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CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA, 2024 ABKB 607

(NIXON ACJ)

Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.3 (Categories of Court Action), 4.5 (Complex Case Obligations), 4.6 (Settling Disputes About Complex Case Litigation Plans) and 4.7 (Monitoring and Adjusting Dates)

This was an Application to adjourn the Trial date in complex litigation between CNOOC Petroleum North America ULC ("CNOOC") and various Defendants, including Wood Group Canada, Inc. ("Wood Group") and ITP SA, concerning a 2015 pipeline failure. The Application by Wood Group to delay the September 2025 Trial date cited significant disclosures made by CNOOC in May 2024 as a basis for requesting further preparation time. In considering the Application, the Court referred to Rules 4.1 and 4.2, emphasizing that the parties bear a responsibility to manage litigation timelines proactively to meet the efficient, cost-effective resolution goals outlined in Rule 1.2.

The Court determined that an adjournment was justified, considering the extensive additional records disclosed, which required re-questioning and further expert preparation by Wood Group. Nonetheless, the Court concluded that Wood Group's proposal to

adjourn the Trial *sine die* would not align with Rule 1.2's objective of a fair and just resolution within a reasonable timeframe. Instead, the Court found that setting a revised Trial date for October 13, 2026, balanced the necessity of adequate preparation with the judicial mandate to proceed efficiently. The Court held that costs may be spoken to if the parties are unable to reach an agreement.

CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA, 2024 ABKB 639

(NIXON ACJ)

Rules 1.2 (Purpose and Intention of These Rules), 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

The dispute arose from a pipeline failure, following which CNOOC Petroleum North America ULC ("CNOOC") filed a Statement of Claim against the Wood Group ("Wood") and ITP SA, alleging defects in the pipeline's design and construction. During Questioning, Wood either refused certain Undertakings or provided responses that CNOOC considered inadequate. As a result, CNOOC applied to compel Wood to respond to certain Undertakings or provide detailed responses. CNOOC argued that some responses were insufficient, while Wood contended that its responses were adequate and that some Undertakings were irrelevant or overly broad.

Nixon A.C.J. outlined the disclosure principles under Part 5 of the Rules. Rule 5.1 emphasizes the importance of obtaining evidence to resolve issues, narrow disputes, encourage early disclosure, and prevent unnecessary delays or costs. Nixon A.C.J. explained that, under Rule 5.2, disclosure requires the exchange of relevant and material information that significantly aids to determine the issues raised in the pleadings. Additionally, Nixon A.C.J. noted that Questioning is restricted to relevant and material matters under Rule 5.25, with exceptions for privilege, irrelevance, or undue burden.

Citing *Brookdale International v Crescent Point Energy,* 2023 ABKB 120, the Court stated that facts that assist with case understanding are discoverable, whereas evidence about how the case will be proven is not. The scope of Questioning is guided by the pleadings, the nature of the claim, and legal principles, with the Court balancing the need for disclosure against overly broad of unreasonable requests.

After reviewing the Undertaking requests, Nixon A.C.J. ordered Wood to provide supplemental responses for five Undertakings, while concluding that Wood responses or refusals to the remaining Undertakings were appropriate.

ANTIQUARIAN BOOKSTORE LTD V VILLETARD'S EGGS LTD, 2024 ABKB 699

(AKGUNGOR J)

Rules 1.2 (Purpose and Intention of these Rules), 4.10 (Assistance by the Court), 4.31 (Application to deal with Delay), 4.33 (Dismissal for Long Delay), 5.3 (Modification or Waiver of this Part), 5.6 (Form and Contents of Affidavit of Records) and 5.16 (Undisclosed Records Not to be used Without Permission)

The Defendants applied to dismiss the Action under Rule 4.33, claiming more than three years had elapsed since the last significant advance in the litigation. Alternatively, they sought dismissal under Rule 4.31 for inordinate and inexcusable delay. The dispute arose due to a fire that destroyed a building and its contents, including premises rented by the Plaintiffs for warehousing. The Plaintiffs initiated the Action in March 2017, seeking damages.

At a Case Management Conference on February 18, 2020, the Plaintiffs were directed to provide an Affidavit of Records (the "AOR") by March 16, 2020. However, the AOR was not served until February 9, 2023, and listed "nil" under producible records, stating that "all relevant and material records were destroyed in the fire." At issue was whether serving of the AOR constituted a significant advance in the litigation.

Justice Akgungor explained that in a Rule 4.33 Application, the delay period is measured from the last uncontroversial significant advance to the filing of the dismissal Application. Akgungor J. determined that the delay period began after the Case Management Conference and extended to the filing of the dismissal Application on November 13, 2023. The Court must then assess if there was a three-year gap without a significant advance during this period. Akgungor J. clarified that a significant advance is one that meaningfully progresses the Action towards resolution, considering its nature, importance, and timing.

The Defendants argued that because the AOR was blank, it could not constitute an advance. The Defendants cited *Ursa Ventures v Edmonton (City)*, 2016 ABCA 135, to support their assertion that a mandatory step under the Rules no longer automatically advances an Action. In response, the Plaintiffs contended that the AOR confirmed the destruction of records, thereby clarifying the lack of evidence and advancing the Action. The Plaintiffs also noted that Rule 5.6 requires disclosure of all relevant and material records, and the AOR, provided an admission under oath that no records exist, exposing them to Costs, denial of interest, and other sanctions under Rule 5.3 for swearing an AOR that does not disclose all required records.

Akgungor J. held that the filing of the AOR constituted a significant advance. The key consideration was whether its content meaningfully advanced the Action, rather than whether it contained records. Akgungor J. found that the AOR was not blank but rather a sworn document verifying that the Plaintiffs had no records, completing their discovery, clarifying the litigation's focus, and enabling the Parties to assess their positions for settlement or adjudication.

The Court assessed the Application for dismissal under Rule 4.31, highlighting that significant prejudice is a prerequisite for dismissal under this Rule. Akgungor J. explained that an Action may be dismissed for delay causing significant prejudice under Rule 4.31(1)(a), or if the delay is inordinate and inexcusable, significant prejudice is presumed under Rule 4.31(2). Justice Akgungor found there was delay, noting that five years had passed since the pleadings

closed and the Action was far from ready for Trial. The Plaintiffs had failed to advance the Action to the extent that a reasonable litigant would have. When assessing whether the delay was inordinate or inexcusable, Akgungor J. noted that Rule 1.2(3)(a) obliges both parties to move the Action along, and Rule 4.31(3) requires consideration of whether the Applicant contributed to the delay. Noting the pace of the Action as a whole, and the Defendants' contribution to the delay, Akgungor J. determined it was not inordinate or inexcusable.

Justice Akgungor continued the analysis to address whether the Defendants demonstrated significant prejudice, as it was not presumed under Rule 4.31(2). The Defendants argued that significant prejudice arose because the retention period for business records had expired, and witness memories were likely to have faded. However, Akgungor J. found that the Defendants failed to specify how this would cause prejudice. The Plaintiffs ultimately had no records, and there was no evidence that witnesses were no longer available. In the absence of actual significant prejudice, the Court found no basis to dismiss the Action for delay pursuant to Rule 4.31.

As a result, Justice Akgungor dismissed the Defendants' Applications under Rules 4.31 and 4.33, and ordered the parties to attend a Rule 4.10 Case Conference.

BAINS V ADAM, 2024 ABCA 374

(STREKAF JA)

Rules 1.2 (Purpose and Intention of These Rules), 10.30 (When Costs Award May be Made), 14.5 (Appeals Only With Permission) and 14.88 (Cost Awards)

Justice Strekaf dismissed the Applicant's request for permission to appeal a Decision by a single Judge to a three-Judge panel. The matter arose from three Actions in which liability was admitted, but the Trial Judge dismissed the Applicant's claim for damages. The Applicant, subject to an Interim Court Access Restriction Order, initially required and was granted permission to appeal specific grounds of that Decision, but had his Application to stay the Trial Costs dismissed. The Applicant subsequently brought two further Applications, seeking amendments to the Claims and other relief, which were dismissed by Strekaf J.A. due to procedural and substantive deficiencies (the "September 19 Applications"). The Applicant then sought to appeal the dismissal of the September 19 Applications to a three-Judge panel.

The Court found that, pursuant to Rules 14.5(1)(a) and (2), permission to appeal Decisions of a single Judge is required and should only be granted in exceptional circumstances. Strekaf J.A. emphasized that the Applicant failed to meet the high threshold required, as the proposed Appeal did not raise any serious questions of law or justify assigning further judicial resources. The Decision was consistent with Rule 1.2, which promotes timely and cost-effective resolution of disputes.

On the issue of Costs, Justice Strekaf clarified that Rule 10.30 allows for Costs to be awarded even after a final Order is entered, dismissing the Applicant's argument that the Court lacked jurisdiction to address Costs for earlier Applications. For the September 19 Applications and

the present Application, which were dismissed, the Respondents were awarded Costs. Regarding earlier Applications for permission to appeal and to stay Trial Costs, Strekaf J.A. applied Rule 14.88, the default rule for Cost Awards, and determined that all parties would bear their own Costs due to mixed success.

DIAO V BANK OF MONTREAL, 2024 ABCA 402

(WAKELING, PENTELECHUK AND GROSSE JJA)

Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Bank of Montreal initiated a foreclosure Action against the Appellant who defaulted on mortgage payments. The Appellant was Noted in Default. The Appellant then applied to set aside the Noting in Default and foreclosure Orders. That Application was dismissed, and the Appellant appealed to the Court of Appeal.

The Appellant argued that the Noting in Default should be set aside due to improper service and that the interest charged on the mortgage was not permitted. The Respondent argued that service was proper, the foreclosure Action was valid, and that the Appellant had no arguable defense against the foreclosure Action.

Pentelechuk J.A. and Gosse J.A. formed the majority, while Wakeling J.A. concurred in the result. The Majority noted that Rule 9.15 grants the Court the discretion to set aside a Noting in Default and permit the filing of a Defence. The Majority determined that there was no procedural flaw leading up to the default, and the Appellant was therefore not entitled to have the Noting in Default set aside as of right. The Majority stated that, per Rule 9.15(3), the Court may grant an Order setting aside Default Judgment on terms it considers just, and retains discretion to grant relief when fairness requires.

To succeed in an Application to set aside the Noting in Default, the Court held that the Appellant was required to demonstrate that: (1) he had an arguable defence; (2) he did not intend to allow the judgment to go by default and has a reasonable excuse for the default, and (3) once he became aware of the Noting in Default, he promptly applied to set it aside. The Chambers judge found that the Appellant did not deliberately let the Judgment go by default and acted promptly in applying to have it set aside. However, the Appellant did not present an arguable defence to the Bank of Montreal's mortgage foreclosure Action.

The Court of Appeal, satisfied that the Chambers Judge considered all the evidence and circumstances, determined that the Chambers Judge exercised reasonable discretion and that there was no basis for appellate intervention. The Appeal was dismissed.

Wakeling J.A., concurring in the result, noted that Rule 9.15 bestows an unfettered discretion on the Court and that the Court must be mindful of the objectives set out in Part 1 of the Rules, especially Rule 1.2(1). Justice Wakeling was also satisfied the Chambers Judge reasonably exercised the discretion bestowed on the Court pursuant to Rule 9.15 and concurred in dismissing the Appeal.

BANERJEE V SOOD, 2024 ABCA 417

(FEEHAN J)

Rules 1.3 (General Authority of the Court to Provide Remedies) and 14.48 (Stay Pending Appeal)

This case involved the parental custody of children who were citizens of Canada, South Africa, and the United Kingdom ("UK"). The family resided in Canada until 2019, when the mother, a British permanent resident, relocated to the UK with the children for work. In 2023 and 2024, the children returned to Canada but were not sent back to the UK as ordered, leading to a dispute over their habitual residence and custody.

The Chambers Judge, pursuant to the *International Child Abduction Act,* RSA 2000, c I-4 (the "*ICAA")* and the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention"*), ordered that the children be returned to the UK to live with their mother (the "Order"). The father, a Canadian citizen, applied for a Stay pending Appeal of the Order under Rules 1.3 and 14.48.

Justice Feehan noted that Applications for Stay pending Appeal under the *ICAA* and the *Hague Convention* follow the same general principles as other Stay Applications, focusing on the best interests of the children. Feehan J. clarified that the traditional tripartite test is modified in family law cases, including those under the *ICAA* and the *Hague Convention*. The test requires determining: (i) whether there is a serious issue on Appeal that is not frivolous or vexatious; (ii) whether the child will suffer irreparable harm if the Stay is denied; and (iii) whether the balance of convenience favours granting or denying the Stay, considering the child's best interests. Even if the test is not fully satisfied, the Court must assess whether the interests of justice call for a Stay.

Courts often identify a serious question to be tried when the best interests of children are involved. Justice Feehan held the father's concerns were serious and not frivolous or vexatious, satisfying the first part of the test. Feehan J. emphasized that the irreparable harm and the balance of convenience factors must be assessed holistically based on the children's best interests. The father argued that denying the Stay would render the Appeal meaningless, disrupting the children's routine in Alberta, and exposing him to legal risks in the UK. In contrast, the mother contended that granting the Stay would disrupt the children's education, stability, and her employment in the UK. Feehan J. determined that moving the children back and forth pending the Appeal would cause irreparable harm to their well-being, tipping the balance of convenience towards dismissing the Stay Application. While the father claimed that denying the Stay would reward the mother for removing the children to the UK before the hearing, Feehan J. emphasized that the children's best interest must come first, and the Appeal panel would decide any consequences for the mother's breach of the Court Order.

Consequently, the Application for Stay pending Appeal was dismissed.

LAUZON V EDMONTON (POLICE SERVICE), 2024 ABKB 612

(LEONARD J)

Rules 1.4 (Procedural Orders), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 13.5 (Variation of Time Periods)

Pursuant to Rule 3.26, the Respondent applied *ex parte* for an Order allowing Substitutional Service of their Statement of Claim. In the result, they obtained an Order allowing for Substitutional Service and extending the time to serve their Statement of Claim. The Appellants brought an Application, pursuant to Rule 9.15, to have both the Order and service of the Statement of Claim set aside. This was first brought before the same Applications Judge who granted the Order, but was dismissed. The Appellants then appealed that decision to a Justice of the Court of King's Bench.

The Appellants argued that the Respondents had only applied for an Order for Substitutional Service. As such, the Applications Judge did not have jurisdiction to grant an Order extending time for service on its own motion. Further, the Appellants argued that Rule 1.4 did not give the Applications Judge jurisdiction to grant an Order extending time for service after the time to serve the Statement of Claim, pursuant to Rule 3.26, had expired. The Respondent argued that its Application was filed before the one-year limit for service had expired, and that Rule 1.4 gave the Applications Judge jurisdiction to grant an Order extending service in replacement of an Order for Substitutional Service.

Justice Leonard agreed with the Appellants and concluded that the Court should not have acted on its own motion. The Court was also not satisfied that the circumstances before the Applications Judge were exceptional enough to warrant intervention. Further, the Court found that Rule 1.4 did not give the Applications Judge jurisdiction to grant an Order extending service. After determining that the Application was not filed within the one-year limit for service, and following previous case law, the Court held that Rules 3.26, 3.27, and 13.5 provide a complete code regarding the circumstances in which the time to serve a Statement of Claim can be extended. Because the Rules specifically address the time within which a Statement of Claim must be served, Rules 1.4(1) and 1.4(2) are not applicable and cannot be used as a basis to extend the time to serve a Statement of Claim.

The Court stated, further, that the materials filed by the Respondent in support of its Application for Substitutional Service were insufficient to support an Application to extend the time for service in any event, as the materials were misleading, and did not comply with the requirements contained in the case law.

Accordingly, the Court allowed the Appeal and set aside the Order and service of the Statement of Claim, as it had not occurred within the required time limit.

ATB FINANCIAL V MAYFIELD INVESTMENTS LTD, 2024 ABKB 635

(MARION J)

Rule 1.4 (Procedural Orders)

Mayfield Investments Ltd. ("Mayfield") was financially distressed, insolvent, and in default of its obligations to ATB Financial ("ATB"). Despite several forbearance agreements, Mayfield continued to default. ATB demanded repayment and filed Notices to Enforce Security. The Parties agreed to a Consent Receivership Order, which was temporarily stayed to allow Mayfield time to cure its defaults. As Mayfield failed to cure its defaults, ATB filed a Lender's Certificate, and a Receiver was appointed.

Mayfiled applied under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), and sought to stay the effects of the Consent Receivership Order and the Lender's Certificate pending determination of the *CCAA* Application. ATB opposed.

Mayfield argued the Court had authority to stay a Receiver's actions even after a receivership commenced, citing *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 3659, but Marion J. found the case distinguishable and inapplicable. However, Marion J. highlighted that Rule 1.4(2)(h) allows the Court to make orders with respect to practice or procedure to further the purpose of the Rules in any action or proceeding.

The Parties agreed that the applicable test for a Stay was the tripartite test from *RJR MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311. However, Marion J. noted that the Court may still exercise discretion to grant a Stay even if the test is not fully satisfied, if the interests of justice so warrant. Justice Marion found that Mayfield failed to demonstrate irreparable harm, and the balance of convenience did not favour a Stay. ATB refrained from enforcement for months and reversing the Receiver's process would be impractical. Additionally, Marion J. observed that even if the Court had residual discretion to grant a Stay, the interests of justice did not warrant it in the circumstances.

As a result, Justice Marion dismissed Mayfield's Application to Stay the effects of the Consent Receivership Order and the Lender's Certificate.

STRATKOTTER V REITSMA ET AL, 2024 ABKB 689

(HOLLINS J)

Rules 1.4 (Procedural Orders), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 3.28 (Effect of Not Serving Statement of Claim in Time), 3.62 (Amending Pleadings), 3.68 (Court Options do Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 11.5 (Service on Individuals)

The Court dismissed the Plaintiff's claims in two related Actions against several physicians and Alberta Health Services. The Defendants argued successfully under Rule 3.68(2) that the claims should be struck because they failed to disclose a reasonable cause of action or establish negligence. The deficiencies were so significant that amendments to the claims were not a viable remedy.

The claims were also dismissed under Rule 3.28 because the Plaintiff failed to serve the Defendants within the time limits under Rule 3.26. Attempts at service by recorded mail and email did not comply with Rule 11.5, and no extraordinary circumstances justified an extension under Rule 3.27. Additionally, the claims were further dismissed under Rule 7.3 as statute-barred under the *Limitations Act*, with no genuine issue for trial regarding the applicable limitation periods.

The Court emphasised its duty under Rule 1.4 to ensure disputes are resolved efficiently and cost-effectively. Allowing these deficient claims to proceed would contravene the Rules' objective by prolonging litigation without advancing the resolution of substantive issues while increasing costs.

The Court concluded that the Plaintiff's claims lacked procedural and substantive merit and dismissed them entirely.

DEBUT DEVELOPMENTS INC V CARBERT WAITE LLP, 2024 ABKB 630

(JUGNAUTH J)

Rules 2.23 (Assistance Before the Court), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.13 (Appointment for Review), 10.17 (Review Officer's Authority), 10.18 (Reference to Court), 10.26 (Appeal to Judge) and 10.27 (Decision of Judge)

The Applicant appealed a Decision of a Review Officer characterizing certain invoices issued by the Respondent law firm as final, periodic invoices. The Decision effectively barred the review of nine out of ten invoices as being out of time under Rule 10.10. The Appellant argued that the Review Officer erred by concluding that all ten invoices were "final, periodic accounts" and that the Review Officer acted unfairly.

The Court noted that Review Officers may review retainer agreements and lawyers' charges for reasonableness. However, they do not have jurisdiction to interpret retainer

agreements and thus any questions arising from the terms of the retainer agreement must be referred to the Court pursuant to Rule 10.18(1)(a). The relevant Rules for the Appeal were Rules 10.10, 10.13, 10.17, 10.18, and 10.27.

The Court began by exercising its discretion under Rule 2.23(4) to permit one of the shareholders and directing minds of the Respondent to appear as agent for the corporation.

The Appellants sought to adduce fresh evidence. The Court held that Rules 10.26(2) and (3) constrained the Appeal to the record that was before the Review Officer. The Court did not have jurisdiction to allow documents dated after the hearing.

The Court agreed with the Appellant that the proceeding lacked procedural fairness because the Review Officer failed to assist the self-represented litigants to understand a critical issue that barred a vast majority of the invoices. The Review Officer also failed to give reasons, which the Court held was particularly problematic because the Decision was dispositive. Finally, the Review Officer exceeded his jurisdiction by interpreting the retainer agreement. Based on those errors, the Review Officer's decision could not stand, and the Court exercised its jurisdiction pursuant to Rule 10.27 to conduct the analysis afresh.

After reviewing the retainer agreement, the Court concluded that the Respondent's accounts were final, period invoices, and the limitation period in Rule 10.10 barred the review of nine of the ten invoices. As such, the matter was remitted back to the Review Officer to conduct a review of the single invoice that was not barred by Rule 10.10.

CHANDOS CONSTRUCTION LTD V DELOITTE RESTRUCTURING INC, 2024 ABCA 403

(SLATTER, GROSSE AND HAWKES JJA)

Rule 3.2 (How to Start an Action)

Capital Steel Inc. ("Capital Steel") was a subcontractor to Chandos Construction Ltd. ("Chandos") on a project in St. Albert. Capital Steel filed an assignment into bankruptcy on September 26, 2016, and Deloitte Restructuring Inc. ("Deloitte") was appointed as the Trustee. On October 26, 2016, Deloitte, on behalf of the Capital Steel Estate, filed a Builder's Lien in the amount of $150,720.58.

On November 8, 2016, the parties agreed to a Consent Order discharging the Lien on payment into court of $165,801.44 by Chandos. The Applicant named in the Order was Chandos, and the Respondent was Deloitte, as Trustee of the Capital Steel Estate. The Order read, in part, "this Order shall be filed as the Originating pleading in this Action". When the Consent Order was filed, the "Action" it started was given docket number 1603-19909.

Some five years later, on September 14, 2021, Deloitte, as Trustee, filed an Application in Action number 1603-19909, seeking a Declaration that the Lien was valid and payment of the funds in Court to Deloitte. On September 15, 2021, Chandos filed a Cross-Application seeking return of the funds. Chandos argued that, since the time period to commence an Action to prove the claim underlying the Lien had expired, it was entitled to return of the money in Court.

The Court of Appeal held that the Consent Order of November 8, 2016, while unorthodox, should be read as explicitly commencing Lien enforcement proceedings along with providing for the payment of money into Court to remove the Lien. The Rules of Court recognize that procedural errors will occur and enable their cure if there is no irremediable prejudice, citing Rule 1.5(4). Rule 3.2(6) also applies to what happened here, which reads that "If an action that is started in one form should have been started or should continue in another, the Court may make any procedural order to correct and continue the proceeding and deal with any related matter".

On the assumption that commencing the Lien enforcement Action by the "Action" authorized by the Consent Order was an irregularity, it could have been cured under Rule 3.2(6). Since Chandos consented to commencing the Lien Action through the Consent Order, it could not now object to curing any irregularity. It followed that that the Consent Order was effectively a proceeding for a remedial Order that satisfied the requirements of the *Limitations Act*. The use of an Order to commence the Action, rather than a Statement of Claim, was at most a procedural irregularity but not a nullity. The claim of Deloitte/Capital Steel was not barred by the passage of time, and the Appeal was allowed.

KLEIMAN ET AL V INNES ET AL, 2024 ABKB 745

(ASHCROFT J)

Rules 3.8 (Originating Applications and Associated Evidence) and 9.16 (By Whom Applications Are to be Decided)

On October 20, 2022, lawyers for the Plaintiffs, Jack Kleiman and Kleiman Resources Ltd. ("Kleiman"), obtained an *ex parte* Attachment Order (the "Attachment Order") against the Defendants, Malcolm Colin Innes and Innes Wealth Management Ltd. ("IWM"). Kleiman applied to continue the Attachment Order, while the Defendants (collectively, "Innes") argued the Attachment Order was obtained improperly and sought to have it set aside.

The parties did not initially address Rule 9.16 of the Rules of Court, which provides that Applications under Rule 9.15 (setting aside, varying and discharging judgments and Orders) must be decided by the Judge or Applications Judge who granted the original Judgment or Order unless the Court otherwise orders. After a query by the Court, Innes argued that Kleiman erred in not trying to have this matter returned to the original Justice. Kleiman responded that Orders under Section 18 of the *Civil Enforcement Act* (the "CEA") are not "Orders" under Rule 9.15.

Justice Ashcroft found that Rule 9.16 does apply to Orders, even if authorized under the CEA. While a Justice who heard the original Application is in the best position to review the matter with full knowledge of what they were aware of at the time, for reasons of efficiency and expediency, which were particularly important in this Application, leave was granted to have another Justice hear the matter.

During the proceedings, a representative of the Applicant (the "Affiant") swore a lengthy Affidavit in support of the *ex parte* Application for the Attachment Order, containing hearsay and double hearsay. Innes argued that this was prohibited by Rule 3.8(2) of the Rules of

Court, which indicates that Affidavits must be sworn on personal belief and knowledge. On this point, however, the Court was persuaded by Kleiman's argument that Rule 3.8(2) was intended to apply in a hearing on the merits of a matter, not an interim Application. Justice Ashcroft found that hearsay is permitted on interim Applications, citing *Heneghaixin Corp v Deng*, 2022 ABCA 271 at para 30.

Nevertheless, on *ex parte* interim Applications, hearsay evidence should be approached with caution. In some circumstances, urgency and efficiency may require all information to come from one affiant. In this case, however, both sides were represented and the parties had been communicating for months.

Justice Ashcroft summarized that lay witnesses must be cautious to limit their evidence to the factual circumstances before them especially on *ex parte* Applications. Further, while hearsay is permitted on interlocutory Applications, it will be subject to closer scrutiny on *ex parte* Applications.

MIKISEW CREE FIRST NATION V ALBERTA, 2024 ABKB 578

(FETH J)

Rules 3.15 (Originating Application for Judicial Review), 3.19 (Sending in Certified Record of Proceedings), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.68 (Court Options to deal with Significant Deficiencies)

This Decision arose from an Application by the Defendant to strike the Pleadings in two related Proceedings: a declaratory relief Action, and a Judicial Review Application. Alternatively, the Defendant sought the stay of the declaratory relief Action pending the outcome of the Judicial Review. The Plaintiffs opposed the Application and cross-applied to amend their Pleadings.

Justice Feth considered the threshold to amend Pleadings under Rules 3.62 and 3.65. The proposed amendments sought to clarify the Defendant's concerns about vagueness and to provide further information. The Defendants argued the amendments were "hopeless." The Court found that the Pleadings could be amended as the amendments would not cause significant prejudice to the Defendants but would merely clarify existing claims.

The Court then analyzed whether the Statement of Claim or portions thereof may be struck for not disclosing a reasonable cause of action according to Rules 3.68(1) and (2)(b). No evidence may be considered pursuant to Rule 3.68(3). The pleaded facts are presumed to be true except where claims are based on assumptions or speculation or where they are patently ridiculous or incapable of proof. However, the approach must be generous, and the Court must err on the side of permitting a novel but arguable claim.

Justice Feth analyzed the four criteria from *Ewert v Canada*, 2018 SCC 30, which governs the Court's discretion to grant declaratory relief. If the criteria are met, the Court assesses the practical utility of a declaration to decide whether to exercise its discretion. Feth J. found that the test for declaratory relief was satisfied. The Pleadings established a live controversy between the Parties and the declaration sought had a practical effect. The Court held there was a reasonable prospect of success. The Applica-

tion to strike the Amended Statement of Claim was dismissed.

The Court also found the Amended Statement of Claim was not a collateral attack and therefore not an abuse of process that could be struck pursuant to Rule 3.68(2)(d). Justice Feth found that parts of the Pleadings that involved the Federal Crown were not to be struck under Rule 3.68(2)(c) because the allegations provided relevant and necessary historical background despite the Federal Crown not being a named Party.

The Court determined, under Rules 3.15(2) and (3), that the Judicial Review Proceedings were not defective due to the Plaintiffs not serving other First Nations or stakeholders. The Judicial Review focused on the duty to consult owed specifically to the Plaintiffs. No other groups were "directly affected" within the meaning of the Rule to require service. Feth J. allowed the amendment to the Originating Application because the amendments merely clarified the existing pleadings and did not seriously prejudice the Defendants.

The Court noted that striking an Originating Application for non-justiciability on a "plain an obvious standard" is challenging, especially without the Certified Record of Proceedings under Rule 3.19. However, Feth J. found the Amended Originating Application raised arguable justiciable issues and was not plainly without merit. The Application to strike the Amended Originating Application was dismissed.

Lastly, the Court analyzed whether the Action should be stayed pending Judicial Review. The Defendants relied on Rules 3.68(1)(d) and (2)(d) such that the Court may order an Action to be stayed where a Pleading or Commencement Document constitutes an abuse of process. Justice Feth concluded that the issues in the Action and Judicial Review were discrete and engaged different injuries and remedies. Therefore, the Action and Judicial Review were not duplicative or an abuse of process. The Court declined to Stay the Action pending Judicial Review.

MEG ENERGY CORP V ALBERTA (MINISTER OF ENERGY), 2024 ABKB 592

(EAMON J)

Rules 3.15 (Originating Application for Judicial Review) and 3.21 (Limit on Questioning)

This was an Application for Judicial Review.

The Alberta Energy Audit ("AEA") audited MEG Energy Corp.'s ("MEG") end-of-period statements from 2014 and 2015. AEA issued audit determinations in June and November 2021. MEG objected to both. This led to final Decisions by the Director of Dispute Resolution in June 2022.

MEG subsequently applied for Judicial Review of those Decisions, alleging that the audits were procedurally unfair and unlawful. The procedural issues related to AEA's alleged failure to complete the audits within prescribed statutory time periods and a lack of disclosure of determinations in other audit files. MEG also contended that portions of the substantive Decisions were unreasonable.

MEG argued that the audit statutory time period expired; however, there were Ministerial Orders extending the time period, but the AEA did not inform MEG of them. Justice Eamon found that MEG was not prejudiced because MEG was entitled to review the fairness and

reasonableness of the extension orders in the present Judicial Review.

The Court referenced Rule 3.15, which imposes a strict, non-extendable time limitation on commencing proceedings for Judicial Review. However, Eamon J. stated that Rule 3.15 and the doctrine against collateral challenges did not preclude MEG from challenging the extension decisions in the Judicial Review. Nonetheless, the Court found the extension decisions valid, and that MEG had waived any objections by continuing to participate in the audits without raising the issue of expired time limits.

While examining MEG's claims for bias, the Court criticized the Director for not fully documenting communications with the auditors; however, that did not amount to bias or unfairness. The Court noted that if there was a document missing from the Certified Record then the parties should have addressed it well before the scheduled hearing. Justice Eamon noted that the Court can allow the Record to be supplemented in appropriate cases where issues such as bias or procedural fairness are in issue, perhaps even directing examination of a witness in certain circumstances according to Rule 3.21.

The Court upheld the Decisions to extend the audit periods and found that there was no breach of procedural fairness or bias in the non-disclosure of previous audit determinations or the Director's consultations with the AEA. However, Eamon J. sent back the Decision on the cost of the Diluent Tanks for reconsideration because it was unreasonable.

BAUHUIS V ASSOCIATION OF PROFESSIONAL ENGINEERS AND GEOSCIENTISTS OF ALBERTA, 2024 ABKB 603

(NIXON J)

Rules 3.15 (Originating Application for Judicial Review) and 3.22 (Evidence on Judicial Review)

A pipeline failure led to an investigation by the Association of Professional Engineers and Geoscientists of Alberta ("APEGA"). The investigation focused on the professional conduct and practices of the Applicants, leading to a decision by APEGA (the "Decision"). The Applicants brought an Originating Application for Judicial Review pursuant to Rule 3.15, arguing that the investigation should be stayed (the "Application").

In the Application, one of the Applicants sought to have the Court consider further evidence to support its position that the Decision was tainted with a reasonable apprehension of bias.

Nixon J. noted that Rule 3.22 sets out that evidence that may be considered by the Court on Judicial Review. Citing *Alberta College of Pharmacists v Sobeys West Inc*, 2017 ABCA 306, Justice Nixon noted the general rule that evidence that was not before the tribunal and that relates to the merits of the decision is not permitted on Judicial Review.

However, the Court went on to list the situations where supplementary evidence has been admitted: to address standing; to show bias or a reasonable apprehension of bias where the facts in support of the allegation do not appear on the record; to demonstrate a breach of the rules of natural justice not apparent on the record; to reveal the evidence actually placed before the decision maker where the decision maker provided an inadequate or no record of its proceedings; where the evidence provides

necessary background and context to the judicial review application, such as explaining the operation of a complex licensing system; to show a complete absence of evidence before the decision maker on an essential point; where the evidence provides necessary background and context to a related constitutional argument under the Charter; and in Aboriginal matters, to address useful contextual information about the termination of consultation.

Based on review of the evidence and analysis of the law, Nixon ruled that the further evidence sought should be admitted as it was necessary to consider the argument that the Decision was tainted by a reasonable apprehension of bias.

LEHODEY V CALGARY (CITY), 2024 ABKB 668

(LEMA J)

Rules 3.15 (Originating Application for Judicial Review) and 11.27 (Validating Service)

The Applicants were pursuing Judicial Review of a recently approved general rezoning bylaw in upcoming proceedings (the "Bylaw"). They applied for advice and directions on meeting their obligations pursuant to Rule 3.15(3), which requires service of an Originating Application for Judicial Review on every person directly affected by the Application. The Applicants did not want to serve ever property owner impacted by the Bylaw. The Respondent, the City of Calgary, opposed the Application.

The Respondent argued that every owner of property covered by the Bylaw is or would be "directly affected" by the Application. Justice Lema agreed. However, Lema J. found that such conclusion did not require the Applicants to serve each owner individually. Rather, a newspaper advertisement previously published by the Applicants constituted a method of service that "brought or was likely to have brought the document to the attention of the person to be served". As such, it was sufficient to meet the requirements of Rule 11.27. In particular, Justice Lema noted that service in this form was appropriate where the persons to be served resided in the city where the newspaper was published. As such, the Applicants were not required to serve each owner individually.

FUSHTEY V WORKERS' COMPENSATION BOARD OF ALBERTA, 2024 ABKB 725

(DILTS J)

Rule 3.15 (Originating Application for Judicial Review)

A worker was killed in a car accident while traveling to assess a business opportunity for his employer. The employer reported the accident to the Workers' Compensation Board ("WCB"), which accepted it as work-related. Counsel for the worker's estate (the "Estate") contacted WCB with instructions to investigate WCB's decision that the accident arose in the course of employment. The Estate later contested this, claiming the worker was pursuing a personal investment opportunity, not acting in the course of employment. The Estate sought to have WCB deny coverage as doing so would remove the statutory limit under the *Workers' Compensation Act,* RSA 2000, c W-15 ("*Act*"), leaving the Estate able to pursue a civil cause of action.

At the Estate's request, the WCB decision went through a process of internal reviews, including a review by WCB's Dispute Resolution and Decision Review Body ("DRDRB"). The DRDRB upheld WCB's decision that the accident happened because of work. The Estate then appealed the DRDRB decision to the Appeals Commission for Workers' Compensation ("Appeals Commission") under the Act. The Appeals Commission upheld the decision by WCB ("Appeal Decision").

The Estate filed both a Statutory Appeal of the Appeal Decision and an Application for Judicial Review. The Court noted that there are important distinctions between the two, including procedural distinctions, the nature of the Court's inquiry and the applicable Standard of Review. The Court was satisfied that the issues raised by the Estate fell outside of the scope of a Statutory Appeal under the *Act*, as they were not questions of law. The Court therefore went on to consider the issues in the context of the Estate's Judicial Review proceedings. In doing so, the Court found that the Appeal Commission's decision was rational and logical.

Therefore, the Court dismissed the Estate's Applications.

SOBEYS CAPITAL INCORPORATED V UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO 401, 2024 ABKB 614

(POELMAN J)

Rule 3.22 (Evidence on Judicial Review)

Sobeys Capital Incorporated ("Sobeys") sought Judicial Review of an Arbitration Decision determining wage increases for a certain group of its employees. They were represented through a collective agreement by the Respondent. Sobeys argued that the Arbitrator breached principles of procedural fairness and unreasonably failed to consider required factors pursuant to the collective agreement.

In support of its Application for Judicial Review, Sobeys filed an Affidavit. The Respondent opposed its admissibility. The Court noted that Rule 3.22(a) provides that the Court will

only consider the records of the proceedings being challenged, but that additional evidence is permitted in exceptional circumstances. The Affidavit filed by Sobeys did not meet any of the criteria for exceptional circumstances and could not be considered.

Ultimately, the Court held that the Arbitrator's Decision was unreasonable, and granted an Order in the nature of *ceritiorari* quashing the Decision and referring the dispute to a new Arbitrator for determination.

MORAWETZ V ALBERTA (DIRECTOR OF SAFEROADS), 2024 ABKB 588

(MARION J)

Rules 3.24 (Additional Remedies on Judicial Review), 9.3 (Dispute Over Contents of Judgment and Orders), 9.13 (Re-Opening Case) and 9.14 (Further or Other Order After Judgment or Order Entered)

Justice Marion set aside two SafeRoads Alberta ("SafeRoads") decisions and remitted them for review before a different adjudicator. Counsel for the Director of SafeRoads wrote to Marion J., indicating that the parties did not agree on the terms of the remitted review, particularly as to whether new issues could be raised or whether new evidence could be adduced, and sought attendance to make oral submissions on these issues, which Marion J. granted.

The Director asserted that the Recipients were seeking to re-open their case pursuant to Rule 9.13(b). The Court disagreed, finding that the situation was one where the parties were unable to agree on the terms of the remittance and were seeking intervention to settle the terms of the Orders. As the Orders had not yet been entered, the Court had discretion to resolve the dispute pursuant to Rule 9.3. Even if the Orders had been entered, the Court still had discretion to make further Orders pursuant to Rule 9.14.

The Court then considered whether it could make or clarify directions regarding the Recipients' remitted reviews. Justice Marion set out the appropriate legal framework, noting that Rules 3.24(2)(a) and (b) provide the Court with wide discretion to direct an Administrative Tribunal to reconsider a matter, in whole or part. After setting out the appropriate legal framework, Marion J. clarified the terms of the Orders for the parties.

BOYER V BOYER, 2024 ABKB 727

(LEMA J)

Rules 3.36 (Judgment in Default of Defence and Noting in Default), 3.37 (Application for Judgment Against Defendant Noted in Default), 10.53 (Punishment for Civil Contempt of Court) and 12.3 (Application of Other Parts)

In a spousal support and matrimonial property proceeding, the Defendant failed to provide required disclosure and, as a contempt sanction, his pleadings were struck. The Court was then asked to determine whether the Defendant should be allowed to participate in the upcoming Trial, despite that his pleadings were struck.

The Court determined that striking the Defendant's pleadings resulted in deemed admissions of the Plaintiff's factual allegations. However, it did not determine questions of law or mixed fact and law, such as the Plaintiff's entitlement to spousal support or property division.

The Court noted that Rules 3.36 and 3.37 address Noting in Default where pleadings are struck and, pursuant to Rule 12.3, those Rules apply to family law cases. However, Justice Lema determined that Rule 3.36 did not apply because the Plaintiff's claim did not seek recovery of property, debt, or liquidated damages. Instead, Lema J. considered the Court's options pursuant to Rule 3.37(3), which sets out the remedies available where a Plaintiff applies to Note a Defendant in Default.

The Court found that striking a defence and Noting a Defendant in Default are functionally equivalent. Both carry the same consequences and options for next steps. Lema J. noted that Rules 3.36 and 3.37 do not address whether a Defendant continues to have a right to participate in the proceeding or the nature and extent of any such right. As a result, Justice Lema found that Rule 3.37 does not necessarily translate to a bar to a Defendant participating where Notice is given and the Defendant wishes to participate.

In particular, the Court considered Rule 3.37(3)(b), which provides the Court with the power to make any Order necessary in the face of an Application to Note in Default. Justice Lema concluded that this power could be used to allow a Defendant to participate in a Trial and to give evidence, despite that their pleadings have been struck, if the Defendant's evidence does not contradict any of the deemed admitted facts in the Plaintiff's claim.

In this case, the Court noted that the pleadings were struck as a form of contempt sanction. Pursuant to Rule 10.53, a complete ban on evidence from the Defendant could have been included as part of the contempt sanction but was not. However, the Court determined that the Defendant's failure to make required disclosures should bar him from presenting any new evidence at Trial, except information sought by the Plaintiff.

The Court granted an Order permitting the Defendant to file a Pre-Trial Brief, make an opening statement, cross-examine the Plaintiff and her witnesses, and make a closing argument at Trial. This was granted because: the initial draft of the Streamlined Trial Order contemplated some level of participation by the Defendant; the Defendant intended to challenge legal positions and had concerns about the Plaintiff's assets and income; the Defendant only sought participation to the degree reflected in the initial draft Streamlined Trial Order; and there was no evidence that the Defendant's participation would be disruptive

or counterproductive. The Court concluded that allowing participation consistent with the initial Trial Order would not undermine the Order striking the Defendant's pleadings. The Order allowing the Defendant's participation was therefore granted.

PONTO V WAWANESA MUTUAL INSURANCE COMPANY, 2024 ABKB 669

(HARRIS J)

Rules 3.56 (Right to Counterclaim), 3.62 (Amending Pleading) and 3.68 (Court Options to Deal With Significant Deficiencies)

The Applicant sought leave to amend her Statement of Claim. The Court noted that amendments to pleadings are governed by Rules 3.62, 3.68 and 3.56 of the Rules, which together require the Court's leave to amend pleadings after pleadings have closed.

In reviewing relevant case law, Justice Harris highlighted the established principle that any pleading can be amended at any time, regardless of how negligent the party seeking the amendment may have been in drafting their pleadings. While the criteria for amending pleadings are generally favorable, indicating a strong inclination to permit such changes, it does not imply that permission to amend is guaranteed. Over time, specific situations have emerged where proposed amendments should not be permitted. The Respondent argued that certain substantive amendments sought by the Applicant were of the type that should not be allowed.

The Respondent argued that these proposed changes were unlikely to succeed at trial and fundamentally altered the nature of the case at a late stage. The Respondent argued this would cause irreparable prejudice that could not be remedied through costs.

Justice Harris reviewed the proposed amendments alongside the evidentiary record and granted leave only for those amendments that were backed by evidence and were not deemed futile. Harris J. then evaluated the amendments that the Respondent claimed would cause prejudice. The Court acknowledged precedent which directed that prejudice could be found where amendments significantly changed the legal case at a late stage of litigation. Justice Harris noted that a considerable amount of time had elapsed since the Statement of Claim was issued (9 years) and even longer since the events that underlie the claim (11 years). The distinction between this case and others where amendments were denied lies in the timing relative to Trial and the progress made in the litigation. This case was not nearing Trial, as many essential steps remained unfinished despite the significant time that had passed. The Court determined that there was no presumption of prejudice, and the Respondent retained the opportunity to submit an Amended Statement of Defense and conduct Questioning. Ultimately, the Court found that the Respondent did not demonstrate prejudice to a level that could not be remedied through costs, and allowed the amendments.

420 INVESTMENTS LTD V TILRAY INC, 2024 ABKB 610

(FEASBY J)

Rules 3.57 (Contents of Counterclaim) and 7.3 (Summary Judgment)

The Respondents entered into an acquisition agreement with the Appellant to acquire the Appellant's business for $70 million, with potential additional contingent payments (the "Arrangement Agreement"). One of the Respondents provided $7 million in bridge financing (the "Bridge Loan") to support the Appellant's development until completion of the acquisition. Later, the Respondents issued notice of alleged breaches under the Arrangement Agreement, prompting the Appellant to initiate an Action for specific performance, while the Respondents counterclaimed for repayment of the Bridge Loan.

The Applications Judge granted the Respondents Summary Judgment for the loan repayment, which was the subject of this Appeal.

The Court noted that, under Rule 7.3(1)(a), Summary Judgment may be granted if there is no defence to a claim or part of it. The Court cited the three-part test for determining whether Summary Judgment is appropriate, as set out in *Hryniak v Mauldin,* 2014 SCC 7: (1) the judge can make the necessary findings of fact, (2) the judge can apply the law to the facts, and (3) it is a proportionate, more expeditious and less expensive means to achieve a just result.

When considering partial Summary Judgment, the Court must balance fairness and efficiency. The Court noted that partial Summary Judgment should avoid duplicative or inconsistent findings, which may not serve justice if other claims proceed to Trial.

In this case, the Applications Judge granted Summary Judgment on the Respondents' Counterclaim. Although a Counterclaim is an independent Action under Rule 3.57, partial Summary Judgment principles apply if the Counterclaim shares similar facts or legal issues with the main claim. The Court referenced cases indicating that interconnected claims and Counterclaims may require a full Trial to avoid injustice or inefficient outcomes, which was applicable to this case.

In the result, the Appeal was allowed.

KOSTIC V PIIKANI NATION, 2024 ABKB 671

(GRAESSER J)

Rules 3.62 (Amending Pleading), 3.63 (Identifying Amendments to Pleadings), 3.64 (Time Limit for Application to Disallow Amendment to Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.66 (Costs) and 3.74 (Adding, removing or Substituting Parties After Close of Pleadings)

In 2002, the Plaintiff entered into an investment management contract with the Defendants, Piikani Nation ("Piikani"), which was terminated after allegations of fraud and bribery. The Plaintiff commenced this Action in 2008, seeking damages for loss of income, pain and suffering, and other damages to be proven at Trial. The Statement of Claim was amended twice: first in 2009 to remove one of the Defendants, and again in 2012 to withdraw the Claim for pain and suffering (the "Amended Claim"). The Plaintiff later sought to amend the Amended Claim to include Wallace-type damages (a form of aggravated damages arising out of the termination of the contract), punitive damages, pain and suffering, and defamation, alleging bad faith termination and reputational harm. Piikani opposed the amendments, arguing that they were prejudicial, hopeless, limitations-barred, and constituted an abuse of process.

Graesser J. addressed Piikani's objections, noting that while the Rules of Court and case law require some evidence to support amendments, the evidentiary threshold is low and does not need to be sufficient for Trial or Summary Judgment. Justice Graesser determined that additional damages, including Wallace-type damages, were permitted since the initial claim sought damages to be proven at Trial. Graesser J. found no prejudice or limitations issue as damages had been addressed in questioning. Furthermore, the Court clarified that specifying punitive damages did not introduce a new cause of action or cause prejudice, as damages for breach of contract were already sought.

Regarding the defamation amendment, Justice Graesser highlighted the 17-year gap since the alleged statements were made. Graesser J. noted that statements in pleadings are absolutely privileged and cannot be the basis of a defamation claim. Additionally, any repetition of defamatory statements does not revive the initial claim, as limitation periods apply only to the repetition itself. With no evidence of defamatory statements made within the last two years, the defamation amendment was deemed statute-barred.

The Court also addressed the broader implications of delay, noting that the absence of records and unavailability of witnesses could disadvantage both parties. This was particularly relevant to the Plaintiff's medical records, which were necessary for assessing the foreseeability of damages. Graesser J. emphasized that the Plaintiff's failure to comply with Orders to produce such records would prejudice Piikani, with no remedy available to address such noncompliance. While acknowledging that damages for mental distress for breach of contract may be available in rare circumstances, Justice Graesser highlighted that the Plaintiff had abandoned those claims in a previous amendment and cannot pursue them again, either directly or indirectly. Similarly, the Plaintiff's indemnification and save harmless claim against Piikani was dismissed, as it had previously been advanced and dismissed. Graesser J. concluded that allowing such amendment would introduce a new cause of action and constitute an abuse of process by revisiting issues that had already been decided.

As a result, Justice Graesser granted the Plaintiff permission to amend the Amended Claim to include Wallace-type damages and punitive damages. However, claims for pain and suffering, mental distress, general damages, defamation, and indemnification and hold harmless relief were disallowed, as they had either been abandoned or were barred.

RK V GSG, 2024 ABKB 661

(MAH 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 5.16 (Undisclosed Records not to be Used Without Permission)

The Plaintiff brought this Application to extensively amend their Statement of Claim. This Application arose after the Defendants successfully struck out large portions of the pleading.

The Court acknowledged its discretion under Rule 3.65(1) to allow amendments to pleadings at any time, whether or not pleadings were closed. However, the Court noted that the Rules do not guide the Court's exercise of that discretion. Rather, it is guided by case law. The common law states that discretion should be exercised generously, and the "classic rule" is that "any pleading can be amended no matter how careless or late is the party seeking to amend." Justice Mah cited *AARC Society v Canadian Broadcasting Corporation,* 2019 ABCA 125, for the principle that, before granting an amendment Application, the Court should consider two separate interests that are equally weighted: the litigation interests of the opposing party and the public interest in having the matter conclude in a timely manner with as little expenditure of resources as possible.

The Court also acknowledged that an amendment can be denied if the opposing party proves that the amendment falls within one of the exceptions, including where the amendment: (1) would cause serious prejudice to the opposing party that cannot be remedied by costs, (2) is hopeless, (3) adds a new party or cause of action after the limitation period has expired, or (4) involves bad faith. Mah J. stated that the governing authority for the Application is Rule 3.65(1) through (3) and interpreted that the Court's authority was restricted to saying yes or no to the proposed amendments and would not extend to striking out parts of the Statement of Claim that are original. In response to the Defendant's allegation that some of the proposed amendments are an attempt to circumvent previous rulings in the Action, the Court affirmed that the amendment Application cannot be used to "breathe life into causes of action that were pronounced legally dead" in his previous decision.

The Court conducted an amendment-by-amendment analysis, allowing amendments that clarified the issues and were supported by evidence, while denying amendments that were vague, irrelevant, or constituted new causes of action outside the limitations period. Justice Mah directed that the Plaintiff had 2 weeks following the date of the Decision to amend and file the Amended Statement of Claim.

HANIF V MAZHAR, 2024 ABKB 620

(ANGOTTI J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

The Applicant sought to strike or summarily dismiss the Defendant's Counterclaim under Rules 3.64, 3.68, 7.2, and 7.3. The allegations presented in the Defendant's Counterclaim were categorized into two groups: first, damages stemming from a complaint lodged with Immigration, Refugees and Citizenship Canada ("IRCC"), which led to an investigation initiated by IRCC in February 2016; and second, claims of assault and battery purportedly occurring on September 15 and 16, 2015.

The Applicant argued that the Claim for legal fees incurred by the Defendant in dealing with the IRCC investigation did not disclose a cause of action.

Justice Angotti acknowledged that Rule 3.68 allows the Court to strike all or part of a claim if the pleading discloses no reasonable claim. The Court further referenced Rule 13.6(2), emphasizing that a pleading must set out the relevant facts upon which a party relies for the cause of action and the remedy claimed. Additionally, Rules 13.6(3) and 13.7 require that certain causes of action must be specifically pleaded.

Justice Angotti remarked that the Respondent is required to present their strongest case by clearly identifying the cause of action and demonstrating how the pleading satisfies the necessary elements. The Respondent did not fulfill this requirement. Their pleading merely stated that the Defendant incurred damages due to legal fees in response to an IRCC investigation, which allegedly stemmed from a complaint made by the Plaintiff under false pretenses.

The Court pointed out that merely perceiving another's actions as harmful does not automatically constitute a cause of action sufficient to seek legal remedies. There must be a recognized legal duty owed by the Defendant to the Plaintiff to pursue a legal remedy. In the absence of a statutory right to such a remedy, causes of action have evolved through common law in areas such as tort, contract, and equity, each requiring specific elements to be proven to establish a valid cause of action.

On that basis, Angotti J. struck certain paragraphs of the Counterclaim.

The Court then evaluated whether the claim for assault and battery should be dismissed summarily under Rule 7.3, due to the Counterclaim's failure to indicate a reasonable fear of imminent harm. The Court found this was not the case, and the facts pleaded did establish this element. The Applicant also argued the claim should be struck or dismissed as being brought past the limitation period, pursuant to the *Limitations Act*, RSA 2000, c L-12 (the "*Act*"). However, this argument also failed due to exceptions provided for domestic violence under s. 3.1 of the *Act*, and Counterclaims, under s. 6(2) of the *Act*. The claim for assault and battery was therefore maintained.

Lastly, the Court reviewed the Defendant's Statement of Defence to determine if paragraphs should be struck out. Angotti J. considered Rule 3.68(2)(c), which permits the striking of all or part of a claim if the pleading is deemed frivolous, irrelevant, or improper. The Court also considered Rule 13.6(2), which

requires parties to plead the facts they intend to rely on. After examining the contested paragraphs, Justice Angotti decided to strike two paragraphs from the Statement of Defence that were found to be either improper or unrelated to the facts or claims presented in the Statement of Claim.

TRAFIGURA CANADA LIMITED V HULTINK, 2024 ABCA 317

(HAWKES, FRIESEN AND FEEHAN JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant appealed a Chambers Judge's Order providing that Civil Practice Note 7 ("CPN7") did not apply.

CPN7 sets out the summary procedures to be followed under Rule 3.68 when a claim, defence, action, application, or proceeding appears to be frivolous, vexatious, or an abuse of process. In the underlying Action, the Respondent filed a Statement of Claim against the Appellant and others, alleging constructive dismissal, negligence, and intentional infliction of mental suffering. Subsequently, she filed a second Statement of Claim with similar allegations, adding a new Defendant and new causes of action, including the tort of harassment.

Counsel for the Appellant wrote the Associate Chief Justice of the Court of King's Bench requesting the second claim be dismissed or struck under CPN7. The Appellant asserted the second Action was duplicative of the first and an abuse of process. Subsequently, the Chambers Judge held the circumstances did not justify applying the CPN7 procedure. He found that CPN7 did not apply because the second claim was "not, on its face, frivolous, vexatious, or an abuse of process".

On Appeal, the Appellant argued the Chambers Judge erred by failing to consider that the second Action was duplicative of the first. The Court found that the Chambers Judge identified and considered the issue of duplication, noting that the second claim was not evidently an abuse of process on its face. The second claim added a new Defendant and new causes of action. It was also filed to pre-empt any limitation defences. Further, the Respondent applied to consolidate the two Actions to avoid a multiplicity of proceedings. The Chambers Judge did not err in finding that this was not an exceptional case warranting the application of CPN7.

SR V EDMONTON (POLICE SERVICE), 2024 ABCA 340

(KIRKER, DE WIT AND FRIESEN JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellants appealed the dismissal of an Application to Strike the Respondent's Claim under Rule 3.68(2)(b). The Appellants submitted that the Chambers Judge overlooked binding authority and proceeded on a faulty view of a prior, Interlocutory Order.

The Court of Appeal highlighted that Rule 3.68 offers mechanisms to address "significant deficiencies" in claims. A pleading can only be struck under this Rule if it is clear and evident that it does not present a valid claim, and no evidence is permitted at this stage.

The panel rejected the Application, disagreeing with the Appellants' position. It stated that a motion to strike a pleading under Rule 3.68(2)(b) does not involve evaluating the merits of the claim. If the claim is adequately pleaded, it should not be dismissed, even if the plaintiff cannot currently prove the claim. The Court noted that the Appellants emphasized the importance of the foundational rules and the necessity to eliminate unmeritorious claims early on. However, they conflated the process of striking pleadings with their Application for Summary Dismissal, which remained unresolved.

The Court concluded that it would be against the purpose and intentions of the Rules (in particular, Rules 1.2(2)(a), and 1.2(3)(c) and (d)) to request the Chambers Judge to strike the Respondent's Statement of Claim under Rule 3.68 based on limitation defences or arguments that had already been considered and dismissed.

CARBONE V DR JEFFREY C DAWES, 2024 ABCA 404

(SLATTER, KRIKER AND DE WIT JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant commenced an Action against the Respondents related to a cosmetic surgery procedure. Subsequently, the Respondents filed a Security for Costs Application. In response, the Appellant filed an Affidavit containing a paragraph expressing an opinion about the Respondents (the "Paragraph"). The Respondents applied to have the Paragraph struck under Rule 3.68(4)(a), asserting it was frivolous, irrelevant, and improper. The Appellant later filed a further Affidavit opposing the Application, reiterating the Paragraph and arguing why it should not be struck. An Applications Judge granted the Respondents' Application, striking the Paragraph from both Affidavits on the basis that the Appellant was not qualified to provide opinion evidence.

The Appellant appealed the Decision to a Justice of the Court of King's Bench. That Appeal was dismissed, as the Chambers Judge found the Paragraph to be an unsupported statement and an opinion the Appellant was not qualified to give. The Chambers Judge

emphasized that the law on evidence clearly prohibits the admissibility of opinion evidence and further noted that the Paragraph was irrelevant to the Security for Costs Application.

The Appellant further appealed to the Court of Appeal, arguing that the Chambers Judge failed to provide meaningful reasons for the Decision and relied on *CLM v DGW*, 2004 ABCA 112, to assert that Affidavit evidence should only be struck if it is scandalous, irrelevant, or oppressive. The Appellant also contended that the Chambers Judge should have left the determination of the Paragraph's admissibility to the Judge hearing the Security for Costs Application. Additionally, the Appellant appealed the $200 Costs Award.

The Court disagreed with the Appellant, affirming that the Chambers Judge clearly found the Paragraph improper since the Appellant was not qualified to provide opinion evidence. The Court noted that the case cited by the Appellant referenced language from the former Rule 307, whereas the current Rule 3.68(4)(a) allows the Court to strike all or part of an Affidavit containing frivolous, irrelevant, or improper information. The Court explained that while the Judge hearing the substantive Application is often better positioned to determine the relevance and admissibility of uncertain evidence, it is appropriate to strike clearly irrelevant or inadmissible evidence in advance to uphold fundamental evidentiary standards. The Court also found no reviewable error in the Chambers Judge's Decision, noting that despite obtaining an adjournment, the Appellant failed to comply with the resulting Court Order to provide particulars of the Appeal.

Consequently, the Court dismissed the Appeal and awarded Costs to the Respondents.

INTER PIPELINE LTD V TEINE ENERGY LTD, 2024 ABKB 740

(FEASBY J)

Rule 3.72 (Consolidation or Separation of Claims and Actions)

In this Decision, the Court addressed Applications brought by Inter Pipeline Ltd. ("IPL") and Teine Energy Ltd. ("Teine") regarding the enforcement and stay of an Arbitral Award issued in favour of Teine. The parties had not formally sought Consolidation under Rule 3.72, which allows separate Actions to be treated as a single proceeding when it is in the interests of justice. Despite this, the Court followed the parties' approach of treating the matters as consolidated for the purposes of the Hearing, citing efficiency and the absence of a substantive reason to maintain the separation of the two Actions. The Court noted that Rule 3.72 typically requires a formal Application to consolidate proceedings and encouraged the parties to consider whether such an Application or similar procedural step might be necessary for the efficient administration of the Actions moving forward.

PEACE WAPITI SCHOOL DIVISION NO 76 V 1510526 ALBERTA LTD, 2024 ABKB 673

(APPLICATIONS JUDGE PARK)

Rule 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Applicant/Plaintiff brought an Application to amend its Amended Statement of Claim to either add the Respondent, Flint Corp., as a Defendant to the Action or in the alternative, to substitute the current Defendant with Flint Corp. The Respondent argued that the claim against it was time-barred, contending that the Applicant had constructive knowledge of Flint Corp.'s involvement but failed to act within the limitation period.

The Application engaged Rule 3.74, as well as Sections 3(1)(a), 6(1) and (4) of the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*"). The Court stated that, pursuant to Rule 3.74, the Court may order that a person be added or substituted as a Defendant to an Action. However, a Court may not make that order if prejudice would result that could not be remedied by a costs award, adjournment, or the imposition of terms. Applications Judge Park stated that the "classic rule" for amendments is that a pleading can be amended at any time, regardless of the lateness or carelessness of the party seeking to amend. However, where the amendment seeks to add a new party or cause of action after the expiry of a limitation period, unless permitted by statute, an exception applies.

The Court determined that the Applicant acted with due diligence in its discovery of the claim against the Respondent, and it was reasonable for the Plaintiff to consider the Respondent as a potential Defendant when it did. The Plaintiff satisfied the requirements of the *Limitations Act* by notifying the Respondent of the claim within months of discovering the claim, inside the 2-year limitation period. The Court found that the amendment would not cause irreparable prejudice. Applications Judge Park therefore granted the Application.

BAINS V ADAM, 2024 ABCA 327

(STREKAF JA)

Rules 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 14.5 (Appeals Only With Permission), 14.51 (Applications Without Oral Argument) and 14.57 (Adding, Removing or Substituting Parties to an Appeal)

This was an Appeal by Dr. Bains following a Trial Judge's dismissal of three Claims for damages resulting from motor vehicle accidents. Due to his designation under an Interim Court Access Restriction Order, Dr. Bains was required to seek permission to Appeal, pursuant to Rule 14.5. The Court of Appeal initially granted permission on limited grounds, including whether the Trial Judge erred in assessing damages, admitting certain medical evidence, and excluding specific medical records ("Permission to Appeal Decision"). Dr. Bains then filed additional

Applications, pursuant to Rule 14.51, which were addressed in this Decision.

Dr. Bains requested that Justice Strekaf recuse herself, citing alleged bias. Strekaf J.A., applying the objective test for reasonable apprehension of bias, found no valid basis for recusal. Dr. Bains also requested a hearing before a three-judge panel to review portions of the Permission to Appeal Decision. However, Justice Strekaf noted that Rule 14.5(3) prohibits Appeals from Decisions on permission to Appeal by a single judge, and the Application was denied on that basis.

In another Application, Dr. Bains sought to amend his claim by adding Parties. Strekaf J.A. held that amending the Statement of Claim to add Defendants should have been done at the Court of King's Bench level. Adding Parties as this stage in the Appeal would result in prejudice to the Respondents. The Court noted that, pursuant to Rules 14.57 and 3.74, it would be improper to add a Party to an Appeal if it would result in prejudice that cannot be compensated in costs. Dr. Bains' request to amend the Claim was denied. In addition, his request to amend a previous Order's wording was denied, as the existing Order accurately reflected the Trial Court's Decision.

Lastly, Dr. Bains sought to halt all Appeal proceedings until certain issues were resolved, including adding Defendants and revisiting Witness Subpoenas. Justice Strekaf denied this request, finding it moot, as all issues had been addressed within this Decision. In conclusion all Applications were denied.

AUTOCANADA CAPITAL MOTORS GP INC V MIRBACH, 2024 ABKB 645

(GILL J)

Rule 4.16 (Dispute Resolution Processes)

This Decision addressed an Application by PricewaterhouseCoopers Inc., as Court-appointed receiver (the "Receiver"), for advice and direction on its Sixth Report of the Receiver and the legal opinion prepared by Miller Thompson LLP.

The Receiver sought various relief, including the approval of factual and legal conclusions, determination of outstanding legal issues, submissions from interested parties regarding priority to vehicle proceeds, access of document production, and for interested stakeholders to attend a Judicial Dispute Resolution ("JDR") pursuant to Rule 4.16(4). The Receiver sought to be excluded from the JDR but wanted the parties to confirm whether a resolution was reached at JDR.

The Court reviewed the Plaintiff's submissions for lack of natural justice in the Receiver's Application, purported bias by the Receiver, the Receiver's mandate, and the Receiver's legal opinion. Justice Gill found that the Receiver did not exceed its authority and acted in accordance with its mandate. The Receiver was independent, objective, unbiased, and acted in good faith.

The Court granted the Receiver's Application and accepted its recommendations with a few modifications. The Court extended the time for the JDR from 60 to 90 days and extended the time to report the outcome of the JDR from 65 to 95 days. Gill J. also granted the Application for the Receivership to be terminated, subject to any further Court direction that may be necessary.

EMBEDIA TECHNOLOGIES V BLUMELL, 2024 ABKB 735

(APPLICATIONS JUDGE PROWSE)

Rule 4.22 (Considerations for Security for Costs Order).

The case involved a dispute between Embedia Technologies Corporation and Embedia Sales Corp. (collectively, "Embedia") and several Defendants, who applied for Security for Costs against Embedia.

The Court noted case law that indicates that an Application for Security for Costs against a corporate Plaintiff could only be sought under Section 254 of the *Alberta Business Corporations Act* (**"***ABCA"*). However, the Court also acknowledged other cases which stated that an Application for Security for Costs against a corporate Plaintiff can be sought under both Section 254 of the *ABCA* and Rule 4.22. The Court noted that the reason for this is due to the perception that Applications under Section 254 are more difficult for the Applicant than Applications under Rule 4.22. The Court questioned whether a material difference exists between an Applicant establishing on the balance of probabilities that the Plaintiff would be unable to pay a Costs Award, and establishing that the Defendant is not likely to be able to enforce a Costs Award, ultimately concluding that there is no material difference between the provisions of Rule 4.22 and Section 254.

Applications Judge Prowse found that the Defendants met the burden to show that Embedia would be unable to pay a Costs Award. The Court considered the financial evidence before it, including Embedia's financial statements and expert opinion, and found Embedia's reliance on speculative purchase orders insufficient to counter the expert's conclusions. The Court ruled that it would be unjust to permit Embedia to pursue litigation without the means to cover Costs in the event of an unsuccessful outcome. Further, the Court found no evidence that ordering Security for Costs would unduly prejudice Embedia's ability to continue the Action.

The amount of Security for Costs was set according to the stages of litigation, with an initial sum of $126,000 awarded.

NORTHERN AIR CHARTER (PR) INC V ALBERTA HEALTH SERVICES AND CAN-WEST CORPORATE AIR CHARTERS LTD, 2024 ABKB 574

(ARMSTRONG J)

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

In 2017, Northern Air Charter (P.R.) Inc. ("Northern Air") sought Judicial Review of Alberta Health Services' ("AHS") decision to award an aviation services contract to Can-West Corporate Air Charters Ltd. ("Can-West"), alleging unfairness and breach of good faith. After

nearly six years, Northern Air discontinued its Application for Judicial Review on the day written submissions were due. Subsequently, the Parties sought a ruling on Costs.

Justice Armstrong emphasized that under Rule 10.29, a successful party is entitled to Costs, with the Court having discretion under Rule 10.31 to determine the reasonableness of the amount. Rule 10.33(1) considers certain factors such as the outcome, degree of success, amounts claimed and recovered, and the significance and complexity of the case when assessing Costs. Rule 10.33(2) evaluates of the parties' conduct, including any delays or misconduct. Justice Armstrong noted that settlement offers may also be considered in the analysis.

AHS sought 60% indemnification of fees, alleging Northern Air's misconduct exacerbated the complex litigation, and requested a three-fold multiplier of Schedule C. Can-West also sought Schedule C Costs due to the complexity of the litigation and double Costs for its hearing preparation. Northern Air, however, argued that the delays were cause by AHS's late document submissions and that Schedule C Costs should apply.

The Court found that AHS and Can-West were entitled to Costs as they were entirely successful. Schedule C Costs were adequate since AHS did not provide sufficient detail to justify a percentage of incurred fees, and the complexity of the Judicial Review did not warrant exceeding those amounts. AHS's request for a multiplier was denied, especially since Can-West, a full participant, sought Schedule C Costs without a multiplier. Justice Armstrong awarded 50% of Costs to AHS's second counsel for managing extensive records, emphasizing that using second counsel should help reduce overall costs. Additionally, since Northern Air abandoned the case before the hearing, the Defendants were entitled to 50% of trial preparation costs, and Costs for all four hearing days were awarded, though reduced by 50% due to the abandonment.

Justice Armstrong also assessed claims for double Costs due to unaccepted settlement offers. AHS had made a formal offer under Rule 4.24, seeking discontinuance of the Judicial Review Application in exchange for a waiver of Costs. Since Northern Air did not accept the offer and unilaterally withdrew the Application, effectively dismissing it, Armstrong J. determined that AHS was entitled to double Costs under Rule 4.29(3). Although Can-West did not make a formal offer, Armstrong J. noted that its genuine efforts to resolve the matter favourably were a factor considered under Rule 10.33(2)(h).

In summary, both AHS and Can-West were entitled to Costs based on Schedule C and the specifics of their conduct during the litigation.

CAZABON V CAZABON, 2024 ABKB 654

(GILL J)

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)

Prior to Trial, Ms. Winter served a Formal Offer to Settle of $150,000 on Mr. Cazabon. At Trial, Ms. Winters received Judgment of $229,501.17 plus half of Mr. Cazabon's pension for the period of joint accrual.

Pursuant to Rule 4.29, Ms. Winter sought, and was awarded, double Costs for any step taken after the Formal Offer to Settle was served. Based on the Judgment, Ms. Winter's fees were recoverable pursuant to Rule 10.31, under Column 3 of Schedule C.

However, as a result of Mr. Cazabon's conduct throughout the proceedings, Ms. Winter sought enhanced Costs. The Court found that Mr. Cazabon had engaged in misconduct and unnecessary conduct. This warranted enhanced Costs, pursuant to Rule 10.33. As a result, Ms. Winters was granted an enhancement in Costs, moving her from Column 3 to Column 4, rounded up to the nearest $10,000 increment to equal a 30% addition to her double Costs.

SAVOIE V LAMBERT, 2024 ABKB 744

(MARION J)

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

Following a Trial, the parties wrote to the Court regarding Costs. The Plaintiff acknowledged that the Defendant was more successful, but sought Costs on the basis that, among other reasons, the Defendant's conduct delayed the Action and that he had made a formal offer under the Rules prior to the Trial (the "2022 Offer"), which contained better terms than the result received.

The Court noted that it had considerable discretion in setting reasonable and proper Costs pursuant to Rules 10.29, 10.31, and 10.33, and went on to consider Costs principles generally and in the family law context. The Court rejected that the Plaintiff had established that he received a result that was "equal to or more favourable" than the 2022 Offer at Trial, as contemplated by Rule 4.29. The Court, however, agreed that the Defendant's conduct throughout the litigation was a factor to consider in assessing Costs. After considering the circumstances, including that the Defendant was self-represented for most of the Action, the Court held that both parties would bear their own Costs of the Action.

GEOPHYSICAL SERVICE INCORPORATED V PLAINS MIDSTREAM CANADA ULC, 2024 ABCA 385

(HUGHES, HO AND KIRKER JJA)

Rules 4.29 (Costs Consequences of Formal Offer to Settle) and 14.59 (Formal Offers to Settle)

The Court of Appeal panel dismissed Geophysical Service Incorporated's ("GSI") Appeal of a Chambers Judge's Order summarily dismissing their claim against the Respondents. The Court did not immediately address Costs because the Chambers Judge first had to determine Costs payable in the Court below. The Chambers Judge awarded Costs on a scale of double Column 5 of Schedule C, which the parties agreed also applied to the Appeal. However, the parties could not agree on two issues: (a) the impact of a formal offer served by each of the Respondents two days before filing their factum ("First Issue"), and (b) whether one Respondent was entitled to claim fees for a second counsel for the Appeal ("Second Issue").

On the First Issue, the parties agreed that the principles outlined in *H2S Solutions Ltd v Tourmaline Oil Corp*, 2020 ABCA 201 ("*H2S*") applied. The court in *H2S* considered Rules 4.29 and 14.59 and held that the primary factors to consider in determining whether a party is entitled to double costs includes the timing of the offer, the content of the offer, whether the offer is beyond *de minimis*, and any special circumstances. After considering the *H2S* factors, the Court found that the Respondents were entitled to double Costs for preparation of the factum. On the Second Issue, the Court held that the Respondent was not entitled to claim fees for second counsel in the circumstances of the case.

OLEKSYN V HI LINE FARM EQUIPMENT LTD, 2024 ABKB 584

(LOPARCO J)

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

The Defendants applied for an Order to dismiss the Action for delay under Rules 4.33 or 4.31. The Action was started on March 21, 2016.

The Court considered the procedural history of the Action and did not find a period of three years (plus 75 days) had passed without a significant advance. The Court also found that it was not necessary in the circumstances to exercise its discretion to dismiss the Action under Rule 4.31.

The Court evaluated the parties' submissions on what qualified as a significant advancement in the Action. The Plaintiffs contended the following steps were a significant advance: (i) Undertaking Responses provided on March 1, 2019; (ii) additional Responses to Undertakings provided on March 5, 2019; (iii) a Formal Settlement Offer dated October 5, 2021; (iv) an Appointment for Questioning on March 15, 2022; and (v) the service of their Questioning Application set for May 17, 2022.

The Defendants submitted that there was a period of three years plus seventy-five days afforded by Ministerial Order 27/2020 where there was no significant advance in the litiga-

tion. Since the last uncontroversial significant advance on January 15, 2019, the Defendants claimed that the Plaintiffs did not take steps to significantly advance the litigation by March 31, 2022.

In response to Rule 4.31, the Plaintiffs asserted that the Defendants' claims of significant prejudice lacked merit. Aside from a vague assertion regarding the fading of memories, the Defendants did not specify how the delay had created an unfair disadvantage or adversely impacted their defense against the Plaintiffs' allegations.

The Court reviewed the pertinent case law under Rules 4.33 and 4.31. Justice Loparco examined the various actions presented by the Plaintiff as significant advancements, including the Undertaking Responses, Formal Settlement Offer, Appointment for Questioning, and the Questioning Application, to assess whether these steps brought the parties closer to a resolution.

The Court held that the March 1, 2019 Undertaking Responses and the letter dated March 5, 2021 greatly propelled the case forward. In its Rule 4.31 analysis, the Court acknowledged the presence of excessive and unjustifiable delays; however, the Plaintiffs effectively countered the assumption of substantial prejudice. The Defendants' concerns for the deterioration of memories lacked evidence, and a significant portion of the evidence remained intact in written form. The request to dismiss the Action was rejected, and specific procedural timelines were established to facilitate the progression of the case.

AC WARING & ASSOCIATES INC V THE NEXT GENERATION REALTY CORPORATION, 2024 ABKB 766

(BURNS J)

Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 10.31 (Court-Ordered Costs Award)

A Trustee applied to set aside a share swap as a transfer under value pursuant to Section 96 of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (the "Section 96 Application"). The Respondent successfully resisted the Section 96 Application, and the parties subsequently wrote the Court to address Costs. In the Decision, the Court also considered an unsuccessful Application by the Respondent under Rules 4.31 and 4.33. The Section 96 Application was adjourned due to issues raised at the last minute.

The Court noted that it had broad discretion to Order Costs pursuant to Rule 10.31. After considering the circumstances, the Court awarded three times Column 3 of Schedule C Costs to the Respondent.

EDMONTON (CITY) V CLARA INDUSTRIAL SERVICES LIMITED, 2024 ABCA 416

(GROSSE, WOOLLEY AND HAWKES JJA)

Rule 4.31 (Application to Deal With Delay)

The Plaintiff appealed a Decision by a Chambers Judge dismissing its Action for prejudicial delay under Rule 4.31. The case arose from a 2006 contract in which Clara Industrial Services Limited ("Clara") painted a bridge in Edmonton using paint manufactured by Termarust Technologies Inc. ("Termarust"). Both Clara and Termarust provided the Plaintiff with a five-year warranty. By 2008, defects in the paint began to appear, prompting the Plaintiff in late 2011 to request repairs under the warranty. Clara denied liability, asserting that it had applied the paint according to specifications, and refused to make repairs.

The Plaintiff filed its Statement of Claim in 2013, and served it on Clara in 2014, advising at the time that no immediate defence was necessary. Other than amending its Claim in August 2014 to add another Defendant, the Plaintiff did not take further formal steps until June 2018, when it requested a Statement of Defence. During this period, the Plaintiff obtained two expert reports on the paint failure, in 2015 and 2018, and shared them with Clara. Despite some correspondence and a 2015 meeting, Clara maintained its denial of liability and, in July 2018, applied to strike the Action for delay under Rule 4.31 and for being out of time under the limitation period.

Rule 4.31 allows for the dismissal of claims where delay has caused significant prejudice, with prejudice presumed if the delay is "inordinate and inexcusable". The Chambers Judge found that the Plaintiff failed to take meaningful procedural steps to advance the litigation. Between the filing of the Claim in 2013 and obtaining the expert reports, the Plaintiff made little progress. While obtaining the expert reports was deemed reasonable, this did not excuse the absence of document exchange or questioning. The prolonged inaction caused significant prejudice to Clara, including the death of two potential witnesses, fading memories, and the deterioration of key evidence such as the solidified paint. Furthermore, the absence of document exchange and questioning left Clara at a disadvantage due to "unknown unknowns". The Chambers Judge concluded that the delay was inordinate, inexcusable, and caused significant prejudice to Clara, warranting dismissal of the Claim.

The Plaintiff appealed the Decision, arguing that it had no obligation to expedite service or advance the litigation more quickly. It contended that only the delay from 2016 to 2018 was relevant and that any prejudice suffered by Clara was unrelated to its Actions. The Plaintiff also claimed that much of the necessary evidence was documented in expert reports. The Court rejected these arguments, noting that earlier procedural steps could have enabled Clara to secure critical evidence, including testimony from witnesses who died during the delay.

The Court upheld the Chambers Judge's Decision, finding no errors in the assessment of delay or prejudice. The Appeal was dismissed.

MCLEOD V MCLEOD, 2024 ABKB 719

(MOORE J)

Rule 4.33 (Dismissal for Long Delay)

The Plaintiffs appealed a Decision by an Applications Judge dismissing their Action for long delay under Rule 4.33(2). The Appellants started a trucking business in 1993, transporting feed and shavings for agricultural operations. By 2006, the business began working on oilfield reclamation projects, and their son, the Respondent, was hired as an independent contractor. The dispute centered on the ownership of the business and its equipment. The Appellants argued that the Respondent was to purchase the equipment at fair market value, whereas the Respondent claimed he took ownership of the business and equipment in January 2011.

The procedural history of the case was undisputed. The Appellants filed their Statement of Claim in December 2013, and the Respondent filed a Statement of Defence in March 2014. Records were exchanged in 2014, Questioning occurred in 2015, and Undertakings were addressed thereafter. On May 16, 2019, a Consent Order directed the Registrar of Motor Vehicle Services (the "Registrar") to produce certain vehicle registration records. On July 17, 2019, the Appellants' former counsel provided those records to the Respondent's counsel via a CD. After the Appellants' counsel withdrew in February 2020, no steps were taken until September 2022, when new counsel was retained, and a Standstill Agreement was reached. In November 2022, the Respondent applied to dismiss the Action for long delay.

The main issue on Appeal was whether the last significant advance in the Action occurred with the May 16, 2019 Order or the July 17, 2019 letter providing the Registrar's records. Rule 4.33(2) mandates that an action be dismissed if three or more years pass without a significant advance, unless certain exceptions apply. The Court emphasized that it must focus on substance rather than form and apply a functional analysis to determine whether a step meaningfully advanced the Action. A step is not significant if it is duplicative, perfunctory, or adds nothing new to the litigation.

The Court found that the documents provided by the Registrar duplicated records already exchanged in 2014. As such, the July 17, 2019 letter did not constitute a significant advance. Consequently, the Appeal was dismissed because no significant step had occurred since the May 16, 2019 Order, thereby exceeding the three-year threshold under Rule 4.33.

WANG V MILLMAN, 2024 ABCA 393

(WATSON, STREKAF AND GROSSE JJA)

Rules 4.33 (Dismissal for Long Delay), 7.3 (Summary Judgment) and 14.88 (Cost Awards)

The Appellants sued the Respondent, their former lawyer, in 2019 and later sought to have the Respondent found in Contempt of Court for filing a Summary Dismissal Application under Rule 7.3. The Appellants argued that the Summary Dismissal Application was contemptuous, asserting it duplicated a prior unsuccessful Application for Dismissal under Rule 4.33, as both sought the same ultimate outcome.

The Chambers Justice determined that the Summary Dismissal Application did not constitute Contempt, and the Court found no reviewable error in this Decision. The Court noted that the Order dismissing the Rule 4.33 Application did not explicitly or implicitly prevent the Respondent from later filing for Summary Dismissal on the merits. The Court emphasized that the two Applications addressed distinct legal issues, and that filing the Summary Dismissal Application was not an abuse of process.

The Appellants also argued that the Costs Order granted by the Chambers Justice was unwarranted. However, the Court upheld the award, affirming that the successful party was entitled to Costs, and noting that the award was appropriate. The Court further observed that the amount could have been higher given the baseless allegations of contempt.

Ultimately, the Court dismissed the Appeal and awarded the Respondent Costs of the Appeal under Rule 14.88.

FORESTBURG (VILLAGE) V AUSTIN CARROLL POOL CONSTRUCTION LTD, 2024 ABKB 587

(LOPARCO J)

Rule 5.2 (When Something is Relevant and Material)

The Appellant appealed a Decision by an Applications Judge that certain undertakings were not relevant or material to the matters in issue and did not require a response.

The underlying Action arose from a construction dispute. The Appellant had issued a request for proposal for the replacement of a swimming pool membrane liner, and the Respondent was awarded the contract, which stipulated a lump sum payment. Upon removal of the existing liner, structural issues were discovered, leading to a stop work order. The Respondent later invoiced an additional amount, which the Appellant disputed on the basis that the cost of materials was inflated. During the Questioning of the Respondent's corporate representative, several undertakings relating to the cost of the materials were refused, leading to this Appeal.

The Court noted Rule 5.2, which establishes that for a question, record, or information to be considered relevant and material in the litiga-

tion, it must significantly assist to determine one or more issues raised in the pleadings or lead to evidence that could assist in this determination. Relevance is tied to the issues outlined in the pleadings. Materiality depends on whether the information can directly or indirectly prove a fact in issue.

Courts take a pragmatic approach and assess relevance and materiality broadly. The party seeking disclosure must demonstrate a plausible line of argument or provide some underlying foundation, but the burden is not intended to be onerous. At the production stage, Courts should avoid fine-tuning counsel's arguments, aiming to prevent abusive discovery practices while allowing legitimate lines of inquiry.

Justice Loparco analyzed each refused undertaking individually and allowed the Appeal in part, directing the Respondent to answer two undertakings.

1254748 ALBERTA LTD V MCBURNEY, 2024 ABKB 732

(LEMA J)

Rules 5.12 (Penalty for Not Serving Affidavit of Records), 10.51 (Order to Appear), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Plaintiffs sought a Declaration that the Defendants were in civil contempt pursuant to Rules 5.12, 10.51, 10.52, and 10.53, and an Order striking the Defendants' Statement of Defence and Counterclaim. The Court found the Defendants were in contempt pursuant to three different Court Orders. After considering the jurisprudence on the appropriate sanction for contempt, the Court struck the Defendants' Statement of Defence and Counterclaim, concluding that striking the pleadings was a sufficient sanction in the circumstances, and that neither imprisonment nor a fine was warranted.

MCNABB V SKINNER, 2024 ABCA 355

(FEEHAN, FAGNAN AND SHANER JJA)

Rule 5.13 (Obtaining Records from Others)

The Appellants challenged the Chambers Judge's Decision dismissing their Application for production of psychological records under Rule 5.13. The Court upheld the Decision, finding no errors in the Chambers Judge's reasoning or application of the law.

The Chambers Judge correctly interpreted Rule 5.13 and applied the test for relevance and materiality as per *Terrigno v Butzner*, 2023 ABCA 124. The Appellants provided insufficient evidence to demonstrate that therapeutic records contained relevant or material information, particularly on the claims of paranoia affecting the Respondent's credibility. The Chambers Judge relied on the psychologist's assessment over speculative assertions by the Appellants

and emphasized that materiality could not be established without preliminary expert evidence.

The Appellants further argued that the Chambers Judge was biased because of comments suggesting their Application escalated the dispute and exploited the Respondent's vulnerabilities. The Court found no merit to this argument. The Chambers Judge's comments were directed at the merits of the Application and did not reflect a predisposition to decide unfairly. The strong presumption of judicial impartiality remained intact.

The Appeal was dismissed, with the Court affirming the Chambers Judge's findings and reasoning under Rule 5.13.

KJM V KUC, 2024 ABCA 388

(SLATTER, KIRKER AND GROSSE JJA)

Rule 5.17 (People Who May Be Questioned)

The Defendants in this medical malpractice Action appealed an Order denying them the opportunity to question for discovery the mother of the infant Plaintiff. The Appeal was dismissed.

The infant was born in 2010 and suffered from several disabilities resulting from the alleged negligence of the Defendants with respect to the care provided to her and her mother at the time of birth. When the father died in 2017, the present Litigation Representative, a practising solicitor, was appointed in his place by Consent Order.

The Appellants argued that the infant Plaintiff's mother was and had been "the plaintiff's sole surviving parent, sole caregiver, and the recipient of allegedly negligent medical care during her pregnancy, and during labour, and delivery". If they were denied Questioning, the Appellants argued that they would be subjected to a "trial by surprise".

In the Order under Appeal, the Chambers Judge dismissed the Application to question the mother. He held that the mother was not a party "adverse in interest" under Rule 5.17(1)(a), and that despite any residual discretion to allow her Questioning, questioning her was not consistent with the fundamental purposes of the Rules.

On Appeal, the Court held the Rules confirmed the long-standing Alberta practice not to permit pre-trial questioning of every possible witness. Rule 5.17(1)(c) specifically deals with questioning where a litigation representative has been appointed. While it permits the questioning of the litigation representative and the person represented, the Rule does not provide for the questioning of any other person who might have important information about the litigation.

The jurisprudence under this Rule should not be read as holding that any witness who stands to benefit from the action and who has evidence that would enhance speed, economy, fairness and disclosure can be questioned.

The presence of witnesses with relevant and material information could arise in many types of litigation, but that does not mean that they can all be questioned before trial. If the Appellants are taken by surprise they are not without remedy, since they can apply for a mid-trial adjournment to make inquiries, or to assemble expert evidence on unexpected issues.

LARSEN V ALLAM FARMS PARTNERSHIP, 2024 ABKB 687

(ALONEISSI J)

Rule 5.31 (Use of Transcript and Answers to Written Questions)

The Plaintiffs relied on read-ins from the Defendant's Questioning. The Defendants argued that any read-ins introduced by the Plaintiff became part of the Plaintiffs' case and that, therefore, the Plaintiffs were not entitled to challenge the credibility or reliability of the witnesses who gave that evidence.

Justice Aloneissi noted that Rule 5.31 allows a party to read-in evidence from questioning at trial. Under Rule 5.31(2), that evidence is evidence of the party who uses the transcript and is evidence only against the party who was questioned.

The Court cited *Abt Estate v Cold Lake Industrial Park GP Ltd*, 2019 ABCA 16 for the proposition that evidence from Questioning is not an admission unless otherwise stated, and that it must be weighed along with all the other evidence entered at Trial. Justice Aloneissi considered the Plaintiff's read-ins in context and found they damaged the Defendants' case.

BENNETT V NE2 CANADA INC, 2024 ABKB 695

(NEUFELD J)

Rules 5.33 (Confidentiality and Use of Information) and 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

This Decision addressed two Applications between NE2 Canada Inc. and its founder Timothy Gunn (together, "NE2"), and several former employees (the "Brokers").

The Brokers sought to strike their Security for Costs Application and Restricted Court Access Application from the Court record (the "Strike Application"). NE2 sought to clarify or vary a Court direction regarding the filing of Cross-Examination Transcripts (the "Clarification/Variation Application").

The Strike Application involved two issues. First, the Brokers argued that the Restricted Court Access Application and its supporting Affidavit, which contained redacted evidence relevant to allegations of workplace toxicity at NE2, should be struck because the Affidavit contained scandalous information about their personal lives. However, Carruthers J. had denied the sealing request in a July 2024 decision, finding that the Brokers failed to demonstrate a serious risk to an important public interest under *Sherman Estate v Donovan*, 2021 SCC 25. She found that that the embarrassment and reputational harm did not meet the threshold for sealing, that redaction was an adequate alternative, and that the Affidavit's relevance outweighed privacy concerns. The Court deemed the Brokers' Restricted Court Access Application a repackaging of previously rejected arguments and emphasized the open court principle. The Brokers' dissatisfaction with prior legal strategies or change in counsel did not overcome the presumption of court openness.

Second, the Brokers argued that their abandonment of the Security for Costs Application rendered the related materials irrelevant and unnecessary. Citing principles from *Ariss v Ariss*, 2011 ABQB 435, the Brokers argued that the materials were filed in error, were no longer relevant, and their withdrawal would not prejudice NE2 or harm the administration of justice. The Court rejected this argument, noting that abandoning the Application did not eliminate the relevance of the materials, particularly since they remained pertinent to NE2's Defence and Counterclaims.

Regarding the Clarification/Variation Application, the Court analyzed Rule 6.7, which requires the filing of cross-examination transcripts unless otherwise directed. The Court clarified that no outstanding direction prevented the filing of transcripts from examinations conducted in March and April 2023 and directed NE2 to file them.

The Court also addressed the Gunn Affidavit, sworn in support of the Clarification/Variation Application. The Affidavit presented Mr. Gunn's version of events on the Brokers' departure, allegations of workplace toxicity, and related litigation history. The Brokers opposed its filing, alleging it served the improper purpose of damaging their reputations and sought restrictions on its use, citing the implied undertaking rule under Rule 5.33. The Court found the Affidavit relevant and material and allowed its filing with appropriate redactions. However, the Court cautioned that excessive dissemination to non-parties could breach the implied undertaking rule, risk defamation claims, and affect future costs awards.

Ultimately, the Court denied the Strike Application, allowing the Affidavits and cross-examination transcripts related to the Security for Costs Application and the Restricted Court Access Application to remain on the record with redactions. The Court granted the Clarification/Variation Application, confirming the requirement to file cross-examination transcripts under Rule 6.7 and allowing the Gunn Affidavit to be filed.

EWASHKO V HUGO ET AL, 2024 ABKB 621

(LEMA J)

Rules 5.35 (Sequence of Exchange of Experts' Reports) and 8.16 (Number of Experts)

This was an Application by the Defendants to exclude the Plaintiffs' third Expert Report, arguing that it contravened Rule 5.35 on expert report sequencing and Rule 8.16, which restricts each party to a single expert per subject. The case involved allegations of medical negligence and standard-of-care issues related to obstetrics. The Defendants contended that any Surrebuttal Report should have been provided by the Plaintiffs' original expert, Dr. Stamp, rather than a new expert, Dr. Barrett. The Plaintiffs argued that Dr. Barrett's report was strictly responsive to new issues introduced by the Defendants' expert, Dr. Birch, thus qualifying as surrebuttal.

Justice Lema found that Rule 5.35 did not require surrebuttal reports to be provided exclusively by the initial expert, and he identified no precedent mandating such a restriction. Upon examining Dr. Barrett's report, the Court concluded that it responded directly to the new details raised by Dr. Birch, thereby maintaining its surrebuttal character. The Court further reasoned that, since Dr. Barrett's report was responsive to specific points raised in the

Defendants' rebuttal, it did not violate Rule 8.16 by introducing a second expert on the same subject, as it was essentially clarifying and supplementing Dr. Stamp's initial findings.

In addition, the Court exercised its discretion under Rule 8.16 to allow any overlapping elements within Dr. Barrett's report, finding no abuse or undue duplication of evidence. Accordingly, the Defendants' Application was denied, and the Plaintiffs were awarded Schedule C Costs with a multiplier of 2.

PACIFIC ATLANTIC PIPELINE CONSTRUCTION LTD V COASTAL GASLINK PIPELINE LTD, 2024 ABKB 696

(WHITLING J)

Rules 6.44 (Persons who are Referees), 6.45 (References to Referee), 10.31 (Court-ordered Costs Award), 10.33 (Court Considerations in making Costs Award) and 10.34 (Court-ordered Assessment of Costs)

The Applicants applied for an Injunction to prevent the Respondent from drawing on an irrevocable $117,162,384 letter of credit. The letter of credit was issued to secure the Applicants' performance in a large pipeline construction project. The Injunction Application was ultimately denied and affirmed by the Court of Appeal. The Respondent applied for Costs as well as "interest" on the Undertaking as to Damages.

The Court denied the Applicants' request for an Order directing an assessment of the Respondent's legal costs, pursuant to Rule 10.34(1), as it was to everyone's benefit to have the question of Costs resolved by the Application.

The Court awarded the Respondent Costs of $287,816.30 in fees and $34,366.16 in disbursements, representing indemnification at a level of 35%. The Court reviewed the factors in Rules 10.2 and 10.33 and found the matter was both very important and urgent, given the time value of money for such a large sum.

The case warranted a level of indemnification below the 40-50% range because the approach adopted by the Respondent in the initial proceedings was unrealistic. The Action could not have been fairly disposed of in urgent Chambers as the Respondent insisted.

Though the Court noted that it was desirable to conclude the matters without further litigation, and that it could determine the Respondent's claim on the undertaking in the context of the present Application, it nevertheless found it necessary to refer the matter of interest to a Referee. The Respondent's approach to simply apply the rate of interest contained in an inapplicable contractual provision to the face value of the letter of credit was problematic. Further, the evidence relied upon by the Respondent in support of its damages was too scant to enable a fair determination. Finally, the damages amount at issue was large; ordering the Applicants to pay over $2 million in the context of the present Application would be inadvisable and unfair, and a more robust inquiry was required.

The Court also noted that a Justice of the Court of Kings Bench was not a Referee within the meaning of Rule 6.44. Therefore, an inquiry or direction by a Referee had to be made by an Applications Judge or others.

PARADIS V DEGROOT, 2024 ABKB 594

(DAVIDSON CJ)

Rule 7.3 (Summary Judgment)

The Appellant appealed the Summary Dismissal of her Action for negligent investigation into her husband's death.

Chief Justice Davidson examined the components of negligence to assess whether the harm experienced by the Plaintiff was reasonably foreseeable, while also considering any policy implications that might oppose the creation of a duty of care.

The Court held that interactions between the Appellant and the Respondents were part of a legally required investigation. That did not establish the necessary proximity to create a duty of care. The responsibilities of the Respondents under the *Fatalities Inquiry Act* were of a public nature and did not extend to individual family members. Acknowledging a private duty of care would jeopardize public trust in the investigative process.

The Appeal was dismissed.

JUDGE V CONDOMINIUM PLAN NO 8322264, 2024 ABKB 666

(BIRKETT J)

Rule 7.3 (Summary Judgment)

The Plaintiff homeowners (the "Homeowners") purchased a condominium in late 2019 which they intended to renovate before moving in. However, the Defendant Condominium Corporation (the "Condominium") imposed a temporary moratorium on construction due to the COVID-19 pandemic, delaying the Homeowners' renovations.

The Homeowners applied for Summary Judgment, pursuant to Rule 7.3, arguing that there was no defence to the Plaintiffs' claim that the Board engaged in improper conduct, as set out under Section 67 of the C*ondominium Property Act*, RSA 2000, c C-22 (the "Act"). The Condominium cross-applied for Summary Dismissal, arguing that it was objectively reasonable that the Condominium protect the health and safety of the residents by placing a moratorium on construction activities until the COVID-19 pandemic improved. The Condominium took the position that the Board did not act in a manner that was oppressive or unfairly prejudicial, or that unfairly disregarded the interests of the Homeowners under Section 67 of the Act.

As explained in *Leeson v Condominium Plan No 9925923*, 2014 ABQB 20, the purpose of the oppression remedy in Section 67 of the Act is to protect the objectively reasonable expectations of an interested party from oppressive or unfairly prejudicial treatment. The courts defer to decisions of condominium boards. The decision is presumed to be reasonable until proved otherwise. Applications Judge Birkett noted that the reasonable expectations, as

expressed by the Homeowners, invited an analysis of these three questions: (i) did the Board act under the powers and authority afforded to them?; (ii) did the Board make its decisions based on the facts and information available to it in a non-arbitrary manner?; (iii) were the Homeowners treated in the same regard as all other owners?

Applications Judge Birkett found that the Board acted under the powers and authority afforded to them. The Condominium had statutory authority to make decisions regarding construction in the condominium building. Given the local, provincial, and federal health orders and mandates to manage the unprecedented COVID-19 pandemic, the Condominium had the authority to issue a temporary moratorium on new construction as a means of protecting the health and well-being of the owners. Implementation of the temporary moratorium on new construction was not ultra vires and not improper conduct as contemplated by Section 67 of the Act.

The Board made its decisions based on the facts and information available to it. It was reasonable to consider the general restrictions that the public was made aware of during the pandemic as a basis for placing a moratorium on new construction, including the Homeowners' renovations.

Lastly, Applications Judge Birkett held the Homeowners were uniquely affected by the temporary moratorium on construction as they were the only owners with plans to renovate their unit before occupancy at the time. However, this did not mean that the Homeowners were singled out and held against a standard that applied to no one else in the building. The steps taken by the Board in the face of the pandemic did not indicate preferential treatment afforded to the other owners over that of the Homeowners.

Ultimately, it was held that there was no merit to the Homeowners' claim that the Condominium engaged in improper conduct as set out in Section 67 of the Act. The Application by the Condominium for Summary Dismissal of the Homeowners' Claim was granted. The Application by the Homeowners for Summary Judgment was dismissed.

OSMAN V ALBERTA, 2024 ABKB 701

(PARK J)

Rule 7.3 (Summary Judgment)

The Crown sought an Order summarily dismissing the claim pursuant to Rule 7.3. On November 25, 2015, the Plaintiff, Mr. Osman, was remanded as an inmate at the Calgary Remand Centre (the "CRC"). On November 29, 2015, he alleged to have been assaulted by a corrections officer. He filed a claim for the alleged assault on November 10, 2017, which was subsequently dismissed for long delay. Mr. Osman filed another Statement of Claim on June 23, 2023, fundamentally identical to the basis of the first action, namely with respect to the purported assault.

The Crown defended the second claim on the basis that it was barred by operation of the *Limitations Act*, R.S.A. 2000, c. L-12 (the "Act"). Mr. Osman filed a Reply to Defence, pursuant to which he alleged that at the time of the assault, he was "utterly dependent" on the CRC corrections officers, including those said to have assaulted him. He relied on subsection 3.1(1)(c)

(iii) of the Act (the "Subsection"), which provides that there is no limitation period in respect of "a claim that relates to an assault or battery, other than a sexual assault or battery, if, at the time of the assault or battery…the person with the claim was dependent, whether financially, emotionally, physically or otherwise, on the person who committed the assault or battery".

After noting the factors under *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49, Applications Judge Park explained that an applicant must prove, on the balance of probabilities, the facts necessary to establish the date on which the plaintiff had knowledge of an injury caused by the defendant (and resulting damages), and no genuine issue requiring trial. Where it is plain and obvious that an action is statute-barred, summary dismissal should be granted.

A relationship of dependence was at the heart of the Subsection. In the Court's view, the Plaintiff had the onus to establish the existence of such a relationship at the time of the purported assault. Mr. Osman did not do so. The absence of such evidence was raised at the hearing of the Application. Counsel for Mr. Osman advised that he did not understand that the Crown's argument focused on the question of dependence and therefore elected not to offer any evidence on that issue. However, even if there had been evidence tendered to establish the necessary dependence, Applications Judge Park noted that it would not have changed his conclusion, and the Subsection would not have saved Mr. Osman's claim.

The "golden rule" of statutory interpretation requires the words of a statute to be read in their entire context and grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the intention of the legislative body. Applications Judge Park found that expanding the category of litigants to include those who delay prosecution would lead to absurd results. Therefore, the claim was time-barred, and Summary Judgment was appropriate.

TWERDOCHLIB V THE LOUGHEED SENIOR CITIZENS' WELCOME CLUB, 2024 ABCA 381

(FAGNAN JA)

Rule 7.3 (Summary Judgment)

The Respondent successfully applied before an Applications Judge for Summary Dismissal of the Applicant's negligence claim under Rule 7.3.

The Applications Judge found no genuine issue for Trial, as the Applicant failed to establish the Respondent owed a duty of care regarding a fall on a municipal sidewalk adjacent to the Respondent's property. The Respondent was found not to be an "occupier" under the *Occupiers' Liability Act*, and no common-law duty of care applied.

The Applicant later sought an extension of time to file an Appeal of the Decision of the Justice affirming the Summary Dismissal. The Court dismissed the Application, finding that the Applicant failed to demonstrate a reasonable chance of success on Appeal or explain the delay.

TOLMAN V TOLMAN, 2024 ABCA 315

(WAKELING JA)

Rules 9.2 (Preparation of Judgments and Orders), 9.4 (Signing Judgments and Orders) and 9.5 (Entry of Judgments and Orders)

The Applicant sought an Order Extending the Time to Appeal, and a Stay of the Order under Appeal based on complaints about the process that preceded entry of the Order. Both were granted.

In morning Chambers, Romaine J. granted the Respondent an order to appoint counsel to the parties' children. The Respondent, as the successful party, did not prepare the order, contrary to Rule 9.2. Four months after the order was pronounced, the Respondent attended Court and advised a Clerk that the Applicant's counsel had refused to draft the order, which was untrue. Justice Romaine prepared and signed the order, which occurred after the three-month period set out in Rule 9.5(2) expired. The Applicant also alleged that the contents of the order were inconsistent with what had been initially pronounced.

The Court found that the Applicant met the six criteria to extend the deadline to file an appeal. The Applicant moved expeditiously to respond to an unexpected development when Romaine J. signed an order after the three-month period. Further, the Applicant would have immediately appealed the Order had it contained the terms introduced by Romaine J.

With respect to the Application for a Stay of the Order pending Appeal, the Court held that Romaine J.'s lack of jurisdiction to sign the order after the three-month period presented a serious issue to be determined on Appeal, and the likelihood of success was high. Accordingly, the Application for a Stay was also granted. The Court invoked Rule 9.4(2)(c).

CGU V ASSOCIATION OF PROFESSIONAL ENGINEERS AND GEOSCIENTISTS OF ALBERTA APPEAL BOARD, 2024 ABCA 325

(DE WIT JA)

Rules 9.4 (Signing Judgments and Orders), 14.28 (Record Before the Court) and 14.56 (Orders to Facilitate Appeal)

The Applicant sought disclosure of certain records the Respondents refused to disclose. The Applicant filed an Application for Leave to Appeal the Decision of the Association of Professional Engineers and Geoscientists of Alberta Appeal Board (the "Board") which was pending at the time of this Decision. The Applicant sought additional documents from the Board for the purposes of the Leave Application. The Board refused to provide the additional records on the basis that they were subject to deliberative secrecy or that the

Board did not possess the requested records. Subsequently, the Applicant brought this Application.

The Applicant argued that disclosure of the additional documents was required under the *Engineering and Geoscience Professions Act*, RSA 2000, c E-11, ("*EGPA*") and that claims of deliberative secrecy should not apply due to procedural issues of the Decision. The Respondent maintained that all records were disclosed as required under the *EGPA* and invoked deliberative secrecy for the additional documents.

The Applicant submitted that an Appeal Judge has jurisdiction to grant Production Orders pursuant to Rule 14.28(3). The Court stated that Rule 14.28(3) allows an appeal judge to direct that any record before the court appealed from, including the Board, be transmitted to the Court. Appeal Justice de Wit noted that at least some, if not all of the records requested by the Applicant did not appear to be records that were before the Board at the Board Hearing and that all of the records that were before the Board had been disclosed to the Applicant.

De Wit J.A. noted that, pursuant to Rule 14.56, the court has wide discretion to make orders that facilitate an appeal. However, the Court determined that the *EGPA* did not extend to include the records requested by the Applicant and that there was no basis to compel the production of records the Respondent did not possess. The Court dismissed the Application for the production of records. Rule 9.4(2)(c) was invoked so the Court could prepare the resulting Order or Judgment.

DAVIS V PRESIDENT'S CHOICE FINANCIAL, 2024 ABCA 338

(FAGNAN JA)

Rules 9.4 (Signing Judgments and Orders), 14.5 (Appeals Only with Permission) and 14.47 (Application to Restore an Appeal)

The self-represented Applicant applied to restore her Appeal of the decision in *Bonville v President's Choice Financial*, 2024 ABKB 356 ("Bonville"). The Appeal was struck because it was not filed within the applicable time limit. However, before this Application was heard, there was a subsequent Decision that ordered the Applicant to pay Security for Costs, or her Action would be Struck. Following the Security for Costs Decision, the Court of King's Bench struck the Applicant's pleading and Judgment was granted to the Respondent.

Appeal Justice Fagnan noted that the Applicant failed to follow the prescribed steps for the Appeal, which may have been attributed to her self-represented status. The Court noted that under Rule 14.47, the primary consideration is the arguable merit of the Appeal. The threshold to establish arguable merit is very low.

The Court found that Bonville was essentially a pre-trial procedural decision because it did not make any final determination in the Action or grant Judgment to any party. Therefore, permission to Appeal under Rule 14.5 was required. Permission is generally granted if a serious question of importance was raised and had a reasonable chance of success. Fagnan J.A. found that the Appeal as formulated had no reasonable chance of success. The Applicant did not appeal the subsequent Decision and the deadlines to do so had passed.

The Court found that the Appeal would have no practical effect on the parties and there was no meaningful relief the Court could grant in the circumstances. Judgment had already been granted to the Respondents. Fagnan J.A. determined that the Applicant had not met the very low threshold to establish arguable merit under Rule 14.47. Fagnan J.A. also noted that the discretion to restore an appeal should be used sparingly and that the interests of justice would not be served by restoring the Appeal. The Application was therefore dismissed. Appeal Justice Fagnan invoked Rule 9.4(2)(c), and the Court prepared the resulting Order.

OKEKE V OAKES, 2024 ABCA 379

(WOOLLEY JA)

Rules 9.4 (Signing Judgments and Orders), 14.5 (Appeals Only With Permission), 14.36 (Case Management Officers), 14.39 (Case Management Officers) and 14.56 (Orders to Facilitate Appeal)

The Applicant was involved in two separate incidents leading to actions against the Calgary Police Service. The first incident involved the Applicant's arrest for trespassing at a Calgary mall, and the second involved his arrest for assault with a weapon.

The Applicant sought permission to appeal two decisions of Justice Woolley, one on recusal and one refusing to rescind the Case Management Officer's directions and denying advanced Costs, pursuant to Rule 14.5(1)(a). Rule 14.5(2) requires an Applicant to seek permission to Appeal.

The Applicant largely reargued his previous position or advanced new arguments for why he should be entitled to advanced Costs. The Court clarified that a Rule 14.5(1)(a) Application is not a rehearing, nor an opportunity to make new arguments on the merits.

Further, the Applicant argued that the Case Management Officer did not have jurisdiction to refuse to accept a new Affidavit for consideration. The Court noted that the Case Management Officer's decision was merely procedural, and that case management officers make important procedural decisions on a daily basis, as provided for by Rules 14.36(1), 14.39, and 14.56.

Thus, the Court concluded that the Applicant did not identify any question of general importance, possible error of law, unreasonable exercise of discretion, or misapprehension of important facts in the Court's refusal to grant his request for advanced Costs. Further, neither the arguments made originally, nor those newly advanced, fell within or even meaningfully addressed the standards for allowing an Appeal. The Court dismissed the Application and invoked Rule 9.4(2)(c), permitting an Order to be submitted without the Applicant's approval as to content and form.

ESFAHANI V SAMIMI, 2024 ABCA 387

(WOOLLEY JA)

Rules 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal the Decision of the Case Management Judge suspending his parenting time, ordering a PN7 evaluative intervention, and requiring him to pay Costs. The Case Management Judge also barred him from making further leave Applications until the PN7 was complete.

The Court noted that because the Case Management Judge's Decision prevented the Applicant from commencing or continuing proceedings, he was required to obtain permission to Appeal under Rule 14.5(1)(j). The Court held that the grounds of Appeal did not merit further consideration as the Applicant had not raised a question of law or precedent, and had not shown that he had a reasonable chance of success on appeal. The Application was dismissed, and the Court invoked Rule 9.4(2)(c).

PIIKANI V MCMULLEN, 2024 ABKB 575

(GRAESSER J)

Rules 9.12 (Correcting Mistakes or Errors), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), and 10.53 (Punishment for Civil Contempt of Court)

After contempt proceedings by the Applicants against the Respondent, for various breaches of Orders related to privileged documents and failure to attend cross-examinations, the Respondent was found guilty of contempt (the "Contempt Decision"). The Court sanctioned the Respondent.

The Applicants argued that the Respondent's Statement of Defence should be struck, and that he should be barred from seeking leave for any further Applications or Actions until he has purged his contempt and paid all costs awards (the "Application"). The Respondent later wrote the Court, seeking leave to set aside the Contempt Decision and to file fresh evidence.

Having found that the Respondent was guilty of contempt, Graesser J. examined the appropriate sanctions under Rule 10.53. The Court can impose a broad array of penalties; however, unauthorized use of privileged information warrants both general and specific deterrence. Justice Graesser found the Respondent's conduct was a serious breach of Court Orders. Justice Graesser further noted that the Respondent had not purged his contempt and remained in violation of several Orders.

Having considered the Application's complexity and the need for finality, Graesser J. awarded, among others, $20,000 in Costs to the Applicants for the sanctions portion of the Application. With respect to the Respondent's argument to set aside the Contempt Decision under Rule 9.15, Graesser J. found no merit to the Respondent's claims of fraud and dishonesty and no justification for a permanent Stay of the Contempt Decision. The Court found no need for further evidence as the Respondent's arguments lacked merit.

YOUNG V ZUKOWSKI, 2024 ABKB 593

(ARMSTRONG J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.21 (Service by Electronic Method)

Following a Summary Trial, which the Defendant did not attend or provide evidence for, Armstrong J. issued an Order dividing certain matrimonial property (the "Order"). The Defendant appealed, arguing that the Order should be set aside for improper service and lack of notice of the Summary Trial.

Citing the principle that a fair process must guide the exercise of discretion involved in deciding whether to set aside an order because of insufficient notice, Armstrong J. set aside the Order on the basis that the Defendant was not properly served with notice of the Summary Trial.

Justice Armstrong found that the Plaintiff, who had previously obtained an order for substitutional service (the "Service Order"), did not comply with the requirements for service under that order or Rule 11.21, which allows for service of documents, other than commencement documents, by e-mail.

Justice Armstrong noted that three conditions must be satisfied to effect for service by e-mail: (1) the party receiving service must have provided an address to which information in respect of an Action may be transmitted; (2) the information sent by e-mail must be received in a form that is usable for subsequent reference; and (3) the party serving electronically must receive a confirmation that the transmission to the party being served was successfully completed.

The Court found the Plaintiff failed to send documents by regular mail as required by the Service Order and did not receive confirmation of successful electronic transmission. Despite the Defendant's unreasonable refusal to update her contact information, the interests of fairness necessitated setting aside the Order to ensure the Defendant could respond to the allegations regarding the parties' matrimonial property. The matter was directed to proceed at a Rule 4.10 case conference to address outstanding issues.

SECURE ENERGY SERVICES INC V 1331616 ALBERTA LTD, 2024 ABKB 604

(KUBIK J)

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

This was an Appeal by Secure Energy Services Inc. ("Secure") challenging the Applications Judge's Decision to set aside the Noting in Default against Lone Star Pipe & Supply LLC ("Lone Star"). The Court noted its discretion under Rule 9.15(3) to set aside default judgment when the defendant presents an arguable defence, a reasonable excuse for non-defence, and acts promptly in seeking to set aside the default. Lone Star was found to have an argu-

able defence. It moved promptly. The issue in dispute was whether it had a reasonable excuse for failing to defend.

Lone Star claimed it lacked knowledge of the Amended Statement of Claim, arguing it failed to monitor its registered address in Texas. However, the evidence established that Lone Star's corporate representatives, including its manager, were informed of the claim, as documents were received at Lone Star's registered address and subsequently forwarded to the responsible parties.

The Court held that a mere failure to monitor mail does not amount to a reasonable excuse for default as litigants are expected to ensure that documents sent to their registered addresses are collected and reviewed. Citing *Wilson v Bobbie,* 2006 ABQB 22 and *Hammond v Hammond*, 2019 ABQB 522, the Court emphasized the importance of diligence. It found that Lone Star's lack of action was not accidental or inadvertent, which are required to set aside a noting in default. A bare denial of notice was insufficient to establish a reasonable excuse in the circumstances.

The Appeal was allowed, and Secure was entitled to proceed with its claim. Secure was awarded costs on Column 5 of Schedule C.

HANLON V URSULIAK, 2024 ABKB 739

(LITTLE J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.16 (Service on Lawyer)

The Defendant, Ms. Ursuliak, applied under Rule 9.15(3) to set aside a Noting in Default on September 16, 2024.

Counsel focussed their submissions on whether there was a flaw in service which would disentitle the Plaintiff to its Noting in Default. Counsel for the Defendant acknowledged that service was effected on September 11, 2024 when she specifically acknowledged service pursuant to Rule 11.16. However, there was disagreement as to whether service was effected on August 20, 2024, when the Defendant's lawyer responded by email that she had "instructions to accept the Amended Statement of Claim". Counsel for the Defendant argued there was a difference between accepting service and confirming that she had instructions to accept Service.

Rule 11.16(2) provides that "Service is effected under this rule on the date service of the commencement document is accepted in writing by the lawyer." Relying on *Toronto Dominion Bank v Halliday*, 2022 ABKB 764, Justice Little confirmed that a written acknowledgement or acceptance of service must be from the Defendant and not an agent of the Defendant. That distinction, however, cannot be relied upon by a lawyer. In the case at hand, counsel for the Defendant confirmed on August 20, 2024 that she had instructions to accept service. That amounts to an acceptance of an email communication by a lawyer. The Court found that counsel for the Defendant, and therefore the Defendant, was properly served on August 20, 2024. That was sufficient to validate the Noting in Default.

Turning to Rule 9.15(3)(a), the Court noted that this Rule is discretionary and permits the Court, on terms it considers just, to permit a Statement of Defence to be filed by a party who has been Noted in Default. The Court applied the test from *David M. Gottlieb Professional Corporation*

v Nahal, 2011 ABQB 355, to decide whether to set aside the Noting in Default, focusing on whether there was a meritorious defence. The Court found a triable issue based on the Defendant's Affidavit, which presented a factual dispute regarding the condition and handling of property. The Defendant was therefore permitted to file a Statement of Defence.

WALLACE & CAREY INC (RE), 2024 ABKB 672

(NEUFELD J)

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

A & M Enterprise Ltd, Freshslice Holdings Ltd, and RF Franchising Inc (collectively, "Freshslice") failed to pay invoices for products delivered by Wallace & Carey Inc ("WC") and engaged one of WC's competitors to supply products to its franchisees, in violation of a Court Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "*CCAA*"). The Court held that WC was entitled to Costs and directed the Parties to refer the matter back if they were unable to agree on Costs.

WC sought solicitor-client costs, asserting that Freshslice repeatedly failed to comply with Court Orders, engaged in litigation misconduct, and rejected a settlement offer that would have resolved the Costs dispute by paying 40% of WC's actual Costs. WC also emphasized that Freshslice's failure to pay previous costs awards necessitated enforcement actions. In response, Freshslice argued that solicitor-client Costs are rare absent contractual provisions, criticized WC for not providing a Schedule C assessment, and claimed that some of the expenses arose due to WC's own procedural errors.

Justice Neufeld explained that the determination of costs awarded to a successful party falls within the Court's discretion, which must be guided by precedent and the Rules. Neufeld J. noted that Rule 10.33 provides a non-exhaustive list of factors for consideration, including the outcome, amounts claimed, complexity, conduct of the parties, non-compliance with the Rules or an order, misconduct, and settlement offers. Additionally, Neufeld J. noted that Rule 10.2 specifies the factors relevant to the evaluation of the reasonableness of legal fees.

Justice Neufeld addressed the issue of solicitor-client Costs, emphasizing that such awards are rare unless explicitly provided for by contract or warranted by egregious misconduct. While acknowledging that Freshslice's conduct was disrespectful and undermined the *CCAA* process, Neufeld J. stated that Freshslice was already facing financial consequences through joint-and-several liability debts owed by its franchisees. Consequently, Neufeld J. declined to award solicitor-client Costs. Additionally, Neufeld J. found that Schedule C Costs were inappropriate due to the distinctive nature of *CCAA* proceedings, which have compressed timelines and higher immediate legal expenses compared to commercial litigation. Neufeld J. concluded that the significant legal and judicial resources involved, along with the importance of the liability issues raised, justified a substantial Costs award for WC.

To expedite the process and avoid delays associated with detailed assessments, WC requested a lump sum award instead of full indemnity costs. Neufeld J. applied two discounts to WC's claimed costs, a 50% discount for time spent on an abandoned hearing and

WC's request for a lump sum award, and a further discount of 45% representing the mid-point between the 40-50% range for recovery of legal costs.

As a result, WC was awarded Costs of $36,000, inclusive of fees and disbursements.

NOVA OCULUS CANADA MANUFACTURING ULC V SATHER, 2024 ABKB 700

(NEUFELD J)

Rule 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account)

In declining to award solicitor-client Costs and instead awarding Costs of 50% of the Respondent's reasonable legal fees and disbursements, Neufeld J. reviewed the general costs principles.

Citing *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144, Neufeld J. noted that the award of costs is fundamentally a matter of discretion for the Court. Such discretion must be exercised judicially, with due regard for case precedent and the Rules.

Solicitor-client costs are the exception, rather than the norm. Partial indemnity provides the successful party with some contribution towards its legal fees and disbursements while ensuring that costs liability does not create unacceptable barriers to justice for litigants generally.

Neufeld J. cited *Lay v Lay,* 2024 ABCA 26 for the proposition that solicitor-client costs are generally awarded where the conduct of the unsuccessful litigant is so blameworthy that they should be required to pay the legal fees and disbursements of both sides. Examples of such conduct include litigation misconduct, and fraudulent pre-trial conduct.

Short of full indemnity solicitor-client costs, it is open to the Court to award partial indemnity costs. When cost recovery is set at a proportion of legal fees, an evaluation of reasonableness having regard to the factors articulated in Rule 10.2 is necessary. Costs Applicants are expected to provide a Bill of Costs calculated under schedule C. The Trial Judge or an Assessment officer must conduct a detailed analysis of reasonableness.

ASSOCIATION OF PROFESSIONAL ENGINEERS AND GEOSCIENTISTS OF ALBERTA V WOOD GROUP CANADA INC, 2024 ABKB 638

(NIXON ACJ)

Rules 10.28 (Definition of "Party"), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

Wood Group Canada Inc. ("Wood") brought an Application ("Underlying Application") seeking production and disclosure against the Association of Professional Engineers and Geoscientists of Alberta ("APEGA"). The Underlying Application was dismissed, and a second Application brought by Wood to compel Undertakings was partially granted (the "Application to Compel"). Barry Bauhuis ("Mr. Bauhuis"), a retired employee of Wood, supported the Underlying Application. APEGA was supported by the intervener CNOOC Petrolum North American ULC ("CNOOC") on both Applications.

APEGA sought a Costs Award of 50% of its own solicitor and client Costs for the Underlying Application, whereas Wood did not seek Costs, but argued that Column 1 of Schedule C was appropriate. CNOOC sought Costs against Wood in both Applications.

The Court noted the general Rule that a successful party to an Application is entitled to Costs pursuant to Rule 10.29, subject to the Court's discretion under Rule 10.31. Further, the Court has broad discretion pursuant to Rule 10.33. The Court found that while Mr. Bauhuis was not directly a party in the Underlying Application, he filed a significant amount of material and fell within the definition of a "party" under Rule 10.28, thereby entitling parties to seek Costs against him.

In the end, APEGA was awarded Column 1 of Schedule C Costs against Wood and Mr. Bauhuis in the Application to Compel. CNOOC was awarded Column 1 of Schedule C Costs.

FORD V NEW DEMOCRATS OF CANADA ASSOCIATION, 2024 ABKB 685

(DARIO J)

Rules 10.28 (Definition of "Party"), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision. The Plaintiff sued the Alberta New Democratic Party ("Alberta NDP"). Due to being an unincorporated association structured with an invalid Trustee, the Plaintiff also named the New Democrats of Canada Association ("Federal NDP") as a Defendant. The parties had reached an Agreement to appoint a representative for the Alberta NDP that would release the Federal NDP; however, the Alberta NDP reneged on the Agreement. Further legal proceedings ensued, leading to this Costs Decision.

Justice Dario acknowledged that the parties agreed the Plaintiff was successful in the proceedings before her and was therefore

entitled to costs. The Plaintiff argued for costs against the Federal NDP due to its unsuccessful application to strike or summarily dismiss the Statement of Claim and sought a multiplier due to the conduct of the parties. The Federal NDP argued that costs should only be awarded for the previous Costs Appeal and not for the Striking Application because the Plaintiff took no position. The Alberta NDP argued that its issues were minor compared to those involving the Federal NDP and that it was not a formal party to the proceedings pursuant to Rule 10.28 and should therefore not bear costs.

Both Defendants took the position that Schedule C was the appropriate method and the Federal NDP claimed Column 5 was appropriate. The Court noted that despite that the Federal NDP had argued for solicitor-client costs before the Applications Judge in the previous Costs Decision, now that it was the payor, it conceded that Schedule C was the default position. The Federal NDP contended that elevated costs are only awarded where there is misconduct or increased complexity in line with the factors set out in Rule 10.33.

Dario J. awarded the Plaintiff costs of $22,680. The Court found that the Alberta NDP's failure to honour its agreement necessitated further litigation which justified the award of costs against it. The Federal NDP's unsuccessful applications also warranted costs against it. Dario J. determined that the complexity of the case and the conduct of the Alberta NDP in reneging on the Agreement and the subsequent delay in proceedings justified a multiplier of two for costs. Additionally, the Court found that the Alberta NDP's conduct amounted to litigation misconduct. The Court held that Alberta NDP and the Federal NDP were jointly and severally liable for Costs.

AK V JJ, 2024 ABKB 582

(RICKARDS J)

Rule 10.29 (General Rule for Payment of Litigation Costs)

The Court determined Costs of an Appeal. As the successful party, the Respondents sought full indemnity costs or, alternatively, costs under Schedule C Column 3. The Appellant argued for costs under Schedule C Column 2 or no costs due to a public interest exception.

The Court applied Rule 10.29, which generally entitles the successful party to costs, and rejected the Appellant's argument for a public interest exception. While the Court agreed that the Respondents were entitled to Costs, it found no basis for full indemnity costs and determined that Costs should be awarded under Column 1 of Schedule C. The final Costs awarded to the Respondents totaled $5,315.63, on a multiplier of 1.5 due to the Appellant's prior notice that the Appeal had a low probability of success.

NORRIS V NORRIS, 2024 ABKB 600

(RENKE 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 parties were unable to settle Costs following three Applications in Special Chambers by the Applicant and applied for guidance. In Special Chambers, the Applicant sought: (1) the removal of the Respondent as Co-personal Representative of the Estate (the Co-personal Representative Application), (2) the termination of the Enduring Power of Attorney for the Respondent's alleged failure to provide proper accounts (the "Accounting Application"), (3) and a contempt determination against the Respondent for failing to comply with Court Orders (the "Contempt Application").

The Applicant argued for full indemnity Costs exceeding $100,000 or, alternatively, Costs under Column 4 or 5 with a multiplier, along with double Costs after a Calderbank Offer. The Respondent sought Costs for the Co-personal Representative and Contempt Applications but agreed the Applicant should receive Costs for the Accounting Application under Schedule C, Column 1.

The Court referred to Rules 10.29, 10.31 and 10.33. Rule 10.29 confirms the general rule that a successful party is entitled to costs subject to the Court's discretion. Courts will consider the factors outlined in Rule 10.33 when awarding costs. A successful party is entitled to reasonable and proper costs, or any other amount deemed appropriate by the Court under Rule 10.31.

After considering the factors and jurisprudence, the Court found mixed success in the Applications, leading to distinct costs determinations.

The Applicant was awarded Costs under Column 2 with a 1.5 multiplier, and double costs after the date of the settlement offer for the Accounting Application. No Costs were awarded for the Contempt Application. The Respondent was entitled to Costs under Column 1 for the Co-personal Representative Application. This resulted in a net costs payable to the Applicant in the amount of $14,387.50, with the Respondent responsible for the Costs due to his conduct in the Accounting Application. Each party bore their own Costs for this Application.

GARBERA ESTATE, 2024 ABKB 641

(RENKE 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 Decision dealt with Costs from an underlying Application. The Applicant, Thomas Garbera, applied for the administration of the Estate of his late father, Walter. Walter's will named his sons, Thomas and Ethan, as beneficiaries, while Joyce Oman was appointed as

Personal Representative and Trustee. Walter also had two joint bank accounts with his sister, Helen Klammer. At the time of the Application, the Estate was valued at about $533,000, excluding joint accounts.

In the Application, Thomas asked the Court to: (i) remove Joyce as Personal Representative and Trustee and appoint someone else; (ii) determine if Joyce's expenses were proper Estate expenses; (iii) decide if Joyce should be paid for work done on behalf of the Estate; and (iv) clarify if the joint accounts were part of the Estate.

In his decision reported at 2024 ABKB 185, Justice Renke: (i) dismissed the application to remove Joyce as Personal Representative and Trustee; (ii) set Joyce's compensation as Personal Representative at $1,500, as of January 31, 2023; (iii) declared that Helen held the beneficial interest to one of the joint accounts; and (iv) declared that Helen held the funds in the other joint account in trust for the Estate, and ordered Helen to pay $77,596.60 to the Estate.

The parties could not agree on the Costs quantum regarding: (i) Thomas' costs against Helen; (ii) Joyce's costs against Thomas; and (iii) indemnification for Joyce's legal expenses.

Justice Renke began by noting that the "key rules" for costs awards are found in Rules 10.29, 10.31, and 10.33. He then canvassed the case law guiding cost determinations.

The overarching principle is proportionality, which "can be understood to lie between (typically) the reasonable legal fees that should have been charged for the litigation steps and the percentage or portion of those reasonable fees payable by the unsuccessful party, taking into consideration the r 10.33 factors". The Rules do not provide a particular method of measuring proportional costs.

Several methods—including examining the successful party's actual costs, percentage indemnity of solicitor-client costs, assessed costs, reasonable solicitor-client costs, or Schedule—may serve as the basis for setting proportionate costs. However, solicitor-client costs, understood as reasonable or proportional solicitor-clients costs (i.e., not necessarily what was actually charged by the successful party's counsel) may be awarded in "rare and exceptional circumstances" and are "generally reserved for reprehensible, scandalous or outrageous conduct by a party and in rare and exceptional circumstances".

Justice Renke noted that Thomas was largely successful on his Application against Helen, recovering about 70% of the joint account funds. However, the Application was not complex, requiring only a half-day hearing. The Court rejected Thomas' claim for solicitor-client Costs due to insufficient justification. Instead, Thomas was awarded Costs against Helen under Column 2 of Schedule C, totalling $10,771.97.

Joyce was awarded double Column 1 Costs from the Estate, totalling $16,100. This higher award was justified by the complexity and volume of her work, including handling beneficiaries, Estate accounting, and personal property distribution. The Court also noted that Joyce made a reasonable settlement offer that Thomas rejected.

For indemnification of Joyce's legal expenses, Renke J. found that the Estate should not cover her full, but only reasonable solicitor-client Costs, due to errors in the administration of the Estate, (e.g., delayed accounting and investigation of joint accounts, even though this was a good faith error).

WHITE BUFFALO MECHANICAL LTD (RE), 2024 ABKB 660

(MAH J)

Rule 10.29 (General Rule For Payment of Litigation Costs), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Decision for Costs arising from the dismissal of Bennington Financial Group's ("Bennington") Appeal of a Decision made by the Registrar in Bankruptcy (the "Registrar"). As Trustee in Bankruptcy of White Buffalo Mechanical Ltd., Faber Inc. opposed the Appeal and successfully upheld the Registrar's Decision on the merits.

Mah J. explained that, pursuant to Rule 10.29(1), the successful party is presumptively entitled to costs, but Rule 10.31 grants the Court discretion to determine costs based on principles of reasonableness, fairness, balance and equity. Justice Mah outlined that the relevant considerations for awarding costs, as set out in Rule 10.33, include the outcome of the matter, its complexity, and whether a matter was improperly or unnecessarily brought.

The Trustee sought full indemnity Costs due to allegations of serious misconduct or exceptional circumstances, relying on *Boyd v JBS Foods Canada Inc.*, 2015 ABCA 191. Mah J. noted Bennington's failure to comply with procedural Orders and the lack of any explanation for what appeared to be deliberate non-compliance. Additionally, Mah J. considered that the Trustee had offered to settle by Consent Dismissal without Costs, which Bennington declined, resulting in increased Costs for the creditors of the bankruptcy estate. Consequently, Mah J. awarded the Trustee 75% of its full-indemnity Costs.

SOUTHWEST DESIGN & CONSTRUCTION LTD V JANSSENS, 2024 ABKB 698

(BOURQUE 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)

Southwest's Application for an Interim Injunction was dismissed, and the parties subsequently made submissions on Costs. The Respondents sought an award of 50% of their solicitor and client fees, whereas Southwest argued for Costs in the cause or, in the alternative, Schedule C Costs or, in the further alternative, a percentage award of the Respondents reasonable solicitor and client Costs.

Southwest argued that the Rule 10.33 factors weighed in favour of Costs in the cause or reduced Costs due to the importance of the issues, the necessity of bringing the Application, and the absence of misconduct. The Court, however, was not persuaded by this argument, noting the presumption in Rule 10.29 that a successful party is entitled to costs. Further, while it was reasonable for

Southwest to commence the Action and seek an injunction, this was not a sufficient reason to depart from the presumptive rule.

The Court noted that Rule 10.31 also provides alternatives for awarding costs, including awarding Schedule C costs, awarding all or part of the reasonable and proper costs, or awarding a percentage of assessed costs. The Court held that Schedule C costs would be inadequate in the circumstances, representing only 5% of the Respondents' solicitor and client Costs. In the result, the Court found that it was appropriate to award a lump sum of $92,500, representing approximately 45% of the Respondents' reasonable and proper Costs.

RK V GSG, 2024 ABKB 771

(MAH J)

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

The Plaintiff, RK, sought to amend his Statement of Claim against multiple Defendants, including SP, GSG, APG, MG, and others. In *RK v GSG*, 2024 ABKB 661, Mah J. approved certain amendments and disallowed others. This Decision dealt with Costs of that Application. The Court considered the following factors: (a) The successful party is presumptively entitled to costs: Rule 10.29(1); (b) The determination of costs is inherently discretionary, and the exercise of that discretion must be based on the judicial principles of reasonableness, fairness, balance and equity: *JBRO Holdings Inc v Dynasty Power Inc*, 2022 ABCA 258 at para 26, Rule 10.31; (c) The relevant considerations for a costs award are found in Rule 10.33 and include, among 1others, the result, complexity, and whether a matter was unnecessarily or improperly brought.

Justice Mah further noted the need to establish consistency and to maintain proportionality in costs awards, provide meaningful (if only partial) indemnity to the successful party, and promote the deterrent and incentive effects of costs awards.

Turning to the facts at hand, Justice Mah found that the Defendants were substantially successful in resisting the substantive amendments proposed by RK, particularly those aimed at expanding liability. The Court noted that while some amendments were approved, they were mostly cosmetic and non-contentious. The Defendants successfully limited their exposure. Thus, from an overall perspective, the Defendants were substantially successful as they resisted these substantive amendments. Thus, they were "qualitatively and quantitatively more successful than RK". The Court exercised discretion to award Costs to the Defendants.

DB V KB, 2024 ABKB 622

(FRASER J)

Rule 10.33 (Court Considerations in Making Cost Awards)

The Court addressed Costs following the dismissal of DB's unsuccessful Appeal of a Costs Order in a family law Trial. The Court emphasized the Rule 10.33 factors relevant to awarding costs, particularly subsections 10.33(2)(a) and 10.33(2)(b), which address the conduct of the parties and complexity of the proceedings.

The Court found DB's conduct aggravating, noting that he knowingly misled the Court about his failure to obtain leave for the Appeal, caused unnecessary delays, and increased costs for the Respondent. Despite an earlier opportunity to resolve the matter through an informal offer, DB pursued the Appeal, which ultimately yielded a less favourable outcome. Considering these factors, the Court awarded the Respondent $10,000 in Costs. The amount exceeded the Schedule C baseline and reflected DB's conduct in the proceedings.

AKPAN (RE), 2024 ABKB 651

(NIXON ACJ)

Rule 10.49 (Penalty for Contravening Rules)

Two members of the Law Society of Alberta, Grace George Akpan ("Akpan") and Kenneth W. Kotyk ("Kotyk"), notarized documents that were identified as part of Organized Pseudolegal Commercial Argument ("OPCA") schemes. These documents were filed in two separate Actions at the Alberta Court of King's Bench. Proceedings were commenced to impose a penalty to Akpan and Kotyk, pursuant to Rule 10.49(1), for failing to comply with the Rules and Practice Notes in a way that interfered with the efficient administration of justice. Since the facts and legal issues in the two Actions were closely related, both Rule 10.49(1) proceedings were conducted together.

The Court noted the importance of these penalties, as lawyers continue to ignore the legislative, professional, and Court directions to discontinue and prohibit notarizing OPCA documents. The Court went on to state that nothing less will achieve the important objective of choking off OPCA schemes based on imaginary notary authority.

The Court concluded that Kotyk should be required to pay a $2,500 penalty. Such a significant amount was deemed appropriate because there were continued downstream consequences to his formalizing the OPCA documents. Though the Court acknowledged that Kotyk's contribution was minor, the Court noted that, as a professional, saying "I only broke the rules a little" is not an excuse. Further, the Court noted that deterrence is important, as lawyers are continuing to engage in this behaviour.

Unlike Kotyk, Akpan was more involved in the OPCA scheme. She formalized documents

that purported to terminate criminal proceedings, and that threatened Court staff. Akpan accepted fake OPCA ID as legally valid and importantly, the OPCA litigant relied upon Akpan's notarized materials, and took further retaliatory steps on that basis, which interfered with the proper and efficient administration of justice. When provided the opportunity to make submissions, Akpan provided neither an excuse for her serious misconduct nor any argument to explain or justify her actions. Therefore, the Court ordered that Akpan pay a $10,000 penalty.

AKPAN (RE), 2024 ABCA 415

(FEEHAN JA)

Rules 10.49 (Penalty for Contravening Rules) and 14.5 (Appeals with Permission)

This was an Application to Appeal an Order of the Court of King's Bench issued by the Associate Chief Justice responsible for managing abusive litigation and litigants in Southern Alberta. The Order arose from concerns about Ms. Akpan's conduct in notarizing and formalizing certain Organized Pseudolegal Commercial Argument documents. These documents, deemed "gibberish" by the Court, were presented in a criminal matter involving drug trafficking charges and an arrest warrant. The Court invited submissions on whether her actions interfered with the administration of justice and whether a penalty should be imposed under Rule 10.49(1) of the Rules of Court.

Ms. Akpan had previously appealed a related Decision due to a procedural error, which led to a rehearing. The Court noted that, pursuant to Rule 14.5(1)(b), permission to appeal is required for pre-trial Decisions respecting adjournments, time periods, or time limits. Since the time period set out in the Order had expired, part of the Appeal regarding the deadline was rendered moot. However, permission to Appeal was not required for substantive issues such as allegations of procedural unfairness and breaches of natural justice.

Subsequent to the initial Appeal Application, the Court issued a penalty Order against Ms. Akpan under Rule 10.49, which she also appealed. Both Appeals were consolidated and scheduled for hearing on February 10, 2025. In conclusion, the Court granted Ms. Akpan permission to proceed with the Appeal based on her filed documentation, finding that her Application for permission was unnecessary in the circumstances.

CMZ V JLO, 2024 ABKB 688

(EAMON J)

Rule 10.52 (Declaration of Civil Contempt)

The Decision captured the verbal reasons of Eamon J. The dispute involved the parents of two children and had a long procedural history. The Decision analyzed whether the Defendant was in Contempt of Court for violating an Interim Parenting Order (the "Order"). The Order directed that the children be immediately transferred to the primary care of the Plaintiff and for the Defendant's parenting time to end. However, the Defendant breached the Order by planning, helping to execute, or concealing the disappearance of the children on March 12, 2021, either alone or in concert with others.

The Court set out that Civil Contempt is governed by Rule 10.52 and that the standard of proof is high. The Court cited *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 for the test for Civil Contempt: the Claimant must prove beyond a reasonable doubt that the order clearly and unequivocally states what should and should not be done, the respondent had actual knowledge of the order (the Court may infer knowledge and willful blindness suffices), the respondent intentionally did the prohibited act or failed to do the compelled act, and there is an absence of reasonable excuse. Contempt of Court is a last resort, rather than a first resort, especially in family law proceedings where the administration of justice and the best interests of the children must be protected.

Justice Eamon noted that in the family law context, the Court must consider discretionary factors before finding contempt, including the best interests of the children, a paramount consideration, and alternatives to a contempt finding. Eamon J. noted that the failure to pay money is not contempt, per Rule 10.52, despite allegations by the Plaintiff that the Defendant's contempt included the failure to pay amounts owing to him.

The Court found that the Defendant was in Civil Contempt. The Defendant had admitted as much through her counsel. Justice Eamon was satisfied beyond a reasonable doubt that the Defendant had actual awareness of the substance of the Order, as she was present when it was pronounced. Eamon J. was also satisfied that the directions of the Order were clear and unequivocal that the children would transition to the Plaintiff's care immediately. The Court found that the Defendant joined in on the ongoing scheme to conceal the children. It was unclear whether she planned the scheme or not; however, the Court found beyond a reasonable doubt that she breached the Order by intentionally failing to disclose the whereabouts of the children. Eamon J. found that there was no reasonable excuse for this breach and that there was no reasonable alternative to a finding of contempt. The Court found that the Defendant's actions were contrary to the children's best interests, which required that the Court find contempt.

The Court noted that the law requires the Defendant the opportunity to purge the contempt, and that it would hear submissions on sanctions.

BALANKO V KONKOLUS, 2024 ABCA 363

(PENTELECHUK, WOOLLEY AND FETH JJA)

Rule 10.52 (Declaration of Civil Contempt)

Ms. Balanko appealed an Order holding her in civil contempt. She and the Respondent, Ms. Konkolus, were sisters and beneficiaries of their father's Estate, with multiple legal actions arising from disputes over the Estate and their respective roles. In 2022, the Court issued an Order (the "Romaine Order") directing Ms. Balanko to retain legal counsel for the Estate, provide an unredacted accounting of her handling of the Estate, and make distributions to beneficiaries.

Despite appealing the Romaine Order, which was later dismissed, Ms. Balanko failed to comply fully. She provided the required accounting after a contempt Application was filed, but delayed retaining counsel until May 2024, contrary to the Order's terms. Under Rule 10.52(3)(a)(i), civil contempt requires proof of clear terms of the order, the individual's knowledge of the order, and intentional non-compliance. On Application to the Court of King's Bench, each of these elements were found to have been established by the Chambers Judge. Ms. Balanko then appealed.

The Court of Appeal found no palpable or overriding error in the Chambers Judge's application of the test for contempt, or her factual findings. The Romaine Order was deemed clear and enforceable, and Ms. Balanko's explanations, including claims of financial inability and procedural misunderstandings, did not constitute reasonable excuses. The Court reiterated that orders are enforceable until set aside, rejecting arguments about the Order's propriety as irrelevant to the contempt finding.

The Appeal was dismissed, and enhanced costs were awarded to the Respondent, reflecting the Appellant's failure to withdraw the Appeal following the dismissal of her challenge to the Romaine Order. Rule 9.4.2(c) was invoked, such that the Appellant did not need to approve the resulting Order.

ANOA MARKETING INC V GOHEL, 2024 ABCA 394

(PENTELECHUK, HO AND KIRKER JJA)

Rules 10.53 (Punishment for Civil Contempt of Court) and 14.75 (Disposing of Appeals)

This Decision dealt with whether a provision in an Order by an Applications Judge was an Attachment Order under the *Civil Enforcement Act*, RSA 2000, c C-15, or an Injunction Order.

The Court found that the Order was, in substance and intent, an Attachment Order designed to preserve property, which is within the jurisdiction of Applications Judges under the *Civil Enforcement Act*. The misapprehension of the Order as injunctive relief had led to an incorrect decision by the Chambers Judge.

The Court exercised its authority under Rule 14.75(1)(c) and made the Judgment that should have been made. The Court granted the Appeal

and directed, pursuant to Rule 10.53(1)(d)(i), that the pleadings of the Respondents in the consolidated action be struck due to their failure to purge contempt and participate in the proceedings.

HENDERSON V PEERANI, 2024 ABCA 370

(DE WIT, FAGNAN AND FETH JJA)

Rule 13.7 (Pleadings: Other Requirements)

This was an Appeal from a Chambers Decision dismissing the Appellant's Application to lift Stays of Proceedings imposed under Section 69.3 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*"). The Appellant alleged fraudulent misrepresentation against the Respondents, asserting that their misstatements induced her to consent to transactions that prejudiced her financial interests. The Appeal raised issues concerning the interpretation of Section 178(1)(e) of the *BIA* and compliance with Rule 13.7 of the Rules.

The Chambers Judge dismissed the Application, finding that the Appellant's pleadings lacked the specificity required under Rule 13.7 to establish a claim for fraudulent misrepresentation. The Judge further determined that the Appellant's claims did not meet the criteria for the exception to discharge under Section 178(1)(e) of the *BIA*, as the alleged misrepresentations did not directly cause a transfer of property from the Appellant to the Respondents. The Appellant contended that the Chambers Judge applied an overly narrow interpretation of Section 178(1)(e) and failed to properly assess her allegations of liability arising from fraudulent misrepresentations.

On Appeal, the Court of Appeal concluded that the Chambers Judge erred in interpreting Section 178(1)(e) and in dismissing the Appellant's Application without fully addressing her evidence. The Court noted that Rule 13.7 requires parties alleging misrepresentation to particularize their claims clearly and precisely. While the Appellant's pleadings were imperfect, the Court held that her Affidavit evidence provided sufficient detail to establish an arguable claim.

The Appeal was allowed. The Court lifted the Stays of Proceedings but required the Appellant to amend her Statement of Claim within 60 days of the Decision.

WADDY V HIS MAJESTY THE KING IN RIGHTS OF ALBERTA (SOLICITOR GENERAL, CORRECTIONAL SERVICES DIVISION), 2024 ABCA 408

(PENTELECHUK, ANTONIO AND HO JJA)

Rule 13.38 (Judge's Fiat)

The Respondent obtained a Fiat to file materials late. The Appellant applied to have the Fiat set aside and for an Order finding the Respondent's counsel in Contempt of Court. The Chambers Judge dismissed the Appellant's Application. The Appellant then appealed that decision to the Court of Appeal.

The Court of Appeal stated that the granting of a Fiat, pursuant to Rule 13.38, is a discretionary, procedural decision that is owed deference on appeal. Such a discretionary decision can only be interfered with by the Court where the Chambers Judge misdirected themselves, the Decision is so clearly wrong it amounts to injustice, or where insufficient or no weight is given to relevant considerations.

The Court found no basis for appellate intervention because the Appellant did not suffer any prejudice from the granted Fiat. Further, the Appeal was moot as new deadlines for filing would be set when the matter was set down for a special. Despite that the Respondent's counsel did not provide the Court with a reasonable excuse for the missed deadline, it was reasonable for the Chambers Judge to attribute this to human error, rather than finding that it was done intentionally to defy a Court Order. The Court also noted that the Appellant's perception of bias against self-represented litigants, that they are held to a high standard while members of the legal profession are given breaks, is unfounded. Although the Respondent's counsel missed a few deadlines and therefore did not model the ideal practice to the Appellant, lawyers are human and from time-to-time miss filing deadlines. The granting of Fiats is a common practice that accommodates such oversights or slips. The Appeal was therefore dismissed.

JUTT MANAGEMENT INC V LEGENDS CONDO DEVELOPMENT CORP, 2024 ABCA 367

(WATSON JA)

Rules 14.3 (When These Rules Apply) and 14.8 (Filing a Notice of Appeal)

Pursuant to Rule 14.8, and supported by Rule 14.3(7), the Appellants sought an extension of approximately six weeks to appeal a Decision of the Court of King's Bench (the "Application").

Watson J.A. cited *Cairns v Cairns*, 1931 CanLII 471 (AB CA), [1931] 4 DLR 819, for the criteria to assess whether an extension of time should be granted in relation to an Appeal: (1) There was a bona fide intention to appeal while the right to appeal existed and that there was some special circumstance that would justify the failure to appeal; (2) There is an explanation for the delay and that the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the Judgment regarding the position

of both parties; (3) The Appellant has not taken the benefits of the judgment from which the appeal is sought; and (4) The Appeal would have a reasonable chance at success if allowed to proceed. (the "*Cairns* Test").

Applying the *Cairns* Test, Watson J.A. dismissed the Application.

Under the first part of the *Cairns* Test, Appeal Justice Watson accepted that there was a bona fide intention to appeal. Under the second part, Watson J.A. found that the Applicants had not provided an explanation for the delay.

However, the Court was satisfied that the Respondent was not so seriously prejudiced by the delay itself that it would be unjust to grant the extension.

As to part three of the *Cairns* Test, Watson J.A. found that Appellant did not appear to have taken the benefits of the Judgment under Appeal. The main question was whether the Appeal would have a reasonable chance at success if allowed to proceed. Watson J.A. held that there was no substantiation to the Appeal, and it had no reasonable chance of success.

SERFAS V SPADY, 2024 ABCA 314

(WAKELING JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought Permission to Appeal an Order for Costs following a seventeen-day Trial. Permission to appeal costs is required under Rule 14.5(1)(e).

Appeal Justice Wakeling outlined the two approaches for granting permission to appeal a Costs Award. Permission may be granted if the Applicant demonstrates that the alleged error raises a question of law of general importance, there is a strong likelihood of success on appeal, and the appeal will not hinder the progress of the action. Alternatively, the Applicant may argue that the order under appeal is clearly incorrect and should be overturned based on the overall circumstances.

The Applicant relied on the first approach, claiming that the Trial Judge had incorrectly awarded solicitor-client Costs of $468,182.80 and that the substantial amount justified an Appeal. The Applicant argued that Costs for Trial preparation should not have been awarded, given the Trial Judge's statement that complete indemnity or solicitor-client Costs were not warranted. Additionally, the Applicant relied on *Stoney v 1985 Sawridge Trust*, 2017 ABCA 368, which emphasized that "where large sums are involved a further appeal may well be justified".

Wakeling J.A. found that the Applicant failed to establish a question of law of general importance, and the likelihood of success on Appeal was estimated at around ten percent. The Costs Award represented sixty-two percent of the actual legal fees, and the Trial Judge had appropriately found enhanced Costs were warranted. Additionally, Wakeling J.A. noted, while unaware of any case where the Court granted permission to appeal solely due to a substantial costs award, that such awards are common in lengthy trials and do not alone justify an appeal. The Court held that since the Costs Award covered a period of over ten years, the award, while substantial, was neither unexpected nor rooted in a legal determination of general importance.

Consequently, Wakeling J.A. denied the Application for Permission to Appeal.

MAKIS V ALBERTA HEALTH SERVICES, 2024 ABCA 320

(SLATTER JA)

Rule 14.5 (Appeals Only With Permission)

The Applicants, a doctor and his professional corporation, were involved in a long-standing dispute with the Respondents, the Alberta Health Services ("AHS") and the College of Physicians and Surgeons of Alberta ("CPSA"). The Applicants had been found to be vexatious litigants previously, and required permission to appeal, pursuant to R. 14.5(1)(j). They therefore sought permission to Appeal an Order which sealed certain confidential information, directed the Applicants to destroy other confidential medical information in their possession, and found the Applicant, Dr. Viliam Makis, to be in contempt of previous court Orders.

In seeking permission to Appeal, the Applicants argued the Order was issued in furtherance of criminal acts, including covering up the murders of numerous Alberta cancer patients. Justice Slatter was brief in his reasons, finding that the Applicants' arguments were frivolous and without merit. The steps taken by the Respondents in the litigation were lawful and authorized by the Rules. Further, the Applicants' accusations of criminal conduct, bias, and conspiracy were unfounded. The proposed Appeal was without merit, and therefore the Application for permission to Appeal was dismissed.

AK V JJ, 2024 ABCA 324

(DE WIT JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant sought permission to Appeal a Decision of the Court of King's Bench, which had acted as an Appeal Court for Decisions made under the *Family Law Act,* SA 2003, c F-4.5 (the "*Family Law Act*") as required by Rule 14.5(1)(i).

The Applicant, the child's biological father, sought to regain custody after the child was placed with the Respondents under a Customary Care Agreement (the "CCA"). Any party could terminate the CCA with 90 days' notice. The Respondents filed a Guardianship Application under the *Family Law Act* in the Court of Justice, seeking permanent guardianship, which the Applicant opposed by revoking the CCA.

The Trial Judge found that the child's Indigenous status and need for protection meant *An Act Respecting First Nations, Innuit and Metis children, Youth and Families*, SC 2019 c 24 (the *"Federal Act"*) applied. The Trial Judge determined it was in the child's best interest to remain with the Respondents, granting the Guardianship Application. The Appeal Judge dismissed the Appeal, confirming that the Trial Judge had correctly applied the *Federal Act* and

concluded that it was in the child's best interest to remain with the Respondents.

De Wit J.A. outlined the test for leave to Appeal as established in *Mezo v Watts,* 2021 ABCA 76. The Applicant must demonstrate: (1) an important question of law or precedent, (2) a reasonable chance of success, and (3) that any delay will not impede the progress of the Action or cause undue prejudice. Additionally, de Wit J.A. highlighted that the child's best interest and the parent's resources should always be taken into account when deciding whether to grant permission to Appeal.

The Applicant argued that the Appeal raised important questions of law with precedential value, as the *Federal Act* had not previously been considered or interpreted by this Court. Further, the Applicant argued that the lower Court's Decision could adversely impact Indigenous parents, effectively penalizing them for responsibly entering into a CCA. The Respondents asserted that both the Trial and Appeal Judges correctly applied the *Federal Act,* noting that CCAs are unique to Ontario and thus any decision involving the *Federal Act* and CCAs would have limited precedential value for parties in Alberta.

Appeal Justice de Wit found that the Appeal raised significant legal questions with potential precedential value, particularly regarding the interpretation of the *Federal Act* in relation to Guardianship Applications after the termination of a CCA. De Wit J.A. highlighted that the Court of Appeal had not previously addressed whether the Federal Act changes the best interests test for Indigenous children. While acknowledging that the CCA is unique to Ontario, the Court noted the implications of such agreements may affect caregivers and children in Alberta. De Wit J.A. concluded that the Appeal was not frivolous and had a reasonable chance of success. Consequently, Appeal Justice de Wit granted permission to Appeal.

CGU V APEGA, 2024 ABCA 406

(DE WIT JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant initially filed an Application for leave to Appeal the Association of Professional Engineers and Geoscientists of Alberta ("APEGA") Board's Decision cancelling the Applicant's professional designation. The Applicant subsequently filed an Application to have certain documents provided to him from the APEGA Board, Disciplinary Committee, and Investigative Committee, which a single Appeal Judge dismissed (the "Document Production Decision"). The Applicant sought leave to appeal the Document Production Decision pursuant to Rules 14.5(1)(a) and 14.5(2). After considering the grounds, the Court dismissed the Application, holding that the Applicant had not shown a possible error of law or misapprehension of facts, nor had he shown that the Appeal would involve a question of general importance.

SHAKERI V CONDO CORPORATION: SERIES MANAGEMENT INC (203532171), 2024 ABCA 398

(FRIESEN JA)

Rule 14.8 (Filing a Notice of Appeal)

The Applicant, a unit owner in a condominium, filed an Originating Application against the Condominium Corporation and another resident. The Originating Application alleged failure to disclose financial documents, inadequate building maintenance, failure to install security cameras, discontinuation of heating to the Applicant's unit, and harassment. However, the Applicant named the incorrect legal entities in the Originating Application. On March 18, 2024, the Chambers Judge granted an Order allowing the Applicant to amend the Originating Application and corresponding Affidavit to correctly name the Condominium Corporation (the "Order"). Pursuant to Rule 14.8(2)(iii), the Applicant had one month to file a Notice of Appeal of the Order. The Applicant, however, filed the Notice of Appeal on October 7, 2024.

The Court emphasized that extending the time limit to file an appeal is a discretionary decision guided by several factors. These include whether the applicant showed a *bona fide* intention to appeal when the right to appeal existed, whether the explanation provided excuses or justifies the delay, whether the delay caused prejudice to the other party, whether the applicant benefited from the Judgment under appeal, and if there is a reasonable prospect of success. The Court noted that it may exercise its discretion to grant an extension if it serves the interests of justice, even if not all these criteria are satisfied.

In evaluating the relevant criteria, the Court found that the Applicant neither demonstrated a *bona fide* intention to appeal the Order when the right to appeal existed, nor provided an adequate explanation to justify the delay. While the Applicant claimed a lack of understanding of the Rules, the Court, referencing *Jutt Management Inc v Legends Condo Development Corp*, 2024 ABCA 367, reiterated that even self-represented litigants are expected to familiarize themselves with and adhere to the Rules governing Court proceedings. Furthermore, the Court concluded that there was no reasonable prospect of success on Appeal, noting that the Order had granted the Applicant exactly what was requested, and no error or valid grounds for Appeal had been identified. Consequently, the Court dismissed the Appeal.

BANK OF MONTREAL V MCLENNAN, 2024 ABCA 410

(FETH JA)

Rules 14.23 (Filing Factums - Standard Appeals) and 14.64 (Failing to Meet Deadlines)

The Applicant bought three Applications. The first was to restore her Appeal, which was struck because she failed to file her Factum in time, pursuant to Rules 14.23(1) and 14.64(b). The second Application was for an extension of time to appeal a Dismissal Order (the "Dismissal Order"). The third Application sought stays of enforcement of a Foreclosure Order (the

"Foreclosure Order") and the Dismissal Order pending her Appeal.

Having found there was no arguable merit to the Appeal, Feth J.A. dismissed all three Applications.

Justice Feth cited *Prochazka v Alberta (Maintenance Enforcement Program)*, 2014 ABCA 448 and *Alberta Treasury Branches v Conserve Oil 1st Corporation*, 2016 ABCA 87, for the tests for all three Applications. Each involved an assessment of whether an Appeal has arguable merit, meaning a reasonable chance of success.

With respect to the grounds of Appeal, Feth J.A. held that the Applicant had not shown any arguable basis for her claim that she was denied procedural fairness, nor had she provided any evidence to the Chambers Judge supporting her allegations against the Respondent.

Justice Feth held the other ground of Appeal was also without merit. Counsel for the Respondent did not make any representation promising to delay any proceedings, nor did they make any representation that could reasonably be interpreted as a promise from the Respondent to forebear.

Finally, the Court noted that the Application to stay the Foreclosure Order pending Appeal of the Dismissal Order required a serious issue for Appeal, which could not be satisfied if the other two Applications were dismissed. All three Applications were therefore dismissed.

GREAT NORTH EQUIPMENT INC V PENNEY, 2024 ABCA 378

(HAWKES JA)

Rules 14.37 (Single Appeal Judges) and 14.48 (Stay Pending Appeal)

This was an Application for a Stay of an Order Pending Appeal. The Applicant sought to extend the non-solicitation period of the Consent Injunction Order it had against the Defendants and to add a new party. Justice Lema dismissed the Application, and the non-solicitation period expired. The Applicant subsequently appealed Justice Lema's Order. In the interim, the Applicant brought this Application under Rules 14.37 and 14.48 for a Stay of the effects of Justice Lema's Order pending the Appeal.

Hawkes J.A. stated that pursuant to Rules 14.37 and 14.48, single members of the Court do not have the ability to grant a Stay where the order appealed from granted no affirmative relief.

To allow the Stay Application would amount to effectively grant the remedy sought in the full Appeal in advance of the Appeal, which is precluded according to the relevant authorities.

The Court noted that the authorities cited by the Applicant were either obiter comments that contemplated a different evidentiary record or that arose in very different circumstances where the hearing of the appeal would not occur soon.

Hawkes J.A. concluded that he could not grant the relief sought because the Order under Appeal lacked any affirmative or executory provision. The Court dismissed the Application.

BLUME V BLUME, 2024 ABCA 343

(FEEHAN, FAGNAN AND SHANER JJA)

Rule 14.45 (Application to Admit New Evidence)

The Appellant appealed certain paragraphs from a Decision of a Case Management Justice and sought to admit new evidence pursuant to Rule 14.45.

The Court considered the test in Palmer v The Queen. The panel observed that most of the proposed new evidence, with a few exceptions, was already accessible and could have been presented to the Case Management Justice. Furthermore, the panel remarked that the proposed new evidence did not change the assessment made by the Case Management Justice, which was owed deference.

The Court dismissed the Application for new evidence, stating that even if the financial information had been presented and fully accepted earlier, it would not have influenced the outcome. The interests of justice would not have been served if new evidence was admitted on Appeal.

SCHNEIDER V HOMENICK, 2024 ABCA 344

(FEEHAN, FRIESEN AND HAWKES JJA)

Rule 14.45 (Application to Admit New Evidence)

The Appellant challenged the Chambers Judge's Decision interpreting her mother's will, which resulted in certain farmland passing to the children of her deceased brother under Section 32(1)(b) of the *Wills and Succession Act.* The Appellant also applied under Rule 14.45 to admit new evidence concerning a previously unknown third child of the deceased brother.

The Court allowed the new evidence, finding it credible and relevant under the test in *Palmer v The Queen,* [1980] 1 SCR 759. While the Appeal was dismissed, the issue of the third child's potential entitlement was remitted to the Court of King's Bench for further consideration. The Court emphasized procedural fairness and encouraged the parties to resolve the matter outside of litigation.