JSS BARRISTERS

RULES

OCTOBER 2020

Jensen Shawa Solomon Duguid Hawkes LLP

Volume 2 Issue 19

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 new fully functional Rules database, giving users full search capabilities of all past summaries up to, and including, our latest release. The interface now improves the user experience through the ability to search and filter summaries by Rule, Judges and Masters, and keywords.

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

1.1	• BLOMER V WORKERS COMPENSATION BOARD, 2020 ABCA 334
1.4	• BLOMER V WORKERS COMPENSATION BOARD, 2020 ABCA 334
1.5	• UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 554
	• BLOMER V WORKERS COMPENSATION BOARD, 2020 ABCA 334

2.6	• ABEL V MODI, 2020 ABQB 530
2.11	• AVI V MHVB, 2020 ABQB 489
2.22	• AVI V MHVB, 2020 ABQB 489
2.23	• AVI V MHVB, 2020 ABQB 489
2.24	• PEARSON V PEARSON, 2020 ABCA 260
2.28	• PEARSON V PEARSON, 2020 ABCA 260
2.29	• PEARSON V PEARSON, 2020 ABCA 260

3.2	• ELITE REAL ESTATE HOLDINGS LTD V BIG RED EXPRESS LTD, 2020 ABQB 399
	• BLOMER V WORKERS COMPENSATION BOARD, 2020 ABCA 334
3.12	• ELITE REAL ESTATE HOLDINGS LTD V BIG RED EXPRESS LTD, 2020 ABQB 399
3.33	• JRB'S WELDING SERVICES INC V FAMILY DIVISION, 2020 ABQB 468
3.62	• JORDAN V ALBERTA HEALTH SERVICES, 2020 ABQB 460
3.68	• LESLIE V EDMONTON INSTITUTION, 2020 ABQB 400
	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415
	• LESLIE V EDMONTON INSTITUTION, 2020 ABQB 430
	• LIPINSKI V SPERANZA, 2020 ABQB 445
	• WEIDENFELD V ALBERTA, 2020 ABQB 451
	• HEISER V CANADA (ATTORNEY GENERAL), 2020 ABQB 456
	• JORDAN V ALBERTA HEALTH SERVICES, 2020 ABQB 460
	• SKRYPICHAYKO V LAW SOCIETY OF ALBERTA, 2020 ABQB 461
	• JRB'S WELDING SERVICES INC V FAMILY DIVISION, 2020 ABQB 468
	• MCCOOEYE V HANKOOK TIRE CANADA CORP, 2020 ABQB 496
	• ABEL V MODI, 2020 ABQB 530
	• DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2020 ABCA 265
3.69	• DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2020 ABCA 265
3.70	• DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2020 ABCA 265
3.71	• DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2020 ABCA 265

3.72	• JORDAN V ALBERTA HEALTH SERVICES, 2020 ABQB 460
3.74	• RAVVIN V CANADA BREAD COMPANY, 2020 ABCA 287

4.16	• MF V MSY, 2020 ABQB 492
	• KEEDER V ALGENDY, 2020 ABQB 509
4.18	• KEEDER V ALGENDY, 2020 ABQB 509
4.22	• ABEL V MODI, 2020 ABQB 530
	• ALI V PAKISTAN CANADA ASSOCIATION OF EDMONTON ALBERTA, 2020 ABQB 552
	• 20008570 ALBERTA LTD V CEDAR PEAKS MORTGAGE INVESTMENTS INC, 2020 ABCA 275
	• HASHAM V KANJI, 2020 ABCA 283
	• MOLSBERRY V 866565 ALBERTA LTD, 2020 ABCA 291
	• KAUSHAL V KAUSHAL, 2020 ABCA 340
4.24	• YOUNG V ALBERTA (ASSESSORS' ASSOCIATION PRACTICE REVIEW COMMITTEE/EXECUTIVE COMMITTEE), 2020 ABQB 493
	• BORGEL V PAINTEARTH (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2020 ABCA 321
4.29	• KUZOFF V TALISMAN PERU BV SUCURSAL DEL PERU, 2020 ABQB 424
	• MF V MSY, 2020 ABQB 492
	• BORGEL V PAINTEARTH (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2020 ABCA 321
4.31	• MH V ROMAN CATHOLIC DIOCESE OF CALGARY, 2020 ABQB 397
	• UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2020 ABQB 413
	• ROYAL BANK OF CANADA V LEVY, 2020 ABQB 500
	• LAPP V JAG GREWAL HOLDINGS LTD, 2020 ABQB 524
	• ROYAL BANK OF CANADA V LEVY, 2020 ABCA 338
4.33	• MH V ROMAN CATHOLIC DIOCESE OF CALGARY, 2020 ABQB 397
	• UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2020 ABQB 413
	• LAPP V JAG GREWAL HOLDINGS LTD, 2020 ABQB 524

6.9	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415
6.20	• EDMONTON (CITY) V GOSINE, 2020 ABQB 546
6.28	• CHEMTRADE ELECTROCHEM INC V STIKEMAN ELLIOTT LLP, 2020 ABCA 322
6.32	• CHEMTRADE ELECTROCHEM INC V STIKEMAN ELLIOTT LLP, 2020 ABCA 322
6.34	• CHEMTRADE ELECTROCHEM INC V STIKEMAN ELLIOTT LLP, 2020 ABCA 322

7.3	• UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2020 ABQB 413
	• GREWAL V MANGAT INVESTMENTS LTD, 2020 ABQB 487
	• BRUNO V SAMSON CREE NATION, 2020 ABQB 504
	• BOLAND V SEAN SCHAEFER PROFESSIONAL CORPORATION, 2020 ABQB 551

8.14	• UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2020 ABQB 413
8.17	• UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2020 ABQB 413

9.2	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415

9.4	• SKRYPICHAYKO V LAW SOCIETY OF ALBERTA, 2020 ABQB 461
	• JRB'S WELDING SERVICES INC V FAMILY DIVISION, 2020 ABQB 468
	• AVI V MHVB, 2020 ABQB 489
	• KEEDER V ALGENDY, 2020 ABQB 509
	• UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 554
9.5	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415
	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 508
9.12	• JMC V JAC, 2020 ABQB 458
9.13	• CLARK V UNTERSCHULTZ, 2020 ABQB 423
	• JMC V JAC, 2020 ABQB 458
	• BRUNO V SAMSON CREE NATION, 2020 ABQB 504
9.14	• DOW CHEMICAL CANADA ULC V NOVA CHEMICALS CORPORATION, 2020 ABQB 441
9.15	• GOWLING WLG (CANADA) LLP V TSYBULNYK, 2020 ABQB 479
	• FORT MCKAY METIS COMMUNITY ASSOCIATION V MORIN, 2020 ABCA 311

10.20	• GOWLING WLG (CANADA) LLP V TSYBULNYK, 2020 ABQB 479
10.29	• SER V JS, 2020 ABQB 390
	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415
	• KUZOFF V TALISMAN PERU BV SUCURSAL DEL PERU, 2020 ABQB 424
	• VESTBY V GALLOWAY, 2020 ABQB 470
	• MF V MSY, 2020 ABQB 492
	• YOUNG V ALBERTA (ASSESSORS' ASSOCIATION PRACTICE REVIEW COMMITTEE/EXECUTIVE COMMITTEE), 2020 ABQB 493
	• SJ V PARKLAND SCHOOL DIVISION NO 70, 2020 ABQB 498
	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 508
	• LAWSON V LAWSON, 2020 ABQB 519
	• 1384334 ALBERTA LTD V BUSTER'S PIZZA DONAIR & PASTA ENTERPRISES LTD, 2020 ABQB 533
10.30	• YOUNG V ALBERTA (ASSESSORS' ASSOCIATION PRACTICE REVIEW COMMITTEE/EXECUTIVE COMMITTEE), 2020 ABQB 493
	• KEEDER V ALGENDY, 2020 ABQB 509
10.31	• MF V MSY, 2020 ABQB 492
	• YOUNG V ALBERTA (ASSESSORS' ASSOCIATION PRACTICE REVIEW COMMITTEE/EXECUTIVE COMMITTEE), 2020 ABQB 493
	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 508
	• KEEDER V ALGENDY, 2020 ABQB 509
	• LAWSON V LAWSON, 2020 ABQB 519
	• 1384334 ALBERTA LTD V BUSTER'S PIZZA DONAIR & PASTA ENTERPRISES LTD, 2020 ABQB 533
	• UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 554
10.33	• SER V JS, 2020 ABQB 390
	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415
	• VESTBY V GALLOWAY, 2020 ABQB 470
	• YOUNG V ALBERTA (ASSESSORS' ASSOCIATION PRACTICE REVIEW COMMITTEE/EXECUTIVE COMMITTEE), 2020 ABQB 493
	• SJ V PARKLAND SCHOOL DIVISION NO 70, 2020 ABQB 498

10.33	• LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 508 • KEEDER V ALGENDY, 2020 ABQB 509 • LAWSON V LAWSON, 2020 ABQB 519 • 1384334 ALBERTA LTD V BUSTER'S PIZZA DONAIR & PASTA ENTERPRISES LTD, 2020 ABQB 533 • STOCKALL V STOCKALL, 2020 ABQB 545 • UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 554
12.41	• SFM V MRM, 2020 ABQB 401
13.6 **13.18**	• DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2020 ABCA 265 • KISSEL V ROCKY VIEW (COUNTRY), 2020 ABQB 406 • SERVUS CREDIT UNION LTD V DALMAC ENERGY INC, 2020 ABQB 478 • RAO V SDO, 2020 ABQB 506
14.5 **14.8** **14.14** **14.16** **14.17** **14.37** **14.42** 14.45 **14.57** **14.64** **14.67** **14.88**	• RANA V RANA, 2020 ABCA 295 • LOGAN ESTATE (RE), 2020 ABCA 259 • RANA V RANA, 2020 ABCA 295 • CROSWELL V KONCUR, 2020 ABCA 258 • RANA V RANA, 2020 ABCA 295 • LOGAN ESTATE (RE), 2020 ABCA 259 • P & C LAWFIRM MANAGEMENT INC V SABOURIN, 2020 ABCA 285 • P & C LAWFIRM MANAGEMENT INC V SABOURIN, 2020 ABCA 285 • RAVVIN V CANADA BREAD COMPANY, 2020 ABCA 287 • CROSWELL V KONCUR, 2020 ABCA 258 • RANA V RANA, 2020 ABCA 295 • 20008570 ALBERTA LTD V CEDAR PEAKS MORTGAGE INVESTMENTS INC, 2020 ABCA 275 • HASHAM V KANJI, 2020 ABCA 283 • MOLSBERRY V 866565 ALBERTA LTD, 2020 ABCA 291 • PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2020 ABCA 273
SCHEDULE C	• SFM V MRM, 2020 ABQB 401 • SJ V PARKLAND SCHOOL DIVISION NO 70, 2020 ABQB 498 • PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2020 ABCA 273

BLOMER V WORKERS COMPENSATION BOARD, 2020 ABCA 334 (WAKELING, CRIGHTON AND ANTONIO JJA)
Rules 1.1 (What These Rules Do), 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-compliance and Irregularities) and 3.2 (How to Start an Action)

The Appellant was a self-represented litigant who failed to file and serve Originating Applications seeking Judicial Review of two decisions under the *Workers Compensation Act*, RSA 2000, c W-15 (the "Act"). Instead, the Appellant filed a Statement of Claim announcing her decision to appeal more than six months past the date of the original decisions made by the Workers' Compensation Board (WCB) and the Appeals Commission.

The Appellant brought an Application under Rules 1.4 and 1.5 asking the Court of Queen's Bench to convert the Statement of Claim to an Originating Application for

Judicial Review, which was to be an appeal of the decision of the Appeals Commission for the WCB. The Appeal Court reviewed whether the Court of Queen's Bench had committed a reviewable error in dismissing the Appellant's Application.

In dismissing the Appeal, the Court of Appeal found that the Chambers Judge came to the correct decision and that the Court of Appeal had no authority to cure the Appellant's "fatal procedural missteps." The Court of Appeal stated that Rule 1.5 does not allow the Court of Queen's Bench to relieve the Appellant of the obligation set out in the Act to make an Application for Judicial Review within six months of the date of the decision sought to be reviewed. The Court of Appeal upheld the decision of the Chambers Justice which had held that time frames for seeking Judicial Review, both in the Rules and the Act, must be adhered to.

The Court of Appeal emphasized that even if Rule 3.2(6) was invoked, which allows the Court to make a procedural Order to correct a form that should have been started in another form, the Appellant's Application would still have failed as (1) she missed the filing deadline and; (2) she served the Respondent more than four months late.

Ultimately, the Court of Appeal held that, while the Court understands the disadvantages of self-represented litigants, "there are not separate statutory regimes for persons who are represented... and persons who are not", emphasizing that Rule 1.1(2) states that the Rules govern all parties that come to the Court, whether that person is a self-represented litigant or is represented by a lawyer.

UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 554 (ROOKE ACJ)
Rules 1.5 (Rule Contravention, Non-compliance and Irregularities), 9.4 (Signing Judgments and Orders), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In proceedings characterized by the persistent litigation misconduct of a self-represented Plaintiff, Rooke A.C.J. restricted the Plaintiff from filing new Applications absent leave of the Court, and permitted the Defendants to seek Costs through a written process set out in a procedural Order. Upon the Defendants' submission of materials as contemplated in that Order, the Plaintiff sought leave to file an Application pursuant to Rule 1.5, challenging the Defendants' submission as noncompliant. Rooke A.C.J. dismissed the request for leave as unmeritorious and abusive. Citing Rule 10.31 for the Court's broad authority and discretion to award Costs, and Rule 10.33 for the appropriateness of the use of Costs in discouraging problematic litigation conduct and misuse of Court resources, Rooke A.C.J. awarded a lump sum of Costs to each Defendant group. Rule 9.4(2)(c) was invoked such that the Plaintiff was not required to approve the form of Order.

ABEL V MODI, 2020 ABQB 530 (HO J)
Rules 2.6 (Representative Actions), 3.68 (Court Options to Deal with Significant Deficiencies) and 4.22 (Considerations for Security for Costs Application)

The Applicants sought Summary Dismissal and alternatively, Security for Costs, in the Action brought against them. The Statement of Claim alleged that Omniarch Capital Corporation had made misrepresentations and improperly diverted investment funds in relation to over 500 Plaintiffs. However, prior to that Application being heard, the Respondents filed Affidavit evidence after the deadline set out in the parties' consent Order.

Accordingly, the Applicants applied to strike the impugned Affidavit in its entirety pursuant to Rule 3.68. The Applicants raised several arguments in this respect, including that the late filing constituted an abuse of process, that the Affidavit was irrelevant to Summary Dismissal, and that the Affidavit was primarily comprised of hearsay or otherwise inadmissible evidence and should be ascribed no weight if admitted.

Madam Justice Ho reviewed the Affidavit. The Court struck the first and third sections of the Affidavit because those sections contained information which was readily available to the Respondents prior to the deadline, and thus there was no reasonable excuse for not adhering to that timeline. The Court also struck paragraphs 10 and 11 of the Affidavit pursuant to Rule 3.68(4), as they contained arguments and legal opinions. In striking these paragraphs,

Her Ladyship relied on *Gauchier v Cunningham*, 2012 ABQB 513, which found that a Case Management Judge has discretion to streamline litigation by avoiding cross-examination on "superfluous opinion, conclusion, and legal interpretations."

The Applicants argued that the second section of the Affidavit containing a settlement agreement with the Alberta Securities Commission ("ASC") should also be struck due to its privative clause, which stipulated that the facts agreed to therein applied only for the purposes of that regulatory proceeding. Further, the Applicants argued that the settlement agreement was irrelevant to Summary Judgment. However, Her Ladyship found that the settlement agreement was admissible notwithstanding the privative clause. Madam Justice Ho noted that the bar for relevance in Summary Dismissal is low and that the alternative Application for Security for Costs tipped the scales in favour of admitting the evidence, as Rule 4.22 permits the Court to consider matters respecting the merits of the Action, and any other matter it considers appropriate.

Finally, Madam Justice Ho noted that despite there being over 500 Respondents, Counsel had only referred to the Foundational Rules discussing efficient resolution of disputes to argue that it would be inefficient to require Affidavit evidence of each individual. Counsel argued that the other Respondents' evidence would have been the same as the Affidavits already before the Court. The Court determined that Affidavit evidence was required for each of the 500 Respondents because they had not commenced a Representative Action pursuant to Rule 2.6 nor had they sought certification under the *Class Proceedings Act*, SA c C-16.5.

AVI V MHVB, 2020 ABQB 489 (GRAESSER J)
Rules 2.11 (Litigation Representative Required), 2.22 (Self Represented Litigants), 2.23 (Assistance Before the Court) and 9.4 (Signing Judgments and Orders)

In this Action, Justice Graesser assessed the merit of an Organized Pseudolegal Commercial Argument ("OPCA") within the context of a family law dispute. In the unique circumstances before the Court, Jacqueline Robinson ("Robinson") purported to represent the mother, MHVB, as an appointed litigation guardian in a custody battle with the father, AVI.

Robinson prescribed to a subset of the OPCA belief system called the "Strawman Theory", whereby she claimed to be comprised of two halves, one of which is a flesh and blood element falling outside the purview of governmental and legal authorities, while the second half - the "Strawman"- is an immaterial legal aspect that is subject to conventional authorities. The Court noted that the legal system has dealt with several different OPCA ideologies in the past, all of which have been wholly rejected as having any legal force and effect.

His Lordship first examined the Power of Attorney which Robinson alleged granted her the ability to represent MHVB in the proceedings, and in doing so, found that as Robinson was not a lawyer, she was unable to represent MHVB. Additionally, the Court noted that while Rule 2.11 contemplates appointing a guardian for those who lack mental capacity, no suggestion had been made that this was the case for MHVB, and further, that the Rules do not permit a litigant to appoint its own guardian in any case. As a final note on this issue, His Lordship confirmed that no one who follows OPCA ideologies is fit to act as a litigation representative, citing *R v Dick*, 2002 BCCA 27.

Having described Robinson as a third-party "busy-body interloper" who had abused the Court process by intervening, Justice Graesser crafted an Order barring her from participating in, or communicating with, the Courts in relation to the underlying family law Action. Moreover, His Lordship provided that Robinson would have until September 30, 2020 to respond with Affidavit evidence as to why she should not be globally banned from providing legal advice, preparing documents submitted to the Court, or from making representations to the Court as a self represented litigant, agent, or friend of the Court as provided for in Rules 2.22 and 2.23. Approval of the Order was dispensed with pursuant to Rule 9.4(2) such that a Clerk of the Court would be authorized to sign on Justice Graesser's behalf.

PEARSON V PEARSON, 2020 ABCA 260 (FRASER, WAKELING AND CRIGHTON JJA)
Rules 2.24 (Lawyer of Record), 2.28 (Change in Lawyer of Record or Self-representation) and 2.29 (Withdrawal of Lawyer of Record)

The Respondent in this matter had sought to enforce a spousal support award. Counsel for the Appellant appeared on his client's behalf and sought an adjournment, as he claimed that the Appellant's former counsel was still counsel of record. Though former counsel had issued a Notice of Withdrawal of Lawyer of Record and served it on the Appellant, she did not file the requisite Affidavit of Service. The Chambers Judge denied the adjournment. The Appellant appealed, arguing that denying the adjournment was procedurally unfair because the Appellant was not able to have his position advanced.

The Court of Appeal disagreed, holding that the Appellant could have appeared and asked to represent himself under Rule 2.24(2). The Court of Appeal also determined that failing to file the Affidavit of Service as required under Rule 2.29(1)(b) did not prevent new counsel from filing a Notice of Change of Representation. The Court of Appeal held that a Notice of Withdrawal of Lawyer of Record pursuant to Rule 2.29 is not required from a former lawyer when a new lawyer files a Notice of Change of Representation pursuant to Rule 2.28.

ELITE REAL ESTATE HOLDINGS LTD V BIG RED EXPRESS LTD, 2020 ABQB 399 (MAH J)
Rules 3.2 (How to State an Action) and 3.12 (Application of Statement of Claim Rules to Originating Applications)

This was an Application to grant a monetary Judgment against a purchaser's counsel for the breach of trust conditions in a failed commercial real estate transaction. It was commenced by Originating Application. Pursuant to Rule 3.2(a), if there is no substantial factual dispute, an Action can be commenced by Originating Application. In Justice Mah's view, there were several substantial factual disputes. The Respondents argued that if any litigable issues survived the Application, they should be dealt with by Statement of Claim pursuant to Rule 3.12. His Lordship agreed. Justice Mah denied the Application but granted the Applicant leave to continue the Action by Statement of Claim pursuant to Rule 3.12.

JRB'S WELDING SERVICES INC V FAMILY DIVISION, 2020 ABQB 468 (NIELSEN ACJ)
Rules 3.33 (Reply to Defence), 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

Two of the Defendants in this matter had filed an Application to strike the Plaintiffs' Statement of Claim pursuant to Rule 3.68, which gives the Court authority to strike all or any part of a claim.

The Defendants had previously requested that the Court review the Statement of Claim under paragraph 5 of Civil Practice Note No. 7 ("CPN7") as a possible Apparently Vexatious Application or Proceeding. The Court conducted that review and determined that the Statement of Claim should be subject to a CPN7 show-cause document-based review which was to take the form of a written submission (the "Written Submission") of no more than 10 pages.

Prior to the date the Court ordered the Plaintiffs complete the Written Submission, the Plaintiffs filed a lengthy document in Form 12 called "Reply to Responses" (the "Reply"). The document purported to be a Reply to the "Statement of Defence/Responses of the… Defendants." As the Reply was filed prior to the date the Court ordered the Written Submissions, the Court did not consider it to constitute the Plaintiffs' Written Submission. The Plaintiffs failed to file a separate Written Submission responding to the Court's questions.

Rule 3.33 specifies that a Reply in Form 12 may be filed by the Plaintiff in reply to a Statement of Defence. However, none of the named Defendants in this Action had filed a Statement of Defence. As a result, the filing of the Plaintiffs' Reply was improper. The Court nonetheless allowed the Defendants to respond to the Reply and took both the Reply and the responses into consideration in determining whether the Action should be struck.

The Court ultimately found that since the Plaintiffs' failed to address any of the Court's concerns that were meant to be addressed in the Written Submission, the Statement of Claim was struck immediately pursuant to Rule 3.68. The Plaintiffs' approval of the form of Order was dispensed with under Rule 9.4(2)(c).

JORDAN V ALBERTA HEALTH SERVICES, 2020 ABQB 460 (NIELSEN ACJ)
Rules 3.62 (Amending Pleading), 3.68 (Court Options to Deal with Significant Deficiencies) and 3.72 (Consolidation or Separation of Claims and Actions)

The Plaintiff had previously filed four Statements of Claim against four different Defendants which Associate Chief Justice Nielsen had ruled to be an Apparently Vexatious Application or Proceeding ("AVAP"), and had ordered, pursuant to Civil Practice Note No. 7, that the Applicant had to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

Following this Order, the Plaintiff obtained counsel and submitted written arguments, arguing the claims had been filed to preserve the Plaintiff's legal rights and remedies. Associate Chief Justice Nielsen reviewed the written submissions provided by the Plaintiff to the Court and determined that the claims should not be struck as vexatious pursuant Rule 3.68, but rather that the Applicant be allowed to amend the Statements of Claim pursuant to Rule 3.62.

Associate Chief Justice Nielsen also made an Order to consolidate the four claims pursuant to Rule 3.72, as each claim arose from the same employment situation.

LESLIE V EDMONTON INSTITUTION, 2020 ABQB 400 (HENDERSON J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Application for relief by way of *habeas corpus*, reviewed by Justice Henderson. His Lordship identified a potential issue in the Application, as it did not appear to challenge an existing deprivation of liberty or a deprivation of residual liberty, whereas *habeas corpus* is only relevant to current and ongoing detention. His Lordship underscored that *habeas corpus* does not provide relief to a hypothetical future detention or to historic detentions. Justice Henderson identified that the Applicant had not indicated that he was currently being illegally detained.

Justice Henderson determined that the Application had a basis for review pursuant to Civil Practice Note No 7. His Lordship ordered that the Applicant had 14 days to provide written submissions to the Court to show why the Application should not be struck pursuant to Rule 3.68. Specifically, His Lordship solicited written submissions regarding: (1) what was the existing detention or loss of residual liberty that the Applicant alleged was illegal and; (2) how *habeas corpus* may apply when the decision that is being challenged as illegal results in an increase in personal liberty.

His Lordship explained that if no written submission were received by the deadline, the Court would proceed to render its final decision on whether the Application should be struck out in whole or in part pursuant to Rule 3.68. If the Applicant provided the written submission, then the Respondent had 7 days to provide a written reply. Thereafter, the Court would render its final decision on whether the Application should be struck out in whole or in part, pursuant to Rule 3.68.

LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 415 (JONES J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 6.9 (How the Court Considers Applications), 9.2 (Preparation of Judgments and Orders), 9.5 (Entry of Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

Jones J. previously struck the Applicant's Action against the Respondents pursuant to Rule 3.68 as an abuse of process. However, the Respondents did not prepare a formal Court Order and did not send a draft Order and Bill of Costs to the Court until more than three months later. The Respondents'

draft Bill of Costs claimed only Schedule C amounts and disbursements. The Applicant objected to the draft Order per Rule 9.5(2) and disputed the draft Bill of Costs.

Justice Jones held that the Respondents' draft Order could only be granted by way of an Application under Rule 9.5(2) because it was provided to the Court more than three months after the Order was pronounced. His Lordship instructed the Respondents to file an Application for a late Court Order per Rule 9.5(2) which would proceed as a document-only process under Rule 6.9(1).

Justice Jones also determined that the draft Bill of Costs was reasonable. The Respondents claimed only Schedule C Costs, and enhanced Costs would have been justified per Rule 10.33 because the Applicant's Action was an abuse of process.

LESLIE V EDMONTON INSTITUTION, 2020 ABQB 430 (HENDERSON J)
Rule 3.68 (Court Options to deal with Significant Deficiencies)

The Applicant was incarcerated and applied for a writ of *habeas corpus*.

Justice Henderson implemented a document-based show cause process to determine whether the Application should be struck out pursuant to Rule 3.68. The Court determined that the Application had several potential issues. The Applicant had failed to provide a basis to show that decisions regarding his detention were illegal, and had challenged a decision to deny release where *habeas corpus* did not apply. Justice Henderson gave the Applicant 14 days to address these issues to prevent his Application from being struck out under Rule 3.68.

LIPINSKI V SPERANZA, 2020 ABQB 445 (MASTER BIRKETT)
Rule 3.68 (Court Options to deal with Significant Deficiencies)

This decision followed an Application and cross-Application previously heard by Master Birkett. Master Birkett had previously given the Court's decision on the Application orally, and this written decision dealt with the cross-Application brought by the Defendants for an Order striking paragraphs of the Plaintiff's Amended Statement of Claim that related to allegations of conspiracy and unlawful interference with economic relations. Master Birkett dismissed the cross-Application. Master Birkett observed that the primary issue was whether or not the conspiracy related claims in the Amended Statement of Claim should be struck on the basis that they merged with the prior defamation allegations.

Master Birkett noted that in an Application brought pursuant to Rule 3.68, the Court is to consider only the pleadings, and no evidence.

Master Birkett ultimately concluded that the pleadings disclosed a reasonable claim for conspiracy and unlawful interference with economic relations what was distinct from the previous allegations of defamation. Master Birkett decided not to apply the doctrine of "merger", stating that, given the stage in the proceedings, it would be more appropriate to leave such a decision to the Trial Judge.

WEIDENFELD V ALBERTA, 2020 ABQB 451 (ROOKE ACJ)
Rule 3.68 (Court Options to deal with Significant Deficiencies)

This was an Application reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Rooke A.C.J. 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.

HEISER V CANADA (ATTORNEY GENERAL), 2020 ABQB 456 (HO J)
Rule 3.68 (Court Options to deal with Significant Deficiencies)

The Applicant, detained upon revocation of his parole and awaiting review of that detention by the Parole Board of Canada, had commenced proceedings in pursuit of *habeas corpus*. The Attorney General of Canada and

Bowden Institution, as Respondents, then brought an interim Application seeking dismissal of the Originating Application pursuant to Rule 3.68 citing case authority settling Alberta's parole review procedure as exempt from the scope of *habeas corpus*. Justice Ho affirmed the case authority and struck the Originating Application, reasoning that "the Court has no jurisdiction to hear [the] application (Rule 3.68(2)(a)), [the] Originating Application discloses no reasonable claim (Rule 3.68(2)(b)), and [the] proceeding is a futile application and an abuse of court processes (Rule 3.68(2)(d))."

SKRYPICHAYKO V LAW SOCIETY OF ALBERTA, 2020 ABQB 461 (ROOKE 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 Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Associate Chief Justice Rooke 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 Rooke also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

MCCOOEYE V HANKOOK TIRE CANADA CORP, 2020 ABQB 496 (MASTER SUMMERS)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendant applied under Rule 3.68 to strike the Statement of Claim, alleging the Action was statute-barred because it was not commenced within two years, and alleging that the Court had no jurisdiction to deal with allegations of discrimination brought by the Plaintiff.

The Plaintiff had initially filed an Action against the Defendant in the Saskatchewan Court of Queen's Bench. However, the Defendant successfully applied to the Saskatchewan Court for an Order that the Action be transferred to Alberta and be refiled in Alberta on the basis that Alberta was *forum conveniens*.

The Plaintiff's Statement of Claim had been filed in Saskatchewan two days short of the two-year limitation period. Consequently, the Court noted that unless there was some law or Rule preserving the Plaintiff's claim and protecting it from a limitation defence, the transfer of the Action from Saskatchewan to Alberta sentenced the Action to an immediate death in Alberta, if the Defendant chose to raise that defence. While some Canadian provinces have legislation that prevents a matter being transferred from another Court from being statute barred, Alberta does not.

However, the Court found that granting the Defendant's Application to strike the Statement of Claim would be manifestly unjust and in direct contradiction to the intention of the Saskatchewan Judge who ordered the Action to be transferred. As a result, Master Summers dismissed the Application.

DOMENIC CONSTRUCTION LTD V PRIMEWEST CAPITAL CORP, 2020 ABCA 265 (FRASER, SLATTER AND KHULLAR JJA)
Rules 3.68 (Court Options to deal with Significant Deficiencies), 3.69 (Joining Claims), 3.70 (Parties Joining to Bring Action), 3.71 (Separating Claims) and 13.6 (Pleadings General Requirements)

The Defendants appealed a Decision which had allowed the Plaintiff, Domenic Construction Ltd.'s ("Domenic") to amend its pleadings. The pleading amendments arose from a complex chain of events involving a default on the impugned land sale agreement. The Respondent, Domenic had sold a parcel of land to Clearview Development Corporation ("Clearview"), the financing of which was guaranteed by the Appellant, Primewest Capital Corp ("Primewest").

During its unsuccessful collection efforts following a foreclosure Action against Clearview, Domenic discovered that it had been holding the lands in question in trust for the benefit of a parent corporation, which was owned by another Defendant in the Action, Mr. Noval. Moreover,

Domenic discovered that shortly after the land sale was executed, the lands were transferred at undervalue in settlement of the trust agreement to this same parent company: one of several corporations which were owned by Mr. Noval.

Accordingly, Domenic applied to amend its pleadings to assert, in essence, that Clearview had clandestinely acted as agent for its parent company during the land purchase in order to insulate the former from liability. These amendments were not adjudicated, as shortly thereafter, Domenic successfully applied to the Court for more substantial amendments which, among other things, alleged that Clearview had been intentionally dissolved and the lands transferred to another of Mr. Noval's companies in an attempt to preclude liability, which would add new Defendant corporations to the Action, and would potentially allow Domenic to pierce the corporate veil, if successful.

The Court of Appeal assessed the Appellants' objections to the proposed amendments. Domenic's discovery of the relevant information prompting the sought-after amendments was also in issue due to the time constraints imposed by the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*) and thus the Court of Appeal was tasked with examining the amendments in light of the Rules as well as the limitations issues.

With respect to the joining of the parent corporation due to the fraudulent transfer of the lands allegation, the Court stated that in assessing Rules 3.69 and 3.70, the amendment was permissible as the corporation's ostensible liability arose from the same transaction, and further, including the parent company as a party would not cause the litigation to become so complex as to become unmanageable, as per Rule 3.71.

However, the Court of Appeal agreed with the Appellants' argument that one of Domenic's amendments, which alleged that Clearview, Mr. Noval, and his corporations intentionally failed to disclose the agency relationship that Clearview held amongst that corporate group, constituted, in the Court's words, "judicial obstruction". The Court noted that while this issue could be litigated under both the *Limitations Act* and the Rules, pleadings must contain facts not evidence, as required by Rule 13.6.

Notwithstanding this assertion, the Court did not grant the Appellant's Application to strike pursuant to Rule 3.68, as the overlapping limitations issues created factual uncertainties which necessitated a Trial to be thoroughly examined.

The Court of Appeal allowed the Appeal in part, and permitted some of Domenic's amendments to the Statement of Claim, and disallowed others.

RAVVIN V CANADA BREAD COMPANY, 2020 ABCA 287 (FEEHAN JA)
Rules 3.74 (Adding, Removing or Substituting Parties after close of Pleadings) and 14.57 (Adding, Removing or Substituting Parties to an Appeal)

The Applicant applied to be added as a Respondent to an Appeal. The Court considered Rule 14.57, which permits a party or person to be added, removed or substituted as a party to an Appeal in accordance with Rule 3.74. The Applicant relied on Rule 3.74(2)(b), which allows a person to be added, removed or substituted as a party to the Action upon Application if the Court is satisfied that the Order should be made.

The Court granted the Application and held that the Applicant had a legal interest in the outcome of the proceedings, and it was in the interests of justice and efficiency that the Applicant be added as a Respondent to the Appeal. The Court confirmed that the Applicant's interests could not otherwise be adequately protected in the circumstances.

MF V MSY, 2020 ABQB 492 (PHILLIPS J)
Rules 4.16 (Dispute Resolution Process), 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court-ordered Costs Award)

The Plaintiff was successful in her Action regarding a number of family law matters, and as such, she made an Application for Costs pursuant to Rule 10.29.

The Plaintiff had made a Formal Offer to settle which would have been more favourable to the Defendant than the Trial Decision. Justice Phillips found that the Formal Offer was genuine, reasonable, realistic and would have resolved all issues between the parties. The Court held that the Plaintiff had satisfied the requirements of Rule 4.29 to obtain double Costs.

In considering the Bill of Costs submitted by the Plaintiff, Justice Phillips noted that one Application was heard where no counsel had was present and the Plaintiff had appeared on her own behalf. Justice Phillips referenced Rule 10.31(5), which allows a Court to order a Costs Award for a self-represented litigant, but Justice Phillips decided against awarding Costs for the impugned Application appearance. The Bill of Costs also claimed Costs for an Early Intervention Case Conference, but Justice Phillips found that such Costs were excluded by Rule 10.31(2)(c), which excludes Costs related to a dispute resolution process described in Rule 4.16. Specifically, Justice Phillips decided that an Early Intervention Case Conference was a Court annexed dispute resolution process as described in Rule 4.16(1)(b).

Ultimately, the Plaintiff was awarded a total of $52,047.29 in Costs.

KEEDER V ALGENDY, 2020 ABQB 509 (PHILLIPS J)
Rules 4.16 (Dispute Resolution Processes), 4.18 (Judicial Dispute Resolution Process), 9.4 (Signing Judgments and Orders), 10.30 (When Costs Award may be Made), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Unable to schedule a binding JDR in the wake of COVID-19, the parties to a family law dispute scheduled a non-binding JDR with Justice Phillips and agreed to accept Her Ladyship's recommendations as final. After the conclusion of the JDR, the Respondent refused to endorse the Consent Orders capturing Justice Phillips' recommendations, and the Applicant sought Costs.

In consideration of Costs, Justice Phillips noted Her Ladyship's authority and discretion to make an award pursuant to the JDR agreement reached by the parties, as well as pursuant to Rules 10.30 and 10.31 generally. Further, Costs pertaining to dispute resolution process described in Rule 4.16, or a judicial dispute resolution process described in Rule 4.18, are not ordinarily recoverable absent serious conduct committed in that process, per Rule 10.31(2)(c).

Taking into account the considerations enumerated in Rule 10.33, Justice Phillips observed that the Applicant was largely successful in the proceedings; the issues were of importance and of significant complexity; and her overall conduct tended to shorten the litigation, while the Respondent had unnecessarily lengthened and delayed the litigation through misconduct which had occurred prior to the JDR. Notwithstanding the Respondent's refusal to accept the result of the JDR as final, contrary to the JDR agreement, Justice Phillips determined that no Costs were payable in respect of the JDR process itself, but was inclined to award a lump sum Costs Award in favour of the Applicant for the balance of the proceedings. Rule 9.4(2)(c) was invoked such that the Respondent was not required to approve the form of Order respecting Costs.

ALI V PAKISTAN CANADA ASSOCIATION OF EDMONTON ALBERTA, 2020 ABQB 552 (BURROWS J)
Rule 4.22 (Considerations for Security for Costs Order)

The Appellant appealed a Master's Order requiring the payment of Security for Costs into Court.

Burrows J. noted the factors that the Court must take into consideration when granting an Order for Security for Costs, as enumerated under Rule 4.22: (1) whether it is likely the Applicant will be able to enforce an Order or Judgment against assets in Alberta; (2) the ability of the Respondent to pay the Costs Award; (3) the merits of the Action; (4) whether an Order to give Security for payment of a Costs Award would unduly prejudice the Respondent's ability to continue the Action; and (5) any other matter the Court considers appropriate.

When considering the factors, Burrows J. noted in particular that while the Appellant was not a wealthy man, he did

have assets in Alberta and made a reasonable living, and therefore Justice Burrows held that the first two factors did not provide a strong reason for granting an Order for Security for Costs. Justice Burrows also discussed the difficulty of assessing the merits of the underlying Action. His Lordship highlighted certain gaps in the materials before the Court and concluded that it was not clear that the Appellant's underlying claim in defamation was without merit. Finally, Burrows J. concluded that requiring the Appellant to deposit Security for Costs should his claim not succeed would be unduly prejudicial to his ability to continue the Action.

Justice Burrows therefore allowed the Appeal.

20008570 ALBERTA LTD V CEDAR PEAKS MORTGAGE INVESTMENTS INC, 2020 ABCA 275 (STREKAF JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Respondent on Appeal applied for Security for Costs in connection with two Appeals filed by the Appellant on Appeal. The Application was brought pursuant to Rule 14.67, which permits a single Appeal Judge to order a party to provide Security for Costs.

Strekaf J.A. considered the elements outlined in Rule 4.22 and determined that an Order for Security for Costs was just and reasonable in the circumstances. Strekaf J.A. determined that the Respondent would be unable to pay its Costs if its Appeal failed. Although the Appeal was not frivolous, Justice Strekaf was not satisfied that an Order for Security for Costs would unduly prejudice the Respondent's ability to prosecute the Appeal.

HASHAM V KANJI, 2020 ABCA 283 (FEEHAN JA)
4.22 (Considerations for Security for Costs Order) and Rule 14.67 (Security for Costs)

The Respondent to this Application had appealed an interim without prejudice parenting Order. The Appeal was to be heard roughly eight months in the future. The Applicant applied for an Order for Security for Costs of the Appeal.

Justice Feehan stated that the test for ordering Security for Costs is set out in Rule 4.22 itself. Feehan J.A. referred to *Parker v Parker*, 2019 ABCA 114 for a succinct summary of the test where the Court pf Appeal stated that such an Order is discretionary, but that a failure to pay previous Costs Awards along with a "demonstrated inability to pay costs if an appeal is unsuccessful" will generally suffice to grant a Security for Costs Order.

Feehan J.A. noted that the prospects for success on Appeal should also inform the Court's exercise of discretion.

Justice Feehan observed that, in this case, much of the Appeal had become moot since the original Order. His Lordship opined that there was very little chance of success on Appeal, noted that the Respondent had no assets in Alberta, and noted that the Respondent had no employment income. As such, Justice Feehan granted the Order for Security for Costs; however, in a more proportionate amount than sought by the Applicant.

MOLSBERRY V 866565 ALBERTA LTD, 2020 ABCA 291 (VELDHUIS JA)
Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

At Trial, the Applicant had been awarded damages for the Respondent's failure to transfer land in accordance with a written agreement. The Respondent appealed without satisfying an adverse Costs award arising from Trial, and the Applicant sought Security for Costs pursuant to Rule 4.22, as referred to in Rule 14.67 for the purposes of Appeal.

Justice Veldhuis considered whether it was reasonable and just to award Security for Costs, reviewing each of the prescribed factors in turn. While Her Ladyship was not able to find that the Appeal was without merit, the Court's analysis of the remaining factors militated in favour of an award of Security for Costs, as the Respondent would be unable to pay Costs if his Appeal failed; it was unlikely that the Applicant would be able to enforce an Order or Judgment against the Respondent; and there was no evidence that Security for Costs would unduly

prejudice the Respondent's ability to continue with the Appeal. Accordingly, the Applicant had satisfied its onus in persuading the Court that an Order for Security for Costs should be issued, and the Respondent did not provide reason for the Court to order otherwise.

KAUSHAL V KAUSHAL, 2020 ABCA 340 (ANTONIO JA)
Rule 4.22 (Considerations for Security for Costs Order)

This was an Application for an Order for Security for Costs on a full indemnity basis arising out of a family law dispute. Justice Antonio noted that the Court may order a party to provide Security for Costs after considering the factors listed under Rule 4.22. Justice Antonio noted that throughout the litigation, the Respondent had avoided providing evidence about assets that he held in Alberta. The Respondent had indicated that he had a reduced income, but otherwise did not claim that Security for Costs would prejudice his ability to continue his Appeal. The Respondent did little to explain the merits of his Appeal. Justice Antonio concluded that the Respondent would be unlikely to comply with any Costs Order, and due to the lack of financial information, it would be unlikely that the Applicant could enforce an Order against any assets the Respondent may have in Alberta. Her Ladyship therefore granted an Order for Security for Costs on a full indemnity basis, and ordered that if the Security for Costs were not posted by the specified date, the Appeal would be struck.

YOUNG V ALBERTA (ASSESSORS' ASSOCIATION PRACTICE REVIEW COMMITTEE/EXECUTIVE COMMITTEE), 2020 ABQB 493 (SHELLEY J)
Rules 4.24 (Formal Offers to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award may be Made), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Respondents were found to have breached a section of the *Professional and Occupational Associations Registration Act*, RSA 2000, c P-26 by a disciplinary committee. That decision was upheld by an appeal committee, and then again upon further appeal to the Court of Queen's Bench, leaving the parties to address Costs of the Appeal, as well as the Costs of two interlocutory Applications leading up to the Appeal.

Justice Shelley noted that while Rule 10.29 presumptively entitles a successful party to Costs, the Court maintains wide discretion as contemplated in Rule 10.31. This framework applies equally where the Court elects, per Rule 10.30, to assess Costs arising in interlocutory matters that were not previously addressed.

The impugned interlocutory Applications concerned whether bias claims could be heard. The Applicants argued that their success in the Appeal, including in establishing that no bias existed, entitled them to Costs of the steps taken in advance. The Respondents noted that they were successful in the interlocutory Applications, entitling them to argue bias, and therefore they should be awarded Costs. Justice Shelley found that the Respondents' success in the interlocutory Applications should be considered when making a Costs Award.

More narrowly, the parties disputed whether Costs of an interlocutory Consent Order were payable. The Applicants argued that as the successful party overall, they should be awarded Costs for a procedural Consent Order. The Respondents argued that neither party should be awarded Costs as neither party had won or lost. Justice Shelley held that a procedural Consent Order did not attract a Costs Award.

With respect to the Appeal, the Applicants argued that the complexity and the Respondents' baseless allegations of bias provided grounds for enhancement of Costs from Column 1 to Column 3. The Respondents argued that the Appeals were neither lengthy nor complex, and also that they their concern had been legitimate such that enhanced Costs should not be awarded.

The Court considered Costs of the Appeal on the ground of misconduct, noting the discretionary factor codified in Rule 10.33(g). Justice Shelley found that the allegations of bias did not rise to the level necessary to award enhanced Costs. The Court also considered Costs of the Appeal in view of a pre-Trial offer which had been made, notwithstanding that

it did not comply with Rule 4.24(2). The Applicants argued that Costs should be doubled as the Respondents failed to accept a pre-Trial offer, given that the Applicants' case was strong, and it would not have been in the public interest to alter penalties that had been imposed in a disciplinary hearing. The Respondents argued that the pre-Trial offer was not genuine, as the Applicants had merely offered to waive Costs that had not yet been awarded, in exchange for the withdrawal of the Respondents' Appeals. Justice Shelley found that the Applicants' case was strong and that they did make a genuine offer to settle. Her Ladyship concluded that the Applicants were due Costs based on Column 2, and that they were entitled to double Costs in respect of all steps taken after the pre-Trial offer to settle.

BORGEL V PAINTEARTH (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2020 ABCA 321 (WATSON, WAKELING AND STREKAF JJA)
Rules 4.24 (Formal Offers to Settle) and 4.29 (Costs Consequences of Formal Offer to Settle)

The Appellants were successful in their Appeal of the prior Judicial Review Decision against the Respondent, the County of Paintearth No. 18 (the "County") and the Subdivision and Development Appeal Board for the County ("SDAB"). The Appellants sought Costs against both the County and SDAB. The County argued that it was entitled to double Costs since it had made a Formal Offer to settle, which it believed was more favourable than the Judgment.

Rule 4.29 states that a party who makes a settlement offer which is more generous than the amount awarded in a Judgment is then entitled to double Costs for the steps taken after service of that offer. The Justices noted that the settlement offer must meet the qualifications for a Formal Offer to settle as set out in Rule 4.24 in order to trigger Rule 4.29.

The Court of Appeal considered whether the new Schedule C tariff, which came into effect on May 1, 2020, should be used in evaluating an offer under Rule 4.29. The Justices decided that, for the purposes of assessing a settlement offer, the Costs should be calculated pursuant to the tariff as it existed at the time the offer was made.

The Court then considered the County's offer and found that it did not comply with Rule 4.24, because it did not address whether the offer was inclusive of interest, did not include a form of acceptance, and did not include a notice of Costs consequences - all requirements prescribed by Rule 4.24(2). The Court found in favour of the Appellants and awarded Costs to them, dismissing the arguments of the County and SDAB.

KUZOFF V TALISMAN PERU BV SUCURSAL DEL PERU, 2020 ABQB 424 (HOLLINS J)
Rules 4.29 (Costs Consequences of Formal Offers to Settle) and 10.29 (General Rule for Payment of Litigation Costs)

Following the Plaintiff, Kuzoff's, unsuccessful Appeal of Master Prowse's decision to summarily dismiss the Action against the Defendant, Talisman Peru BV Sucursal Del Peru ("Talisman"), Madam Justice Hollins addressed the issue of Costs. Having determined Talisman to be the successful party, Her Ladyship found it was entitled to Schedule C, Column 3 Costs pursuant to Rule 10.29.

Additionally, Madam Justice Hollins assessed whether either of Talisman's formal or informal offers to settle would enable it to claim double Costs. Following the Summary Dismissal of Kuzoff's claim, Talisman made a Formal Offer to settle, in which Talisman would agree to forfeit Costs granted by Master Prowse, in exchange for Kuzoff consenting to a dismissal of the Appeal. Her Ladyship found that this was a Formal Offer to settle falling under the purview of Rule 4.29, and that no special circumstances, as noted in 4.29(e), barred Talisman from doubling its Costs. Having arrived at that conclusion, it was therefore unnecessary to consider the informal "Calderbank Offer" and its potential impact on Costs.

Lastly, Her Ladyship granted Talisman a 45.6% inflation on Costs based on the draft Amendment Regulation that increased Schedule C Costs, which the Court noted to be "…woefully unrepresentative of average out-of-pocket costs of litigation."

MH V ROMAN CATHOLIC DIOCESE OF CALGARY, 2020 ABQB 397 (MASTER SCHLOSSER)
Rules 4.31 (Application to deal with Delay) and 4.33 (Dismissal for Long Delay)

This was an Application to strike a claim for sexual assault for long delay. Master Schlosser began with a Rule 4.33 analysis and considered whether there had been a three-year period without a significant advance in the Action. When the Action began in 2014, an issue arose as to whether or not it was barred by limitations. In 2017, *An Act to Remove Barriers for Survivors of Sexual and Domestic Violence*, SA 2017, c 7 was proclaimed, which amended the Limitations Act, RSA 2000, c L-12. The amendment was retroactive and removed any and every limitation period for claims for sexual assault. The Applicant argued that the change in law did not count as a significant advance in the Action, as the Respondent did not intentionally or deliberately bring it about. Master Schlosser found that neither the language of Rule 4.33 or the applicable case law required the agency of the Plaintiff in relying on an advancing event. The Rule 4.33 Application was dismissed.

Master Schlosser then proceeded with a Rule 4.31 analysis and considered whether there had been an inordinate and inexcusable delay. The Court observed that the Action had effectively been stalled pending determination of the limitations issue, and further that the Applicant had not, but could have, moved to strike the Action before the change in legislation. Master Schlosser found that the delay was excusable and dismissed the Rule 4.31 Application.

UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2020 ABQB 413 (FETH J)
Rules 4.31 (Application to deal with Delay), 4.33 (Dismissal for Long Delay), 7.3 (Summary Judgment), 8.14 (Unavailable or Unwilling Witness) and 8.17 (Proving Facts)

In this Action arising from the historical contamination of the lands in question, United Inc. ("United") applied pursuant section 218 of the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12 (the *"EPEA"*) to extend the limitation period under the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*). In response, Canadian National Railway Company ("CNR") cross-applied for Summary Judgment of the Action pursuant to Rule 7.3 on the basis that the Action was time barred by sections 3(1)(a) or (b) of the *Limitations Act*.

The Application to extend limitations under section 218 of the *EPEA* involved an assessment of prejudice that CNR may suffer as a result of an extension being granted, due to the historical nature of the litigation, with nearly 15 years having passed since the filing of the Statement of Claim. Nonetheless, Justice Feth noted that Rules 4.31 and 4.33 provide mechanisms to deal with the prejudice arising from excessive delay, which CNR could take advantage of should they wish.

Moreover, His Lordship found that the Court has access to a variety of remedies in the Rules to alleviate CNR's prejudice resulting from a deceased witness who had not been cross-examined on his Affidavit prior to his passing. Specifically, Justice Feth noted that the Trial Judge could admit the deceased's discovery evidence pursuant to Rule 8.14, or could admit the Affidavit evidence under Rule 8.17. As such, the alleged prejudice could be mitigated, and was therefore insufficient to bar the extension. Thus, the Court favoured United's position and declined to grant Summary Judgment due to the failure of CNR's prejudice argument.

ROYAL BANK OF CANADA V LEVY, 2020 ABQB 500 (YAMAUCHI J)
Rule 4.31 (Application to deal with Delay)

The Defendants applied for a dismissal of the Plaintiff's claim pursuant to Rule 4.31.

Justice Yamauchi cited *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 in support of the proposition that analysis under Rule 4.31 requires balance. The Plaintiff is required to pursue its claim quickly, but when the Defendant seeks to have a claim dismissed for want of prosecution, the Defendant's conduct and pace is a relevant consideration. Yamauchi J. cited *Humphreys v Trebilcock*, 2017 ABCA 116 to

state that when a party alleges fraud, they are under an obligation to advance the litigation at a faster pace than is otherwise expected.

Although His Lordship was provided with several pieces of case law in support of the Application to dismiss for delay, Justice Yamauchi held that the primary considerations for the Court are the facts and parties before it, and the actual conduct in the proceedings. Justice Yamauchi also noted that "[s]etting a presumptive ceiling is arbitrary and does not abide by a contextual approach."

Yamauchi J. found that, given the scope of the litigation and the number of parties, the Plaintiff's delay was neither inordinate nor inexcusable. As such, the presumption of "significant prejudice" contained in Rule 4.31(2) did not exist. In the absence of the presumption, Yamauchi J. found that the Defendants had failed to demonstrate any prejudice arising from the delay.

Justice Yamauchi therefore dismissed the Application.

LAPP V JAG GREWAL HOLDINGS LTD, 2020 ABQB 524 (MASTER SUMMERS)
Rules 4.31 (Application to deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendants had brought an Application to dismiss the Plaintiffs' Action for long delay under Rule 4.33, or alternatively under Rule 4.31 based upon significant prejudice.

With respect to Rule 4.33, the Plaintiffs argued that three steps taken in May, November and December of 2016 constituted a significant advance in the Action. In May 2016, the Defendants' adjuster asked the Plaintiffs' former counsel for further documentation and to set up a conference call. The Court accepted that there was an extensive amount of questioning and information provided during this phone call. In November 2016, counsel for the Plaintiffs provided the Defendants with further documents. In December 2016, counsel served the Defendants with an Affidavit of Records.

Master Summers found that cumulatively, what occurred between May and December of 2016 was a significant advance in the Action. In particular, Master Summers found that the conference call of 34 minutes, where there was an extensive amount of questioning and information provided, constituted a significant advance. The Court emphasized that this analysis was a functional one, as "the Plaintiff providing extensive information on the issues of liability and damages does functionally advance the action in a material way".

The Court also underscored that not every exchange of information between parties may be considered a significant advance, and that the decision here was fact-specific.

With respect to Rule 4.31, the Court highlighted that although Rule 4.31(2) provides for a presumption of significant prejudice, that presumption is rebuttable. Master Summers agreed with the Plaintiffs that the Defendants had not suffered significant prejudice due to the delay that occurred. With that, Master Summers highlighted that eight years had passed since the impugned breach had occurred, which did not countenance delay. Therefore, while Master Summers dismissed the Defendants' Application, Master Summers also directed the parties to submit an Application for a litigation plan within 30 days.

ROYAL BANK OF CANADA V LEVY, 2020 ABCA 338 (PAPERNY, SLATTER AND VELDHUIS JJA)
Rule 4.31 (Application to deal with Delay)

The Defendants had filed an Application to dismiss the action for delay pursuant to Rule 4.31. The Case Management Judge had denied the Application, and the Defendants appealed.

The Statement of Claim was filed by the Royal Bank of Canada in 2009. At the time that the 4.31 Application was brought, 10 years had passed since the Action was commenced and the matter was still not scheduled for Trial. As such, the Defendants argued that the delay was inordinate and inexcusable, causing significant prejudice to the Defendants, and that the Action should be struck pursuant to Rule 4.31.

The Court of Appeal emphasized that "significant prejudice" is a precondition to dismissal for delay pursuant to Rule 4.31. The Court of Appeal noted there was no test for measuring inordinate delay, and rather that each case has different considerations and circumstances, meaning there is no presumptive time period which gives cause to strike an Action for delay. Rather, the Court of Appeal emphasized that the degree of prejudice is more important than the "raw passage of time". Although areas of delay and prejudice were noted by the Court of Appeal, the Court of Appeal decided not to allow the Appeal as the Case Management Judge had made no error that invited appellate intervention.

The Appeal was dismissed, but the Court of Appeal ordered that Costs of the Appeal be in the cause.

EDMONTON (CITY) V GOSINE, 2020 ABQB 546 (MAH J)
Rule 6.20 (Form of Questioning and Transcript)

The Applicant applied to confirm an Attachment Order that was previously granted against the Defendants *ex parte*. As a preliminary issue, the Applicants requested that three of the Defendants be required to answer certain questions that were objected to and respond to certain Undertakings that were refused. The questions and Undertakings arose when the Defendants were cross-examined on their Affidavits.

Justice Mah reviewed some general principles regarding the scope of cross-examination on an Affidavit. His Lordship noted that the scope of cross-examination on an Affidavit is somewhat narrower than that of Questioning under Part 5 of the Rules. The Court also noted several differences between cross-examination on an Affidavit and Questioning. One such difference is that a witness cannot be required to inform him or herself in the absence of knowledge when cross-examined on an Affidavit.

Justice Mah reviewed the case law considering Rule 6.20, which also referred to the old Rule 314. After a review of the case law, Justice Mah concluded that the Court should be reluctant to direct that Undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the deponent during cross-examination. The Court also determined that it should be more difficult to have Undertakings directed on cross-examination on an Affidavit than it is on Part 5 Questioning.

With these principles in mind, the Court reviewed each category of objections and refusals and directed that one of the Defendants produce, or make inquiries to produce, emails relating to the Action. While the Court determined that some objected to questions and refused Undertakings were irrelevant, Justice Mah directed the Defendants to comply with certain Undertakings.

CHEMTRADE ELECTROCHEM INC V STIKEMAN ELLIOTT LLP, 2020 ABCA 322 (PAPERNY, CRIGHTON AND ANTONIO JJA)
Rules 6.28 (Application of this Division), 6.32 (Notice to Media) and 6.34 (Application to Seal or Unseal Court Files)

This was an Appeal of a Chambers Justice's issuance of a Restricted Court Access Order. The Appellant's primary ground of Appeal was that Rule 6.32 requires that the Applicant provide notice of the Application to obtain the Restricted Court Access Order to the Appellant and the media, and that the Applicant had not provided such notice. The Court disagreed with the interpretation of Rule 6.32, and noted that the Court has the discretion to issue restrictions on Restricted Court Access Orders pursuant to Rule 6.28, and that the Court may direct when, and to whom, an Application must be served per Rule 6.34(3). The Court further noted that the test for granting a Restricted Court Access Order was met, and that solicitor-client privilege was not waived in respect of the documents that were the subject of the Restricted Court Access Order. The Appeal was dismissed.

GREWAL V MANGAT INVESTMENTS LTD, 2020 ABQB 487 (MICHALYSHYN J)
Rule 7.3 (Summary Judgment)

The Plaintiffs brought an Application for Summary Judgment. The Court confirmed that the proper approach to summary dispositions is set out in *Hryniak v Mauldin*, 2014 SCC 7 (*"Hryniak"*). The Court noted the several key considerations set out in *Hryniak*. First, the Court must

consider if it is possible to fairly resolve the dispute on a summary basis, or whether there are uncertainties that reveal a genuine issue requiring a Trial. Second, the Court must consider if the moving party met the burden to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a Trial. Third, the Court must consider if the resisting party has put its best foot forward and demonstrated from the record that there is a genuine issue requiring a Trial. Lastly, the Court must be left with sufficient confidence in the state of the record such that it is prepared to exercise the judicial discretion to summarily resolve the dispute. Justice Michalyshyn stated that the Application turned on the quality of the evidence relevant and material to the Application. After reviewing the evidence, His Lordship found that it was not possible to fairly resolve the dispute on a summary basis. Indeed, the evidence revealed several substantial uncertainties that raised a genuine issue requiring a Trial.

First, Justice Michalyshyn determined that the Affidavit of one of the employees of the law firm acting for the Plaintiffs added little substance. Indeed, the Affidavit merely attached excerpts of Questioning transcripts and documents produced in the litigation. Second, Justice Michalyshyn found that the Affidavit of one of the Plaintiffs was little more than opinion, unsupported by any clear or uncontradicted evidence. Third, some of the Plaintiffs' evidence was unequivocally contradicted by the Defendants. Lastly, His Lordship found "worrying" internal conflicts in the Plaintiffs' own evidence that were not credibly explained.

In sum, the quality and paucity of the evidence was such that the Court did not have enough confidence in the record to grant Summary Judgment. The Application was dismissed.

BRUNO V SAMSON CREE NATION, 2020 ABQB 504 (ROOKE ACJ)
Rules 7.3 (Summary Judgment) and 9.13 (Re-opening Case)

The Plaintiff sought certification of a Class Action at a previous hearing. The purported class members were individuals added to the Band List of the Defendant First Nation for which the Defendant withheld payment of per capita distributions pursuant to Bill C-31. Associate Chief Justice Rooke determined that this was an appropriate case to proceed by way of a class proceeding.

As a preliminary issue, the Court considered the Plaintiff's request to file additional materials relating to the law on the availability of a constructive trust. The Court reviewed the case law on Rule 9.13 and concluded that it had broad discretion to re-open the case and permit the filing of additional substantive supplemental submissions. Rooke A.C.J. permitted the materials to be filed for the purpose of assisting with determining the common issues at Trial.

The Court then considered the Plaintiff's application for Summary Judgment under Rule 7.3. The Plaintiff sought Summary Judgment for several of the common issues. Rooke A.C.J. reviewed the case law on Summary Judgment and examined each common issue. The Court granted Summary Judgment on the first common issue but denied Summary Judgment on the remaining issues. As success was divided, the Court made no ruling on Costs and left it to the parties to make submissions on same by way of Application.

BOLAND V SEAN SCHAEFER PROFESSIONAL CORPORATION, 2020 ABQB 551 (FETH J)
Rule 7.3 (Summary Judgment)

The Applicant applied for Summary Dismissal of the Plaintiff's claims. The Applicant was a professional corporation through which an Alberta lawyer operated his practice. The Respondent retained the Applicant to assist him with his divorce proceedings and division of matrimonial property. The Respondent claimed that the Applicant failed to protect his interests in the sale of his house, which was the matrimonial home.

The Court noted that Rule 7.3(1)(b) allows a party to apply for Summary Judgment if there is no merit to a claim or part of it. Justice Feth then reviewed the legal principles relating to Summary Judgment.

The Court noted that Summary Judgment is appropriate where the record allows the Court to make the necessary

findings of fact, apply the law to the facts, and Summary Judgment is a proportionate, more expeditious and less expensive means to achieve a just result (*Hryniak v Mauldin*, 2014 SCC 7)

The Defendant must meet the burden of showing the claim has no merit based on facts proven on a balance of probabilities. If the moving party meets this burden, then the resisting party must put its best foot forward to demonstrate that a triable issue remains (*Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49).

The Court applied the principles of Summary Judgment to the Respondent's negligence claim. While the Applicant owed the Respondent a duty of care, the Court determined that the Applicant had met the standard of care. The Court also determined that there was no evidence that the Applicant had suffered damages. Even if the Applicant had suffered damages, the Court held that the Respondent's actions did not cause such damages. As a result, the Court granted the Application and summarily dismissed the Respondent's claim.

LAIRD V (ALBERTA) MAINTENANCE ENFORCEMENT, 2020 ABQB 508 (JONES J)
Rules 9.5 (Entry of Judgments and Orders), 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 an Application brought by the Respondents in the Action for the entry of an Order more than three months after it had been pronounced pursuant to Rule 9.5(2).

Rule 13.5 provides the Court authority to extend timelines where a time period has expired, and Rule 9.5 allows the late entry of Orders upon Application. The Respondents argued that the question was one of prejudice, and that the Applicant had not been prejudiced by the late Order as its terms had been in operation for some time. The Respondents also argued that the Applicant's complaints regarding prejudice were improper re-litigation of settled issues, and that the Applicant in any event could have obtained an Order pursuant to Rule 9.2. The Applicant argued that the case authority relied upon by the Respondent was irrelevant as it had referred to the old Rule 327. Justice Jones disagreed and found that the Applicant had not established prejudice and granted the Respondents' Rule 9.5(2) Application.

Justice Jones then turned to the question of Costs for the Respondents' Application, acknowledging a successful party's general entitlement to Costs per Rule 10.29, the Court's broad discretion per Rule 10.31, and the many relevant factors to the Court's discretion per Rule 10.33. His Lordship noted that the Applicant's conduct throughout the Application had been problematic, however, the Applicant correctly noted that the appropriate procedure to address a late Order was under Rule 9.5. The reason that a Rule 9.5 Application was needed was due to the Respondents' failure to prepare and submit a draft Order. Justice Jones concluded that neither party should be required to pay Costs.

JMC V JAC, 2020 ABQB 458 (HO J)
Rules 9.12 (Correcting Mistakes or Errors) and 9.13 (Re-opening Case)

Justice Ho released an Endorsement addressing, among other things, parenting access and child support. Both self-represented parties immediately wrote to the Court to identify perceived errors in the Endorsement. The parties were permitted to submit supplementary Affidavits respecting certain aspects of Justice Ho's Decision, and did so. Citing Rule 9.12, pursuant to which the Court may correct a mistake or error in a Judgment or Order; and Rule 9.13, pursuant to which the Court may vary a Judgment or Order any time before the Judgment or Order is entered, Justice Ho considered the additional materials provided by the parties and issued a further Endorsement revising and supplementing Her Ladyship's Decision.

CLARK V UNTERSCHULTZ, 2020 ABQB 423 (ROSS J)
Rule 9.13 (Re-opening case)

Justice Ross' original Decision arose in response to Applications and an Appeal under the *Arbitration Act*, RSA 2000, c A-43. The Applicant then applied to have that Decision varied under Rule 9.13.

Ross J. referred to *Lewis Estates Communities Inc v Brownlee LLP*, 2013 ABQB 731 in discussing when it is appropriate for the Court to exercise its discretion under Rule 9.13 to re-open a case. There, it was stated that it is appropriate to re-open a case and vary a Judgment when there are "objectively demonstrable errors", such as a misreading of a contractual term. It is inappropriate to do so when the Applicant is merely seeking "reconsideration of a judgment call". Rule 9.13 is not a tool by which to obtain a second kick at the can.

Justice Ross therefore declined to exercise Her Ladyship's discretion to vary the original Decision as it pertained to identifying additional issues of law or granting leave to appeal additional issues of law. Ross J. opined that this would be equivalent to allowing a second kick at the can, and directed the Applicant to the Court of Appeal.

Justice Ross felt it was appropriate, however, to exercise Her Ladyship's discretion under Rule 9.13 to modify the original Judgment to provide further direction to the arbitrator to whom the matter was being remitted.

DOW CHEMICAL CANADA ULC V NOVA CHEMICALS CORPORATION, 2020 ABQB 441 (ROMAINE J)
Rule 9.14 (Further or Other Order After Judgment or Order Entered)

Romaine J. previously ruled in favour of the Plaintiff in this Action to resolve a dispute over a joint venture agreement to build and operate an ethylene production facility. In that ruling, the parties agreed to curtail evidence on damages after the end of 2012, and rely on experts' calculation of damages. Justice Romaine's Decision had held that the parties could make further submissions on damages and ancillary issues if they were unable to agree on damages. The parties were unable to agree on damages or the issues to be decided at the hearing on same.

This Decision outlined the issues that the Court would decide at the damages hearing. The Defendant set out several issues in its Memorandum that related to liability rather than damages. Justice Romaine determined that the Court had no jurisdiction to reopen or change the previous decision on liability which did not provide for a reservation on liability issues. Her Ladyship's Decision became final upon entry of the Judgment Roll subject to Rule 9.14(b). This Rule only allows the Court to make such further Orders as are needed to provide a remedy to which a party is entitled in connection with the Judgment.

GOWLING WLG (CANADA) LLP V TSYBULNYK, 2020 ABQB 479 (JONES J)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 10.20 (Enforcement of Review Officer's Decision)

In the course of a dispute between Gowling WLG (Canada) LLP ("Gowling") and a former client regarding legal fees, Gowling obtained a Certificate of Review, Judgment, and Writ of Enforcement. The former client applied to have the Certificate of Review, Judgment, and Writ of Enforcement set aside.

The Applicant argued that Gowling's Judgment was essentially a Default Judgment and that Rule 9.15 (pursuant to which the Court may set aside, vary or discharge a default judgment) was engaged. Gowling argued that Rule 10.20 (pursuant to which a decision of a Review Officer may be entered as a Default Judgment or Order) applied and that the test for setting aside a Default Judgment under Rule 9.15 did not apply. Under the version of Rule 10.20 which applied at the time Gowling sought an Order, there was no requirement to provide notice to the Applicant; however, under the current version of Rule 10.20, notice must be given to the other party before an Application may be brought to enter the decision of a Review Officer as a Judgment or Order.

Justice Jones noted that Gowling's Application to enter the Certificate of Review as a Judgment did not refer to

Rule 10.20, but did refer to other Rules in Part 10. His Lordship was satisfied that the Judgment was not a Default Judgment and dismissed the Application.

FORT MCKAY METIS COMMUNITY ASSOCIATION V MORIN, 2020 ABCA 311 (SLATTER, KHULLAR AND HUGHES JJA)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

In response to defamatory statements that the Appellant, Morin, had published to Facebook, the Respondents had filed and served a Statement of Claim which the Appellant did not defend. Accordingly, Morin was noted in default, and appealed the lower Court's Decision not to open up her Noting in Default which, if successful, would allow her to file a Statement of Defence pursuant to Rule 9.15.

In assessing the Application, the Court noted that Rule 9.15(3)(a) grants the Court discretion to open up a Noting in Default on any terms that it considers just. Additionally, the criteria for opening up a Noting in Default were set out in *Kraushar v Kraushar*, 2019 ABCA 186 as follows: (a) there is an arguable defence; (b) the Defendant did not intend to allow the Judgment to go by default and offers some reasonable excuse for the default such as illness or a solicitor's inadvertence; and (c) once the Noting in Default came to the Defendant's attention, they promptly applied to set it aside.

In applying these factors, the Court agreed with the Chambers Judge that the Appellant had fulfilled the third arm of the test, as she had moved quickly to make an Application to set aside the Noting in Default. However, the Court was not satisfied that the Appellant was able to provide a reasonable excuse as required by the second part of the test as: (1) she was educated; (2) she was not intimidated by the legal process (as she had taunted the Respondents to sue her in Facebook posts); and (3) her assertion that caring for her aging mother had prevented her from mounting a defence was rejected by the Chambers Judge.

Finally, the Court stated that the most important element of the test was an arguable defence, and that even though the Appellant was not burdened with proving her defence would be successful, she was required to tender some credible evidence that her defence was at least viable. As the Appellant was unable to produce any records showing that the defamatory statements she had made were in fact true, the Court upheld the Chambers Judge's finding that she had failed to satisfy this aspect of the test. The Court of Appeal dismissed the Appeal.

SER V JS, 2020 ABQB 390 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision regarding Costs related to a family law matter. The Plaintiff mother, SER, had previously made an Application to impute a higher income to the Defendant father, JS, which was ultimately unsuccessful. A child support Order was granted on the basis of the reported line 150 income of JS.

The Court considered Rule 10.29 in making the Costs Award, which states the "successful party" is entitled to Costs. Each party argued they had been successful, and as a result should be entitled to Costs. JS argued that he had been successful in defeating SER's Application to impute a higher income, whereas SER argued that she had successfully obtained a child support Order. Justice Jones summarized his findings with respect to the proceedings on the substantive matter and held that JS was the successful party and was therefore entitled to Costs.

The Court then considered Rule 10.33(2) which allows a Court to consider the conduct of a party with respect to delaying the Action, their willingness to make admissions, or the filing of multiple claims. The Court again referred to the Decision on the merits and found that SER had alleged fraud and conspiracy unnecessarily, but that a Costs Award should not be used as a penalty or fine. The Court found that the Application for child support was fundamentally reasonable.

The Court then reviewed the factors set out in *Jackson v Trimac Industries Ltd.*, [1993] 138 AR 161 when determining if an increased Costs Award should be made.

The Court held that SER had only engaged in making untrue and scandalous statements regarding the financial and business practices of JS, but that such statements did not attract solicitor-client Costs. Costs were ordered to be paid by SER to JS on the basis of Schedule C, Column 1. The Court also awarded Schedule C, Column 1 Costs with a multiplier applied to the third party individuals who were required to respond to the imputed income Application.

VESTBY V GALLOWAY, 2020 ABQB 470 (FETH J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

The Court determined a Costs Award related to a recent Action and pursuant to Rule 10.29, which establishes the general rule for Costs Awards, being that a successful party is entitled to Costs against an unsuccessful party. The Court, in making a Costs Award, may consider all or any of the factors set out in Rule 10.33, including the degree of success of each party.

The Court found that the Plaintiff had enjoyed substantial success in his lawsuit and determined that there were no compelling reasons to vary from the presumption that the Plaintiff should have Costs against the unsuccessful Defendants. The Plaintiff was awarded Column 3 Costs.

SJ V PARKLAND SCHOOL DIVISION NO 70, 2020 ABQB 498 (ROSS J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiff was unsuccessful before the Alberta Human Rights Commission and broadly appealed the Commission's ruling on the merits. The Defendant appealed the Commission's decision not to award Costs. Madam Justice Ross dismissed the Appeals, and the Defendant sought Costs of the Appeal, including on an enhanced basis.

The Plaintiff argued that Costs should not be awarded, as neither the Appeal nor cross-Appeal had been successful. Justice Ross observed that pursuant to Rule 10.29, a successful party is entitled to Costs, and as the scope of the Appeal far outweighed the scope of the Cross-Appeal, the award of Costs arising upon the Plaintiff's success in defending the cross-Appeal would be set off against the award of Costs arising upon the Defendant's success in defending the Appeal.

Turning to the scale of Costs, Justice Ross found the Appeal to fall within Column 3 of Schedule C, as amended in May of 2020, and the cross-Appeal to fall within Column 1. On account of significant factual complexity requiring multiple hearing days and voluminous written materials, the Court directed that Costs be assessed under Items 18 through 21 of Schedule C, as if the Appeal had proceeded before the Court of Appeal. The Court also awarded the Defendant second counsel fees. Justice Ross declined the Defendant's invitation to depart from an assessment of party and party Costs per Schedule C, recognizing the line of cases which suggest a target for partial indemnity, but noting that the amendment of Schedule C in May of 2020 had cast serious doubt on the persisting value of such authority.

With respect to the Defendant's claim for enhanced Costs, the factors in Rule 10.33 were reviewed as governing judicial discretion. Considering the complexity of the Appeal, the lack of merit of the Plaintiff's allegation of the Commission's bias, and the irrelevance of the Plaintiff's plea of impecuniosity, the Court ordered enhanced Costs of the Appeal from Column 3 to Column 4.

LAWSON V LAWSON, 2020 ABQB 519 (DEVLIN J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31(Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was an Application for Costs arising out of a family law matter. The father applied for an *ex parte* injunction and obtained an Order to prevent the mother from travelling with their child. He did not serve the Order on the mother until she had left. When the matter returned to Justice Devlin, the mother claimed that she did not have enough time to prepare materials once the Order was served on her which resulted in an adjournment.

Pursuant to Rule 10.29(1), a successful party is generally entitled to receive Costs. Rule 10.31(5) permits an award of Costs to self-represented individuals in "exceptional circumstances". The Alberta Court of Appeal has linked awarding such Costs to advancing the policy objectives underlying Costs, part of which includes preventing some of the behaviour contained under Rule 10.33(2).

Justice Devlin noted that success on the matter was mixed but favoured the father. His Lordship proceeded to review the Costs that were claimed and applied the relevant factors and principles. The father claimed Costs for legal coaching; it appeared to be money well spent as the materials submitted were of good quality and helpful to the Court. The mother correctly pointed out that the father did not suffer a loss in compensation in preparing for the Applications as he was a salaried employee. Justice Devlin noted that although the conduct of both parties outside of the Applications was not ideal, they behaved reasonably within the Applications. The mother argued that the notice period she was given for the initial hearing was far too short and that she should not have to pay Costs for the adjournment, and Justice Devlin agreed. It was also found that the reason for the *ex parte* Application was the mother's failure to communicate with the father about travel plans, and at the hearing it was concluded that she had breached a parenting Order. The mother explained that she was in a weak financial position and Justice Devlin noted that a significant Costs Award would have a detrimental impact on the children. Justice Devlin used his discretion to give the father a Costs Award that included half of the fees incurred in preparing for the Application, as well as his filing fee.

1384334 ALBERTA LTD V BUSTER'S PIZZA DONAIR & PASTA ENTERPRISES LTD, 2020 ABQB 533 (BERCOV J) Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision regarding Costs following a Trial. The Court confirmed that Costs are awarded in the Court's discretion, but the exercise of that discretion is guided by Rules 10.29(1), 10.31 and 10.33.

Justice Bercov highlighted that in determining Costs under Rule 10.33, the Court may also consider the conduct of the parties and, in particular, whether the parties' conduct tended to shorten the Action. Her Ladyship found that in this case there were several examples of conduct by the Defendants that did not shorten the Action. For example, the Defendants maintained that the Plaintiffs were in default under the agreement for leased equipment, despite overwhelming evidence that they were not in default, and that the Defendants conspired with the lessor to wrongfully seize and sell the leased equipment. Further, the Defendants brought two Applications returnable on the day of Trial: a Security for Costs Application and an Application to strike the Action. The Defendants argued that these Motions should be heard before the Trial. No explanation was provided for why the Applications were brought at the last minute.

Ultimately, the Court found that considering all of the issues, the complexity of the issues, the time spent on those issues, the Defendants' conduct in failing to concede matters that should have been conceded, and bringing last minute Applications that were not successful, that the Plaintiffs were entitled to Costs under Column 1 of Schedule C.

STOCKALL V STOCKALL, 2020 ABQB 545 (RICHARDSON J) Rule 10.33 (Court Considerations in Making Costs Award)

This was a Decision regarding Costs following a family law Trial regarding a divorce Judgment. Her Ladyship noted the considerations set out in Rule 10.33 when making a Costs Award, including: 1) the result of the Action and the degree of success of each party; 2) the amount claimed and the amount recovered; 3) the importance of the issues; 4) the complexity of the Action; 5) the conduct of a party that tended to shorten the Action; and 6) any other relevant matter that might be appropriate.

Madam Justice Richardson determined that Mr. Stockall enjoyed substantially more success at Trial and thus, was entitled to Schedule C Column 3 Costs. In arriving at this conclusion, Her Ladyship found that Ms. Stockall's conduct added unnecessary length to the Trial, including

by unnecessarily challenging expert evidence and taking positions in her child support claim that had no basis at law.

Mr. Stockall sought double Costs for Trial preparation, each subsequent half day of Trial, and submitting written arguments on Costs. Madam Justice Richardson declined to award double Costs because her Ladyship had already accounted for Ms. Stockall's misconduct in making a Costs Award. As such, awarding double Costs would effectively have doubly counted Ms. Stockall's behaviour.

Finally, Mr. Stockall sought Schedule C Column 3 Costs based on the increased tariff of May 2020. As the Trial had taken place before those amendments were in effect, Madam Justice Richardson awarded Costs to Mr. Stockall based on the Schedule C Column 3 rates that were in effect at the time of Trial.

SFM V MRM, 2020 ABQB 401 (LEMA J)
Rule 12.41 (Notice to Disclose Documents) and Schedule C

This was a Decision regarding Costs in a family litigation matter. A primary issue was whether Column 2 or Column3 of Schedule C applied. After determining that the Column 2 range applied, Justice Lema assessed whether the Plaintiff's pursuit of additional, non-monetary relief (for example, a divorce) changed the Costs analysis. His Lordship reviewed the potential application of Rule 1(4) of Division 1 in Schedule C and concluded that the Rule did not apply to interlocutory proceedings, regardless of whether monetary relief was also pursued. Ultimately, His Lordship determined that Column 2 of Schedule C applied.

The Court then analyzed what tariff item in Schedule C covers a Noting in Default and Default Judgments. Justice Lema reviewed item 1(1) of Division 2 and found that it did not apply, as a Noting in Default is not a "commencement document" or "pleading" as required by item 1(1). The Court ultimately determined that item 6(2) of Division 2 ("Uncontested Applications") applied, even though the Application was of "desk character". Indeed, the Court underscored that item 6(2) does not distinguish between "Court appearances" and "desk" Applications.

The Court also analyzed whether any Notice to Disclose efforts by the Plaintiff constituted "thrown away costs" for which the Defendant would be responsible. Justice Lema reviewed Rule 12.41 and noted that a Notice to Disclose has no fixed lifespan. Indeed, nothing in the Rule indicates that the Notice to Disclose served with the Statement of Claim somehow expired, necessitating a new Notice to Disclose. The Court found that with the first Notice to Disclose continuing to oblige the Defendant to provide disclosure, the second Notice to Disclose was not needed, and thus Costs regarding the second Notice to Disclose were not recoverable.

KISSEL V ROCKY VIEW (COUNTRY), 2020 ABQB 406 (EAMON J)
Rule 13.18 (Types of Affidavit)

This was an Application for Judicial Review brought pursuant to the *Municipal Government Act*, RSA 2000, c M-26. In addressing the standards for admissibility of Affidavit evidence, the Court reviewed Rule 13.18(3), confirming that in final Applications, the Affidavit must be sworn on the basis of personal knowledge.

Justice Eamon detailed that personal knowledge encompasses a wide variety of personal observations. Namely, a witness might have observed some relevant event, be able to identify an otherwise admissible record such as a business record, describe his or her belief held at some material time which is relevant to the issues (for example, evidence of belief which explains why the witness took a particular action at a particular time), or describe some relevant act or statement made by another person out of Court if otherwise admissible (for example, an admission against interest, or a spontaneous exclamation).

By contrast, the Applicants in their Affidavits often inferred matters of fact. The Court underscored that generally inferences are for the Court, not fact witnesses, and therefore the Affidavits contained inadmissible evidence.

SERVUS CREDIT UNION LTD V DALMAC ENERGY INC, 2020 ABQB 478 (MAH J)
Rule 13.18 (Types of Affidavit)

An Application was brought by the Bowra Group, who was the Receiver and Trustee in Bankruptcy (the "Trustee") of Dalmac Energy Inc. ("Dalmac"), for the Court to determine which party had priority on a 2011 Western Star truck. The truck had been sold to Dalmac in 2018 under written agreement with Jimco Holdings Inc ("Jimco"). At the time of the Application, the truck had been returned to Jimco to extinguish the remainder of Dalmac's debt under that agreement.

In response to the Application, Jimco filed an Affidavit sworn by its principal, Mr. Rukavina. Mr. Rukavina's Affidavit appended a statement from Dalmac's principal, Mr. Babic, as an exhibit. Mr. Babic did not swear his own Affidavit. The Court refused to admit Mr. Babic's appended statement, as it ran afoul of Rule 13.18(3) which requires Affidavit evidence to be based on personal knowledge, and because it was contrary to rules of evidence on hearsay.

Mr. Rukavina's Affidavit was subsequently inadmissible as contrary to the parole evidence rule. In light of the written agreement and lack of contrary evidence, Justice Mah granted the Trustee's application for a declaration that the Trustee had priority to the truck and ordered that Jimco transfer possession and execute any necessary documents to effect the transfer.

RAO V SDO, 2020 ABQB 506 (MAH J)
Rule 13.18 (Types of Affidavit)

Justice Mah presided over this child mobility case in which the father, SDO, brought an Application to have the children returned to Alberta after having lived with their mother, RAO, in Nova Scotia for nearly two years. Following a domestic abuse incident between the parents, RAO brought an *ex parte* without notice Application in morning chambers on July 11, 2018, in which she was granted full custody of the children and an Order preventing SDO from having parenting time (the "July 11, 2018 Order"). Thereafter she moved to Nova Scotia for work, taking the children with her.

The July 11, 2018 Order was reviewed on August 10, 2018. During the August 10, 2018 morning chambers hearing, the Court held that the determination of parenting time could not be made in that hearing, since Practice Note 2 stipulates that such matters must be scheduled for a Special Application. This procedural element brought evidentiary issues into play in the current Application before Justice Mah.

RAO's counsel alleged that SDO's Affidavit contained impermissible hearsay evidence, which was barred by Practice Note 2 since this Application was a final adjudication of where the children would reside. Implicit in this argument was that since Practice Note 2 stipulates that the issue could not be adjudicated in morning chambers when the July 11, 2018 Application was returnable, then this Special Application must operate as the final adjudication. However, His Lordship found that pursuant to Rule 13.18, hearsay evidence is permissible in an Affidavit sworn in support of an Application for an Order which is not final. Justice Mah further stated that although hearsay is admissible in such circumstances, the Court will still assess the credibility and reliability of such evidence in order to attribute the appropriate weight. Accordingly, His Lordship granted SDO's Application to return the children to Alberta in consideration of the fact that the matter may still proceed to Trial, and thus the Application was not a final adjudication.

RANA V RANA, 2020 ABCA 295 (FEEHAN JA)
Rules 14.5 (Appeals Only with Permission), 14.14 (Fast Track Appeals), 14.17 (Filing the Appeal Record - Fast Track Appeals) and 14.64 (Failure to Meet Deadlines)

This was an Application to restore an Appeal from a Costs Award. The Notice of Appeal filed by the Applicant initially included issues related to the Decision underlying the Costs Award. The Case Management Officer explained that those issues had been concluded and could not be raised on the Appeal. The Appeal was then re-categorized

as a Fast Track Appeal as prescribed for an Appeal of a Decision concerning only Costs, pursuant to Rule 14.14(2)(d). The Applicant was informed of the deadline set out in Rule 14.17(1) which provides a month within which to file an Appeal Record. As the Applicant did not meet this deadline, the Appeal was struck pursuant to Rule 14.64(a).

In considering whether to restore the Appeal, Justice Feehan noted that Rule 14.5(1)(e) mandates that leave of the Court is necessary to appeal a Decision related to Costs. Leave had been neither sought nor granted. In any event, Justice Feehan determined that the Applicant had not satisfied the discretionary common law test for restoring an Appeal, and the Application was dismissed.

LOGAN ESTATE (RE), 2020 ABCA 259 (SCHUTZ JA)
Rules 14.8 (Filing Notice of Appeal) and 14.37 (Single Appeal Judges)

A beneficiary to the estate in question, Ms. Logan, had made an Application for an Order striking the Notice of Appeal filed by a grandchild of the deceased, Ms. Balanko. Ms. Logan argued that Ms. Balanko had failed to properly serve the named Respondents as required by Rule 14.8. Ms. Balanko cross-applied to remove Ms. Logan, and other named Respondents from the style of cause, to change the lawyer contact information for one of the Respondents, as she wished to remove those Respondents from the Appeal, and to add the Decision in the Court of Queen's Bench regarding Costs to her proposed amended Notice of Appeal.

The primary issue was that Ms. Balanko had served her Notice of Appeal on counsel for the estate's personal representative, but did not serve any of the other named Respondents, who were all self-represented. Her Ladyship noted that pursuant to Rules 14.8(2)(a)(iii) and 14.8(2)(b), Ms. Balanko was obligated to serve Notice of her Appeal on all parties within 30 days of the Decision under Appeal, which she had failed to do as a result of this error. However, due to the unique circumstances at bar, Madam Justice Schutz chose to exercise the discretion conferred by Rule 14.37 not to strike the Appeal, but rather, to grant the requested amendments, as they did not enlarge the scope of the Appeal.

In so doing, Madam Justice Schutz explicitly stated that her Decision should not stand for the legal correctness of Ms. Balanko's Applications, and in fact, it was actually Ms. Logan's Application to strike which likely held more merit. Nonetheless, as Ms. Logan and the other named Respondents took no issue with being removed entirely from the Appeal, the strike Application was dismissed for mootness.

CROSWELL V KONCUR, 2020 ABCA 258 (SCHUTZ JA)
Rules 14.16 (Filing the Appeal Record - Standard Appeals) and 14.64 (Failure to Meet Deadlines)

The Applicant applied to restore his Appeal which had been struck under Rule 14.64(a) after he failed to file his Appeal Record within the period set out in Rule 14.16(3). Rule 14.16(3)(a) requires that an Appeal Record be filed no later than four months from the date on which the Notice of Appeal is filed.

In determining whether to restore the Appeal, the Court considered the Applicant's health issues and his stated misunderstanding that the pandemic had caused a halt to Court proceedings. The Court noted that the Applicant wished to present evidence on Appeal that he was unable to present at the Application before the Court of Queen's Bench. After reviewing the relevant law, the Court determined that it was in the interests of justice to restore the Appeal subject to strict conditions prohibiting further delay.

P & C LAWFIRM MANAGEMENT INC V SABOURIN, 2020 ABCA 285 (FEEHAN JA)
Rules 14.42 (Applications to Court of Appeal Panels) and 14.45 (Application to Admit New Evidence)

The Respondents on Appeal sought permission to extend the time for filing an Application to admit new evidence. The deadline for filing an Application to admit new evidence had lapsed with the parties' prior filing of their facta, pursuant to Rule 14.45. In deciding whether to grant leave, the Court had regard to several considerations borne out in the case law "including the reason for the late filing, the effect of the late filing on the appeal proper, and whether the application for fresh evidence has a reasonable

prospect of success or is prima facie meritorious". In result, Justice Feehan granted leave to file the Application to admit new evidence, but imposed certain procedural deadlines, and directed that filing occur in the manner prescribed for Applications to be heard by a panel of the Court of Appeal, per Rule 14.42.

PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2020 ABCA 273 (WAKELING, CRIGHTON AND KHULLAR JJA)
Rule 14.88 (Cost Awards) and Schedule C

In a Decision granting Security for Costs of an Appeal against a bankrupt's professional trustee, the Chambers Judge was critical of the non-party individual acting on behalf of the trustee ("PD"). PD then pursued several Applications to intervene i) in the Application for permission to appeal the Security for Costs Order; ii) in the Appeal of the Security for Costs Order; and iii) in the Appeal proper. Upon dismissing all of PD's Applications, the Court of Appeal considered Costs payable.

PD argued that the scale of Costs applicable for non-monetary relief is Column 1, citing Rule 1(4) of Schedule C. The Court observed that Rule 1(4) of Schedule C provides that the scale of Costs applicable for non-monetary relief is the higher of Column 1 and "the scale that would have applied if the other remedy had not been given or sought." The Court additionally referred to Rule 14.88(3), which specifically presumes that the scale of Costs applicable to an Appeal is the scale which applied to the Order or Judgment appealed from. As the Appeal in issue respected Security for Costs in the aggregate amount of $240,000, the Court held that Column 3 was the appropriate scale for Costs.

The issue of enhanced Costs was also before the Court. It was observed that PD had doggedly pursued relief, which was improper and contrary to law, as PD was in essence attempting to censor the obiter comments of a Chambers Judge with which PD disagreed. The Court awarded enhanced Costs to each separately represented party on the basis of five times Column 3.