreements, one of which contained a governing law and forum selection clause in favour of Alberta.

Nixon J. first considered the Plaintiff's disclosure obligations. In obtaining the Order for service *ex juris*, the Plaintiff had only referenced one of the several agreements (the "Agreements") between the parties, and not the Proposal or others of the Agreements. Nixon J. held that it had not acted deceitfully or in a "very misleading" manner; rather, it had taken the position that its claim was solely based on one of the Agreements, and disclosed that Agreement in whole to the Court. As such, His Lordship did not set aside the Order on the basis of non-disclosure.

Next Nixon J. considered whether the Court had jurisdiction to hear the Action. His Lordship reviewed Rule 11.25(2), which sets out the requirements for a service *ex juris* Order, and noted that commencement documents may be served outside of Canada if there is a real and substantial connection to Alberta, and the Court permits such service on an Application supported by Affidavit evidence. The parties agreed that the establishment of a "good arguable

case" from the old Rules also remains a requirement under Rule 11.25(2), even though it is not explicitly referenced in the Rule. His Lordship also noted that the Court is entitled to refer to the commencement document and any materials filed in support of an Application to set aside service pursuant to Rule 11.31(1) in assessing whether the test for service *ex juris* has been met.

Nixon J. found that the Application and Affidavit evidence submitted by the Plaintiffs disclosed a "good arguable case". His Lordship explained that a "good arguable case" is established where the Plaintiff has put forward "some evidence that the case it proposed to bring has a foundation in fact". The evidence "need not be based on first-hand information or require a positive factual conclusion". His Lordship further held that a real and substantial connection to Alberta had been established. In doing so, Nixon J. reviewed the list of "presumptive connecting factors" set out by the Supreme Court in *Van Breda v Village Resorts Ltd*, 2012 SCC 17, as well as the factors listed in Rule 11.25(3). His Lordship found that the forum selection clause in favour of Alberta was "broad, unambiguous, and unqualified", and that the Proposal containing the clause in favour of Lausanne was not applicable.

Finally, Nixon J. considered whether the Court should not exercise its jurisdiction in spite of the forum selection clause naming Alberta, on the basis that it is *forum non conveniens*. In doing so, His Lordship noted that forum selection clauses are encouraged because they create certainty in cross-border transactions, and should only be disregarded where the Applicant shows "strong cause" that it should not be complied with. Nixon J. found that "strong cause" had not been established - in particular because the majority of witnesses were situated in Alberta, and those who were located in Switzerland could provide testimony electronically pursuant to Rule 6.10.

WESTMAN V ELGER, 2020 ABQB 125 (BURROWS J)
Rules 6.11 (Evidence at Application Hearings), 7.7 (Application of Other Rules) and 7.11 (Order for Trial)

This was an Application for the assessment of personal injury damages by way of a Summary Trial. The Plaintiff attempted to rely on unsworn expert evidence. Justice Burrows noted that Affidavit evidence is required to be used when the Court is to decide an Application, pursuant to Rule 6.11(1)(a). His Lordship explained that Division 3 of the Rules deals with Summary Trials and explained that pursuant to Rule 7.7(2), Part 6 of the Rules (including Rule 6.11(1)(a)) applies to Summary Trials except to the extent modified by Division 3. Justice Burrows noted that there is nothing within Division 3 that modifies the requirement that the Court rely on sworn Affidavit evidence when considering an Application. His Lordship considered ordering a Trial of the issue pursuant to Rule 7.11, which allows the Court to do so at any stage of a Summary Trial, but ultimately held that the Plaintiff's materials for his Application were deficient, and ordered that that the Application be adjourned *sine die* until the deficiencies were remedied.

KUZOFF V TALISMAN PERU BV SUCURSAL DEL PERU, 2020 ABQB 111 (HOLLINS J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

Justice Hollins dismissed the Appellant's Appeal from a Decision of a Master to summarily dismiss the Action.

Her Ladyship noted that pursuant to Rule 6.14(3), an Appeal from a Master to a Justice of the Court of Queen's Bench is an Appeal on the record and the standard of review is correctness.

Justice Hollins ultimately determined that the Master had correctly determined, under Rule 7.3, that the Appellant's claim was without merit and therefore subject to Summary Dismissal. Specifically, the Master correctly found that it was possible to fairly resolve the dispute on a summary basis as there was no genuine issue for Trial; the Defendant had successfully shown that there was no merit to the claim; the Plaintiff did not demonstrate a genuine issue requiring a Trial; and it was appropriate to exercise judicial discretion to summarily resolve the dispute.

SSC NORTH AMERICA, LLC V FEDERKIEWICZ, 2020 ABQB 176 (FETH J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

A Master granted Summary Judgment against the Defendants, Federkiewicz and Know Limits Private Lending Inc. The Defendants successfully appealed the Summary Judgment.

Justice Feth noted that Rule 6.14(3) allows an Appeal from a Master's Judgment to rely on additional evidence that is relevant and material in the opinion of the Judge hearing the Appeal. His Lordship found that new evidence only needed to be relevant and material and is not required to meet any other requirements for fresh evidence such as in other types of appeals. As a result, Justice Feth accepted new evidence on foreign laws and other evidence from expert Affidavits as relevant and material to the Appeal.

Justice Feth then considered whether the facts of the case were appropriate for Summary Judgment. His Lordship applied Rule 7.3 which limits Summary Judgment only in the case where there is no defence or merit to a claim (or part of it) or when the only real issue to be tried is the amount to be awarded. Justice Feth found that the claim had highly contested and complicated facts. Summary adjudication was not appropriate for the difficult factual questions and contested facts.

Justice Feth allowed the Appeal and set aside the Summary Judgment.

KIM V CHOI, 2020 ABQB 51 (MICHALYSHYN J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicants (the "Chois") applied to set aside an Order obtained by the Respondents (the "Kims") in February of 2017, pursuant to Rule 9.15. The Order at issue awarded Judgment to the Respondents, plus interest and solicitor and own client Costs, and certain other relief relating to the Chois' rights as shareholders and directors of a corporation.

Michalyshyn J. considered the test for setting aside a Default Judgment pursuant to Rule 9.15(1), which requires the Court to ask three questions: (a) is there an arguable defence; (b) did the Applicant not intend to allow the Judgment to go by default, and can the Applicant provide a reasonable excuse for the default; and (c) did the Applicant move promptly to set the Default Judgment aside when it came to his or her attention. Further, pursuant to Rule 9.15(3), the Court retains residual discretion to grant the relief, even if the test is not met, if fairness requires it.

Michalyshyn J. assessed the evidence and determined that the Chois had established a reasonably meritorious defence, had not intended the Judgment to go by default, and had moved promptly to set aside the Default Judgment when they became aware of it. The real question was whether their excuses for the default - that they could not remember being advised by their lawyers that they had agreed to the Application date, and that Mr. Choi had been ill - were reasonable. His Lordship noted that the burden was on the Chois to demonstrate that they had a reasonable excuse for failing to oppose the Application, and held that they had failed to do so. They "knew or ought to have known" about the Application and did nothing to respond to it, and the Kims had also "made valid points […] regarding the Chois' apparent disregard for the proceedings".

Nevertheless, Michalyshyn J. was persuaded that given the circumstances of the case, "fairness dictate[d] that notwithstanding the absence of a reasonable excuse, the Chois should have an opportunity to advance their possibly reasonably meritorious defence." His Lordship also set aside certain relief that was granted in the Order, because it had not been sought in the Kims' original Application.

Finally, Michalyshyn J. ordered that "the Chois' ability to advance their defence will be conditional on the payment forthwith of [C]osts to the Kims". His Lordship asked the parties to provide further submissions as to the scale of Costs, but warned that His Lordship would not order solicitor-client Costs or Security for Costs. Rather, His Lordship would be prepared to award Costs in accordance with Column 4 of Schedule C or enhanced Costs.

801 SEVENTH INC V CNOOC PETROLEUM NORTH AMERICA ULC, 2020 ABQB 198 (DILTS J)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments), 11.25 (Real and Substantial Connection), 11.27 (Validating Service) and 11.31 (Setting Aside Service)

Following 801 Seventh Inc.'s ("801") successful receipt of Orders permitting service *ex juris*, and subsequently validating that service, Madam Justice Dilts presided over this Application to set aside both Orders. In determining that the Application should be dismissed, Her Ladyship clarified that an Application to set aside an Order for service *ex juris* is properly brought pursuant to Rule 11.31, as opposed to Rule 9.15. Justice Dilts also concluded that an Order to validate service can be granted pursuant to Rules 11.27(1) and 11.27(4)(b) in a manner consistent with the principles of the *Hague Convention*, so long as evidence can be offered which shows that service was either affected or frustrated.

The Applicant also sought to invalidate the service *ex juris* Order pursuant to Rule 11.25(3) on the basis that several misstatements made by the articling student who obtained that Order compounded and were ultimately fatal. Madam Justice Dilts addressed these apparent deficiencies, and concluded that although the articling student may have conveyed some factual inconsistencies, the dispositive evidence necessary to determine whether to grant the ex parte Application was properly put before the Court.

Lastly, Madam Justice Dilts examined the threshold requirement read into Rule 11.25(3) that an Applicant must demonstrate a good arguable case. Her Ladyship held that to make out a good arguable case, it is not necessary to tender evidence of every single cause of action, as an Applicant is permitted to plead in the alternative.

FLEMING V FLEMING, 2020 ABQB 85 (LEMA J)
Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges) and 10.11 (Who May Request Review of Lawyer's Charges)

After their matrimonial property was divided, a former wife challenged, among other expenses, the quantum of legal fees and disbursements incurred by her former husband and charged against the proceeds of certain lands that had been divided and sold.

The husband argued that the wife was barred from challenging the legal fees pursuant to Rule 10.10(2), which requires that a lawyer's charges be reviewed within 6 months of the date of the account being sent to the client. Lema J. agreed that the challenge was out of time, as more than 6 months had gone by since the account was issued. His Lordship also commented that under Rule 10.11, both the former husband and wife were considered "clients" entitled to have the account reviewed pursuant to Rule 10.10 because they were each liable to pay the lawyer's charges.

SELLERS V SELLERS, 2020 ABQB 79 (RICHARDSON J)
Rules 10.28 (Definition of "Party"), 10.29 (General Rules for Payment of Litigation Costs), 10.30 (When Costs Award May be Made), 10.31 (Court-ordered Costs Award), 10.32 (Costs in Class Proceeding) and 10.33 (Court Considerations in Making Costs Award)

After Richardson J. granted a Judgment of Divorce, divided the parties' matrimonial property, and ordered the payment of child and spousal support, the parties could not agree on Costs. Both the husband and wife argued that they had been "more successful" than the other in the Action, and therefore that they were entitled to Costs.

Richardson J. first noted that authority to award Costs is governed by Rules 10.28 to 10.33, and that Costs should be awarded in a manner that is fair, efficient, just, and cost-effective. Her Ladyship further explained that one goal of Costs is to offset the financial impact of being forced to attend Court without valid reason, and that Rule 10.33 lists additional factors that the Court may consider in awarding Costs. Ultimately, because the parties enjoyed mixed success, Richardson J. ordered that they each bear their own Costs.

BLOUGH V BUSY MUSIC INC, 2020 ABQB 19 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This Costs Decision arose out of two interlocutory Applications brought to address issues with production of documents, as well as Undertakings refused and objections raise on Questioning on an Affidavit of a witness. Jones J. confirmed that pursuant to Rule 10.29 and the Court's discretion, a successful party to an Application is entitled to Costs payable forthwith against the unsuccessful party, and the Court will consider the factors set out in Rule 10.33, specifically the relative success of the successful party. The Court determined that the successful party had achieved "substantial success" and was entitled to Costs.

In determining the proper quantum of the Costs to be awarded, given that the Applications were matters not involving monetary amounts, the Court considered whether an award should be based on the amount sought in the main Action (which would have engaged Column 4 of Schedule C) or, as the matters had no monetary amount, if Column 1 of Schedule C should be used as suggested in Schedule C.

The Court awarded Costs in favour of the successful party pursuant to Column 1 of Schedule C payable forthwith, rather than in the cause as requested by the unsuccessful party.

CRESSMAN ESTATE (RE), 2020 ABQB 42 (NATION J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court-Ordered Costs Award)

This Decision related to two questions put before the Court. One of the questions the Court was tasked with determining was if the Applicant was responsible to pay Costs as she had discontinued her Application. Justice Nation noted that Rule 10.29 was the general Rule for the payment of litigation Costs and that Rule 10.33 listed several factors that the Court could consider when determining Costs Awards including "(1) the conduct of any party that was unnecessary, or that unnecessarily lengthened or delayed the action; (2) a refusal to admit anything that should have been admitted; and (3) whether any application was unnecessary, improper or a mistake." Her Ladyship created a timeline of salient facts and applied the law to those facts. Justice Nation ultimately decided not to award solicitor-client Costs against the Applicant due to the Respondent's own contributions to the confusion on certain issues and suspicious circumstances. Instead, the Respondent was entitled to taxable Costs against the Applicant under Column 5 of Schedule C for each step taken by the Respondent relating to certain claims within a certain time period.

ELDER ADVOCATES OF ALBERTA SOCIETY V ALBERTA, 2020 ABQB 54 (ROSS J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.32 (Costs in Class Proceeding) and 10.33 (Court Considerations in Making Costs Award)

The Defendant in a Class Action sought an Order for Costs against the Plaintiffs and their counsel, which the Plaintiffs opposed. The Plaintiffs cross-applied for an Order for no Costs. Justice Ross noted that the relevant Rules in the proceeding were Rules 10.29, 10.31, 10.32 and 10.33. Her Ladyship explained that the factors in Rule 10.33 related to the amount of Costs awarded, and that Rule 10.32 addressed whether a Costs Award should be made against an unsuccessful representative party in a Class Action.

Justice Ross considered the factors set out in Rule 10.32, which required the Court to consider the public interest, whether the Action involved a novel point of law, whether the proceeding was a test case, and access to justice considerations. Her Ladyship found that the underlying Action was not a test case and that all the 10.32 factors weighed in the favour of the Plaintiffs. The issues in the Class Action proceeding were issues of public importance, and issues of statutory interpretation present in the underlying Action that had not been previously analyzed by the Court could be considered a novel issue. The claim was potentially meritorious, triable, and was brought forward on behalf of class members who were disadvantaged and in the interests of their access to justice. Justice Ross dismissed the Defendant's Application, and granted the Plaintiffs' Application for no Costs.

MOTTA V DAVIS WIRE INDUSTRIES LTD, 2020 ABQB 136 (DEVLIN J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and Schedule C

This was a Decision regarding Costs following a Trial. In the previous Trial Decision, Justice Devlin found that the Defendant had cause to terminate the Plaintiff, but the Defendant also owed the Plaintiff $36,912 for unpaid vacation entitlement. As such, the Plaintiff was partially successful following Trial and sought Costs. The Defendant also sought Costs, as it was successful in defending a large portion of the Plaintiff's original claim.

Justice Devlin noted that Costs are awarded as compensation and are highly discretionary. Pursuant to Rule 10.29, the successful party is normally entitled to Costs. Justice Devlin considered the Trial in its entirety and determined the successful party to be the Plaintiff.

Justice Devlin relied on item 1(3)(b) under the Framework of Schedule C, which dictates that the column for a Costs Award against a Defendant is determined by the amount recovered, not the amount claimed. As the Plaintiff was awarded $36,912, this put the Costs Award in Column 1 of Schedule C.

Justice Devlin then turned to Rule 10.33 to determine the appropriate factors applicable in making the Costs Award. Justice Devlin found that the Trial should have been shorter, and that part of the blame for the length of the Trial sat with the Plaintiff. His Lordship then reduced the Costs Award for the extra Trial time on the Plaintiff's unsuccessful portion of his claim, namely two and a half days. Pursuant to item 1(3)(b) under the Framework of Schedule C, the reduction was calculated on Column 3 to reflect the unsuccessful amount claimed by the Plaintiff.

ANNETT V ENTERPRISE RENT-A-CAR CANADA LTD, 2020 ABQB 74 (RENKE J)
Rules 10.33 (Court Considerations in Making Costs Award), 13.6 (Pleadings: General Requirements) and Schedule C

This Decision dealt with the parties' entitlement to Costs after the Trial of the Action.

The Plaintiff had originally claimed against Enterprise Rent-a-Car Canada Limited ("Enterprise") and the Calgary Police Service ("CPS"), but later discontinued his Action against CPS on a without Costs basis. Thereafter, Enterprise obtained a Consent Order permitting it to serve a Third Party Notice on CPS. After two weeks of Trial, the Plaintiff and Enterprise reached a settlement. Thereafter, the Court found that CPS was not liable to the Plaintiff or Enterprise.

In its ruling on Costs, the Court first addressed the question of what Costs column in Schedule C applied for determining CPS's Costs. The parties could not agree as to the applicable Costs column because the Plaintiff had claimed for general damages in the amount of $200,000, and pecuniary and special damages without quantifying them. Justice Renke commented that the Plaintiff's pleadings may have been deficient, as they did not contain an estimate of the amount to be claimed as required by Rule 13.6(2)(c)(ii). Later, while at Trial, Enterprise has valued the Plaintiff's claim at $1.5 million or $1.7 million; and then in its closing submissions, had stated it was seeking contribution of $303,750 based on its share of the settlement amount. Justice Renke considered Rule 10.33(1) and noted that the Rule "refers to the amount claimed [in the pleadings] and the amount recovered as matters that may be considered in a costs award." His Lordship also highlighted two objectives of a tariff of fees (Schedule C, Division 2): (1) to provide certainty to parties; and (2) to promote parity or fairness for litigants through similar treatment. The Court found that Column 3 of Schedule C was the appropriate one for determining CPS's Costs, as both the Plaintiff's pleadings and the settlement amounts fell under Column 3.

Justice Renke next considered whether Enterprise should pay all of CPS's Costs, or only those Costs incurred after it

served its Third Party Notice on CPS. The Court found that there was nothing that disentitled CPS to Costs from the beginning of litigation.

ALKADRI V ALKADRI, 2020 ABCA 82 (O'FERRALL JA)
Rules 10.33 (Court Considerations in Making Costs Award) and 14.5 (Appeals Only With Permission)

The parties, Antoine Alkadri (the "Applicant") and Khaled Alkadri (the "Respondent") were brothers who had started the company Tiles4Less (the "Company"). The brothers' business relationship became contentious and the Respondent filed an oppression complaint pursuant to section 242 of the *Business Corporations Act*, RSA 2000, c B-9 (the "*Act*") against the Company and the Applicant (the "Underlying Action").

The Applicant sought permission to appeal an interlocutory Order (the "Order") in which the Case Management Judge ("CMJ") had ordered the Company to pay to the Respondent interim Costs to cover, among other things, legal fees and disbursements pursuant to section 243(4) of the Act (the "Appeal"). The Applicant argued, among other things, that the CMJ erred in exercising his discretion to award interim Costs by failing to consider the factors in Rules 10.33(2)(a) and (f). The Applicant submitted that the Respondent had delayed the Underlying Action thereby increasing the cost of the proceedings, and that this conduct should disentitle him to any assistance.

O'Ferrall J.A. found that pursuant to Rule 14.5(1)(e), an Applicant must receive permission to appeal a Decision as to Costs only. The Applicant must be able to demonstrate: (a) a good arguable case; (b) issues of importance to the parties and in general; (c) that the Appeal has practical utility; and (d) that no delay in proceedings will be caused by the Appeal.

Justice O'Ferrall noted that Costs awards are discretionary and are reviewable on the standard of palpable and overriding error. After reviewing the relevant factual history, His Lordship found, as did the CMJ, that the Respondent owned 40% of the Company and the Order was drafted to operate as a loan, secured by way of Consent Judgment in favour of the Company as against the Respondent. Accordingly, if the Respondent was to lose the Underlying Action, he would have to repay the loan. Justice O'Ferrall further found, as did the CMJ, that it appeared that some of the delay was due to the inaction of the Company and the Applicant. Accordingly, O'Ferrall J.A. dismissed the Applicants' Application for permission to Appeal.

CANLANKA VENTURES LTD V CAPITAL DIRECT LENDING CORP, 2020 ABQB 96 (HALL J)
Rule 10.42 (Actions within Provincial Court Jurisdiction) and Schedule C

This was a Decision regarding Costs. The Plaintiff had made claims in respect of four different mortgages. Three of the claims failed, but Justice Hall found in favour of the Plaintiff for the fourth claim. Damages were assessed at $25,000.

The Plaintiff maintained that it should be awarded Costs as the successful party. The Plaintiff further argued that Schedule C is outdated and does not properly reflect a litigant's actual legal costs. It argued that Costs should be 40% to 50% of actual legal costs, yielding a total of over $106,000.

The Defendant argued that it was substantially successful in its defence and sought Costs in accordance with Column 2 of Schedule C. In the alternative, if Costs were to be awarded to the Plaintiff, the Defendant argued that the Costs should be limited by Rule 10.42(2)(a). Pursuant to Rule 10.42(2)(a), where an Action is brought in the Court of Queen's Bench but the amount awarded does not exceed the jurisdiction of the Provincial Court, then Costs must be assessed at no more than 75% of the Column 1 of Schedule C unless the Court otherwise orders.

Justice Hall found that neither of the parties was particularly successful at Trial. His Lordship agreed with the Defendant that Rule 10.42(2)(a) applied, and awarded 75% of Column 1 to the Plaintiff, equating to Costs awarded of $11,907.43.

LYMER (RE), 2020 ABQB 157 (MASTER SMART)
Rule 10.53 (Punishment for Civil Contempt of Court)

The bankrupt Applicant in this case sought a declaration from the Court that he had purged his contempt. He had previously, on numerous occasions, provided false or incomplete information to creditors that had opposed his discharge from bankruptcy despite Court Orders requiring complete and honest production.

Master Smart considered Rule 10.53(3) which allows the Court to waive or suspend a penalty or sanction "[i]f a person declared to be in civil contempt of Court purges the person's contempt."

Ultimately, Master Smart determined that the most recent production of the Applicant failed to answer the central question to the litigation (i.e. where had the money gone?) and, therefore, the Applicant had failed to purge his contempt.

BLANEY V MURPHY, 2020 ABQB 196 (FETH J)
Rule 12.36 (Advance Payment of Costs)

This was an Application for ongoing and retroactive interim partner support and for advance Costs. Rule 12.36 addresses advance Costs in the family law context. Feth J. explored the case law that developed around the Rule, and noted that the case law provides a three-part test that also applies in family law and matrimonial cases.

Feth J. explained that the three part test considers first, the impecuniosity of the Applicant; second, whether the Applicant has established a "prima facie case of sufficient merit", and third, whether "special circumstances bringing the claim within the class of cases to which th[e] extraordinary remedy applies". His Lordship explained that in marital litigation, the second part of the test is usually met due to a rebuttable presumption that a dispute arising from the process of marriage and divorce was a "prima facie case of sufficient merit"; however, this Application arose from a dispute in a common law relationship. Justice Feth noted that the presumption found in marital litigation logically and often follows for claims based on an adult interdependent partnership as well. The "special circumstances" portion of the test does not often create an impediment to matrimonial or family law cases. In fact, interim Costs are often granted in that type of litigation. His Lordship found that the nature of the litigation in the underlying Action was one which fell within the scope of cases often recognized in the third part of the test; however, the presumption was rebuttable. Justice Feth also noted that even if all three parts of the test were met, granting Costs was still at the Court's discretion.

His Lordship applied the test to the facts and found that although the Applicant had met the second and third elements of the test, she had not demonstrated impecuniosity. Justice Feth dismissed the Application for advance Costs, granted interim partner support subject to set off, and reserved the Application for retroactive support for Trial.

KOCH V KOCH, 2020 ABQB 65 (KENNY J)
Rule 13.6 (Pleadings: General Requirements)

Reasons for Judgment were issued in this family law dispute on October 5, 2017. Several issues remained outstanding between the parties following Judgment. One issue was whether interest was owed on the sale of some of the matrimonial property. Justice Kenny referred to Rule 13.6 which requires a party to specifically plead a statement of any interest claimed, the basis for the interest, and the method of calculating the interest in the Statement of Claim.

Justice Kenny reviewed the Statement of Claim. The *Judgment Interest Act*, RSA 2000, c J-1 was pleaded in the Statement of Claim for the claim for statutory pre-judgment interest. Her Ladyship noted that a different interest rate was raised in argument which had not properly been pleaded, but that awarding pre-judgment interest was discretionary. Ultimately, Justice Kenny ordered pre-judgment interest in the lump sum of $30,000.

STEWART V SCHUMACHER, 2020 ABQB 133 (ROOKE ACJ)
Rule 14.5 (Appeals only with Permission)

In an underlying Action alleging harassment (the "Action") commenced by a radio announcer (the "Plaintiff") against one of her listeners, the Applicant/Defendant, John Schumacher ("Mr. Schumacher"), had previously made an Application (the "Application") which Associate Chief Justice Rooke ruled to exhibit several indicia of abusive litigation. His Lordship had imposed interim Court access restrictions on Mr. Schumacher and invited him and the Plaintiff to provide written submissions addressing two questions: (1) whether Mr. Schumacher should be subject to indefinite Court access restrictions; and (2) if so, what form those Court access restrictions should take.

Because Mr. Schumacher had attempted to bring the Plaintiff's employer, a radio station and its owner (the "Radio Station" and the "Owner", respectively) into the litigation, they were also invited to make submissions. The Court received no submissions from the Plaintiff or Mr. Schumacher but did receive a joint submission from the Radio Station and Owner (the "Owner's Submission").

After reviewing the relevant procedural history and the Owner's Submission, Associate Chief Justice Rooke found that the circumstances of the case, in particular the concern for the safety of Ms. Stewart, weighed in favour of indefinite Court access restrictions as against Mr. Schumacher. His Lordship provided a litany of prohibitions and restrictions as against Mr. Schumacher which included a requirement that Mr. Schumacher must apply to a single Appeal Judge for leave to commence or continue any Appeal, Application, or other proceeding in the Alberta Court of Appeal, and if a single Appeal Judge granted Mr. Schumacher leave to commence an Appeal, then Mr. Schumacher may be required to apply for further permission to Appeal under Rule 14.5(1)(j).

His Lordship concluded by noting that the Court would prepare and file the appropriate Order to reflect this Decision, and that approval of that Order by Mr. Schumacher was not required.

HAYDEN V HAYDEN, 2020 ABCA 37 (ROWBOTHAM JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant in this case sought permission to appeal from the Decision of a single Appeal Judge to a panel of three judges, pursuant to Rule 14.5.

Rowbotham J.A. determined that the Applicant did not meet the test for permission to appeal from the decision of a single Judge; specifically, the Applicant failed to establish (a) a serious question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts.

Rowbotham J.A. confirmed that the Application did not merit the scrutiny of three Appeal Judges and dismissed the Application to for permission to Appeal.

PIIKANI NATION V RAYMOND JAMES LTD, 2020 ABCA 116 (STREKAF JA)
Rule 14.5 (Appeals Only With Permission)

The Applicant sought permission, pursuant to Rule 14.5(1)(a), to appeal the decision of Strekaf J.A. (the "Application to Appeal") which granted Security for Costs to the Respondents in relation to the Applicant's Appeal of an interlocutory Order granted by a Case Management Judge to a full panel, and dismissing the bulk of the Applicant's cross-Application (the "Underlying Application").

Justice Strekaf reviewed some of the considerable factual history in the Underlying Application and the relevant jurisprudence applicable to Rule 14.5. Her Ladyship outlined the test and factors to consider in allowing an Application to Appeal and noted that permission can be granted if the Applicant establishes that there is: (a) a question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts.

Justice Strekaf found, *inter alia*, that the Applicant sought to rely on an Affidavit which contained written argument (which was not properly the subject of an Affidavit), attempted to relitigate the merits of the Costs Award that

gave rise to a contempt Order, and provided information that could have been, but was not, provided in the Underlying Application.

Strekaf J.A. further emphasized that the question of whether Security for Costs is appropriate is discretionary, and, given that the Applicant had not demonstrated any important legal issue which was raised by the Decision to grant Security for Costs, the Applicant had not met the applicable test to grant the Application for permission to Appeal, and the Application was dismissed.

GEZEHEGN V ALBERTA (APPEALS COMMISSION OF THE WORKERS' COMPENSATION BOARD), 2020 ABCA 48 (SCHUTZ JA)
Rules 14.8 (Filing a Notice of Appeal) and 14.37 (Single Appeal Judges)

The Applicant unsuccessfully pursued Judicial Review of a decision from the Appeals Commission of the *Workers Compensation Act*, RSA 2000, c W-15. Within the month following the Judicial Review Decision, the Applicant filed an Application to extend the time to appeal rather than a Notice of Appeal.

Justice Schutz considered Rule 14.8(2)(iii), which requires the Applicant to file Notice of Appeal within one month of the date of the Decision. Justice Schutz then considered *Cairns v Cairns*, 1931 CanLII 471 (AB CA), for the factors which should guide the Court's exercise of discretion on whether to extend the time to appeal: (1) whether an intention to appeal was held by the Appellant while the right to appeal existed; (2) whether an explanation exists which serves to justify or excuse the lateness; (3) whether the opposing party was seriously prejudiced by the delay; (4) whether the Appellant had taken benefits of the Judgment from which an Appeal is sought; and (5) whether the Appeal has a reasonable chance of success.

Justice Schutz did not address the fourth factor but found that the Applicant had made out the first three factors. Justice Schutz then turned to consider whether the Applicant had a reasonable chance of success. Although Justice Schutz indicated that the Appeal may be difficult, Her Ladyship found that the Appeal was not hopeless or frivolous and granted the Application to extend the time to appeal pursuant to Rule 14.37(2)(c).

PACE V ECONOMICAL MUTUAL INSURANCE COMPANY, 2020 ABCA 67 (STREKAF JA)
Rules 14.14 (Fast Track Appeals), 14.17 (Filing the Appeal Record – Fast Track Appeals), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Appellant, Rochelle Pace ("Ms. Pace"), sought to restore an Appeal that was struck by the Registrar for failure to comply with the deadlines for a Fast Track Appeal pursuant to Rules 14.17(1) and 14.64. Ms. Pace had commenced an Action in August of 2014 against the driver of an ATV on which she was a passenger for injuries she sustained as a result of an accident when the ATV struck a tree (the "Underlying Action"). The Respondent insurer, who was added as a Third Party to the Action, applied to amend the driver's Amended Statement of Defence to particularize the causation issue and to plead additional defences (the "Underlying Application"). The Underlying Application was granted by a Chambers Judge and appealed by Ms. Pace.

Ms. Pace had indicated on her Notice of Appeal that the Appeal was not required to be dealt with as a Fast Track Appeal. By a letter dated the same day the Appeal was filed, the Court's Case Management Officer advised the parties that the Appeal was a Fast Track Appeal pursuant to Rule 14.14. Ms. Pace failed to meet the deadlines of a Fast Track Appeal under Rule 14.17 and accordingly, the Appeal was struck.

Strekaf J.A. found that an Appeal that has been struck may be restored pursuant to Rule 14.65(1). Her Ladyship reviewed the relevant jurisprudence noting that the test to restore an Appeal is well-settled and based on five factors: (1) arguable merit; (2) explanation for the defect or delay that caused the Appeal to be taken off the list; (3) reasonable promptness in moving to cure the defect and have the Appeal restored; (4) timely intention to proceed with the Appeal; and (5) potential prejudice to the Respondents (including the length of the delay).

Justice Strekaf emphasized that no single factor is determinative. Weighing these factors, Justice Strekaf concluded that it was in the interests of justice to restore the Appeal; however Her Ladyship awarded no Costs to either party, determining that, while Ms. Pace was successful, the Application was occasioned by Ms. Pace's failure to comply with the deadlines in Rule 14.17.

EDMONTON (POLICE SERVICE) V DELUCA, 2020 ABCA 31 (FEEHAN JA)
Rules 14.46 (Application to Reconsider a Previous Decision) and 14.72 (Binding Precedents)

In 2007, the Alberta Court of Appeal pronounced the Decision of *Edmonton Police Association v Edmonton (City of)*, 2007 ABCA 147 ("*Murdoch*"). The issue before the Court in *Murdoch* was whether a dispute between the Edmonton Police Association and the City of Edmonton was a labour relations matter that should be dealt with by grievance under a collective agreement, or whether it was a matter of police discipline that should be dealt with under the *Police Service Regulation*, Alta Reg 356/1990. Eleven years later, the Applicant, the Chief of the Edmonton Police Service (the "Chief"), in an underlying Appeal of a Decision from the Law Enforcement Review Board (the "Underlying Decision"), applied to the Court of Appeal to reconsider its earlier precedent set in *Murdoch*.

Feehan J. A. noted that Rules 14.46 and 14.47 allow a panel of the Court to grant permission for a party to argue that a prior precedential Decision should be reconsidered. Citing the relevant jurisprudence, Justice Feehan noted that this power should be exercised cautiously and by applying a balanced analysis of the following factors: (a) age of the Decision; (b) whether the Decision has been relied upon so as to create settled expectations; (c) treatment of the issue by other Appeal Courts; (d) whether the Decision has an obvious, demonstrable flaw; and (e) whether it was classified as "Reasons for Judgment Reserved" or a "Memorandum of Judgment".

In balancing these factors, Justice Feehan found that while *Murdoch* was decided in 2007, the impact of the Decision was not made clear until the Underlying Decision in October of 2018. Given, among other things, that both *Murdoch* and the Underlying Decision were both Memoranda of Judgment and that these Decisions have not resulted in settled expectations, His Lordship granted the Chief's Application to reconsider the Court of Appeal's decision in *Murdoch*.

KENT V MACDONALD, 2020 ABCA 91 (FEEHAN JA)
Rules 14.47 (Application to Restore an Appeal), 14.60 (Judicial Dispute Resolution of an Appeal), 14.61 (Suspension of Time Periods) and 14.65 (Restoring Appeals)

The Applicants applied to restore their Appeal that had been previously struck for failure to file the Appeal Record within the time set out in the Rules.

Under Rule 14.65, on Application of a party under Rule 14.47, a single Court of Appeal Judge can restore an Appeal that had been struck by operation of the Rules. The Court found that there was arguable merit to the Applicants' Appeal, that the Applicants moved with reasonable promptness to have the Appeal restored, had intention in time to proceed with the Appeal, and did not cause prejudice to the Respondents. Feehan J.A. found that the Applicants had met the test for restoring the Appeal by providing an explanation for the delay which caused the Appeal to be struck.

In restoring the Appeal, Feehan J.A. encouraged the parties to consider an appellate Judicial Dispute Resolution pursuant to Rules 14.60 and 14.61.

RANCHER CONSTRUCTION LTD V SCOTT CONSTRUCTION (ALBERTA) LTD, 2020 ABCA 112
(VELDHUIS JA)
Rule 14.47 (Application to Restore an Appeal)

The Applicant, Scott Construction (Alberta) Ltd., applied to restore its Appeal after it had been struck and deemed abandoned due to the Appellant's failure to file their Appeal Record within the required deadline.

Justice Veldhuis listed the relevant factors for whether to restore an abandoned Appeal: (i) whether the Applicant

intended in time to proceed with the Appeal; (ii) the Applicant's explanation for the delay or defect causing the Appeal to be deemed abandoned; (iii) whether the Applicant moved with reasonable promptness to have the Appeal restored; (iv) whether the Appeal has arguable merit; and (iv) whether the Respondent has suffered any prejudice.

Justice Veldhuis held that the factors should be considered as a whole and that a Decision to restore an Appeal is discretionary. In Her Ladyship's consideration of the factors, she found that the Applicant's Appeal did not have arguable merit and that it was not in the interest of justice to restore the Appeal. Justice Veldhuis dismissed the Application.

PROSPER PETROLEUM LTD V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2020 ABCA 85 (STREKAF JA) Rules 14.48 (Stay Pending Appeal) and 14.57 (Adding, Removing or Substituting Parties to an Appeal)

A mandatory interim Injunction was granted by a Chambers Judge which the Applicants, Her Majesty in the Right of Alberta, the Lieutenant Governor in Council and the Minister of Energy (collectively, "Alberta") sought to stay pending Appeal. The Injunction ordered Alberta to decide whether to authorize Prosper Petroleum Ltd.'s oil sands project within 10 days. Fort McKay First Nation ("FMFN") made a concurrent Application to be added as a Respondent, or alternatively for intervenor status, on the Appeal.

Alberta applied for the stay pursuant to Rule 14.48. Justice Strekaf adopted the test for a stay pending Appeal from *RJR MacDonald v Canada*, 1994 CanLII 117 (SCC): (1) a serious question must be determined on Appeal; (2) the Applicant will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting the stay. Justice Strekaf found that Alberta had met their onus on all three parts of the test and granted the stay.

FMFN applied to be added as a Respondent to the Appeal pursuant to Rule 14.57. Justice Strekaf applied the test from *Carbon Development Partnership v Alberta (Energy and Utilities Board)*, 2007 ABCA 231, in order to determine whether the Applicant has a legal interest in the outcome of the Appeal. To determine if the Applicant has a legal interest, the Court must consider whether it is just and convenient to add the party and whether the Applicant's interest could only be adequately protected if granted party status. Justice Strekaf found that FMFN did not meet the test as the subject matter of the Appeal did not necessarily affect the legal interests of FMFN. The Application under Rule 14.57 was denied, but Justice Strekaf did grant intervenor status to FMFN.