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RULES

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

3.27	**BRISTOL-MYERS SQUIBB CANADA CO V GRAND PRAIRIE (CITY),** 2023 ABCA 294
3.61	**GAY V ALBERTA (WORKERS' COMPENSATION BOARD),** 2023 ABCA 351
3.62	**GRENON V CANADA REVENUE AGENCY,** 2023 ABKB 707
3.64	**GAY V ALBERTA (WORKERS' COMPENSATION BOARD),** 2023 ABCA 351
3.65	**GRENON V CANADA REVENUE AGENCY,** 2023 ABKB 707
3.68	**WORBECK V GEF SENIORS HOUSING,** 2023 ABKB 592
	WOODBRIDGE HOMES INC V PALMER, 2023 ABKB 649
	H2 CANMORE APARTMENTS LP V CORMODE & DICKSON CONSTRUCTION EDMONTON LTD, 2023 ABKB 659
	CO-SOLVE SOLUTIONS INC V PURDY, 2023 ABCA 324
	GAY V ALBERTA (WORKERS' COMPENSATION BOARD), 2023 ABCA 351
4.14	**AIG INSURANCE CO OF CANADA V KOSTIC,** 2023 ABKB 702
4.22	**CARBONE V DAWES,** 2023 ABKB 729
	SHTAIF V MIDLAND RESOURCES HOLDING LIMITED, 2023 ABCA 319
4.31	**LYMER V JONSSON,** 2023 ABKB 565
	DANIS-SIM V SIM, 2023 ABKB 637
	AIG INSURANCE CO OF CANADA V KOSTIC, 2023 ABKB 702
	WOODBRIDGE HOMES INC V RANDLE, 2023 ABKB 731
	LONCIKOVA V GOLDSTEIN, 2023 ABCA 358
	LYMER V JONSSON, 2023 ABCA 367
4.33	**DANIS-SIM V SIM,** 2023 ABKB 637
	AIG INSURANCE CO OF CANADA V KOSTIC, 2023 ABKB 702
	LONCIKOVA V GOLDSTEIN, 2023 ABCA 358
5.1	**CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA,** 2023 ABKB 689
5.2	**CARBONE V DAWES,** 2023 ABKB 729
5.7	**STARRATT V CHANDRAN,** 2023 ABKB 609

5.7 (cont)	**CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA,** 2023 ABKB 689
5.8	**STARRATT V CHANDRAN,** 2023 ABKB 609
5.11	**STARRATT V CHANDRAN,** 2023 ABKB 609
5.13	**LC V ALBERTA (CHILD WELFARE),** 2023 ABKB 586
	CENTER STREET V LLOYD'S UNDERWRITERS, 2023 ABKB 709
	OFFICE OF THE CHILD AND YOUTH ADVOCATE V LC, 2023 ABCA 365
	ELHERT V SAILER, 2023 ABCA 371
5.17	**LC V ALBERTA (CHILD WELFARE),** 2023 ABKB 586
	OFFICE OF THE CHILD AND YOUTH ADVOCATE V LC, 2023 ABCA 365
5.18	**LC V ALBERTA (CHILD WELFARE),** 2023 ABKB 586
5.19	**LC V ALBERTA (CHILD WELFARE),** 2023 ABKB 586
5.25	**CARBONE V DAWES,** 2023 ABKB 729
5.26	**MCDONALD V SPROULE MANAGEMENT GP LIMITED,** 2023 ABKB 587
5.30	**MCDONALD V SPROULE MANAGEMENT GP LIMITED,** 2023 ABKB 587
5.31	**STONHAM V RECYCLING WORX INC,** 2023 ABKB 629
	FEG V MJV, 2023 ABKB 726
	CARBONE V DAWES, 2023 ABKB 729
5.32	**MCDONALD V SPROULE MANAGEMENT GP LIMITED,** 2023 ABKB 587
5.33	**CARBONE V DAWES,** 2023 ABKB 729
5.34	**WIRRING V LAW SOCIETY OF ALBERTA,** 2023 ABKB 580
5.35	**ALBERTA DRYWALL & STUCCO SUPPLY (CALGARY) INC V ALBERTA DRYWALL & STUCCO SUPPLY INC,** 2023 ABKB 696
5.36	**SERINUS ENERGY PLC V SYSGEN SOLUTIONS GROUP LTD,** 2023 ABKB 625
5.37	**ALBERTA DRYWALL & STUCCO SUPPLY (CALGARY) INC V ALBERTA DRYWALL & STUCCO SUPPLY INC,** 2023 ABKB 696

6.7	**MCDONALD V SPROULE MANAGEMENT GP LIMITED,** 2023 ABKB 587
	SERINUS ENERGY PLC V SYSGEN SOLUTIONS GROUP LTD, 2023 ABKB 625
	STONHAM V RECYCLING WORX INC, 2023 ABKB 629
	FEG V MJV, 2023 ABKB 726
	CARBONE V DAWES, 2023 ABKB 729
6.11	**WIRRING V LAW SOCIETY OF ALBERTA,** 2023 ABKB 580
	MCDONALD V SPROULE MANAGEMENT GP LIMITED, 2023 ABKB 587
	CARBONE V DAWES, 2023 ABKB 729
6.14	**CARBONE V DAWES,** 2023 ABKB 729
6.20	**MCDONALD V SPROULE MANAGEMENT GP LIMITED,** 2023 ABKB 587
6.29	**CARBONE V DAWES,** 2023 ABKB 729
6.44	**STARRATT V CHANDRAN,** 2023 ABKB 609
6.45	**STARRATT V CHANDRAN,** 2023 ABKB 609
6.46	**STARRATT V CHANDRAN,** 2023 ABKB 609
	ROMSPEN MORTGAGE LTD PARTNERSHIP V 3443 ZEN GARDEN LTD PARTNERSHIP, 2023 ABKB 730
7.3	**JOHNSON V VARSITY CHRYSLER DODGE JEEP RAM LTD,** 2023 ABKB 544
	KIBRIA V KAY-PFAU, 2023 ABKB 574
	MCDONALD V SPROULE MANAGEMENT GP LIMITED, 2023 ABKB 587
	WOODBRIDGE HOMES INC V PALMER, 2023 ABKB 649
	BROKOP V 1378882 ALBERTA LTD, 2023 ABKB 650
	DOERFLER V FITZPATRICK, 2023 ABKB 651
	ROMSPEN MORTGAGE LTD PARTNERSHIP V 3443 ZEN GARDEN LTD PARTNERSHIP, 2023 ABKB 730
	CALGARY CO-OP V FEDERATED CO-OP, 2023 ABKB 735
7.5	**DENHOED V GRIFFITHS,** 2023 ABKB 557
7.11	**STONHAM V RECYCLING WORX INC,** 2023 ABKB 629
8.12	**CARBONE V DAWES,** 2023 ABKB 729

9.4	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
9.14	**STAR ENERGY CANADA INC V BUILDERS ENERGY SERVICES LTD,** 2023 ABKB 641
9.15	**BROKOP V 1378882 ALBERTA LTD,** 2023 ABKB 650
	STRAIGHTVAC SERVICES LTD V SUNSHINE OILSANDS LTD, 2023 ABKB 660
	LAYEGHPOUR V RASHIDI, 2023 ABKB 674
	BRISTOL-MYERS SQUIBB CANADA CO V GRAND PRAIRIE (CITY), 2023 ABCA 294
	KUMAR V KUMARI, 2023 ABCA 306
9.16	**L'ECUYER V STITECH INDUSTRIES INC,** 2023 ABCA 344
10.2	**REMINGTON DEVELOPMENT CORPORATION V CANADIAN PACIFIC RAILWAY COMPANY,** 2023 ABKB 591
10.29	**ROCK RIVER DEVELOPMENTS LTD V VILLAGE OF NAMPA,** 2023 ABKB 529
	REMINGTON DEVELOPMENT CORPORATION V CANADIAN PACIFIC RAILWAY COMPANY, 2023 ABKB 591
	MERCHANT LAW GROUP LLP V BANK OF MONTREAL, 2023 ABKB 597
	STARRATT V CHANDRAN, 2023 ABKB 609
	GRAHAM ESTATE (RE), 2023 ABKB 621
10.30	**STAR ENERGY CANADA INC V BUILDERS ENERGY SERVICES LTD,** 2023 ABKB 641
10.31	**REMINGTON DEVELOPMENT CORPORATION V CANADIAN PACIFIC RAILWAY COMPANY,** 2023 ABKB 591
	MERCHANT LAW GROUP LLP V BANK OF MONTREAL, 2023 ABKB 597
	UHL V OSTERGAARD, 2023 ABKB 614
10.33	**ROCK RIVER DEVELOPMENTS LTD V VILLAGE OF NAMPA,** 2023 ABKB 529
	TEMPO ALBERTA ELECTRICAL CONTRACTORS CO LTD V MAN-SHIELD CONSTRUCTION INC, 2023 ABKB 575
	REMINGTON DEVELOPMENT CORPORATION V CANADIAN PACIFIC RAILWAY COMPANY, 2023 ABKB 591

10.33 (cont)	**MERCHANT LAW GROUP LLP V BANK OF MONTREAL,** 2023 ABKB 597
	GRAHAM ESTATE (RE), 2023 ABKB 621
	SERINUS ENERGY PLC V SYSGEN SOLUTIONS GROUP LTD, 2023 ABKB 625
	STONHAM V RECYCLING WORX INC, 2023 ABKB 629
10.34	**BEATTIE V 1382549 ALBERTA LTD,** 2023 ABKB 600
10.39	**HANSEN V HANSEN,** 2023 ABCA 335
10.49	**CARTER V HORIZON HOUSING SOCIETY,** 2023 ABKB 558
	MCCLELLAND V HARRISON, 2023 ABKB 638
10.52	**MARTINEAU V HENRY ESPINA,** 2023 ABKB 664
11.18	**POWELL ESTATE (RE),** 2023 ABCA 311
11.22	**RICHARDSON V SCHAFER,** 2023 ABKB 727
11.25	**LAYEGHPOUR V RASHIDI,** 2023 ABKB 674
11.26	**DE GUZMAN V DE GUZMAN,** 2023 ABKB 624
	RICHARDSON V SCHAFER, 2023 ABKB 727
11.27	**DE GUZMAN V DE GUZMAN,** 2023 ABKB 624
	STRAIGHTVAC SERVICES LTD V SUNSHINE OILSANDS LTD, 2023 ABKB 660
	RICHARDSON V SCHAFER, 2023 ABKB 727
11.30	**POWELL ESTATE (RE),** 2023 ABCA 311
12.55	**DE GUZMAN V DE GUZMAN,** 2023 ABKB 624
13.5	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
13.6	**1361556 ALBERTA LTD V RISTORANTE COSA NOSTRA INC,** 2023 ABKB 590
	STONHAM V RECYCLING WORX INC, 2023 ABKB 629
	GAY V ALBERTA (WORKERS' COMPENSATION BOARD), 2023 ABCA 351
13.7	**1361556 ALBERTA LTD V RISTORANTE COSA NOSTRA INC,** 2023 ABKB 590
	GAY V ALBERTA (WORKERS' COMPENSATION BOARD), 2023 ABCA 351
13.12	**STONHAM V RECYCLING WORX INC,** 2023 ABKB 629

13.18	**MCDONALD V SPROULE MANAGEMENT GP LIMITED,** 2023 ABKB 587
	WOODBRIDGE HOMES INC V PALMER, 2023 ABKB 649
	H2 CANMORE APARTMENTS LP V CORMODE & DICKSON CONSTRUCTION EDMONTON LTD, 2023 ABKB 659
	WOODBRIDGE HOMES INC V RANDLE, 2023 ABKB 731
14.5	**CARTER V HORIZON HOUSING SOCIETY,** 2023 ABKB 558
	ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS), 2023 ABCA 295
	INNES V KLEIMAN, 2023 ABCA 307
	COLLINS V CAMPBELL, 2023 ABCA 364
	LYMER V JONSSON, 2023 ABCA 367
14.8	**JACKSON V COOPER,** 2023 ABCA 299
14.14	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
14.15	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
14.16	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
	HANSEN V HANSEN, 2023 ABCA 335
14.24	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
14.37	**WESLEY V ALBERTA,** 2023 ABCA 289
	JACKSON V COOPER, 2023 ABCA 299
14.44	**JACKSON V COOPER,** 2023 ABCA 299
14.45	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
	FOUGERE V THE KING'S UNIVERSITY, 2023 ABCA 374
14.47	**XU V MA,** 2023 ABCA 352
14.47	**DYNAMO COATINGS LTD V ALBERTA BUILDING TRADES COUNCIL BENEVOLENT SOCIETY (ABTCBS),** 2023 ABCA 355
14.48	**VENINI V VENINI,** 2023 ABKB 601
14.50	**JACKSON V COOPER,** 2023 ABCA 299

14.58	**WESLEY V ALBERTA,** 2023 ABCA 289
	CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION INC V THOMSON, 2023 ABCA 340
14.67	**SHTAIF V MIDLAND RESOURCES HOLDING LIMITED,** 2023 ABCA 319
14.71	**ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS),** 2023 ABCA 295
14.88	**HANSEN V HANSEN,** 2023 ABCA 335
14.90	**HANSEN V HANSEN,** 2023 ABCA 335

STARRATT V CHANDRAN, 2023 ABKB 609

(FEASBY J)

Rules 1.2 (Purpose and Intention of These Rules), 5.7 (Producible Records), 5.8 (Producible Records for Which There is an Objection to Produce), 5.11 (Order for Record to be Produced), 6.44 (Persons Who Are Referees), 6.45 (References to Referee), 6.46 (Referee's Report) and 10.29 (General Rule for Payment of Litigation Costs)

The Plaintiffs sought an Order directing the Defendant companies to provide a further and better Affidavit of Records, to pay unpaid Cost Awards, and to answer outstanding Undertakings.

The Defendants had bundled their Affidavit of Records, and argued that their bundling of records was no different than the common practice under Rule 5.8 of bundling the contents of a lawyer's file when asserting a claim of privilege The Plaintiffs acknowledged that the Rules permit groups of records to be bundled pursuant to Rule 5.7 but argued that the Defendants' bundling practice did not provide "sufficient detail to enable another party to understand what it contains" pursuant to Rule 5.7(2)(b). Justice Feasby held that the adequacy of the descriptions is inextricably linked to whether the records are "all of the same nature", as required by Rule 5.7(2)(a), which had never been judicially considered in Alberta.

The Plaintiffs argued that records "of the same nature" should be interpreted to mean that they are the same type or class of record and should be from a defined period, and that this is consistent with the purpose and intention of the Rules as provided by Rule 1.2. The Court held that given the longstanding practice in Alberta of bundling records from a common source, "I cannot read 'same nature' as to restrict the practice of bundling only to situations where there is the same type or class of record such as bank statements or invoices." The Court held that the approach to describing bundles must be adjusted depending on the context, and that the principle of proportionality that governs production equally applies to description of bundles. Where a bundle is compromised of homogenous records, a terse description is all that is needed, whereas the more heterogeneous the contents of a bundle, the more robust the description that is required. As the bundles before the Court contained a mix of different types of records, a more thorough description was required, and the Court ordered the Defendants to provide bundle descriptions with sufficient detail to enable the Plaintiffs to understand what each bundle contains.

The Plaintiffs also applied pursuant to Rule 5.11 for an Order compelling the Defendants to disclose records that the Defendants had asserted privilege over. After reviewing the law on solicitor-client privilege and litigation privilege, the Court held that the descriptions of the bundled documents provided by the Defendants did not appear to fall under either category. While the Court may review the records to assess the privilege claim pursuant to Rule 5.11(2)(a) or a referee may be appointed to inspect the records pursuant to Rules 6.44-6.46, Feasby J. ordered the Defendants to review the records "with the benefit of these Reasons" and ordered that any change must be reflected in the updated Affidavit of Records.

The Court also found that the Defendants had failed to comply with a previous Court Order to produce Undertakings. Justice Feasby ordered the Defendants to provide the Undertakings in the updated Affidavit of Records.

Finally, with respect to outstanding Costs, the Court noted that one outstanding Costs Award was due within 30 days of the Order and the other Costs Award was silent on timing. After noting that the unsuccessful party must pay Costs forthwith pursuant to Rule 10.29(1), Feasby J. held that a further Order for the Defendants to pay Costs added nothing to the existing directions. Accordingly, Justice Feasby held that the Plaintiffs were permitted to pursue enforcement proceedings in respect to the unpaid Costs.

DANIS-SIM V SIM, 2023 ABKB 637

(KENDELL J)

Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Applicant in divorce proceedings applied for, among other things, a dismissal of the Respondent's June 2017 Application to vacate arrears of child support (the "June 2017 Application") for delay in accordance with Rules 4.31 and 4.33.

The Court reviewed the jurisprudence for Rules 4.31 and 4.33 and found that it was clear that the delay rules apply to divorce and other family law proceedings and although Rule 4.33 is mandatory, Courts in Alberta have repeatedly chosen not to apply the delay Rules on Applications under the *Divorce Act*, RSC 1985, c 3.

The Court accordingly noted that although more than three years had passed without a significant advance in the June 2017 Application, it declined to dismiss for long delay for the following reasons: (1) the ability of the Respondent to restart the Application would not prevent her from initiating a fresh Application and restarting the process again; (2) the principle of *res judicata* does not extend to Applications that are dismissed for long delay; (3) dismissing for delay when the Respondent could simply restart the process would not be in the interests of justice, with reference to Rule 1.2; and (4) either party could have set the June 2017 Application down for further adjudication, and it would accordingly run counter to the fundamental principles of parental support obligations to dismiss the June 2017 Application.

BRISTOL-MYERS SQUIBB CANADA CO V GRAND PRAIRIE (CITY), 2023 ABCA 294

(MARTIN, PENTELECHUK AND FAGNAN JJA)

Rules 1.2 (Purpose and Intention of These Rules), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant appealed a Decision of the lower Court extending the time for service of a class action Statement of Claim by three months. The Order was granted by an Applications Judge *ex parte*. The Defendant applied to an Applications Judge to set aside that Order, pursuant to Rule 9.15(4). That Application was denied. The Decision of the Applications Judge was then appealed to a Chambers Justice. That Appeal was also dismissed. The Defendant then appealed the Chambers Justice's Decision to the Court of Appeal.

On the initial Appeal before the Applications Judge, the Defendant argued that the necessary threshold had not been met to justify extension of service, and that there had not been full, fair, and candid disclosure of the relevant facts. The Applications Judge found that the Application filed with the initial Application had been sufficiently fulsome, and exceeded the bare minimum requirements to justify an extension.

The Chambers Justice then considered the matter *de novo* on Appeal. The Court concluded that the delays in service were the result of solicitor negligence. However, on review of the law relating to solicitor negligence and Rules 3.26 and 3.27, the Court found that delay caused by solicitor negligence does not preclude an extension. Citing Rule 1.2, the Chambers Justice added that setting aside service might cause a proliferation of actions and complicate and delay the existing class action, which would not serve the purpose and intention of the Rules. The Court consequently dismissed the Appeal.

On Appeal to the Court of Appeal, the Appellants argued that the Chambers Justice overlooked gaps in the evidence regarding efforts to serve each Defendant, and created a new and problematic "solicitor's negligence" exception to Rule 3.26. The Court declined to comment on the issue of solicitor's negligence as a principle, but found that the solicitor had not been negligent, as the extension had been sought before expiry of the service period. It then focused on the sufficiency of the evidence before the Applications Judge at the without notice hearing, finding that it was open to the Applications Judge and Chambers Justice to find that the evidentiary record sufficiently supported the Application. Therefore, there was no error in law or principle in granting the extension, and the Appeal was dismissed.

ZEINALI V PETROLIAM NASIONAL BERHAD (PETRONAS), 2023 ABCA 295

(SLATTER JA)

Rules 1.2 (Purpose and Intention of These Rules), 9.4 (Signing Judgments And Orders), 13.5 (Variation Of Time Periods), 14.5 (Appeals Only with Permission), 14.14 (Fast Track Appeals), 14.15 (Ordering the Appeal Record), 14.16 (Filing the Appeal Record), 14.24 (Filing Factums – Fast Track Appeals), 14.45 (Application to Admit New Evidence) and 14.71 (Interlocutory Decisions)

The Plaintiff started an Action against two entities he alleged were his former employers. One of the Defendants was based in Malaysia ("Petronas Malaysia"). Petronas Malaysia was served by the Plaintiff with an Order permitting service outside of Canada (the "Service *Ex Juris* Order") but refused to defend on the basis that it did not wish to attorn to the jurisdiction of Canadian Courts. The Plaintiff noted Petronas Malaysia in default.

As a result, Petronas Malaysia applied to set the Service *Ex Juris* Order aside. The Plaintiff opposed the Application and filed an Affidavit. The Plaintiff was cross-examined on the Affidavit and refused to answer eight questions. A Case Management Judge ordered the Plaintiff to answer the questions, and made various procedural directions for the filing of further Applications and appointments for Questioning (the "CM Order").

The Plaintiff applied for permission to Appeal the CM Order and for a corresponding Stay pending Appeal. The Plaintiff experienced mixed success.

Appeal Justice Slatter found that the Plaintiff was not required to seek permission to Appeal the part of the CM Order that directed him to answer questions refused at cross-examination. However, he was required to obtain permission to Appeal the rest of the CM Order, which was procedural in nature.

Rule 14.5(1)(b) stipulates that an Appellant must obtain permission from the Court of Appeal before appealing pre-Trial decisions related to adjournments, time periods, or time limits. The Rule aims to discourage interlocutory Appeals as they usually cause expense and delay. Rule 14.71 encourages matters to proceed on the merits, with procedural issues to be raised in the Appeal from the ultimate decision. Together, Rules 14.5(1)(b) and 14.71 complement Rule 1.2(1) and aim to resolve claims in a manner that is fair, just, timely, and cost-effective.

Appeal Justice Slatter dismissed the Plaintiff's Application for permission to Appeal the procedural components of the CM Order. The matters complained of by the Plaintiff were within the discretion of the Case Management Judge. The Case Management Judge had jurisdiction to schedule and sequence any Applications related to issues from the Service *Ex Juris* Order.

The Plaintiff's application for a Stay of the CM Order was also dismissed, but partial relief was granted to avoid rendering the Appeal moot. Appeal Justice Slatter directed the Plaintiff to answer the questions and provide them to the Case Management Officer, who would hold the answers until the Appeal would be resolved or abandoned.

A few collateral issues arose from the Plaintiff's Applications.

First, the CM Order directed the Plaintiff to answer questions within 14 days. Since that deadline had passed, Slatter J.A. relied on Rule 13.5(2) and extended the time the Plaintiff had to provide answers to the Case Management Officer.

Second, if the Plaintiff wanted to proceed with the Appeal of the part of the CM Order that directed him to answer questions, he had to perfect his Appeal under the Rules. Accordingly, a series of deadlines were extended by the Court as they had lapsed.

Rule 14.14(1) categorizes Appeals from parts of a Decision as fast track Appeals. As a result, under Rule 14.15(1), the Plaintiff had 10 days to order the Appeal Record and transcripts from the date of the notice of Appeal. Since that date had already passed, it was extended by 10 days.

Rule 14.16(3) applies to fast track Appeals and directs Appellants to file and serve the Appeal Record and transcripts within one month from the date the Notice of Appeal was filed. Since that date lapsed too, it was extended by one month.

Lastly, the Plaintiff was directed to comply with Rule 14.24(1). This Rule applies to fast track Appeals and mandates that Appellants file and serve their Factum the earlier of 20 days after the Appeal Record is filed or two months after the Notice of Appeal is filed. Failure to do so will result in the Registrar striking the Appeal.

The Court invoked Rule 9.4(2)(c) and directed the Court Clerk to sign the resulting Order without approval from the Plaintiff.

L'ECUYER V STITECH INDUSTRIES INC, 2023 ABCA 344

(SLATTER, CRIGHTON AND DE WIT JJA)

Rules 1.2 (Purpose and Intention of these Rules), 1.5 (Rule Contravention, Non-Compliance and Irregularities) and 9.16 (By Whom Applications are to be Decided)

The Appellant started two Actions against the Respondents. After noting the Respondents in default in both Actions, the Appellant obtained Default Judgment. The Respondents successfully applied to set the Default Judgments aside and defend. The Appellant sought to appeal the Chambers Judge's Decision setting the Default Judgments aside. The Appeal was dismissed.

The Appellant advanced several arguments.

First, he argued that the Chambers Judge made an overriding and palpable error by "devaluing the evidentiary weight accorded to his affidavits because of the date they were filed". On the record, that was not the case. Any comments by the Chambers Judge in relation to the Appellant's Affidavits related to the speediness with which the Appellant intended to proceed, not their credibility.

Second, the Appellant argued that the Chambers Judge contravened Rule 9.16, which requires a party applying to set aside a Default Judgment to apply before the same Applications Judge who granted it unless the Court orders otherwise.

The Court of Appeal found that the Chambers Judge did not err in deciding the Application by not referencing Rule 9.16. The Rule allows for a different Judge to decide the Application. Further, Rules 1.5(2) and (3) state that if there are procedural irregularities, an Application can be brought to cure them. However, if the Applicant takes further steps in the Action with knowledge of prejudice, it is precluded from applying to fix the procedural irregularity. The Appellant was aware that the set aside Application was before a different Judge and did not object.

Lastly, the Appellant argued that the Chambers Judge should have permitted him to question the Respondents on their Affidavits in support of their alternative relief sought, citing that cross-examination is an almost absolute right. However, the Chambers Judge did not decide the alternative relief sought by the Respondents and decided only that the test for setting aside the Default Judgments had been met.

Setting aside the Default Judgments was in accordance with Rule 1.2(1), which provides that the purpose of the Rules is to resolve claims fairly, timely and cost-effective way. There was no basis on which the Court of Appeal could intervene.

GRENON V CANADA REVENUE AGENCY, 2023 ABKB 707

(BOURQUE J)

Rules 1.4 (Procedural Orders), 3.62 (Amending Pleading) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff, James Grenon, applied for leave to file an Amended Statement of Claim after substantial parts had been struck by a prior Order of Justice Dario. As part of the Appeals of the Order of Justice Dario, the Court of Appeal ruled that Mr. Grenon required leave to file an Amended Statement of Claim. The amendments sought by Mr. Grenon partially sought reintroduction of paragraphs struck by the Order of Justice Dario. Mr. Grenon also sought to add a new Defendant.

Mr. Grenon initially attempted to file the Amended Statement Claim in reliance on Rule 3.62, arguing that the Pleadings had not closed because no Statement of Defence had been filed, and he therefore had the right to file an Amended Statement of Claim. The Clerks of the Court rejected the filing, based on the Court of Appeal's ruling that leave was required. Mr. Grenon applied for a Fiat to file his Amended Statement of Claim, which was denied by Applications Judge Prowse. Mr. Grenon then applied for leave to amend.

Justice Bourque considered what was required, procedurally, to file an Amended Statement of Claim given the prior Decision of the Court of Appeal. The Crown argued that the prior Decision, requiring Mr. Grenon to apply to amend, was consistent with Rules 1.4 and 3.65. Justice Bourque agreed, finding that Mr. Grenon was required to apply for leave to amend his Statement of Claim. However, he found that an Order should be granted allowing the Amended Statement of Claim to be filed.

CARBONE V DAWES, 2023 ABKB 729

(MARION J)

Rules 1.4 (Procedural Orders), 4.22 (Considerations for Security for Costs Order), 5.2 (When Something is Relevant and Material), 5.25 (Appropriate Questions and Objections), 5.31 (Use of Transcript and Answers to Written Questions), 5.33 (Confidentiality and Use of Information), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.11 (Evidence at Application Hearings), 6.14 (Appeal from Applications Judge's Judgment or Order), 6.29 (Restricted Court Access Applications and Orders) and 8.12 (Exclusion of Witnesses)

Pursuant to Rule 6.14, the Plaintiff appealed an Applications Judge's Decision dismissing her Application to exclude the Defendants from attending at each other's Questioning on Affidavits, filed in support of the Defendants' Security for Costs Applications (the "Exclusion Application"). In dismissing the Appeal, Marion J. set the out the applicable framework for excluding a party from attending the Questioning on Affidavit of another party in the same Action.

The claim arose from a surgical procedure involving several Defendants comprised of doctors, their professional corporations, and the center at which the procedure took place.

Before the Applications Judge, the Plaintiff tendered cases supporting the proposition that the Court can exclude Defendant parties from each other's Questioning if there is an apprehension of misconduct based on "cogent evidence of tailoring or harmonization of evidence". However, the Defendants distinguished the Plaintiff's line of cases based on the fact that they dealt with Questioning for discovery, not Questioning on Affidavits.

The Defendants argued that Questioning on Affidavits was akin to a Trial and as such, by analogy, Rule 8.12 was engaged. Rule 8.12 addresses the exclusion of witnesses and parties at Trial. The Defendants urged the Applications Judge to apply a line of cases from Ontario that addressed the exclusion of witnesses. However, the onus under these cases was more onerous.

Before setting out the applicable framework, Marion J. reviewed the case law related to the exclusion of parties from Questioning for discovery and Trials.

Justice Marion noted that Applications for exclusions of parties from Questioning for discovery "occur with some frequency in Alberta and other provinces". However, the Rules do not specifically provide for excluding a party from Questioning for discovery. Nonetheless, the Court has discretion to exclude parties under Rule 1.4, the case law, and section 8 of the *Judicature Act,* RSA 2000, C J-2. Rule 1.4 gives the Court broad procedural discretion to ensure the fair and expeditious determination of an Application or proceeding.

The Court found that the Alberta case law was clear that the Applicant must justify an exclusion. The focus of the inquiry is on the integrity of the legal process. The general test is "whether exclusion is necessary for the fair and proper judicial conduct of the action". The Applicant must establish that there is a "reasonable apprehension of misconduct or prejudice which, without an order, will defeat the object and purpose of the discovery questioning". The test is applied to the specific circumstances of each case in light of various factors. For example, the Court will analyze the "impacts of the decision to exclude or not

exclude on the party sought to be excluded, the party seeking exclusion, the person testifying, the functioning of the discovery process itself, and the impact on the action more generally".

Next, the Court turned its attention to the test for excluding parties from Trial. Generally, it is more difficult to exclude a party from attending at Trial than at Questioning for discovery because the Trial represents the final resolution of the parties' rights.

Under the previous Rule 247, the Court could exclude a witness from Trial irrespective of whether the witness was a party or not. However, Rule 8.12 restricted the Court's jurisdiction to exclude parties; and under Rule 8.12(3), a party may be excluded only if it interferes with the Trial process.

Lastly, Marion J. reviewed whether parties can be excluded from Questioning on Affidavit. Rule 6.7 stipulates that a person who makes an Affidavit can be questioned by any person adverse in interest. The Court has discretion to order an exclusion; however, Applications to exclude a party from Questioning on Affidavit are rare.

In reviewing the case law, Marion J. noted some crucial distinctions between Questioning for discovery and Questioning on Affidavit. Questioning for discovery is private and subject to the implied undertaking rule at common law and under Rule 5.33. Further, transcripts from Questioning for discovery are not filed. Rules 5.31 and 6.11(c) stipulate that the questioning party may nonetheless use Questioning for discovery transcripts, or portions of them, as "read-ins", at Trial or in support of an Application against a party adverse in interest. On the other hand, transcripts from Questioning on Affidavit must be filed under Rule 6.7(b). Further, if an Applicant wants to exclude a party from attending another party's Questioning on Affidavit, it would most likely have to apply for a restricted Court access Order under Rules 6.29 and surrounding Rules, or seek an injunction prohibiting the party from reviewing publicly available documents.

Lastly, Rule 5.25 outlines the scope of questions allowed at Questioning for discovery. A party is required to answer questions that are "relevant and material". As per Rule 5.2, a question is "relevant and material" if its answer significantly helps to determine an issue in the Pleadings. On the other hand, the scope of questions at Questioning on Affidavit is limited to questions that are "relevant and material" to the issues raised in the underlying Application.

Justice Marion held that a more nuanced approach is required to exclude a party from Questioning on Affidavit. There are four principles that come into play. First, a party has the right to be present under Rule 6.7 unless excluded by the Court. The right to be present is particularly strong where the Application is for final relief. Second, the Applicant bears the onus to establish an evidentiary foundation justifying exclusion. Third, the general test is whether the exclusion is necessary for the fair and proper judicial conduct of the Action, with the focus being on the integrity of the legal process. Fourth, the general test is met where "reasonable apprehension of misconduct or prejudice which, without an order, will defeat the object and purposes of questioning on affidavit".

Additional factors that are relevant in the context of Questioning on Affidavits include: (a) the nature of the underlying Application (where an Application involving final relief counts against the exclusion of a party); (b) the degree to which the apprehension or risk of evidence tailoring is mitigated by the fact that the Affiants have already attested to facts; and (c) whether the exclusion will actually address the concerned mischief (little is achieved through exclusion if the evidence of the parties has already been fully explored in Questioning for discovery or previous Questioning on Affidavits).

Justice Marion determined that the Exclusion Application was in the context of Security for

Costs Applications, which involve a two-step process. First, the criteria in Rule 4.22 must be met. Second, the Court must ask whether it is just and reasonable to grant security. Security for Costs Applications are not final Orders but can end an Action. Therefore, the Defendants' rights were not in jeopardy as they would be at Trial or on a Summary Judgment Application.

In considering the state of the Action and evidence, Marion J. found that little would be gained by excluding the Affiants from each other's Questioning because Questioning on their Affidavits already took place and the transcripts had been filed and made public.

Based on the parties' submissions and the record, there was no reasonable apprehension of evidence tailoring or misconduct by the Defendants. Further, an Order was not necessary for the fair and proper judicial conduct of the Action.

KILCOMMONS V ZAPATA, 2023 ABKB 691

(NATION J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.2 (How to Start an Action) and 3.8 (Originating Applications and Associated Evidence)

The Plaintiff brought an Application upon receipt of a filed Application and Affidavit (the "Underlying Application") corresponding to a Fiat relating to the Underlying Application, to: (1) set aside the Fiat; (2) require the Defendant to file the same Application using a different form; (3) and for any new Application to be dated on the actual date of any such future filing. The Defendant brought a cross Application for an Order that the Fiat backdating the Underlying Application in the original form be validated (the "Cross Application"). The Underlying Application was required to be filed within the one-year period (the "One-Year Period"). set out in Article 12 of the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention").

The Defendant had requested the Fiat for the Underlying Application under the Hague Convention which was granted.

Among other things, the Court noted how Practice Note 6 indicates that the party seeking an Order directing the return of the child must file an Originating Application (Form 7) pursuant to Rule 3.8 and a supporting Affidavit. The Plaintiff advanced an argument setting out that Practice Note 6 was directive and that any corrective discretion given to a Justice pursuant to Rule 1.5 could not backdate the date of the actual filing of the Underlying Application, as to do so would have the effect of prejudicing the Plaintiff. Conversely, the Defendant argued that Rule 1.5 could be used to remedy any shortfall or noncompliance with the Rules, noting these were not circumstances where the Underlying Application or its contents were unknown to the Plaintiff until after the One-Year Period had expired, and therefore no one had been prejudiced.

The Court set out Rule 3.2(6), which sets out how to bring an Action. The Court noted that the Court of Appeal had indicated that Practice Notes do not have the full force of law but are rather informational statements for guidance and that Courts should always attempt to support them as they are set out to facilitate the proper regulation of litigation. The Court additionally noted that the directive words in Practice Notes are often overcome by the

use of Fiats and are distinguishable from circumstances where there is express directive language in legislation. Accordingly, the Court found that it was able to relieve against the incorrect form.

Among other things, the Court acknowledged that although the Defendant had sought the Fiat, the Defendant was in error by failing to (1) provide a complete history; (2) clarify that the notice to the Plaintiff had been provided the same morning the Fiat was sought; (3) identify or highlight the issue of the form of the Application; and (4) explain the effect of the One-Year Period.

The Court additionally noted that the Court had wrongly assumed that the Plaintiff consented to the Fiat from the brief introduction provided by the Defendant, which included the fact that a hearing had been set in February and that notice had been provided. The Court accordingly found that the Defendant had not made an intentional misrepresentation, such that the administration of justice should not support consideration of curing the non-compliance.

The Court found that the curative action would not be prejudicial or cause irreparable harm such that it would be prevented under Rule 1.5(4)(a), and the curative powers of Rule 1.5 could be applied. The Court accordingly granted the Defendant's Cross Application.

MCDONALD V SPROULE MANAGEMENT GP LIMITED, 2023 ABKB 587

(MARION J)

Rules 1.7 (Interpreting these Rules), 5.26 (Transcript of Oral Questioning), 5.30 (Undertakings), 5.32 (When Information May be Used), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.11 (Evidence at Application Hearings), 6.20 (Form of Questioning and Transcript), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff applied for Summary Judgment in respect of a claim for wrongful dismissal against the Defendant.

Among other issues, the Court considered what constituted a transcript that must be filed pursuant to Rule 6.7. The Court noted that the Defendant filed a Court reporter generated transcript of the Questioning on the Plaintiff's Affidavit but did not include with it the exhibits that were marked, other records put to the Plaintiff during Questioning but not marked as exhibits, or the Plaintiff's responses to Undertakings (or attached records) given during the Questioning.

The Court set out Rules: 6.20(5), as it relates to the obligation of the Questioning party to arrange for the Questioning to be recorded and the transcript filed; 6.20(3), as it relates to the requirements of recording of the questions and answers; 6.11(b), as it enables the Court to consider a transcript of Questioning under Part 6 of the Rules in deciding an Application; and Rule 13.46, as it relates to the obligations of the official Court reporter.

The Court noted that although Part 6 of the Rules is silent as to whether exhibits marked by the official Court reporter during a Questioning on an Affidavit under Rule 6.7 are part of the

transcript, the principles from Rule 5.26(3) and 5.32 apply by analogy pursuant to Rule 1.7(2). The Court accordingly found that absent agreement of all parties or other Court Order, the questioning party must file with the Questioning transcript any marked exhibits (whether numbered or lettered exhibits for identification).

The Court determined that the documents referenced in a Questioning on an Affidavit but not marked as exhibits do not form party of the transcript unless otherwise agreed or ordered by the Court. The Court noted that the parties are encouraged to reach agreement on the matter as it is a common practise consistent with the expediency and efficiency, which will often be consistent with Rule 1.2. The Court further noted that any such agreement should be put on the record to avoid misunderstanding or disputes and expressly reference the parties' agreement that those records are to be treated as exhibits to, or otherwise part of, the transcript.

The Court reviewed Rule 5.31 noting that it provided that in certain circumstances, a party may use (read-in) the evidence of the other party under Rule 5.17 and 5.18, but that Part 5 does not specifically address whether Undertaking answers form part of the transcript of Questioning. After noting that there was an issue as to whether Undertaking answers must be questioned upon under Rule 5.30(2) in order for them to form part of the Part 5 Questioning transcript, the Court determined that Undertaking answers form part of the transcript whether or not they are questioned upon. The Court determined that although Rule 5.30 does not technically apply to Questioning under Part 6, it applies by analogy pursuant to Rule 1.7(2), as modified by the jurisprudence which restricts its use in Questioning on an Affidavit. The Court additionally noted that there was no principled basis to differentiate between Part 5 and Part 6 Questioning when determining what forms part of the transcript.

The Court accordingly found that: (1) unless otherwise agreed or ordered by the Court, Undertaking answers form part of the transcript to a Questioning on an Affidavit pursuant to Rule 6.7 and should be filed with the transcript; (2) records produced as part of the Undertaking answers should be filed as part of the transcript where they form an integral part of a substantive factual answer to the question asked, but do not need to be filed where they are only produced in response to an Undertaking request to produce records; and (3) if the questioning party wishes to have records produced pursuant to Undertakings form part of the evidentiary record, they should conduct a follow-up Questioning on the Undertaking answers and associated records. The Court also noted that parties may apply to have Undertaking responses including additional superfluous, inappropriate, or non-responsive information struck from the record by arguing that they should be given little or no weight, or by questioning on them. The Court additionally set out that parties are encouraged to discuss and reach agreement on the contents of the transcript to be filed pursuant to Rule 6.7 wherever possible.

The Court determined that the Plaintiff's Undertaking responses were to be filed as part of the Plaintiff's transcript and set out that certain records produced as part of the Undertaking answers that were integral to the answer of a substantive factual question that was asked, were to be included with the filed transcript.

The Court set out Rules 7.3(1)(a) and 7.3(1)(c), noting that they enabled a Plaintiff to apply for Summary Judgment and reviewed the jurisprudence applicable to Summary Judgment. In reviewing the evidentiary tools appropriate to Summary Judgment, the Court set out that Applicant Affidavits should generally be based on personal knowledge with respect to Rule 13.18, but noted that some evidence not based on personal knowledge can be admitted with

respect to the application of Rule 13.18(3). The Court further noted that Respondent Affidavits may include hearsay evidence based on information and belief, provided the source of the information is disclosed, with reference to Rules 13.18(1)(b) and 13.18(2).

The Court determined that: the Plaintiff had discharged its threshold burden to provide the factual elements of the case; there was no merit to the Defendant's just cause defence which resulted in the Court determining that the Defendant had not established a genuine issue requiring a Trial; and it was possible and appropriate to resolve the Plaintiff's claim summarily. The Court found that the Defendant did not have just cause to terminate the Plaintiff without notice. The Court further found that there was no genuine issue requiring Trial and it was fair to summarily resolve: the Plaintiff's notice period, the Defendant's mitigation defence, and the calculation of the Plaintiff's damages.

RICHARDSON V SCHAFER, 2023 ABKB 727

(EAMON J)

Rules 2.29 (Withdrawal of Lawyer of Record), 11.22 (Recorded Mail Service), 11.26 (Method of Service Outside Alberta) and 11.27 (Validating Service)

The Plaintiff was subject to an Order requiring her to seek leave from the Court to continue three Actions due to her prior participation in frivolous and vexatious litigation alongside her father. The Order required the Plaintiff to seek such leave within six months, failing which the Defendants were permitted to apply to strike out the Plaintiff's claims. The Plaintiff did not seek leave to continue the Actions, and this Decision dealt with the validity of service by the Defendants of their joint Application to strike the Plaintiff's Claims.

The Plaintiff had originally been represented by counsel in these Actions. The Plaintiff's counsel withdrew from the record in accordance with Rule 2.29, and in doing so provided a last known residential address for the Plaintiff in South Carolina, as well as the Plaintiff's email address.

In considering whether the Plaintiff was properly served with the present Application, the Court noted Rule 11.22, which permits service of a non-commencement document by recorded mail, addressed to the party at the address for service provided in the most recently filed document in the Action. Rule 11.22 deems service effective on the earlier of the date on which receipt is acknowledged, or seven days after the recorded mail is sent (regardless of an acknowledgement).

The Defendants sent a copy of the Application materials to the South Carolina address by recorded mail; the package was not able to be delivered to the Plaintiff, nor was it picked up pursuant to the instructions which were left at the South Carolina address.

The Court first dealt with the issue of whether service under the Hague Convention on Service was required. Citing Rule 11.26, Justice Eamon held that it was not, since the Application was not a commencement document.

Next, the Court considered whether the South Carolina address was the appropriate address at which to serve the Plaintiff. Justice Eamon found that the Defendants were entitled to rely on the address listed on the Notice of Withdrawal in accordance with the obligations

of counsel under Rule 2.29. This conclusion was not affected by the subsequent filing of documents by the Plaintiff's father, which documents were later struck as amounting to an abuse of process.

Lastly, Justice Eamon considered whether service was defeated because the package was never picked up. Justice Eamon held that, pursuant to Rule 11.2, service by recorded mail is not invalid only by reason that the addressee refuses to accept the mail or no longer resides or is otherwise not present at the address. The Court emphasized the importance of the ability for litigants to rely on the address for service that is given and the methods for service under the Rules. The Court therefore concluded that service was effective under Rule 11.22 and should be deemed good and sufficient under Rule 11.27.

In the result, Justice Eamon struck the Plaintiff's claims as being an abuse of process further to the earlier Order of the Court.

JONES V NILSSON LIVESTOCK LTD, 2023 ABKB 588

(LOPARCO J)

Rule 3.2 (How to Start an Action)

The Applicants commenced the Action by way of Originating Application to obtain title to certain lands that were in the name of the Respondent. Two issues arose before the Court: (1) whether an Originating Application was the proper method to resolve the matter; and (2) if so, whether title to the lands should be transferred to the Applicants.

Justice Loparco refused to transfer title to the lands but converted the Applicants' claim into a Statement of Claim and allowed the Action to continue. The Originating Application did not allow for a fair and just adjudication of the matter. There were material facts in dispute and the parties' credibility was a live issue.

Rule 3.2(2)(a) prescribes that an Action must be commenced by Statement of Claim unless there are no substantial factual disputes, in which case the Action may be commenced by Originating Application. Rule 3.2(6) contemplates that if an Action is started in one form when it should have been started or should continue in the other form, the Court may correct it and allow the proceeding to continue.

Justice Loparco noted that Originating Applications cannot be used to resolve matters with substantial facts in dispute and gaps in the record. The onus is on the party opposing the Originating Application to show that there are material facts in dispute. It can adduce evidence by cross-examining the Applicant's Affiant or relying on material filed by the Applicant.

The Court noted that the material facts in dispute related to the terms of a land agreement and whether parol evidence should be considered. The transaction in question was a deal between old friends, purportedly varied by oral conversations between a now deceased party to the transaction and the Respondent's principal. Further, the Court would benefit from a more complete discovery process and *viva voce* evidence at Trial so that credibility may be assessed.

Relying on Rule 3.2(6), Loparco J. allowed the Action to continue as if it was originally started by Statement of Claim.

BATEMAN V ALBERTA (SURFACE RIGHTS BOARD), 2023 ABKB 640

(CARRUTHERS J)

Rule 3.24 (Additional Remedies on Judicial Review)

The Applicant was seeking recovery of unpaid compensation under a surface lease agreement with an oil producer. The Tribunal awarded compensation to the Applicant in respect of his claim, but for only half of the amount owing. The Applicant argued that this award was unreasonable and sought Judicial Review.

Carruthers J. noted that ordinarily, having found that an administrative decision is unreasonable, the reviewing Court should, under Rule 3.24, remit the matter for rehearing. However, citing *Telus Communications Inc v Telecommunications Workers Union,* 2014 ABCA 199, Carruthers J. commented that the reviewing Court may issue a Decision on the merits if "...in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable".

Carruthers J. found that the Applicant's particular circumstances were not properly considered by the Tribunal, and that there did not appear to be any reason to find that full compensation was unjustified, patently absurd, or provided unjust enrichment. As such, the Court found that there was little utility in remitting the matter back to the Tribunal, and found that the Tribunal should have awarded the Applicant full compensation.

GAY V ALBERTA (WORKERS' COMPENSATION BOARD), 2023 ABCA 351

(SLATTER, CRIGHTON AND DE WIT JJA)

Rules 3.61 (Request for Particulars), 3.64 (Time Limit for Application to Disallow Amendment to Pleading), 3.68 (Court Options to Deal with Significant Deficiencies), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Appellant appealed an Order that struck out his Statement of Claim on the basis that it was beyond the jurisdiction of the Court or did not disclose a reasonable cause of action. The Court set out Rule 3.68 and reviewed the prevailing principles for striking a claim pursuant to the Rule. The Appellant claimed for damages from the Respondent for the way it dealt with his claim for compensation for injuries he suffered in the workplace.

The Court noted that when an Application is brought to strike a Pleading because it is significantly deficient or does not disclose a reasonable claim, a relevant factor is whether the Pleadings are in proper form. The Court noted that Rule 13.6(2)(a) provides that a Pleading must include the facts on which a party relies, but not the evidence by which the facts are to be proved and that Rules 13.6(3) and 13.7 describe some matters that must be specifically pleaded, including: malice, ill will, and wilful default. Further, Rule 3.61 requires that Pleadings must also provide sufficient

particulars to give the Defendant notice of the claim and to avoid surprise.

The Court noted that where particular actors are known, using their names can provide important particulars and may enhance the reasonableness of the claim. The Court found that the Appellant did not identify any of the employees of the Respondent that the Appellant alleged had harmed him, although from the context it appeared that he did or should have known some of their identities. The Court found that the Appellant had made Pleadings that amounted to "name calling", which was not an adequate method of pleading a claim.

Furthermore, the Court set out that is inappropriate to plead conclusions of law generally, unless they are clearly grounded in the facts and necessary to the Pleading. The Court found that the claim contained (1) many Pleadings which were merely conclusory and were insufficient to support any reasonable claim; (2) did not plead that the Respondent acted without an honest belief that it was acting within its jurisdiction; and (3) numerous causes of action which were not saved by the 41 subparagraphs, which were themselves not grounded in the facts or tied to any particular claim. The Court did however find that the element of the claim dealing with misfeasance in public office (the "Alleged Misfeasance Claim") was deficient but maintainable against the Respondent.

The Court accordingly allowed the Appeal in part, in which it granted the Appellant the entitlement to amend his Alleged Misfeasance Claim by providing a fresh Statement of Claim limited to the Alleged Misfeasance Claim. The Court stipulated that the Respondent was entitled to comment as to whether the fresh Statement of Claim was in compliance with the Rules and that if the parties were unable to agree that the fresh Statement of Claim was in the proper form in a timely way, the Appellant would need to bring an Application to amend pursuant to Rule 3.64.

WORBECK V GEF SENIORS HOUSING, 2023 ABKB 592

(NIELSEN ACJ)

Rule 3.68 (Court Options to Deal With Significant Deficiencies)

This was an Application to strike a Statement of Claim, pursuant to Rule 3.68. Mr. Worbeck, acting as a self-represented litigant, filed an unclear handwritten Statement of Claim against G.E.F. Seniors Housing ("GEF"), alleging various forms of misconduct and seeking damages. GEF denied liability. Following the Statement of Defence, Mr. Worbeck delivered numerous documents to the Court which did not comply with the Rules, nor did they advance his lawsuit in a meaningful way.

The Court, referencing Rule 3.68, contemplated striking out Mr. Worbeck's lawsuit for being an abuse of Court processes. It was noted that Mr. Worbeck's submissions were voluminous, failed to conform to the Rules, and were not directed solely at the Court of King's Bench of Alberta, but were broader in scope.

Associate Chief Justice Nielsen instructed Mr. Worbeck to submit written argument or Affidavit evidence by a specified deadline to demonstrate that his lawsuit was not abusive. Mr. Worbeck failed to comply with the Court's instructions for submission conformity. Consequently, the Court ordered Mr. Worbeck's Statement of Claim to be struck out, with no Costs awarded, and directed GEF's counsel to prepare the Order reflecting the Decision.

Further, in compliance with the Supreme Court of Canada's guidance in *Pintea v Johns*, 2017 SCC 23, Mr. Worbeck was informed that if he wished to challenge the Decision, the appropriate course would be an Appeal to the Court of Appeal of Alberta. Mr. Worbeck was also directed to cease submitting materials related to this matter to the Associate Chief Justice's office and the Court of King's Bench of Alberta.

WOODBRIDGE HOMES INC V PALMER, 2023 ABKB 649

(ALONEISSI J)

Rule 3.68 (Court Options to Deal With Significant Deficiencies), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Applicants applied for Summary Dismissal in accordance with Rule 7.3 which was granted in relation to a claim over alleged misrepresentations and other alleged misconduct. The Court reviewed the principles applicable to Summary Dismissal set out in the jurisprudence and found that that there was no triable issue, concluding on a balance of probabilities: that the parties did not enter into an agreement to negotiate in good faith; the alleged misrepresentations by the Applicants were not false and even if they were, they were not actionable; the Respondent's claim in negligence was not made out; the Respondent's claim against one of the Applicants for misfeasance in public office was not made out; the Respondent's claim against one of the Applicants premised on vicarious liability for trespass was not made out; and the Respondents' claim for diversion was out of time. The Court accordingly determined that the Applicants had disproven the claims against them and the Respondent had failed to raise a triable issue on any of the claims.

Among other issues, the Court considered whether an Affidavit made in support of the Respondent (the "Respondent's Affidavit") contained opinions and conclusions on matters that must be decided by the Court in accordance with Rule 3.68(4)(a). The Court noted that no party is entitled to give legal argument as evidence or to provide legal conclusions on issues that are in front of the Court, which is more properly the role of the Court in deciding the Application. The Court ultimately found that evidence given via Respondent's Affidavit was not sufficient to raise triable issues.

The Court also considered whether an Affidavit in support of the Applicants (the "Applicants' Affidavit") improperly deposed to events that the Affiant did not personally witness in accordance with Rule 13.18(3). The Court determined that the Affiant did not provide any hearsay evidence, noting that the Affiant was not entitled to give evidence in support of the Application based on hearsay unless she relied on relevant and reliable documents that could be admitted at Trial. The Court accordingly found there was no issue with the admissibility of the Applicant's Affidavit.

H2 CANMORE APARTMENTS LP V CORMODE & DICKSON CONSTRUCTION EDMONTON LTD, 2023 ABKB 659

(MARION J)

Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 13.18 (Types of Affidavit)

The Applicant Defendants applied for Summary Dismissal of the Plaintiffs' claim against certain Defendants (the "Summary Dismissal Application"). The Plaintiffs opposed the Summary Dismissal Application and applied to strike portions of the Defendants' Affidavits (the "Striking Application"). The Court was asked to determine whether any portion of the Defendants' Affidavits should be struck prior to the Summary Dismissal Application.

The Court set out the prevailing principles for Summary Judgment and the evidentiary screening principles in the context of Summary Judgment Applications. Further, the Court noted that it had jurisdiction to engage in evidentiary screening pursuant to Rule 3.68(4). The Court then reviewed the evidentiary principles related to Affidavit evidence and addressed the Plaintiff's grounds for the Striking Application, i.e., argument, conclusion (fact), conclusion (law), opinion, and hearsay.

With respect to hearsay, the Court cited Rule 13.18(3) and noted that an Affidavit used in support of an Application should generally be based on personal knowledge. Although there is some flexibility when applying Rule 13.18(3) in Summary Judgment Applications to admit evidence not based on personal knowledge, hearsay should only be admitted if it would be admissible at Trial, or if it meets the requirements for a principled exception to hearsay.

After applying the evidentiary principles to the impugned Affidavits, the Court struck certain portions of the Defendants' Affidavits.

CO-SOLVE SOLUTIONS INC V PURDY, 2023 ABCA 324

(CRIGHTON, HO AND WOOLLEY JJA)

Rule 3.68 (Court Options to Deal With Significant Deficiencies)

The Appellants appealed a Chambers Judge's earlier Decision declining to strike an Amended Statement of Claim. The Appellants were individual Defendants and officers of a company. The Appellants previously filed an Application to strike under Rule 3.68 on the basis that it disclosed no reasonable claim as against them in their personal capacities. The Respondents filed a cross-Application to file the Amended Statement of Claim. Both Applications were heard together, and initially, the cross-Application was granted.

The Application's Judge had dismissed the Application to strike noting that the law on concurrent liability of employees, officers, and directors for torts committed in the course of their employment is unsettled. The Appellants appealed to the Court of King's Bench.

The Chambers Judge then dismissed the Appellants' Appeal, noting that it was not obvious whether the proposed amendments to the Statement of Claim disclosed any triable issue or whether the Appellants could be held personally liable for their actions.

On Appeal, the Court of Appeal then considered the factors that determine whether an individual can be held personally liable as a concurrent tortfeasor to a corporation, including the nature of the tort and whether it was intentional. The Court agreed with the Chambers Judge that it was not clear whether the Appellants could be held personally liable, and that the claims outlined in the Amended Statement of Claim should not be struck against the individual Defendants. The Appeal was ultimately dismissed.

AIG INSURANCE CO OF CANADA V KOSTIC, 2023 ABKB 702

(GRAESSER J)

Rules 4.14 (Authority of Case Management Judge), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

This Decision arose from case management proceedings involving the Defendant and a series of related lawsuits. The case management protocol in place mandated that a party must seek permission to bring an Application against parties in the case management proceedings.

The Defendant applied for a Fiat to proceed with an Application to strike the Plaintiff's Claim for delay and for a Fiat to proceed with an Application for Summary Trial. Justice Graesser declined both.

With respect to the Application to strike for Delay, Graesser J. identified several issues, and held that the Application lacked a reasonable chance of success.

First, the Defendant's success would depend on whether her Counterclaim could be severed from the Plaintiff's Statement of Claim. Justice Graesser was unaware of Alberta cases where the Plaintiff's claim was struck for delay yet the Defendant's Counterclaim was allowed to proceed. The claim and Counterclaim are joined, and one step in one would move the entire Action towards Trial.

Second, the Defendant had previously obtained an Order staying the running of time under Rules 4.31 and 4.33. Rule 4.31 provides that an Action should be dismissed where delay causes significant prejudice to a party. Rule 4.33 provides that an Action must be dismissed if three or more years have passed without a significant advance in the Action. The Order was granted in case management pursuant to Rule 4.14, which provides Case Management Judges with broad powers to resolve issues in the litigation. The Order provided for a suspension period under Rules 4.33(2)(a) and 4.33(9), which caused the time to stop running against both parties.

Further, there was delay from the transition of case management from various Judges to Graesser J., for which neither party would be responsible.

Lastly, the Plaintiff's Statement of Claim sought a declaration that it no longer had a duty to

defend or indemnify the Defendant. Even if the Plaintiff's Statement of Claim would be struck for delay, the Plaintiff would not lose the ability to maintain its position. If necessary, it could start a new Action seeking a declaration as to its obligations.

With respect to the Application for Summary Trial, Graesser J. found that the matter was not appropriate for summary determination, especially because the Defendant had to prove damages on her Counterclaim. There was no benefit to either party in trying to have the matter determine summarily, either by Trial or Application. The materials before Graesser J. made it clear that there were significant factual issues that could only be addressed through oral testimony and cross-examination at Trial.

SHTAIF V MIDLAND RESOURCES HOLDING LIMITED, 2023 ABCA 319

(HUGHES JA)

Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)

The Applicant applied to set aside a Stay of Enforcement and for Security for Costs. It succeeded on both.

In May 2021, a Justice of the Alberta Court of King's Bench upheld an Order by an Applications Judge permitting the Applicant to register a 2017 Ontario Judgment against the Respondent under the *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6. Further, the Order required the Respondent to complete a Financial Statement of Debtor Form and answer questions in aid of enforcement in favour of the Applicant.

The Alberta Court of Appeal stayed the enforcement proceedings against the Respondent pending the outcome of two matters before the Ontario Courts. The two Ontario matters were concluded and decided against the Respondent, with the Ontario Superior Court recently declaring the Respondent a vexatious litigant.

Accordingly, the Applicant applied to set aside the Stay and for Security for Costs.

The Court of Appeal noted that to set aside a Stay, the Court will apply the tri-partite test set out by the Supreme Court of Canada in *RJR-MacDonald v Canada (Attorney General),* [1994] 1 SCR 311. The first question asks whether there is a serious question arguable on Appeal. The Court held that considering the Ontario Court's findings, there was no serious question on Appeal. The second question asks whether there is irreparable harm to the Respondent. The Respondent would not suffer irreparable harm by completing a Financial Statement of Debtor Form and submitting to Questioning in aid of enforcement. Lastly, the third question looks to determine whether the balance of convenience favours the Applicant or Respondent. Given that this matter had been before the Courts for a long time and that the matter was a money Judgment, the balance of convenience favoured the Applicant. Therefore, the Stay was lifted but no steps could be taken until the Respondent's Appeal was heard.

After considering the factors in Rule 4.22, the Court of Appeal noted that it had discretion to grant Security for Costs. The Court of Appeal found that it was inappropriate to order Security for Costs for steps taken because the parties had already filed their Factums. However, the Respondent was asked to post Security for Costs within two months of the Decisions otherwise his Appeal would be deemed abandoned under Rule 14.67(2).

LYMER V JONSSON, 2023 ABKB 565

(BELZIL J)

Rule 4.31 (Application to Deal with Delay)

The Applicant filed a *Charter* Notice and applied for a Stay of Contempt proceedings.

The Applicant had previously failed to comply with a Court Order to prepare an Affidavit of Records and was declared to be in Civil Contempt of Court. The Alberta Court of Appeal reversed an initial Contempt sanction and ruled that the question of sanction for Contempt be remitted for a fresh hearing before a different Justice of the Alberta Court of King's Bench.

The Applicant argued that Contempt proceedings should be dismissed under Rule 4.31, which allows the Court to dismiss all or part of a claim if the Court determines that delay has resulted in significant prejudice to a party. Belzil J. disagreed, noting that the onus was on the Applicant to purge his Contempt and he failed to do so. The Court also noted that the Applicant participated in or contributed to the delay, which engaged Rule 4.31(3). The Court determined that it would not be just and equitable to issue a Stay pursuant to Rule 4.31.

WOODBRIDGE HOMES INC V RANDLE, 2023 ABKB 731

(APPLICATIONS JUDGE SMART)

Rules 4.31 (Application to Deal with Delay) and 13.18 (Types of Affidavit)

The Application for delay under Rule 4.31 was brought by the Applicant/Defendant. The Plaintiff initiated the underlying Action in 2009. As a preliminary matter, the Court addressed an evidentiary concern raised by the Respondent regarding the Defendant's Affidavits under Rule 13.18. The Respondent expressed reservations about the hearsay content of the Defendant's Affidavits. The Court acknowledged that Rule 13.18 aims to prevent reliance on hearsay Affidavits when the very existence of a legal Action is at stake, but some flexibility is necessary in interpreting this Rule. It was noted that an Application for delay is a procedural matter, and the Court's focus is on the pace at which the claim has progressed rather than the merits of the claim. The Court observed that the risks associated with hearsay evidence are mitigated when the Affidavit is prepared by reviewing relevant correspondence and documents, and when the Affiant has attached them as exhibits for the Court's review, which was done in this case.

Additionally, the Court examined the relevant case law under Rule 4.31. It considered the claim against each of the Defendants and took note of the 13-year gap between the filing of the Statement of Claim and the current Application. The Court noted that the Action was not yet ready for Trial, and it was unlikely to reach that stage for a few more years due to outstanding steps, particularly the exchange of expert reports. The Court emphasized that the overall delay and the gaps in the progress of

the case constituted significant delay against all the Defendants.

Applications Judge Smart emphasized that if Plaintiffs do not proceed with due diligence and expedition, they may lose the right to pursue their case. Court determined that the Plaintiff's progress in prosecuting this Action had been slow, which constitutes an unreasonable and inexcusable delay. The Applicant failed to counter the presumption of prejudice, specifically by not providing an expert report that would assist the Defendants in understanding the nature and strength of the Applicant's claim, determining the necessary evidence, retaining experts, and identifying essential witnesses. Applications Judge Smart found no compelling reasons for the Court to refrain from dismissing the Action, and consequently, dismissed the Plaintiff's Action against the Defendants.

LONCIKOVA V GOLDSTEIN, 2023 ABCA 358

(SLATTER, ANTONIO AND GROSSE JJA)

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

The Appellant appealed the dismissal of their Action pursuant to Rule 4.33 in a claim that alleged that the Respondent was negligent in providing dental treatment. The Appellant argued that the Chambers Judge erred in failing to find a significant advance in the Action, largely relating to whether the parties' counsel had a shared understanding after a phone call in April 2019 that the Appellant would gather additional medical evidence.

A Trial set for ten days was to commence on June 1, 2015. On March 23, 2015, the Appellant's counsel forwarded to the Respondent's counsel a new expert report from a doctor who had not been listed as one of the Appellant's expert witnesses. Chief Justice Wittmann endorsed a Consent Order, dated April 21, 2015, adjourning the Trial *sine die* and providing the parties leave to set the matter down again for a further Trial date. The parties participated in an unsuccessful Judicial Dispute Resolution ("JDR"). On February 25, 2020, the Respondent applied for an Order dismissing the Action for delay pursuant to either Rule 4.33 or 4.31.

Both the Applications Judge and the Chambers Judge found that there was no significant advance of the Action for over three years between the JDR and the Application to dismiss for delay. The Appellant's Action was dismissed pursuant to Rule 4.33. As a result, the Chambers Judge did not need to address the companion Application to dismiss pursuant to Rule 4.31.

The Court surveyed Alberta jurisprudence where one party's information and document gathering was put forward as significantly advancing an Action. The Judgments showed that Courts consider the importance of the documents, the information in the documents, the relevance and quality of the information, and, importantly, whether the information and documents were provided to the other party. The Court emphasized that the purpose for which documents are sought is not determinative on its own, and whether the documents, or the document-gathering process, was communicated to the opposing party must be considered. In the case at hand, it was undisputed that the

medical information was not provided to the Respondent until February 28, 2020, after they brought the Application to dismiss.

The Appellant argued that the process for gathering additional evidence was communicated during an April 5, 2019 telephone conversation. Though the contents of that conversation were disputed, the Respondent sent a draft Order Scheduling Trial Date to the Appellant. Among other things, it would have required the Appellant to serve a further Supplemental Affidavit of Records. The Appellant never responded or followed-up. The Chambers Judge found this inaction was "wholly inconsistent" with the existence of any agreement between the parties as to the further production of medical documents by the Appellant. This ground was dismissed.

The Appellant raised a final ground of Appeal: that the Order of April 21, 2015 stayed or adjourned the Action as contemplated within the meaning of Rule 4.33(2)(a). This ground was also dismissed, as the Court agreed with the Chambers Judge's findings that the terms of the April 21, 2015 Order adjourned the Trial, not the Action, as it did not prevent any party from taking any further steps.

The Appeal was dismissed.

LYMER V JONSSON, 2023 ABCA 367

(FETH JA)

Rules 4.31 (Application to Deal with Delay) and 14.5 (Appeals Only With Permission)

The Applicant sought leave to Appeal a Decision denying their request to permanently Stay a civil Contempt proceeding because of long delay. The Applicant was an undischarged bankrupt in an Action started in 2011, as the Court rejected his proposal under Part III, Division I of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (the "*BIA*"). The Applicant was directed by Court Order to prepare and serve Affidavits of Records in the bankruptcy Action on behalf of themself and certain companies by January 2014. The Applicant was later found in civil Contempt for failing to comply with the Court Order and was subsequently sanctioned at a later date.

The Court had to first determine whether the Applicant needed leave to Appeal. Pursuant to s. 193(e) of the *BIA* and Rule 14.5(1)(f), the Court concluded that leave to Appeal was required in the matter.

Thus, the Court turned its attention to the Rule 4.31 Application. The Court concluded that Rule 4.31 contemplates dismissing all or part of a claim, which in this case was the bankruptcy Action. Since the Applicant was seeking a Stay of the civil Contempt proceedings, and not the dismissal of all or part of the Action, the Court ruled that Rule 4.31 had no Application and denied leave to Appeal.

CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA, 2023 ABKB 689

(NIXON ACJ)

Rules 5.1 (Purpose of this Part (Disclosure of Information)) and 5.7 (Producible Records)

The present Applications concerned claims of privilege over certain documents. In the underlying Action, the Plaintiff, CNOOC Petroleum North America ULC ("CNOOC") issued a Statement of Claim against a number of parties, including Sunstone Projects Ltd. and Wood Group Canada, Inc. (collectively, the "Wood Group") and ITP SA ("ITP").

Nixon A.C.J. was asked to determine the following Applications: (1) CNOOC's Application against ITP to compel answers to certain questions and Undertakings; (2) CNOOC's Application against Wood Group to compel answers to certain questions and Undertakings, requesting production of certain records and revising their Affidavit of Records; and (3) Wood Group's Application against CNOOC requesting production of certain records.

Nixon A.C.J. noted that the purpose of Part 5 of the Rules (and citing Rule 5.1 in particular) is to encourage early disclosure of records, discourage conduct that unnecessarily delays proceedings or increases their Costs, and to facilitate the resolution of issues in dispute. While recognizing the general principle that records that are both material and relevant but protected under a form of privilege do not need to be disclosed, Nixon A.C.J., noted that a party's Affidavit of Records should comply with Rule 5.7 to ensure the proper disclosure of privilege claims over multiple records. Nixon A.C.J. found it appropriate for the parties to revise their Affidavits of Records to give a fuller description of the materials over which privilege was being claimed.

Nixon A.C.J. then addressed the parties' Applications to compel answers to Undertakings and reviewed each outstanding Undertaking to determine whether it was relevant and material to the issues in dispute.

With respect to Wood Group's Application against CNOOC requesting production of certain records, Nixon A.C.J. held that the records should be produced since they were not privileged, or the privilege had been waived.

LC V ALBERTA (CHILD WELFARE), 2023 ABKB 586

(GRAESSER J)

Rules 5.13 (Obtaining Records from Others), 5.17 (People Who May be Questioned), 5.18 (Persons Providing Services to Corporation or Partnership) and 5.19 (Limit or Cancellation of Questioning)

The Applicants applied to set aside a Notice of Appointment for Questioning of Ms. Pelton (the "Advocate") and to dispense with the Respondents' Application to compel the Advocate to attend Questioning and mandating the Office of the Child and Youth Advocate (the "OCYA") to produce certain records. The Respondents sought to compel the attendance of the Advocate and the production of records identified on the Application.

The competing Applications arose in the context of ongoing discovery in class proceedings. The Applicant took the position that neither the production of records held by the OCYA, nor Questioning the Advocate, was permitted under the *Child and Youth Advocate Act,* SA 2011, c C-11.5 (the "*Act*"), as the records were created before the Act. At the time the records were created, the relevant legislation was the *Child, Youth, and Family Enhancement Act,* RSA 2000, c C-12 (the "*CYFEA*"). Graesser J. concluded that the *CYFEA* did not prohibit anyone for being called on to testify in any type of proceedings, and that the *Act* did not provide retroactive protection against lawsuits commenced before the *Act* came into effect. Thus, Graesser J. turned his analysis to the Rules.

The Advocate and the OCYA opposed production of the records on a number of grounds, claiming, among other things, that Rule 5.17 did not apply and the OCYA was not adverse in interest to the Plaintiffs, and the requirements of Rule 5.13 had not been met. The Plaintiffs, on the other hand, argued, among other things, that the records were relevant, and the requirements of the Rules were met.

The Applicant advanced the argument that that there was not another party "adverse in interest" to the Respondents. Graesser J. concluded that, subject to Rule 5.13, no valid objection to the Advocates proposed Questioning could be made on the basis that the Advocate and the OYCA are not "adverse in interest" to the Plaintiff. He concluded this on the basis that until April 1, 2012 (the date in which the Act came into effect) the Advocate reported to the Minister of Children and Family Services and the OCYA was part of the Ministry of Children and Family Services, and thus were compellable to testify in any proceeding, just like any other government officer or employee, pursuant to s. 11 of the P*roceedings Against the Crown Act*, RSA 2000, c P-25. Further, in the event that the OYCA was somehow considered independent from the Crown, attendance for Questioning would likely be secured by using the "near employee" provisions of Rule 5.18, as if someone is not included in Rule 5.17, Rule 5.18 provides for the Questioning of "near" employees or officers.

The Plaintiffs sought records categorized by Graesser J. as the "Initial Advice Documents" and the "Subsequent Documents". As for the Initial Advice Documents, the Applicants cited *Dreco Energy Services Ltd v Wenzel,* 2009 ABQB 574, where Greckol J. (as she then was) held that Rule 5.13 required that the requested documents be defined with specificity. Graesser J. distinguished the case from the matter at hand since the Plaintiffs were seeking documents that the Defendant gave to the Applicants, and because the Applicants were not true third parties since they were part of

the "Crown". Graesser J. was satisfied that the Initial Advice Documents existed and did not see how the Plaintiffs could have provided any better description of what they were looking for. Graesser J. did not feel the need to address the issue of relevance and materiality of the Initial Advice Documents, as they appeared to go to the heart of a live issue and Questioning on them automatically flowed from that. Thus, he concluded that the proposed Questioning was not contrary to Rule 5.17.

Graesser J. concluded that ongoing communications, if there are any, between the Applicants and the Government as to the issue of suing for Government wrongs allegedly done to children in care would be relevant for the same reasons as above. Records dealing with possible claims against the Government and how those situations were handled by the Applicants would also be relevant, assuming any such claims were referred to the Applicants and any records exist. Though the Applicants argued that the Plaintiff could not embark on a fishing expedition, Graesser J. concluded this was not the case as it was a logical assumption to believe ongoing communications would exist, and because the Applicants themselves will know if the communications exist.

The Applicants further argued that the Advocate did not personally have records, and therefore no records could not be compelled under Rule 5.13. Graesser J. stated that though the Advocate may not have personal control over the records, as an employee she had access to such records. Thus, he concluded that to the extent that the Applicants have possession of or control over the any of the records sought in the Plaintiffs' Application (but for privileged documents), they were clearly producible under Rule 5.13.

Thus, the Application by the Advocate and the CYAO was dismissed. As it pertained to Costs, the Applicants suggested that the Plaintiffs' counsel was improper and sought to cancel the appointment for Questioning as being unnecessary, improper, or vexatious under Rule 5.19. The Applicant alleged that the Plaintiffs' counsel had repeatedly contacted employees of the OCYA attempting to obtain information that was not within the public domain, calling the behavior improper, harassing and an annoyance to the OCYA. Graesser J. found, to the contrary, that the Applicant's personal attacks warranted enhanced Costs therefore set Costs at double the appropriate column for a contested Application with Briefs.

CENTER STREET V LLOYD'S UNDERWRITERS, 2023 ABKB 709

(APPLICATIONS JUDGE PROWSE)

Rule 5.13 (Obtaining Records from Others)

This was an Application under Rule 5.13 to compel an adjusting firm to provide a witness transcript for use in legal proceedings. The Respondents opposed the Application based on litigation privilege. The transcript was an interview with a former employee, and the main issue was whether it fell under litigation privilege. The interview included a lawyer representing the CGL insurer, the director and manager of a roofing contractor, and an employee from an independent adjusting firm. The interviewee was a former employee of the subcontractor of the roofing contractor.

The case outcome depended on whether the interview could be considered as falling within common interest privilege. Applications Judge Prowse noted that the primary purpose of the

interview was to assess coverage, and struggled to identify a significant common interest among the parties involved. The independent adjuster's argument indicated they were unaware of which party the lawyer represented during the interview, making it difficult to support the notion of common interest privilege. Ultimately, the Court determined that the transcript was not protected by litigation privilege.

OFFICE OF THE CHILD AND YOUTH ADVOCATE V LC, 2023 ABCA 365

(FAGNAN JA)

Rules 5.13 (Obtaining Records from Others) and 5.17 (People Who may be Questioned)

The Applicants applied for a Stay pending Appeal an Order of a Case Management Justice. In that Order, one of the two Applicants was required to submit for Questioning, while the other Applicant, the Office of the Child and Youth Advocate (the "OCYA"), was required to produce records from 2004. The OCYA was not a party to the underlying Action.

The Applicants argued that the Case Management Justice erred in law by: (1) concluding that the provisions in the *Child and Youth Advocate Act,* SA 2011, c C-11.5 (the "CYAA") regarding production of records and Questioning did not apply retroactively; and (2) misapplying Rules 5.13 and 5.17(d), which address production of third party records and the right to question a party respectively.

In dismissing the Respondents' argument that the Appeal was frivolous, the Court found that the Applicants had raised serious questions as to whether the procedural provisions in the CYAA applied to the Respondents' requests for records and Questioning, and whether Rules 5.13 and 5.17(d) were properly applied. Further, the Court found that the Applicants had established a likelihood of irreparable harm as the Appeal would be moot if the Applicants were required to comply with Questioning and production requirements, which could not be undone. The Court also found that the Stay was not significant and that the balance of convenience favoured the granting of a Stay considering all of the circumstances.

Based on the above analysis, the Court granted the Application.

ELHERT V SAILER, 2023 ABCA 371

(CRIGHTON, ANTONIO AND GROSSE JJA)

Rule 5.13 (Obtaining Records from Others)

The Appellant appealed a Decision where the Court declined to order the production of specific corporate financial statements. The purpose of seeking these documents was to evaluate the amount of child support that should be paid by the Respondent. The Alberta Court of King's Bench previously determined that the Respondent did not exercise control over the involved companies (the "Companies"). This conclusion was based on the finding that the Respondent was neither an owner, shareholder, nor a director of the Companies.

The Court noted that in family law proceedings like this, certain subject-specific disclosure obligations arise under legislation, but those specific provisions do not replace the basic disclosure obligations in the Rules. The Court noted that Rule 5.13 provides a mechanism to obtain production of relevant and material records from non-parties, including entities like the Companies.

The Chambers Judge did not decide whether Rule 5.13 required the Companies to produce the requested financial records. Since this issue remained unresolved, the Court addressed it during the Appeal. The Court noted that to obtain a records from a non-party under Rule 5.13 notice of the Application must be served on the non-party and the Applicant must show that: (1) The records exist; (2) They are under the control of the non-party; (3) The records are relevant and material; (4) The records cannot be obtained from a party; and (5) It is appropriate to order the non-party to produce the records.

Satisfied that the Applicant met the test, the Court allowed the Appeal and ordered disclosure of the requested financial records under Rule 5.13.

STONHAM V RECYCLING WORX INC, 2023 ABKB 629

(MARION J)

Rules 5.31 (Use of Transcript and Answers to Written Questions), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 7.11 (Order for Trial), 10.33 (Court Considerations in Making Costs Award), 13.6 (Pleadings: General Requirements) and 13.12 (Pleadings: Denial of Facts)

The Plaintiff applied for Judgment by way of Summary Trial in his wrongful termination Action against the Defendant.

The Court began by discussing the state of the evidentiary record. Justice Marion noted that the Plaintiff did not file the exhibits from the transcript of his Cross-Examination of the Defendants' witness and was therefore directed to do so pursuant to Rule 6.7. Justice Marion also noted that the Defendant relied on read-in portions of the transcript from the Question-

ing of the Plaintiff, as permitted by Rule 5.31. Finally, Justice Marion explained that *viva voce* evidence had been given during the Summary Trial proceedings through in-Court Cross-Examinations pursuant to Rule 7.11(b).

As part of its case, the Defendant alleged that the Plaintiff had either resigned from or abandoned his employment, and was therefore not entitled to reasonable notice of his termination. The Plaintiff argued that the allegation of abandonment had not been properly pleaded by the Defendant in its Statement of Defence. Justice Marion held, however, that the issue had been anticipatorily raised by the Plaintiff in his Statement of Claim, and was therefore properly before the Court pursuant to Rule 13.12(1); Justice Marion observed that there was no risk of surprise which would lead to a breach of Rule 13.6(3).

In argument, however, the Defendant asserted that the Plaintiff's alleged abandonment constituted just cause for his termination. Justice Marion found that a defence of just cause had not been properly pleaded, and that the Defendant was therefore not permitted to rely on that defence per Rule 13.6(3).

In terms of the substantive analysis, the Court began by considering whether Summary Trial was appropriate as guided by Part 7, Division 3 of the Rules. The Court cited the two-part test, which asks (1) whether the Court can decide disputed questions of fact by proceeding in a manner authorized by the Rules for Summary Trial; and (2) whether it would be unjust to decide the issues in that manner. The second part of this test, per the Court, is informed by a list of factors which seek to determine whether Summary Trial will provide a fair process while keeping in mind issues of proportionality related to the nature of the dispute. Justice Marion held that this matter was appropriate for Summary Trial.

In the result, the Court held that the Plaintiff had neither resigned from nor abandoned his employment. Justice Marion held that the Plaintiff had been wrongfully terminated and was entitled to damages in the amount of $11,250.00, representing a 2.5-month notice period.

Absent agreement by the parties, the Court directed submissions on Costs which would include their position with respect to the factors listed under Rule 10.33.

FEG V MJV, 2023 ABKB 726

(MAH J)

Rules 5.31 (Use of Transcript and Answers to Written Questions) and 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

In relation to a Special Application, the Court considered, among other issues, an updated Affidavit which was filed by the Plaintiff which relied on and referred to the transcript of a Questioning on Affidavit conducted by the Defendant. The Defendant objected to use of this Affidavit (the "Objected to Affidavit"). The Objected to Affidavit was objected to on the basis that the submission was contrary to Rule 5.31, which restricts the use or reliance of a Part 5 Questioning transcript to the questioning party, not the questioned party. The Court determined that there had been confusion because of the use of the word "questioning"

within Rule 5.31, which applies to Questioning for discovery, and Rule 6.7, which applies to Questioning on Affidavit.

The Court accordingly found that there was nothing improper about the Plaintiff relying on or referring to their own Questioning on Affidavit in the Objected to Affidavit and the filing of the entirety of the Questioning on Affidavit transcript for the purposes of the Application, noting that it should have been done so by the questioning party.

WIRRING V LAW SOCIETY OF ALBERTA, 2023 ABKB 580

(JOHNSTON J)

Rules 5.34 (Service of Expert's Report) and 6.11 (Evidence at Application Hearings)

The Plaintiff, Prabjot Singh Wirring ("Mr. Wirring") claimed that the portion of the oath allegiance to the sovereign violated his rights to religious freedom and equality guaranteed by the *Charter*. The Defendant, His Majesty the King in right of Alberta ("Alberta"), applied to strike or alternatively to summarily dismiss the claim. Mr. Wirring opposed Alberta's Application and applied for Summary Judgment.

Mr. Wirring swore and filed an Affidavit, along with another Affidavit by Harjeet Grewal ("Grewal Affidavit") in support. Alberta opposed the Grewal Affidavit stating that it included an unqualified expert opinion and did not comply with Rule 5.34. Mr. Wirring argued that Rule 6.11(1)(a) permits the filing of expert evidence. Both parties relied on a previous case, *ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653, which established that opinion evidence is generally inadmissible but can be allowed for matters requiring specialized knowledge. The Court noted that expert evidence should be introduced as it would at Trial, with the expert's qualifications and scope of opinion clearly defined. Justice Johnston considered the fact that Dr. Grewal, the expert in question, had impressive qualifications and expertise in religious studies, particularly in Sikhism. Dr. Grewal's opinion provided necessary and relevant information to Mr. Wirring's case based on the tenets of his faith. The Court concluded that there were no concerns about Dr. Grewal's qualifications, and Alberta did not challenge the evidence or seek to cross-examine him. Therefore, admitting the Grewal Affidavit would have significant benefits with no corresponding harm, and therefore was considered admissible.

ALBERTA DRYWALL & STUCCO SUPPLY (CALGARY) INC V ALBERTA DRYWALL & STUCCO SUPPLY INC, 2023 ABKB 696

(DUNLOP J)

Rules 5.35 (Sequence of Exchange of Experts' Reports) and 5.37 (Questioning Experts Before Trial)

The Defendant applied for an Order requiring the Plaintiff's expert or the Plaintiff to provide the documents referred to in the expert's report and used by the expert in preparing his report which had not been previously disclosed, and for an Order directing the Plaintiff's expert to attend for Questioning on his report. All the information relied upon by the expert had been disclosed, except for the discussions between the expert and the principal of the Plaintiff, which were referenced in the expert report.

The Defendant argued that the Plaintiff had waived privilege over its expert's report when it was filed and served. The Court noted that there are two lines of authority on this issue in Alberta: one line of authority holds that privilege over an expert's report and the material the expert relied upon is not waived until the expert is called as a witness, and the other line of authority holds that privilege is waived when the expert report is served, as is required for the expert to be called at Trial pursuant to Rule 5.35. The question, therefore, was whether the Plaintiff had waived privilege over the discussions between the principal of the Plaintiff and the expert by serving the expert report on the Defendant.

The Court held that the Supreme Court of Canada's decision in *R v Stone,* [1999] 2 SCR 290, stands for the principle that once a party has committed to calling an expert at Trial, privilege over the expert's report is waived and the opposing party is entitled to the report and all foundational information. However, Dunlop J. disagreed with Feasby J.'s recent ruling in *Ho v Connell,* 2023 ABKB 133, that "[t]he waiver of privilege with respect to foundational information occurs when the expert report is exchanged because it is at that time when the party delivering the expert report signals to the other side its intention to rely at trial on the expert report." Justice Dunlop held that a party is free to not call an expert at Trial whose report it previously served and that all that a party serving an expert report does is keep its options open. Accordingly, the Court found that the Plaintiff did not waive privilege over the communications merely by serving the expert report. The privilege would be waived if the expert is called at Trial, or if the Plaintiff did something that commits the Plaintiff to calling the expert as a witness at the Trial. The Defendant's Application was therefore dismissed. Justice Dunlop also held that while the Defendant may be entitled to know what material the expert had but did not rely upon if he testifies at Trial, that information remained privileged at this stage in the proceedings.

The Court then considered the Defendant's Application to question the Plaintiff's expert pursuant to Rule 5.37. Rule 5.37 requires "expectational circumstances" to be shown. Justice Dunlop found that the circumstances referred to by the Defendant, namely that the case is in case management, is highly contentious, and the quantum of damages is significant, did not constitute "exceptional circumstances", and dismissed the Application.

SERINUS ENERGY PLC V SYSGEN SOLUTIONS GROUP LTD, 2023 ABKB 625

(MARION J)

Rules 5.36 (Objection to Expert's Report), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application) and 10.33 (Court Consideration in Making Costs Award)

The Defendant, SysGen Solutions Group Ltd ("SysGen"), provided IT services to the Plaintiff, Serinus Energy Plc ("Serinus"). SysGen used its continued access to Serinus' information systems to remove Serinus' administrative access to its own systems at a time when Serinus was transitioning away from SysGen to a new IT service provider. SysGen changed Serinus' passwords, which locked Serinus out from administrative control of its system, without notice to Serinus and immediately after Serinus disputed a SysGen invoice for services during the transition period. SysGen asserted that it did this to investigate a security threat to Serinus' system. SysGen failed to return administrative access, and instead made a settlement offer using Serinus' administrative access as part of a settlement of the billing dispute. Serinus took matters into its own hands and managed to break into its own system to regain control.

Serinus filed a Statement of Claim alleging that SysGen acted with the intent to ransom Serinus for disputed invoices, and claimed breach of contract, breach of fiduciary duty, conversion, and intrusion upon seclusion. SysGen filed a Statement of Defence and Counterclaim for unjust enrichment stemming from unpaid invoices.

The matter proceeded by Summary Trial. The parties relied on a jointly filed Compendium of Pleadings and Evidence (the "Compendium"), which included evidence from 13 witnesses, including two experts. Eight of the civilian witnesses were questioned on their Affidavits pursuant to Rule 6.7. The parties agreed that the evidence in the Compendium, other than the expert reports which were objected to pursuant to Rule 5.36, was admissible evidence. No viva voce evidence was heard, and the matter proceeded directly to two days of final argument.

The Court noted that Part 7, Division 3 of the Rules govern Summary Trial, and that the well-established test for whether a Summary Trial is appropriate, pursuant to the Decision in *JN v Kozens,* 2004 ABCA 394, is (1) can the Court decide disputed questions of fact on Affidavits or by other proceedings authorized by the Rules for a Summary Trial? And (2) would it be unjust to decide the issues in such a way? The Court found the first branch of the test was met as there was an extensive documentary record that the parties had organized, and that both parties agreed there was not a significant dispute on the facts, but rather disputes about the legal effects of what happened. The Court, in considering the second branch of the test, held that while the Court of Appeal has warned that Courts should not give unreasonable weight to the agreement of parties as to the suitability of the Summary Trial process, "I interpret this only to mean that the parties' agreement is not determinative but is one factor to consider." It is, however, an important factor to consider because it respects that counsel will have the best understanding of the issues at play. After considering the non-exhaustive list of factors as to whether it would be unjust to proceed by Summary Trial, as laid out in *Shaufert v Calgary Co-Operative Association Limited,* 2021 ABQB 579, and noting the parties agreement, the Court held that the matter was appropriate for Summary Trial.

After qualifying both parties experts, and considering the evidence set out in the Com-

pendium, Marion J. held that Serinus was entitled to $5,000 in personnel costs that salaried employees spent responding to the system lockdown, $42,012.50 in amounts paid to iON Work for services in response to the system lockdown, and $50,000 in punitive damages based on SysGen's conduct, totalling $97,012.50. However, Serinus was entitled to judgment of $53,137.89 for unpaid services. After set-off, Serinus was granted Judgment against SysGen for $43,874.61.

The Court held that if the parties were unable to agree on Costs, they could provide written submissions addressing the Rule 10.33 factors, any Formal Offer of settlement they wished the Court to consider, a draft proposed Bill of Costs pursuant to Schedule C, and a summary of their proposed reasonable and proper Costs that the party incurred in respect of the Action.

ROMSPEN MORTGAGE LTD PARTNERSHIP V 3443 ZEN GARDEN LTD PARTNERSHIP, 2023 ABKB 730

(FETH J)

Rules 6.46 (Referee's Report) and 7.3 (Summary Judgment)

The Plaintiffs applied for Summary Judgment against the Defendant and Summary Dismissal of the Counterclaim.

Feth J. cited *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49 and *Hannam v Medicine Hat School District No 76,* 2020 ABCA 343 for the propositions that Summary Judgment is available where the moving party establishes the facts at issue on a balance of probabilities and demonstrates that no genuine issue remains for a Trial. Further, the evidence must be sufficient so that the Judge is confident the dispute can be fairly resolved without a Trial.

If the moving party meets the initial burden of showing "no merit", the resisting party must then put its best foot forward to demonstrate that a triable issue remains. Feth J. reminded us that a party cannot resist summary disposition by speculation about what might turn up in the future.

Feth J. further commented that although the Application does not contemplate Summary Judgment on difficult factual questions, Summary Judgment is not limited to cases where the facts are not in dispute. The Court can make contested findings of material facts and make material fact findings.

Citing *Hryniak v Mauldin,* 2014 SCC 7 and *Weir-Jones*, Feth J. commented that the facts pleaded in the Statement of Claim and the Counterclaim are not assumed to be true. The record must enable the Court to make the necessary findings of fact and determine the applicable law. The Court must also reflect on whether the claim or part of it may be fairly and justly resolved at this stage of the litigation.

Having found that the liability for the debt had been determined in foreign Courts of competent jurisdiction, Feth J. concluded that the Plaintiffs were entitled to partial Summary Judgment. As the full amount owing could not be determined on the evidence submitted, Feth J. referred the determination of the balance of the debt amount to a Referee, pursuant to Rule 7.3(3).

Feth J. further held that, pursuant to Rule 6.46, the Referee shall make a report to the Court on the assessment of the debt amount. A copy of the report must be filed and served on the parties. After the report has been served, a party may apply to adopt the report in whole or in part, vary the report, require an explanation from the Referee, remit the whole or part of the assessment to the Referee for further consideration, or decide the assessment on the evidence taken before the Referee with or without additional evidence. The Court held that the Acting Chief Justice would then determine whether that Application should be assigned to another Judge.

As the Counterclaim allegations had been determined by Courts of competent jurisdiction, Feth J. dismissed the Counterclaim.

JOHNSON V VARSITY CHRYSLER DODGE JEEP RAM LTD, 2023 ABKB 544

(GROSSE J)

Rule 7.3 (Summary Judgment)

This was an Appeal from a Decision of an Applications Judge granting partial Summary Judgment pursuant to Rule 7.3 to two Plaintiffs in their Actions for constructive dismissal. The Applications Judge found that both Plaintiffs had been constructively dismissed. The employer, who was the Applicant, appealed the Applications Judge's Decision.

The Court emphasized the general approach to Summary Judgment as set out in *Hryniak v Mauldin,* 2014 SCC 7 ("*Hyrniak*") and *Weir-Jones Technical Services Inc. v Purolator Courier Ltd*., 2019 ABCA 49 ("*Weir Jones*"). The Court noted that in Hryniak, the Supreme Court of Canada held that there would be no genuine issue requiring a Trial where the Judge could reach "a fair and just determination on the merits on a motion for summary judgment".

The Court cited the seminal employment law decision of *Potter v New Brunswick Legal Aid Services Commission,* 2015 SCC 10, stating that an employee claiming constructive dismissal must demonstrate that the employer's conduct evinces an intention no longer to be bound by the employment contract.

In assessing the appropriateness of Summary Judgment, the Court acknowledged that the primary concern in this case revolved around the partial nature of the Application. The Applicant solely sought Summary Judgment in relation to the claim of constructive dismissal, deferring the determination of any remedy to a later stage. The Respondent contended that addressing constructive dismissal without considering damages would not significantly expedite or streamline the Trial process, as the issues were interconnected. Furthermore, the Respondent argued that granting partial Summary Judgment should only be employed in situations where issues can be easily separated. Conversely, the Applicant asserted that granting partial Summary Judgment in these circumstances would resolve a distinct issue of liability that applies to both Plaintiffs, and is separate from the individualized assessment of damages.

The Court referenced various authorities in its consideration of partial Summary Judgment and emphasized that the application and its implications must be evaluated within the

broader context of the litigation. After weighing the relevant factors, the Court determined that granting Summary Judgment would not be proportionate, expedient, or cost-effective in this particular case. The Court expressed two primary concerns with its Decision. Firstly, the parties had spent nearly three years pursuing Summary Judgment Applications without making any progress, which contravened both the Rules and the principles established in *Hyrniak* and *Weir Jones*. Secondly, the Court was apprehensive that the Respondent might misconstrue the Decision as an endorsement of its position on the merits of the constructive dismissal case, which would be erroneous. Consequently, the Court extended an invitation to the parties to engage in a Judicial Dispute Resolution process to facilitate the advancement of the Action.

KIBRIA V KAY-PFAU, 2023 ABKB 574

(MAH J)

Rule 7.3 (Summary Judgment)

The Plaintiff appealed from an Applications Judge's Decision which granted Summary Dismissal in favour of the Defendants pursuant to Rule 7.3. The Applications Judge's Decision was premised on a holding that the resolution of an earlier Action between the same parties, and that the resulting Settlement Agreement and Consent Judgment, constituted a full answer to the Plaintiff's claim in this new Action.

The Plaintiff's position on Appeal was twofold: (1) that the Consent Judgment, which arose from the Defendants' failure to satisfy the Settlement Agreement, was not a Judgment for unpaid wages which was the subject-matter of the new Action; and (2) that conflicting evidence on the records before the Applications Judge rendered Summary Dismissal unavailable.

The Court considered Rule 7.3 and the relevant Summary Judgment case law, and stated that Summary Judgment is available: (1) where the record allows the Court to make the necessary findings of fact and apply the law to the facts; and (2) where Summary Judgment is a proportionate, more expeditious and less expensive means to achieve a just result. The Court noted that the absence of a genuine issue requiring a Trial is central to this analysis.

With respect to the Plaintiff's first position, the Court held that it had never been established, through adjudication or otherwise, that the Plaintiff was, from a legal perspective, an employee who was owed wages. As such, the Consent Judgment did not allow the Plaintiff to satisfy the statutory prerequisites for a claim for unpaid wages against the individual Defendants in their capacity as directors. The Court suggested that circumstances would be different had the Consent Judgment made specific reference to "unpaid wages".

Given this analysis, the Court held that a Trial would not improve the Plaintiff's position from what was plain and obvious on the record as it then stood, and that, accordingly, the Applications Judge was correct to grant Summary Dismissal.

Justice Mah therefore dismissed the Appeal, with Costs to be addressed separately.

BROKOP V 1378882 ALBERTA LTD, 2023 ABKB 650

(ROMAINE J)

Rules 7.3 (Summary Judgment) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiffs were Judgment creditors of the Defendant numbered company ("137"). The Defendants were comprised of 137 and its principal, as well as the principal's deceased father, ex-wife, and son.

The ex-wife and son applied to vacate Default Judgments obtained by the Plaintiffs against them. The Plaintiffs applied for Summary Judgment seeking a declaration that the transfer of certain funds from 137 to the principal's father (now his estate) be declared void. The estate sought to summarily dismiss the Plaintiff's claim on the ground that there was no merit to it.

Justice Romaine set aside the Default Judgments against the ex-wife and son. She dismissed the Plaintiff's Application for Summary Judgment against the estate and allowed the estate's Application for Summary Dismissal, pursuant to Rule 7.3.

If it is fair in the circumstances, Rule 9.15(3) gives the Court discretion to set aside a Judgment. Rule 9.15(4) and the case law confirm that the Court can set aside the Judgment on any terms the Court considers just.

To determine whether it is fair to set aside a Judgment, the Court applies a three-part test looking to determine if (a) there is an arguable defence, (b) the Defendant has an excuse for why it let the Judgment go by default, and (c) the Defendant moved promptly to set aside the Noting in Default once it became aware of it.

The Defendants showed that they had an arguable defence. The ex-wife and son denied any improper receipt of money and relied on an expert report to support their position. The ex-wife provided uncontradicted evidence to explain that during the time when certain transfers of funds were alleged to have happened, she was in martial difficulties and 137's principal handled all of their financial matters. The son provided uncontradicted evidence that at the time he received the alleged transfers, he was in his 20s, recovering from cancer and chemotherapy, unable to work, and requiring very expensive medication. He was unaware of the source of the alleged funds and had no reason to suspect anything untoward about their source.

Both Defendants were unaware that the Plaintiffs applied for Default Judgment against them, and once they found out, moved quickly to set it aside.

Turning her attention to the Plaintiff's Summary Judgment Application, Romaine J. cited the Court of Appeal decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49 for the key considerations on the merits of a Summary Judgment Application. The Plaintiffs failed to show that there was no merit or defence to their claim against the estate. The estate had provided evidence that the father was not involved in the running of 137's bank accounts, that he did not receive a benefit from any of the alleged funds, and that he was not privy to the transfers into his own account.

Lastly, the estate's Summary Dismissal Application against the Plaintiffs was granted. The Court was able to conclude on the record that the Plaintiffs' claims against the father lacked

merit. The record was sufficiently clear to establish that the father did not have knowledge of the transactions conducted through his bank account.

DOERFLER V FITZPATRICK, 2023 ABKB 651

(MALIK J)

Rule 7.3 (Summary Judgment)

One of the Defendants sought Summary Dismissal of the Plaintiffs' Action pursuant to Rule 7.3.

Malik J. cited *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 and *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343 for the proposition that Summary Judgment is appropriate when there is no genuine issue requiring Trial, such as where the record allows the Court to make the necessary findings of fact, apply the law to those facts, and arrive at a just result in an expeditious way.

Malik J. further commented that while a Court is not precluded from granting Summary Judgment in the face of contested facts or conflicting evidence, it should not be granted if there is a genuine issue requiring Trial such as where there is a dispute on material facts or there are questions of credibility or evidentiary gaps. On an Application for Summary Judgment, the parties must put its best foot forward. The focus is on the evidentiary record available to the Judge rather than on speculation about what might "turn up in the future" or whether a party can produce a "better" record should the matter proceed to Trial.

In determining whether to grant the Defendant's Application, Malik J. considered the following questions: (a) Is it possible to fairly resolve this dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a Trial; (b) Has the moving party met the burden to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a Trial; (c) Have the Plaintiffs demonstrated there is a genuine issue that requires a Trial; and (d) Does the state of the evidentiary record give rise to sufficient confidence that summary disposition is appropriate in the circumstances.

Having found that there were credibility issues that require a Trial and that the Defendant failed to show that there was no merit to the claim, Malik J. held that the Plaintiffs' Action should not be summarily dismissed. Malik J. further commented that while a Trial might not yield a more complete documentary record, having the parties testify at Trial would produce a more complete evidentiary record from which to make a fair and just Decision. As such, the Defendant's Application was dismissed.

CALGARY CO-OP V FEDERATED CO-OP, 2023 ABKB 735

(SLAWINSKY J)

Rule 7.3 (Summary Judgment)

Calgary Co-operative Association Limited ("Calgary Co-op") sourced food, fuel and retail products from the Federated Co-operatives Limited (the "FCL") until 2019, when it gave notice that it was switching suppliers. Calgary Co-op alleged that, after notice was delivered, FCL fundamentally changed its practices and engaged in objectionable conduct to the detriment of Calgary Co-op. It sought a finding of oppression and related remedies.

Calgary Co-op applied for Summary Judgment pursuant to Rule 7.3 on its oppression claim related to discrete issues, reserving all other concerns for Trial. The Court considered the test for Summary Judgment from *Weir-Jones Technical Services Inc v Purolator Courier Ltd,* 2019 ABCA 49, which requires that the Court be able to make the necessary findings of facts, apply the law to the facts, and be satisfied that Summary Judgment is a proportionate, more expeditious and less expensive means than a Trial to achieve a just result.

The Court reviewed several further principles of Summary Judgment, including that the burden lies on the Applicant to show on a balance of probabilities that there is no genuine issue requiring a Trial, and that the volume of materials alone is likely not itself a reason to reject a Summary Judgment Application, nor is complexity, an extensive record, or expense expended. The Court reiterated that Summary Judgment is particularly suited to cases where facts are not in serious dispute and the real question is how the law applies to the facts.

Justice Slawinsky also considered that this was an Application for partial Summary Judgment, which required additional consideration of whether resolving some issues would increase efficacy, despite that litigation will still proceed on other issues, and the possibility of inconsistent findings.

In considering the facts of the Application before her, Justice Slawinsky found that there were no material disputes regarding the facts, the law was settled on the issues before her, and there was a low risk of inconsistent findings. Slawinsky J. therefore found that the Application could proceed. Ultimately, Justice Slawinsky held that there was oppression, and granted Calgary Co-op's Application for partial Summary Judgment.

DENHOED V GRIFFITHS, 2023 ABKB 557

(KUBIK J)

Rule 7.5 (Application for Judgment by way of Summary Trial)

This Action concerned three principal parties: (1) Denhoed, the Plaintiff, who initiated the Action against Constable Kanyo, The City of Lethbridge, and Lethbridge Police Service ("LPS") following a collision on a highway; (2) Constable Kanyo, representing LPS and The City of Lethbridge, who responded to an initial collision and whose police cruiser was involved in a secondary collision with a vehicle driven by Griffiths, and; (3) Griffiths, whose subsequent collision with Kanyo's cruiser ignited the central issue of negligence and standard of care.

The dispute chiefly scrutinized a) whether Constable Kanyo's handling of the scene met the requisite standard of care, specifically focusing on the parking of his cruiser and the use of emergency lights, and b) if Griffiths' collision with the cruiser was a result of negligence.

The Court found that Kanyo followed the traffic stop protocol by positioning his cruiser with activated emergency lights to secure the scene, in line with sections 43, 63(4) and 67 of the *Use of Highway and Rules of the Road Regulation*, Alta Reg 304/2002. The Court found that the arrangement successfully diverted traffic away from the scene for 25 minutes until the collision with Griffiths transpired.

The Summary Trial Order allowed rebuttal Affidavits under Rule 7.5(3)(a). Denhoed didn't provide rebuttal expert evidence but submitted a response Affidavit sharing her road experiences to counter the Defendant's expert evidence, suggesting other factors may have influenced Griffith's view during the incident. The Court found the speculative evidence on what Griffiths observed or the factors affecting his reaction to be unhelpful in determining liability.

The Court affirmed that Kanyo's actions aligned with the standard of care expected from a reasonable officer under similar circumstances. It found Griffiths solely liable for the subsequent collision under the *Traffic Safety Act,* RSA 2000, c T-6 for careless driving. The Action against Kanyo, The City, and LPS was dismissed.

STAR ENERGY CANADA INC V BUILDERS ENERGY SERVICES LTD, 2023 ABKB 641

(MALIK J)

Rules 9.14 (Further or Other Order after Judgment or Order Entered) and 10.30 (When Costs Award May be Made)

The Respondent successfully applied before an Applications Judge for an Order enforcing an Undertaking of the Appellant to pay Costs to the Respondent. The Appellant appealed that Decision, arguing that the Applications Judge did not have the power to grant the Order because he was *functus officio*.

Justice Malik considered whether Rule 10.30(1)(c) or Rule 9.14 created an exception to the

functus officio doctrine when the issue concerned Costs. In reviewing the jurisprudence, Justice Malik confirmed that both Rule 10.30 and Rule 9.14 are exceptions to the doctrine of *functus officio*. Both allow for the granting of further Costs Awards after final Judgment or Order has been pronounced and constitute a Rules-based exception to the application of the *functus officio* doctrine.

Further, and in any event, Malik J. held that the doctrine of *functus officio* did not apply in enforcing an Undertaking, as it did not require the Applications Judge to revisit the Costs Award. The Appeal was therefore dismissed.

STRAIGHTVAC SERVICES LTD V SUNSHINE OILSANDS LTD, 2023 ABKB 660

(FRASER J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.27 (Validating service)

The Applicant appealed the Decision of Applications Judge Schlosser, which set aside a Default Judgment obtained by the Applicant against the Respondent.

The Applicant served the Respondent with a copy of the Statement of Claim by delivering it to the Respondent's registered office. Due to the COVID-19 pandemic, the office was closed, and the Statement of Claim was not received by an employee of the Respondent. Thus, an envelope containing the Statement of Claim was placed under the door of the Respondent's office. Pursuant to Rule 11.27(1), an Application seeking an Order validating service was made and then subsequently granted in favour of the Applicant (the "Validation Order").

The Respondent filed an Application to set aside the Validation Order and the Noting in Default. Applications Judge Schlosser found that the Noting in Default was irregular because the method of service was not one permitted by the Rules. He also concluded that the Statement of Claim was not brought to the attention of the Respondent. As a result, he set-aside the Noting in Default and the Default Judgment and provided the Applicant 20 days to file a Statement of Defence.

Fraser J. upheld the Decision rendered by Applications Judge Schlosser's concluding that the Court based its analysis on Rule 9.15(1) and 9.15(3), which allows the Court to set aside, vary or discharge a Judgment or an Order. Applications Judge Schlosser was entitled to rely on Rule 9.15(1) and 9.15(3), as there had been a procedural irregularity regarding service. The Court provided further justification for upholding the Decision, with Fraser J. agreeing that the Respondent did not strictly comply with the Rules, which likely resulted in the Applicant not being aware of the Statement of Claim.

LAYEGHPOUR V RASHIDI, 2023 ABKB 674

(GRAESSER J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.25 (Service of Documents Outside Alberta)

This was an Application by the Applicant, Shahin Layeghpour, to appeal a Decision that dismissed his request to set aside a Default Judgment obtained by the Respondent, Leila Rashidi. The Respondent had secured a Default Judgment against the Applicant for unpaid monies invested in a technology project. Despite challenges in serving the Applicant, the Respondent successfully utilized an Order for substitutional service, resulting in a Default Judgment of $8,000. She then commenced collection proceedings.

Upon learning of the Judgment, the Applicant sought to have the Default Judgment set aside. This Application was denied by the Alberta Court of Justice, leading the Applicant to appeal to the Alberta Court of King's Bench.

In his Appeal, the Applicant raised issues concerning improper service, the jurisdiction of Alberta Courts, and the qualifications for reopening a Noting in Default. The Court determined that service was properly executed under Rule 11.25, as the Applicant was residing in Alberta at the time. The Court also confirmed Alberta's jurisdiction over the dispute, referring to the Applicant's residency and the governing law clause in the agreement.

Per Rule 9.15, reopening a Noting in Default requires a reasonable explanation for failing to defend, no unreasonable delay in applying to reopen the Noting in Default, and an arguable defence. The Court held that the Applicant did not present a sufficient defence on the merits. As a result, the Appeal was dismissed.

KUMAR V KUMARI, 2023 ABCA 306

(MCCARTHY J)

Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Appellant sought to Appeal a divorce Judgment and corollary relief Order. The Affidavit of Service on file reflected that, upon being served with the Statement of Claim in the divorce proceeding, the Appellant "promptly tore it up". She was then Noted in Default and Judgment was granted against her.

The Appellant applied in Family Chambers to set aside the Noting in Default and Judgment, as well as for a Stay of the Judgment pending Appeal, pursuant to Rule 9.15 of the Rules. As her primary argument, she claimed lack of proper notice. That Application was dismissed on the basis that this Appeal was pending, but stayed the Judgment pending outcome of the Appeal.

The Court noted that Family Chambers would have been the more appropriate forum to consider the Appeal, stating that challenges to *ex parte* or default Orders must be made under Rule 9.15 to the Court of King's Bench, not the Court of Appeal. The Court noted this was

largely preferable due to the increased cost and complexity of a hearing at the Court of Appeal.

Further, both parties sought to rely on evidence which had been entered for the Chambers Hearing, but which was not before the Court of first instance. McCarthy J. noted that an Appeal Court is not the preferable forum for the initial assessment of evidence.

The Appeal was therefore dismissed, but the Court extended the stay granted by the Chambers Justice to allow the parties to take the necessary steps to resolve their differences with the Court of King's Bench.

REMINGTON DEVELOPMENT CORPORATION V CANADIAN PACIFIC RAILWAY COMPANY, 2023 ABKB 591

(WOOLLEY 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)

This was a Costs Decision arising from a complex Trial.

The Court began its analysis by noting the general rule under Rule 10.29(1) that the successful party to an Application or Action is entitled to Costs. The Court also adopted the reasoning in *McAllister v Calgary (City),* 2021 ABCA 25, wherein the Court held that where a Judge awards a percentage of the solicitor-client Costs incurred by the client, the assessment requires a "detailed analysis" to determine whether the Costs were "reasonable and proper", considering the factors in Rules 10.2 and 10.33. Citing Rule 10.31(2), the Court further noted that expert fees are only recoverable if ordered by the Court.

After reviewing the invoices and charts provided by the Plaintiff regarding its legal Costs, the Court found that the legal fees submitted by the Plaintiff were reasonable and proper for the following reasons: (1) the fees, while substantial, were only 3% of the total damages Award; (2) the Plaintiff succeeded at Trial; (3) the case was important for the Plaintiff; (4) the Trial was complex; (5) all parties took steps to shorten the Trial proceedings; and (6) the skill and effort of the Plaintiff's legal counsel were exceptional. The Court further found that the above factors supported a Costs Award at the higher end and that fifty percent of the Plaintiff's reasonable and proper legal fees was an appropriate and proportionate indemnification.

With respect to the fees and disbursements associated with the Plaintiff's nine experts, the Court noted that the fees should be assessed based on the measurable output of the experts, namely their expert reports and testimony. The Court found that the fees of the Plaintiff's experts were generally reasonable and proper as the expert evidence was thorough and helpful, while the Defendant's experts, who were less qualified than the Plaintiff's experts, offered evidence on only some of the important points. That said, the Court was satisfied that the fees charged by one of the Plaintiff's experts were too high to be reasonable, considering the hours and rates charged as well as the quantum relative to the other experts.

ROCK RIVER DEVELOPMENTS LTD V VILLAGE OF NAMPA, 2023 ABKB 529

(HOLLINS J)

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

The Plaintiff's Application for a permanent Injunction to prevent the Defendant from selling its properties to satisfy tax debts was dismissed (the "Application"). The Court now proceeded to consider the appropriate Costs disposition.

Hollins J. noted that Rule 10.29 requires the Court to start with the assumption that a successful party is entitled to their Costs, subject to the Court's discretion. Hollins J. then moved on to consider the most relevant factors set out in Rule 10.33, namely, the result of the dismissal of the Application and the Defendant's settlement offer (the "Settlement Offer").

Hollins J. commented that the dismissal of the Application disposed of essentially all the issues in the lawsuit. Therefore, it would be unfair to the Defendant to have to wait to collect any Costs. As such, the Costs should not be in the cause.

Hollins J. further noted that the Plaintiff refused the Defendant's Settlement Offer to suspend its attempts to proceed with the sale of the Plaintiff's properties if 1) the Plaintiff provides its bank's corroboration of the Plaintiff's excuse for missing its tax payment, 2) the Plaintiff pays its overdue taxes, and 3) the Plaintiff discontinues the Action.

Hollins J. commented that while the first condition was somewhat unusual, it made sense in light of the Defendant's evidence. Further, the Settlement Offer explicitly referred to the Cost consequences of refusing it. Hollins J. further commented that the Plaintiff ought to have accepted the Settlement Offer or at least brought its taxes current to avoid the sale of the properties while retaining the ability to dispute the tax debt.

Having noted that the Application required cross-examinations and Briefs, and that Column 1 of Schedule C would not adequately capture the work done nor the quantum of value at issue, Hollins J. held that the Defendant was entitled to approximately 35% of its Costs, payable forthwith.

MERCHANT LAW GROUP LLP V BANK OF MONTREAL, 2023 ABKB 597

(ARMSTRONG J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Merchant Law Group LLP ("Merchant LLP") held a bank account with the Bank of Montreal ("BMO"). The Government of Alberta ("Alberta") issued a Requirement to Pay ("RTP") to BMO in relation to a debt owed by Merchant Law Professional Corporation, one of the partners of Merchant LLP. Merchant LLP asserted that the bank account belonged to Merchant LLP

and that Alberta could not enforce the debt of a partner against a partnership. BMO sought Interpleader relief and asked to pay the disputed funds into Court, which was granted on November 29, 2018 ("Interpleader Decision"). Merchant LLP appealed the Interpleader Decision, which was dismissed by the Alberta Court of Appeal ("ABCA") and remitted to the Alberta Court of King's Bench to determine several issues arising from the Interpleader Decision. On February 8, 2023, Armstrong J. rendered a Decision on the five questions that the Alberta Court of Appeal remitted. Merchant LLP, BMO and Alberta then applied for a determination of Costs arising from the Appeal and subsequent Application addressing the remitted questions.

Justice Armstrong noted that the Court is required to consider the factors set out in Rule 10.33(1) in making a Costs Award, but that once the enumerated factors are considered, the Court has considerable discretion in fashioning a Costs Award pursuant to Rule 10.31. Further, while the Court may refer to Schedule C of the Rules in determining reasonable and proper Costs, as the Court of Appeal held in *McCallister v Calgary (City),* 2021 ABCA 25, a fair and reasonable Costs Award should generally provide a level of indemnification in the range of 40% to 50% of Costs reasonably incurred by the successful party.

The Court held that because BMO was successful on Appeal, BMO was presumptively entitled to Costs pursuant to Rule 10.29. BMO was also successful on the subsequent Application on the Interpleader question, which was the only question BMO had interest in. The Court took issue with Alberta and Merchant LLP requiring BMO to continue to participate in the Action once it had successfully applied for Interpleader relief since the sole issue was whether Alberta or Merchant LLP was entitled to certain funds paid into Court. The Court reviewed BMO's draft Bill of Costs and determined that BMO was entitled to approximately 55% of the actual fees incurred. However, because BMO had also made offers to Merchant LLP and Alberta that would have allowed for a more efficient and cost-effective means of resolving the issues in dispute, which were declined, Armstrong J. held that BMO was entitled to enhanced Costs of 75% indemnification of actual fees incurred.

Merchant LLP was also entitled to Costs, as Merchant LLP was successful on the issue of entitlement to the money that was paid into Court. Merchant LLP sought full indemnity of $111,639.01. Justice Armstrong held that this was not reasonable and proper in the circumstances as the legal fees were disproportionate to the amount of money at issue and the complexity of the case. Further, Merchant LLP was providing legal services to itself. The Court held that reasonable and proper fees for the Application for Merchant LLP would have been $30,000. Unlike BMO, Merchant LLP was not entitled to enhanced Costs as there was no misconduct or unreasonable behaviour that would warrant this Order. Justice Armstrong concluded that Merchant LLP was entitled to a 55% level of indemnification, totalling $16,5000 in Costs.

GRAHAM ESTATE (RE), 2023 ABKB 621

(HOLLINS J)

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

This was a Costs Decision following an Application for Summary Dismissal in a disputed estate matter. The substantive Application was dealt with by consent of the parties, but the ability to speak to Costs was reserved.

The Applicant, who was the Executor of the deceased's estate, sought solicitor-client Costs of $20,041.91.

The Court began with the presumption, set out under Rule 10.29, that the successful party is entitled to Costs from the unsuccessful party. The Court also noted the factors listed under Rule 10.33 which may be considered in making a Costs Award.

In the result, Justice Hollins granted the Application for solicitor-client Costs based on the following: (a) The Respondent had made unfounded allegations of undue influence, which in estate matters are treated akin to allegations of fraud; (b) Given that the estate was distributed evenly amongst the deceased's children, the proceedings initiated by the Respondent could have had no practical impact and were seemingly motivated by personal distrust; (c) There was undue delay on the Respondent's part, including litigation conduct which unnecessarily prolonged resolution of the dispute and which caused a waste of judicial resources; (d) Per Rule 10.33(1)(a), the Applicant was wholly successful; and (e) Per Rule 10.33(1)(b), the amount at issue was minimal and disproportionate to the years of litigation that followed.

UHL V OSTERGAARD, 2023 ABKB 614

(NEUFELD J)

Rule 10.31 (Court-ordered Costs Award)

This was a Costs Decision arising from competing Applications for Summary Judgment. The underlying Action was a contract dispute with a lengthy procedural history including a series of Court Applications and two Arbitrations.

Justice Neufeld observed that Rule 10.31 provides the Court with significant discretion in the implementation of a Costs Award, the exercise of which is guided by considerations such as the relative success of the parties, the complexity of the litigation, offers of settlement, and any litigation misconduct. The Court further noted that where a contract provides for full indemnity Costs, such Costs are available despite the usual rule that full indemnification should be exceptional.

The Defendant sought to rely on provisions in his Agreement with the Plaintiff to claim full indemnity Costs for all the proceedings (Court Applications and Arbitrations). In dismissing this argument, the Court noted that under the Agreement, disputes were to be resolved by referring them to a specific lawyer who would make a final and binding adjudication. Therefore, the Costs contemplated in the Agreement were far from full indemnification of Costs for almost five years of litigation before two Arbitrators and the Courts.

In terms of the quantum of Costs, the Court found that the Costs claimed by the Defendant were incurred in two distinct phases of litigation. The first phase was a very lengthy Arbitration, for which the parties should bear their own Costs as neither party was at fault for the highly flawed result. However, in the ensuing phase of the litigation, commencing from the granting of the Application to review and set aside the first Arbitration decision, the Plaintiff should indemnify the Defendant on a solicitor-client basis. Besides the Defendant's relative success, the Court noted the following reasons: (1) the Plaintiff refused to accept an early and reasonable settlement offer from the Defendant; and (2) the Plaintiff's repeated reprehensible behavior during the proceedings against the opposing party and counsel, the expert witness, and the Court. The Plaintiff was also ordered to pay for the expert fees.

TEMPO ALBERTA ELECTRICAL CONTRACTORS CO LTD V MAN-SHIELD CONSTRUCTION INC, 2023 ABKB 575

(BERCOV J)

Rule 10.33 (Court Considerations in Making Costs Award)

The Costs Endorsement concerned the Costs of an Appeal from the Decision of an Applications Judge granting the Plaintiff partial Summary Judgment. The Plaintiff sought a Costs Award of $71,953.86 which represented 50% of the legal fees that it incurred in obtaining the Judgment, plus disbursements (the "Plaintiff's Claim for Costs"). The Defendant argued that Costs should be awarded based on Schedule C.

The Court noted that the Plaintiff was entitled to Costs of the Appeal and that the Plaintiff's reasonable and proper Costs must be determined considering all factors, including those set out in Rule 10.33. Further, the Court noted that the jurisprudence confirmed that it was entitled to determine Costs as a percentage of legal expenses, Schedule C, a modification of Schedule C, or some other alternative.

The Court determined that the Plaintiff's claim for Costs was not reasonable on the basis that (1) the accounts it had submitted did not contain the details the Court required to assess whether the accounts rendered were what reasonably should have been incurred; (2) it claimed for damages due to delay which had not been adjudicated; (3) it was not possible to fairly consider whether the Defendant should have accepted the offers exchanged as those pertained to a settlement of the Action as a whole; (4) it was unpersuaded that the cancelled Mediation could be considered a delay tactic by the Defendant; and (5) it was not possible from the information the Plaintiff provided to determine the cost of legal services that the Plaintiff paid associated with earlier proceedings, in the event the Court had juris-

diction to order Costs in excess of what had already been ordered in the earlier proceedings.

In determining what the reasonable and proper Costs were, the Court set out that it was entitled to consider the failure to comply with the obligation on all parties to identify the real legal issues in dispute and facilitate the quickest means of resolving disputes at the least expense. The Court noted that the Defendant did not make an attempt to organize, classify, or link the documents to the issues in dispute which in substance amounted to a document dump on the Plaintiff and the Court. The Court found that that a reasonable inference was that the Plaintiff incurred significantly more Costs to review the materials and draft a Brief that was organized and responsive to the issues than the amounts permitted under Schedule C multiplied by 1.5. The Court accordingly determined that a lump sum Costs Award was appropriate in the amount of $10,000, including GST and disbursements.

BEATTIE V 1382549 ALBERTA LTD, 2023 ABKB 600

(DEVLIN J)

Rule 10.34 (Court-Ordered Assessment of Costs)

The Respondents had previously been held in Contempt for having failed to complete a Court-ordered audit. Having been jailed for the weekend, the individual Respondent appeared before Justice Devlin and advised of his intention to complete the audit.

This Decision dealt with the Application for Costs by the Applicant in respect of the Contempt proceedings. The Court remarked upon the public policy rationale in favour of indemnifying litigants who have to spend significant amounts simply to enforce prior Court Orders.

The Court therefore granted an award of solicitor-client Costs in favour of the Applicant, but in light of the amount claimed by the Applicant, directed an assessment pursuant to Rule 10.34 to ensure the reasonableness of the Costs asserted.

HANSEN V HANSEN, 2023 ABCA 335

(KHULLAR, SLATTER AND FAGNAN JJA)

Rules 10.39 (Assessment Officer's Authority), 14.16 (Ordering the Appeal Record), 14.88 (Cost Awards) and 14.90 (Sanctions)

In accordance with Rules 10.39 and 14.88(2), an Assessment Officer sought guidance from the Court regarding the appropriate scale of Costs for an Award under Rule 14.90(2) in the context of an Appeal being struck due to non-compliance with the Rules.

The case involved matrimonial litigation, specifically concerning child support for two adult children. The Appellant's Appeal was struck for failing to file the necessary Appeal Record, as required by Rule 14.16(3), entitling the Respondent to a Costs Award under Rule 14.90(2).

The Court noted that Rule 14.88(3) generally prescribes that Costs for an Appeal are assessed based on the scale awarded in the original Order. However, this approach was complicated by the fact that the original Order awarded lump sum Costs, and the Respondent had not completed many of the steps outlined in Schedule C of the Rules.

The Court noted that in situations where the standard presumptions for Costs Assessments are impractical, the Respondent should seek the Court's direction on Costs. This involves first attempting to reach an agreement with the Appellant and, failing that, consulting the Case Management Officer for the appropriate procedure.

In this specific Appeal, the Respondent claimed solicitor and client Costs, citing the Appellant's failure to accept reasonable offers and allegations of litigation misconduct. However, the Court observed that only offers to settle the Appeal, not prior settlements, are relevant to the Costs of the Appeal. Similarly, alleged misconduct by the Appellant was found to be relevant to the Trial proceedings but not to the Appeal process.

The Court concluded that there was no basis to deviate from the standard Cost assessment method. Since the Respondent did not complete the necessary steps in responding to the Appeal, the Court awarded half the Costs of "all other preparation" under item 19(2) of Schedule C, amounting to $337.50, plus reasonable disbursements and GST. No additional Costs were awarded.

CARTER V HORIZON HOUSING SOCIETY, 2023 ABKB 558

(NIELSEN ACJ)

Rules 10.49 (Penalty for Contravening Rules) and 14.5 (Appeals Only With Permission)

This Action centered around Glen Carter's ("Mr. Carter") request for leave to Appeal a Decision by the Residential Tenancy Dispute Resolution Service (the "RTDRS"), following his previous imposition of Court access restrictions due to unrelated litigation. The RTDRS had upheld a notice to vacate served to Mr. Carter by his landlord, Horizon Housing Society ("Horizon"), which Mr. Carter sought to challenge, alleging discriminatory motives and improper procedure.

Nielsen A.C.J. considered Mr. Carter's leave request under Rule 14.5(4), particularly focusing on the required standards for initiating or continuing litigation under Court access restrictions as laid out in the case *Re Thompson*, 2018 ABQB 87 and other cited precedents. The standards necessitated that a claimant must establish reasonable grounds for the litigation and provide a full and complete deposition regarding the facts and circumstances of the proposed claim or proceeding.

Mr. Carter's allegations largely revolved around his claims of covert surveillance and larger conspiracy involving various entities, which he contended led to biased treatment and ultimately to the termination of his tenancy on discriminatory grounds. He also raised procedural issues with the RTDRS hearing, such as alleged bias by the Tenancy Dispute Officer, inadequate service, and being denied a full opportunity to express himself.

Nielsen A.C.J. found multiple independent bases to deny Mr. Carter's leave request. Primarily, the lack of substantiation for Mr.

Carter's extraordinary claims of surveillance and conspiracy, which were seen as the core basis for his proposed litigation. Secondly, the absence of a transcript from the RTDRS hearing on August 3, 2023, which was deemed necessary to evaluate Mr. Carter's claims of procedural unfairness during the hearing, as necessitated by the RTDRS Regulation, section 23(2). Finally, the improper inclusion of the Calgary Housing Company ("CHC") as a party in the proposed Appeal, despite CHC not being a party to the RTDRS Hearing.

Furthermore, Nielsen A.C.J. warned Mr. Carter about potential penalties under Rule 10.49(1), should he continue to abuse the Court's leave processes. This denial of leave to Appeal signified the third time Mr. Carter had been denied leave by the Court, with Nielsen A.C.J. emphasizing that any disagreement with the Memorandum of Decision should be taken to the Supreme Court of Canada.

MCCLELLAND V HARRISON, 2023 ABKB 638

(NIELSEN ACJ)

Rule 10.49 (Penalty for Contravening Rules)

The matter arose from a high-conflict family law proceeding that had been before the Courts multiple times and which was case managed. During case management, the Defendant engaged in abusive email activity with the Court which resulted in the Case Management Justice imposing a $1,000 penalty against her pursuant to Rule 10.49(1).

After the Trial concluded, the Defendant remained under strict communication protocols with the Court. Given that the Defendant continued to bully the Court's decision makers and personnel, she was directed to pay another $1,000. If she was to breach the protocols yet again, she would face additional Rule 10.49(1) penalties. Rule 10.49(1) penalties are discretionary and imposed on litigants who fail to comply with the Court's direction and who interfere with the proper or efficient administration of justice.

The Defendant continued her pattern of abusive and bullying conduct. In recent activities, she had (a) repeatedly breached Court-imposed communication protocols, (b) deliberately changed her email address several times to evade communications with the Court, (c) initiated collateral attacks on the Trial decision, (d) commenced Applications and then failed to participate in the hearings, and (e) would submit unsigned "Emergency Orders" for filing without explanation.

Associate Chief Justice Nielsen determined that if the Defendant was to file documents in the family Action, the Defendant was required to pay the $2,000 penalties imposed under Rule 10.49(1). This step was required to ensure the Defendant would not bring the administration of justice into disrepute.

MARTINEAU V HENRY ESPINA, 2023 ABKB 664

(POELMAN J)

Rule 10.52 (Declaration of Civil Contempt)

The Applicant applied for an Order of civil Contempt against the Respondent relating to various Orders for conduct related to the children of their relationship.

The Court set out that three elements must be established beyond a reasonable doubt in order to find civil Contempt: (1) the Order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the Order must have had actual knowledge of it; and (3) the party alleged to be in breach must have intentionally done what is prohibited or intentionally failed to do what was compelled. The Court noted that Rule 10.52(3) codifies the requirement for Contempt but explicitly adds the requirement that failure to comply was "without a reasonable excuse".

Among other issues, the Court considered whether one of the alleged breaches underlying the Application was the Respondent's continued contact with and assumption of care of the children between August 25-30, 2022, contrary to an August 15, 2022 arbitration award which directed that the Respondent and his partner "shall have no contact with the children" (the "Arbitration Award"). The Court noted that Rule 10.52 speaks of not complying with an Order and that the definition of an Order means an Order of the Court. The Court further set out that the leading cases speaking of Orders in the Contempt context referred to Court Orders. The Court additionally noted that civil Contempt proceedings are quasi-criminal in nature with potentially severe consequences, as such the requirements must be strictly construed. The Court did however note that an arbitration award could become an Order pursuant to section 49 of the *Arbitration Act,* RSA 2000, c A-43 and in the circumstances the Arbitration Award became an Order pursuant to an Order pronounced on August 30, 2022 as opposed to a consent Order pronounced June 15, 2022, which set out that any decision or award would "be deemed an Order of this Court, unless otherwise stated in a subsequent order" (the "Consent Order"), noting that that for Contempt purposes, the Consent Order could not give advance Court Order status to anything the arbitrator might decide. The Court accordingly found that the Respondent had engaged in activities between August 25-30, 2022 that breached the Arbitration Award, but which could not ground a finding that the Respondent was in Contempt of Court.

Separately, the Court did find that the Respondent was in Contempt of Court by determining that the Respondent had beyond a reasonable doubt acted contrary to Order(s); by using a Practice Note 8 report, communicating with the children about the Applicant's care, and communicating with the one of the children in relation one of their letters.

POWELL ESTATE (RE), 2023 ABCA 311

(FEEHAN, HO AND FAGNAN JJA)

Rules 11.18 (Service on Self-Represented Litigants) and 11.30 (Proving Service of Documents)

The Appellant was the personal representative of the estate of the deceased. The Appellant appealed from an Order of a Chambers Judge which deemed service on certain self-represented beneficiaries of the deceased's estate good and sufficient, having regard to their acknowledgement of such service. The Chambers Judge's Order was based on the *Surrogate Rules* AR 130/1995 (the "*Surrogate Rules*"), which do not, absent an Order, equate an acknowledgement of service by a self-represented litigant with proof of service.

The Appellant argued on Appeal that, given the permissive language found in the *Surrogate Rules*, and since Rule 11.18 provides that a self-represented litigant may accept service in writing, and since Rule 11.30(1)(b) provides that service of a document in Alberta may be proven by an acknowledgment of service in writing, these Rules override the *Surrogate Rules*.

The thrust of the Appellant's argument was that, under the *Surrogate Rules*, an Order validating service should not be required where proof of an acknowledgment of service is filed with the Clerk as contemplated by the Rules (but not necessarily the *Surrogate Rules*).

The Court of Appeal agreed, noting that this approach was reasonable, cost effective, and timely, and did not cause prejudice to any potential party.

The Appeal was therefore allowed.

DE GUZMAN V DE GUZMAN, 2023 ABKB 624

(SIDNELL J)

Rules 11.26 (Method of Service Outside Alberta), 11.27 (Validating Service) and 12.55 (Service of Documents)

The Plaintiff previously filed a Statement of Claim for divorce and applied for a desk divorce. The Court considered whether the Plaintiff had been properly served in accordance with Rules 11.26 and 11.27, as the Respondent appeared to reside in the Philippines.

The Plaintiff was previously granted a substitutional service Order allowing him to serve the Respondent a Statement of Claim for divorce and all other documents in the Action by serving the Respondent by email to a specific email address. The substitutional service Order was granted on the basis that "the country in which the Respondent resides is a Contracting State to the Hague Service Convention, but the Respondent's mailing address is not known".

Rule 11.26 outlines the methods for service outside Alberta. The Court noted that Rule 11.26 requires documents to comply with Division 8 of the Rules where a document is to be served in a jurisdiction to which the *Hague*

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") applies. The Court reviewed cases confirming that validating service that does not comply with the Hague Service Convention would undermine the purpose of the convention as it would no longer be a comprehensive authority for service abroad involving its signatories.

The Court confirmed that the Hague Service Convention does not apply where the recipient's address is not known. However, the Court determined that a party is required to make reasonably diligent efforts to learn the address of the intended recipient rather than simply submitting that the recipient's address is not known. Upon review, the Court determined that: the evidence before the Court did not demonstrate that the Plaintiff made reasonably diligent efforts to learn the address of the Defendant; and the Plaintiff's email service failed to comply with the Hague Service Convention, which allows a state to consent to methods of service within its boundaries. There was no evidence that email was an authorized method of service in the Philippines.

The Court determined that the Plaintiff failed to comply with Rule 12.55, which requires a Statement of Claim for divorce to be served personally unless the Court otherwise orders. The Court ordered the Plaintiff to re-serve the Defendant in accordance with the Hague Service Convention and Rules before re-submitting his desk divorce Application.

1361556 ALBERTA LTD V RISTORANTE COSA NOSTRA INC, 2023 ABKB 590

(KISS J)

Rules 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

When determining whether the Plaintiff's Statement of Claim pleaded all of the necessary elements of negligent misrepresentation and unjust enrichment as required under Rules 13.6 and 13.7, Kiss J. cited *Love v Parmar,* 2023 ABKB 30 ("*Parmar*") for a more "realistic and pragmatic" approach.

Specifically, while recognizing the need for Defendants to understand the case against them at the pleadings stage, the Court must also recognize that not every claim is capable of being pleaded with the same degree of particularity, and that subsequent stages in the litigation process may also function to clarify and narrow the issues.

Following the practical approach in *Parmar*, Kiss J. found that the Statement of Claim contained sufficient particulars for the Defendants to understand that the Plaintiff was pleading negligent misrepresentation and the basis for that claim.

Kiss J. further held that, even if the initial pleadings were deficient, there was no prejudice or surprise to the Defendants. By the time the Defendants filed their Statement of Defence, they clearly understood the specifics of this cause of action. The Statement of Defence outlined their position with respect to each of the necessary elements of a misrepresentation claim.

Applying the same approach in *Parmar*, Kiss J. held that the Plaintiff failed to prove its claim of unjust enrichment. The Plaintiff's complaint about unjust enrichment was found in effect a claim of fraud, which, as per Rules 13.6(3)(d) and 13.7, was a serious allegation and therefore

must be explicitly pleaded and the proof of which involved a high burden. Further, the Plaintiff could not use complaints about the sales in the context of the cause of action of unjust enrichment as a backdoor to raise allegations of fraud, which had not been pleaded.

INNES V KLEIMAN, 2023 ABCA 307

(CRIGHTON, ANTONIO AND HO JJA)

Rule 14.5 (Appeals Only with Permission)

This Appeal considered the validity of two lower Court Orders concerning an Attachment Order. The Applicants, Malcolm Innes and his company (together herein "Mr. Innes"), acting as wealth managers, were accused by the Respondents, Jacob Kleiman and Kleiman Resources Ltd. (together herein "Mr. Kleiman"), of mishandling funds.

Mr. Kleiman obtained an ex parte Attachment Order from Justice Kubik under the *Civil Enforcement Act*, RSA 2000, c C-15, which Mr. Innes sought to have extended (the "Kubik Order"). During a subsequent hearing, Justice Armstrong granted an adjournment to allow for cross-examination on Mr. Innes' Affidavit, maintaining the original Order and allowing Mr. Innes access to funds for legal fees and living expenses (the "Armstrong Order").

Mr. Innes appealed both the Kubik Order and the Armstrong Order. The Court of Appeal dismissed the Appeal against the Armstrong Order due to a lack of jurisdiction, as leave for such an Appeal was not obtained in accordance with Rule 14.5(1)(b). The Appeal against the Kubik Order was dismissed as premature, noting that issues related to *ex parte* Orders should be addressed at the Trial level before an Appeal unless exceptional circumstances exist.

The Court did not find the circumstances alleged by Mr. Innes, which included claims of non-disclosure by Mr. Kleiman, to be exceptional. It was emphasized that any errors in the making of the Kubik Order would be evaluated in a proper forum with a full record. The Court declined to assess the merits of Mr. Innes' Appeal based on the incomplete record before the Court and without factual findings by a Judge on the evidence.

The Court of Appeal thus dismissed the Appeal.

Costs were awarded to Mr. Kleiman for the Appeal, calculated according to Column 1 of Schedule C to the Rules. An informal offer made by Mr. Kleiman to accept a discontinuance of the Appeal without Costs did not influence the Costs awarded, as it was not found to meet the requirements of a *Calderbank* offer.

COLLINS V CAMPBELL, 2023 ABCA 364

(HO JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant sought to Appeal a mutual no contact Order on the basis that she did not agree with the Order and that the underlying facts remained in dispute. The Order was a consent Order, and therefore permission to Appeal was required pursuant to Rule 14.5(1)(d).

As the Order was set to expire in approximately two weeks time, the Court held that the matter would be moot by the time any panel could hear the Appeal. The Application was dismissed.

JACKSON V COOPER, 2023 ABCA 299

(STREKAF JA)

Rules 14.8 (Interest on Judgments), 14.37 (Single Appeal Judges), 14.44 (Application for Permission to Appeal) and 14.50 (Time Limits for Oral Arguments)

This Action revolved around Applications by Julie Cooper and Tower Financial Inc., for an extension of time to seek permission to Appeal, and for permission to Appeal an issue relating to the calculation of prejudgment interest on the non-pecuniary portion of a damages award stemming from a motor vehicle accident.

Following an amendment to the *Insurance Act,* RSA 2000, c I-3, the rate of prejudgment interest applicable to non-pecuniary damages in motor vehicle accident claims was altered. The Trial Judge applied the new (lower) rate of prejudgment interest from the date of proclamation (December 9, 2020), a Decision which the Appellants sought to challenge.

The Court's case management officer (CMO) queried the necessity of permission to Appeal under Rule 14.5(1)(g), as the amount in issue appeared to be below $25,000. This Rule necessitates permission to Appeal in such scenarios.

Following this, a timeline was set for the Appellants and the Respondent to file respective materials concerning the Appeal.

The Court noted that Applications for permission to Appeal need to be brought within one month of the Judgment, pursuant to Rules 14.44(1)(b) and 14.8(2). The Appellants were required to satisfy a test to extend time to Appeal under Rule 14.37(2)(c), which a single Appeal Judge could grant. The criteria for the test include a bona fide intention to Appeal within the Appeal period, a justifiable explanation for the delay, absence of serious prejudice, not having taken benefits from the Judgment under Appeal, and a reasonable chance of success on Appeal.

Furthermore, the Appellants needed to establish, under the stipulated test, that there was a reasonable prospect of success and that the Appeal concerned a significant public interest

issue, in order to obtain permission to Appeal a decision under $25,000.

Both Applications were granted as the Applicants satisfied the conditions set forth by the Rules, permitting the Appeal and extending the time to file.

WESLEY V ALBERTA, 2023 ABCA 289

(STREKAF JA)

Rules 14.37 (Single Appeal Judge) and 14.58 (Intervenor Status on Appeal)

The Applicants, Piikani and Siksika Nations (the "Nations") applied for permission to intervene in the upcoming Appeals between the Stoney Nakoda Nations ("Stoney") and Alberta and Canada from the decision in *Wesley v Alberta,* 2022 ABKB 713 ("*Wesley 2022*"). In the W*esley 2022* decision, the Case Management Judge dismissed Stoney's claims for remedial relief but allowed Stoney's claims for declaratory relief to proceed. Stoney appealed the dismissal of the claims for remedial relief and Alberta appealed the denial of Summary Dismissal of the claims for declaratory relief (the "Appeals"). The Nations applied to be added as intervenors in the Appeals stemming from the *Wesley 2022* decision.

The Court noted that a single Appeal Justice has jurisdiction to render a Decision on an Application to intervene under Rules 14.37(2)(e) and 14.58. The Court also noted that Rule 14.58(3) provides that, unless otherwise ordered, an intervenor may not raise or argue issues not raised by the other parties to the Appeal. The test for intervenor status considers: (1) whether the proposed intervenor has a particular interest in, or will be directly and significantly affected by the outcome of the Appeal, or (2) whether the intervenor will provide some special expertise, perspective, or information that will help resolve the Appeal.

The Nations submitted that the Decisions arising from the Appeals would have far-reaching implications. The Nations also noted that their proposed intervention would not prejudice the parties or expand the issues or factual record and has the support of other. The Court noted that the Nations' interest in these Appeals was primarily jurisprudential which is generally insufficient to justify intervenor status. The Court concluded further that the Applicants had failed to demonstrate that they brought a sufficiently different perspective or expertise to the Appeals, beyond that which can be expected to be presented by the parties. The Application to intervene was dismissed.

FOUGERE V THE KING'S UNIVERSITY, 2023 ABCA 374

(FAGNAN JA)

Rule 14.45 (Application to Admit New Evidence)

The Applicant sought leave to file a late Application to admit additional evidence on Appeal consisting of documents that he submitted would have changed the Decision in first instance.

Under Rule 14.45(1), an Application to admit new evidence on Appeal must be filed and served prior to the Applicant's Factum being filed. An Applicant seeking to file a late Application to admit such evidence must seek permission to file.

Fagnan J.A. applied the four-part test from *Palmer v The Queen,* [1980] 1 SCR 759 for leave to file a late Application to admit new evidence under Rule 14.45(1). Specifically, the evidence generally should not be admitted if it could have been obtained for the hearing through due diligence. The evidence must be relevant in the sense that it relates to a potentially decisive issue in the Trial and must be reasonably capable of belief. Finally, it must be such that it could have reasonably affected the result of the hearing. The Court must also consider whether the proposed Application has a reasonable prospect of success.

Fagnan J.A. observed that the threshold for granting leave is low, and took note that the Court has denied leave where the proposed additional evidence was only marginally relevant or material, where it was irrelevant, and where it was not even arguably probative. Fagnan J.A. further held that although due diligence is not a condition precedent, failure to act with due diligence will generally foreclose the admission of fresh evidence on Appeal.

Having found that the Applicant's written Application contained only a bare assertion that the evidence was relevant and probative without explaining its particulars or the impact it could be expected to have, Fagnan J.A. denied the Application.

XU V MA, 2023 ABCA 352

(FETH JA)

Rule 14.47 (Application to Restore an Appeal)

The Applicant applied pursuant to Rule 14.47 to restore its Appeal after it had been struck due to the Applicant's failure to file their Appeal Record within the required deadline.

Justice Feth listed the relevant factors that the Court will consider when determining whether to restore an abandoned Appeal: (i) whether an explanation exists for the defect or delay that caused the Appeal to be struck; (ii) whether the Applicant moved with reasonable promptness in curing the defect or delay and in having the Appeal restored; (iii) whether the Applicant intended to proceed with the Appeal; (iv) whether the Respondent will suffer prejudice (including consideration of the length of the delay); and (iv) whether the Appeal has arguable merit.

Justice Feth stated that an Applicant's failure to satisfy one of the factors is not fatal because all factors are weighed collectively to determine if, overall, it is in the interests of justice to restore the Appeal. Justice Feth weighed all of the relevant factors stating: (i) the Applicant had provided a reasonable explanation for the delay; (ii) the Applicant acted promptly to cure any defects; (iii) the Applicant demonstrated a consistent intention to proceed with his Appeal; (iv) the evidence did not demonstrate any actual prejudice to be suffered by the Respondent due to the delay; and (v) the Applicant's Appeal had some arguable merit. The Court granted the Application.

DYNAMO COATINGS LTD V ALBERTA BUILDING TRADES COUNCIL BENEVOLENT SOCIETY (ABTCBS), 2023 ABCA 355

(FETH JA)

Rule 14.47 (Application to Restore an Appeal)

The Applicant filed an Application to reinstate its fast-track Appeal, which was dismissed due to failure to meet filing deadlines and subsequently deemed abandoned. The Court evaluated the criteria for reinstating an abandoned Appeal as per Rule 14.47. Justice Feth referred to *Li v Morgan,* 2020 ABCA 186, and took into account the following factors: a) The reason for the delay that led to the dismissal of the Appeal; b) Timeliness in addressing the issue and seeking to reinstate the Appeal; c) A continued intention to proceed with the Appeal; d) The absence of harm to the Respondent (including the impact of the delay); and e) Whether the Appeal has arguable merit.

After considering these factors, Justice Feth observed that the Applicant did not request an extension for filing the Appeal Record. It was the Applicant's responsibility to be aware of and comply with all Appeal deadlines. The Court also noted that although the Applicant expressed a continued intention to pursue the Appeal, they did not adequately explain the delay that resulted in the dismissal and did not promptly seek to reinstate the Appeal. Furthermore, the Court emphasized that the Applicant failed to demonstrate any arguable merit to the Appeal. Based on these considerations, the Court ultimately concluded that the Applicant did not meet the heightened threshold required to establish that restoring the Appeal was in the interests of justice, and therefore dismissed the Application.

VENINI V VENINI, 2023 ABKB 601

(MARION J)

Rule 14.48 (Stay Pending Appeal)

This matter related to an ongoing dispute amongst four siblings each holding 25% of the shares in a closely-held family business. On September 15, 2023, Justice Marion granted an Order that declared that one of the siblings (the "Applicant") was not permitted to vote at a director's meeting on May 6, 2019 and, in doing so, breached section 120(6) of the *Alberta Business Corporations Act*, RSA 2000 c. B-9 (the "*ABCA*"); and (2) declared that the Applicant was not entitled to vote on any future directors' vote about the termination of their own employment, provided that none of the exceptions in section 120(6) of the *ABCA* applied (the "Vote Declaration").

On October 6, 2023, the Applicant appealed the first two paragraphs of Justice Marion's Order. He then applied to Stay the Vote Declaration aspect of Justice Marion's Decision pending Appeal pursuant to Rule 14.48(a). Thus, the issue before the Court was whether the Vote Declaration should be stayed pending Appeal.

Under Rule 14.48, the Applicant seeking a Stay must show: (1) that there is a serious question to be considered on Appeal, (2) that the Applicant will suffer irreparable harm if the Stay is not granted, and (3) that the balance of convenience favours granting the Stay. Even if the tripartite test is not met, the Court can issue a Stay if the interests of justice call for it.

As it pertained to a serious question to be considered on Appeal, the Applicant planned to argue on Appeal that Justice Marion's interpretation of the meaning of "transaction" was too broad. Justice Marion was satisfied that this was a serious question to be considered on Appeal.

Justice Marion further found that the collective harm caused to the Applicant would render the Appeal nugatory, both legally and practically, due to the potential loss of his right to vote as a director and the disruption to his long-standing employment which may not be practically reversed if he is successful on Appeal. Therefore, the Applicant sufficiently established irreparable harm.

Lastly, Justice Marion considered whether the balance of convenience supported a Stay. If a Stay was not granted, it was likely that the Applicant's employment would be terminated. On the other hand, the Respondents had delayed in taking any steps to address or confirm the Applicant's employment during events that gave rise to a portion of the dispute. Then, during the lengthy wait to have their Application heard, they agreed not to take steps pending the outcome of their Application and to preserve the status quo pending clarification of the parties' rights by the Court. Though the Court acknowledged that the Respondents would like to move on to direct the affairs of the business, the Court found that the balance of convenience favoured a Stay pending the Appeal.

Therefore, Justice Marion granted a Stay pending Appeal of the Vote Declaration portion of the Order.

CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION INC V THOMSON, 2023 ABCA 340

(PENTELECHUK JA)

Rule 14.58 (Intervenor Status on Appeal)

Canadian Life and Health Insurance Association Inc (the "Association") applied to intervene in an Appeal regarding the interpretation of a 10-day cancellation clause in the context of a life insurance policy underwritten by the Appellant. The Association sought to intervene, arguing that the Decision may impact the interpretation of all life insurance policies issued in Alberta as well as many issued in the rest of Canada.

The Court reviewed the test for intervention under Rule 14.58(1), which requires determining the proposed intervener's interest in the subject matter of the proceeding by examining (a) if the intervener will be directly and significantly affected by the Appeal's outcome, and (b) if the intervener will provide some expertise or fresh perspective on the subject matter that will be helpful in resolving the Appeal.

The Court went on to clarify that a proposed intervener must provide fresh information or a fresh perspective in order to be granted permission to intervene; simply establishing an interest affected by the Appeal is not enough. However, Pentelechuk J.A. went on to state that the test is not "conjunctive" such that a proposed intervener must always establish both. The Court relied on the recent Decision from the Alberta Court of Appeal in *VLM v Dominey Estate*, 2023 ABCA 226, to support the notion that the test is not strictly conjunctive or disjunctive, but rather involves a consideration of both factors in all cases.

The Court concluded that the Association established a particular interest in the outcome of the Appeal. However, when deciding whether the Association brought any particular expertise or a fresh perspective to the Appeal, Pentelechuk J.A. found that the submissions came uncomfortably close to taking a position on the merits of the Appeal that aligned with the Appellant. The Court emphasized that there was nothing precluding the Association from working with Appellant's counsel to flesh out the arguments on Appeal but noted that the purpose of intervention is not to provide "second counsel" by supplementing the efforts of counsel for the parties.

Further, Pentelechuk J.A. found the timing to be problematic, as there was evidence that the President of the Appellant was also a Director of the Association's Board of Directors, so presumably the Association would have been well aware of the Decision under Appeal. The Court concluded that the late filing of the Application would prejudice the Respondent by impacting their preparation for the Appeal. Thus, Pentelechuk J.A. dismissed the Application.