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# RULES

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## OUELLETTE, ET AL V LAW SOCIETY OF ALBERTA, 2021 ABCA 99

(WAKELING JA)

Rules 1.1 (What These Rules Do), 14.8 (Filing a Notice of Appeal) and 14.37 (Single Appeal Judges)

The Applicants applied for an Order restoring their Appeal. The Applicants filed a Notice of Appeal almost two months after the one-month Appeal deadline set out in Rule 14.8(2). The Applicants then applied for an Order extending the deadline, and the Court of Appeal Registry later struck the Applicants' Appeal after the Applicants failed to file the Appeal record on time.

Wakeling J.A. stressed the importance of Appeal deadlines to move proceedings along at an acceptable rate. Justice Wakeling also noted that there is a secondary Appeal window to cover extraordinary cases, as Rule 14.37(c) allows a single Appeal Judge to extend the duration of the primary Appeal window for an unspecified period.

Wakeling J.A. then considered the Application to extend the time to appeal, noting that such Applications are assessed using the six-part test from *Cairns v Cairns*, [1931] 4 DLR 819, 826 ("*Cairns*"): (1) did the Applicant intend to appeal while the Applicant had the right of Appeal?; (2) has the Applicant explained the failure to file a Notice of Appeal before the deadline?; (3) if the Applicant has provided an explanation, does it constitute very special circumstances that excuses or justifies such failure?; (4) has the Applicant established that the delay has not caused the Respondent any prejudice, or the prejudice the Respondent has suffered is not of such a magnitude as to make it unjust to grant the extension?; (5) has the Applicant derived any benefit from the Judgment?; and (6) does the Appeal have a reasonable chance of success?

Wakeling J.A. that the Applicants had met the first two elements of the *Cairns* test. The Respondent conceded that the Applicants demonstrated the necessary intention to Appeal. The Applicants also provided a reason for their delay. One of the Applicants swore in an Affidavit that he thought the Appeal period commenced when the Order was filed rather than when it was pronounced.

The Applicants failed the third and fourth elements of the *Cairns* test. Justice Wakeling determined that the Applicants' explanation did not constitute very special circumstances. The Court noted that the fact the Applicants were self-represented did not assist them, as Rule 1.1(2) states that the Rules apply to self-represented litigants. The Court also determined that granting the extension would significantly prejudice the Respondent's interests.

Wakeling J.A. found that the Applicant met the fifth element of the *Cairns* test. The Court

did not find that the Applicant had derived a benefit from the Judgment. The Court noted that this will rarely occur and that it is difficult to imagine a set of facts that would create this situation.

Finally, Justice Wakeling found that the Applicant failed the sixth element of the *Cairns* test. The Court determined that the Applicants' Appeal was hopeless. The Applicants claimed damages for the Respondent's alleged breach of their *Charter* rights. Justice Wakeling determined that it was plain and obvious that damages would not be an appropriate and just remedy in the circumstances. Justice Wakeling also determined that the Respondent did not owe the Applicants a duty of care.

Since the Applicants only met three of six of the elements in the *Cairns* test, the Court determined that there were no valid reasons to exercise the Court's discretion to extend the Appeal period. As a result, it was unnecessary to consider whether to restore the Applicants' Appeal. Without the extension, the Applicants' Notice of Appeal had no legal effect and there was thus no Appeal to restore.

## RICHARDSON PIONEER LTD V HUTTERIAN BRETHREN CHURCH OF SILVER VALLEY, 2021 ABQB 20

(BOKENFOHR J)

Rules 1.2 (Purpose and Intention of These Rules), 4.2 (What the Responsibility Includes) and 4.33 (Dismissal for Long Delay)

This was an Appeal from the Decision of a Master dismissing the Action on the basis of long delay. The central issue on Appeal was whether an unfiled Affidavit that was sworn and provided to opposing counsel significantly advanced the Action, such that the Application to dismiss for long delay could not succeed pursuant to Rule 4.33.

The underlying facts involved a contractual dispute, as between the Appellant, Richardson Pioneer Ltd. ("Richardson") and the Respondent, Hutterian Brethren Church Of Silver Valley ("Silver Valley"). The Action was started in April 2016 by way of Statement of Claim. Regular advances in the Action continued through October 2016, following which, in September 2017, Richardson advised Silver Valley of its intention to file an Application for Summary Judgment. Though Richardson provided unfiled copies of its Application and accompanying Affidavit and Silver Valley expressed a likely intent to question on the Affidavit, no date was set for Questioning. In October 2017, counsel for Richardson advised that it was passing the file to a colleague. Though the colleague contacted Silver Valley in 2018 to arrange for Questioning, no Questioning was ever conducted and the file proceeded to languish until Silver Valley brought its Application to dismiss.

In upholding the Master's dismissal, the Court relied on the "functional approach", which asks: "whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality…". The Court went on to find that the Summary Judgment Application, and in particular the Affidavit filed therewith, failed to "significantly advance" the Action, as it did nothing to narrow the issues, complete disclosure, or clarify the positions of the parties. The Court characterized the Affidavit as primarily a restatement of the allegations made in the Statement of Claim.

Moreover, the Court held that the Action could not be saved by virtue of Silver Valley's failure to confirm its intention to question or agree to dates for Questioning. On this point, the Court noted that although all parties to an Action are obligated to communicate honestly and manage the litigation effectively pursuant to Rules 1.2 and 4.2, one party's alleged failure to do so is insufficient to override the clear language of Rule 4.33, and in any event was not at issue in this case.

## POITRAS V ONESPOT, 2021 ABQB 120

(MALIK J)

Rules 1.2 (Purpose and Intention of These Rules), 4.22 (Considerations for Security of Costs Order), 4.31 (Application to Deal With Long Delay) and 4.33 (Dismissal for Long Delay)

The Applicant in this family law matter sought an Order dismissing the Action for have been commenced outside of the limitation period, for delay pursuant to Rules 4.31 and 4.33, as well as seeking an Order for the discharge of a certificate of *lis pendens* registered by the Respondent.

The Court rejected the limitations defence, as the Applicant had not expressly pled reliance on the Limitations Act, RSA 2000, c L-12 as required by section 3(1). His Lordship noted that the Applicant's argument under Rule 4.31 only sought to dismiss the constructive trust portion of the Respondent's Statement of Claim. Further, the Court stated that any Application to dismiss for delay involves a consideration of the foundational principles in Rule 1.2 in assessing whether the delay in question justifies dismissal.

However, the Applicant's argument in relation to Rule 4.31 was effectively that the Respondent's failure to advance the constructive trust portion of the claim caused the prejudice which was relied upon in support of a prior Application to discharge the certificate of *lis pendens* from the Applicant's property. As that Application was dismissed by the Chambers Judge, Justice Malik found the Applicant's argument pursuant to Rule 4.31 to be *res judicata* on the basis of issue estoppel. The element of prejudice which was critical to the Applicant's Rule 4.31 argument had essentially already been litigated. Accordingly, the Rule 4.31 Application was dismissed.

Finally, Justice Malik found that although the constructive trust portion of the Respondent's claim had not been advanced, this was due to the parties' focus on parenting and custody issues, which resulted in a Consent Order just prior to the 3 year deadline found in Rule 4.33. This Consent Order constituted a significant advancement of the Action. Thus, the Applicant had not satisfied the requirements for dismissal pursuant to Rule 4.33. His Lordship also made a procedural Order for the scheduling of future steps in the litigation, and declined to require the Respondent to post Security of Costs pursuant to Rule 4.22.

## SCHNEIDER V SCANDINAVIAN MANAGEMENT AND REALTY LTD, 2021 ABQB 139

(GRAESSER J)

Rule 1.2 (Purpose and Intention of these Rules)

The Plaintiff sought to compel the officer of the Defendant corporation to comply with refusals to provide or answer Undertakings arising from Questioning, as well as to require the Defendant corporation's officer to provide or further or better answers to Undertakings arising from Questioning. The Defendant cross-applied to have the Plaintiff provide further and better answers to Undertakings arising from the Questioning.

Graesser J. considered Rule 1.2 prior to making specific rulings on each refused Undertaking. His Lordship noted that under Rule 1.2, litigation is to be resolved in a timely and cost-effective manner, and it is key to identify the real issues in dispute and facilitate a timely resolution to the claim.

Graesser J. further considered Rule 1.2 in determining whether an Undertaking was properly refused. Graesser J. found that, because the Plaintiff intended to bring an Application to make the Action a class action proceeding, it would be contrary to the "spirit of the Foundational Rule to put the exploration of this issue on hold until a certification application has been brought."

## TRINITY CHRISTIAN SCHOOL ASSOCIATION V SCHIENBEIN, 2021 ABQB 218

(RENKE J)

Rules 1.2 (Purpose and Intention of these Rules), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant applied for Costs after being successful on an Application. The Applicant was a school association governed by a Board of Directors. After numerous home schooling personnel decided to resign, the Respondent, a new Board of Directors, was purportedly elected. The Respondent, among other things, padlocked the school and attempted to take over the school association's social media and bank accounts. An Originating Application was brought on an emergency basis. The Respondent filed a counter-Application supported by a 300 page Affidavit. The school association filed an Affidavit in response and conducted Questioning. At the Application, Renke J. found that the election of the new Board of Directors was illegitimate, and that the Respondent lacked standing to bring its claim. The Respondent was not entitled to an equitable remedy for their claim of breach of fiduciary duty because they did not come with "clean hands".

Renke J. noted that Costs must be applied in accordance with the foundational Rules, including Rule 1.2. His Lordship further noted that pursuant to Rule 10.31, an award of Costs is discretionary; the discretion extends to awarding Costs with or without reference to Schedule C; the discretion should be based on the consideration of factors in Rule 10.33;

and Costs awarded may fall into one or more different categories consisting of party-party Costs, a lump sum, indemnity Costs, and full indemnity Costs.

Renke J. noted that the factors to be considered under Rule 10.33 include the result of the Action and the degree of success of each party, the amounts claimed and recovered, the importance of the issues, the complexity of the Action, the apportionment of liability, the conduct of the parties, and other matters that the Court may consider appropriate.

The school association sought full indemnity Costs. Renke J. noted that full indemnity Costs (solicitor and own client Costs) were only justified in the most exceptional circumstances and were only appropriate if the losing party engaged in some form of misconduct. Renke J. found that the Respondent's litigation conduct was unreasonable because there was no serious issue of fact or law. The school association was forced to take proceedings to correct the obvious wrongs of the Respondent. The Respondent had also introduced issues in the Application that had no foundation and did not belong in the Application.

His Lordship noted that although the litigation was not long, it was incredibly urgent. The brevity of the timeline did not undermine a claim for full indemnity Costs. In fact, the time-constraints of the Application supported a form of elevated Costs. Renke J. found that if the litigation had focused only on the matters essential to the Application, it would not have been complex. However, the Respondent had introduced many arguments that were ultimately groundless. Significant work had to be done to show that the Respondent's arguments had no legal support. As a result, the Application involved many complexities that demanded attention in a short-time frame. Ultimately, Renke J. awarded enhanced Costs of $62,700.00.

## MORIN ESTATE (RE), 2021 ABCA 35

(VELDHUIS JA)

Rules 1.2 (Purpose and Intention of These Rules), 14.5 (Appeals Only with Permission), 14.14 (Fast Track Appeals) and 14.47 (Application to Restore an Appeal)

The Applicants applied, pursuant to Rule 14.47, to restore a Fast Track Appeal (brought pursuant to Rule 14.14) that had been struck for failing to file the Appeal Record.

Veldhuis J.A. referred to *Prochazka v Alberta (Maintenance Enforcement Program),* 2014 ABCA 448, which discusses how restoring an Appeal is a discretionary decision that engages the following considerations: (a) whether there is merit to the Appeal; (b) an explanation for the defect or delay; (c) whether the Applicant moved with reasonable promptness to have the Appeal restored to the list; (d) whether the Applicant had an intention in time to proceed with the Appeal; and (e) lack of prejudice to the Respondents (including length of delay).

The Court stated that no single factor is determinative, and that these considerations must be weighed collectively with a view to determining if allowing the Appeal is in the interests of justice.

Veldhuis J.A. held that on the facts there was no merit to the Applicants' Appeal. No evidence was submitted to explain the delay, to establish that the Applicants moved with reasonable

promptness, or to substantiate that the Applicants had an intention in time to proceed with the Appeal.

Counsel for the Applicants suggested that they wanted to "wait and see" the outcome of a related Summary Dismissal Application. In response, the Court stated that taking a "wait and see" approach to an Appeal is an inappropriate contravention of Rule 1.2.

The Respondent argued that she was prejudiced by the Applicants' flagrant litigation misconduct in repeatedly disregarding the Rules and procedural processes, as was established in a previous ruling by the Case Management Judge. The Court took this litigation misconduct into consideration in determining that it was not in the interests of justice to permit the Appeal.

Veldhuis J.A. also noted that the amount of the dispute was $7,500 and that pursuant to Rule 14.5(1)(g); permission to appeal is required for any Decision where the controversy in the Appeal can be estimated in money and does not exceed the sum of $25,000. Due to the cumulative weight of these factors, the Application to restore the Appeal was dismissed.

## ELDER ADVOCATES OF ALBERTA SOCIETY V ALBERTA HEALTH SERVICES, 2021 ABCA 67

(O'FERRALL, SCHUTZ AND STREKAF JJA)

Rules 1.2 (Purpose and Intention of These Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.32 (Costs in Class Proceeding) and 10.33 (Court Considerations in Making Costs Award)

Following the dismissal of the Elder Advocates of Alberta Society's class action suit against Alberta Health Services ("AHS"), AHS appealed the Trial Judge's "no Costs" Award.

The Court noted that Rule 10.29 enshrines the general principle that the successful party to litigation is presumptively entitled to Costs. However, when a class proceeding is involved, Costs must also be determined in light of Rule 10.32, which requires an assessment of: (a) the public interest; (b) whether the Action involved a novel point of law; (c) whether the proceeding or Action was a test case; and (d) access to justice considerations.

AHS argued that the Trial Judge's Decision to award no Costs was based too heavily on the factors in Rule 10.32, without considering the criteria in Rule 10.33. Furthermore, AHS' position was that Rule 10.32 allows the Court to consider "any other factors the Court considers appropriate", which permits an assessment of the ordinary Costs factors in Rule 10.33. The Court responded that while these two Rules are not "mutually exclusive", both involve the exercise of discretion in determining which factors are most appropriately relied upon in making a Costs Order.

The Court addressed Rule 10.32 and found that the matter involved vulnerable, disadvantaged members of society, and raised issues of societal importance which transcended the interests of an individual litigant, militating in favour of a no Costs Award. The Court also noted that the litigation raised a novel point of law, as it involved the statutory interpretation of whether an increased accommodation charge for elderly residents of long term care homes was legislatively and constitutionally valid. The complexity and difficulty of these legal issues merited a no Costs Award, despite AHS' success. The Court also ruled that access to justice concerns were engaged, as the class

of Plaintiffs was comprised of disadvantaged elderly people whose individual best case outcome in the litigation was so financially marginal that a no Costs Award was justified.

Finally, the Court addressed AHS' argument that the litigation conduct of the parties should impact the ruling on Costs pursuant to Rule 10.33. The Court addressed the foundational principles in Rule 1.2 and the overlap between litigation conduct's effect on Costs pursuant to Rule 10.33. The Court concluded that the Trial Judge provided no meaningful explanation of how AHS' litigation conduct would substantiate or discredit a no Costs award. Accordingly, the Appeal was dismissed.

## RAHMANI V 959630 ALBERTA LTD, 2021 ABCA 110

(VELDHUIS, KHULLAR AND ANTONIO JJA)

Rules 1.2 (Purpose and Intention of These Rules), 4.4 (Standard Case Obligations) and 4.33 (Dismissal for Long Delay)

The Court heard an Appeal of a Chambers Judge's refusal to dismiss the Action for long delay pursuant to Rule 4.33, as well as the Chambers Judge's Decision to set a litigation plan. The underlying Action arose when Mr. Rahmani was detained while traveling in the United States on false allegations that he was a terrorist, during which he was unable to pay his rent to 959630 Alberta Ltd., ("959"), resulting in 959 selling the contents of his apartment and renting it to a new tenant.

Mr. Rahmani issued a Statement of Claim alleging wrongful seizure and disposal of his personal property. The parties attended Questioning and exchanged Undertaking responses, which was the last significant step taken in the Action that all parties agreed constituted an advancement of the Action. The dispute in reference to Rule 4.33 was whether an expert opinion letter explaining how Mr. Rahmani's detention in a foreign country impacted his mental health and therefore his ability to move the Action forward, was a significant advance. The Court also considered whether Mr. Rahmani's Application to schedule a Trial date, and providing a loss appraisal report to opposing counsel, was a significant advance in the Action.

The Court considered the principles governing Rule 4.33, including that the Rule must be applied within the context of Rule 1.2, and that pursuant to Rule 1.2, Defendants are obligated not to obstruct, stall or delay an Action that the Plaintiff is trying to advance.

The Court found that the Chambers Judge did not err in finding that the expert letter being provided to opposing counsel significantly advanced the Action, as it was not just a mere summary of information which was already provided to the Defendant. Additionally, the Court upheld the lower Court's finding that the loss appraisal report also significantly advanced the Action, as it provided further information to quantify losses in response to an Undertaking request. As such, the Chambers Judge's Decision to dismiss the Application for long delay was upheld, and a procedural Order to submit a litigation plan within 60 days was made, pursuant to Rule 4.4.

## AUTOCANADA CAPITAL MOTORS GP INC V MIRBACH, 2021 ABQB 170

(LEMA J)

Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders) and 3.72 (Consolidation or Separation of Claims and Actions)

The Plaintiff in a multi-Defendant Action, which involved a number of cross-claims, sought to partially consolidate this Action with a second Action that it had started against some of the same parties and involving some common facts and issues. Some of the Defendants and cross-claimants objected to partial consolidation, arguing that the entire second proceeding should be consolidated with the first.

The Court relied on Rule 3.72 to find that, for two of the Defendants, the second Action would be heard directly after the first Action by the same Justice, with evidence, fact finding, and legal findings carrying over from the first Action to the second Action. Justice Lema ruled that the second Action's remaining claims were to be consolidated with, and "folded into" the first Action.

Rule 3.72 allows two or more Actions to be tried at the same time, or one after the other, when the Actions have a common question of law or fact, or arise out of the same transaction(s) or occurrence(s). The Court cited authority to highlight that the purpose of consolidation is to enhance the administration of justice and that a Court should consider the possibility of inconsistent verdicts and the impact of non-consolidation on scarce resources. The Court also noted that the Court may rely on the pleadings alone to determine whether there are common issues of law and fact.

In this case, the Court found that there was virtually complete overlap of the two Actions and that they would need to be consolidated to prevent inconsistent factual and legal findings. The Court also found that, while some Alberta authority holds that an Application is a necessary precondition to consolidation, Rule 3.72 does not expressly require an Application to allow a Court to consolidate proceedings. Indeed, the Court found that pursuant to Rules 1.3 and 1.4, the Court is empowered to direct consolidation under Rule 3.72 on its own motion.

## CJ V ALBERTA (CHILD, YOUTH AND FAMILY ENHANCEMENT ACT, DIRECTOR), 2021 ABCA 15

(STREKAF, KHULLAR AND PENTELECHUK JJA)

Rules 1.4 (Procedural Orders) and 4.10 (Assistance by the Court)

This was an Appeal of an Order dismissing an Application for Judicial Review on the basis of mootness. The Appellant was the mother of a 12-year old child who sought to challenge a decision of the Director of Child and Family Services concerning frequency of access. The Order under Appeal was granted in the context of a case conference convened in respect of the Appellant's Originating Application for Judicial Review of the Director's decision. At the

time of the case conference, the Appellant had also challenged the Director's decision in the Alberta Provincial Court, pursuant to the *Child, Youth and Family Enhancement Act,* RSA 2000, c C-12, and was awaiting Trial in that Court. Accordingly, the Court adjourned the Originating Application sine die, pending hearing of the Provincial Court Trial. Later, a second Application was brought similarly seeking Judicial Review in advance of the Provincial Court Trial, but was dismissed on the basis of mootness. The Order dismissing this second Application was the subject of this Appeal.

The Alberta Court of Appeal upheld the Order to dismiss the Application for Judicial Review. In so doing, the Court noted the language of Rule 4.10(4), which permits the issuance of procedural Orders before, at or during a case conference, as well as the broad general discretion afforded under Rule 1.4 to grant Orders aimed at streamlining and facilitating the resolution of disputes.

## SORIANO V BACALLA, 2021 ABQB 195

(FETH J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.58 (Status of Counterclaim), 3.60 (Application of Rules to Counterclaims), 3.68 (Court Options to Deal with Significant Deficiencies) and 4.33 (Dismissal for Long Delay)

The Applicant husband applied to dismiss a spousal support "counterclaim" advanced by his wife for long delay pursuant to Rule 4.33 so that he could proceed with a desk Application for divorce. Alternatively, he asked for the spousal support issue to be severed and for leave to proceed with the desk Application divorce.

The wife's "counterclaim" was a request in her Statement of Defence for, "as Counterclaim, plaintiff be ordered to support his (2) children and defendant pursuant to the Philippine Law." The wife did not serve and file a separate Counterclaim pursuant to the Rules.

Feth J. considered that although the wife did not apply to cure the irregularity with her pleading, that Feth J. on his own motion could cure the irregularity under Rule 1.5 if doing so would cause no irreparable harm to the husband.

The Applicant husband treated the wife's Statement of Defence as though it had included the "counterclaim" for spousal support so there would be no irreparable harm if the Court treated the wife's pleading as a combined Statement of Defence and Counterclaim.

His Lordship then considered if he should dismiss the "counterclaim" for long delay pursuant to Rule 4.33. Rules 3.58 and 3.60 allow the 3-year drop dead Rule to apply to counterclaims. However, a Statement of Defence cannot be "dismissed" for long delay, it must be struck out under Rule 3.68. On this basis, an Application to dismiss the "counterclaim" would fail. Feth J. then considered what would happen if he first cured the irregularity with the wife's pleading, making it a proper Counterclaim, and then determined if it should be dismissed for long delay.

The wife had not taken any steps to significantly advance the claim for spousal support since filing her Statement of Defence over six years ago. However, dismissal for delay does not prevent a party from commencing a second Action for the same cause if the party is within the applicable limitation period or if no limitation period applies. Justice Feth noted that there is no limitation period for a divorce Action or a spousal or child support Application, and as such, it would be inappropriate to dismiss the "counterclaim" for long delay because it would not preclude the wife from commencing a new Action, which would invite the risk of unnecessary expense and delay.

The husband indicated that he wished to move on with his life and re-marry. The wife did not respond to or appear at the Application. The couple's two children were adults and as such, issues of custody, access and parenting issues were moot. In the circumstances, Feth J. was satisfied that the wife and children would not be disadvantaged if divorce was severed from the spousal support issue, and the Court allowed the husband to proceed with a desktop Application for divorce.

## MACARONIES HAIR CLUB AND LASER CENTER INC V BANK OF MONTREAL, 2021 ABCA 40

(FRASER, KHULLAR AND PENTELECHUK JJA)

Rules 1.9 (Conflicts and Inconsistencies with Enactments) and 14.4 (Right to Appeal)

The Appellants, Wal-Mart and Home Depot, who were purported class members in a class action, sought to appeal a Decision of the Case Management Judge to approve settlement of the class action. The Court of Appeal found that the Appellants did not have standing to bring the Appeal. In considering Rule 14.4, the Court noted that the Rule gives the Court of Appeal jurisdiction to hear an Appeal from a Decision of the Court of Queen's Bench, but did not give the Appellants standing to launch the Appeal.

Specifically, this was because Rule 1.9 provides that an enactment, in this case the *Class Proceedings Act,* SA 2003, c C-16.5 (the "*CPA*"), prevails over the Rules to the extent of any inconsistency. Section 36 of the *CPA* only permits appeals of individual claim determinations, and not of settlements as a whole. In addition, the Court of Appeal noted the general rule is that only a party may appeal, except in exceptional circumstances, and found that as per the *CPA*, the Appellants were class members but not parties in the proceeding.

## ROYAL BANK OF CANADA V GODBOUT, 2021 ABQB 191

(ROOKE ACJ)

Rules 2.11 (Litigation Representative Required), 2.14 (Self-appointed Litigation Representatives), 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions), 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Plaintiff referred an Appeal of a Master's Decision in a foreclosure proceeding to Rooke A.C.J. for review pursuant to Civil Practice Note No 7 ("CPN7"). The Defendant in the underlying Action was an estate. The Plaintiff had filed a claim against property held by the estate, and the estate did not defend, resulting in the Master granting a foreclosure order (the "Foreclosure Order"). The son of the personal representative of the estate, Mr. Feeny, appealed the Foreclosure Order. The Plaintiff argued that Mr. Feeny did not have standing to appeal, as he had not satisfied the requirements to be appointed as a litigation representative under Rule 2.14: namely, he had not provided any supporting Affidavit, and he had not established any financial interest in the estate. Further, Mr. Feeny had an extensive, abusive litigation record.

Rooke A.C.J. noted that CPN7 is a document-only method used to conduct a Rule 3.68 proceeding, which focuses on whether a filing is abusive. Rooke A.C.J. noted that Mr. Feeny's standing as a litigation representative was not relevant to the Rule 3.68 proceeding, and he noted that Mr. Feeny had filed a supporting Affidavit for the Appeal.

Rooke A.C.J. also noted that pursuant to Rule 3.68, alleged and claimed facts are presumed to be true except for when they are absurd, implausible or hyperbole. Mr. Feeny had claimed in his Affidavit on the Appeal that he was a beneficiary of the estate. Rooke A.C.J. noted that because Mr. Feeny was a relative of the deceased, his claim that he was a beneficiary of the estate was not absurd, implausible or hyperbole, and was therefore established on a presumed factual basis.

Rooke A.C.J. held that Mr. Feeny's previous abusive litigation record did not matter in this instance, because CPN7 only relates to the substance (or absence of substance) of a particular filing. Rooke A.C.J. therefore rejected the Plaintiff's referral of Mr. Feeny's Appeal to the CPN7 process.

Mr. Feeny had purported to be a self-appointed litigation representative for the estate pursuant to Rule 2.14. A precondition to Rule 2.14 is that the estate is one that is required to have a litigation representative pursuant to Rule 2.11. Rooke A.C.J. noted that Mr. Feeny's mother was already the personal representative of the estate, and therefore it was not immediately obvious that the estate required a litigation representative pursuant to Rule 2.11. Rule 2.14 requires that an Affidavit satisfying the criteria set out in the Rule be filed, and Mr. Feeny had not filed such an Affidavit. Rooke A.C.J. held that this resulted in Mr. Feeny not having the authority to file the Appeal of the Master's Decision.

Accordingly, Rooke A.C.J. ordered that the Appeal filed by Mr. Feeny be stayed until he had filed a Rule 2.14 Affidavit or provided a valid basis for why the Court should exercise its discretion under Rule 2.14(4) to allow him to continue the Appeal without an Affidavit. Rooke A.C.J. also ruled that Mr. Feeny did not need to approve the Order granting the stay pursuant to Rule 9.4(2)(c).

## MCLELLAND V MCLELLAND, 2021 ABCA 102

(O'FERRALL, WAKELING AND CRIGHTON JJA)

Rules 2.11 (Litigation Representative Required), 2.15 (Court Appointment in Absence of Self-Appointment), 2.16 (Court-Appointed Litigation Representatives in Limited Cases), 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions), 3.68 (Court Options to Deal with Significant Deficiencies) and 14.32 (Oral Argument)

This Appeal was with respect to the allegedly gratuitous transfers of three condominium properties by a father to two of his children shortly before the father's death. The Appeal was heard despite that the Respondent (the third child) was absent. The Court confirmed that the Respondent had refused to provide any contact information and had made no effort to contact the Registry or Counsel to the Appellant with respect to the hearing of the Appeal, and so the hearing proceeded pursuant to Rule 14.32(3).

The Respondent's claim, which was brought in Alberta after already having commenced an Action in British Columbia, related to the transfer of the condominiums and sought remedies for undue influence, lack of testator capacity, and unjust enrichment. The Respondent also sought to be appointed as a litigation representative to bring the claim on behalf of the father's estate (the "Estate"), and sought litigation funding from the Estate. The Case Management Judge refused to strike the Respondent's claim as an abuse of process, named the Respondent as the administrator of the Estate *ad litem* to continue with the Alberta Action, and directed the executor of the Estate to fund the Respondent's advancing of the Alberta Action. The Appellant, one of the three children that the condominium properties had been transferred to, appealed this Decision.

With respect to the abuse of process question, the Court observed that the power granted by Rule 3.68(2)(d) to strike a claim as an abuse of process is a flexible power that is not confined to specific criteria. The Court held that a Judge's determination on whether there is or is not an abuse of process is a discretionary finding based on a factual inquiry, and this finding is owed deference and should not be overturned absent palpable and overriding error. However, no deference will be afforded by an Appeal Court where a Judge has "clearly misdirected" themselves or if the Decision is "so clearly wrong as to amount to an injustice." The Court of Appeal held that it was an abuse of process to permit the Respondent to advance the Alberta claim after the British Columbia Courts had been properly seized with the administration and distribution of the Estate.

The Court of Appeal also ruled that appointing the Respondent as the Estate's litigation representative in order to advance the Respondent's own Action on behalf of the Estate was not appropriate under Rule 2.16(3). This was so for two reasons: (1) there was already an Estate representative in British Columbia where the Estate was being administered; and (2) because of the high level of animosity between the parties, who were both beneficiaries of the Estate.

The Court of Appeal therefore struck the Alberta Action as an abuse of process and vacated the Respondent's appointment as litigation representative of the Estate.

Justice O'Ferrall, in a dissent opinion, would have dismissed the Appeal. His Lordship observed that the Case Management Judge was not persuaded that the claim had no merit, and therefore refused to strike it. His Lordship also

observed that the Alberta Action was not identical to the Action advanced in British Columbia. Justice O'Ferrall stated that these findings by the Case Management Judge were owed deference and should not have been interfered with.

Justice O'Ferrall also would have allowed the Case Management Judge's appointment of the Respondent as litigation representative.

O'Ferrall J.A. stated that the Case Management Judge adhered to the procedure set out in Rules 2.11 and 2.15, and that the Court is not precluded from appointing a person who also may have a personal interest in the outcome of the litigation. His Lordship also noted that Rule 2.21 provides further protections against a litigation representative's potential misconduct.

## CB V BM, 2021 ABQB 151

(KISS J)

Rule 3.2 (How to Start an Action)

After the Applicant father and Respondent mother divorced, the Respondent mother took the children of the marriage to Canada. The Applicant father sought the return of the two children to France.

The Court determined that the Respondent had wrongfully removed the children from France. The Court then considered whether "proceedings" were commenced within one year from the date of the alleged wrongful removal. The Court noted that Article 12 of the *Convention of the Civil Aspects of International Child Abduction* (the "Hague Convention") states that the Court was required to order the immediate return of the children if "proceedings" were commenced within one year.

The Court determined that proceedings were not commenced within one year. The Applicant had initially filed a Hague Convention claim with the French Central Authority which had referred the matter to the Alberta Central Authority. Although the Alberta Central Authority filed a Notice under the Hague Convention, the Court determined that the Notice itself was not an Application or proceeding. The Court noted that Rule 3.2(1) provides that an Action may only be started by filing a Statement of Claim, an Originating Application, or a Notice of Appeal.

## TRANSALTA GENERATION PARTNERSHIP V REGINA, 2021 ABQB 37

(PRICE J)

Rules 3.15 (Originating Application for Judicial Review), 3.19 (Sending in Certified Record of Proceedings) and 3.22 (Evidence on Judicial Review)

The Applicants applied for Judicial Review of a Ministerial Order as it related to the *2017 Alberta Linear Property Assessment Minister's Guidelines* (the "*2017 Linear Guidelines*") pursuant to Rule 3.15. The Application sought to sever certain provisions in the *2017 Linear*

Guidelines that limited the Applicants' ability to claim depreciation for taxation purposes. The Applicants filed a Certified Record of Proceedings pursuant to Rule 3.19 and filed five Affidavits in support of their Application. The Respondents objected to any reference to the Affidavits and sought to strike them.

Justice Price noted that Rule 3.22 sets out what evidence the Court may consider on an Application for Judicial Review. This includes the Certified Record of Proceedings and "any other evidence permitted by the Court". The Court noted the general rule is that evidence which was not before the decision maker and related to the merits of the Decision are not permitted on Judicial Review. However, there are exceptions such as: to show a breach of natural justice not apparent from the record, to add background information, or to reveal that the decision maker had an inadequate record of its proceedings.

On the facts, the Court found that four of the five Affidavits fell within the limited exceptions of general inadmissibility. The Affidavit that was not admitted into evidence addressed the merits of tables forming part of the *2017 Linear Guideline*s notwithstanding that the affiant was not involved in the preparation of those tables and did not have direct personal knowledge about them, which the Court held was inappropriate.

## SEDGWICK V EDMONTON REAL ESTATE BOARD CO-OPERATIVE LISTING BUREAU LIMITED, 2021 ABQB 59

(MANDZIUK J)

Rule 3.15 (Originating Application for Judicial Review)

The Applicant submitted an Originating Application for Judicial Review of a decision to deny membership in the Real Estate Association of Edmonton after a disciplinary suspension.

Justice Mandziuk noted that Rule 3.15(3)(b) states that an Originating Application must be served on "the Minister of Justice and Solicitor General or the Attorney General for Canada, or both, as the circumstances require". There was no evidence that notice was given to either the Minster of Justice and Solicitor General or to the Attorney General of Canada. Justice Mandziuk interpreted "as the circumstances require" to mean a choice to serve either the provincial or federal government or both, rather than the discretion to serve or not. Ultimately His Lordship held that the Originating Application for Judicial Review failed for multiple reasons — Rule 3.15 was not complied with, and further, the Application failed the relevant common law test.

## DR. MAYS ABDULGHAFOOR V UNIVERSITY OF CALGARY, 2021 ABQB 187

(JEFFREY J)

Rules 3.21 (Limit on Questioning) and 3.22 (Evidence on Judicial Review)

The Applicant, Dr. Abdulghafoor, applied for Judicial Review of a decision that ended her enrollment in a clinical placement with the University of Calgary. The Applicant was enrolled in residency program prior to a committee decision that concluded she had not satisfactorily completed her probation period in the program.

Justice Jeffrey considered the admissibility of additional Affidavit evidence. The Applicant filed and served an Affidavit, and the Respondents challenged its admissibility. The Respondents took the position that Affidavit evidence is generally not admissible in a Judicial Review and that the Applicant's Affidavit did not fall into an exception to this general rule. In determining the admissibility of the Affidavit, Justice Jeffrey considered Rule 3.21 and 3.22. Specifically with regards to Rule 3.21, Justice Jeffrey highlighted that the Applicant complied with the Rule by obtaining a prior Order permitting the Applicant to file Affidavit evidence on the conditions that the Respondents had the opportunity to question on the Affidavit and challenge its admissibility.

Justice Jeffrey also specifically highlighted Rule 3.22(d), Respondents contested the admissibility of the Affidavit on the grounds the Applicant had failed to display a complete lack of evidence or a breach of natural justice. The Applicant's position was that the Affidavit provided support for the allegations of breach of procedural fairness. Justice Jeffrey concluded that in circumstances where the Applicant challenges the process followed by the decision maker, it may be necessary to allow additional evidence. As the nature of the Applicant's allegations related to breach of procedural fairness, Justice Jeffrey admitted portions of the Affidavit.

## SCOTT V WESTWINDS COMMUNITIES, 2021 ABCA 30

(PAPERNY, SLATTER AND HUGHES JJA)

Rules 3.26 (Time for Service of Statement of Claim) and 6.14 (Appeal from Master's Judgment or Order)

The Defendant/Applicant brought an Appeal to set aside the Order of a Chambers Justice which had extended the time for the Plaintiff/Respondent to serve a Statement of Claim by three months, under Rule 3.26. The Plaintiff/Respondent had failed to serve the Defendant/Applicant within one year of filing the Statement of Claim.

The Plaintiff/Respondent operated a seniors' lodge which the Defendant/Applicant provided security services at. On December 15, 2015, a fire occurred during the construction of the premises. On December 14, 2017, the Plaintiff/Respondent filed a Statement of Claim, listing 9 Defendants including the Defendant/Applicant. On December 14, 2018, the Plaintiff/

Respondent applied for an extension of time for service under Rule 3.26. In support of this Application, the paralegal for the Plaintiff/Respondent's counsel swore an Affidavit which contained little helpful evidence. The Master granted an extension of three months for service.

The Defendant/Applicant appealed the Decision of the Master, claiming that they were prejudiced because they had destroyed relevant records after 3 years had passed from the date of the fire. In support of the Appeal, the Defendant/Applicant had submitted a new Affidavit containing additional evidence pursuant to Rule 6.14. On appeal of the Master's Decision, the Chambers Justice determined that the destroyed records were not evidence and therefore, while there may be prejudice, it could be dealt with at a Trial of the Action. The Chambers Justice upheld the Decision of the Master.

The Defendant/Applicant then appealed the Chambers Justice's Decision to the Court of Appeal. In determining whether the Decision of the Chambers Justice should be set aside, the Alberta Court of Appeal considered Rule 3.26 and determined that, while there may well be prejudice to the Defendant/Applicant, the Chambers Justice had properly balanced the competing interests at play in upholding the extension of time for service of the Statement of Claim.

The Court of Appeal also noted that the Chambers Justice erred in determining that the records were not evidence, as they could be admissible under a common law exception to the hearsay rule.

## TORONTO DOMINION BANK V WHITFORD, 2020 ABQB 102

(DARIO J)

Rules 3.59 (Claiming Set-Off), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Defendant was the victim of a mortgage fraud scheme. As a result of the scheme, the Defendant was the sole party against whom the Plaintiff bank sought to recover a $583,733 deficiency.

In her Trial Decision, Justice Dario noted that while the Defendant did not issue a Counterclaim for set-off, the Statement of Defence did partially set out the particulars of fraud, negligence, contribution, and illegality or invalidity of the mortgage contract.

In considering some alleged deficiencies in the Defendant's Statement of Defence, Justice Dario discussed Rules 13.6 and 13.7, which set out the requirements for pleadings. Justice Dario held that a "wide interpretation" should be given to the contents of pleadings filed by self-represented litigants, noting that such an interpretation must be within reason.

Justice Dario held, applying the required "wide interpretation", that the Statement of Defence set out negligence on behalf of the Plaintiff, potential knowledge of and participation in the fraud, and a suggestion of the contract's invalidity. Her Ladyship held that some of these claims were sufficient in the context to constitute a pleading of set-off as a defence, pursuant to Rule 3.59.

Justice Dario found that special consideration must be given to the allegations of fraud and invalidity of contract, given the particular Rules which apply to allegations of this nature under

Rules 13.6 and 13.7. However, Her Ladyship noted that these Rules are in place to ensure fairness to the parties and to prevent Trial by surprise. In the circumstances, Dario J. held that there was no unfairness to the Plaintiff.

In the result, Dario J. held that the Plaintiff bank was precluded from recovering as against the Defendant due to its wilful blindness towards the scheme and the doctrine of *ex turpi causa*.

## ACDEN ENVIRONMENT LIMITED PARTNERSHIP V ENVIRONMENTAL METAL WORKS LTD, 2021 ABQB 160

(ROSS J)

Rules 3.59 (Claiming Set-Off) and 6.14 (Appeal from Master's Judgment or Order)

The Plaintiff sought Summary Judgment for damages for undelivered products which the Plaintiff had paid for in advance. Master Schlosser had granted Summary Judgment for $996,720 but directed that $300,000 as a portion of the Judgment be stayed for proof of damages.

The Defendant appealed the Master's Decision. The Plaintiff did not cross-appeal but argued against the stayed portion of damages. The Plaintiff argued that there was no need to cross-appeal seeing as an Appeal from a Master is a hearing de novo. In consideration of Rule 6.14, regarding Appeals from a Master's Decision, Justice Ross found that the scope of the Appeal is informed by the Notice of Appeal and not by the de novo nature of the hearing. In support of this finding, Justice Ross cited *Uniserve International Products Inc v Alberta Treasury Branches*, 2003 ABQB 475 where the Court had found that the only issues before the Court on appeal are those in the Notice of Appeal. In consideration of the Notice of Appeal, Her Ladyship found that the entire Master's Order was included in the scope of the Appeal.

The Plaintiff also argued that the Defendant's damages could not be considered, as there was no cross-claim for damages. As noted by Justice Ross, Rule 3.59 allows set-off to be pled as a defence. The Amended Statement of Defence pled set-off, and so Her Ladyship found that it was appropriate to determine the Defendant's damages on the basis of set-off.

Ultimately, the Appeal was dismissed, and Master's Decision was upheld.

## PACE V ECONOMICAL MUTUAL INSURANCE, 2021 ABCA 001

(MARTIN, WAKELING AND ANTONIO JJA)

Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Appellant appealed an Order which granted the Defendant insurer leave to amend its Statement of Defence.

The Court of Appeal set out numerous cases in which the analytical framework for whether to allow amendments to pleadings pursuant

to Rule 3.65(1) has been discussed. The Court emphasized that the bar for obtaining leave to amend a pleading is very low, and that there is a presumption in favour of allowing amendments. The Court added that amendments should generally be allowed where they will help narrow the real issues in dispute and allow the determination of all matters in controversy between the parties.

However, the Court also noted that Courts should pay careful attention to "very late amendments", as amendments of this nature may cause prejudice to the non-moving party. In these cases, the non-moving party must present a compelling reason not to allow the amendment, such as significant prejudice which is not compensable in Costs, the advancement of a hopeless position, or the amendment being the product of bad faith.

The Court held that the Appellant failed to advance a compelling reason not to allow the amendment, and as such, the Appeal was dismissed.

## PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2021 ABCA 92

(PAPERNY, WATSON AND SLATTER JJA)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court Ordered Costs Award) and 14.88 (Costs Award)

The Court heard an Application seeking direction on the Costs consequences and form of Judgment granted in a prior Decision. The parties had previously brought competing Applications for Summary Judgment, and the Court found that the Respondent trustee in bankruptcy was substantially, although not completely successful.

The Court noted that the prior Court of Appeal Decision granted the Appellant leave to circulate an amended Statement of Claim pursuant to Rule 3.65, and that any disputes as to the nature and form of the amended pleadings were to be referred back to the Trial Court, and that the form of Judgment should reflect that.

With respect to Costs, the Court stated that although the payment of Costs for interlocutory Applications can be deferred until the litigation is finalized, the presumption in Rule 10.29 is that Costs are paid following that particular Application. Additionally, the Court found that Rule 14.88 could not be relied upon, as Trial Costs had not been set, so with this being an Appeal, that Rule did not apply.

Thus, the Court held that Costs were payable forthwith. Due to the complexity of the legal issues raised in the Appeals, Costs were awarded at 5 times the Column 5 Schedule C amount for the initial Appeal, while the Respondent received 3 times item 19(1) of Column 5 of Schedule C for the filing of its Factum in the cross-Appeal. In addition, the Court ruled that the Respondents were entitled to Costs as set out in Column 3 of Schedule C as a result of the Applicant's failed motion for Security of Costs. The Court noted that this Application could have been avoided if the Trustee in Bankruptcy had acknowledged that it was primarily liable for the Costs of litigation commenced on behalf of the bankrupt estate. Finally, the Court noted that the aforementioned Costs Awards would offset each other, pursuant to Rule 10.31(4).

## RENNALLS V TETTEY, 2021 ABQB 1

(DEVLIN J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 6.14 (Appeal from Master's Judgment or Order)

This was an Appeal from a Master's Decision pursuant to Rule 6.14. The question on Appeal was whether the Master had erred in refusing to strike out the Statement of Claim pursuant to Rule 3.68 in light of its failure to disclose a reasonable claim.

The underlying facts concerned alleged serious errors on the part of Calgary Police Service ("CPS") in its prosecution of a sexual assault case, which ultimately led to the case being dropped against the accused. The Plaintiff claimed against both the accused and CPS in tort. Relying on an established body of cases limiting complainants' capacity to claim against police for negligent case management, CPS applied to strike the Statement of Claim pursuant to Rule 3.68. Upon noting the evolving quality of jurisprudence in this area, as well as important factual distinctions in the Plaintiff's case, the Master dismissed the Application.

On Appeal to the Court of Queen's Bench, the Court explained that the Appeal was to be de novo. However, upon fresh consideration, the Court agreed with the Master's assessment. In so doing, the Court noted the novelty of the Plaintiff's case, as well as Supreme Court of Canada's guidance that Courts should adopt a generous approach and "err on the side of permitting a novel but arguable claim to proceed to trial". Moreover, the Court concluded that the principles protecting police investigative discretion from private law obligations to complainants did not preclude finding a duty of care in light of the particular circumstances of the case and, as such, the claim was not bound to fail. The Appeal was dismissed.

## PRICEWATERHOUSE COOPERS INC V PERPETUAL ENERGY INC, 2021 ABQB 2

(NIXON J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Action underlying this Application engaged the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"). The Defendant Applicants sought to strike the Plaintiff's Statement of Claim pursuant to Rule 3.68, or alternatively, summarily dismiss the Plaintiff's claim pursuant to Rule 7.3.

The primary issue before the Court was whether Perpetual Energy Operating Corp. ("PEOC"), a predecessor of Sequoia Resources Corp. ("Sequoia"), who Pricewaterhouse Coopers Inc. acted as Trustee in bankruptcy for, was insolvent at the time of an asset transaction, or was rendered insolvent by it within the meaning of the *BIA*.

Justice Nixon analyzed the commencement documents when considering whether the Plaintiff's Statement of Claim could be struck under Rule 3.68. The Statement of Claim pleaded that Sequoia acquired assets with

associated abandonment and reclamation obligations ("ARO") that exceeded the value of the assets.

Justice Nixon gave the Plaintiff's allegations in the Statement of Claim a generous interpretation in relation to their novel nature and therefore erred on the side of not striking. His Lordship also considered the exceptions of whether the allegations in the commencement document were based on assumptions or speculations or were patently ridiculous or incapable of proof. His Lordship did not find that either of the exceptions applied. Ultimately, His Lordship did not strike the Plaintiff's Statement of Claim under Rule 3.68.

Under Rule 7.3, Justice Nixon considered whether this matter, as it related to section 96 of *BIA*, was appropriate for Summary Dismissal. His Lordship reiterated that a Court may summarily dismiss a claim where there is no genuine issue for Trial. Justice Nixon also recognized that the only dispute at this point of the Action was the insolvency of PEOC (the "Insolvency Element").

Justice Nixon noted that the Insolvency Element is comprised of three financial variables: the value variable, the ARO variable, and the property tax variable. The key consideration for whether this Action was appropriate for Summary Dismissal was enumerated by His Lordship in the Decision:

"If the ARO is properly characterized as falling within the scope of "obligations, due and accruing due" for the purposes of the Insolvency Element, then this Action must proceed to a trial proper in order to deal with the Section 96 *BIA* Claim. On the other hand, if the ARO does not fall within the scope of "obligations, due and accruing due" for purposes of the Insolvency Element, then Section 96 *BIA* Claim fails because the Insolvency Element would not be satisfied."

Given the evidence before the Court, Justice Nixon determined that the ARO did not meet the definition of "obligations, due and accruing due", and as a result, the Defendants had met the burden in showing that there was "no merit" to the section 96 *BIA* claim. As a result, His Lordship summarily dismissed the Plaintiff's Statement of Claim under Rule 7.3.

## ALTIUS ROYALTY CORPORATION V ALBERTA, 2021 ABQB 3

(MASTER FARRINGTON)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiffs filed a claim against the governments of Alberta and Canada for the expropriation of its royalty interest in a coal mining facility. This expropriation was alleged to occur by the passing of the *Reduction of Carbon Dioxide Emissions from Coal*-fired Generation of Electricity Regulations, SOR/2018-263, which had collateral effects on coal producers, including the Plaintiffs. Specifically, instead of generating royalty interests to 2055, the Plaintiffs alleged that they would receive no royalty interests after 2030 due to the governments' actions.

The Defendant governments filed Applications to strike the claim pursuant to Rule 3.68 or for Summary Judgment pursuant 7.3. Master Farrington did not consider the Application pursuant to Rule 3.68, finding that it would be inappropriate to do so on the volume of evidence before the Court and the fact specific nature of the claim.

With respect to Rule 7.3, the Defendants first argued that the Action was premature, as there could be changes to the regulatory environment many times between now and 2030. Master Farrington found that the declaratory remedy sought was not premature and was capable of adjudication on existing facts. As stated by Master Farrington, "parties who are affected by the regulation who feel aggrieved are entitled to an answer now as to whether the regulation amounts to a "taking" or not."

The Defendants next argued that the facts did not support a finding of "taking" or expropriation. Master Farrington reviewed the case law on constructive expropriation and noted that such cases were "very fact specific." On a review of the facts before him, Master Farrington found that ownership of land or resources did not carry with it any exemptions from land use regulations, and that such regulations could be expected in Canada. On that basis, Master Farrington found that the Plaintiffs had no legal cause of action, granted the Application for Summary Judgment, and the Action was summarily dismissed against both governments.

## FEDUN V KORCHINSKI, 2021 ABQB 14

(MAH J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 4.24 (Formal Offers to Settle)

The Applicant and the Respondent were engaged in divorce and matrimonial property proceedings. The Applicant brought two preliminary Applications: one to remove the Respondent's counsel from the file because of a conflict, and the other to determine whether the Applicant had accepted a Formal Offer.

The Court declined to remove the Respondent's counsel. The Respondent's counsel had his legal assistant swear an Affidavit that offered opinions, arguments, and proposed inferences. Justice Mah noted that a lawyer cannot be counsel and witness in the same proceedings. Although the Court declined to remove the Respondent's counsel, the Court noted that it did not approve of the subjective commentary in the Affidavit. The Court also noted that objectionable opinion evidence in an Affidavit may be struck out under Rule 3.68(4).

The Court then considered whether the Applicant had accepted the Formal Offer.

The Formal Offer was open for acceptance for two months per Rule 4.24(3). The Respondent had applied for leave to withdraw the Formal Offer early, but the Respondent's Application was adjourned when the Court temporarily closed due to the COVID-19 Pandemic (the "Court Closure"). The Applicant later purported to accept the Formal Offer but was unable to file his acceptance due to the Court Closure. The Court noted that Master Order #2, which extended all filing deadlines due to the Court Closure, extended the deadline to accept the Formal Offer.

The Court decided to hear the Respondent's Application to withdraw the Formal Offer because allowing the Court Closure to deny the Respondent of the opportunity to have her Application heard would be grossly unfair. The Court noted that Rule 4.24(4) allows a Formal Offer to be withdrawn where written notice is given and if the Court is satisfied that there are

special circumstances that justify withdrawal. The Respondent argued that the Applicant had offered a false property statement in an earlier Affidavit. However, the Court found there was no material non-disclosure and declined to allow the Respondent to withdraw the Formal Offer. As a result, the Court held that the Formal Offer had been validly accepted.

## 222 & 223 BASELINE ROAD INC V WORLD HEALTH EDMONTON INC, 2021 ABQB 22

(MASTER BIRKETT)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 3.72 (Consolidation or Separation of Claims and Actions), 4.22 (Considerations for Security for Costs Award), 5.6 (Form and Content of Affidavit of Records), 6.25 (Preserving or Protecting Property or Its Value) and 9.24 (Fraudulent Preferences and Fraudulent Conveyances)

The Defendant sought an Order striking a Statement of Claim in which the Plaintiff relied on information inadvertently disclosed by the Defendants in another Action.

The Plaintiff was landlord to the Defendant. The Plaintiff commenced an Action for breach of lease. The Defendant disclosed an unsworn Affidavit of Records which included an Asset Purchase Agreement between the Defendant and a non-arms length party. Before Questioning, counsel for the Defendant attempted to remove the Asset Purchase Agreement on the grounds it was not relevant. The Plaintiff commenced a second Action alleging a fraudulent conveyance based partly on information gleaned from the Asset Purchase Agreement.

The Plaintiff brought an Application seeking a further and better Affidavit of Records under Rule 5.6, and an Order that the two Actions be tried simultaneously under Rule 3.72. The Defendant brought a cross-Application for an Order striking the Plaintiff's Statement of Claim in the second Action pursuant to Rule 3.68, or for an Order for Security for Costs pursuant to Rule 4.22.

The Defendants submitted that the Statement of Claim filed in the second Action was an attempt to obtain prejudgment relief and should properly have been brought in the first Action, pursuant to Rule 6.25. The Plaintiff submitted that they were not seeking prejudgment relief, and they relied on Rule 9.24 to support the position that a Judgment is not a requirement when enforcing against property when there are allegations of a fraudulent conveyance. Master Birkett found that the Statement of Claim in the second Action disclosed a reasonable claim and did not seek disclosure or remedies prior to a Judgment in the first Action.

Master Birkett found that the second Statement of Claim was not improper because it was not based on facts solely gained from the Asset Purchase Agreement. The second Statement of Claim's statement of facts was also based on public information and facts discovered during Questioning. The circumstances did not warrant striking the second Statement of Claim pursuant to Rule 3.68. The second Statement of Claim was not a mere duplication, and contained further allegations and a new, reasonable, cause of action.

Master Birkett concluded that the Asset Purchase Agreement must be disclosed pursuant to Rule 5.6(1)(b), and held that due to the allegations in the second Statement of Claim, the Asset Purchase Agreement was relevant to the allegations of a fraudulent conveyance.

Master Birkett further found that pursuant to Rule 3.72, both Actions should be tried simultaneously as they contained common questions of fact and arose from the same transaction or series of occurrences. Finally, Master Birkett found Security for Costs to be unwarranted under Rule 4.22, as the Plaintiff had significant assets in Alberta.

## BOLAND V BENKE, 2021 ABQB 27

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

## STRATKOTTER V CANADA, 2021 ABQB 45

(ROOKE ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant had previously made an Application which Associate Chief Justice Rooke had ruled to be an Apparently Vexatious Application or Proceeding ("AVAP"), and had ordered, pursuant to Civil Practice Note No. 7, that the Applicant had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. Associate Chief Justice Rooke reviewed the written submissions provided by the Applicant to the Court and determined that the AVAP should be struck pursuant Rule 3.68.

## JOHNSRUD V FADER, 2021 ABQB 48

(ROOKE ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

A self represented litigant who was remanded at the Calgary Remand Centre delivered a package of materials to the Court which purported to be an application for *habeus corpus*.

The Application was 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).

## PASCAL V TRUDEAU, 2021 ABQB 69

(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, Rooke ACJ 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).

## BOLAND V BENKE, 2021 ABQB 78

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Plaintiff had previously made an Application 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 Plaintiff had 14 days to provide the Court with

written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. Associate Chief Justice Nielsen found that what the Plaintiff submitted to the Court were not proper written submissions and determined that the AVAP should be struck pursuant Rule 3.68.

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

## OLDFORD V MEDICINE HAT CATHOLIC BOARD OF EDUCATION, 2021 ABQB 79

(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, pertaining to five specific questions, 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).

## ELLIS V SZAWLOWSKI, 2021 ABQB 103

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Associate Chief Justice Nielsen ordered that the Plaintiff 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 Nielson also ruled that the Plaintiff's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

## GAUVREAU V LEBOUTHILLIER, 2021 ABQB 108

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Associate Chief Justice Nielsen ordered that the Plaintiff 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 Nielson also ruled that the Plaintiff's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

## TOMA V ALBERTA (SERVICE), 2021 ABQB 110

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Nielsen A.C.J. ordered that the Applicants had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

## DONIGER V LAW SOCIETY OF ALBERTA, 2021 ABQB 136

(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, 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.

Rooke A.C.J. also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

## SEWAK V KILLIPS, 2021 ABQB 147

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Applicant had previously made an Application 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 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

Associate Chief Justice Nielsen reviewed the written submissions provided by the Applicant to the Court and determined that the AVAP should be struck pursuant Rule 3.68 and also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

## SAVAGE V SNIDERMAN, 2021 ABQB 165

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

## GAUVREAU V LEBOUTHILLIER, 2021 ABQB 172

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal With Significant Deficiencies), 6.9 (How the Court Considers Applications) and 9.4 (Signing Judgments and Orders)

The Plaintiffs had filed a Statement of Claim personally naming the Minister of National Revenue as a Defendant, and seeking $10 million dollars in damages on the basis that the Minister had no statutory authority to require the Plaintiffs to file income taxes. His Lordship reviewed the Statement of Claim in a previous hearing, and determined it to be an Apparently Vexatious Application or Pleading which should be reviewed pursuant to Civil Practice Note No. 7 ("CPN7"). Thus, the Plaintiffs were permitted to show cause as to why the Statement of Claim should not be struck pursuant to Rule 3.68.

The Plaintiffs asserted that the review by written submissions procedure called for in CPN7 was unlawful and unfair. The Court responded that Rule 6.9(1)(c) permits legal procedures on a documents only basis, and that this process had been endorsed by the Courts of Appeal. The Court also noted that several documents filed by the Plaintiffs effectively expanded on the Statement of Claim, and were inadmissible by operation of Rule 3.68(3).

The Court found that the Statement of Claim was substantively an Organized Pseudolegal Commercial Argument ("OPCA"), which have consistently been found to be an abuse of process. Likewise, the Statement of Claim sought an Order that the Minister must settle the case; an impossible remedy, and further grounds to strike the pleading. Having found that the Statement of Claim had no basis in law and was an abuse of process, His Lordship ordered it to be struck pursuant to Rule 3.68 and paragraph 3(e) of CPN7. The Plaintiffs' approval of the form of Order was dispensed with as per Rule 9.4(2)(c).

## DMYTERKO V TELUS, 2021 ABQB 175

(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, 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.

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).

## TOMA V ALBERTA (SERVICE), 2021 ABQB 178

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Applicant had previously made an Application 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, and that the Applicant had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. Associate Chief Justice Nielsen reviewed the written submissions provided by the Applicant to the Court and determined that the AVAP should be struck pursuant Rule 3.68.

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

## CLAYBROOK V ALBERTA (HEALTH SERVICES), 2021 ABQB 182

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

## OUGHTON V BOWDEN INSTITUTION, 2021 ABQB 183

(HENDERSON J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Justice Henderson as being an Apparently Vexatious Application or Proceeding ("AVAP"). The Applicant was in prison and framed his Application as a *habeas corpus* matter. He alleged that his circumstances and treatment at the medium

security Bowden Institution were a breach of his *Charter* rights. However, his Application did not identify an alleged illegal decision that caused him to experience a deprivation of residual liberty.

Pursuant to Civil Practice Note No 7, Justice Henderson 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.

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

## DMYTERKO V SIMPLII FINANCIAL, 2021 ABQB 198

(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).

## DONIGER V LAW SOCIETY OF ALBERTA, 2021 ABQB 200

(ROOKE ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

A previous Application for Judicial Review had been reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Rooke had 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. The Plaintiff asked for an extension which Associate Chief Justice Rooke granted. The deadline had passed and nothing had been received. As such, in this Application, Associate Chief Justice Rooke determined that the AVAP should be struck pursuant Rule 3.68.

Associate Chief Justice Rooke noted that when an Action is terminated through the CPN7 process, the Court usually awards Costs in favour of the litigant who referred the matter to the Court. His Lordship noted that, per Rule 10.31, the Court has the broad discretion to determine an appropriate Cost Award, and that, per Rule 10.33, the Court may take into

consideration a litigant's conduct if it caused unnecessary litigation or delay, if a litigant engaged in improper litigation, or if a litigant otherwise engaged in misconduct. Associate Chief Justice Rooke determined that the Plaintiff's Application was an attempted to derail the disciplinary proceedings that were underway between she and the Defendant. Further, the Plaintiff advanced claims that were absurd. His Lordship determined that, on a balance of probabilities, the Plaintiff knew that her Application had no valid legal basis and ordered that the Plaintiff be required to pay elevated litigation costs of $5,000. 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).

## DMYTERKO V TELUS, 2021 ABQB 220

(ROOKE ACJ)

Rules 3.68 (Court Options to deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)

The Defendant, Telus Communications Inc., referred two Statements of Claim, filed by the Plaintiff, to the Court as candidates for Apparently Vexatious Applications or Proceedings ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Rooke A.C.J. ordered that the Plaintiff 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.

The deadline for the Plaintiff's written submissions passed without the Plaintiff making submissions. Subsequently, the Court deemed the Statements of Claim hopeless and abusive proceedings, and struck them out pursuant to CPN7 and Rule 3.68.

The Court awarded Costs to the Defendant and ordered that it prepare and serve the Court Order giving effect to the Decision. Pursuant to Rule 9.4(2)(c), Rooke A.C.J. dispensed with the Plaintiff's approval of the Order granted.

## PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2021 ABCA 16

(PAPERNY, WATSON AND SLATTER JJA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment), 10.31 (Court-Ordered Cost Awards) and 13.6 (Pleadings: General Requirements)

This Appeal addressed three issues that were brought by various parties to this litigation. First, the Trustee in Bankruptcy appealed the striking or Summary Dismissal of large portions of the Statement of Claim filed in *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.,* 2020 ABQB 6. Further, the Respondents cross-appealed for Summary Dismissal under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3. Finally, the Trustee in bankruptcy appealed the Costs awarded in *PricewaterhouseCoopers Inc. v Perpetual Energy Inc*., 2020 ABQB 513.

The Court of Appeal, when considering striking the claim or Summary Dismissal of the claims under either Rules 3.68 or 7.3, recognized that, while both respective Rules serve as a method of addressing and weeding out unmeritorious claims prior to adjudication at Trial, the underlying considerations in determining if a claim is appropriate for either remedy is different. As the reasons under appeal were a blended analysis of the two, they were largely unhelpful.

The Court of Appeal emphasized that, while there are some exceptions to the assumption in an Application to strike that the facts pled are true, it is imperative that the exception does not overtake the rule. The Court reiterated that there is no wide exception to the rule that no evidence is to be tendered or considered in Applications to strike. The Court highlighted two subsidiary issues in Applications to strike, namely that pleadings are to be read generously and pleadings are to allege facts, not evidence, pursuant to Rule 13.6. The Court noted that if the pleadings were insufficient, the appropriate remedy would have been to amend the pleadings or provide particulars. Ultimately, the Court allowed the Appeal and restored the struck pleadings.

Regarding the Costs Appeal, the Trustee in Bankruptcy challenged the Costs Award of 85% of solicitor-client Costs awarded to an individual Respondent, and which had held the Trustee in Bankruptcy personally liable for these Costs. The Court of Appeal recognized that, while Costs are typically awarded in accordance with Schedule C, a Trial Judge has wide discretion in awarding Costs. The Court went on to clarify that solicitor-client Costs are generally appropriate in circumstances where there has been reprehensible conduct in the course of litigation. Ultimately, the Court of Appeal did not find that the Trustee in Bankruptcy conducted the litigation in a manner that would justify enhanced Costs, and as such, allowed the Appeal.

## TRISURA GUARANTEE INSURANCE V DUCHNIJ, ET AL, 2021 ABCA 78

(WAKELING JA)

Rules 4.22 (Considerations for Security for Costs Order), 14.37 (Single Appeal Judges) and 14.67 (Security for Costs)

The Respondent on Appeal brought an Application for Security for Costs. The Appellant was the unsuccessful Defendant in the underlying Action. Following conclusion of the underlying Action, the Respondent took steps to enforce Judgment, including by seeking an Order requiring the Appellant to provide a sworn financial report. The Order was granted; however, the Appellant failed to provide a proper sworn financial report and was ultimately found to be in Contempt of Court. The Appellant appealed the Contempt Order and the Respondent sought Security for Costs, pursuant to Rule 14.67 (and by implication, Rule 4.22).

The Appellant opposed the Application for Security for Costs on its merits, and additionally, challenged the constitutional validity of the Rules under which it was brought. The Court disagreed with both of the Appellant's positions and granted the Application.

As a preliminary, procedural point, the Court confirmed that it was appropriate for a single Appeal Judge to hear the Application, notwithstanding its constitutional element. In so concluding, the Court noted that the Appellant's response to the Application carried consequence only in respect of the Application, which issues are specifically permitted to be adjudicated by a single Appeal Judge, pursuant to Rule 14.37, whether or not they involve a constitutional element. A challenge of the Rules' constitutional validity, generally, would require a different method of pleading.

Having decided this preliminary point, the Court went on to conclude that the Security for Costs Rules are constitutional. While the Court accepted that access to justice is a significant constitutional objective and that it is not open to the provinces to seek to limit such access, it concluded that the Security for Costs Rules at issue did not have that objective or effect. Rather, it held that Rules 4.22 and 14.67, which confer discretion to award Security for Costs in light of the parties' capacity to pay a Costs Award and strength of legal position, strike an appropriate balance between access to justice, fairness between the parties and maintenance of judicial resources. In respect of Rule 14.67 specifically, the Court also noted that Appellate Courts are not necessarily subject to the same access to justice concerns as their Trial Court counterparts, and that the limitations on access to Appeal imposed by a properly ordered Security for Costs Award are neither unconstitutional, nor inappropriate.

Finally, the Court held that it would be appropriate to award Security for Costs in this Application in light of the Appeal's very low likelihood of success and the likelihood that the Respondent would be unable to enforce a Costs Award that might be granted in its favour.

## 956126 ALBERTA LTD V JMS ALBERTA CO LTD, 2021 ABQB 121

(FETH J)

Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 10.29 (General Rule for Payment of Litigation Costs)

Judgment in this Action was granted in favour of 956126 Alberta Ltd. ("956") following a Summary Trial. The Counterclaim against 956 and Jae Soo Doh ("Mr. Doh") was dismissed. As successful parties, 956 and Mr. Doh applied for Costs.

The Court noted that pursuant to Rule 10.29, a successful party is usually entitled to Costs against the unsuccessful party, subject to the Court's discretion. With respect to the initial claim, 956 was awarded Costs in Column 2 of Schedule C of the Rules, as the Court determined that the full amount awarded to 956, including interest, would be below $200,000. The Court also found that, in respect of awarding Costs for the unsuccessful Counterclaim, Costs in Column 2 fairly reflected the complexity, legal expense and true measure of the financial interests raised by the Statement of Claim and Counterclaim.

With respect to the Former Offer to Settle (the "Offer") provided by 956 and Mr. Doh, which would have resolved the Statement of Claim and Counterclaim, the Court found that the Offer complied with the requirements under Rule 4.24. The Offer was rejected. The Court noted that in accordance with Rule 4.29, 956 and Mr. Doh were entitled to double Costs for all steps taken in relations to the Statement of Claim and Counterclaim following service of the Offer. The Court further noted that no "special circumstances" as contemplated by Rule 4.29(4)(e) were identified. The Court ordered double Costs for Mr. Doh and 956 for all steps in the Action after the issuing of the Offer.

## BALOGUN V PANDHER, 2021 ABQB 7

(BURNS J)

Rule 4.29 (Costs Consequences of Formal Offer to Settle)

This was a Costs Decision that involved a self-represented Plaintiff who had been involved in a motor vehicle accident. The Plaintiff sought over $1,000,000 in damages and was awarded $129,558.08. This was less than a Formal Offer made by the Defendant in the amount of $160,000, which was rejected by the Plaintiff. The issues were whether the Plaintiff was entitled to Costs, and what the effects of the Formal Offer were on Costs owed to the Defendant.

The Defendant, who was represented by legal counsel, argued that the Plaintiff was not entitled to Costs and that this should have been a simple Trial regarding quantum that was unnecessarily drawn out. The Plaintiff, amongst many other things, had filed 37 Affidavits and rejected five Formal Offers without ever making a counter-offer. Justice Burns expressed concern that the Defendant took advantage of the Plaintiff procedurally. The Plaintiff thought that he had to file "update" Affidavits and the Defendant questioned him on each one. After considering the relevant case law, Justice Burns found that the Plaintiff was entitled to Costs.

The Defendant noted that they had sent five Formal Offers to settle, three of which exceeded the amount that the Plaintiff won at Trial, and therefore the Defendant argued that it was entitled to enhanced Costs. Her Ladyship noted that enhanced Costs may be awarded where the conduct of a litigant fell short of what was expected of a responsible litigant. After considering the conduct of both parties, Justice Burns declined to grant the Defendant enhanced Costs. Instead, Her Ladyship granted the Defendant Costs from August 26, 2014: from the day of the first Formal Offer that exceeded the Judgment onwards, pursuant to Rule 4.29(2). The Plaintiff was granted Costs for the time before August 26, 2014.

## RATH V 4TH STREET HOLDINGS LTD, 2021 ABQB 201

(HOLLINS J)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.33 (Court Considerations in Making Costs Award) and Schedule C

The Plaintiffs brought an Application to the Court for direction on Costs. At Trial, Justice Hollins found that the Defendants were not liable for the Plaintiffs' alleged losses. The dispute regarding the appropriate Costs was complicated due to the treatment of a Formal Offer that was advanced by the Defendants in the course of litigation.

Justice Hollins stated that under Rule 10.33, it is important to remember that the Trial Judge has discretion regarding Costs Awards. On May 1, 2020, Schedule C of the Rules was amended to increase the amount of Costs Awards for various steps in litigation. The Trial of this matter took place prior to May 1, 2020; however, Justice Hollins applied the amended Schedule C and held that the wording of the amendment was clear in that it was irrelevant whether the particular step occurred before or after May 1, 2020, and that the higher fees were to apply.

With regards to Rule 4.29(3), Justice Hollins stated that the Defendants are entitled to double their recoverable Costs under Schedule C provided the Formal Offer was genuine and that there was an element of compromise. Justice Hollins found that the Defendants' Formal Offer that the Plaintiffs discontinue while the Defendants waive their Costs was both genuine and contained a compromise. As such, the Defendants were entitled to double Costs for the steps taken after the issuance of the Formal Offer.

## 1361556 ALBERTA LTD V RISTORANTE COSA NOSTRA INC, 2021 ABQB 157

(MASTER ROBERTSON)

Rules 4.31 (Application to Deal with Delay) and 5.10 (Subsequent Disclosure of Records)

The Defendants, Haxton Holdings Ltd. and Keith D. Haxton, brought an Application under Rule 4.31 for dismissal of the Action, which related to the construction of a restaurant. There were two Actions commenced in early 2016 after the registering of certificates of lis pendens, and on a functional basis, the lawsuits were being advanced in tandem.

After they were commenced in January of 2016, the lawsuits proceeded at a reasonable pace. Questioning took place in August 2017, and answers to Undertakings were completed by June 25, 2018. On April 28, 2018, a potential witness died. The next significant step occurred on June 30, 2020, when the Defendants received a supplementary Affidavit of Records that had been sworn on July 24, 2019. A tolling agreement was put in place on March 17, 2020, when the Covid-19 Pandemic became a factor.

In analyzing the delay under Rule 4.31(1) Master Robertson noted that in seeking dismissal under this Rule, both delay and significant prej-

udice must be present. In the event both delay and significant prejudice are present, the Court retains discretion to dismiss, or not. The prejudice alleged in this matter was that a witness had died and could no longer be called. Master Robertson identified that under Rule 4.31(1), the significant prejudice must be a result of the delay. Master Robertson found that the significant prejudice alleged to have occurred in this matter was not a result of the delay as the witness had died prior to the delay occurring.

With regards to Rule 4.31(2), Master Robertson addressed whether the delay was inordinate and inexcusable. If the delay is inordinate and inexcusable, then significant prejudice is presumed. However, Master Robertson noted there was reasonable explanations for the delay and that they were not inordinate. The Application under Rule 4.31 was dismissed.

Under Rule 5.10, Defendants' counsel took issue with the fact that he was not informed of the documents in the supplemental Affidavit of Records. Master Robertson noted that counsel for the contractor should have immediately informed counsel for the Defendants of these documents, and Master Robertson considered this as part of the larger Application under Rule 4.31.

## LDS V SCA, 2021 ABCA 59

(STREKAF, PENTELECHUK AND ANTONIO JJA)

Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

This was an Appeal by the Defendant of the Chambers Judge's Decision refraining from dismissing an Action for long delay (Rule 4.33) or for delay causing significant prejudice (Rule 4.31).

The underlying Action concerned allegations that the Defendant had hacked the Plaintiff's personal email account and forwarded nude and semi-nude photographs of her to her new partner and posted them on pornographic websites. The Action was managed by a Case Management Judge and involved several procedural steps, including the granting of an Anton Piller Order ("APO"). Nearly four years following the granting of the APO, the Defendant applied to have the claim dismissed pursuant to Rules 4.31 and 4.33. The Chambers Judge refused both Applications on the basis that there had been significant advances in the litigation in the preceding three years, including multiple case management appearances and three interim reports of the Independent Supervising Solicitor ("ISS"), appointed to oversee execution of the APO, and that any delays following granting of the APO had not resulted in prejudice to the Defendant.

On Appeal, the Defendant argued that the Chambers Judge had erred by failing to apply the appropriate tests in respect of both Applications. The Court of Appeal disagreed. In respect of the Application to dismiss for long delay, the Court held that the Chambers Judge had considered and correctly applied all applicable jurisprudence, including the correct test for determining whether a significant advance has occurred within the requisite three-year window: i.e. "[h]as anything that happened in the applicable period increased by a measurable degree the likelihood either the parties or a court would have sufficient information - usually a better idea of the facts that can be proven - and be in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action?" and

"[a]re the parties at the end of the applicable period much closer to resolution than they were at the start date?". Moreover, the Court agreed with the Chambers Judge's assessment that activities undertaken in respect of the APO were sufficient to advance the Action within the meaning of Rule 4.33. Though the Court agreed with the Defendant's submission that he should be entitled to have the Judge consider a three-year period other than the one commencing immediately before filing of his Application, in the present circumstances, no three-year window could be identified during which there had been no significant advancement of the Action.

Additionally, the Court of Appeal held that the Chambers Judge had adopted the correct approach in assessing whether the claim should be dismissed pursuant to Rule 4.31 for delay causing prejudice. In particular, the Court held that the Chambers Judge had not committed a reviewable error in finding that delays attributable to issues with execution of the APO was not improper or ordinate. Moreover, the Court held that the Defendant's claims lacked "any details of prejudice, other than a vague concern that his private information would have been revealed to two IT professionals, one of whom had a criminal record, and that he incurred costs in defending the action", which it held to be insufficient. Accordingly, the Appeal was dismissed.

## JESSON V JESSON, 2021 ABQB 93

(YUNGWIRTH J)

Rules 4.34 (Stay of Proceedings on Transfer or Transmission of Interest) and 12.35 (Operation of Rule 4.34 Under This Part)

Ms. Jesson applied to the Court to lift a stay in place pursuant to section 69.3 of the *Bankruptcy and Insolvency Act,* RSC, 1985, c. B-3 (the "*BIA*") and Rule 4.34(1) that resulted from the bankruptcy of Mr. Jesson. The two parties had cohabited, married, separated and filed for divorce. The day before an Application for retroactive child support and ongoing child and spousal support was to be heard, Mr. Jesson filed an assignment in bankruptcy.

Justice Yungwirth found that section 69.3 of the *BIA* did not apply to Ms. Jesson's claims in the divorce and matrimonial property proceeding and applied only to claims provable in bankruptcy. Ms. Jesson's child support claims were not "provable" in bankruptcy because the existing Order was not made until after the date of bankruptcy. Support claims could be prosecuted against a bankrupt without leave. Her Ladyship found that the child support payments ordered should be factored into Mr. Jesson's monthly expenses when the Trustee in Bankruptcy calculated Mr. Jesson's monthly surplus, however, the child support arrears could only be enforced against exempt assets of the bankrupt and the bankrupt's income in excess of payments to the estate.

Rule 4.34 operated to stay Ms. Jesson's Action as a result of the bankruptcy. Pursuant to Rule 12.35, Rule 4.34 did not apply to stay a proceeding under the Divorce Act, RSC 1985, c-3 and only applied to the matrimonial property proceeding. Her Ladyship noted that there was no test to apply when considering an Application made pursuant to Rule 4.34(2) to lift a stay, and that this was not an instance where

there was a good reason not to lift the stay — a spouse should not be able to use the bankruptcy system to stall and prevent determination of matrimonial property entitlements. Accordingly, Justice Yungwirth ordered that the divorce and matrimonial proceedings continue using the process outlined in section 81 of the *BIA*.

## SMYTH V SMYTH, 2021 ABQB 13

(MAH J)

Rules 5.38 (Continuing Obligation on Expert) and 5.40 (Expert's Attendance at Trial)

The Court heard a Trial concerning prospective spousal support and division of matrimonial property. The parties agreed to enter two expert business valuation reports into evidence by consent. However, at Trial, the husband took issue with several conclusions reached in his own expert's report. The husband's counsel attempted to call this expert to give *viva voce* evidence at Trial. Justice Mah determined that doing so was not permitted by the Rules.

Justice Mah found that since the expert report had been entered explicitly by consent, the wife's counsel had not served a notice requiring the expert to attend for cross-examination pursuant to Rule 5.40(1). Rule 5.40(2) provides that an expert must not give oral evidence at Trial unless they have been cross-examined, or if permitted to do so by the Court. Justice Mah held that it would be unfair to allow the expert to give evidence, since the wife had no opportunity to cross-examine, or to have her expert prepare a response to this additional evidence.

His Lordship noted that Rule 5.38 set out a process under which a party may provide an amended expert's opinion by disclosing the new opinion and serving it immediately on the adverse party, but this process had not been followed. Justice Mah stated that the only exception to this rule may be if there is either minimal or no prejudice flowing to the adverse party, which was not the situation before the Court.

## ASQUIN V MICHETTI, 2020 ABQB 16

(EIDSVIK J)

Rule 6.11 (Evidence at Application Hearings)

The Applicant sought an Order for vacant possession of her home and other remedies, including retrieval of certain personal property in the home. The home was held in joint tenancy with a former common law partner, who had passed away in February 2020. Title of the home was then transferred into the Applicant's sole name through her right of survivorship. The Respondents, the family of the deceased, who were living in the home without paying rent, argued that the Applicant and the deceased were tenants in common, not joint tenants, and as a result there should be a calculation of what the ownership interest was.

The Respondents sought to rely on documents from an Affidavit of Records that they had filed in the Action in November 2020. The Applicant objected on the grounds that the materials were filed late and that accordingly, she had not responded with a further Affidavit. The Respondents argued that their delay was caused by the Covid-19 Pandemic and late access to Court documents.

Justice Eidsvik applied Rule 6.11 in determining that the Respondents could rely on the Affidavit of Records, but that the weight of some of the documents may be affected: for example an Affidavit of the deceased that could not be cross-examined on. The Court also noted that many of the documents in the Affidavit of Records were admissible since they were pleadings that a Court could take judicial notice of. Rule 6.11(d) allows the Court to consider an admissible record disclosed in an Affidavit of Records under Rule 5.6, and Rule 6.11(e) allows the Court to consider evidence taken in any other Action, if notice is given to the opposing side.

## TAM V ALBERTA, 2021 ABQB 156

(DUNLOP J)

Rules 6.11 (Evidence at Application Hearings) and 8.16 (Number of Experts)

This was an Application by the Plaintiffs for an interlocutory Injunction prohibiting the Defendant province from denying Injectable Opioid Agonist Treatment ("iOAT") until the final determination of the underlying Action. The underlying Action concerned the constitutional validity of the Defendant's decision to change the way that it provides iOAT to patients.

Among other things, the Application involved expert witness evidence from a multitude of individuals. Expert witnesses were called upon by the Plaintiffs to explain the effects and elements of opioid use disorder and its treatment, and to predict the likely impact of proposed changes to the Defendant's existing program. The Court noted that introduction of expert evidence is permitted on Applications, pursuant to Rule 6.11, and should be introduced following the same procedure as at Trial.

In advance of the hearing, the Court advised the parties that it would be seeking submissions respecting Rule 8.16, which states that, unless the Court otherwise permits, no more than one expert may give opinion evidence on any one subject on behalf of a party. The Plaintiffs argued, based on the Rule's location under Part 8 of the Rules, that Rule 8.16 applies only to Trials, and not Applications. The Court agreed; however, it went on to find that the same concerns regarding necessity and limitation of expert evidence continue to apply. Accordingly, it held that where a party wishes to adduce evidence from multiple expert witnesses on a given subject in a Chambers Application, such party must seek leave in advance.

The Court noted that leave had not been sought in this case. However, since failure to obtain leave had not been specifically raised by the Defendant, the Court chose to evaluate permissibility on the basis of relevance, necessity and proper qualifications. Though some witnesses were ultimately rejected, and others accepted, the Court came to the conclusion that an interlocutory Injunction could not be sustained in the circumstances.

## ALLNUTT V CARTER, 2021 ABQB 51

(ROTHWELL J)

Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiffs and the Defendants both appealed a Master's Decision that dismissed both the Plaintiffs' Application for Summary Judgment and the Defendants' Application for Summary Dismissal.

Pursuant to Rule 6.14, a Justice has discretion to allow additional evidence on an Appeal from a Master's Decision, and Justice Rothwell therefore held a de novo hearing and applied the standard of review of correctness.

Pursuant to Rule 7.3(1), Summary Judgment can be granted if: there is no defence to a claim or part of it, there is no merit to a claim or part of it, or if the only real issue is the amount to be awarded. If the burden of showing "no merit" or "no defence" is met, then the other party is required to show that there is a genuine issue requiring a Trial.

Under the *Occupiers Liability Act*, RSA 2000, c O-4, the Defendant occupier company, Hudsons, would be liable in negligence if it was reasonably foreseeable by Hudsons that the Plaintiff, Allnutt, would have been injured by the intoxicated Defendant, Carter. Justice Rothwell found that in the absence of a prior disturbance or inappropriate behaviour, an unprovoked assault was not reasonably foreseeable. As such there was no genuine issue for Trial.

His Lordship found that the assault was not reasonably foreseeable, dismissed the Action and Appeal of the Plaintiffs for their Application for Summary Judgment, and granted the Appeal of Hudsons for their Application for Summary Dismissal.

## GRAHAM CONSTRUCTION AND ENGINEERING INC V ALBERTA INFRASTRUCTURE), 2021 ABQB 184

(INGLIS J)

Rule 6.14 (Appeal from Master's Judgment or Order)

The Appellant, Graham Construction and Engineering Inc., appealed an Order of a Master regarding the priority of which parties were to be distributed funds for unpaid invoices on a construction project pursuant to the *Public Works Act*, RSA 2000, c P-46 (the "*Act*"). The Master had determined that the Appellant had the second priority for payment under the *Act*.

Justice Inglis noted that the standard of review for an Appeal of a Master's Decision is correctness on all issues, in accordance with Rule 6.14. Justice Inglis also noted that an Appeal from a Master's Decision is a *de novo* hearing, and that deference is not owed.

Her Ladyship found "those that have a claim

and follow the notice provisions have a priority claim and there is no subsequent, secondary, priority" contrary to the Master's Decision on that point. As a result, Justice Inglis held that the Master's Decision was an incorrect interpretation of the *Act*, and the Appeal was granted on that basis.

## HIERATH V SHOCK, 2021 ABQB 185

(KUBIK J)

Rule 6.14 (Appeal from Master's Judgment or Order)

This was an Appeal of a Master's Order dismissing the Plaintiff's Application for Summary Judgment.

The Plaintiff and Defendant were former spouses whose matrimonial property included a shared interest in a corporation. Prior to the events giving rise to the Appeal, the Plaintiff and Defendant were parties to a shareholder oppression dispute which was resolved in advance of Trial pursuant to a settlement agreement. The Defendant defaulted under the settlement agreement and the Plaintiff sued, subsequently applying for Summary Judgment before a Master. The Summary Judgment Application was dismissed. The Plaintiff appealed.

In granting the Appeal, Justice Kubik concluded that the Plaintiff's entitlements upon default of the settlement agreement could be readily ascertained from the pleadings, and agreed with the Plaintiff's interpretation of the settlement agreement. Moreover, the Court permitted the partial introduction of additional Affidavit evidence from the Plaintiff, pursuant to Rule 6.14(3). In permitting introduction of the new evidence, the Court noted the evidence's relevance to the issues in dispute, namely the circumstances surrounding the settlement agreement and the alleged defaults. The Court noted that other portions of the Affidavit evidence, which concerned the Plaintiff's subjective intentions or understandings, were inadmissible and were not considered in deciding the Appeal. Specific paragraph numbers were referenced throughout the Judgment to indicate which portions of the Affidavit were being relied upon.

## 0678786 BC LTD V BENNETT JONES LLP, 2021 ABCA 62

(SLATTER, WAKELING AND GRECKOL JJA)

Rules 6.28 (Application of this Division), 6.32 (Notice to Media) and 14.83 (Orders Restricting Access to Appeal Proceedings)

The issue on this Appeal was whether the solicitor-client privilege that was admitted to exist over certain notes prepared by a solicitor had been waived, or was otherwise unenforceable.

The Case Management Judge had granted a Restricted Court Access Order ("RCAO"). In the reasons for granting the RCAO, the parties were referred to by pseudonym. Rule 6.28

contemplates RCAOs and the use of pseudonyms, and the Court of Appeal noted that a RCAO should only be granted when (a) such an Order is necessary to prevent a serious risk to an important interest; and (b) the salutary effects of the RCAO outweigh its deleterious effects, including the effects on the right to free expression. The Court of Appeal determined that solicitor-client privilege was a sufficiently "important interest" to meet this test. The Court of Appeal added that an Order sealing the privileged notes was appropriate, but not an Order sealing the entire Court file, or all of the proceedings.

The Court of Appeal underscored that the media had not been provided notice of the RCAO, as required by Rule 6.32, and added that giving the media notice is an important aspect of the procedure, enabling a proper balancing of competing public interests, and that the RCAO should not have been issued absent media notice.

Lastly, the Court of Appeal noted that, pursuant to Rule 14.83, a RCAO made by the Trial Court continues to apply during the Appeal. After reviewing submissions from one of the parties, the Court of Appeal determined that it was not necessary to continue using pseudonyms.

The Court of Appeal ultimately dismissed the Appeal, stating that an RCAO would be issued, and that the Appellants had not established that privilege over the notes had been waived.

## JESKE V JESKE, 2021 ABQB 58

(NEUFELD J)

Rules 7.1 (Application to Resolve Particular Questions or Issues) and 13.1 (When One Judge May Act in Place of or Replace Another)

The Court heard an Application to vary 1 of 4 Consent Orders which governed the distribution of matrimonial property. Following the Court's endorsement of 3 of these Consent Orders, Mr. Jeske passed away. Ms. Jeske then proceeded to collect her deceased ex-husband's pension pursuant to her survivorship rights. She did not divide these payments with her son Nathan Jeske despite the Order providing Ms. Jeske with the option to do so. Nathan then brought an Application to vary the Consent Order to divide Mr. Jeske's pension between himself and Ms. Jeske.

The issues before the Court were whether it was appropriate to vary the previously granted Consent Order to divide the pension, and whether Justice Neufeld was barred from doing so pursuant to the doctrine of *functus officio.*

In response to the Application to vary the Consent Order, His Lordship noted that Rule 13.1 only allows a Judge to vary the Order of another Judge if that Judge dies, ceases to hold office or if it is inconvenient, improper or impossible for that other Judge to act. Unless there are errors in drawing up the Order, or if the Order does not manifestly express the Court's intent, a final Order may not be reopened by another Judge. Justice Neufeld found that Rule 13.1 could not operate to vary this Order since it granted Ms. Jeske an entitlement to divide the pension but did not create an obligation to do so. Since the redistribution

clause was not an obligation, the Court found this to be a final Order which could not be varied due to the doctrine of *functious officio*.

Despite being a moot point given the Court's determination pursuant to Rule 13.1, Justice Neufeld also addressed Ms. Jeske's cross-Application under Rule 7.1 for an Order declaring that the Court had no authority to vary the Consent Order. His Lordship applied similar reasoning to this argument in that, although the Consent Order permitted Ms. Jeske to seek a subsequent Order amending the distribution of the pension, this was still a final Order which could not be interfered with since there was no obligation to act on this clause. As a result, the Court dismissed the Application.

## PAUL FIRST NATION V K & R 2014 INC, 2021 ABQB 32

(FETH J)

Rule 7.3 (Summary Judgment)

The Plaintiff, Paul First Nation ("Paul") was the beneficial owner of land sold by the Defendant trustee, K & R 2014 Inc. ("K&R") to the co-defendant, Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie Bros"). Paul sued K&R for allegedly selling the land to Ritchie Bros without the knowledge or consent of the Band Council. Ritchie Bros applied for Summary Dismissal on the basis that the claim against it had no merit.

Rule 7.3(1)(b) allows a Defendant to apply for Summary Dismissal if "there is no merit to a claim or part of it." The Court applied the principles from *Hryniak v Mauldin*, 2014 SCC 7, and held that Summary Judgment is appropriate where the moving party establishes the facts in issue on a balance of probabilities and demonstrates that there is no genuine issue requiring a Trial.

Paul's first argument was that the land was considered "reserve land", and any private sale was void under the *Indian Act*, RSC a985, c I-5. Justice Feth found that on the evidence and on a balance of probabilities, the land was not set apart and intended to be reserve land. His Lordship found that he was able to fairly and justly determine that no genuine issue for Trial remained.

Paul's second argument was that Ritchie Bros was liable as a constructive trustee by the doctrines of either "knowing assistance" or "knowing receipt" of trust. Justice Feth found that on the evidence, there was no basis to conclude that Ritchie Bros had actual or constructive knowledge of a breach of trust or was wilfully blind or reckless. His Lordship noted that the evidence disclosed between the parties was already substantial and that each party had been obligated to put its best foot forward. He was satisfied that he was able to fairly and justly determine the matter without a Trial.

As such, the Action as against Ritchie Bros was summarily dismissed.

## WETASKIWIN ANIMAL CLINIC LTD V HARTLEY, 2021 ABQB 144

(FETH J)

Rule 7.3 (Summary Judgment)

The Applicant, Wetaskiwin Animal Clinic, applied for Summary Judgment for veterinary services performed for the Respondent, Ms. Hartley, over a period of several years. The amount owing was determined by a settlement agreement reached in May 2016. The Applicant also applied for Summary Dismissal of Ms. Hartley's Counterclaim which alleged that Wetaskiwin Animal Clinic had provided negligent veterinary services.

The Applicant applied for Summary Judgment and Summary Dismissal pursuant to Rule 7.3. Feth J. noted that Rule 7.3 allows a party to apply for Summary Judgment where "there is no defence to a claim" and a Defendant by Counterclaim may apply for Summary Dismissal if "there is no merit to a claim part of it". The Court reviewed the approach of the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 and noted that Summary Judgment is appropriate where the moving party establishes the facts in issue on a balance of probabilities and demonstrates that no genuine issue requires a Trial as in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49.

Feth J. found that on the facts, there was no genuine issue that required a Trial. Ms. Hartley had two defences against the settlement agreement: that the calculations were inaccurate and that she signed it under duress. There was no evidence showing that the calculations were inaccurate and there was insufficient merit to the duress argument to warrant a Trial.

Ms. Hartley's Counterclaim was for professional negligence. Ms. Hartley did not provide an expert report on the standard of care. The animal clinic's evidence was sufficient to shift the evidentiary burden to Ms. Hartley to establish that there was a genuine issue for Trial. She was unable to meet the burden and the Counterclaim was summarily dismissed.

## GIUSTINI V WORKMAN, 2021 ABCA 65

(BIELBY, ANTONIO AND FEEHAN JJA)

Rule 7.3 (Summary Judgment)

The Appellant Defendants, Tim and Karen Workman, applied to set aside a Summary Judgment that had been awarded to the Respondent Plaintiffs, Jordan and Jordana Giustini, in relation to a real estate purchase agreement. Of note, both parties had made cross-Applications for Summary Judgment. The Court of Appeal canvassed the development of Summary Judgment jurisprudence in Alberta, highlighting the decision in *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.*, 2019 ABCA 49, prior to dismissing the Appeal.

The Court emphasized that before the Master, the parties were in agreement that Summary Judgment was an appropriate remedy. Before the Court of Appeal, the Applicants submitted that the evidentiary record of the Respondents

was insufficient to fairly decide the matter against the Applicants. The Court did not accept this argument, and instead explained that because the parties had agreed before the Master and Chambers Judge that Summary Judgment was appropriate on the evidence, it was not open to the Applicants to now submit that the evidentiary record was insufficient when they received an unfavourable result.

Ultimately, the Court found that there was no error in the Chambers Judge's Decision that this was an appropriate case for Summary Judgment, and that the evidentiary record enabled him to make a finding on a balance of probabilities.

## JOHNSRUD V FADER, 2021 ABQB 88

(ROOKE ACJ)

Rule 9.4 (Signing Judgments and Orders)

The Applicant had submitted a package of documents containing 10 purported writs of *habeas corpus* arising from his incarceration and denial of bail. His Lordship had reviewed these Applications in a previous hearing, resulting in a determination that they constituted Apparently Vexatious Applications or Proceedings ("AVAP") which required review pursuant to Civil Practice Note 7 ("CPN7").

The Applicant failed to provide written submissions within 2 weeks to show cause why the Applications should not be struck, as required by CPN7. Thus, His Lordship proceeded to strike the Applications pursuant to paragraph 3(c) of CPN7 as being hopeless and abusive. The Court also noted that abuse of *habeas corpus* is a serious form of litigation misconduct meriting a Costs Award against the Applicant.

The Applicant's approval of the form and content of the Order was dispensed with as per Rule 9.4(2)(c).

## JRB'S WELDING SERVICES INC V FAMILY DIVISION, 2021 ABQB 52

(NIELSEN ACJ)

Rule 9.13 (Re-opening Case)

A document entitled "Demands Application" was submitted to Justice Nielsen as the Justice conducting a Civil Practice Note 7 ("CPN7") process on a matter that was ultimately struck out as an abuse of the Court process. The Demands Application was a 20-page document seeking, amongst other things, $75 million in damages from "corrupt, terrorizing, tyranny, communistic, illegal, harassing and Discrimination tort-feasors". The Applicants also disagreed with the results of the CPN7 process.

The Applicants relied on Rule 9.13, which allows a Court to re-open a Decision in limited circumstances, including before an Order is entered. Associate Chief Justice Nielsen stated that the

Applicants were too late to rely on Rule 9.13 as the Order had already been entered. His Lordship also noted that the Applicants failed to provide a "good reason" for the Court to revisit the matter, as required by Rule 9.13. The Applicants did not provide Affidavit evidence to support the Application, nor did they identify an error or omission in the CPN7 Decision.

Therefore, Associate Chief Justice Nielsen dismissed the Demands Application and noted that the self-represented Applicants could Appeal the Decision with the Alberta Court of Appeal.

## BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2021 ABQB 135

(FAGNAN J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The parties provided written submissions on Costs following Justice Fagnan's dismissal of the Appellant's Appeal of a Review Officer's decision. The Appellant had previously entered into a contingency fee agreement (the "CFA") with the Respondent law firm. The Review Officer determined that the CFA was deficient but found that the Respondent's time entries were reasonable. The Respondent had beat prior Formal Offers made to the Appellant when the Appeal of the Review Officer's decision was dismissed.

Justice Fagnan reviewed the Rules regarding Costs and noted that the successful party is generally entitled to Costs against the unsuccessful party according to Rule 10.29 and Rule 10.31, which state that the Court has wide discretion to determine an appropriate Costs Award. Rule 10.33 sets out factors that the Court may consider in making a Costs Award, including any settlement offers per Rule 10.33(2)(h). Justice Fagnan noted that the value of the claim was on the low end of Column 2 of Schedule C.

After considering the written submissions and the circumstances, including that the deficient CFA required the Review Officer to have to determine reasonable fees pursuant to Rule 10.2, Justice Fagnan granted the Respondent double Column 2 Costs for the Appeal hearing. Justice Fagnan granted 1.5 times Column 2 Costs for the written arguments on Costs because the parties had mixed success.

## SUNSHINE VILLAGE CORPORATION V BOEHNISCH, 2021 ABQB 63

(DEVLIN J)

Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

This Decision determined the appropriate Costs Award after the underlying litigation had concluded. The Plaintiff lodged a discrimination complaint with the Alberta Human Rights Commission (the "Commission"). The parties were unable to agree as to Costs after Justice Devlin dismissed the Defendant's Appeal of a decision of the Alberta Human Rights Tribunal (the "Tribunal").

The Plaintiff sought solicitor-client Costs alleging inexcusable conduct on the part of the Defendant before the Tribunal heard the matter. The Plaintiff was a ski patroller employed by the Defendant and was not rehired. The Defendant initially claimed that the Plaintiff was unfit for the position but later asserted that it gave the Plaintiff the chance to prove that she was fit. The Defendant's initial position led the Acting Director of the Commission to dismiss the Action and the Plaintiff requested a review under section 26 of the *Alberta Human Rights Act*, RSA 200, c A-25.5 (the "*HRTA*"). The claim was sent to the Tribunal for review, but the Plaintiff had to pay for this review according to section 29 of the *HRTA*. The Tribunal ultimately found in favour of the Plaintiff.

Although the value of the claim placed it in Column 1 of Schedule C, the Court awarded Column 3 Costs. As the successful party, the Plaintiff was entitled to Costs per Rule 10.29(1). The Court noted that Costs decisions are highly discretionary, subject to the principled application of the facts set out in Rule 10.33(1) and (2). In awarding higher Costs, the Court noted the complexity of the litigation and the Defendant's meritless Appeal. The Court also noted that the Defendant's conduct resulted in the Plaintiff having to carry the costs of litigation personally rather than being represented by the Commission.

## BATTAGLINI V BATTAGLINI, 2021 ABQB 89

(FETH J)

Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff was granted interim spousal support following a hearing in Special Chambers. Following that Decision, the parties were unable to agree on the appropriate Costs of the Application. The Plaintiff sought enhanced Costs and the Defendant argued that the parties should bear their own Costs.

The Court noted that the successful party is entitled to Costs per Rule 10.29, subject to

the Court's general discretion. The factors the Court considers when making a Costs award are set out in Rule 10.33(1). The Court noted that the parties enjoyed mixed success on the Application, the Plaintiff was awarded less spousal support than he claimed, and the Defendant had engaged in some misconduct. The Court also noted that Plaintiff's *Calderbank* offer did not explain whether the Defendant would be fully released upon acceptance.

The Court determined that each party should bear their own Costs except for a Costs Award to address the Defendant's misconduct. The parties had agreed to a Consent Order directing that monthly salary payments be paid to the Plaintiff from a corporation the Defendant controlled. Despite the Consent Order, the Defendant suspended salary payments to the Plaintiff. The Court awarded some Costs against the Defendant for forcing the Plaintiff to return to Court to deal with the consequences of the Defendant disobeying the Consent Order.

## MACARONIES HAIR CLUB AND LASER CENTRE INC V B OF A CANADA BANK, 2021 ABQB 106

(ROOKE ACJ)

Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.32 (Costs in Class Proceeding)

Two Defendants in the underlying class action proceeding sought an Order granting Costs at five times the rate set out in Schedule 5 Column C of the Rules following a previous ruling approving the settlement agreement entered into by the parties. The Respondents were two class members who had unsuccessfully raised objections to the settlement agreement based on concerns that the overly broad release provisions therein were prejudicial to certain members of the multijurisdictional class proceeding. However, Courts in five different provinces had approved the settlement agreement by the time this Application was heard.

The Respondents raised several arguments in opposing the imposition of Costs at such an elevated rate. The Respondents argued that since approval of the settlement agreement was required by section 35 of the Class Proceedings Act, SA 2003, c C-16.5 (the "*CPA*"), the default principle that Costs should be awarded to the successful party should not apply. Second, the Respondents posited that the Applicants' inordinate delay in bringing the Application precluded such an inflation of the Column 5 Costs. Finally, the Respondents argued that the issues raised concerned access to justice and were in the public interest, and therefore the quantum of Costs sought were unreasonable.

Ultimately, His Lordship was not satisfied that the requirement for approval of the settlement agreement in section 35 of the *CPA* trumped Rule 10.29, which supports the principle that a successful party is presumptively entitled to Costs. In rejecting the delay argument, the Court found that consideration for the nature of multijurisdictional proceedings must be made. In that vein, not only did the multijurisdictional nature of the Action justify the Applicants' delay, but the Court found that such delay was not caused by the Applicants, and did not prejudice the Respondents. His Lordship also found that the broad nature of the release

terms in the settlement did not concern the public interest to such a degree that Rule 10.29 did not apply.

The Court addressed Rule 10.32(3)(b) to consider the quantum of Costs sought by the Applicants. In doing so, Associate Chief Justice Rooke noted that the Application was not overly complex, which did not support an increase of the tariff rate. However, the amount of the $45 million dollar claim did significantly exceed the amount provided for in Column 5, which militated in favour of increased Costs. Likewise, the conduct of the Respondents in raising Appeals and objections to the Costs amount in multiple Provinces, as well as seeking leave to Appeal to the Supreme Court caused significant delay, and warranted an increase of the Column 5 rate. Accordingly, His Lordship balanced these factors and granted Costs at 3 times the Column 5 rate.

## MCALLISTER V CALGARY (CITY), 2021 ABCA 25

(O'FERRALL, HUGHES AND ANTONIO JJA)

Rules 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 Appellant, who was successful at Trial, appealed a Costs Award on the basis that it did not provide sufficient indemnification. The Costs Award being appealed was made pursuant to Rule 10.31(1)(a) and was not an exceptional or discretionary Costs Award pursuant to Rule 10.31(1)(b). The Appellant argued that the Costs Award only represented 17% of the actual legal fees that were incurred.

The Court of Appeal acknowledged that Trial Courts have wide discretion to award Costs under Rules 10.29(1), 10.30(1), 10.31, and 10.33. However, this discretion is subject to the need to act judicially, and Appellate Courts should intervene when there is an unreasonable exercise of that discretion.

The Court of Appeal found that the Trial Judge misperceived Schedule C as the default rule that applies absent misconduct or complexity. The Court of Appeal held that the Rules do not support such a characterization, and that Schedule C is merely one of several tools that may be used to arrive at a reasonable and proper Costs Award pursuant to Rule 10.31(1)(a).

The Court of Appeal observed that, in Alberta, the weight of authority is that Costs should generally represent partial indemnification of the successful party at a level of roughly 40–50% of actual legal fees incurred. The Court found no reason to depart from this general guideline. The Court generally approved of the use of Schedule C, but emphasized that Trial Judges must consider whether a bare application of Schedule C will yield an appropriate level of indemnification when making a Costs Award.

Given the foregoing, the Appeal was granted, and the matter of Costs was remitted to the Trial Judge.

## KARNALYTE RESOURCES INC V PHINNEY, 2021 ABQB 26

(ROMAINE J)

Rule 10.33 (Court Considerations in Making Costs Award)

Shareholders successfully defended an Application alleging that they had improperly solicited proxies. Two of the shareholders sought Costs on a solicitor-client basis instead of based on Schedule C. The Court considered the factors set out in Rule 10.33 for the awarding of Costs.

Justice Romaine cited the case of *Secure 2013 Group Inc. v Tiger Calcium*, 2018 ABCA 110, stating that solicitor-client Costs are generally "only awarded in rare and exceptional circumstances and may be available if misconduct occurs in the course of litigation". The shareholders alleged that litigation was conducted as a "weapon" to ensure that they were put to as much expense and hardship as possible in a situation where the allegations were personally and professionally damaging.

Following a detailed review of available evidence and the factors set out in Rule 10.33, Justice Romaine found that the company engaged in misconduct sufficient to warrant an award of Costs on a solicitor-client basis.

## BAILEY V BAILEY, 2021 ABQB 74

(RICHARDSON J)

Rule 10.33 (Court Considerations in Making Costs Award)

Following a half-day Special Chambers Application in which both parties were partially successful, Justice Richardson issued this Decision on Costs. Justice Richardson identified the applicable factors from Rule 10.33, such as the degree of success of each party, the amount claimed and recovered, the importance of the issues, complexity of the Action, conduct of a party to shorten the Action, and any other relevant matter. In His Lordship's review of the matter, each party had some success with respect to the parenting Order and child support Order.

With respect to the degree of success by each party, the father was successful in opposing the claim for the daughter's graduation dress, but unsuccessful in proving undue hardship or overpayments, and unsuccessful in his opposition of math tutor costs under section 7 and post-secondary school costs under section 3. The father also caused some delay by initially filing improper Affidavits, changing counsel, and filing multiple new Affidavits for the Application, but agreed in advance to pay some section 7 expenses. Generally, there was mixed results with permitted hockey expenses and permitted post-secondary expenses. The mother was successful in obtaining full section 3 child support for her daughter and successful in her claim for section 7 reimbursements for martial art expenses for both children.

Justice Richardson ultimately found that due to the mixed success, each party should bear their own Costs.

## HAMM V CANADA (ATTORNEY GENERAL), 2021 ABQB 159

(BERCOV J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following the Defendant, Canada, successfully appealing a Master's Decision dismissing Canada's Application for a stay of proceedings. Canada, as the successful party, sought Costs of $5,600.18. The Plaintiffs argued that there were special circumstances justifying a departure from the general rule that a successful party to an Application is entitled to Costs.

The Court considered the decision in *Elder Advocates of Alberta Society v Alberta Health Services*, 2021 ABCA 67, which noted that exceptions to the general rule can be made in appropriate cases. Rule 10.33 provides guidance on the factors to consider.

Bercov J. found that Canada's conduct did not justify a departure from the general rule on Costs. Canada did not engage in misconduct, and Canada's delay in bringing the stay Application did not impact the Costs of the stay Application or the Appeal. However, Bercov J. noted that the Court may consider other factors under Rule 10.33(1)(g), such as the novelty of the issue. Canada's stay Application was novel enough to justify a departure from the general rule on Costs. There is a lack of jurisprudence in Alberta and throughout Canada regarding the appropriate test and factors to consider when determining whether to stay an individual Action when there are certified class actions involving the same subject matter of the individual Action. Bercov J. determined that there was merit to both parties' positions and held that each party should bear their own Costs.

## KOSTIC V ALGER, 2021 ABCA 31

(SLATTER, GRECKOL AND HUGHES JJA)

Rules 10.53 (Punishment for Civil Contempt of Court), 14.45 (Application to Admit New Evidence) and 14.70 (No New Evidence Without Order)

The Appellant applied to appeal a Case Management Judge's Decision holding her in Contempt of Court. The Case Management Judge had held the Appellant in Contempt of Court for failing to pay a Costs Award. Part of the sanction was to dismiss an Application brought by the Appellant to add certain Respondents (the "Grant Thornton Respondents") to the main Action.

The Appellant argued that this was not a remedy available to the Case Management Judge. The Case Management Judge had previously granted a Fiat allowing the Appellant to make an Application to add the Grant Thornton Respondents. The Appellant argued that the Case Management Judge was *functus officio* after granting the Fiat.

The Court of Appeal stated that the Case Management Judge is not *functus officio* once they grant a Fiat, and that it was open to the Case Management Judge to revisit or withdraw the Fiat. Additionally, Rule 10.53(1)(d) allowed the Case Management Judge to strike out pleadings as a sanction for Contempt of Court. The granting of the Fiat did not immunize the Appellant from that remedy.

The Court considered a side issue as the Appellant had filed an amended Factum that included fresh evidence. However, the Appellant did not file an Application to adduce fresh evidence pursuant to Rules 14.45 and 14.70, and accordingly, the Court did not consider any of the fresh evidence.

## SF V NG, 2021 ABQB 210

(HOLLINS J)

Rule 12.36 (Advance Payment of Costs)

The Applicant mother applied under Rule 12.36 for advance payment of Costs from the father to fund her continued legal representation in their family proceedings. The parties were separated in 2016 and both children lived with the father. The mother stated that she intended to contest the parenting arrangement and division of matrimonial property, and needed advance Costs to be ready for Trial.

The Court considered the three-part test for advance Costs set out in *VMH v JH,* 2020 ABCA 389: (a) is the Applicant impecunious to the point where they would be unable to proceed further without an advance award of Costs?; (b) does the Applicant have a *prima facie* case for the relief sought?; and (c) is it the type of case that warrants an award of Costs?

In considering the factors under the test, the Court noted that neither party had provided comprehensive financial information nor elected to cross-examine the other on their respective Affidavits. The "playing field" was not so unlevel as to warrant the father paying the mother's Costs when the father's financial constraints were related to the couple's joint debts, and the mother did not pay any child support.

The Court noted that the burden for a *prima facie* case is low. The mother wanted to apply again for visitation with the children, however, she did not point to any evidence that there was a change in circumstances that would allow the Court to revisit the numerous refusals of visitation in the recent past. The parties did not agree on whether there was matrimonial property that would warrant a Trial, with the father stating that all that was left was the matrimonial debt. In this case, there was no compelling evidence that a significant change in parenting was imminent and the Court noted that parties do not generally proceed to Trial and spend money on lawyers, only to divide debt.

The Court also noted that the test involves consideration of the stage that the litigation

is at. The mother sought Costs to prepare for Trial, but the matter did not seem to be on the verge of readiness for Trial. The parties did not agree on whether Questioning was complete. Hollins J. noted that an Application for advance Costs that is unsuccessful at one stage may not necessarily be unsuccessful at a later stage of the proceedings. In the current circumstances, the mother may have been required to navigate the next steps of the litigation without representation, but Hollins J. did not see this as disadvantageous to her. Hollins J. held that it may be appropriate to meet with Resolution Counsel and attempt some form of alternate dispute resolution, and if a binding mediation/arbitration was required, then the mother could resubmit a clearer funding request.

The mother's Application for advance payment of Costs by the father was dismissed.

## BOSKO V BOSKO, 2021 ABCA 34

(SCHUTZ JA)

Rules 12.36 (Advance Payment of Costs) and 14.48 (Stay Pending Appeal)

This was Application made in an Appeal of a family law Judgment. The Appellant husband applied pursuant to Rule 14.48 for a stay of the Trial Judgment pending conclusion of the Appeal. The Respondent wife cross-applied for advance Costs to fund her participation in the Appeal. At Trial, the wife was awarded exclusive possession of the marital home.

In considering the husband's Application, the Court noted that the test for granting a stay pending Appeal requires the Applicant to show that (i) there is a serious question to be tried, such that the Appeal is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay. Although the Court agreed that the Appeal disclosed a serious issue to be tried and was neither frivolous nor vexatious, it held that the husband had not adduced sufficient evidence to show that he would suffer irreparable harm if the stay were not granted, and thus failed at the second prong of the test. The Court clarified that "harm compensable in money rarely qualifies as irreparable harm", and as such, the husband's concerns regarding the wife's capacity to upkeep the home and his costs of securing alternative housing did not suffice. The Court further held that the husband's concerns regarding potential delay of the proceedings could be addressed by the imposition of a Court-approved timeline, which was put forward and subsequently approved.

Regarding the wife's cross-Application for advance Costs, the Court held that a modest advance Costs Award was appropriate in the circumstances, having regard to the merits of the Applicant's case and the Applicant's need for the funds to finance the litigation. The Court awarded advance Costs in the amount of $4,000.

## MEZO V WATTS, 2021 ABCA 76

(GRECKOL JA)

Rule 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court)

The Applicant had previously sought to move cities with the child of the Applicant and the Respondent. The Respondent was granted primary parenting by the Provincial Court, thus precluding the Applicant's desired move with the child. The Applicant appealed this Decision to the Court of Queen's Bench. That Appeal was denied. The Applicant then applied for permission for a further Appeal to the Alberta Court of Appeal, pursuant to Rule 12.71.

Justice Greckol explained that to obtain permission for such an Appeal pursuant to Rule 12.71, the Applicant must demonstrate: (1) that there is an important question of law or precedent; (2) that there is a reasonable chance of success on appeal; and (3) that the delay involved will not unduly hinder the progress of the Action or cause undue prejudice.

With respect to the first prong of this test, Her Ladyship ruled that the questions raised in this Application regarding the Trial Judge's treatment of the leading cases on mobility of a parent, and the Appeal Judge's failure to correct any potentially erroneous analysis were important questions of law or precedent. Justice Greckol held that the second prong was also met: the Applicant's proposed Appeal had a reasonable chance of success.

While Justice Greckol acknowledged that the Appeal would cause delay, Her Ladyship also recognized that the mobility issue was central to the overarching divorce proceedings. As such, any delay caused by the Appeal would not be undue.

Justice Greckol therefore granted permission to Appeal pursuant to Rule 12.71.

## LAUDER V THE OWNERS: CONDOMINIUM PLAN NO 932 1565, 2021 ABQB 145

(MASTER ROBERTSON)

Rule 13.18 (Types of Affidavit)

The Applicant, Ms. Lauder, filed an Originating Application for Judicial Review of the Respondent condominium corporation's conduct with respect to leaking windows.

In response to the Originating Application, the Respondent filed an Affidavit from the current president of the Board of Directors for the condominium corporation ("Ms. Wise"). One additional Affidavit was provided by another member of the Board which explained the timeline of events.

At some point in Ms. Wise's Affidavit, the details of an incident between Ms. Lauder and a contractor were described. Master Robertson found that such details were contrary to Rule 13.18(1) and (2), as those details are "hearsay evidence, without clear indications of the actual source of the allegations." As noted by Master

Robertson, these Rules require the Affiant to both identify the source of their information and state that they believe that information to be true. Ms. Wise's Affidavits failed to provide the requisite details. As a result, Master Robertson would not let the Board of Directors rely on the hearsay evidence for the truth of its assertions. The Board of Directors was only permitted to rely upon the hearsay evidence to argue that it had acted reasonably with Ms. Lauder.

Ultimately, on a full review of the merits, Master Robertson ordered the Board of Directors to seek repairs and awarded Ms. Lauder $5,000 for general damages and Costs, as to be determined between the parties.

## BELLATRIX EXPLORATION LTD (RE), 2021 ABCA 85

(WATSON JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant sought leave to appeal a Decision of a Chambers Justice rejecting various submissions of the Applicant concerning the disposition of proceedings under the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, (the "*CCAA*"). The Application was mostly governed by section 13 of the *CCAA*, however the Court noted that Rule 14.5 also applied.

Pursuant to Rule 14.5(1)(f), a litigant may not appeal to the Court of Appeal from any Decision where "permission" to appeal is required by an enactment, in this case, by the *CCAA*.

Justice Watson noted that there is no material difference between "leave" to appeal, as stated in the *CCAA*, and "permission" to appeal as provided by the Rules. The Court added that "permission" is a modern expression recently adopted in the Rules as the nomenclature for the gatekeeping functions to be performed by single Judges of the Court of Appeal.

The Court conducted an analysis of various provisions of the *CCAA* and relevant case law, and dismissed the Application for leave to appeal.

## BIG PLANS FOR LITTLE KIDS LTD V SOUSTER, 2021 ABCA 73

(ROWBOTHAM JA)

Rule 14.8 (Filing a Notice of Appeal)

The Applicant lawyer and law firm applied to appeal an Order outside the one-month period set out in Rule 14.8. The Respondent was previously granted an Order permitting it to access certain business records in the Applicant's possession (the "Preservation Order"). The records were put into the custody of an Independent Supervising Solicitor (the "ISS"). The ISS was granted a further Order on September 4, 2020 (the "Inspection Order"). The Applicant applied to Appeal the Inspection Order on December 4, 2020.

Rowbotham J.A. noted Rule 14.8(2)(a)(iii) states that an Applicant must file a Notice of Appeal within one month after the date of the Decision, and noted that the following factors guide the Court's discretion to extend the time to appeal: (12) a *bona fide* intention to appeal while the right to appeal existed; (2) an explanation for the failure to appeal in time that serves to excuse or justify the lateness; (3) an absence of serious prejudice such that it would not be unjust to disturb the judgment under appeal; (4) the Applicants must not have taken the benefits of the Judgment under appeal; and (5) the Appeal would have a reasonable chance of success if allowed to proceed.

After reviewing each factor, Rowbotham J.A. denied the Application to extend the time to appeal. The Court was satisfied that the first factor was met based on correspondence from the Applicant lawyer to his counsel requesting the Inspection Order be appealed.

The Court determined that the second factor was not met. The Applicants argued that the date of Decision was November 4, 2020, which was the date the final Inspection Order was served on the Applicant. The Respondent argued that the date of the Decision was when the Decision was issued on September 4, 2020. The Court agreed with the Respondent, noting that Rule 14.8(1) starts the clock when the Order is made, not when served. As a result, the Court was not satisfied that there was a valid explanation for the lateness.

The Court also found that the third factor was not met. The prejudice the Respondent asserted was the cost associated with the ISS having already acted under the Inspection Order. The ISS had reviewed and categorized thousands of pages of records. The Court noted that if this were the only factor that negated the extension of time, it would not be sufficient to deny the Application. Neither party disputed that the fourth factor was met.

Finally, the Court was not satisfied that the Applicant's Appeal had a reasonable chance of success. The Court noted that the Applicants' main concern appeared to be with the Preservation Order, not the Inspection Order. As such, the Applicants' other Application to extend the time to set aside the Preservation Order was a more appropriate forum for the dispute.

## FEENEY V ALBERTA, 2021 ABCA 71

(ROWBOTHAM JA)

Rules 14.57 (Adding, Removing or Substituting Parties to an Appeal) and 14.58 (Intervenor Status on Appeal)

The Applicant applied for a number of Orders in relation to two ongoing Appeals. Amongst other things, the Applicant applied for an Order removing a particular Respondent from the style of cause, and an Order allowing "any party to partake in the appeals, in any way, shape or form".

With respect to the Order being sought regarding the removal of a party to the Appeal, Justice Rowbotham observed that there was no opposition to this request. Her Ladyship noted that Rule 14.57 permits a party to be removed as a party to an Appeal. Justice Rowbotham therefore directed that the Respondent's name be removed from the style of cause and any further documents in the Appeal.

With respect to the Applicant's request that any party be allowed to take part in the Appeals,

Rowbotham J.A. stated that, generally, parties to an Appeal are the same parties as in the Court below. Any party wishing to intervene must apply to do so pursuant to Rule 14.58 and satisfy the common law tests for intervention. No such Application existed in the matter at hand, so Justice Rowbotham dismissed this request.

## OSLANSKI V OSLANSKI, 2021 ABCA 68

(WAKELING JA)

Rule 14.88 (Cost Awards)

Justice Wakeling had previously denied the Applicant's Application for a stay of two previous Orders and the Respondent sought enhanced Costs under Rule 14.88.

The Applicant and Respondent were previously married and had a daughter (the "Child"). The Respondent was granted an Order allowing her to relocate to Texas with the Child (the "Relocation Order"). Near the end of the Applicant's summer parenting time, the Applicant informed the Respondent that he would not return the Child to the Respondent. The Respondent was granted an Order enforcing the terms of the Relocation Order (the "Enforcement Order"). Justice Wakeling had previously dismissed the Applicant's Application to set aside the Relocation Order and the Enforcement Order but did not address Costs.

Justice Wakeling first considered whether the Respondent was out of time to seek enhanced Costs under Rule 14.88. While Rule 14.88 does not specify a time limit to request direction on Costs, the Rules of Court Committee's information note provides a two-month deadline. Justice Wakeling determined that the information note had no legal effect but noted the opinion of the Rules of Court Committee should be given considerable weight. Justice Wakeling agreed with the two-month window except where the adverse party agrees to an extension or the applying party has a compelling reason for missing the deadline. While the Respondent did not have a compelling reason for missing the deadline, the Applicant agreed to submit written submissions more than two months after the underlying Decision was issued.

As a result, Justice Wakeling considered the Respondent's request for enhanced Costs. The Court awarded enhanced Costs because the Applicant had ignored the Relocation Order when he refused to return the Child to the Respondent in Texas. Justice Wakeling noted that the Applicant should have applied for an Order relieving him of his obligation to send the Child to Texas. However, the Court limited its award of enhanced Costs to the issues on Appeal. The Respondent did not appeal the Decision on Costs in the Enforcement Order. As such, the Court determined that it had no jurisdiction to award Costs to the Respondent for her successful Application for the Enforcement Order.