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# RULES

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## ATCO ENERGY SOLUTIONS LTD V ENERGY DYNAMICS LTD, 2024 ABKB 162

(MARION J)

Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 3.43 (How to Make a Claim Against Co-defendant), 5.6 (Form and Contents of Affidavit of Records), 5.10 (Subsequent Disclosure of Records), 5.15 (Admission of Authenticity of Records), 5.16 (Undisclosed Records Not to be Used Without Permission), 5.34 (Service of Expert's Report) and 9.13 (Re-opening Case)

The Plaintiff, ATCO, filed a claim against NGC Compression Solutions Ltd. ("NGC") and Energy Dynamics Ltd. ("EnDyn") seeking damages for negligent design, manufacture and assembly of pistons that malfunctioned in one of the engines used to power ATCO's storage compressors in July 2014 ("2014 Incident"). NGC and EnDyn issued notices to co-Defendants to each other pursuant to Rule 3.43. Prior to Trial, ATCO settled its claim against NGC. For the Trial, the parties agreed on exhibits ("Joint Exhibits") and agreed on the terms of the use of the Joint Exhibits, which the Court noted was a useful practice in accordance with Rule 1.2.

At Trial, ATCO sought to rely on evidence of the performance of other EnDyn-manufactured pistons, which was disclosed seven days before Trial ("Late Disclosure"). EnDyn, relying on Rule 5.16, objected to admission of the Late Disclosure. The Court noted that the expectation inherent in Rule 5.10 is that relevant and material records should be located and disclosed prior to a Trial being scheduled. Rules 5.16 and 5.10 were designed to avoid Trial by ambush and the associated unfairness. The Court found that ATCO had not shown sufficient reason for the failure to disclose at an earlier time, and that ATCO had not provided any evidence about why it did not search for relevant and material records for its Affidavit of Records pursuant to Rule 5.6. As such, ATCO was not permitted to rely on the Late Disclosure.

Following the Trial, EnDyn, pursuant to Rule 9.13, applied to re-open the Trial to call a witness to provide evidence on an adhesive to prevent loosening of the plugs in the pistons. ATCO opposed the Application, arguing that Rule 9.13 did not apply because there was not any "judgment or order or reasons for it" to change or modify and, even if Rule 9.13 applied, there was no good reason to re-open the Trial. The Court rejected ATCO's argument that an Application to re-open could not be made prior to a Judgment or Order being granted, holding that the considerations under Rule 9.13 still apply, either directly or by analogy under Rule 1.7(2). However, the Court agreed with ATCO that there was no good reason to re-open the Trial.

Another issue that arose was whether emails produced by NGC that contained photos were admissible as the author of the emails did not testify. The Court noted that Rule 5.15 provides that a party who makes an Affidavit of Records and a party on whom the Affidavit of Records is served are both presumed to admit that the record is authentic, meaning that the document is a true copy of the original and is not a forgery. As such, the Court held that the photos were admissible to prove the authenticity of the photos.

ATCO did not use an independent expert at Trial, instead relying on Andrew Hockett ("Hockett"), a maintenance manager who conducted an inspection. The Court considered Hockett to be a "witness with expertise". The Court noted that while ATCO did not provide an expert report in Form 24 as required for an

independent expert under Rule 5.34, ATCO did provide significant advance notice of Hockett's opinion, which was sufficient.

Similar to ATCO, EnDyn relied on Dwayne Sleight ("Sleight") as a witness with expertise. Sleight had prepared a failure inspection report ("EnDyn Report"). ATCO objected to the use of the EnDyn report due to its late disclosure, including based on Rule 5.16. ATCO's argument was rejected, with the Court finding that the EnDyn report had been referenced or included in another report and was also provided in a Supplemental Affidavit of Records before Trial.

In the result, the Court found that ATCO had proven that several pistons were defective and negligently manufactured but had not proven that those pistons caused the 2014 Incident. ATCO, accordingly, was only awarded damages for the cost of replacing the pistons.

## BLAZER MECHANICAL PLUMBING & HEATING LTD V DELNOR CONSTRUCTION 2012 LTD, 2024 ABKB 183

(SILVER J)

Rules 1.2 (Purpose and Intention of These Rules), 4.22 (Considerations for Security for Costs Order) and 6.14 (Appeal from Applications Judge's Judgment or Order)

The Plaintiff appealed an Order for Security for Costs under Rule 6.14. Justice Silver dismissed the Appeal and upheld the Order for Security for Costs.

Rule 6.14 allows for the Appeal of an Order by an Applications Judge to a Justice. Such an Appeal is *de novo*, and no deference is owed to the Applications Judge's Decision. The standard of review is correctness.

In finding that the Order for Security for Costs was reasonable in the circumstances, Silver J. outlined the test for Security for Costs. She mentioned that Security for Costs can be granted under both Rule 4.22 and section 254 of the *Business Corporations Act*, RSA 2000 c B-9 While the burden under either is the same, the Plaintiff relied on the test under Rule 4.22 for the Appeal. Rule 4.22 allows the Court to grant Security for Costs if it considers that it is just and reasonable to do so in the circumstances. Five factors are weighed, and the Court's discretion is balanced against the purpose and intention of Rule 1.2(1), which is to solve claims in a fair and just manner that is timely and cost effective.

The first factor under Rule 4.22 asks whether the Defendant will be able to enforce the Order against the Plaintiff's assets in Alberta. The second factor asks whether the Plaintiff can pay the Costs Award. The third factor requires the Court to look at the merits of the Plaintiff's Action. The fourth factor asks whether the Security for Costs Order would unduly prejudice the Plaintiff's ability to continue the Action. Lastly, the Court may review any other matter it considers relevant.

In analyzing the second factor, the Court found that it was insufficient for the Plaintiff to offer as a substitute for the Security of Costs Order a legal expense insurance policy. The insurance policy limited the aggregated coverage amount for legal costs, applied only to legal costs agreed to by the insurer, could not be enforced by the Defendant, and could be cancelled by the insurer on 15 days' notice. There was further concern that the insurance

policy was funding the litigation rather than providing safety net for the Defendant. Similarly, undertakings by the Plaintiff's solicitor to "allay any concerns with the coverage" in the insurance policy would be inadequate. The undertakings would not "fill the shortfalls, gaps and inadequacies of the policy", and would fail to promote the purpose and intention under Rule 1.2 by requiring a disproportionate use of Court resources.

In reviewing the third factor, Silver J. found that based on the submissions, evidence, and pleadings, the Defendant had a meritorious defence to the claim. However, it was difficult at this stage to determine the merits of the Action, and the Court found that this factor was of limited use in light of the claim and defence.

With respect to the fourth factor, Silver J. found that the Security for Costs Order did not unduly prejudice the Plaintiff's ability to continue the Action. The Plaintiff was an impecunious corporation without assets and with a "corporate director who is unwilling to provide any resources towards this claim from which he will personally benefit".

## DROOG V HAMILTON, 2024 ABKB 243

(JONES J)

Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay), 7.3 (Summary Judgment), 11.15 (Service on Person Providing an Address for Service), 11.21 (Service by Electronic Method) and 11.27 (Validating Service)

The Appeal concerns whether the Appellants' Action was properly dismissed for long delay under Rule 4.33, focusing on the service of an Affidavit of Records ("AOR") after the presumptive expiry date for advancing the Action.

The Appellants contended that the service of the AOR significantly advanced the Action forward and was completed within the required timeframe. The Appellants argued that any issues related to the remote commissioning and email service of the AOR were merely technicalities that should not impede the progress of the case. They also argued that the Respondents' decision to amend their delay Application to seek Summary Dismissal indicated their intention to proceed with the Action, engaging Rule 4.33(2)(b). On the other hand, the Respondents maintained that the AOR did not meet the necessary criteria for advancing the Action, citing reasons such as improper timing, content, commissioning, and method of service. They also argued that adding a Summary Dismissal Application onto the delay Application did not invoke the relieving provisions of Rule 4.33(2)(b).

Justice Jones analyzed Rule 4.33 and emphasized the Court's strict stance on delay, with no room for discretion in cases of prolonged delay. Despite having discretion under Rule 11.27, Justice Jones decided against exercising it in this situation to uphold the essence of Rule 4.33 and the foundational Rules.

Justice Jones determined that the service of the AOR did not extend the deadline as stated in section 22(2) of the *Interpretation Act*. In deciding that issue, Justice Jones considered other means of service noting Rule 11.15, which speaks to service on a person providing an address for service, and 11.27 which allows for service via email. The Court noted that the service could not have been affected by elec-

tronic means because the Respondents did not provide an email address, and neither agreed for email service.

The Court agreed with the Applications Judge's assessment that the three-year period specified in Rule 4.33 had passed without a significant advance in the case.

Despite considering the remaining grounds for Appeal, such as whether the AOR constituted a significant advancement of the Action and whether it was properly commissioned, Justice Jones ultimately concluded that the case was rightfully dismissed due to the lengthy delay. The Decision also addressed the appropriateness of email service and the application of Rule 4.33(2)(b) by the Respondents in their request for Summary Dismissal, ultimately determining that these factors did not prevent the dismissal of the Action due to delay.

Justice Jones also took into account the Respondent's Summary Dismissal Application. He observed that both Rule 4.33 and 7.3, when looked at from a broader perspective, share the same ultimate goal of eliminating litigation that has no future. This could be due to its futility or because one party has allowed it to wither away. Justice Jones acknowledged that the foundational Rules, like Rule 1.2, aim to ensure a fair and just resolution of disputes in a timely and cost-effective manner. Therefore, the Respondent's decision to seek Summary Dismissal alongside dismissal for delay aligned with the parties' obligations under these foundational Rules.

In conclusion, Justice Jones noted that it is appropriate to allow Applications for dismissal for delay and Summary Dismissal to coexist, even though it will require additional effort to pursue and respond to each of them.

## BANK OF MONTREAL V LUCIANO, 2024 ABKB 314

(MARION J)

Rules 1.2 (Purpose and Intention of These Rules), 2.29 (Withdrawal of Lawyer of Record), 6.14 (Appeal from Applications Judge's Judgment or Order), 11.3 (Agreement Between Parties), 11.18 (Service on Self-Represented Litigants), 11.20 (Service of Documents, other than Commencement Documents, in Alberta), 11.21 (Service by Electronic Method), 11.30 (Proving Service of Documents) and 13.5 (Variation of Time Periods)

The Defendant applied for leave of the Court to file and serve a Notice of Appeal of an Order by an Applications Judge granting the Plaintiff: (i) Summary Judgment and (ii) a declaration that the Defendant's actions were fraudulent (together the "BMO Judgment"). Specifically, the Defendant sought to Appeal the fraud declaration in the BMO Judgment.

After engaging with questions of "if" and "when" the Defendant was served with the BMO Judgment, to determine if the Appeal period expired and, if the Appeal period had expired, whether to extend it, the Court ultimately dismissed the Plaintiff's Application.

The Court found that the Defendant was served with the BMO Judgment on November 17, 2023, by email. Under Rule 6.14(2), a Notice to Appeal an Order of an Applications Judge must be filed and served within 10 days after the Order was entered and served, and the Appeal must be scheduled within two months after the date on which the Notice to Appeal was filed. The

Appeal period expired on November 27, 2023.

Importantly, the Court found that the Defendant was served with the BMO Judgment because she acknowledged service in her email response the Plaintiff.

On October 27, 2023, the Defendant's then counsel filed and served a Notice of Withdrawal of Lawyer of Record that provided the Defendant's last known address; however, it did not include the Defendant's email address. The Plaintiff served the Defendant at the email address. The Court noted that Rule 2.29(3) provides that "the address of the party stated in the notice of withdrawal is the party's address for service after the lawyer of record withdraws unless another address for service is provided or the Court otherwise orders".

Rule 11.20 stipulates for the service of documents in Alberta, other than commencement documents. It provides that non-commencement documents can be served by a method of service described in Division 2 for service of a commencement document. Relying on the 2023 Court of Appeal decision in *Powell Estate (Re)*, the Court found that "one of the ways that service of commencement documents (and therefore also non-commencement documents under rule 11.20(a)) may be effected on self-represented litigants is if the self-represented litigant accepts service of the document in writing". Rule 11.18 further allows self-represented litigants to accept service of commencement documents in writing.

Since the Defendant acknowledged receipt of the BMO Judgment on November 17, 2023 via email, the court found that service was effected and the limitation period to Appeal started to run.

With respect to determining whether the Court should exercise its discretion to extend the Appeal period under Rule 13.5, Marion J. held that the Defendant's lengthy delay and overall conduct in the litigation mitigated against granting leave. The Court was guided by the application of the five well known *Cairns* factors: (i) a bona fide intention to Appeal, (ii) an explanation for the failure to Appeal in time that justifies the lateness, (iii) an absence of serious prejudice that it would not be unjust to disturb the Judgment, (iv) lack of benefits derived by the Applicant from the benefits of the Judgment under Appeal, and (v) a reasonable chance of success on Appeal. While not determinative, the factors assist the Court to determine whether the interest of justice are served by granting the extension.

The thrust of the analysis focused on the second *Cairns* factor, which did not assist the Appellant. The Court found that the Defendant did not file her Application for permission to Appeal until more than three months after being served with the BMO Judgment. This was longer than the two-month period under Rule 6.14(2) which states that an Appeal of an Order by an Applications Judge must be returned within two months after the Notice of Appeal was issued. While the two-month period is often not achieved because of scheduling issues, the Defendant's delay was considered significant and inexcusable. The fact that the Defendant was self-represented was material but not a "very special circumstance" that could excuse the failure to Appeal on time.

## HOURIE-PEEBLES V DINOSAUR TRAIL GOLF, 2024 ABKB 324

(FUNK J)

Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 6.14 (Appeal from Applications Judge's Judgment or Order)

This was an Appeal from a procedural Order by Applications Judge Park under Rule 4.31. Martha May Hourie-Peebles, injured by a golf ball at Dinosaur Trail Golf & Country Club, faced potential dismissal of her claim due to procedural delays.

Applications Judge Park, despite confirming the criteria of Rule 4.31 were met due to significant delays and resulting prejudice to the Defendant, opted for a procedural Order instead of dismissal, aiming to move the case towards trial. The Defendant's Appeal centered on whether this Decision aligned with the foundational principles of Rule 1.2, ensuring timely and cost-effective resolution of claims.

Justice Funk, in the Appeal under Rule 6.14(3), focused on whether compelling reasons existed to maintain the Action despite the significant delays. Justice Funk highlighted that under Rule 4.31(2), the inordinate and inexcusable delay led to presumed significant prejudice against the Defendant, which the Plaintiff failed to rebut.

The Appeal also touched on considerations from Rule 4.33 about dismissals for undue delays affecting the integrity of the Judicial process, emphasizing that the passage of time significantly disadvantaged the Defendant in preparing a defence, directly impacting the Action's fairness and efficacy.

Concluding that no compelling reasons justified overriding the significant prejudice to the Defendant, Justice Funk allowed the Appeal, dismissed the procedural Order, and terminated the Plaintiff's Action under Rule 4.31.

## LESENKO V WILD ROSE READY MIX LTD, 2024 ABKB 333

(FEASBY J)

Rules 1.2 (Purpose and Intention of These Rules), 6.14 (Appeal from Applications Judge's Judgment or Order), 9.13 (Re-opening Case), 9.14 (Further or Other Order After Judgment or Order Entered), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.26 (Appeals to Judge) and 13.5 (Variation of Time Periods)

This was an Appeal from the Application Judge's Decision granting the Plaintiffs' Application to remove liens from the title to their property and dismissing the Defendant's cross-Application to extend the time to commence lien enforcement proceedings. In the underlying Action, the parties executed a Consent Order pursuant to the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 (the "*PPCLA*"), under which the Plaintiffs paid security for the liens and had the liens discharged from their property. The Consent Order required the Defendant

to commence enforcement proceedings within 180 days after the date of the registration of the liens, which the Defendants failed to do. The Plaintiffs applied to have the Action dismissed and for an Order directing that their security be returned, while the Defendant cross-applied for an Order extending the time to commence enforcement proceedings pursuant to Rule 13.5.

Two sets of reasons were issued by the Applications Judge: in the Order disposing of the Applications (the "Decision Order"), the Applications Judge held that the Court had no power to reinstate the liens; in the amended reasons (the "Corrigendum") that were issued after the Decision Order was entered, the Applications Judge held that the Court had power to reinstate the liens but no compelling reason was given to exercise his discretion to do so.

Feasby J. noted that Appeals from Applications Judges are statutory and can be either on the existing record or with new evidence pursuant to Rule 6.14(3), and traditionally heard *de novo*.

However, Feasby J. suggested that a shift from *de novo* to the appellate standard of review would be more efficient and in line with general Appeals practice. In response to the constitutional objections to using the appellate standard of review for Appeals of Applications Judge Decisions, Feasby J. noted that Rule 10.9 gives provincially appointed Review Officers authority to assess the reasonableness of lawyer's retainer agreements and charges, and that Appeals of Review Officers' Decisions are on the record pursuant to Rule 10.26. As such, the appellate standard of review is appropriate and constitutionally valid for Decisions made by Applications Judges, consistent with how similar judicial roles are treated.

Feasby J. recommended that the Rules of Court Committee consider revising Rule 6.14(3) to bring Applications Judge Appeals in line with the general Appeals practice by restricting them to the record and requiring new evidence to satisfy the test set out in *Palmer v The Queen*, 1980 1 SCR 759 in exceptional circumstances. Feasby J. highlighted that requiring the *Palmer* test to be satisfied to adduce new evidence on Appeal obligates parties to put their best case forward. Feasby J. noted these changes are consistent with the purpose of the Rules as outlined in Rule 1.2(1) to resolve claims fairly in a timely and cost-effective manner.

With respect to this Appeal, Feasby J. determined that the Corrigendum was null and void because it made significant changes to the Decision Order after the Decision Order was entered, which was beyond the Applications Judge's power. Feasby J. noted that the Applications Judge had broad discretion to vary a Judgment or Order pursuant to Rule 9.13(a) before the Order was entered; however, once the Order was entered, the Applications Judge became *functus officio* and did not have the power to make substantive changes pursuant to Rule 9.14.

Furthermore, Feasby J. concluded that the term of the Consent Order providing a 180-day period to commence a Court Action is *void ab initio* as it shortened the statutory limitation period in the Limitations Act and contradicted s. 44 of the *PPCLA*, which stated a lien does not cease to exist due to inaction within 180 days where it has been replaced by a security held by the Court.

Feasby J. therefore allowed the Appeal and reinstated the liens.

## KYAMBADDE V CALGARY POLICE SERVICE, 2024 ABKB 370

(POELMAN J)

Rules 1.2 (Purpose and Intention of the Rules), 3.15 (Originating Application for Judicial Review), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.5 (Variation of Time Periods)

The Applicant, a Walmart employee, was mistakenly detained by Calgary Police Service (CPS) officers and subsequently released without charges. The Applicant filed a complaint against the officers, which was dismissed by the Chief of Police without a hearing. The Applicant sought Judicial Review of this Decision, which was initially set aside by the Court. However, that Decision was challenged, and the Respondents brought an Application to set aside the Judicial Review Decision, alleging that the Originating Application was not properly served on the Respondent or the Minister of Justice, both said to be required under Rule 3.15(3).

The Court concluded that since an Originating Application for Judicial Review must be filed and served within six-months after the date of the Decision, pursuant to Rule 3.15(2), and because Rule 3.15(2) provides that Rule 13.5 (which allows for variation of time periods) does not apply to the six-month limitation period, the six-month deadline in Rule 3.15 is absolute and cannot be extended. Therefore, if the six-month time limit for filing and serving an Originating Application for Judicial Review was not satisfied, the Originating Application may be struck.

Rule 3.15 requires service on the Chief, Alberta's Minister of Justice and "every person or body directed affected by the application." The Court concluded that since the Crown or statutory body is always implicated in administrative law, they must be given notice of Applications that ask the court to contemplate a Judicial Review. The Applicant argued that service on the Chief or CPS was sufficient to encompass service on the officers. However, the Court noted that it is patent from the statutory and regulatory framework that there are cases in which the Chief and CPS as an organization have interests different from the sworn officers involved in policing. Further, the *Police Act* makes plain that an officer is regarded as a public office holder who is independent of the municipality, not its agent or employee, and does not act as a government functionary or agent when investigating a crime or making an arrest. The Court concluded that police officers were legally separate from CPS and the office of the Chief; and were directly affected by the Judicial Review Application. Thus, the Applicant was required to serve them with their Judicial Review Application. The Court further noted, in *obiter*, that there are cases where actual knowledge of an Application may suffice, even where service was not effected. However, the evidence in this case was to the contrary, and supported that the police officers had no knowledge of the Application.

In Response to the Applicant's argument that the Application must be governed by considerations of fairness under Rule 1.2, and the Court's inherent jurisdiction to effect fairness notwithstanding the Rules, the Court concluded that there are specific procedures and time limitations governing Judicial Review, and no legitimate basis existed on which the Court could disregard them. The Court went on to say that it was illusory to posit a distinction between procedural and substantive fairness, and that Rule 1.2, cannot be used to subvert Rules that specifically address points such as service requirements and time limitations for Judicial Review.

Thus, the Action commenced for Judicial Review was struck, pursuant to Rule 3.68

## 420 INVESTMENTS LTD V TILRAY INC, 2024 ABKB 210

(SIDNELL J)

Rules 1.4 (Procedural Orders) and 6.14 (Appeal from Applications Judge's Judgment or Order)

This Appeal involved a Decision by Applications Judge Farrington pursuant to Rule 6.14, stemming from a financial dispute between 420 Investments Ltd ("Four20") and High Park Shops Inc ("High Park"). The Application focused on alleged breaches of an agreement and a contested loan repayment. The Applications Judge granted High Park Summary Judgment for $7,000,000 plus interest and dismissed Four20's Application for an interim Stay of the Judgment pending the Appeals.

The Court determined that the standard of review for this Appeal, conducted under Rule 6.14, is *de novo*, with the correctness standard applied as established by the precedents set in earlier rulings. Four20 also invoked Rule 1.4(2)(h) and section 17 of the *Judicature Act*, which authorize a Stay of Orders pending an Appeal if it is "just and equitable in all the circumstances of the case." The Court reviewed all materials from both the Summary Judgment and the Stay Application, noting that no new evidence was introduced after the denial of the Stay Application.

Justice Sidnell dismissed the Appeal, finding that Four20 failed to demonstrate irreparable harm or that the balance of convenience favoured granting a Stay. The Court determined that while Four20 presented a serious issue for Trial, the evidence did not substantiate claims of irreparable harm, and the balance of convenience did not support altering the Applications Judge's Decision. The funds from the Judgment were ordered to be held in trust to address potential recovery issues should Four20 succeed in future Appeals.

## BALL V 1979927 ALBERTA LTD, 2024 ABKB 229

(NIXON ACJ)

Rule 1.4 (Procedural Orders)

The Court was asked to resolve various issues in a class action. A subset of the Defendants applied to dismiss the Action against them, or in the alternative, to strike or permanently stay the Amended Statement of Clam, on the basis that the Action was an abuse of process (the "Applicant Defendants"). Another subset of the Defendants entered into Pierringer Agreements with the Plaintiffs (the "Settling Defendants") and the Plaintiffs applied to have the settlement agreements approved.

The Court dismissed the Action against the Applicant Defendants and declined to approve the Pierringer Agreements.

A preliminary issue arose as to the sequence in which the Court should decide the Applications. Associate Chief Justice Nixon looked to Rules 1.4(1) and 1.4(2)(d) to hold that the Court has inherent jurisdiction and power to control its process and procedure. Rule 1.4(1) allows the Court to govern the practice and procedure in all matters before it, while Rule 1.4(2)(d) lets the Court determine how or if the Rules apply to the Court's practice or procedure. Notably, there is no Rule stating that applications must be heard in the sequence they were filed.

Accordingly, Nixon A.C.J. elected to decide the abuse of process Application first. If the Action was an abuse of process, there would be no need to approve the settlement agreements.

The Court determined that the Action was an abuse of process against the Applicant Defendants. Several years beforehand, some of the Defendants, referred to as Seair, were involved in bankruptcy proceedings. The Applicant Defendants were involved in Seair's bankruptcy proceedings as counsel, bankruptcy trustee, or an investment banking firm. The Plaintiffs were shareholders and unsecured creditors of Seair and had note of the bankruptcy proceedings. Some Plaintiffs actively participated in the bankruptcy proceedings. A joint proposal was eventually made under section 50 the *Bankruptcy and Insolvency Act* (the "BIA Order") and approved by the Court. The BIA Order extinguished the Plaintiffs' rights as shareholders and unsecured creditors of Seair. Therefore, the Action advanced against the Applicant Defendants was a collateral attack on the BIA Order and an abuse of process. The Plaintiffs were attempting to re-litigate findings made in the context of the bankruptcy proceedings and were guilty of laches and acquiescence for failing to pursue their remedies before the BIA Order was pronounced.

In declining to approve the Pierringer Agreements between the Plaintiffs and the Settling Defendants, the Court noted that the Plaintiffs had a duty to immediately disclose the existence of the settlement agreements to non-settling Defendants and the Court. They had not done so and their failure to disclose amounted to abuse of process. The relationships between the Plaintiffs, the Settling Defendants, and the non-settling Defendants can be clarified only after disclosure and the granting of Court approval.

## LIU V KADIRI, 2024 ABKB 271

(NIELSEN J)

Rules 1.4 (Procedural Orders), 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court) and 9.4 (Signing Judgments and Orders)

The Applicant, Stephen Liu ("Mr. Liu"), brought an Application for the Respondent, Idris Kadiri ("Mr. Kadiri"), to be declared a vexatious litigant pursuant to the *Judicature Act*, RSA 2000, c J-2 ("Act"). Neither Mr. Liu or Mr. Kadiri were represented by counsel when the Application was first before the Court, and Nielsen J. adjourned the Application because it did not comply with the process set out by the Court of Appeal of Alberta in *Jonsson v Lymer*, 2020 ABCA 167. At that time, Nielsen J. also made Mr. Kadiri subject to an interim Court access restriction

Order that stayed all litigation initiated by Mr. Kadiri before the Application was heard ("Kadiri #1 Decision").

Following the Kadiri #1 Decision, Mr. Liu retained counsel and served a replacement Application under the Act ("Updated Application"). Mr. Kadiri did not file any materials in response to the Updated Application but did submit materials to suggest that the Court lacked jurisdiction to vary and adapt litigation process as occurred as a result of the Kadiri #1 Decision. The Court rejected Mr. Kadiri's argument, finding it was contrary to the general litigation management authority set out in Rule 1.4. After canvassing Mr. Kadiri's litigation conduct, Nielsen J. held that Mr. Kadiri was a vexatious litigant. Mr. Kadiri was prohibited from, *inter alia*, commencing any Application in the Court of King's Bench of Alberta, acting as a self-represented litigant pursuant to Rule 2.22, and assisting other parties before the Court pursuant to Rule 2.23. The Court rejected Mr. Liu's Application to strike Mr. Kadiri's Actions pursuant to Rule 3.68(4) as the effect of the Court access restrictions was to stay Mr. Kadiri's Actions indefinitely. Mr. Liu's counsel was ordered to prepare and file the Order giving effect to the decision and approval of the Order was dispensed with pursuant to Rule 9.4(2)(c).

## BRUNEAU V QUINN, 2024 ABCA 108

(FAGNAN JA)

Rules 1.4 (Procedural Orders), 13.5 (Variation of Time Periods) and 14.21 (Format of Appeal Record)

The Applicants applied for a review of the Case Management Officer's ("CMO") decision to extend the Appellants' filing deadline. The Court noted that Rule 14.21(2)(b) requires transcripts to be filed and approved before the Appeal Record may be received. The Appellants, however, attempted to file the transcripts and the Appeal Record at the same time, which was rejected by the registry. When the materials were rejected, the Appellants wrote to the CMO and requested an extension to the filing deadline. The Applicant wrote a letter to the CMO objecting to the extension. The CMO subsequently issued a decision granting a one-week extension.

The Court noted that it had discretion to extend time periods pursuant to Rules 1.4(2)(h) and 13.5(2), and the relevant factors that had to be considered included the reason for the delay, the prospect of moving ahead with the Appeal, prejudice to the other party, and whether the Appeal was frivolous. After reviewing the relevant factors, Justice Fagnan dismissed the Application.

## AXIOM FOREIGN EXCHANGE INTERNATIONAL V RUDIGER MARKETING LTD, 2024 ABKB 224

(FEASBY J)

Rules 2.2 (Actions by or Against Partners and Partnerships) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff obtained a Judgment against the Defendant. During the enforcement process, the Plaintiff discovered that there were no assets remaining in the Defendant company to satisfy the Judgment and sought to hold corporate agents of the Defendant company personally responsible for their alleged misrepresentation.

Among other things, the Court addressed the threshold issue of whether the Plaintiff could maintain an Action as a dissolved partnership.

The Court noted that a dissolved corporation could not initiate or continue legal proceedings without restoration. While the *Alberta Business Corporations Act* now addresses the continuance of Actions commenced by dissolved corporations, the *Partnership Act* does not for dissolved partnerships. The Court emphasized the nature of a partnership as a group of individuals conducting business together, rather than a distinct legal entity. Rule 2.2 recognizes this by allowing Actions by or against a partnership to be brought in the name of the partnership or the individual partners. Therefore, even after dissolution, Actions initiated using the name of a partnership continue as Actions by or against the individual partners. The Court noted that it was advisable to update the style of cause to reflect the individual partners post-dissolution, but failure to do so would not invalidate the Action.

Consequently, the former partners of the Plaintiff were granted leave to amend their Pleading to include their individual names pursuant to Rule 3.65.

## BANK OF MONTREAL V EXCLUSIVE HARDWOOD LTD, 2024 ABKB 322

(LEMA J)

Rules 2.10 (Intervenor Status), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings) and 6.3 (Applications Generally)

Lien-enforcement proceedings were brough by two lien holders against a landowner. A lien-bond surety wanted to be added into the proceedings, either as a party or an intervenor, pursuant to Rules 2.10 or 3.74. A special Application on lien validity and claim quantification was scheduled for May 31, 2024, before an Applications Judge. The surety sought to adjourn the Application to allow time for it to apply to be added to the proceedings.

Justice Lema considered the proper forum to hear the Application to adjourn. The Court considered Rule 3.74 and Rule 2.10, and the definition of the term “the Court” in the Rules. He found that the Rules permitted an applica-

tion to add a party or intervenor to be made before an Applications Judge. The upcoming Application was also scheduled to be heard by an Applications Judge. The Court therefore determined that the appropriate forum to argue the adjournment Application was before an Applications Judge.

The Applicant also sought to rely on Rule 6.3(3), arguing that the matter should be adjourned because it was not properly served with the Application materials 5 days before the Application. Justice Lema found that they may have been an affected party, which may provide support for an adjournment. However, Justice Lema dismissed the adjournment request, in favour of allowing the assigned Applications Judge to hear the same Application.

## ROYAL BANK OF CANADA V COURTOREILLE, 2024 ABKB 302

(NIELSEN ACJ)

Rules 2.22 (Self-Represented Litigants), 2.23 (Assistance Before the Court), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

This Memorandum of Decision involved the Royal Bank of Canada ("RBC") seeking to recover a debt from Patrick Courtoreille. Mr. Courtoreille, in his defence, argued against the validity of the debt without providing concrete evidence, leading RBC to apply for Summary Judgment, pursuant to Rules 7.2 and 7.3. The Application was granted by Applications Judge Park, who also awarded solicitor-client Costs to RBC.

The Court identified the defence employed by Mr. Courtoreille as stemming from Organized Pseudolegal Commercial Argument ("OPCA") tactics, which were presented on Mr. Courtoreille's behalf by a third party, "UnitedWeStandPeople," and notably by Mr. Kevin Kumar during the hearing. These tactics included demands for an "original wet ink signed loan document" and an Affidavit verifying the debt was not sold, and other known pseudolaw strategies that have been consistently rejected by Canadian Courts.

The Court found the involvement of Mr. Kumar and UnitedWeStandPeople concerning, and their actions brought up serious concerns about the abuse of legal process. The Court emphasized that such behaviours undermine the administration of justice and detailed measures to prevent Mr. Kumar from further participating in Court proceedings, citing his past activities, some of which are linked to fraudulent schemes.

In conclusion, the Court ordered several prohibitions, including restrictions under Rules 2.22 and 2.23, restricting Mr. Kumar's ability to act as a representative or provide legal advice, ensuring he can no longer engage in or facilitate pseudolegal activities within the jurisdiction of the Court of King's Bench of Alberta.

## SABO V ALTALINK MANAGEMENT LTD, 2024 ABCA 179

(KHULLAR, STREKAF AND HO JJA)

Rules 3.2 (How to Start an Action) and 14.46 (Application to Reconsider a Previous Decision)

The Appeal was brought by an operator of a power transmission line that pertained to the interpretation of section 25(1)(d) of the *Surface Rights Act*. The issues were whether (i) the Alberta Surface Rights Board (the "Board") had the power under that section to award compensation for nuisance caused by power transmission lines that are not located on lands with a right of entry in favour of the operator, and (ii) whether the King's Bench Justice hearing the Appeal of the Board's decision on Costs had jurisdiction to do so.

The Appeal regarding the Justice's interpretation of the Board's authority under section 25(1)(d) was allowed, and the matter was set back to the Board for determination. The Justice's decision on Costs was set aside for lack of jurisdiction.

In finding that the Board's decision on Costs was not appealable, the Court of Appeal stated that the Justice erred in finding that he had jurisdiction to consider an Appeal of the Board's original Costs Decision. In part, the confusion stemmed from the 1983 Court of Appeal decision in *Bergman v Francana Oil and Gas Ltd*, on which the Appellant relied for the proposition that the Board's Costs Decisions are not appealable because they do not form part of the compensation order. The Justice incorrectly relied on the same decision for the narrow proposition that there are no stand-alone Appeals from a Costs Decision of the Board.

Importantly, the parties had not asked the Court of Appeal to reconsider that decision pursuant to Rule 14.46. Under this Rule, the Court of Appeal can reconsider its previous Decisions if an Application for Reconsideration is filed and served, and returned prior to the filing and prior to the deadline for the filing of the Applicant's Factum.

Nonetheless, the Appellant tried to argue that while the Board's Costs Award had not been sought as a Judicial Review, it could be decided by the Court. After all, under Rule 3.2(6), the Court has discretion to change the procedural form of a case if it was started incorrectly. However, the Court of Appeal noted that the Rule was of no assistance to the Appellant in this case as the Hearing Justice considered the Board's Costs Decision *de novo*, as though it was a statutory Appeal rather than Judicial Review. The correct remedy and procedure in this case was to return the Costs issue to the Board for recommendation.

## ENVIRONMENTAL DEFENCE CANADA INC V ALBERTA, 2024 ABKB 265

(HAYES-RICHARDS J)

Rules 3.15 (Originating Application for Judicial Review), 11.14 (Service on Statutory and Other Entities) and 11.27 (Validating Service)

This was an Appeal of the Applications Judge's Decision dismissing the Appellants' Application pursuant to Rule 11.27 to confirm and validate service of commencement documents upon the Respondent Commissioner ("Commissioner Allan") under the *Public Inquiries Act*, RSA 2000, c. P-39 (the "*Public Inquiries Act*").

By way of background, the Lieutenant Governor issued an Order in Council ("OIC") to establish a Commission under the *Public Inquiries Act* to investigate foreign organizations supporting anti-Alberta energy campaigns. Commissioner Allan was appointed and required to prepare a final report for the Minister of Energy. Commissioner Allan's final report was published on October 21, 2021. Under Rule 3.15(2), the deadline for filing and serving Judicial Review commencement documents was April 21, 2022.

The Appellants sent the commencement documents for electronic filing on April 20, 2022 and received a filed copy back on June 7, 2022, due to a filing backlog. The filed copy was date stamped April 20, 2022. On April 21, 2022, the Appellants emailed the commencement documents to the Director of Civil Litigation at Alberta Justice ("Ms. Bridgett"), who acknowledged receipt. However, the Appellants' email did not expressly mention service on Commissioner Allan. When the Appellants sent the filed copy to Ms. Bridgett, the Crown/Minister of Energy Respondents indicated that they could not accept service on Commissioner Allan's behalf as he was not an employee or agent of the Crown. Personal service on Commissioner Allan was finally achieved on June 24, 2022.

The Court first considered whether serving unstamped copies of commencement documents before the deadline was sufficient when delays at the courthouse prevented timely filing. The Court referenced a recent decision in *Siciliano v Alberta (Director of SafeRoads)*, 2024 ABCA 62, where the Court of Appeal ruled that serving unstamped documents followed by the stamped copies once received was acceptable when filing delays occurred. Applying this precedent, the Court found that the Appellants' service of unstamped documents before the deadline was sufficient.

The Court then assessed whether Commissioner Allan was properly served within the required time. Judicial Review Applications must be filed and served within six months of the Decision being reviewed pursuant to Rule 3.15(2), which is strictly enforced. Rule 3.15(3) specifies who must be served, including the decision-maker and directly affected parties. Further, Rule 11.14 governs service on statutory entities, requiring service on someone with management or control responsibilities regarding the entity.

The Court found that while Commissioner Allan's independence with respect to his mandate during the Commission was clear, his role concluded once he submitted his report, making him functionally defunct thereafter. When the commencement documents were served, the Crown and/or the Minister of Energy held complete and exclusive control of the Commission. The Court concluded that requiring personal service on Commissioner Allan would contradict Rule 11.14 and the foundational principles of the Rules, which aim to resolve claims fairly, justly, and efficiently.

Consequently, the Court allowed the Appeal

and ruled that the statutory entity, Commissioner Allan, was properly served with commencement documents when the Appellants served Ms. Bridgett via email on April 21, 2022, as required by Rules 3.15 and 11.14.

## SHODUNKE V ALBERTA HUMAN RIGHTS COMMISSION & MINISTER OF PUBLIC SAFETY AND EMERGENCY SERVICES, 2024 ABKB 335

(RICKARDS J)

Rules 3.15 (Originating Application for Judicial Review), 3.22 (Evidence on Judicial Review), 6.31 (Timing of Application and Service) and 6.32 (Notice to Media)

This was an Application for Judicial Review, pursuant to an Originating Application which named the Alberta Human Rights Commission ("AHRC") and others as Respondents. The Applicant, a self-represented litigant, had their security license suspended pursuant to section 20(h) of the *Security Services and Investigators Act,* SA 2008 c S-4.7 (the "Security Act"), due to criminal charges of possession and distribution of child pornography. Instead of following proper procedure to request a review of the decision by the Director of Law Enforcement within 30-days, the Applicant sent a letter to the Registrar. The Peace Officer and Security Program responded to the letter, informing the Applicant that the request for review was not received within the 30-day period. As a result, the Applicant filed several Human Rights Complaint's against the Peace Officer and Security Program, and subsequently the AHRC when the Complaint's were rejected.

The Applicant filed a lengthily Affidavit in addition to the original proceedings, which the Respondents contested should not be considered. Referring to Rule 3.22, the Respondents argued that additional Affidavit evidence is permissible in four specific circumstances. Rickards J. stated that these exceptions exist unless Rule 3.22 (b.1) is applicable. Rickards J. determined Rule 3.22 (b.1) applied, since the Applicant was clearly seeking more than an Order in the nature of *certiorari* or an Order to set aside a decision or act. Rickards J. allowed the Affidavit.

Rickards J. noted the Applicant had requested to have his name anonymized in his brief but failed to properly apply for a Restricted Access Order as per Rule 6.31. Additionally, Rickards J. found the Applicant did not present arguments satisfying the necessity and proportionality criteria of the test for a Restricted Access Order, as outlined in *Edmonton Police Service v Alberta (Law Enforcement Review Board)*, 2013 ABCA 236. Furthermore, Rickards J. noted the Applicant failed to notify the media as required under Rule 6.32 when seeking a Restricted Access Order. Consequently, Rickards J. denied the Applicants request for a Restricted Access Order.

In assessing whether any of the decisions made by the Respondents were eligible for Judicial Review, Rickards J. referenced Rule 3.15(2), which stipulates that an Originating Application for Judicial Review must be filed and served within six months of the decision. Rickards J. concluded that none of the decisions made by the Peace Officer and Security Program, which the Applicant contested, fell within the six-month statutory limit and therefore were not subject to Judicial Review. Regarding decisions made by the AHRC decisions, only one decision challenged by the Applicant fell within the six-month limit and was eligible for Judicial Review.

However, applying the reasonableness standard of review established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, Rickards J. found that the Applicant did not demonstrate that the decision was unreasonable. Rickards J. emphasized that the decision was justified, transparent, and clear in articulating why the Appellants claim could not proceed.

Rickards J. dismissed the Application for Judicial Review.

## SYNCRUDE CANADA LTD. V ALBERTA (HUMAN RIGHTS COMMISSION), 2024 ABKB 355

(ALONEISSI J)

Rule 3.15 (Originating Application for Judicial Review)

The Applicant sought Judicial Review of three decisions, seeking to quash, set aside or alternatively request the Court make a declaration confirming that the decisions were unreasonable or incorrect. The Respondent argued that the Applicant filed its Application for Judicial Review of one of the decisions after the six-month limitation period as per Rule 3.15, and therefore the Judicial Review of the decision cannot proceed. The Applicant submitted that the Respondents are estopped from relying on the passage of time to defend the Judicial Review Application as the Applicant was not provided with prior notification between the relevant time that the Agreement would not continue to have effect. The Applicant further stated that it relied on this Agreement to its detriment resulting in its position being weakened by the other decision.

The Court considered the relevant principles of Rule 753.11 (predecessor of Rule 3.15) stating that Rule 3.15 is strictly construed, that unless there is a clear and stated obligation to provide notice of a decision, the six-month limitation runs from the date of the decision. If there is a clear obligation to provide notice, then the limitation runs from the date the notice is given. The Applicant was notified in time and filed its Application well beyond the strict six-month limitation period. The Court did not further review the decision on the basis that it was not filed and served within the strict limitation period as set out in Rule 3.15. Therefore, the Application was dismissed.

## SOUTHPOINT LANDING JV INC V CAMROSE (CITY), 2024 ABKB 207

(LITTLE J)

Rules 3.19 (Sending in Certified Record of Proceedings) and 3.22 (Evidence on Judicial Review)

The Plaintiff commenced a Judicial Review, challenging the validity of Bylaws passed by the Defendant City. In particular, the Plaintiff argued that the requirements for publicizing the hearing of the Bylaw were not followed.

As required by Rule 3.19, the City filed a Certified Record of Proceedings which formed part of the Court Record, pursuant to Rule 3.19(2).

Pursuant to Rule 3.22, Justice Little permitted the Plaintiff to file an Affidavit containing its evidence regarding the publication of the Bylaw hearings. However, Justice Little found that there was contradictory evidence proving that notice was given to the public regarding the hearings. As such, Little J. dismissed the Application.

## STOPA V ALBERTA (DIRECTOR OF SAFEROADS), 2024 ABKB 217

(MARION J)

Rules 3.22 (Evidence on Judicial Review) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant sought Judicial Review of a decision under the *Traffic Safety Act*. Justice Marion found the decision reasonable and dismissed the Application.

On Judicial Review, the Court has discretion to grant remedies, including addressing the question of whether to consider an issue raised for the first time on Judicial Review. Judicial Reviews are not, however, *de novo* hearings and the Court must exercise its supervisory function. Subject to some exceptions, the Court must assess the decision of an administrative tribunal based on "the record, issues raised, and arguments made before the tribunal at the time of review".

This is supported by Rule 3.22, which applies to the evidence allowed on Judicial Reviews. It asks the Court to consider only the certified copy of the record of proceedings subject to review; if Questioning was permitted, a transcript of that Questioning; Affidavit evidence if the relief sought is not for setting aside the decision; and other evidence permitted by the Court or enactments. Therefore, raising new issues on Judicial Review is not the norm, and the Court will not exercise its discretion to entertain new issues where the issues could have been but were not raised before the administrative tribunal.

Justice Marion found that the Applicant's position on Judicial Review was inconsistent with his position before the adjudicator and in fact, the adjudicator's conclusion was reasonable in the circumstances, taking into account the issues raised by the Applicant before him. Furthermore, Marion J. relied on Rule 3.68 to state that applicants have a duty, whether self-represented or not, to "do the appropriate work up front and raise arguments, cancellation grounds and

issues before adjudicators that are reasonably grounded in the facts and law and are not frivolous, irrelevant, improper or an abuse of process".

## WOODLANDS (COUNTY) V WHITECOURT (TOWN), 2024 ABKB 388

(RENKE J)

Rule 3.22 (Evidence on Judicial Review)

An Arbitrator issued an Award respecting the intermunicipal collaboration framework between Woodlands County ("County") and the Town of Whitecourt ("Town") pursuant to the *Municipal Government Act*, RSA 2000, c M-26 ("Award"). The County sought a Judicial Review of the Award. The Town argued that two Affidavits referred to in the County's submissions, which were filed in support of interim injunction Application, should be disregarded. The Affidavits were not filed in either the arbitration or the Judicial Review. The Court therefore found that the Affidavits did not meet the Rule 3.22 criteria and refused to consider them. In the result, the County's Application was dismissed.

## CARBONE V DAWES, 2024 ABCA 189

(HO JA)

Rules 3.23 (Stay of Decision) and 14.5 (Appeals Only With Permission)

The Applicant sought permission to Appeal a scheduling Order (the "Order") under Rule 14.5(1)(b). The Applicant also sought a Stay to prevent an Applications Judge from releasing her decisions regarding the Respondents' Security for Costs Applications (the "Stay Application").

Ho J.A. cited *Pander v Chopra*, 2023 ABCA 249 for the test for permission to Appeal under Rule 14.5(1)(b), which requires the Applicant to show: (i) a serious question of general importance, (ii) a reasonable chance of success on Appeal, and (iii) that the Appeal will not unduly hinder the progress of the Action or cause undue prejudice to the parties, without any proportionate benefit.

Having considered the Applicant's arguments, Ho J.A. held that the test for permission to Appeal was not met and that the Rule 14.5(1)(b) Application should be denied. Specifically, there was no question of general importance that might have precedential value, and the Appeal of the Order did not have a reasonable chance of success on Appeal.

Ho J.A. dismissed the Stay Application on the basis that it was premature. Specifically, it remained unknown whether the Respon-

dents' Security for Costs Applications would be granted, or how much security would be required to be posted and by when. Further, the Applicant might well post security within the required time-frame, obviating the need for a Stay Order. And if the Applicant chose to appeal any Order for Security for Costs, such Appeal would be heard by a Justice of the Court of King's Bench and a Stay might be sought at that time.

## NORTH V DAVISON, 2024 ABKB 242

(BURNS J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.7 (Pleadings: Other Requirements)

This was an Application pursuant to Rule 3.68 for an Order striking a Counterclaim. The Counterclaim arose within a receivership Action where the Applicants were the Interim Receiver and its representative. The Respondents cross applied to amend their Counterclaim and sought leave to pursue Actions against the Applicants.

Regarding the Respondents' Application to amend the Counterclaim, the Court noted that leave was required because Pleadings had closed, pursuant to Rule 3.65. The Court also noted that the test for amending Pleadings was low. Two proposed amended Counterclaims were attached to the Application to amend the Counterclaim and the bench brief respectively; and the Court based its analysis on the second proposed amendment given the low bar to allow amendments to Pleadings. The Court further noted that while an Application under Rule 3.68 typically precludes evidence and limits analysis to what is pled, the Court must consider evidence when assessing leave to sue and ensure it supports the cause of action against the Applicants. The Court found that many of the Affidavits submitted by the Respondents contained hearsay, speculation, or conjecture, and cautioned against their use.

The Court then considered Rule 3.68, which allows for the striking of all or part of a claim where it does not disclose a reasonable claim. The Court noted that the question was whether an Action had a reasonable prospect of success when accepting pleaded facts as true, but Rule 3.68 should be applied sparingly.

The Court identified the claims made against the Applicants and found that they did not meet the test for leave to sue and should be struck. One of the causes of actions pled against the Applicants was conspiracy, but the Court found that the Pleadings resorted to broad allegations of conspiracy without specifying facts that would ground the claim, which was contrary to the requirement under Rule 13.7. This rule stipulates that allegation of fraud (by extension, conspiracy to commit fraud) must be particularized.

As a result, the Court allowed the Applicants' Application to strike the Counterclaim, while dismissing the Respondents' Cross Applications.

## ARMSTRONG V GULA, 2024 ABKB 358

(MARION J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 7.3 (Summary Judgment), 13.6 (Pleadings: General Requirements) and 13.18 (Types of Affidavit)

The Defendant applied under Rule 7.3 to summarily dismiss the Plaintiff's claim. The claim related to the purported sale of land by the Defendant, now deceased, to the Plaintiff, as captured by a written purchase and sale agreement. Justice Marion granted the Defendant's Application, finding no merit to the claim as the Plaintiff failed to waive the stipulated conditions by the required date, leading to the contract ending on its own terms.

Rule 7.3(1)(b) stipulates that a Defendant may apply to summarily dismiss a claim if there is no merit to it. In most cases, such applications are decided based on the personal knowledge of the affiants, as required by Rule 13.18(3). However, Courts may accept evidence that is not based on personal knowledge when the Applicant is an Estate. In such cases, the Court may weigh Affidavits sworn on information and belief, provided that the sources are disclosed as required by Rules 13.18(1)(b) and 13.18(2)(b).

The Plaintiff opposed the Application arguing, among others, that the waiver issue had not been properly pled by the Defendant. Rule 13.6(3)(i) requires a pleading to expressly plead "performance". Justice Marion found that on the face of the existing Pleadings, a more specific pleading was not required. The Court held that when a "contract expired on its own terms because a certain event did not occur, neither a pleading of 'breach of contact' nor a specific pleading of 'performance'" is required.

While the Court dismissed the claim on the Pleadings as they were before it, it also engaged in a separate analysis to determine if the Defendant would have been entitled to amend its Statement of Defence.

By virtue of Rule 3.65, the Defendant could have been granted permission to amend its Pleadings. While the Rule is discretionary, there is a strong presumption in favour of allowing amendments, and the applicant need not show any particular reason for amending it. The Court must, however, assess two guiding interests: (a) the impact of the proposed amendment on the non-moving party's litigation interests, and (b) the public interest in resolving the litigation as quickly as reasonable, without the need to expand further public or private resources.

The Court found that it would have granted the estate permission to amend its Statement of Defence as: (i) the proposed amendments were amply supported by evidence, (ii) particularized the existing pleadings rather than add new defences, (iii) were not made in bad faith, and (iv) did not contravene the public interest. The amendments would not have unduly delayed the matter from proceeding to Trial, and would not have caused prejudice to the Plaintiff.

## QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP, 2024 ABCA 115

(HUGHES, PENTELECHUK AND KIRKER JJA)

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

The Defendants appealed an Order that allowed the Plaintiff to amend its Statement of Claim and attach proceeds from a potential sale of lands that were at issue between the parties. The Appeal was allowed, and the Order was set aside on the basis that the "super priority" claim advanced by the Plaintiff could not succeed at law.

The Plaintiff framed its original Action in nuisance and asserted that certain chemical contaminants had migrated onto its lands from the adjoining lands owned by the Defendants. The Plaintiff obtained permission to amend its claim under Rule 3.65 on the basis that none of the exceptions to the general rule allowing amendments applied. The Plaintiff amended its claim to seek a declaration that any Judgment for remediation damages be paid to is from the sale of the Defendants' lands in priority to any of the Defendants' secured creditors and registered mortgagees.

The Plaintiff was an unsecured tort claimant; in other words, a private litigant. Nonetheless, it advanced an argument by drawing parallels to the Supreme Court of Canada decision in *Orphan Wells Association v Grant Thornton* (**"***Redwater*"). The Plaintiff argued that the Alberta Environment and Protected Areas ("AEP") had a statutory duty under the Environmental Protection and Enhancement Act, RSA 2000, c E-12 to address the damage caused by the migration of contaminants from the Defendant's lands, similar to how the Alberta Energy Regulator ("AER") in *Redwater* had statutory powers to enforce compliance of Redwater's abandonment and reclamation obligations.

The Court of Appeal disagreed. It noted that while the *Redwater* decision had the effect of giving the AER a "super priority" over secured creditors in a formal bankruptcy proceeding, it did not create a common law priority entitlement untethered from the applicable legislation and its objectives. The Chambers Judge erred in law when he held that *Redwater* created a common law "super priority" in favour of a private litigant such as the Plaintiff, outside of insolvency proceedings. The Plaintiff's "super priority" amendment was hopeless, and the Appeal was allowed.

## DIANE JONSSON V 1920341 ALBERTA LTD, 2024 ABKB 184

(BERCOV J)

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

The Defendant filed an Application for Summary Judgment pursuant to Rule 7.3, or alternatively dismissal pursuant to Rule 3.68. The Plaintiff applied to adjourn the Defendant's Applications until after Questioning. The Applications Judge had dismissed the Plaintiff's Application and granted the Defendant's Application for Summary Judgment, noting that it was not reasonable or necessary to allow Questioning prior to the Summary Judgment Application as in the five years of litigation to date, no evidence had surfaced that assets were transferred to the Defendant, which was the crux of the Action.

The Plaintiff appealed, arguing that the Summary Judgment Application should have been adjourned to allow the Plaintiff an opportunity to conduct Questioning. After considering the evidence before the Court, including what had taken place in the litigation to date, Bercov J. allowed the Appeal, noting that "I am satisfied that there are reasonable grounds for believing that a fuller investigation into the facts may add to or alter the evidence available to a trial judge."

## PARKS V MCAVOY, 2024 ABKB 306

(HOLLINS J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 3.72 (Consolidation or Separation of Claims and Actions)

This was a procedural decision involving two related Actions and the manner in which they should be heard. Specifically, the Plaintiff, Mr. Parks, initiated two separate legal Actions related to the construction of his home. The first Action (the "1901 Action") involved claims against Woodparke Homes, the general contractor, and, among others, its principal, Steve McAvoy, seeking Judgment for damages. The second action (the "2101 Action") was also against Steve McAvoy, with the addition of his wife, Cathy McAvoy (the "McAvoy Defendants"), seeking a constructive trust over their home.

The McAvoy Defendants applied to strike the 2101 Action under Rule 3.68(1)(a), which provides that the Court may do so if the bringing of two Actions constitutes an abuse of process, generally because the Actions are the same and thus trying them separately is unnecessary: Rule 3.68(2)(d). Hollins J. held that, although the two Actions were "clearly related", they were not the same because the 2101 Action included a new Defendant and sought different relief. Where the parties sued are different and the relief claimed is different, a second Action is not an abuse of process.

The McAvoy Defendants also complained that Mr. Parks ought to have applied to amend his Statement of Claim in the 1901 Action rather than beginning a second lawsuit. The Court

disagreed, holding that the choice to proceed in this fashion could be accommodated by having the Actions heard one after the other, rather than striking the second Action, as per Rule 3.72(1)(b) and (2).

## BONVILLE V PRESIDENT'S CHOICE FINANCIAL, 2024 ABKB 356

(NIELSEN ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Orders), 7.2 (Application for Judgment), 7.3 (Summary Judgment), 10.29 (General Rule for Payment of Litigation Costs) and 10.49 (Penalty for Contravening Rules)

Associate Chief Justice Nielsen considered the frequency of illegitimate "representatives" attempting to take on lawyer-like roles before the Court. In particular, he voiced concern with how these representatives invoked non-law arguments, called "Organized Pseudolegal Commercial Arguments" ("OPCA"), and did so for profit at the expense of naïve and vulnerable customers. In this case, the issue was an individual, Kevin Kumar, who operated a pseudolaw debt elimination scheme called "UnitedWeStandPeople". Mr. Kumar has a lengthy history of abusive and illegal litigation related to real estate, and has been incarcerated for Contempt of Court.

Given his history, Mr. Kumar was prohibited from providing legal advice or acting as a representative before the Court of King's Bench. Despite this, Mr. Kumar resurfaced to represent Defendants in two Actions commenced by a lender for credit card debt, and to commence claims against the same lender.

The Court considered the proper response to abusive litigation. First, the lawsuit may be brought to an end by Rule 3.68, or Rules 7.2-7.3 and Civil Practice Note No. 7. Alternatively, a Court Access Restriction Order may be granted against the abusive litigant. Justice Nielsen noted that ending an abusive litigation can be costly, and often does not result in an award of Costs to the abused party that is actually paid out. On the other hand, Court Access Restriction Orders are seldom granted, as a last resort, which requires a substantial waste of Court resources and harm to litigants. In this case, Justice Nielsen considered that the OPCA scheme at play was particularly problematic, as it was resulting in a large amount of litigation and was seemingly immune to typical court processes by virtue of working through new shell corporations.

Nielsen A.C.J. found that a new approach was required to deal with this emerging issue. In light of that, he ordered that $10,000 in Security for Costs should be paid by the Plaintiffs represented by Mr. Kumar, pursuant to Rule 4.22, unless written submissions on why that should not occur convinced the Court otherwise. Nielsen A.C.J. noted that a failure to pay the Security for Costs would result in the Plaintiffs' Actions being terminated, with a potential for a Costs Award against them pursuant to Rules 10.29 and 10.49. He further dispensed with the requirement for approval of the Order, pursuant to Rule 9.4(2)(c).

Nielsen A.C.J. further required that Mr. Kumar submit an Affidavit with personal contact information, social media websites, and a true

copy of his government-issued identification, along with written submissions and an Affidavit on, *inter alia*, why the Court should not find Mr. Kumar jointly and severally liable for any Costs Awards granted against the Plaintiffs.

## ANGLIN V RESLER, 2024 ABCA 113

(SLATTER, WAKELING AND WOOLLEY JJA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.13 (Appointment of Case Management Judge), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.11 (Evidence at Application Hearings) and 13.29 (Certified Copies of Original Records)

The Appellant sought to appeal two Decisions (the "Appeals"). The first was a procedural Decision by the Case Management Judge that set the stage for the Respondent's strike Application ("Appeal 2203-0110AC"). The second was a Chambers Judge's subsequent Order that struck out the Claim ("Appeal 2203-0154AC"). The Appeals were allowed in part.

Appeal 2203-0110AC raised the issue of the Appellant's right to cross-examine the Respondent. Slatter and Woolley J.J.A., for the Court, commented that Rules 6.7 or 6.8 would have enabled the Appellant's examination under oath of the Respondent for the purpose of obtaining a transcript for use in an Application. The Appellant only had to issue a notice to the Respondent to attend for that purpose. Absent an abuse of process or a specific rule to the contrary, there would be no objection to examining an opposing party.

Slatter and Woolley J.J.A. continued to note that Rule 6.11 is widely worded and would likely permit the consideration of any relevant and material evidence. This Rule specifically authorized the Respondent to rely on his Affidavit in one of the sanction Appeals.

Rule 13.29(3) enables the Court to take notice of certified copies of its own records, which would include the Originating Applications filed in the sanction Appeals and prior Decisions.

The Case Management Judge granted an Order precluding the Appellant from establishing the admissibility of an expert Affidavit, which had not been tendered in a timely way. Slatter and Woolley J.J.A. noted that although Case Management Judges have a mandate under Rule 4.13 to promote fair and efficient conduct and resolution of dispute, the Respondent's Applications should not have been scheduled until all the necessary evidence was filed and all pre-Application proceedings were completed.

Slatter and Woolley J.J.A. continued to comment that the test for striking a Claim under Rule 3.68 is well established. If a claim is challenged as not disclosing a reasonable claim under Rule 3.68(2)(b), then under Rule 3.68(3) no evidence is admissible. The pleaded facts are taken as being provable, and the claim is assessed for its legal sufficiency. Challenges under the other subrules in Rule 3.68(2) might be supported by relevant and material evidence.

Slatter and Woolley J.J.A. cited *Gay v Alberta (Workers' Compensation Board)*, 2023 ABCA 351 for the proposition that there are limits to the principle that on a motion to strike the pleaded facts are taken as being true. Specifically, bald

assertions of misconduct will not be accepted as being true without reasonable particulars of the allegations.

Citing *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16, Slatter and Woolley J.J.A. held that a relevant factor on a strike Application was whether the pleadings were in proper form. If the Statement of Claim did not plead specifics, a possible remedy was to order particulars, not strike the Claim. However, if particulars would not cure the irregularity, it would be appropriate to strike the Claim without giving an opportunity to amend.

## PARENTEAU V SKOREYKO, 2024 ABCA 213

(WAKELING, GROSSE AND FETH JJA)

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

This was an Appeal from a prior decision to strike the Appellants claim against the Respondents alleging unjust enrichment and dismissal of the Appellants Application for Summary Judgment.

The Chambers Justice granted the Respondents Application to strike pursuant to Rule 3.68, for failure to disclose a cause of Action, constituting an abuse of process. In addition, the Chambers Justice ordered that the Appellants obtain leave of the Court to commence any Action alleging the same or substantially the same facts against the Respondents. The Court stated a decision to strike under Rule 3.68 is entitled to deference unless there has been an error of law. The Court determined that questions of whether a Pleading discloses a cause of Action or constitutes an abuse of process, are questions of law subject to review on a correctness standard.

The Court determined that the Chambers Justice was correct in finding no reasonable cause of Action and that the claim was an abuse of process. The Appellants unjust enrichment claim arose from the sale of property, which was approved by Court Order. The Court determined the sale agreement's approval by Court Order was a juristic reason for the enrichment. The Court noted the Order was never appealed and remained valid. The Court further stated that the Appellants allegations were a collateral attack on the Court Order to undermine its validity, which can be struck as an abuse of process. Despite the Appellants argument that their claim was equitable and should have been decided on the merits, the Court stated Rule 3.68 remains a valid procedure to end claims which have no reasonable prospect of success, applicable to claims in both law and equity.

The Appellants argued that the Chambers Justice, in issuing the requirement to obtain leave, did not follow the required procedure in obtaining a vexatious litigant Order pursuant to the *Judicature Act*, RSA 2000 c J-2. The Court rejected this argument, noting that the Chambers Justice expressly declined to issue a vexatious litigant Order. The Court stated that the Chambers Justice considered that the leave requirement to be reasonable under Rule 3.68 and the Court's inherent jurisdiction to control its processes. The Court also emphasized that the narrow scope of the leave requirement did not cause any significant prejudice to the Appellants, rendering intervention unnecessary.

The Court dismissed the Appeal and invoked Rule 9.4(2)(c) authorizing the Court clerk to sign the Judgment.

## STRAWSON V STRAWSON, 2024 ABCA 126

(SLATTER, KIRKER AND FETH JJA)

Rules 4.16 (Dispute Resolution Processes), 4.18 (Judicial Dispute Resolution Process), 4.19 (Documents Resulting from Judicial Dispute Resolution), 4.21 (Involvement of Judge after Process Concludes), 9.13 (Re-opening Case), 13.5 (Variation of Time Periods) and 14.5 (Appeals Only with Permission)

The Appellant appealed the Decision of the lower Court granting Judgment following a binding Judicial Dispute Resolution ("JDR") process, undertaken pursuant to Rules 4.16 and 4.18. At issue was the finality of the JDR process, the ability of the JDR Judge to clarify or vary the Decision, and the need for permission to Appeal the resulting Judgment.

The parties were engaged in a high-conflict matrimonial dispute. They agreed to a binding JDR. The parties attended the JDR and, although it was not wholly successful, an Order resulted which included provisions to which the parties had agreed. The JDR Judge then followed up with a letter containing further findings. The letter contained ambiguities and ultimately appeared to vary the Order. The Appellant appealed the findings of the JDR Judge for exceeding his jurisdiction by varying his final Judgment by letter, without notice, and for endorsing an Order that was inconsistent with the Judgment.

The Court reiterated that records arising from a JDR are limited by Rule 4.19 and, if agreement is not reached, Rule 4.21 prohibits the JDR Judge from being involved in any subsequent Application or Trial of the Action without the parties' consent. Similarly, it highlighted that the opinion of a JDR Judge is not an adjudication of the dispute in a technical sense, as the rules of evidence and conventional court process are not followed.

As the parties consented to a binding JDR, the Order seeking to be appealed was made by consent and permission would ordinarily be required to Appeal pursuant to Rule 14.5. This would require the Appellant to explain why it should be entitled to side-step its agreement to proceed with a binding JDR, showing an important question of law or precedent, a reasonable prospect of success, and that an Appeal would not prejudice the other party. However, given the complication in this case arising from the letter of the JDR Judge, the Appeal was allowed.

On the substance of the Appeal, the Court found that the JDR Judge had wide discretion on how to conduct the session and was not bound by the ordinary rules of evidence or court procedure. There was no procedural unfairness found in how the JDR Judge conducted the JDR and subsequent hearings. Regarding the letter, the Court found that it was not objectionable for the JDR Judge to clarify his original intention and that, as the Order was not entered, the Judge was entitled to vary it pursuant to Rule 9.13.

The Appellant argued that the JDR Judge was prohibited from any further involvement two weeks following the JDR as the JDR Agreement provided that the parties could apply to the Justice only within that time frame. The Court found that this was a misinterpretation of the Agreement and, similar to the flexibility provided to a Trial Judge by Rule 13.5, the time limits could be varied.

Ultimately, the Court dismissed the Appeal.

## ARRAF V ROYAL VIEW SURGICAL CENTRE LTD, 2024 ABKB 262

(PRICE J)

Rules 4.22 (Considerations for Security for Costs Order) and 6.14 (Appeal from Applications Judge's Judgment or Order)

This was an Appeal of the Applications Judge's Decision dismissing the Defendants' Application for Security for Costs. The Plaintiffs, Dr. Arraf and his professional corporation, filed a Statement of Claim against the Defendants, alleging wrongful and/or constructive dismissal and seeking damages. After ending his relationship with the Defendants, Dr. Arraf moved to Texas, where he now works and owns property. He no longer owns property in Alberta but has a bank account containing $77,255.21 and an RRSP account valued at $192,339.08 in Alberta. His professional corporation does not own any property or assets.

The Applications Judge noted that Dr. Arraf's Alberta funds were easily movable but found this insufficient to grant the Application. The Decision relied on the fact that Montana, where Dr. Arraf claimed to own property, is a reciprocating jurisdiction under *Alberta's Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6 ("REJA"), allowing Alberta Judgments to be enforced in Montana. The Applications Judge concluded that Dr. Arraf's high income and assets in a reciprocating jurisdiction justified denying the Security for Costs Application.

The Court noted that under Rule 6.14, an Appeal of an Applications Judge's Decision was *de novo*, and that the standard of review was correctness. The Court further noted that an Appeal from an Applications Judge's Decision is an Appeal on the record of proceedings before the Applications Judge.

The Court noted that as both Dr. Arraf and his professional corporation were named Respondents, and that both Rule 4.22 and section 254 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "ABCA") were argued, the law under both pieces of legislation should be considered, while the tests under both are discretionary. The Court further noted that Rule 4.22 involves a two-step test, weighing various factors to determine if it is just and reasonable to award Security for Costs, while section 254 of the ABCA is a more stringent test, focusing on the corporation's inability to pay Costs.

Applying the factors provided in Rule 4.22, including the likelihood of enforcing the Judgment in Alberta, the Respondents' ability to pay a Costs Award, the merits of the Action, prejudice to the Respondents, and other factors (such as Montana being a reciprocating jurisdiction without evidence about the assets in Montana and whether they could be conveniently realized upon), the Court allowed the Appeal and ordered Security for Costs.

## MILOT LAW V SITTLER, 2024 ABCA 116

(FEEHAN JA)

Rules 4.22 (Considerations for Security for Costs Order), 14.5 (Appeals only with Permission), and 14.67 (Security for Costs)

Heather and Sheldon Sittler (collectively, the "Sittlers") became engaged in litigation around a $4 million debt owed to the Canada Revenue Agency. Initially, Milot Law became involved with the Sittlers as their tax counsel, but subsequently assumed the role of their trustee in bankruptcy. In a prior Appeal hearing (2024 ABCA 39), the Sittlers asserted that Milot Law breached solicitor/client confidentiality during the bankruptcy proceedings, contending that privileged information should remain shielded. In that underlying proceeding, Milot Law sought to vary an Order that ruled on the scope of confidentiality, which, in their view, should have incorporated certain findings made by the chambers judge at the oral hearing.

At the first Appeal hearing, Feehan J.A. adjourned the matter for a period of three months to allow the parties time to file an amended Order which would include the impugned omitted provisions.

In the comeback hearing, Feehan, J.A dealt with proposed Appeals and cross-Appeal addressing the Sittlers claims for breach of solicitor/client privilege and confidentiality, and the Chambers Judge's Decision not to review his earlier Order respecting confidentiality.

Feehan J.A. turned to Rule 14.5(1)(f), which requires permission to Appeal if that is required by enactment, which, in this case, was found in 193(e) of the Bankruptcy and Insolvency Act. It was found that the test for leave to Appeal under s 193(e) is whether: (a) the point on the proposed appeal is of significance to the bankruptcy practice; (b) the point on the proposed Appeal is of significance to the underlying Action itself; (c) the proposed Appeal is *prima facie* meritorious or, on the other hand, frivolous; (d) the proposed Appeal will unduly hinder the progress of the Action itself; and (e) the Judgment from which an Appeal is proposed to be taken appears contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice for which there is no remedy.

In applying these factors, Feehan J.A. granted leave to Appeal and cross-Appeal the Order of confidentiality.

In considering Milot Law's adjacent Application for C (Rules 4.22 and 14.67), Feehan J.A. noted that the test for granting Security for Costs is set out in *Poole v City Wide Towing and Recovery Service Ltd.*, 2020 ABCA 102. Among other things, the applicant bears the burden of establishing, on a balance of probabilities, that it is just and equitable to order Security for Costs or that the respondent would be unable to pay Costs that may be awarded. On the facts of this case, it was found that although the Sittler's would likely be unable to pay Costs should they be awarded against them, "[a]llowing the Milot Law appeal to proceed but potentially preventing the broader discussion of solicitor/client privilege and confidentiality over the whole disclosure by Milot Law to the trustee in bankruptcy would not be equitable or reasonable".

## ESFAHANI V SAMIMI, 2024 ABCA 142

(GROSSE JA)

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

The Applicant sought Security for Costs in two Appeals commenced by the Respondent, as the parties had been engaged in contentious family law proceedings for several years, including several Appeals filed in the Court of Appeal.

When applying Rules 14.67 and 4.22 to the matter, the Court began by considering the financial considerations engaged by the matter. The Court noted that the Respondent previously had a substantial income, earning over $200,000 in 2020, had some assets in Alberta, which included a home with equity of over $150,000, a substantial RRSP and a locked-in retirement account and various bank and investment accounts. However, the Respondent had not paid several Costs Awards of the Court of King's Bench and one award from the Court of Appeal.

The Court concluded that the Respondent had the means to post security for reasonable Costs and being required to post security would not interfere with his ability to pursue his Appeals. Further, without security, it would be unlikely that the Respondent would pay any Costs Award voluntarily, and it would be difficult if not impossible for the Applicant to enforce a Judgment for Costs.

There were also material challenges in the merits of the Respondent's Appeals, which meant that a Costs Award against him was a reasonable prospect and that this was not a situation where an Order for Security for Costs risks dissuading an Appellant from pursuing a strong Appeal.

When determining the quantum of the Security for Costs, the Court stated that the purpose of Security for Costs is to ensure funds are available to satisfy an ultimate Costs Award in favour of the Applicant, and that the usual practice of this Court is to order Costs on the same basis as they were awarded at first instance. However, in this matter, there were no award of Costs in respect of the first instance decision, and the Judge awarded the Applicant tariff Costs on Column 1 in the Contempt decision.

The Court was not persuaded that the decisions of *Pinder v HML Contracting Ltd*, 2021 ABCA 207 and *McAllister v Calgary (City),* 2021 ABCA 25 assisted the Court. In Pinder, the Court ordered Security for Costs of $25,000 based on an estimate of solicitor and client Costs, because the parties were subject to a contract that provided for solicitor and client Costs. *McAllister* speaks to a calculation of reasonable and proper Costs as a partial indemnification of 40-50% of actual legal fees, but *McAllister* was not invoked in either of the decisions under Appeal. Therefore, and based on the materials before the Court, The Court awarded $4000 for each Appeal. This reflected items 18, 19 and 20 on Column 1 of the Schedule C plus an allowance for GST and disbursements.

## AUBIN V CONDOMINIUM PLAN NO 862 2917, 2024 ABCA 201

(FEEHAN JA)

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

The Applicant applied for Security for Costs against the Respondent, a condominium owner, submitting that their Appeal of a Chambers Judge's Order had no merit and that they would be unable to pay Costs in the event they were unsuccessful.

The Court reviewed the Alberta jurisprudence regarding Security for Costs Orders, and noted that concerns regarding a party's ability to pay Costs coupled with modest prospects of an Appeal's success have been sufficient to justify granting an Application for Security for Costs. Further, the Court noted that granting Security for Costs is discretionary and requires the Court to look to the equities of the case before making an Order. The Court may make Orders if it "considers it just and reasonable to do so", taking into consideration the elements set out in Rule 4.22.

Justice Feehan determined that the majority of factors under Rule 4.22 did not support granting a Security for Costs Order. The evidence, taken in its totality, did not show that it was likely the Applicant would be unable to enforce a Costs Order against the Respondent; nor that the Respondent would be unable to pay a Costs Award. The Respondent was employed full-time in a steady position, had property assets, a savings and chequing account, could make an immediate Costs Award payment of $10,000, but would have to take on debt to repay the Costs paid to her following the Applications Judge's decision and any further Costs Award. The Court determined that this did not establish an impecuniosity or unwillingness to pay any potential Costs Award.

Further, the Appeal was considered to have merit as it was not frivolous or vexatious, and the Respondent had been successful in the initial Applications Court decision. Further still, it was concluded that requiring Security for Costs would not unduly prejudice the Respondent's ability to continue the Appeal, as they had agreed that they would be able to pay an immediate Security for Costs award of $10,000.

Therefore, the Court concluded that most of the factors in Rule 4.22 weighed against granting a Security for Costs Order.

## EHLI V LAMANATOR COATINGS LTD, 2024 ABKB 339

(RENKE J)

Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 7.3 (Summary Judgment), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.34 (Court-Ordered Assessment of Costs)

The Action was commenced by shareholders of a corporation claiming various wrongdoings by a corporation. Damages were sought in the amount of $179,000. The claim was summarily dismissed by a prior Application, pursuant to Rule 7.3, with no Costs awarded to the corporation. Both the decision to dismiss the Action and the Costs Award were appealed. The Appeal of the dismissal decision was dismissed, and the Appeal of the Costs Award was granted.

On the Appeal of the dismissal decision, Justice Renke reviewed the relevant case law and found that the Plaintiffs' claim did not disclose a genuine issue requiring Trial. In particular, he found that the submissions of the Plaintiffs did not specifically address the causes of action raised in the Statement of Claim. Putting that aside, Justice Renke considered each of the causes of action raised by the Plaintiffs' pleadings, and found that none provided a genuine issue for Trial.

In determining whether Costs should be awarded, and in what quantum, the Court considered Rules 4.24, 4.29, 10.29, 10.31, and 10.33. Pursuant to this, and the jurisprudence, Justice Renke determined that a successful party is *prima facie* entitled to Costs reflecting the reasonable and proper Costs the party incurred. The Court also considered whether there had been any Formal Offers to settle pursuant to Rules 4.24 and 4.29. It noted that the onus falls to the party seeking to rely on a Formal Offer to settle to prove it was reasonable and genuine.

Justice Renke determined that the Defendants were wholly successful and therefore entitled to Costs. He considered Formal Offers made, but found that only one of two Formal Offers were genuine and reflected an informed compromise, as the first offer was made only shortly after the Statement of Claim was filed, and was for a very small amount compared to the damages sought in the claim.

Justice Renke also considered informal Offers as, pursuant to Rule 10.33, they are relevant to the exercise of discretion regarding Costs, though they do not have the same automatic Costs consequence as a Formal Offer to settle. He found that the informal Offers made enhanced the proper Costs Award to be granted.

In determining the quantum of damages, the Court found that proper Costs should emanate from Schedule C. Renke J. granted Column 2 Costs, with a multiplier of 1.5 and a multiplier of 3 following the Formal Offer to settle and an additional 1.25 multiplier after the informal Offers to settle. He directed that a Bill of Costs be prepared pursuant to Rule 10.34.

## ARMBRUSTER V NUTTING, 2024 ABKB 195

(WILSON J)

Rule 4.29 (Costs Consequences of Formal Offer to Settle )

This Costs Decision arose out of a personal injury lawsuit where the Plaintiff was awarded damages. The awarded damages were $12,000 below the Formal Offer to Settle made by the Defendants, which triggered Rule 4.29, which provides that a Defendant is entitled to double Costs for all steps in taken in the Action after the offer is made, if the Plaintiff is awarded damages less than the Formal Offer.

The Plaintiff submitted that he should be relieved from a strict application of Rule 4.29 because a minor deferential of $12,000, should be reviewed as a "special circumstance" as set out under the exceptions listed in Rule 4.29(4)(e). The Plaintiff failed to provide any authorities in support, but the Court noted that there are authorities to the contrary where "being close to an offer is not enough to trigger the relief he seeks". Accordingly, the Court dismissed Plaintiff's submission on the point.

## BAKER LAW FIRM V COLORS UNLIMITED INC, 2024 ABKB 241

(LABRENZ J)

Rules 4.29 (Cost Consequences of Formal Offers to Settle), 10.2 (Payment of 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 Cost Award)

This was an Appeal by Baker Law Firm, challenging the non-production of a settlement agreement and solicitor's file, as well as disputing the Costs awarded against them. The firm argued against the decisions of the Application Judge that denied the production of the documents and awarded significant Costs to the opposing parties, citing alleged misapplication of legal standards concerning settlement privilege and Costs assessment.

The Court noted that, pursuant to Rule 10.29(1), the Respondents were presumptively entitled to costs after succeeding in the Appeal. The Court also noted that a *Calderbank* offer warrants Costs considerations, but it does not automatically provide for double Costs like Formal Offers, pursuant to Rule 4.29. Justice Labrenz exercised the Court's discretion as provided under Rule 10.31(1) to set the Costs Award, which could be determined as any multiple or fraction of Schedule C, as a lump sum, or as a percentage of assessed Costs. Additionally, the Court considered various factors outlined in Rule 10.33 and Rule 10.2, which include the result of the Action, the amount claimed and recovered, the conduct of the parties, and the complexity of the issues involved, to determine the appropriate quantum of Costs.

Ultimately, the Court found Baker Law Firm's

allegations of fraud and misconduct in litigation to be unfounded, justifying significant Costs consequences against them. Consequently, Costs were ordered to be assessed by an Assessment Officer specifically for the Appeal proceedings alone, directing an award of either assessed solicitor-client Costs or the Schedule C, Column 3 amount with a five-times multiplier, whichever was lower.

## ELLIOT V ELLIOT, 2024 ABCA 204

(FEEHAN, HO AND FAGNAN JJA)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Appellants appeal of a Costs Award following a Trial was dismissed. The Appellant and Respondent had been involved in litigation over child support since 2015. In March 2021, a Trial was ordered to address the Appellant's child support obligations from June 2017 onward. Despite an informal settlement offer from the Respondent in May 2021, which the Appellant did not accept, the Trial proceeded. At Trial, the Respondent presented expert testimony, while the Appellant represented himself. The Trial Judge ruled that the Appellant owed $288,510.08 in child support, exceeding the Respondent's offer. Consequently, the Respondent sought full indemnity Costs or, alternatively, double Schedule C Costs.

The Trial Judge awarded the Respondent Costs assessed pursuant to a Bill of Costs under Column 3 and 70% of the Respondent's expert fees, noting that Costs are payable by the unsuccessful party to the successful party on a party-party basis and considering the factors listed in Rules 10.31 and 10.33. The Trial Judge also noted that double Costs presumption in Rule 4.29 did not apply when a litigant achieves success exceeding an informal offer.

The Appellant argued that the Trial Judge erred by ignoring terms in the parties' Matrimonial Settlement Agreement, disregarding alleged misconduct by the Respondent, and failing to consider various aspects of the lengthy litigation.

In dismissing the Appellant's argument, the Court noted that Costs Decisions should not be disturbed unless they reflect an error in principle or the Costs Award is plainly wrong. As the Trial Judge reviewed and addressed arguments by both parties and applied reductions to the Costs claimed by the Respondent where appropriate, the Appellant failed to establish any error in principle or that the Costs Award was plainly wrong.

The Court dismissed the Appeal on Costs as a result.

## DEMARAIS V MOORE, 2024 ABKB 319

(APPLICATIONS JUDGE SUMMERS)

Rule 4.31 (Application to Deal with Delay)

The Defendant applied for an Order dismissing the five and one-half years old Action pursuant to Rule 4.31 for inordinate and inexcusable delay (the "Application"). Applications Judge Summers granted the Application.

Applications Judge Summers cited *Humphreys v Trebilcock*, 2017 ABCA 116, in which the Alberta Court of Appeal provided the direction in considering a Rule 4.31 Application: 1) Has the non-moving party failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review? 2) Is the shortfall or differential of such a magnitude to qualify as inordinate? 3) If the delay is inordinate has the non-moving party provided an explanation for the delay? If so, does it justify inordinate delay? 4) If the delay is inordinate and inexcusable, has the moving party demonstrated significant prejudice? 5) If the moving party relies on the presumption of significant prejudice created by Rule 4.31(2), has the non-moving party rebutted the presumption of significant prejudice? 6) If the moving party has met the criteria for granting relief under Rule 4.31(1), is there a compelling reason not to dismiss the Action?

Having noted that no Questioning for discovery had occurred, Applications Judge Summers found that the Plaintiff failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have attained. Applications Judge Summers further found that the shortfall between where on the litigation spectrum this Action should be and where it was actually was of such a magnitude as to qualify as inordinate.

Having considered the Plaintiff's explanation for the nearly three-year delay, which was his counsel's oversight, Applications Judge Summers held that the fault of counsel was not an adequate excuse for the delay. The absence of adequate excuse for the delay then triggered the presumption that the Defendant had suffered significant prejudice as a result of the delay.

Having noted that the Defendant demonstrated the problem with obtaining accurate evidence after a passage of eight years since the Plaintiff and Defendant interacted, Applications Judge Summers found that the Plaintiff failed to rebut such presumption. Finally, it was found that there was no compelling reason to not dismiss the Action.

## QUIKCARD BENEFITS CONSULTING INC V MP BENEFITS INC, 2024 ABKB 367

(APPLICATIONS JUDGE SMART)

Rule 4.31 (Application to Deal with Delay)

This was an Application to dismiss an Action pursuant to Rule 4.31. The case arose from allegations by Quikcard Benefits Consulting Inc. that the Defendants retained insurance sales commissions mistakenly paid to them and breached a non-solicit agreement. The litigation included claims and counterclaims involving defamation, breach of contract, and other related allegations.

The procedural history spanned from 2016, when the Actions were initiated in Provincial Court and subsequently transferred and consolidated with Actions in the King's Bench, through multiple procedural steps from 2017 to 2023. These steps included the filing of various Claims, Defences, and Counterclaims, service of Affidavits, cross-examinations, and Applications related to the management of the case.

The Applicants argued for dismissal based on procedural delays and prejudice resulting from these delays, including the death of a key witness and the loss of evidence. The Respondents argued against the dismissal, emphasizing their ongoing efforts to advance the case and manage procedural issues, and disputed the extent of prejudice claimed by the Applicants.

Applications Judge Smart analyzed the procedural history, the nature of delays, and their impact on the parties. Despite acknowledging the complexity of the case and the efforts by both parties to advance proceedings, the Court found that the delays, particularly those related to the loss of key evidence and the death of a critical witness, significantly prejudiced the Applicants. Consequently, the Action and Counterclaim were dismissed.

## 1199096 ALBERTA INC V IMPERIAL OIL LIMITED, 2024 ABCA 166

(HO JA)

Rules 4.31 (Applications to Deal with Delay) and 14.8 (Filing a Notice of Appeal)

In 2009, the Applicant filed a Statement of Claim against the Respondent (the "Action"). On February 17, 2023, Applications Judge Farrington dismissed the Action pursuant to Rule 4.31 (the "Farrington J. Order"). On February 5, 2024, Simard J. dismissed the Appeal of the Farrington J. Order (the "Simard J. Order"). The Simard J. Order was filed March 5, 2024, and transmitted to the Applicant's office. On March 6, 2024, the Applicant attempted to file a Notice of Appeal of the Simard J. Order, which was rejected as, pursuant to Rule 14.8(2)(a)(iii), the deadline for filing a Notice of Appeal was March 5, 2024. The Applicant sought an Order extending time to file the Notice of Appeal.

Justice Ho considered the factors that guide the Court in exercising its discretion to extend the time to Appeal as set out in *Cairns v Cairns*, 1931 CanLII 471 (AB CA) ("*Cairns*"). Ultimately, the Court granted the Application, noting that the *Cairns* factors weighed in favour of granting

an extension and accepting the Applicant's counsel explanation that there was a misunderstanding about the requirement to file within "one month" as opposed to within 30 days.

## LLAN V THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS IN CANADA, 2024 ABKB 60

(MOORE J)

Rule 4.33 (Dismissal for Long Delay)

The Defendants appealed a Decision by an Applications Judge dismissing their Application to have the Action dismissed for delay under Rule 4.33(2). At issue was whether the Plaintiff's Affidavit of Records constituted a significant advanced in the litigation. Justice Moore ultimately found that the Affidavit of Records did not significantly advance the litigation and dismissed the Plaintiff's claim.

The Court noted that an Appeal from an Applications Judge is *de novo* and the Decision is reviewed on the correctness standard. Rule 4.33(2) provides that if three or more years have passed without a significant advance in an Action, the Court must dismiss the Action unless the exceptions contemplated in Rules 4.33(2)(a) and (b) apply. Rule 4.33 is mandatory and serves to promote a fair, just and efficient litigation.

A Respondent to a Rule 4.33 Application has significantly advanced the Action when it has done something "which increased by a measurable degree, the likelihood of either of the parties or the Court having sufficient information to rationally assess the merits of the parties' positions and be better positioned to either settle or adjudicate the dispute".

Justice Moore noted that in order to significantly advance the Action, an Affidavit of Records must "narrow the issues, complete the discovery of documents and information or clarify the positions of the parties". A functional analysis is undertaken in the particular context of each lawsuit looking to determine if the lawsuit was moved forward given the nature of the advance, its importance, quality and timing.

The Plaintiff's Affidavit of Records consisted of 22 documents, 17 of which were corporate searches of the Defendants through a public registry. The remaining 5 documents were documents that were relevant but in the Defendants' possession, or documents not relevant to the claim. Justice Moore found that the 17 corporate searches were irrelevant to a claim for wrongful dismissal. The Plaintiff failed to include any documents that would move the litigation forward, such as an updated curriculum vitae, his new employment position and income, or any records pertaining to mitigation efforts.

Accordingly, the Just Moore found that Plaintiff's Affidavit of Records failed to move the litigation forward in any substantial fashion and his claim was dismissed under Rule 4.33.

## DERRICK CONCRETE CUTTING & CONSTRUCTION LTD V NEXXT CONCRETE CUTTING & CONSTRUCTION LTD, 2024 ABKB 190

(NEILSON J)

Rule 4.33 (Dismissal for Long Delay)

The Defendants applied to have the Action dismissed pursuant to Rule 4.33. That Application was dismissed by Applications Judge Summers. The Defendants appealed.

There were Applications for Summary Judgment and Summary Dismissal filed, but neither Application had been heard or decided. Cross-examinations occurred, and undertakings were responded to as late as December 5, 2021. There was also an Order requiring production of further documents in relation to the Applications. An Application to dismiss for long delay was filed June 2, 2022 by one Defendant, and another Application to dismiss for long delay was filed by a separate Defendant on October 28, 2022.

Justice Neilson applied a correctness standard to the Appeal. He considered whether there had been a "significant advance in the Action" in the three years and 75 days prior to the Applications, accounting for the extension granted for COVID-19. The Court stated that a significant advance is one that moves the Action forward in an essential way having regard to the nature, quality, genuineness, and timing of the advancing action. It is appropriate to take a functional, rather than formalistic, approach to this analysis.

The Court found that the steps taken related to Applications arising from the matter, but not the matter itself. While there was an Application for Summary Dismissal filed, it could not be considered a significant step as it had not been heard or decided. Similarly, while records were ordered to be produced, they could not be considered a significant advance as they did not narrow issues or assist in the assessment of the merits of the case. The Appeal was therefore allowed.

## HAWRESCHUK V CONDOMINIUM PLAN NO 782 2678, 2024 ABKB 350

(WHITLING J)

Rule 4.33 (Dismissal for Long Delay)

The Plaintiff appealed an Order that dismissed her Action for long delay under Rule 4.33. The Appeal was allowed and the Order dismaying her Action under Rule 4.33 was set aside.

The Appellant, self-represented, started an Action for damages of $290,000 for mold-related deficiencies in her condominium unit and common areas. At first, her claim included the condominium corporation and several of its directors as Defendants. On October 5, 2021, the directors applied for Summary Dismissal of the Action against them. The Appellant did not participate in that Application and the Application was heard and granted February 3, 2023.

Rule 4.33 prescribes that an Action can be dismissed if no significant advance occurs within three years. At issue was whether the Order granted February 3, 2023 summarily dismissing the Action against the director Defendants constituted a significant advance.

Justice Whitling noted that a significant advance in an Action, for the purposes of Rule 4.33(2), is one which advances the Action as a whole. It is not necessary for the party resisting Summary Dismissal to have initiated the event, and the event need not have directly involved the party seeking Summary Dismissal.

The Court held that the since the February 2023 Order identified the sole defendant in this litigation, it significantly narrowed the matters in dispute, and constituted a "significant advance".

## MOMAN V BRADLEY, 2024 ABKB 351

(FEASBY J)

Rule 4.33 (Dismissal for Long Delay)

The Defendants sought to have the claims against them dismissed for long delay pursuant to Rule 4.33 (the "Application"). Feasby J. dismissed the Application and ordered that the parties provide the Court with a Consent Order attaching a litigation plan.

Feasby J. took note of the following findings made by Alberta Courts in relation to Rule 4.33: time is counted forward from the date of the last uncontroversial significant advance and the count stops on the date the Rule 4.33 Application was filed; in determining whether there has been a significant advance, the Court asks whether anything has happened in the applicable period increased by a measurable degree the likelihood either the parties or the Court would have sufficient information to assess the merits of the parties' positions and either settle or adjudicate the Action; an advance that occurs in a different proceeding that is inextricably linked to the Action in question can constitute a significant advance for the purpose of Rule 4.33; the four factors to consider in determining whether Actions are inextricably linked (the "*Angevine* Analysis"): (a) are the two Actions inextricably linked in the sense that the result in the related Action would be "legally or factually determinative" of the issues in the primary Action? (b) will the issue determined in the related action be "relevant and binding" in the primary Action? (c) does the related Action materially advance the primary Action? (d) could the decision in the related Action be a "barrier in law" to the Court's adjudicating the primary Action?; Not all four elements of the *Angevine* Analysis must be satisfied. The related Action also need not be determinative of all issues; and the *Angevine* Analysis should be approached in a functional, not formalistic way.

Feasby J. held that a criminal proceeding against the Applicants (the "Criminal Proceeding") was inextricably linked to the present Action and that the Applicants' conviction and the Agreed Statement of Facts in the Criminal Proceeding constituted a significant advance in the present Action. Taking note of the fact that the parties agreed to stay the present Action for the duration of the Criminal Proceeding (the "Stay"), Feasby J. found that the clock for calculating delay accordingly started to run once the Stay expired. Since the Respondents attempted to take several steps prior to expiration of the Stay that would have advanced the Action but for the Applicants giving notice of their inten-

tion to bring the Application, the delay period fell short of the three years required to trigger mandatory dismissal.

## CRAWFORD V MARSH, 2024 ABCA 121

(ANTONIO, SLATTER AND STREKAF JJA)

Rule 4.33 (Dismissal for Long Delay)

The Respondents on Appeal initially applied in morning Chambers to have the Appellant's Action dismissed for long delay under Rule 4.33. The Appellant argued that a reply to a Notice to Admit Facts constituted a material step in the Action, with the materiality being established in one paragraph. The Chambers Judge dismissed the Action, concluding that the fact admitted in that paragraph had already been established through other means, and therefore the reply did not amount to a material step in the Action.

On Appeal, the Court of Appeal noted that the Appellant had shown many facts admitted in several paragraphs. Cumulatively, these admissions did amount to a "significant advance" under Rule 4.33. The Court of Appeal also found a sufficient factual basis to address the new issues without prejudice to the parties, determining that not doing so would result in unfairness due to the outright dismissal of the Action.

As a result, the Court of Appeal allowed the Appeal and restored the Action.

## ARNSTON V ARNSTON, 2024 ABCA 226

(STREKAF, WOOLLEY AND FETH JJA)

Rule 4.36 (Discontinuance of Claim)

This was an Appeal involving the Appellant, Donald Arnston, and the Respondent, Viva Arnston, who ended their 30-year marriage in 2011. Following a Statement of Claim for divorce and division of matrimonial property filed by Ms. Arnston, the parties engaged in extensive litigation. This led to a global settlement agreement in March 2016. However, various matters remained unresolved, prompting Mr. Arnston to seek procedural direction from the family docket Court in 2023.

On February 22, 2023, Ms. Arnston filed a Discontinuance of her Claim, which her son Mikkel, who is a lawyer, communicated to Mr. Arnston's counsel, suggesting the Docket Application was moot. Mr. Arnston then applied to have the Discontinuance set aside. The Chambers Judge partially set aside the Discontinuance only to allow for the submission of a desk Divorce Application, citing Rule 4.36(1). Mr. Arnston appealed this Decision.

The Court of Appeal reviewed whether the Chambers Judge erred in determining that there were no outstanding issues in the matrimonial litigation due to the 2016 settlement agreement, whether filing the Discontinuance constituted an abuse of process, and whether Rule 4.36(1) or Rule 4.36(2) governed the Discontinuance given that a Trial date had been set but was adjourned.

The Court concluded that there were still outstanding issues related to the matrimonial litigation, and the Chambers Judge had erred in determining that these issues were solely related to the settlement agreement rather than the matrimonial litigation. Additionally, the Court held that filing the discontinuance during the adjournment of Mr. Arnston's family Docket Application was an abuse of process intended to prevent him from obtaining procedural direction from the Court. The Court also noted that Rule 4.36(2) should apply in circumstances where a Trial date has been set but the trial has been adjourned or not taken place.

Ultimately, the Court of Appeal allowed the Appeal, set aside the Discontinuance, and remitted the matter to the lower Court for further proceedings, ensuring Mr. Arnston could seek the enforcement of the settlement agreement within the matrimonial litigation.

## LC V OFFICE OF THE CHILD AND YOUTH ADVOCATE, 2024 ABCA 104

(ANTONIO, FEEHAN AND FAGNAN JJA)

Rules 5.6 (Form and Contents of Affidavit of Records), 5.13 (Obtaining Records From Others) and 5.17 (People who may be Questioned)

The Appellants, the Office of the Child and Youth Advocate ("OCYA") and Ms. Pelton (the current Child and Youth Advocate), appealed a Decision by a Chambers Judge to compel the production of records from OCYA and to compel Ms. Pelton to attend for Questioning.

The Court of Appeal found that the Chambers Judge erred by ordering document production and Questioning of Ms. Pelton without the requirements of Rules 5.13 or 5.17 being satisfied.

The Court of Appeal noted that an Applicant under Rule 5.13 must demonstrate that the requested records exist, are under the control of the non-party, are relevant and material, and cannot be obtained from a party. Here, the Respondents failed to establish that all the requested records exist, nor did they establish that either of the Appellants had control over any of the records sought. Additionally, rather than requesting records from the non-party Appellants, the Respondents could have obtained the records they requested from the Defendant. The Defendant would be required to disclose the records or identify "the time when, and the manner in which, those records ceased to be under" their control and specify the "present location of the records, if known" under Rules 5.6(1)(b) and 5.6(2)(d).

The Court of Appeal further determined that the Respondents failed to meet the two-part test under Rule 5.17(1)(d), which governs the ability to compel Questioning of a party's former employee. Although the Respondents established that Ms. Pelton was a former employee of the Defendant, the biography relied upon by the Respondents did not support an inference that Ms. Pelton had, or

appeared to have, relevant and material information acquired due to her employment with the Defendant.

Based on the above, the Appeal was allowed.

## CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA, 2024 ABCA 139

(SLATTER, HO AND WOOLLEY JJA)

Rules 5.6 (Form and Content of Affidavit of Records), 5.11 (Order for Record to be Produced), 5.16 (Undisclosed Records not to be Used Without Permission) and 5.35 (Sequence of Exchange of Experts' Reports)

The Appeal concerned whether a report commissioned by the Appellant into the failure of a pipeline was protected from disclosure by litigation privilege, and whether that privilege was waived or lost.

The Court also dealt with an Application to admit fresh evidence. The Court reviewed the Rules regarding Affidavits of Records, including that undisclosed records cannot be used by a party at Trial, as provided in Rule 5.16. Ultimately, the fresh evidence was not admitted.

On the issue of litigation privilege, the Court considered the interplay between the obligation to produce all relevant and material records pursuant to Rule 5.6, and privilege. It also noted that the Case Management Judge, who ruled that the reports were not privileged, opted not to inspect the reports despite the right to do so pursuant to Rule 5.11.

Without drawing a firm conclusion on whether the reports were privileged, the Court considered whether privilege had been waived. One way the Court noted that privilege can be waived is when an expert report is disclosed under Rule 5.35 for use at Trial. In this case, privilege was waived when the reports were provided to regulatory bodies. The Appeal was therefore dismissed.

## MURRAY V WINDSOR BRUNELLO LTD, 2024 ABKB 281

(SIDNELL J)

Rule 5.11 (Order for Record to be Produced)

The Plaintiffs, Donald and Linda Murray (collectively, the "Murrays"), brought an Action against a multitude of Defendants who were involved in constructing their home. The Murrays alleged, *inter alia*, that the Defendants were negligent and breached the construction contracts. The matter proceeded to Trial.

The Murrays relied on the expert opinion and report of Mr. Demitt ("Demitt Report"). The

Demitt Report relied, in part, on a video that the Murrays had provided him. The video had not been provided to the Defendants. One Defendant, Windsor Brunello Ltd. ("WBL"), argued that the Court should make an adverse inference against the Murrays for failing to produce the video. The Court rejected this argument, noting that generally a party in civil lawsuit who takes the position that undisclosed records are relevant and material, and should have been disclosed by the opposing party, brings an Application pursuant Rule 5.11 to obtain a ruling on the contested disclosure prior to Trial. WBL did not do so.

Ultimately, the Murrays were successful, and WBL was ordered to pay $914,946.49 in damages.

## TRANSALTA CORPORATION V ALBERTA (ENVIRONMENT AND PARKS), 2024 ABCA 127

(MARTIN, HUGHES AND DE WIT JJA)

Rule 5.11 (Order for Record to be Produced)

TransAlta Corporation and its affiliates initiated an Action against the Crown, represented by the Minister of Environment and Parks, under the *Proceedings Against the Crown Act*,

RSA 2000, c P-25. They sought indemnification for potential damages and a declaration that the Crown had breached a 1960 contract concerning the Brazeau Dam by failing to regulate hydraulic fracturing activities within a designated buffer zone, thereby endangering the dam's safety.

During the litigation, a significant procedural event occurred related to the disclosure of documents. TransAlta challenged the Crown's withholding of certain documents, leading to a ruling by Justice Neufeld. On November 20, 2023, pursuant to Rule 5.11, Justice Neufeld ordered the Crown to produce eight records, although they were allowed to make redactions for sections covered by solicitor-client privilege.

This decision was later reviewed concerning the Crown's invocation of solicitor-client privilege and public content immunity, leading to further judicial consideration on December 19, 2023.

The Court determined that the Case Management Judge incorrectly ordered the release of certain contested documents. The Justices found that two of the documents should remain confidential under solicitor-client privilege because they contain legal advice. Moreover, the Court ruled that the other documents fell under the protection of the public interest immunity doctrine, observing that the initial ruling did not reflect the latest Supreme Court precedents, which emphasized the need for maintaining Cabinet confidentiality and the integrity of governmental deliberative processes. As a result of these conclusions, the Appeal was granted, affirming the privileged status of specific documents under both solicitor-client privilege and public interest immunity.

## CABIN RIDGE PROJECT LIMITED V ALBERTA, 2024 ABKB 189

(MALIK J)

Rule 5.17 (People Who May Be Questioned)

This decision considered whether Ministers of the Crown can be compelled to Questioning under section 11 of the *Proceedings Against the Crown Act*, RSA 2000, c P-25 ("*PACA*").

The Court considered Rule 5.17(1)(b) which permits the examination of officers or former officers of a corporation "who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation". The Court interpreted Rule 5.17(1)(b), in principle, to include Ministers of the Crown, noting that section 1(c) of *PACA* and Rule 5.17(1)(b) puts Ministers of the Crown in the same position as officers of a corporation and in principle would apply to former Minister Savage and Minister Nixon. However, the Court considered the test in the leading case of *Leeds v Alta*, 1989 ABCA 208, concluding that the test was not met, as there are no special circumstances that existed requiring Questioning of the Minister or former Minister, and they are not the best person informed to answer the posed questions. Therefore, neither former Minister Savage nor Minister Nixon needed to attend for Questioning.

## SHEEN V SHEEN, 2024 ABCA 227

(ANTONIO, FAGNAN AND FETH JJA)

Rules 5.31 (Use of Transcript and Answers to Written Questions) and 12.41 (Notice to Disclose Documents)

The Appellant appealed a Special Chambers Justice's refusal to order disclosure of information in a family law matter.

The parties co-owned a company, with the Respondent managing the business and the Appellant handling bookkeeping. After their separation, the Respondent excluded the Appellant from the company and formed a new company that retained all the assets from the co-owned business. The Special Chambers Justice denied the Appellant's request for further disclosure of certain documents, including comprehensive statements for the Respondent's bank and credit card accounts and compliance with an Undertaking concerning corporate expense receipts for the new company.

The Court found that the Special Chambers Justice erred in principle by not adequately considering the disclosure obligations under the relevant legal standards. Regarding the corporate expense receipts, the Court emphasized the importance of full and transparent disclosure in family law matters, particularly when one party controls the financial information of jointly owned businesses. The Court also noted that the Respondent had never applied to be relieved of his obligation to comply with the Undertaking, nor did the Special Chambers Justice base his Decision on the Court's powers

under Rule 5.31 to relieve the Respondent from disclosure obligations.

With respect to the Respondent's bank and credit card account statements, the Court noted that Rule 12.41 sets out a procedure for parties to seek disclosure of copies of bank and credit card statements for the most recent 6 months, with ongoing disclosure obligations. The Court found that the Special Chambers Justice erred in principle in failing to address and consider Rule 12.41 and the procedure involved.

As a result, the Court allowed part of the Appeal and ordered the disclosure of the corporate expense receipts and the Respondent's bank and credit card statements as requested by the Appellant.

## UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 2103 V PROVENCHER, 2024 ABKB 291

(DUNLOP J)

Rules 5.32 (When Information May Be Used), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.20 (Form of Questioning and Transcript), 7.1 (Application to Resolve Particular Questions or Issues), 7.2 (Application for Judgment) and 13.18 (Types of Affidavit)

The Plaintiffs, consisting in part of an individual member to a local union, Luke Theriault, challenged certain amendments made to trust agreements governing pensions and health benefits. Numerous Affidavits were filed in the Action prior to the Plaintiffs' Application for Summary Judgment. After cross-examination on those Affidavits but prior to the Summary Judgment hearing, the Defendants' counsel believed that the transcript of Luke Theriault should not be filed, pursuant to Rule 5.32. Justice Dunlop disagreed, writing that "[t]hat rule applies to questioning under Part 1, Division 5 of the Rules. Mr. Theriault was questioned under Part 6 of the Rules which requires the questioning party to file the transcript: Rule 6.7(b) and 6.20(5)(b)".

The Defendants also took the position that there was hearsay in some of the Affidavits, including Luke Theriault's, which, they argued, was inadmissible in support of the Application because the Plaintiffs were seeking final relief. Dunlop J. generally agreed, citing Rule 13.18(3), which provides that "[i]f an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit." However, Justice Dunlop noted that the trust agreements attached as exhibits to Luke Theriault's Affidavit were not hearsay, as argued by the Defendants. They were "original evidence", which the Defendants admitted as authentic to the Court in a prior hearing. Citing Rules 7.1 and 7.2, Dunlop J. found "[a]dmissions and evidence other than affidavits are admissible on an application for summary judgment".

Dunlop J. granted the Plaintiffs' Application in part.

## PIIKANI V MCMULLEN, 2024 ABKB 381

(GRAESSER J)

Rule 5.33 (Confidentiality and Use of Information)

The Applicant, Canadian Imperial Bank of Commerce ("CIBC"), brought an Application against the Respondent, Dale McMullen, under Rule 5.33, in a long-standing complex dispute between the parties. Mr. McMullen made a fiat request seeking permission to bring an Application to add CIBC, CIBC Trust Corporation, and CIBC World Markets Inc. (collectively the "CIBC Parties") as well as the CIBC Parties' lawyers Blake, Cassels & Graydon LLP as third parties and defendants by counterclaim in the within Action.

The Application noted, among other things, that Mr. McMullen's materials for his Fiat request, which had been provided to Associate Chief Justice Rooke as well as the CIBC Parties contained information in breach of the "implied undertaking" against use codified in Rule 5.33.

CIBC argued that Mr. McMullen used materials from CIBC Trust's production in Action 0601-13061 ("Action 0601") and information from Questioning in that Action (the "Confidential Documents") without having obtained the necessary Consent or Court approval to do so. Mr. McMullen was not a party to Action 0601. CIBC stated that the only way Mr. McMullen could have accessed the Confidential Documents was through the Questioning process, as both were marked as exhibits, and such Confidential Documents are impressed with confidentiality and protected from disclosure and use by Rule 5.33. Mr. McMullen had made no Application for permission to use the Confidential Documents.

Mr. McMullen argued that another Defendant in Action 0601, Ms. Lili Kostic, had used the Confidential Documents. Justice Graesser rejected the argument noting that Ms. Kostic is allowed to use the Confidential Documents to defend herself in that Action. However, Ms. Kostic's use of the Confidential Documents, whether lawful or unlawful, does not give anyone else the ability to use protected materials in their litigation.

Justice Graesser concluded that on the balance of probabilities, Mr. McMullen's use of the information contained in the Confidential Documents was a breach of Rule 5.33, and such information and the Confidential Documents have no place in this litigation.

## KHALEEL V INDAR, 2024 ABKB 203

(BERCOV J)

Rules 5.43 (Payment of Costs of Medical Examinations), 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

When determining whether the Plaintiff in a medical malpractice Action was entitled to a percentage of the Costs they reasonably incurred, Bercov J. held that the legal fees the Plaintiff incurred was reasonable considering the factors set out in Rule 10.2.

Bercov J. found that although the contingency fees the Plaintiff owed under the Contingency Fee Agreement (the "Agreement") was significantly higher than Schedule C Costs, the circumstances justified the higher fees. Medical malpractice actions were difficult, requiring highly skilled counsel. Counsel willing to advance these Actions under Contingency Fee Agreements face significant risk and must carry significant disbursements to the end of Trial.

Having considered the factors set out in Rule 10.33, specifically, the expertise required to litigate this Action, the risks counsel took on, the need to carry significant disbursements, and the Defendant's refusal to consider any offer except a discontinuance without Costs, Bercov J. held that Schedule C Costs were not reasonable and proper Costs and awarded 50% of the fees the Plaintiff owed under the Agreement.

Bercov J. accepted the Defendant's argument that Rule 10.31(2)(c) prohibited the Plaintiff from recovering Costs associated with a Dispute Resolution Meeting the parties had (the "Meeting"). Bercov J. continued by commenting that Rule 10.31(2) provides that reasonable and proper costs "do not include costs related to a dispute resolution process". Alberta Courts have consistently held that such Costs are not recoverable for dispute resolution unless a party engages in serious misconduct during the dispute resolution process, which was absent here.

When determining whether the Plaintiff could recover the videographer costs they incurred to record the Defence IME, Bercov J. held that Rule 5.43 did not preclude the Plaintiff from seeking reimbursement of videographer costs at the end of a Trial. Under Rule 5.43, the party who applies for an IME pays upfront the costs of the Plaintiff to attend. The party seeking the IME does not have to pay upfront the cost of videotaping or having the attendance of a nominated health care professional. Bercov J. noted that in *Dirk v Toews*, 2020 ABQB 16, the cost of a nominee to attend with the Plaintiff at an IME was found to be a recoverable disbursement. Seeing no reason to treat the cost of a videographer differently than the cost of a nominee, Bercov J. concluded that this disbursement was reasonable and recoverable.

## GREAT NORTH EQUIPMENT INC V PENNEY, 2024 ABKB 391

(FEASBY J)

Rules 6.7 (Questioning on Affidavit in Support, Response and Reply to Application) and 6.8 (Questioning Witness Before Hearing)

The Applicants examined three individuals who were not parties to the Action pursuant to Rule 6.8, which deals with questioning non-party witnesses, in an effort to obtain evidence to support their Application to extend an interlocutory Injunction preventing the Respondents from soliciting their employees and clients. During the examinations, the Applicants requested that the non-party witnesses give Undertakings to produce records and information. The Undertakings were taken under advisement and subsequently refused.

The Applicants submit that the non-party witnesses are obliged to answer Undertaking requests in the same way as witnesses under Rule 6.7, which deals with Questioning on Affidavits made in support of an Application. The Respondents rejected this position, taking the position that a non-party witness is to be treated the same as a witness at Trial and that there is no obligation to answer Undertakings.

Justice Feasby began by highlighted the types of evidence permissible on Applications and concluded that Affidavits given as evidence on an Application stand in place of viva voce evidence being given in Court at Trial. Accordingly, the mode of adducing evidence on an application is "analogous to the approach used at trial" and fundamentally different than, for example, Part 5 Questioning, where "undertakings are an essential feature". A witness at Trial, however, is not required to give and answer Undertakings.

Turning to Rule 6.8 and the facts at hand, Feasby J. similarly noted that there is a "fundamental difference" between witnesses examined pursuant to Rule 6.7 and Rule 6.8. This is because witnesses who have sworn an Affidavit have consented to taking an "active role in the litigation", either because they are parties or have agreed to assist a party through a supporting Affidavit. As such, it is reasonable to ask such witnesses to answer Undertakings. Witnesses who are examined pursuant to Rule 6.8 are "strangers to the litigation" and have "not consented to taking an active role in the litigation". As such, it is reasonable that they be treated differently than witness who have provided an Affidavit. In dismissing the Applicants Application, Justice Feasby found that a Rule 6.8 examination should be no more intrusive than necessary and thus not require that undertakings be given.

## CONDOMINIUM CORPORATION NO 752 1349 V MUHAMMAD, 2024 ABCA 234

(KHULLAR CJA)

Rules 6.14 (Appeal from Applications Judge's Judgment or Order), 9.4 (Signing Judgments and Orders), 14.4 (Right to Appeal) and 14.5 (Appeals Only with Permission)

This was an Application seeking permission to appeal a Decision denying an extension of time to Appeal.

The Applicant owned a condominium unit where the Condominium Corporation (the "Corporation") initiated renovation work. The Applicant continued to pay monthly fees with post-dated cheques that did not reflect the increased amount to cover renovation costs. The Corporation rejected the cheques as insufficient and initiated a foreclosure Action against the Applicant. The Corporation sought Summary Judgment, and was awarded $2,499.12 plus reasonable solicitor-client Costs. The formal Order was issued on December 2, 2022. Pursuant to Rule 6.14(1), the Applicant had 10 days to file a Notice of Appeal of the Decision, which he failed to do. Consequently, the Appeal period expired December 12, 2022.

In February 2023, an Assessment Officer determined reasonable solicitor-client Costs and disbursements, which was not disputed. Following this, the Applicant attempted to stay enforcement of the Costs Order, but this request was denied. The Applications Judge overseeing the matter instructed the Applicant to file an Application seeking an extension of time to Appeal. In March 2023, the Applicant submitted an irregular Application, which was adjourned sine die. Despite receiving detailed instructions on the proper submission process, the Applicant did not rectify the filing until March 2024. The Chambers Judge dismissed the Application due to the significant delay between the Appeal deadline and the Application hearing, and determined that the Appeal was unlikely to succeed.

In April 2024, the Applicant filed a Notice of Appeal against the Chambers Judge's Decision. The Court's Case Management Officer instructed the Applicant to Apply for permission to Appeal, which was submitted in May 2024. The Court clarified that since the Appeal involved a substantive Decision and Costs, permission under Rule 14.5(1)(e) was not required as it applies to a Decision regarding a Costs award only. However, because the value of the substantive Decision was less than $25,000 excluding Costs, permission was necessary under Rule 14.5(1)(g). The Court emphasized that several factors may be relevant to an Application for permission to Appeal under Rule 14.5(1)(g), and noted the importance of assessing whether the Appeal has arguable merit and raises a significant legal question worthy of consideration by a panel of three Judges.

The Court determined that the Applicant failed to show that the denial to extend time to Appeal constituted a legal error substantial enough to warrant review by a panel. The Court emphasized that the short timelines set in the Rules are for good reasons, and an extension of time requires exceptional circumstances in cases of significant delay. The Applicant claimed the reason for delay was because he worked abroad and was unaware of the strict Appeal deadlines as a self-represented litigant. However, the Court noted that the Applicant was informed multiple times of the proper procedures but failed to comply, which it deemed an insufficient justification for delaying over a year. As a result, the Application was dismissed.

## 1880499 ALBERTA LTD V WARWICK & KENT (CANADA) GP LTD, 2024 ABKB 197

(KUNTZ J)

Rule 7.3 (Summary Judgment)

This was an Appeal Decision from cross-Applications for Summary Judgment by an Applications Judge.

The Plaintiffs and the Defendants engaged in a multi-step and multi-party transaction to incorporate a company for acquiring three energy services companies. Following the transaction, both parties became shareholders in that company, with the Plaintiffs holding some of their shares through a limited partnership ("the Canadian LP") governed by a limited partnership agreement ("the Canadian LPA").

The Plaintiffs applied for a Summary Judgment, claiming that the Canadian LPA had terminated as per its terms, requiring the dissolution of the Canadian LP and the return of the Plaintiffs' shares. The Defendants disagreed, arguing that the Canadian LPA had been renewed and extended and that the return of the Plaintiffs' shares was prohibited until the company experienced a liquidity event, which had not occurred and was not imminent.

The Applications Judge agreed with the Plaintiffs, determining that the Canadian LPA had terminated and granting them Summary Judgment in that regard (the "Extension Issue"). However, the Applications Judge disagreed that the termination of the Canadian LPA automatically mandated the return of the Plaintiffs' shares, directing instead that this matter proceed to Trial (the "Remedy Issue"). Both parties appealed: the Defendants against the Summary Judgment on the Extension Issue and the Plaintiffs against the denial of Summary Judgment on the Remedy Issue.

The Court noted that this was not a hearing de novo; instead, the Court must decide whether the Applications Judge's Decision was correct on the record that was before him. The Court considered Rule 7.3(1) 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 contested findings of fact were permitted on a Summary Judgment motion, unless those facts, proven on a balance of probabilities, raised a genuine issue requiring Trial.

The Court concluded that a Summary Judgment was fair and just for the issues on Appeal, which revolved around the contractual interpretation of the Canadian LPA in the context of the transaction and other related agreements between the parties. The facts were not disputed and were well canvassed in the parties' Affidavits and cross-examination transcripts. The Court found that it was unnecessary to hear viva voce evidence at Trial regarding the parties' intentions for the transaction.

Based on the foregoing, the Court affirmed the Decision of the Applications Judge on the Extension Issue and granted the Plaintiffs' Appeal on the Remedy Issue.

## STARRATT V CHANDRAN, 2024 ABKB 253

(FEASBY J)

Rule 7.3 (Summary Judgment)

The Plaintiffs sought Summary Judgment against one of the Defendants (the "Respondent") pursuant to Rule 7.3. Feasby J. granted the Plaintiffs partial Summary Judgment while held that the remaining claims must be resolved at Trial.

Having considered the four key considerations in Summary Judgement Applications as set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 and the definition of "genuine issue requiring a trial" from *Hryniak v Mauldin*, 2014 SCC 7, Feasby J. held that the record was not sufficient for the Court to grant Summary Judgment on all of the Plaintiffs' claims; however, it was appropriate to grant Summary Judgment on some of them.

Feasby J. cited *Butera v Chown, Cairns LLP,* 2017 ONCA 783 for the proposition that partial Summary Judgment should be a rare procedure reserved for issues that may be readily bifurcated from those in the main Action and that may be dealt with expeditiously and in a cost-effective manner.

It was noted that the Plaintiffs had filed written submission that pointed to the evidence that would support their position. Furthermore, many of the evidentiary gaps were attributable to the Respondent's failure to comply with directions of the Court to produce records. Feasby J. further noted that the Plaintiffs' claims related to distinct investments that could be assessed independent of one another, and found that as such it would be fair and reasonable to summarily decide those claims for which there is sufficient evidence independent of the claims that remain for Trial.

## SANSOM/SMITH ET AL V BILODEAU ET AL, 2024 ABKB 279

(ROTHWELL J)

Rule 7.3 (Summary Judgment)

In 2020, Anthony Bilodeau fatally shot two individuals near Glendon, Alberta. After Anthony was criminally charged and found guilty, the families of the deceased (the "Plaintiffs") initiated civil proceedings for damages against his brother Joseph, seeking to hold him liable as joint tortfeasor in the wrongful deaths of those two individuals as well as for the torts of assault and battery arising out of his participation in the crime. Joseph applied to summarily dismiss the claim under Rule 7.3.

Justice Rothwell presided over the Decision, who found that there were procedural fairness concerns relative to the factual record due to the Plaintiffs inability to examine Anthony and his father (who was present at the murder) regarding what transpired, including, most notably, any conversations they may have had with Joseph. This was because the Case Management Justice declined to allow the Plaintiffs to examine Anthony and his father as a result of their outstanding criminal Appeals; however,

both Appeals had since been dismissed by the Court of Appeal of Alberta.

This inability was deemed a valid reason preventing the Plaintiffs from putting "their best foot forward" in response to Joseph's Application, a cornerstone of Rule 7.3. The Court emphasized the need for procedural fairness and decided to adjourn Joseph's Application, allowing the Plaintiffs time to conduct necessary examinations.

## BONETTE V BONETTE, 2024 ABKB 337

(HARTIGAN J)

Rule 7.3 (Summary Judgment)

The Plaintiff sought, under Rule 7.3, a declaration of the continued existence of a partnership. Hartigan J. conducted Summary Judgment analysis and made the declaration by way of Summary Judgment.

Citing *Weir-Jones*, Hartigan J. commented that Summary Judgment is not limited to cases where the facts are not in dispute. Hartigan J. further commented that the evidence need not be equivalent to that at Trial, but must be such that the Judge is confident that they can fairly resolve the dispute. A Judge is permitted to draw inferences from the admitted facts, the undisputed evidence, the conduct of the parties, and the corroborating evidence.

Having reviewed the evidentiary record available to the Court, Hartigan J. found that: 1) it was possible to fairly resolve the dispute summarily, 2) the Plaintiff has met his burden, on a balance of probabilities, to show that there was no genuine issue requiring a Trial, 3) the Defendants did not put forward significant evidence demonstrating a termination of the partnership, and 4) the record was sufficient for the Court to resolve the dispute in relation to the existence of the partnership.

## PITTMAN BROTHERS PRODUCTION LTD V EVANS, 2024 ABCA 185

(SLATTER, ANTONIO AND GROSSE JJA)

Rule 7.3 (Summary Judgment)

This was an Appeal of a decision, *Pittman Brothers Production Ltd v Evans*, 2022 ABQB 541, where the Chamber's Judge summarily dismissed the Appellant's claim for specific performance and discharged the associated caveat and certificate of *lis pendens*, holding that damages would be an adequate remedy. In the Chamber's Decision, the Appellant, a farming corporation, sought specific performance for the purchase of farmland from the Respondents.

The grounds of Appeal included: 1) the Chambers Judge erred in placing the burden on the Appellant to demonstrate that a substitute property was not available; 2) the Chambers Judge erred in not considering the behaviour of

the Respondents with respect to the availability of specific performance; 3) the Chambers Judge erred in granting partial Summary Judgment where such Judgment does not dispose or substantially dispose of the litigation; and 4) the Chambers Judge erred in determining that this was an appropriate case for Summary Judgment.

Justices Antonio and Grosse, in relation to Summary Judgment pursuant to Rule 7.3, determined that the Chambers Judge correctly outlined the test and burden of Summary Judgment. However, they found an error in law as the Judge required the Appellant to prove that substitute property was not readily available or that the disputed lands were unique enough to warrant specific performance in order to raise a triable issue. The Court of Appeal pointed out that the Chambers Judge suggested that the Appellant could not raise a triable issue without actively seeking alternate land, but evidence of an unsuccessful search for alternate land by the claimant is not a prerequisite for a successful claim for specific performance. Additionally, the Court highlighted that the Chambers Judge did not hear oral evidence, leading to a genuine issue for Trial regarding the availability of comparable properties and the adequacy of damages as a remedy based on the existing record.

The Court stressed that specific performance could still be suitable due to the unique suitability of the disputed lands for the Appellant's farming operations and the complexity of calculating damages for lost production. Consequently, the Appeal was granted, and the Order dismissing the claim for specific performance and removing the caveat and certificate of *lis pendens* was overturned.

## HENDERSON ESTATE (RE), 2024 ABCA 141

(SLATTER, ROWBOTHAM AND FEEHAN JJA)

Rules 9.2 (Preparation of Judgment and Orders), 9.3 (Dispute Over Contents of Judgment or Order), 9.5 (Entry of Judgment and Orders), 9.6 (Effective Date of Judgments and Orders), 14.77 (Preparation and Signatures of Judgment and Orders) and 14.88 (Costs on Appeals)

This was an Appeal in which the Appellants sought permission to enter a Judgment more than three months after it was pronounced, pursuant to Rule 9.5(2). The Court highlighted that Rule 9.5(2) aims to prevent delays and ensure the finality of decisions. It stressed that if parties cannot agree on the form of a Judgment, they must utilize Rules 9.2 and 9.3, which establish procedures for swiftly resolving disputes over Judgment forms. Additionally, the Court pointed out that according to Rule 9.6, a Judgment takes effect on the date it is pronounced, emphasizing the need for prompt resolution of any disputes concerning its form.

Despite acknowledging the unreasonable delay in entering the Judgment, the Court concluded that entering the Judgment was in the interests of justice. Therefore, the Appellants were granted permission to enter the Judgment. Regarding Costs, the Court applied Rule 14.88, which presumes that the successful party in an appeal is entitled to Costs. The Court also mandated that if the parties could not agree on the form of the order within 20 days, they must promptly schedule a conference call with the president of the panel under Rule 14.77(2).

## AGS V RNS, 2024 ABKB 280

(EAMON J)

Rules 9.4 (Signing Judgments and Orders), 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff and Defendant, once married, engaged in a prolonged legal battle involving divorce, child and spousal support, division of family property, and parenting time. The Plaintiff was largely successful, particularly in matters of child support and spousal support, while the division of family property showed mixed success. The Court was thus required to rule on Costs of the Action. Justice Eamon reviewed the proceedings of the past several years in order to ascertain what costs, if any, should be awarded to either party.

Justice Eamon began his analysis by citing the Court's discretion in awarding Costs provided by Rule 10.29, and further noted that in addition to the Court's general discretion, a successful party to an Application, a proceeding or an Action is entitled to a Costs Award against the unsuccessful party, subject to a variety of considerations under Rule 10.31. In relation to success, the Court noted that a party need not be successful on each argument or claim to relief, to qualify as a successful party for Costs purposes, and where success is mixed to the extent that it cannot be said that one party was "substantially successful", no Order should be made as to Costs and the parties will bear their own Costs. The Court acknowledged that it had several options in dealing with cases of mixed success. These included awarding Costs to either party by issue; awarding partial Costs to one party; and, requiring each party to bear their own Costs, and that the factors set out in Rule 10.33 could assist in this determination.

Given that the Defendant was self-represented for significant periods of time during the Action, including the entire Trial and steps taken thereafter, the Court considered the Cost principles as they relate to self-represented litigants. Under Rule 10.31, the Court acknowledged it had the power to award Costs to a self-represented party of an amount or part of an amount equivalent to the fees in Schedule C, but noted that these awards are exceptional.

In relation to the quantum of Costs, the Court reviewed recent appellate decisions on the issue, and noted that appellate decisions conflict on the question of whether Schedule C Costs are presumptive absent exceptional circumstances or are a starting point. Ultimately, on the quantum question, the Court concluded that it was sufficient to use Schedule C as a tool in coming to the appropriate amount.

The Court also addressed solicitor-client Costs, given that each party asked the Court for such an award. The Court reminded the parties that an award of solicitor-client Costs is only available in rare and exceptional cases, and that It has long been recognized that the fact that an Application that has little merit is no basis of awarding solicitor-client Costs. The Court also was aware that it must not base an award of solicitor-client Costs on pre-litigation conduct alone, independent of other circumstances.

Justice Eamon determined that the Plaintiff was substantially successful in the Action, particularly on issues of parenting, child support, and spousal support. The Defendant's conduct, including inadequate financial disclosure and litigation misconduct, significantly influenced the decision on costs. The Court utilized its discretion under Rule 10.31 to award Costs,

considering the need to deter misconduct and the efforts required by the Plaintiff to address the Defendant's conduct. The decision also considered the mixed success in property equalization and the Defendant's failure to substantiate claims of misconduct by the Plaintiff. The Court invoked Rule 9.4 in relation to preparing the formal Order.

## BEHR V BEHR, 2024 ABKB 359

(NIELSEN ACJ)

Rules 9.4 (Signing Judgments and Orders) and 10.49 (Penalty of Contravening Rules)

This Memorandum of Decision responded to the actions of Mr. Behr, who used pseudolegal arguments to challenge a Court Order and intimidate judicial officers. Following Orders made on March 12, 2024, related to the sale of family property, Mr. Behr sent communications rejecting the Orders and imposing fictitious fines on Justice Akgungor. These communications were recognized as "Organized Pseudolegal Commercial Arguments" ("OPCA"), a form of pseudolaw intended to undermine the Court's authority.

The Court, applying Rule 10.49(1), found Mr. Behr's actions to be an interference with the administration of justice. Mr. Behr employed pseudolaw strategies, specifically the "Strawman Theory" and "Three/Five Letters" process, to challenge the Court's authority. Despite being instructed to provide an explanation for his conduct, Mr. Behr continued his pseudolaw activities and escalated his communications.

The Court concluded that Mr. Behr did not provide an adequate excuse for his actions and imposed a $5,000 penalty under Rule 10.49(1). This penalty was to be paid immediately, or it would be recovered from the proceeds of the Court-directed property sale. The Court also exercised its authority under Rule 9.4(2)(c) to dispense with Mr. Behr's approval of the Order effectuating this Decision.

The Court warned Mr. Behr that any further pseudolaw submissions would result in escalating penalties and possible additional litigation management measures. The Court advised Mr. Behr to seek legal counsel and provided information about his right to appeal to the Court of Appeal of Alberta.

## KONKOLUS V BALANKO, 2024 ABCA 134

(WAKELING, DE WIT AND FAGNAN JJA)

Rules 9.4 (Signing Judgments and Orders), 13.5 (Variation of Time Periods) and 14.88 (Cost Awards)

The Appellant appealed Teskey J.'s Order staying their claim pending a determination of the Respondent's Application to strike or summarily dismiss the Appellant's claim, directing the Appellant to retain legal counsel, and abridging the time for one Respondent to serve their Application pursuant to Rule 13.5. The issues revolved around the specifics of an estate case, which were fact sensitive.

The Court dismissed the Appeal. The Appellant was ordered to pay $10,000 in Costs to each Respondent, with the Court acknowledging, among other things, that the Respondents were entirely successful, that Rule 14.88(3) provides that the Costs on Appeal are the same as the scale that applies to the Order appealed from, and that the Court has discretion when setting a Costs Award. The Court invoked Rule 9.4(2)(c) and held that it would prepare the Order.

## GIESBRECHT V PRPICK, 2024 ABCA 187

(HAWKES JA)

Rules 9.4 (Signing Judgments and Orders) and 14.48 (Stay Pending Appeal)

The Court noted that Applicants can apply under Rule 14.48 to stay enforcement proceedings pending Appeals. Such Applications can be made to the Judge who made the Decision or to a single Appeal Judge.

The Defendant applied to stay enforcement of damages and Costs arising out of two related Actions pending Appeals by her and her company. The Defendant failed to meet the test for stay of enforcement and her Stay Application was denied.

The Court noted that Applicants seeking a stay of enforcement are guided by the three part test in *RJR-MacDonald Inc v Canada (Attorney General)*: (i) is there a serious question to be tired, (ii) will the Applicant suffer irreparable harm if the Stay is not granted, and (iii) does the balance of convenience favour granting the Stay?

Appeal Justice Hawkes found that while the Defendant may have passed the low threshold of establishing a serious question to be tried, she could not establish irreparable harm and failed to demonstrate that the balance of conveyance favoured her position.

The Court invoked Rule 9.4(2)(c) to prepare the resulting Orders.

## VIZOR V 383501 ALBERTA LTD (VAL BRIG EQUIPMENT SALES), 2024 ABCA 192

(PENTELECHUK JA)

Rules 9.4 (Signing Judgments and Orders), 14.5 (Applications Only with Permission) and 14.8 (Filing a Notice of Appeal)

Justice Pentelechuk had previously declined to restore the Applicant's Appeal after it was struck for failing to meet a filing deadline (the "Initial Decision"). The Applicant sought permission to Appeal the Initial Decision pursuant to Rule 14.5(1)(a). Justice Pentelechuk noted that the present Application was brought more than a month after the Initial Decision and was therefore out of time pursuant to Rule 14.8(2)(a). The Court also held that the Applicant had failed to articulate a basis upon which the Initial Decision should be appealed, and the Application was dismissed. The Court invoked Rule 9.4(2)(c).

## 1218807 ALBERTA LTD V MUSLIM ASSOCIATION OF CANADA, 2024 ABKB 34

(ANGOTTI J)

Rules 9.12 (Correcting Mistakes or Errors) and 9.13 (Re-opening case)

This was a Decision regarding damages. The case involved a lease agreement between 1218807 Alberta Ltd., as the Plaintiff landlord, and the Muslim Association of Canada ("MAC"), as defending lessee, with the latter being unable to pay rent due to the COVID-19 pandemic and government lockdowns. The Plaintiff sought Judgment for unpaid rent, while the Defendant argued that the *force majeure* clause in the lease excused them from paying rent during this time.

On May 19, 2023, following a Summary Trial, Justice Angotti granted Judgment in favour of the Plaintiff for unpaid rent and dismissed the Defendant's counterclaim for a declaration that they were excused from paying rent under the *force majeure* clause. In that decision, Angotti J. stated: The Landlord provided evidence with respect to the rent owing at various times. However, after April 1, 2021, when both parties agree that the rents owing were $663,117.15, the calculations revert to a yearly rather than a monthly calculation. If the parties are unable to determine the calculation of rent owing as of June 30, 2021, they may appear before me to have the calculation determined.

The Court accepted the Plaintiff's calculation of damages for May and June 2021. However, it was not brought to the Court's attention by either party, until MAC's letter of October 26, 2023 (after the Summary Trial decision), that the original calculation of damages included property taxes (and GST on the same). Because the parties agreed at the Summary Trial that MAC is a not-for-profit corporation, and pursuant to the lease, would not be responsible for paying property taxes as a result of that designation, the original damages assessment needed to be reduced. Justice Angotti found that the original damages calculation constituted an "accident, slip, or omission" that could be corrected by the Court under Rule 9.12 or Rule 9.13. Therefore, the Court corrected its prior Judgment and found the total damages

for which MAC was liable was $515,024.59. This included the original calculation less the property taxes and GST charged on those property taxes, as well as a security deposit of $101,823.50.

## FOUGERE V THE KING'S UNIVERSITY, 2024 ABCA 176

(FAGNAN JA)

Rule 9.13 (Re-opening Case)

The Applicant sought to reargue his initial Application to extend time to apply to admit additional evidence that he believed would have changed the Decision which he had appealed.

By way of background, the Applicant filed an Originating Application seeking judicial dispute resolution, reinstatement as a student, and retrieval of intellectual property. A Chambers Judge dismissed his Application, holding there was no remedy the Court could grant. The Appeal of the Chambers Judge's Decision was scheduled for June 4, 2024. The Applicant filed his initial Application to extend time to apply to admit new evidence in 2023, which was dismissed on December 20, 2023 (the "December 2023 Decision").

The Court noted that the threshold for granting an extension to admit new evidence is low, considering factors such as the reason for the delay, the effect of the late filing on the Appeal proper, and whether the Application for fresh evidence has a reasonable prospect of success or is *prima facie* meritorious. The Court further noted that Applications to reargue are allowed only in exceptional circumstances with a high test to meet. Not only should the Applicant disclose the new evidence and explain why it was not available at the time of the original hearing, but the evidence should also be of sufficient importance to alter the earlier Decision.

The self-represented Applicant failed to provide proposed evidence in his initial Application but submitted new documents, including a January 31, 2024 letter from the Respondent's Privacy and Security Officer and an appeal letter dated January 13, 2022 from the Applicant to the Respondent (the "Appeal Letter"). These documents were not available to him during his initial Application.

The new evidence, particularly the Appeal Letter and a January 14, 2022 email from the Respondent to the Applicant acknowledging receipt of "a letter of appeal", was crucial to the case as it challenged the Respondent's earlier claims that the Applicant had expressed an intention not to Appeal. The Respondent did not include the Appeal Letter and email in its Affidavit in support of its Summary Dismissal Application and failed to address why these documents were previously omitted.

The Court held that the Applicant met the low threshold for granting an extension of time to apply to admit new evidence and the high test required for an Application to reargue the December 2023 Decision. The Applicant not only provided a reason for the late filing but also disclosed new evidence, explained why it was not available during the initial hearing, and demonstrated that the evidence was of sufficient importance to alter the earlier Decision.

In light of the foregoing, the Court granted the

Application to reargue and extended the time to admit new evidence regarding the Appeal Letter, the January 14, 2022 email, and the January 31, 2024 letter. The Court held that it would be up to the Appeal Panel to decide on the admissibility of this new evidence.

## CONDOMINIUM PLAN NO 912 3701 (LIBERTON VILLAGE CONDOMINIUM CORPORATION) V HERBERT, 2024 ABKB 362

(APPLICATIONS JUDGE SUMMERS)

Rule 9.14 (Further or Other Order after Judgment or Order Entered)

The parties brought cross Applications to determine, among other things, if the condominium corporation (the "Condo Corp") is entitled to further Costs from a prior Court Order pursuant to Rule 9.14.

By way of background, a resident of the Condo Corp owned a unit adjacent to a unit owned by the Respondents. A tenant of the Respondents' unit cut a hole between the two units and had continuously harassed the resident prior to this incident. As a result, the resident and the Condo Corp commenced an Action, obtained a restraining Order against the tenant, and sought his eviction. On December 9, 2020, Master Smart ordered the tenant's eviction and required the Respondents to pay for repairs to both units and cover Condo Corp's Costs of the eviction Application on a solicitor-and-his-own-client basis (the "Eviction Order").

A draft Eviction Order was sent to the Respondents' counsel on December 10, 2020, and revisions were requested. A revised draft was sent on December 30, 2020, specifying the Respondents' responsibility for repairs to the resident's unit. Despite numerous emails from Condo Corp's counsel, the Respondents' counsel did not respond until January 27, 2021, approving the December 10 draft, which was later filed. Meanwhile, the Respondents completed repairs to their unit without using a contractor proposed by the Condo Corp. When the parties attended before the Assessment Officer to assess Condo Corp's Costs awarded under the Eviction Order, the Assessment Officer advised that given the wording in the Eviction Order, he could only deal with Costs of the appearances before Master Smart and Costs with respect to the Eviction Order.

The Condo Corp applied for an Order under Rule 9.14 to grant Costs for the entire Action up to December 9, 2020, on a solicitor-and-own-client basis, arguing that the Respondents' counsel deliberately ignored their efforts to get the Eviction Order approved and greatly increased Condo Corp's Costs. The Court noted that Rule 9.14 allows the Court to make further Orders without varying the original Judgment, only if it is necessary to provide the litigants with a remedy to which they are entitled under the original Order. The Condo Corp's Application for Costs covering all steps in this Action was considered to exceed these limits as it sought to vary the Eviction Order, which was beyond the Court's jurisdiction under Rule 9.14.

The Applications were dismissed as a result.

## CARNWELL V CARNWELL, 2024 ABKB 318

(SIDNELL J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 10.31 (Court-Ordered Costs Award), 10.49 (Penalty for Contravening Rules), 10.51 (Order to Appear), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court), 12.41 (Notice to Disclose Documents), 12.42 (Request for Financial Information) and 12.53 (Form of Orders)

This case related to the remedies that a person seeking financial disclosure can seek and enforce when the party who is obliged to pay fails to make full financial disclosure.

The Applicant, Ms. Carnwell, sought to enforce a previous Court Order, requiring the Respondent, Mr. Carnwell, to fulfill certain financial disclosure obligations. In this Application, Ms. Carnwell argued that Mr. Carnwell failed to comply with the previous financial disclosure Order and was thus in Civil Contempt. She also sought enforcement of Costs penalties and further Court orders to compel compliance.

The Court noted that Rule 12.41(3) permits a recipient (i.e., Ms. Carnwell) to file a Notice to Disclose, requesting documents that are relevant and material to the proceeding. Sidnell J. noted that recipients have a number of options available to them when a payor (i.e., Mr. Carnwell) fails or refuses to provide disclosure. First, where a payor fails to provide disclosure within one month of being served with a Notice to Disclose, Rule 12.41(7) grants the Court the jurisdiction to take a number of steps, including: (a) to set a date for the payor to provide the documents requested in the Notice to Disclose; or (b) to draw an adverse inference against the payor and impute an income to the payor and to order that the payor pays support in the amount the Court considers appropriate; or (c) to order that the payor pays Costs to the recipient to fully compensate the recipient for all costs incurred in the proceeding.

The Court also noted that Rule 10.49 grants the Court jurisdiction to require a party, lawyer, or other person to pay a penalty to the Clerk of the Court, if: (a) the party, lawyer or other person contravenes or fails to comply with the rules or a practice note or direction of the Court without adequate excuse; and (b) the contravention or failure to comply, in the Court's opinion, has interfered with or may interfere with the proper or efficient administration of justice.

Third, the Court noted Rules 10.51 to 10.53, which are the Civil Contempt Rules. However, relying on *Carey v Laike*n, 2015 SCC 17, Sidnell J. noted that these Rules "should be used 'cautiously and with great restraint'" and that they are an "enforcement power of last rather than first resort".

The Court noted that where a person is declared to be in civil contempt, Rule 10.53(1) then grants the Court the discretion to order numerous penalties, including, among others, imprisonment, the imposition of a fine, or the dismissal of a claim. In addition to the penalties or sanctions set out in Rule 10.53(1), Rule 10.53(2) grants the Court the discretion to make a Costs Award against a person declared to be in Civil Contempt. However, the Court noted that penalties issued under this Rule are not payable to the opposing party, but rather to the Government of Alberta because they are directed at the public interest in the due administration of justice, not any private interest.

Ultimately, Justice Sidnell found that Ms. Carnwell's Application was not properly before

the Court because it engaged Rules 10.51 to 10.53 and Mr. Carnwell was not served in the manner of a commencement document, as required by Rule 10.52. As a result, there could be no finding or declaration that Mr. Carnwell remained in breach and contempt of the previous Order. However, citing Rule 9.15(4), which gives the Court jurisdiction to vary Orders on grounds that are "just", Sidnell J. varied the previous Order to allow for an adverse inference to be made against Mr. Carnwell should he fail to comply with his financial disclosure requirements, and to impute an income to him in the amount the Court considered appropriate, if required.

Turning to the Costs that Ms. Ms. Carnwell was entitled to, Sidnell J. began by noting that the Court was permitted to award Costs in an amount that fully compensated Ms. Carnwell for all her costs incurred in the proceedings: Rule 12.41(7)(c). Because Ms. Caldwell was also at times a self-represented litigant, the Court cited Rule 10.31(5), which states that in appropriate circumstances, the Court may order, in a Costs Award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

However, citing *Hicks v Gazley,* 2020 ABCA 239, Sidnell J. noted that Alberta Courts are typically "very conservative" in awarding Costs to self-represented litigants and that, under Rule 10.31(5), an award of Costs to a self-represented litigant are awarded only in "exceptional circumstances". The reason for this is because a self-represented litigant does not incur any legal fees; thus, the ordinary objective of indemnification is not needed.

Here, it was found that Mr. Carnwell never fully provided his financial disclosure and, as a result, Ms. Carnwell was required to take several legal steps both as a self-represented litigant and as a litigant represented by counsel. Citing Rule 12.41(7)(c), the Court found that it was appropriate to award Ms. Carnwell Costs under Schedule C, column 1, in the amount of $800 for the steps she took as a self-represented litigant. For the period that she was represented by counsel, she was entitled to legal Costs in the amount of $9,601.32, representing almost full indemnity for her legal costs.

## GILL V KHALSA CREDIT UNION (ALBERTA) LIMITED, 2024 ABKB 194

(REED 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 an Application by Beant Singh Gill seeking an Injunction to prevent Khalsa Credit Union (Alberta) Limited from conducting a Special General Meeting intended to remove Mr. Gill and another director from their positions. The urgency of the Application stemmed from its aim to halt the meeting scheduled for March 17, 2024, only days after the Application was presented in Court. Despite Mr. Gill's efforts, the Court dismissed the Injunction Application in its entirety and subsequently addressed the issue of Costs. In their submissions, Khalsa Credit Union requested full-indemnity costs amounting to $36,875.75,

while Mr. Gill advocated for a Costs Award based on Schedule C, estimated at approximately $9,100.

The Court underscored that there are no special exceptions for Injunctions concerning Costs; the standard rules apply, thus enabling the successful party an immediate award of Costs. The Court referenced the Court of Appeal's decision in *McAllister v Calgary (City)*, which clarified the discretionary spectrum available under Rule 10.31(1). The Court also recognized its broad discretion to award Costs, pursuant to Rules 10.31 to 10.33.

The Court noted the *Barkwell v McDonald*, 2023 ABCA 87 decision, highlighting that there are no presumptions favouring the use of a percentage of actual legal expenses or adherence to Schedule C for setting Costs. Instead, the guiding principles include proportionality and reasonableness, anchored by factors outlined in Rules 10.2 and 10.33, which dictate what is deemed a reasonable fee.

In determining the appropriate quantum of Costs, the Court considered the actual work performed by the lawyers for Khalsa Credit Union, the absence of a formal Bill of Costs, and the overall context of the litigation, which involved significant efforts on short notice. Although the credit union did not fully justify its claimed expenses with detailed documentation, the Court found that the amount requested was not found wholly unreasonable given the circumstances.

Ultimately, exercising its discretion under Rules 10.29, 10.31, and 10.33, the Court considered the urgency, complexity of the matter, and the substantial efforts expended by both parties. A lump sum of $15,750 was awarded to Khalsa Credit Union.

## LY V RY, 2024 ABKB 209

(THOMPSON J)

Rules 10.2 (Payment of Lawyer's Services and Contents of Lawyer's Account) and 10.33 (Court Considerations in Making Costs Awards)

This was an Originating Application under the Hague Convention for the return of six children from Calgary, Alberta to Conroe, Texas, initiated by the father against the mother. The mother initially took the children to Calgary with the father's consent for a temporary stay, which she subsequently extended, seeking to make the relocation permanent. The mother contested the return, asserting that the children were habitually resident in Calgary, that the father had consented to their permanent relocation, and that returning them would pose a serious risk of physical or psychological harm. The father maintained that the children were wrongfully retained in Calgary beyond the agreed-upon period, that their habitual residence was in Texas prior to the retention, and that he did not consent to their permanent relocation. He also argued that there was no significant risk of harm to the children if they were returned to Texas.

Finding that the children lacked a stable life with any significant family and social contact, the Court held that the children were habitually resident in Texas immediately before their wrongful retention by the mother. The Court concluded that the mother had not met her burden to establish the Hague Convention exceptions of the father's consent, nor had she

shown a grave risk of physical or psychological harm to the children if they were returned to Texas. As such, the Court ordered the children be returned to Texas.

The father sought a full indemnity cost award against the mother, totaling $41,426, which included Canadian legal fees, United States legal fees, and travel costs. Alternatively, he requested party-party Costs pursuant to the principle in *McAllister v Calgary (City)*. The Court noted that assessing full-indemnity costs requires a detailed Bill of Costs showing the work done and disbursements incurred. Within 30 days, each party was required to file and serve written Cost submissions addressing the factors in Rule 10.2 and Rule 10.33, including supporting records and a draft Bill of Costs under Schedule C of the Rules.

## STURGEON LAKE CREE NATION V RATH AND COMPANY BARRISTERS AND SOLICITORS, 2024 ABKB 258

(SIMARD J)

Rules 10.3 (Lawyer Acting in Representative Capacity), 10.4 (Charging Order for Payment of Lawyer's Charges), 10.7 (Contingency Fee Agreement Requirements) and 10.8 (Lawyer's Non-compliance with Contingency Fee Agreement)

The Applicant, Sturgeon Lake Cree Nation, applied to invalidate the contingency fee agreement ("CFA") that it signed with its lawyers, Rath and Company ("Rath"), along with the invoices issued under the CFA, on the basis that the CFA did not comply with Rule 10.7.

The Court considered Rule 10.7 and 10.8, taking note of the various mandatory requirements outlined for contingency fee agreements. If those requirements are not met, the lawyer's charges are determined under Rule 10.2 (which entitles a lawyer to a "reasonable amount") rather than an amount under the contingency fee agreement. The Court acknowledged the significance of Rule 10.7(7), which specifically addresses accounts issued under contingency fee agreements. According to this Rule, if an account fails to include a mandatory statement as required, it will be deemed ineffective, subject to the Court's discretion to grant relief under subrules 10.8(a) and (b).

The Court acknowledged the significance of contingency fee agreements in providing access to justice for individuals who may not have the financial means to pursue legal action. It emphasized the importance of adhering to Rule 10.7, recognizing that while the rule is mandatory, there may be some flexibility in certain circumstances. A distinction was made between minor technical violations of the Rules, which may be remedied, and more serious breaches that could invalidate an agreement.

In this case, the Court highlighted the specific requirements of Rule 10.7, particularly the mandatory processes outlined in subrules 10.2(g), (3), and (4). The history of the relationship between SLCN and Rath was taken into consideration, as they had previously engaged in hourly rate arrangements. However, the transition to a contingency fee agreement necessitated strict adherence to the Rules to ensure that SLCN understood the implications of the new arrangement.

Ultimately, the Court determined that the failure to comply with Rules 10.7(2)(g), 10.7(3),

and 10.7(4) was not a minor issue that could be overlooked. As a result, the contingency fee agreement was deemed unenforceable, leading to the conclusion that any accounts issued under the agreement would also be invalid.

## LAROCQUE V KANTOR LLP, 2024 ABKB 327

(SLAWINSKY J)

Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.17 (Review Officer's Authority) and 10.18 (Reference to Court)

The Appellant, Howard Larocque ("Larocque"), retained the Respondent law firm, Kantor LLP ("Kantor"), through Timothy Louis ("Louis"), an intermediary lawyer in British Columbia, to represent him in litigation against his father. Kantor billed Larocque for its legal services, which accounts were received and paid for personally by Louis on Larocque's behalf. Larocque subsequently sought review of the accounts, resulting in a decision to reduce the last bill by $3,000, which Larocque appealed.

After summarizing a Review Officer's authority pursuant to Rule 10.9, 10.10, 10.17, and 10.18, the Court found that the Review Officer erred by failing to determine whether the accounts were "periodic interim" or "periodic final" before reviewing the accounts, because the characterization of the account determines the applicable limitation period. Since the Review Officer did not first determine whether the accounts were periodic interim or periodic final, his review of the reasonableness of the accounts was missing the requisite foundation, and therefore his reasons were insufficiently grounded. The Appellant's original Application was remitted back to a different Review Officer for review.

## BERTRAM FAMILY TRUST V FELESKY FLYNN LLP, 2024 ABKB 341

(RICHARDSON J)

Rules 10.17 (Review Officer's Authority), 10.18 (Reference to Court), 10.26 (Appeal to Judge) and 10.27 (Decision of Judge)

This was an Appeal of the decision of the Review Officer regarding a legal bill submitted by the Respondent for tax planning services provided to the Appellants. The Review Officer reduced the bill by $100,000 but confirmed the remainder of the fees. The Appellants argued that the entire decision should be nullified, and they should be refunded the overpaid fees, claiming errors by the Review Officer. They also sought to have the matter quashed, remitted for rehearing, or set for Trial with full disclosure and expert evidence. The Respondent main-

tained that the Review Officer made no errors and sought Costs for the Appeal.

The Court acknowledged that the standard of review under Rule 10.26 is deferential, given the Review Officer's specialized knowledge and experience. The Court emphasized that errors must be clear on the record to justify interference. The Review Officer's decision to reduce the final fee by $100,000 was supported by detailed consideration of the complexities involved in the tax planning work, the reasonableness of the fees, and the terms of the retainer agreement.

The Court reviewed the application of Rule 10.17, which allows a Review Officer to take evidence either by Affidavit or orally under oath but does not require it. The Appellants argued they were not afforded procedural fairness because the hearing lacked sworn evidence and cross-examination. The Court found that the Review Officer conducted the hearing fairly, reviewed all submitted materials, and provided all parties an opportunity to present their submissions. The Court determined that the Review Officer's application of Rule 10.17 was proper and that the hearing was procedurally fair.

Regarding Rule 10.18, the Appellants claimed that the Review Officer exceeded his jurisdiction by interpreting the retainer agreement to include a "bonus fee" over the hourly rates. The Court found that the Review Officer did not interpret the retainer agreement but merely applied its terms to the 2021 engagement, which was governed by the 2017 agreement. The Court concluded that the Review Officer's jurisdiction was not exceeded and his application of Rule 10.18 was appropriate.

The Court concluded that the Review Officer's decision to reduce the fees by $100,000 was reasonable and supported by the evidence. The Court made an additional reduction of

$3,925 + GST for overbilling. The Review Officer's application of the relevant Rules was found to be appropriate and within jurisdiction. Consequently, the Court affirmed the remainder of the Review Officer's decision, awarded Costs on the Appeal to the Respondent, and confirmed that the outstanding fees were subject to interest as stipulated in the retainer agreement.

## AG CLARK HOLDINGS LTD V 1352986 ALBERTA LTD, 2024 ABKB 180

(BIRKETT 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)

The Court previously granted the Plaintiffs Summary Judgment against the Defendants after hearing a Special Chambers Application brought under s 53 of the former *Builders' Lien Act*, RSA 2000, c B-7 (the "Decision"). As the parties were unable to agree on Costs, the Court considered the appropriate Costs Awards following the Decision.

The Plaintiffs argued that they were entitled to full indemnity Costs or, in the alternative, 80% of its solicitor and own client Costs. The Defendants argued that a Costs Award based on column three of Schedule C was appropriate. The Court noted that the successful party is presumptively entitled to Costs under Rule 10.29. The Court also noted that Rule 10.31

provides wide discretion to make a Costs Award considering the factors set out in Rule 10.33.

The Court considered the procedural history, and draft Bills of Costs prepared by the parties. The Court compared the draft Bills of Costs submitted by the parties and noted that the Plaintiffs' Bill of Costs was almost 19 times the amount that the Defendants would be required to pay under Schedule C of the Rules. The Court determined that there must be proportionality between what the successful party spent and how much that party can reasonably expect the other party to pay. The Court noted that the time and steps taken in the Action, and therefore the solicitor and own client fees incurred were disproportionate to the Costs that should reasonably have been incurred. The Court declined to award full indemnity Costs and awarded Costs based on column four of Schedule C and an additional lump sum of $20,000.

## AT V AT, 2024 ABKB 201

(EAMON J)

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

Following a Decision confirming an Emergency Protection Order ("EPO"), the claimant applied for Costs. While the Claimant was substantially successful in the EPO proceeding, her Application was refused.

The Claimant sough Costs under Rule 10.29 and subsection 4(2)(d) of the *Protection Against Family Violence Act*, RSA 2000, c P-27 ("*PAFVA*"). Under the Rule 10.29, a successful party is entitled to Costs payable forthwith. Subsection 4(2)(d) of *PAFVA* provides that a protection Order granted by a Justice may include reimbursement for a claimant's losses, including "legal expenses and costs of an application under this Act".

Justice Eamon rejected the claimant's argument that subsection 4(2)(d) applied to the Application before him, as that provision dealt with protection Orders which are distinct from EPOs. Since the sections of the *PAFVA* governing EPOs do not contain a provision similar to subsection 4(2)(d), then, as a matter of public policy, the Legislature must not have intended to expose claimants of EPOs to costs. Instead, the Court may consider Costs arising from the review or Appeal of an EPO proceeding under Rule 10.33. However, Eamon J. noted that the Court has previously declined to "award costs against respondents in EPO proceedings merely because they were unsuccessful in contesting the EPO". To attract Costs, the claimant must have sought an EPO for collateral purposes or abused the Court's process, none of which were applicable in the cast at bar.

## CAMPBELL V COOPER, 2024 ABKB 206

(LOPARCO J)

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

This Costs Endorsement dealt with the question of whether Costs should be ordered after cancellation of a Judicial Dispute Resolution ("JDR"). The JDR was canceled due to availability issues, and the Parties ultimately decided to proceed with a private Arbitration. The Applicant requested Costs amounting to $15,000 for the canceled JDR.

The Court acknowledged that Costs are not typically awarded in a dispute resolution process. However, the Applicant argued that they should be permitted under Rule 10.31(2)(c), which allows for Costs in cases of serious misconduct. The Applicant pointed out that Costs were warranted, especially since the Court had offered alternative JDR dates, all of which were refused by the Respondent.

In considering Rule 10.29, 10.31, and 10.33, the Court stated that a successful party in an Application, proceeding, or Action is generally entitled to a Costs Award against the unsuccessful party. The Court also noted that the determination of Cost Awards is within the general discretion of the Courts.

The Court placed emphasis on Rule 10.31(2)(c), highlighting that dispute resolution Costs are only awarded if a party engages in serious misconduct during the dispute resolution process or the judicial dispute resolution process.

Justice Loparco reviewed relevant case law and concluded that, given the Respondent's attempts to reschedule and payment of the Arbitrator's retainer, this case did not involve the level of misconduct necessary to warrant a Costs Award under Rule 10.31(2)(c). The Court determined that, since the parties had agreed to a private dispute resolution process, any Costs Award would be at the sole discretion of the Arbitrator, including any Costs related to the Arbitration.

## BFL CANADA RISK AND INSURANCE SERVICE INC V LE, 2024 ABKB 338

(ROTHWELL 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)

The Costs Decision arose from an Application initially set for an interim Injunction, which was being resolved through a Consent Order, leading to a request for a short adjournment. The Applicant argued that they had spent significant resources in seeking an Injunction and therefore should be entitled to Costs.

The Respondent, on the other hand, claimed that they should be entitled to Costs as they successfully defended the Application and no breaches of the Unanimous Shareholder Agreement were proven. The Court referred to Rule 10.29, 10.31 and 10.33 noting the general principles regarding a successful party being

entitled to Costs. Justice T.G. Rothwell found that the Applicant was largely successful in obtaining what they sought through the Consent Order, leading to the decision to award Costs to the Applicant. The Court emphasized the importance of encouraging resolution and considered the complexity of the matter and the resources expended by both parties before deciding on the Costs Award.

## AUBIN V CONDOMINIUM PLAN NO 862 2917, 2024 ABKB 345

(MANDZIUK J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.41 (Assessment Officer's Decision)

The Decision arose from an Appeal of an Applications Judge's Decision where the parties could not agree on Costs. At first instance, the Applications Judge found the corporation's conduct improper under the *Condominium Property Act* and ordered remedial actions and Costs in favor of Ms. Aubin, the Respondent on Appeal. The corporation appealed, and the Appeal was granted, setting aside the initial Costs Award and granting Costs of the Action to the corporation.

The corporation argued that it was entitled to indemnification Costs, whereas Ms. Aubin asserted that the indemnification Costs were excessive, lacked reasonableness and proportionality and were not supported by evidence. The Court noted that the principle of proportionality applies to non-monetary issues as well, and even though the initial remedy sought was not monetary, the principle applied. The Court determined that the indemnification Costs requested by the corporation were far greater than the value of what was being sought by Ms. Aubin at first instance. The Court noted that awarding a percentage of fees is not proper if the percentage is disproportionate to the issues and the amounts involved. The Court concluded that the amount requested was inordinately high and that the corporations' prepared Bill of Costs did not possess the sufficient evidence to ground the amount requested.

The Court found that though the corporation failed to efficiently conduct the proceedings, new evidence of steps taken after the Order granted by the Applications Judge were factored into the Appeal Decision reasons. Though Rule 10.29 provides that the successful party is entitled to Costs, the steps the corporation took to satisfy the terms of the Order were contributing factors to its success on Appeal. Therefore, the somewhat mixed success of both parties favoured granting Costs pursuant to Schedule C. Consistent with the considerations listed at Rule 10.33(1)(2), the relatively low amount at stake, the jurisprudential value of the case, the fact that Ms. Aubin was not vexatious or frivolous in bringing her Action, and the fact that the matter was not overly complex, further supported granting Costs pursuant to Schedule C. The Court, after considering the factors listed at Rule 10.33(2), applied a multiplier of 1.5 for the Appeal to account for the reasonable settlement offer made by the corporation subsequent to the corporation taking steps to satisfy the terms of the Order.

Therefore, using its discretion under Rule 10.31, the Court rejected the corporation's claim for

indemnification Costs, and Costs were awarded pursuant to Schedule C, Column 1, with a multiplier of 1.5 for the Appeal and no multiplier for other steps taken in the Action. The Court noted that, pursuant to Rule 10.41, an Assessment Officer is permitted to review the Bill of Costs and that the parties could appear before the Assessment Officer for resolution of any disputes concerning steps taken or not taken, as there was some dispute in that regard that had not been resolved in the Decision.

## QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP, 2024 ABCA 219

(HUGHES, PENTELECHUK, AND KIRKER JJA)

Rules 10.29 (General Rule for Payment of Litigation Costs) and 14.88 (Cost Awards)

The parties had been unable to settle the issue of Costs since the Court's Decision to allow the Appeal of 12-10 Capital Corp. ("Capital Corp"), in *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2024 ABCA 115.

The Applications Judge issued an Order releasing the Respondent's registered certificate of *lis pendens* ("CLP") on Capital Corp's lands and dismissed the Application for an Attachment Order. The Applications Judge instructed the Respondent to bear the Costs related to both the CLP Application and the subsequent Application. The Chambers Judge did not intervene with the Applications Judge's Decision on Costs. However, the Chambers Judge granted the Respondent's Application to amend pleadings and the Attachment Order sought in the Appeal of the Applications Judge's Decision. Pursuant to Rule 14.88, the Chambers Judge determined that the Respondent, as the prevailing party in the Appeal, was entitled to recover Costs, but the specific amount was not determined. The Chambers Judge's Decision was appealed and reversed by the Court of Appeal.

The Appellants sought solicitor-client Costs amounting to $328,790 for the Appeal and both Applications heard in the Court of Kings Bench. The Appellants argued that extraordinary Costs were warranted since the Respondent engaged in a series of behaviours that constituted an abuse of process. The Respondent acknowledged that the Appellants were entitled to Costs for the successful Appeal but contended that Costs should be evaluated according to Column 5 of Schedule C, disputing the justification for claims of misconduct.

The Court resolved the remaining Costs matters concerning the Appeal and previous proceedings. Citing *Clearbakk Energy Services Inc v Sunshine Oilsands Ltd*, 2023 ABCA 96, the Court concluded that with the reversal of the Chambers Judge's Decision on Appeal, the grounds for awarding Costs in favour of the Respondent no longer applied. The Court ruled that the Appellants are entitled to Costs according to Column 5 of Schedule C, as solicitor-client Costs are typically granted only in extraordinary cases involving egregious behavior.

As a result, the Court allowed the Appeal. Pursuant to Rule 10.29, the Appellants were entitled to Costs for both the Appeal and the proceedings before the Chambers Judge.

## ERICKSON ESTATE V AXSEN, 2024 ABKB 69

(LITTLE J)

Rules 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a decision for Costs under Rule 10.33. The merits decision respecting Rules 9.15 and 9.16 (applications to set aside, vary, and discharge orders) can be found at 2024 ABKB 10.

Briefly, in the underlying Application, the Applicants were successful in setting aside an *ex parte* order on the basis that there had been incomplete disclosure of relevant information at that hearing, particularly with respect to the financial condition of the moving party.

Counsel for the Applicants sough solicitor-client Costs of close to $200,000.00; alternatively, they sought costs in line with *McAllister v Calgary (City)*, 2021 ABCA 25 ("*McAllister*"), in the region of 50% of their solicitor-client Costs.

Turning to Rule 10.33, Little J. considered the following applicable factors: (a) The result of the action and the degree of success of each party. Here, the Action was not concluded, but the Applicants were entirely successful in their Application to set aside "a broad, restrictive Order", which restrained them and their related corporations, from dealing with any of their exigible property; (b) The importance of the issues. Here, Little J. noted that a party's conduct in obtaining an *ex parte* order was an important issue. It was necessary that the Applicants mount an "enthusiastic response designed to ensure as best as possible that the Order was properly vacated".

For those reasons, Little J. adopted the *McAllister* approach in conjunction with a "lump sum" permitted by Rule 10.31(1)(b)(ii). It was found that a lump sum award of $40,000 recognized the above factors and avoided the necessity of further involvement of the Court and its finite resources in settling the matter of Costs.

## VLM V DOMINEY, 2024 ABKB 295

(HENDERSON J)

Rules 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant sought a ruling on Costs following a successful certification Application. The dispute was solely as to quantum. The Applicant sought an amount equivalent to 40-50% of actual legal fees, relying on the factors for Costs outlined in Rule 10.33. The Court held that that 40-50% Costs are not the standard, and that a Judge has considerable discretion in setting "reasonable and proper costs" under Rule 10.31. Justice Henderson also considered the factors outlined in Rule 10.33(1). Henderson J. was unable to conclude that a percentage of time recorded by counsel was an appropriate measure of Costs and instead ordered Costs under Schedule C of the Rules.

## GIANNELIA V GIANNELIA, 2024 ABKB 344

(BELZIL J)

Rule 10.31 (Court-Ordered Costs Award)

The Plaintiff sought a Costs Award following a Decision on her claims for divorce, spousal support, and division of matrimonial property. The Trial, which spanned eight days, involved substantial records and was complicated by the Defendant's failure to make full and frank disclosure.

The Plaintiff argued for enhanced Costs due to the Defendant's conduct, which protracted the litigation by delaying the Action, refusing to admit relevant facts, and consistently violating Court Orders.

The Court found that the Defendant's conduct in failing to make full disclosure, failing to comply with Case Management Orders, and dissipating matrimonial assets, although not justifying an award of solicitor-client Costs, fell short of what was expected of a responsible litigant and warranted enhanced Costs. Recognizing the extraordinary efforts required to address the Defendant's litigation misconduct and the incomplete evidence presented at Trial, the Plaintiff was awarded lump sum Costs of $620,000.00 (inclusive of disbursements and GST) under Rule 10.31, which allows the Court to order payment of reasonable and proper Costs without reference to Schedule C.

## WALCZAK V CANADIAN IMPERIAL BANK OF COMMERCE, 2024 ABKB 373

(SILVER J)

Rules 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Appellant appealed an Applications Judge's decision of granting a Summary Judgment to the Respondents, finding the claim statute barred under the *Limitations Act*. The Court investigated various sections of the *Limitations Act* to determine if the claim was statute-barred and if any of the exceptions under section 4 of the *Limitations Act* applied. The Court dismissed the Appeal.

The Respondents requested Costs in the amount of $16,700, which applied a multiplier of 1.5 of their Schedule C Costs of $10,800. The Court considered Rule 10.31 and 10.33 noting that the Costs in this case should be modest. Justice Silver had acknowledged that the Respondents were the successful party in this Appeal, and there were some settlement Offers to consider, however, the Appellant had lost this Appeal due to a mandatory provision in the law and not based on the merits. If the claim had been brought on in time, the Respondents could arguably be found negligent. Justice Silver also considered the delay on the Respondent's part in responding to the Appellant's inquiries, which may have contributed to the expiration of the limitation period. Ultimately, the Court awarded Costs to the Respondents in the amount of $1,600.

## PENN V ST STEPHEN'S COLLEGE, 2024 ABCA 222

(ROWBOTHAM, PENTELECHUK AND HO JJA)

Rules 10.31 (Court-ordered Costs Award) and 14.88 (Costs Awards)

The Court previously allowed the Appellant's Appeal (the "Appeal"). The Appellant, a self-represented litigant, now sought party and party Costs under Schedule C, Column 5, and the return of the $3,000 in Costs ordered against her in the most recent Judicial Review Application.

The Appellant was ultimately awarded Costs under Schedule C, Column 1 for specific items related to the Appeal and new evidence Applications. The Respondent was ordered to return $3,000 to the Appellant and pay her $7823.59 in costs and disbursements, plus applicable GST.

Rowbotham, Pentelechuk, and Ho J.J.A. considered Rules 14.88(1) and 10.31(5) and determined that while self-represented litigants are normally not entitled to Costs for legal fees they did not incur, the Appellant's case warranted an exception. The Appellant's previous legal representation and her familiarity with the case record contributed significantly to the merits of her Appeal. In reaching that conclusion, Rowbotham, Pentelechuk, and Ho J.J.A. commented that the Court will award Costs to a self-represented litigant if it would serve one of the policy reasons. These policy reasons include encouraging settlement, preventing frivolous, vexatious or harassing litigation, and encouraging economy and efficiency during litigation.

Rowbotham, Pentelechuk, and Ho J.J.A. also noted that the Respondent's delay in disclosing the existence of an evidence (the "Evidence") exacerbated the litigation process. Costs for both the Appeal and the new evidence Applications were justified because they were crucial to the successful outcome of the Appeal. Rowbotham, Pentelechuk, and Ho J.J.A. disagreed with the Respondent on excluding Costs for the McKenzie Friend Application and the second Appeal hearing, awarding Costs for these items as well.

When determining the quantum of Costs to be awarded, Rowbotham, Pentelechuk, and Ho J.J.A. considered Rule 14.88(3) and determined that Costs under Schedule C, Column 1 was appropriate.

The Appellant sought for enhanced Costs which she supported by reference to her repeated requests for the Evidence. Rowbotham, Pentelechuk, and Ho J.J.A., citing *Kantor v Kantor*, 2023 ABCA 329, commented that while conduct which unnecessarily delays proceedings can justify enhanced Costs, when Appeal Costs are at issue, the delay must relate to the Appeal. There was nothing in the Respondent's conduct that resulted in any delay of the Appeal. As such, the appropriate quantum of Costs was found to be Schedule C, Column 1.

## ORPHAN WELL ASSOCIATION V SANLING ENERGY LTD, 2024 ABKB 240

(HARRIS J)

Rule 10.33 (Court Considerations in Making Costs Award)

The dispute involved fees owed between the parties arising from an oil and gas contract. Both parties brought Applications regarding the fees, but the primary Application was withdrawn on a without Costs basis. Only the cross-Application remained. Justice Harris dismissed the cross-Application, substantially reducing the amount to be paid by the Respondent. Despite this, the Applicant argued for Costs of the cross-Application on a full indemnity basis.

Justice Harris noted the general rule that only a successful party is entitled to Costs. Harris J. also noted that the Court has considerable discretion in deciding Costs Awards, so long as that discretion is exercised reasonably. Reference was made to the factors outlined in Rule 10.33(2) which the Court may consider when deciding to depart from the general rule that a successful party is entitled to Costs, including unnecessary litigation and misconduct. However, the Court did not agree that the Respondent's actions rose to a level that warranted a departure from the general rule, and no Costs were awarded to the Applicant.

## MCCORMACK V ALBERTA HEALTH SERVICES, 2024 ABKB 263

(NIELSEN ACJ)

Rule 10.49 (Penalty for Contravening Rules)

This was a Memorandum of Decision issued by Acting Chief Justice Nielsen, not directly addressing the lawsuits initiated by Plaintiff, Mark JJ McCormack, against numerous Defendants. Instead, the Decision focused on McCormack's improper communications and demands directed at personnel of the Court of King's Bench of Alberta. The Court noted that the Plaintiff, as a self-represented litigant, engaged in communications that bypassed established Court procedures and harassed Court staff, actions which violated Court norms and prompted the invocation of the Court's inherent jurisdiction to protect the integrity of its processes.

The Decision highlighted the inappropriate and escalated nature of the Plaintiff's interactions, particularly his use of emails that circumvented established protocols, constituting an abuse of Court process. Consequently, the Court imposed restrictions on the Plaintiff, mandating that he could only communicate with the Court through email or telephone if represented by legal counsel, and restricted the Plaintiff's interactions to direct submissions at the Court counter or via mail.

Further, the Court warned the Plaintiff of potential consequences, including penalties under Rule 10.49 if the abusive behaviours

continued. The Court emphasized the need for the Plaintiff to change his conduct immediately and strongly recommended that he seek legal representation to guide his future actions in the litigation process.

## BEHR V BEHR, 2024 ABKB 288

(NIELSEN ACJ)

Rule 10.49 (Penalty for Contravening Rules)

The case involved a divorce, where the Court previously ordered the severance of divorce and property issues and directed the sale of family properties. The Defendant, a self-represented litigant, disputed the property sale Order not through legal appeal but by sending pseudolegal documents asserting his identity as separate from legal entities and threatening fines against Justice Akgungor for alleged trespasses on his rights.

After reviewing the relevant jurisprudence on "Organized Pseudolegal Commercial Arguments" ("OPCA"), a category of not-law concepts, the Court concluded that the Defendant clearly intended to interfere with the proper administration of justice with his abusive OPCA strategies. If the Defendant disagreed with the March 12, 2024 Order, and/or Akgungor's J. conduct, the Court pointed out that there were legitimate ways to raise those issues within Canadian law and by judicial administration. Instead, the Defendant chose pseudolaw to threaten and bully his target.

Therefore, the Court instructed the Defendant to provide written submissions and/or Affidavit evidence on why he has an "adequate excuse" for what he had done. Otherwise, the Court would impose a Rule 10.49(1) penalty. Following the Court's practice in collecting these penalties from uncooperative abusive litigants, the Court warned the Defendant that he could anticipate that the Court would Order that any Rule 10.49(1) penalties imposed would be paid to the Court from his proceeds from the Court-ordered sale of the properties.

The Court also took issue with the Alberta lawyer who notarized and formalized the OPCA documents, noting that the notarization was problematic, and that the Court had the ability to impose Rule 10.49(1) penalties against lawyers who notarize and authentic pseudolaw documents. The Court of Appeal of Alberta has repeatedly instructed that lawyers must not notarize or otherwise authenticate pseudolaw documents. However, and after reviewing the materials, the Court concluded that the pseudolaw documents authenticated themselves did not purport to reject Court authority, impose false claims, or advance the Defendant's presumptively bad intent Strawman Theory and Three/Five Letters schemes. Given that, the Court did not believe penalties under Rule 10.49(1) for the lawyer were appropriate in the instance.

The Court went on to warn the Defendant that if he persists in abusing the Court, he would be subject to possible larger fines, and that the Court may respond with other litigation and litigant management steps, such as Costs, communications restrictions, and Court access restrictions.

## AKPAN (RE), 2024 ABCA 232

(MARTIN, STREKAF AND ANTONIO JJA)

Rule 10.49 (Penalty for Contravening Rules)

Associate Chief Justice Rooke (as he then was) found that Grace Akpan ("Akpan") had participated without excuse in an illegal scheme by notarizing a package of pseudo law documents. The Decision was made on the Court's own motion and without notice to Akpan. The Court then gave Akpan a copy of the Decision and 14 days to make submissions on why she should not be penalized pursuant to Rule 10.49. Akpan was ultimately ordered to pay a $10,000 penalty.

Akpan appealed the Decision, arguing a breach of natural justice. The Court agreed with Akpan, noting that Rooke A.C.J. (as he then was) made serious findings about Akpan's conduct before she was provided with an opportunity to make submissions. The Appeal was allowed, the Rule 10.49 penalty set aside, and the matter was directed back to the administrative justice of the Court of King's Bench to consider whether proceeding with a Rule 10.49 motion was warranted.

## KOTYK (RE), 2024 ABCA 233

(MARTIN, STREKAF AND ANTONIO JJA)

Rule 10.49 (Penalty for Contravening Rules)

The Appellant, a lawyer, appealed a decision under Rule 10.49, which allows the Court to order a "party, lawyer or other person" to pay a penalty if they have contravened the Rules, a practice note or a direction of the Court, without adequate excuse, in a way that has or may interfere with the administration of justice. The decision below directed the lawyer to pay a $5,000 penalty for notarizing a "pseudolaw" document. The decision was made on the Court of King's Bench own motion, without notice to the Appellant, and without affording him an opportunity to make submissions in response.

The Court of Appeal emphasized the importance of natural justice and the *audi alteram partem* rule, which requires parties be given adequate notice of the case against them and a fair opportunity to be heard before Judgment is rendered. The Court noted that a finding of improper conduct on the part of counsel is a serious matter and, as a general rule, when a Court raises a matter on its own motion, it must give the affected parties adequate warning and afford them a fair opportunity to present evidence and argue their position. For this reason, the Appeal was allowed and the Rule 10.49 penalty imposed on the Appellant lawyer was set aside.

## MYW V DTW, 2024 ABKB 231

(HOLLINS J)

Rule 10.52 (Declaration of Civil Contempt)

The Applicant applied for an Order finding the Respondent in Contempt of an Interim Parenting Order (the "Order"). Hollins J. found the Respondent in Contempt of the Order.

Hollins J. cited *Carey v Laiken*, 2015 SCC 17 for the three elements for civil Contempt that must be established beyond a reasonable doubt: (1) that the Order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) that the party alleged to have breached the Order must have had actual knowledge of it; and (3) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels done (the "Elements").

Hollins J further commented that the Elements are codified in Rule 10.52(3), which also requires that the alleged contemptor have no reasonable excuse for the breach. That requirement has been described as reflective of the highly discretionary power of the Court to sanction a party for civil Contempt.

Hollins J. found that all the elements of civil Contempt were established. The Order granted the Applicant parenting time with both of his children over their spring break. When he went to pick them up from the Respondent's home, the younger child did not come out. Ultimately, the Applicant did not see the younger child over the spring break period.

The Respondent had previously admitted that she was in breach of the Order. While was asked to reconsider withholding the younger child while the Court attempted to schedule the contempt hearing, she refused. As such, it was found that there had been no attempt by the Respondent to purge her Contempt. It was further found that the Respondent did not have a reasonable excuse for her breach of the Order. Hollins J. found that the Respondent was in civil Contempt for the breach of the Order.

## BROWN-FORMAN CORPORATION V CHARTON-HOBBS INC, 2024 ABKB 261

(ANGOTTI J)

Rules 11.25 (Real and Substantial Connection) and 13.6 (Pleadings: General Requirements)

This case was the culmination of the Trial of an Action commenced by a liquor supplier seeking damages against its former agent for withholding products from the market, and the agent's Counterclaim for payment in lieu of notice on termination. As part of the Counterclaim, the agent sought termination pay for both its agency in the West and its agency in Ontario, which arose under separate contracts. The supplier defended the Ontario claim, arguing that the Court had no jurisdiction simpliciter to decide the claim.

Justice Angotti cited Rule 11.25(3) for the relevant presumptive factors to consider in determining if there was a real and substantial

connection between Alberta and the Ontario claim: 1) the claim is related to a contract made, performed, or breached in the chosen forum; 2) the chosen forum's law governs the claim; 3) the Defendant to the claim is resident in the chosen forum; or 4) the Defendant carries on business, by an actual presence, in the chosen forum.

Angotti J. found that the Ontario claim did not have a real and substantial connection to Alberta as the underlying contract was made and breached in Ontario, dealt with and agency relationship in Ontario, and included a clause that it was governed by the laws of Ontario. However, because the Ontario claim arose by way of Counterclaim, and the Court had jurisdiction for the primary claim, Justice Angotti found that the Court had jurisdiction simpliciter over the Ontario claim.

The supplier further argued that the Ontario claim was not properly pleaded, as there was no mention of the Ontario agreement or its breach in the Counterclaim. Justice Angotti considered the requirement arising from Rule 13.6(2) that Pleadings must set out relevant facts, and found that the Ontario claim was not properly pleaded due to the absence of facts related to the Ontario agreement. The Ontario claim therefore could not succeed.

## ZIBELL V ZIBELL, 2024 ABCA 145

(PENTELECHUK, HO AND FETH JJA)

Rule 12.48 (Availability of Application for Summary Judgment)

This Appeal concerned the interpretation of certain clauses within a divorce and property Contract (the "Contract"), and specifically, whether the conditions precedent to Ms. Zibell's waiver of spousal support were satisfied. The answer to this question informed the second issue in the Appeal, namely the remedy available to her if they were not.

Ms. Zibell maintained that the conditions for her waiver of spousal support were not met, Mr. Zibell having failed to provide certain RRSP values as contemplated in the Contract. The Chambers Judge agreed and awarded in Ms. Zibell's favour.

On Appeal, the Court found the Chambers Judge's interpretation of the Contract could not be sustained, and that Ms. Zibell's waiver of spousal support became operative (the Contract provided that the claim was satisfied by receiving the matrimonial home and certain pension amounts).

Ms. Zibell nonetheless argued that Mr. Zibell was precluded from invoking the Contract as a bar to further spousal support on account of his alleged RRSP breach, citing *McVeetors v McVeetors*, 1985 CanLII 2168 (ONCA), which held "... it is elemental that a husband who seeks to invoke a separation agreement as a bar against a claim for further maintenance by a wife must himself have honoured that agreement". In other words, should the waiver be deemed enforceable, Ms. Zibell sought the Court to permit her to apply for Summary Judgment in existing proceedings under the *Family Property Act* pursuant to Rule 12.48(b), rather than commence a separate proceeding for specific performance or damages.

The Court found that *McVeetors* dealt with the "variation" of a separation agreement, which was not considered by the Chambers Judge with there having been no argument made in that regard. As such, the Court declined to

comment on this remedy and instead encouraged Ms. Zibell to pursue Summary Judgment under Rule 12.48(b).

## SZAKALY V SMITH, 2024 ABCA 171

(HO JA)

Rules 12.61 (Appeal from Court of Justice Order to Court of King's Bench), 12.71 (Appeal from Decision of Court of King's Bench Sitting as Appeal Court) and 14.5 (Appeals Only with Permission)

The Applicant sought permission under Rule 14.5 to Appeal an Order issued by a Court of King's Bench Justice sitting as an Appeal Court under section 9(1) of the C*ourt of Justice Family Law Procedure Regulation* and Rule 12.61. This Order allowed the Respondent to relocate with their two children from Alberta to British Columbia. The Applicant argued that the King's Bench Justice made errors of law in their decision.

Rule 12.71 provides no Appeal lies to the Court of Appeal from a decision of the Court of King's Bench sitting as an Appeal Court for decisions made under the *Family Law Act* except on a question of law or jurisdiction, or both, with permission of a Judge of the Court of Appeal.

The Applicant bore the burden of establishing that: (i) there is an important question of law or precedent; (ii) there is a reasonable chance of success on Appeal; and (iii) the delay will not unduly hinder the progress of the Action or cause undue prejudice. The Court concluded that none of the Applicant's proposed questions met the test for Permission to Appeal.

The Court noted that the King's Bench Justice had correctly applied the law regarding the burden of proof and had adequately considered all necessary factors in the best interests analysis. Furthermore, Justice Ho agreed with the King's Bench Justice's view on the limited utility of appealing interim Orders and emphasized the importance of moving towards a final hearing rather than prolonging litigation through Appeals. The Court agreed that there was no question that mobility Applications pose different challenges for litigants and Courts than other family law Applications, but it was apparent the King's Bench Justice was alive to future arguments about the *status quo* when they urged the Applicant to move towards a final hearing as quickly as possible, rather than appealing an Interim Order. Justice Ho shared the view that it was in the parties' and childrens' interest to move towards a final hearing, and was concerned that an Appeal of the interim Order would unduly hinder progress of the matter.

Therefore, the Application for permission to Appeal was dismissed.

## STRAIGHTVAC SERVICES LTD V SUNSHINE OILSANDS LTD, 2024 ABCA 8

(KHULLAR, STREKAF AND HO JJA)

Rule 13.14 (Endorsement of Documents)

This was an Appeal that centered on the interpretation of Ministerial Order 27/2020, issued during the COVID-19 pandemic, which suspended the running of limitation periods under Section 3(1)(a) of the *Limitations Act*. The Chambers Judge's narrow interpretation led to the summary dismissal of the Appellant's Action, a decision which was subsequently challenged. The Appellate Court clarified that the Ministerial Order intended to suspend these limitation periods for all Actions during its effective period, irrespective of when the Actions were commenced.

The context of the dispute involved StraightVac Services Ltd. ("StraightVac"), which sought rectification or damages against Sunshine Oilsands Ltd. following disagreements over a share transfer as per their settlement agreement.

Although StraightVac initiated its claim after the nominal expiration of the typical limitation period, it fell within the extended timeframe due to the pandemic-related suspension.

The Court also touched on the implications of Rule 13.14, which pertains to filing deadlines but those were specifically exempted from suspension by the Master Orders referenced in the Appeal. The Court noted that the Master Orders did not suspend the limitation periods set by the Limitations Act, thus maintaining the applicability of the Ministerial Order's suspension to the case at hand.

Ultimately, the Court concluded that the initial Summary Dismissal was incorrect, leading to the allowance of the Appeal and the setting aside of the Summary Dismissal.

## GARBERA ESTATE, 2024 ABKB 185

(RENKE J)

Rule 13.18 (Types of Affidavits)

When hearing a Special Chambers Application concerned the administration of an estate, Renke J. asked counsel whether the determination of an issue would require *viva voce* evidence. Both counsel submitted, and Renke J. agreed, that the documentary record, particularly as it included cross-examinations on Affidavits, permitted a just and proportionate resolution of the issues without the need for *viva voce* evidence.

Renke J. relied on *Saito v Lester Estate*, 2021 ABCA 179 for the proposition that some flexibility is required in interpreting Rule 13.18(3) and the use of hearsay affidavits in Summary Judgment or analogous Applications, particularly those involving corporations and by analogy, estates.

However, Renke J. cautioned against a general loosening of Rule 13.18(3) or the rules of admissibility of evidence. Renke J. further commented that flexibility is required if there is no better evidence than hearsay evidence, even if the strictures of the reliability element

of the principled exception are not satisfied and no traditional hearsay exception applies. That does not loosen the grip of the hearsay rule respecting issues for which better evidence than hearsay is reasonably available.

## HEATH-ENGEL V ALBERTA (HUMAN RIGHTS COMMISSION), 2024 ABCA 138

(GROSSE JA)

Rule 14.8 (Filing a Notice of Appeal)

The Applicant sought to Appeal a Court of King's Bench Decision outside the one-month period set out in Rule 14.8.

Grosse J.A. noted that the factors guiding the Court's discretion to extend the time to Appeal: (1) a bona fide intention to Appeal while the right to Appeal existed; (2) an explanation for the failure to Appeal in time that serves to excuse or justify the lateness; (3) an absence of serious prejudice such that it would not be unjust to disturb the Judgment under Appeal; (4) the Applicants must not have taken the benefits of the Judgment under Appeal; and (5) the Appeal would have a reasonable chance of success if allowed to proceed.

Grosse J.A. acknowledged the Applicant's genuine intention to Appeal, short delay, and lack of benefit from the dismissal of the Judicial Review Application. Furthermore, Grosse J.A. noted that the Applicant provided some explanation for the delay, such as misunderstanding of the Rules and health issues, although the weight of the information was attenuated because it was neither sworn nor affirmed.

However, Grosse J.A. found that the Applicant's proposed grounds for Appeal lacked merit, as they did not allege errors by the Chambers Justice and merely sought to re-argue the original human rights complaint or make complaints about counsel in the course of the human rights proceedings.

Consequently, Grosse J.A. decided not to extend the Appeal period and dismissed the Application.

## WORBECK V GEF SENIORS HOUSING, 2024 ABCA 159

(SLATTER JA)

Rule 14.16 (Filing the Appeal Record)

The Applicant applied to restore the Appeal of a decision that struck out his Statement of Claim. The Appeal was struck by the Registrar under Rule 14.16(3) for the Applicant's failure to file the Appeal Record in time.

Appeal Justice Slatter dismissed the Application to Restore the Appeal, noting that the Applicant's materials, much like his Statement of Claim, were difficult to read and understand. Notwithstanding that the Appeal was struck

some time ago, the Applicant was still not in a position to file the Appeal Record and failed the test for restoring Appeals set out in *Li v Morgan*, 2020 ABCA 186.

## BANK OF MONTREAL V MCLENNAN, 2024 ABCA 197

(SLATTER JA)

Rules 14.18 (Content of Appeal Records - Standard Appeals) and 14.25 (Contents of Factums)

The Applicant applied to restore their Appeal, which was struck for failure to file the Appeal record. The Applicant explained that the delay was due to her poor health and unfamiliarity with the Rules. The Court granted the Application and ordered that the Applicant must assemble the Appeal record using the format stipulated in Rule 14.18 and with a table of contents as required by Rule 14.18(1)(a). For the Applicant's sake, the Court also noted that the contents of a Factum are set out in Rule 14.25.

## FOUGERE V THE KING'S UNIVERSITY, 2024 ABCA 183

(FEEHAN JA)

Rule 14.45 (Application to Admit New Evidence)

The Applicant applied for an extension of time to file an Application to admit new evidence on an Appeal (the "Application"). Feehan J.A. considered the Application under Rule 14.45(1) and ordered it be dismissed.

Feehan J .A. commented that although the current Rule does not expressly require a party to obtain leave to apply to introduce new evidence if such an Application had not been made before the party's factum was due, the Court still requires Applications for permission to file late new evidence. Relevant considerations include: 1) the reason for the late filing, 2) the effect of the late filing on the Appeal, and 3) whether the Application for new evidence has a reasonable prospect of success or is *prima facie* meritorious (the "Criteria").

Having considered the Criteria, Feehan J.A. held that although the threshold for granting an extension of time to apply for leave to admit new evidence is low, the Application did not meet that threshold, and therefore should be dismissed. Specifically, the video proposed to be admitted as new evidence had been available since September 2020, and known to the Applicant since late 2020 or early 2021. The Applicant failed to provide an explanation for the lateness of the Application to admit that video into evidence. Further, it did not appear the video could have any relevant impact on the Appeal by the Applicant being heard next week. A potential Application to admit new evidence would have no reasonable prospect of success nor was it *prima facie* meritorious.

## KATELNIKOFF V IRRICANA (TOWN), 2024 ABCA 205

(FEEHAN, HO AND DE WIT JJA)

Rule 14.45 (Application to Admit New Evidence)

The Appellant had flooding on her property as a result of a blockage of a concrete swale which was connected to a drainage pipe that ran through her property. She sought a mandatory permanent Injunction and an Order that the town of Irricana remove the drainage pipe. The Application was dismissed, which led to the Appeal.

The Appellant sought to adduce new evidence pursuant to Rule 14.45(1), which included documents, emails, photos, and a further affidavit. After setting out the test for admission of fresh evidence from *Palmer v The Queen*, [1980] 1 SCR 759, the Court considered each piece of proposed new evidence. Ultimately, the Court declined to admit the fresh evidence for a variety of reasons, including that that it was irrelevant, would not bear on a decisive issue in the Application, and that it could have been previously adduced. The Appeal was dismissed.

## JL ENERGY TRANSPORTATION INC V ALLIANCE PIPELINE LIMITED PARTNERSHIP, 2024 ABCA 175

(STREKAF, HUGHES AND ANTONIO JJA)

Rules 14.46 (Application to Reconsider a Previous Decision) and 14.72 (Binding Precedents)

The Applicant, JL Energy Transportation Inc. ("JL"), applied for permission within its Appeal to argue that *Secure Energy Services Inc v Canadian Energy Services Inc*, 2022 ABCA 200 ("*Secure Energy*") should be reconsidered pursuant to Rules 14.46 and 14.47. The Court noted that leave to reconsider binding precedents is only granted in very limited circumstances, subject to consideration of the six factors set out in *R v Effert*, 2010 ABCA 144.

The Court accepted the Applicant's argument that the test to reconsider a previous decision of the Court of Appeal was met because S*ecure Energy* is a recent decision that had not become settled law, and because it had only been relied on for the relevant issues the Applicant sought reconsideration of in the decision under Appeal.

JL's Application argue on its Appeal that *Secure Energy* should be reconsidered was granted.

## RUNKLE V CANADA (ATTORNEY GENERAL), 2024 ABCA 220

(SLATTER, FAGNAN AND FRIESEN JJA)

Rules 14.46 (Application to Reconsider a Previous Decision) and 14.72 (Binding Precedents)

The Applicants sought reconsideration of the decision in *Canada (Attorney General) v Smykot*, 2023 ABCA 131, decided April 20, 2023, which concerned the legal status of their firearms. The reconsideration Applications were brought under Rules 14.46 and 14.72. The Court of Appeal dismissed the Applications.

Rule 14.46 stipulates that in order for the Court of Appeal to reconsider its previous decisions, the Applicant must file and serve its Application for reconsideration, and have it returned before the filing of, and prior to the deadline for filing, the Applicant's Factum. Parties who fail to obtain permission under Rule 14.46 are barred from arguing reconsideration by Rule 14.72.

The Court of Appeal noted that predictability and stability are important values in the legal system, and the Court is bound by its previous decisions. In determining whether to overturn its precedents, the Court of Appeal weighs and considers several criteria. The Court analyzed five factors.

First, it noted the recency of the precedent. *Smykot* was one year old and absent a patent error or a reason to doubt the precedent's correctness, reconsideration would have undermined the stability of the law.

Second, it asked whether the precedent disapproved or was contrary to decisions from other Courts of appeal. *Smykot* determined that the standard form letters sent to firearm owners were not license revocations and thus could not be reviewed under the *Firearms Act*. *Smykot* was followed once by the Ontario Court of Appeal and called into question by the Federal Court. The Federal Court decision, however, did not determine whether the standard form letters triggered a right of review.

Third, it asked whether the precedent overlooked binding statute or authority. Here, the Court of Appeal noted that *Smykot* did not opine on the Court of Justice's jurisdiction to decide Firearm Act appeals, and thus did not overlook binding authority.

Fourth, the Court of Appeal asked whether the precedent created settled expectations. Given the recency of the decision, it was likely that *Smykot* did not create settled expectations.

Fifth, whether the precedent arose from Reasons for Judgment Reserved or a Memorandum of Judgment. *Smykot* came from a reserved Judgment.

After considering the five factors and determining that *Smykot* had not been decided on a deficient record, the Court of Appeal dismissed the reconsideration applications.

## VANMAELE V MARYNIAK, 2024 ABCA 181

(FAGAN JA)

Rule 14.47 (Application to Restore an Appeal)

The Applicant sought to restore an Appeal under Rule 14.47. The Appeal concerned the Applicant's Application against the estate of his father to adduce new evidence regarding whether he qualified as a "dependant" under the (now repealed) *Dependents Relief Act*.

On May 14, 2024, the Appeal was deemed abandoned due to documentation not having been filed within the allotted time, which was after the date in which he applied to restore the Appeal. The Court noted that "the decision on an application to restore an appeal is discretionary. In determining whether it is in the interests of justice to restore the appeal, the Court must weigh all the relevant factors, set out in *Li v Morgan*, 2020 ABCA 186 at para 8". This includes the (i) arguable merit of the Appeal; (ii) explanation for the delay that caused the Appeal to be struck or dismissed; (iii) explanation for the delay in applying to restore the Appeal; (iv) continuing intention to proceed with the Appeal; (v) prejudice to the Respondent; and (vi) interest of justice.

Although noting that "arguable merit" is a "low standard", Fagan J.A. found that it did not appear that the proposed further evidence related to the sole question which was to be decided at Trial, being whether the applicant was a "dependant" at the relevant time.

In considering the explanations for the delays in filing and applying to restore the Appeal, the Court acknowledged his "numerous chronic medical conditions" but found this to be an insufficient reason to revive the Appeal. The Court drew minimal inferences regarding his continued intention to proceed with the Appeal.

In light of the circumstances of the Appeal not deeming to be abandoned until after the Applicant filed his Application to restore, any presumption of prejudice was weak. Finally, the Court concluded that restoring the Appeal would not serve the interests of justice, primarily due to the lack of arguable merit in the Appeal itself.

## POPP V ZACK, 2024 ABCA 209

(CRIGHTON JA)

Rules 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

The Applicant, Ms. Popp, sought to relocate with her child to Illinois, a move opposed by the Respondent, Mr. Zack. The Alberta Court of King's Bench denied the Ms. Popp's relocation request, citing, among other things, a shared parenting arrangement that had been in place since 2019.

Ms. Popp applied pursuant to Rule 14.47(b)(ii) to restore her Appeal, which was struck when

she failed to file the required documents within the required time limit. When Ms. Popp later failed to take the necessary steps to have her application to restore the Appeal heard within three months of it being struck, her Appeal was deemed abandoned pursuant to Rule 14.65

(an Appeal from such a decision is classified as a "fast track appeal" because of its child centred nature).

Crighton J.A. analyzed the Applicant's failure to comply with procedural requirements and the reasons provided for these failures, which were mainly personal in nature, such as various health issues and financial concerns. It was found that "[w]hile procedure will rarely override the best interests of children", it was the continuation of this prolonged litigation that most profoundly impacted the child as it sought to disturb the parenting regime the parties had followed for the last five years. The Court concluded that allowing this Appeal to proceed after repeated failures to meet the required deadlines, undermined both certainty and finality; as such, Ms. Popp's Application was dismissed.

## TURPIN V MILLER, 2024 ABCA 128

(WATSON JA)

Rule 14.48 (Stay Pending Appeal)

The Applicant sought a Stay of an Order issued by Madam Justice Bercov pursuant to Rule 14.48. The relevant paragraphs of the Order included declarations regarding the Applicant's status as a formal adult interdependent partner of the deceased and the striking of certain materials filed by the Applicant.

Justice Watson noted that the criteria for a Stay Application are: (1) serious questions to be tried or considered on Appeal; (2) irreparable harm to either side; and (3) balance of convenience as between the two sides. Justice Watson also noted that the strength of the "serious question" was important.

Justice Watson found no error in Madam Justice Bercov's line of reasoning in her Decision regarding the interpretation of statutory provisions related to adult interdependent relationships and wills. However, Justice Watson noted that the Applicant made two arguments: the admissibility of evidence and the nature of the proceeding as Summary Judgment. Justice Watson held that there was an arguable point as to whether Madam Justice Bercov erred in granting Summary Judgment.

Justice Watson also determined that the irreparable harm to the estate due to a Stay was not a significant concern, and that the balance of convenience favored granting the Stay as it provided psychological relief to the Applicant while the Appeal was pending.

As a result, the Stay was granted.

## CODY V MONAGHAN, 2024 ABCA 223

(ANTONIO JA)

Rule 14.48 (Stay Pending Appeal)

The Applicant applied under Rule 14.48 for a Stay of enforcement pending Appeal of an Order which, *inter alia*, would allow the sale of her matrimonial home by her ex-partner pursuant to a post-nuptial agreement.

The Court applied the tripartite test set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, which requires that the Applicant demonstrate (1) a serious issue to be tried; (2) that irreparable harm will arise if the Stay is not granted; and (3) that the balance of convenience favours granting the Stay.

The Applicant argued that the Respondent lacked capacity to terminate the marriage, and therefore the marriage was never terminated. Termination of the marriage was required for the post-nuptial agreement to be enforced and the home to be sold. However, the Applicant never sought a ruling on the Respondent's capacity. The Chambers Judge found there was no serious issue to be tried regarding the Respondent's capacity, and Justice Antonio found this was not an error.

The Applicant also argued that irreparable harm would result if a Stay was not granted, because she would be rendered homeless. No evidence of her finances was put before the Court and Antonio J. found that irreparable harm would not arise without a Stay. The Application was therefore dismissed.

## WIRRING V LAW SOCIETY OF ALBERTA, 2024 ABCA 162

(SLATTER JA)

Rule 14.58 (Intervenor Status on Appeal)

Two Applicants applied to intervene in the Appeal (the "Applications"). The underlying issue was the constitutionality of the oaths that must be taken for admission to the Law Society of Alberta.

Slatter J.A. took note that the first Applicant had a particular interest in cases where the law might conflict with legal professionals' religious beliefs, and that it devoted resources to the education and support of its members, published the Christian Legal Journal, and where appropriate sought to intervene in Court cases that engage its mandate. The second Applicant described itself as an organization with the resources of a full-time staff devoted exclusively to civil liberties; one that prepared submissions on public policy, engaged in public education, and assisted individuals with complaints about violations of their civil liberties.

Slatter J.A. commented that interventions are permitted under Rule 14.58 and that the test for intervention, as has been stated in a number of cases such as *VLM v Dominey Estate,* 2023 ABCA 226, is based on 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.

Slatter J.A. further commented that having a common interest with one of the parties will not necessarily be sufficient unless the intervenor can provide some fresh perspective.

Both Applicants argued that they could provide some special expertise, perspective, or information that would help resolve the Appeal. Having held that the Applications were unopposed, Slatter J.A. grated the Applications.

## ANGLIN V RESLER, 2024 ABCA 193

(SLATTER, WAKELING AND WOOLLEY JJA)

Rule 14.71 (Interlocutory Decisions)

This is a Decision relating to Costs of Appeals 2203-0110AC and 2203-0154AC (the "Appeals"), which were resolved by the Reasons for Decision reported as *Anglin v Resler*, 2024 ABCA 113.

The Appellant achieved substantial success in the Appeals. The Appellant successfully achieved his main procedural goal of being able to cross-examine the Respondent before the Summary Judgment Application, and certain parts of the Order that had struck out his Statement of Claim were overturned. The Court acknowledged that the Appellant is entitled to Costs assessed on Column 5, along with reasonable disbursements and GST. Additionally, the Respondents were entitled to the assessed Costs, reasonable disbursements, and GST for the Appellant's unsuccessful Stay Application.

Another issue raised by the Appellant was whether the assessed Costs should be based on a single Appeal or two separate Appeals. Appeal 2203-0110AC was related to an unreported procedural decision made by the Case Management Judge on May 13, 2022, which set the stage for the Respondent's Application to strike out the Appellant's claim. Appeal 2203-0154AC was regarding the subsequent Order made by another Chambers Judge on July 11, 2022, which did strike out the Appellant's claim.

The Court examined Rule 14.71 and determined that an Appeal of a procedural Order in this case was unnecessary. Consequently, the Court decided that the Costs for filing the Appeals and other preparations should be assessed as one set due to the consolidation of the Appeals. This decision was based on the procedural history and the actions taken by the Appellant in managing the Appeals. The Court also acknowledged that even though Appeal 2203-0110A from the interlocutory Order turned out to be unnecessary, it was not improper for the Appellant to file that Appeal as a precautionary measure.

## INSTANT STORAGE (EDMONTON) INC V EDMONTON (CITY), 2024 ABCA 210

(WAKELING, FEEHAN AND GROSSE JJA)

Rule 14.75 (Disposing of Appeals)

Instant Storage (Edmonton) Inc. ("Instant Storage") appealed a decision of the Land and Property Rights Tribunal (the "LPRT") awarding it $12,149 in disturbance damages relating to a U-Haul business it operated at Hanger 11, a property located at the Edmonton Municipal Airport, and which was owned and expropriated by the City of Edmonton.

On appeal of that decision, Instant Storage claimed that it also operated self-storage and parking businesses from Hangar 11 and was entitled to a disturbance or business loss payment of $4,275,000 relating to those businesses. The LPRT determined that Instant Storage did not operate these other businesses for its own benefit. It found that revenue from the parking and self-storage businesses belonged to Hangar 11 Corp., a closely affiliated company to Instant Storage.

Among other things, Instant Storage argued that the LPRT committed a legal error in focusing on the legal rights of a third party to the revenue Instant Storage said it derived from the businesses at Hangar 11. The Alberta Court of Appeal agreed, writing: The [LPRT] asked itself the wrong question. The issue before it was whether Instant Storage had demonstrated disturbance or business losses arising from the expropriation with respect to the operation of self-storage and parking businesses from Hangar 11 – not whether Hangar 11 Corp. is entitled to the revenue from these businesses. It was unreasonable for the [LPRT%] to make findings as to the rights inter se between Instant Storage and Hangar 11 in the context of this compensation hearing and in particular, where Hangar 11 was not a party to the proceedings [...]

Exercising its authority under Rule 14.75(g), the Court referred the matter back to the LPRT for a disposition of Instant Storage's claim in accordance with this decision.