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RULES

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

2.11 (cont)	**KARDYNAL V SHUMLICH,** 2021 ABQB 357
2.13	**BOYKO V BOYKO,** 2021 ABQB 266
2.14	**BOYKO V BOYKO,** 2021 ABQB 266
	ROYAL BANK OF CANADA V GODBOUT, 2021 ABQB 321
2.21	**ROYAL BANK OF CANADA V GODBOUT**, 2021 ABQB 321
2.28	**NAMMO V CANADA (JUSTICE AND ATTORNEY GENERAL),** 2021 ABCA 245
3.2	**ZAROOBEN V WORKERS' COMPENSATION BOARD,** 2021 ABQB 232
3.8	**ZAROOBEN V WORKERS' COMPENSATION BOARD,** 2021 ABQB 232
3.15	**ZAROOBEN V WORKERS' COMPENSATION BOARD,** 2021 ABQB 232
	COTE V ALBERTA (SAFEROADS), 2021 ABQB 313
	BOLL V WOODLANDS COUNTY, 2021 ABQB 406
	CANADA (ATTORNEY GENERAL) V SMYKOT, 2021 ABQB 457
	NORHEIM V CHIEF JUDGE OF THE PROVINCIAL COURT OF ALBERTA, 2021 ABQB 465
3.18	**JACOBSON V NEWELL (COUNTY),** 2021 ABQB 505
3.19	**MÉTIS NATION OF ALBERTA ASSOCIATION FORT MCMURRAY MÉTIS LOCAL COUNCIL 1935 V ALBERTA,** 2021 ABQB 282
	JACOBSEN V NEWELL (COUNTY), 2021 ABQB 505
3.21	**ECOJUSTICE CANADA SOCIETY V ALBERTA,** 2021 ABQB 397
3.22	**ZAROOBEN V WORKERS' COMPENSATION BOARD,** 2021 ABQB 232
	MÉTIS NATION OF ALBERTA ASSOCIATION FORT MCMURRAY MÉTIS LOCAL COUNCIL 1935 V ALBERTA, 2021 ABQB 282
	ECOJUSTICE CANADA SOCIETY V ALBERTA, 2021 ABQB 397
	JACOBSEN V NEWELL (COUNTY), 2021 ABQB 505
3.26	**ASHRAF V MUNN,** 2021 ABQB 472
3.27	**ASHRAF V MUNN,** 2021 ABQB 472
3.61	**MILLER V JACKSON,** 2021 ABQB 281

3.61 (cont)	**MELCOR REIT LIMITED PARTNERSHIP (MELCOR REIT GP INC) V TDL GROUP CORP (TIM HORTONS),** 2021 ABQB 379
3.62	**ASHRAF V MUNN,** 2021 ABQB 472
	CLUB INDUSTRIAL TRAILERS (2012) LTD V PARAMOUNT STRUCTURES INC, 2021 ABQB 480
3.65	**KOSTECKYJ V PARAMOUNT RESOURCES LTD,** 2021 ABQB 225
	LISCHUK V K-JAY ELECTRIC LTD, 2021 ABQB 280
	INGRAM V ALBERTA (CHIEF MEDICAL OFFICER OF HEALTH), 2021 ABQB 343
	CLUB INDUSTRIAL TRAILERS (2012) LTD V PARAMOUNT STRUCTURES INC, 2021 ABQB 480
3.67	**ASHRAF V MUNN,** 2021 ABQB 472
3.68	**REMINGTON DEVELOPMENT CORPORATION V ENMAX POWER CORPORATION,** 2021 ABQB 261
	LISCHUK V K-JAY ELECTRIC LTD, 2021 ABQB 280
	MILLER V JACKSON, 2021 ABQB 281
	MÉTIS NATION OF ALBERTA ASSOCIATION FORT MCMURRAY MÉTIS LOCAL COUNCIL 1935 V ALBERTA, 2021 ABQB 282
	INGRAM V ALBERTA (CHIEF MEDICAL OFFICER OF HEALTH), 2021 ABQB 343
	WIDNEY ESTATE (RE), 2021 ABQB 361
	ALBERTA UNION OF PUBLIC EMPLOYEES V HER MAJESTY THE QUEEN (ALBERTA), 2021 ABQB 371
	MELCOR REIT LIMITED PARTNERSHIP (MELCOR REIT GP INC) V TDL GROUP CORP (TIM HORTONS), 2021 ABQB 379
	BAHADAR V REAL ESTATE COUNCIL OF ALBERTA, 2021 ABQB 395
	ALBERTA UNION OF PROVINCIAL EMPLOYEES V ALBERTA, 2021 ABQB 398
	BOLL V WOODLANDS COUNTY, 2021 ABQB 406
	PAPASCHASE FIRST NATION V MCLEOD, 2021 ABQB 415
	ANDERSON V OSSOWSKI, 2021 ABQB 456
	NORHEIM V CHIEF JUDGE OF THE PROVINCIAL COURT OF ALBERTA, 2021 ABQB 465
	ASHRAF V MUNN, 2021 ABQB 472

3.68 (cont)	**GAUVREAU V LEBOUTHILLIER,** 2021 ABCA 130
	QUAYE V LAW SOCIETY OF ALBERTA, 2021 ABCA 167
	FEENEY V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2021 ABCA 185
4.10	**GEOPHYSICAL SERVICE INCORPORATED V PLAINS MIDSTREAM CANADA ULC,** 2021 ABQB 359
4.13	**HUNEAULT V HUNEAULT,** 2021 ABCA 203
4.14	**HUNEAULT V HUNEAULT,** 2021 ABCA 203
4.22	**STEPANIK V TIMMONS,** 2021 ABQB 287
	PINDER V HML CONTRACTING LTD, 2021 ABCA 207
4.23	**STEPANIK V TIMMONS,** 2021 ABQB 287
4.24	**SS V AS,** 2021 ABQB 294
4.28	**KOSTECKYJ V PARAMOUNT RESOURCES LTD** 2021 ABQB 225
4.29	**KHALIL V DURANT,** 2021 ABQB 424
4.31	**HUK V HUDSON'S BAY COMPANY,** 2021 ABQB 236
	EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 239
	BOYKO V BOYKO, 2021 ABQB 266
	MHK INSURANCE INC V GURR (ESTATE), 2021 ABQB 328
4.33	**HUK V HUDSON'S BAY COMPANY,** 2021 ABQB 236
	EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 239
	BOYKO V BOYKO, 2021 ABQB 266
	MHK INSURANCE INC V GURR (ESTATE), 2021 ABQB 328
	NAMMO V CANADA (JUSTICE AND ATTORNEY GENERAL), 2021 ABCA 245
4.34	**EDINBURGH TOWER DEVELOPMENT LTD V CURTIS,** 2021 ABQB 239
4.36	**CONDOMINIUM CORPORATION NO 082 9220 (TERWILLEGAR TERRACE) V YAN,** 2021 ABQB 429
	ASHRAF V MUNN, 2021 ABQB 472
5.6	**OUELLETTE V MAY,** 2021 ABCA 124
5.10	**OUELLETTE V MAY,** 2021 ABCA 124

5.12	**HARDY V RUMANCIK,** 2021 ABQB 484
5.34	**MITCHELL V PYTEL,** 2021 ABQB 403
6.8	**RE GOW ESTATE,** 2021 ABQB 305
6.14	**HARPER V CANADA (AG),** 2021 ABQB 233
	DIRTT ENVIRONMENTAL SOLUTIONS LTD V FALKBUILT LTD, 2021 ABQB 252
	REMINGTON DEVELOPMENT CORPORATION V ENMAX POWER CORPORATION, 2021 ABQB 261
	BOYKO V BOYKO, 2021 ABQB 266
	ABBAS V ESURANCE INSURANCE COMPANY OF CANADA, 2021 ABQB 303
	ROYAL BANK OF CANADA V GODBOUT, 2021 ABQB 321
	BAHADAR V REAL ESTATE COUNCIL OF ALBERTA, 2021 ABQB 395
	SIGNAL HILL MANUFACTURING INC V CANADA REVENUE AGENCY, 2021 ABQB 460
6.40	**VALSTAR V VSTAR ENTERPRISE LTD,** 2021 ABQB 404
6.41	**VALSTAR V VSTAR ENTERPRISE LTD,** 2021 ABQB 404
6.42	**VALSTAR V VSTAR ENTERPRISE LTD,** 2021 ABQB 404
6.43	**VALSTAR V VSTAR ENTERPRISE LTD,** 2021 ABQB 404
7.1	**UNTERSCHULTZ V CLARK,** 2021 ABQB 492
7.2	**ABBAS V ESURANCE INSURANCE COMPANY OF CANADA,** 2021 ABQB 303
7.3	**HARPER V CANADA (AG),** 2021 ABQB 233
	DIRTT ENVIRONMENTAL SOLUTIONS LTD V FALKBUILT LTD, 2021 ABQB 252
	LISCHUK V K-JAY ELECTRIC LTD, 2021 ABQB 280
	MILLER V JACKSON, 2021 ABQB 281
	GINN V FENG, 2021 ABQB 292
	ABBAS V ESURANCE INSURANCE COMPANY OF CANADA, 2021 ABQB 303
	COTE V ALBERTA (SAFEROADS), 2021 ABQB 313
	BRYANT V PARKLAND SCHOOL DIVISION, 2021 ABQB 391

7.3 (cont)	**BOLL V WOODLANDS COUNTY,** 2021 ABQB 406
	SIGNAL HILL MANUFACTURING INC V CANADA REVENUE AGENCY, 2021 ABQB 460
	JBRO HOLDINGS INC V DYNASTY POWER INC, 2021 ABQB 463
	MARTIN V KUBES, 2021 ABQB 479
	SAITO V LESTER ESTATE, 2021 ABCA 179
8.4	**MITCHELL V PYTEL,** 2021 ABQB 403
8.15	**JEGOU V CANADIAN NATURAL RESOURCES LIMITED,** 2021 ABQB 401
8.17	**UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY,** 2021 ABQB 356
	MITCHELL V PYTEL, 2021 ABQB 403
9.4	**ROYAL BANK OF CANADA V GODBOUT,** 2021 ABQB 321
	INGRAM V ALBERTA (CHIEF MEDICAL OFFICER OF HEALTH), 2021 ABQB 343
	ANDERSON V OSSOWSKI, 2021 ABQB 456
	ASHRAF V MUNN, 2021 ABQB 472
9.13	**ANGLIN V ALBERTA (CHIEF ELECTORAL OFFICER),** 2021 ABQB 353
9.15	**TAQA DRILLING SOLUTIONS INC V YAR HOLDINGS INC,** 2021 ABQB 309
	BREITKREUZ V BREITKREUZ, 2021 ABQB 339
	HAMM V CANADA (ATTORNEY GENERAL), 2021 ABCA 190
9.21	**GINN V FENG,** 2021 ABQB 292
	MARTIN V KUBES, 2021 ABQB 479
9.24	**GINN V FENG,** 2021 ABQB 292
9.28	**ROYAL BANK OF CANADA V GODBOUT,** 2021 ABQB 321
10.2	**TALLCREE FIRST NATION V RATH AND CO,** 2021 ABQB 234
	BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2021 ABCA 129
10.7	**TALLCREE FIRST NATION V RATH AND CO,** 2021 ABQB 234
	BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2021 ABCA 129
10.8	**BETSER-ZILEVITCH V PROWSE CHOWNE LLP,** 2021 ABCA 129

10.9	**TALLCREE FIRST NATION V RATH AND CO,** 2021 ABQB 234
10.18	**TALLCREE FIRST NATION V RATH AND CO,** 2021 ABQB 234
	BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2021 ABCA 129
10.27	**TALLCREE FIRST NATION V RATH AND CO,** 2021 ABQB 234
10.29	**MUDRICK CAPITAL MANAGEMENT LP V WRIGHT,** 2021 ABQB 242
	SS V AS, 2021 ABQB 294
	PATEL V CHIEF MEDICAL SUPPLIES LTD, 2021 ABQB 355
	EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 392
	JWS V CJS, 2021 ABQB 411
	KHALIL V DURANT, 2021 ABQB 424
	ANDERSON V OSSOWSKI, 2021 ABQB 456
	WANG V ALBERTA, 2021 ABCA 175
10.31	**MUDRICK CAPITAL MANAGEMENT LP V WRIGHT,** 2021 ABQB 242
	PATEL V CHIEF MEDICAL SUPPLIES LTD, 2021 ABQB 355
	EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 392
	JWS V CJS, 2021 ABQB 411
	KHALIL V DURANT, 2021 ABQB 424
	CONDOMINIUM CORPORATION NO 082 9220 (TERWILLEGAR TERRACE) V YAN, 2021 ABQB 429
	ROMSPEN INVESTMENT CORPORATION V STEPHENSON, 2021 ABQB 486
	TERRIGNO V BUTZNER, 2021 ABCA 125
	1705221 ALBERTA LTD V THREE M MORTGAGES INC, 2021 ABCA 192
10.33	**KOSTECKYJ V PARAMOUNT RESOURCES LTD,** 2021 ABQB 225
	MUDRICK CAPITAL MANAGEMENT LP V WRIGHT, 2021 ABQB 242
	IRONSTAND V PRIOR, 2021 ABQB 267
	SS V AS, 2021 ABQB 294

10.33 (cont)	**HAACK V SECURE ENERGY (DRILLING SERVICES) INC,** 2021 ABQB 342
	PATEL V CHIEF MEDICAL SUPPLIES LTD, 2021 ABQB 355
	EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 392
	JWS V CJS, 2021 ABQB 411
	KHALIL V DURANT, 2021 ABQB 424
	CONDOMINIUM CORPORATION NO 082 9220 (TERWILLEGAR TERRACE) V YAN, 2021 ABQB 429
	ANDERSON V OSSOWSKI, 2021 ABQB 456
	ROMSPEN INVESTMENT CORPORATION V STEPHENSON, 2021 ABQB 486
	WANG V ALBERTA, 2021 ABCA 175
10.34	**EDINBURGH TOWER DEVELOPMENT LTD V CURTIS,** 2021 ABQB 392
10.41	**HAACK V SECURE ENERGY (DRILLING SERVICES) INC,** 2021 ABQB 342
10.42	**KHALIL V DURANT,** 2021 ABQB 424
10.44	**BETSER-ZILEVITCH V PROWSE CHOWNE LLP,** 2021 ABCA 129
10.48	**CANA MANAGEMENT LTD V CONDOMINIUM CORPORATION NO 0513341,** 2021 ABQB 470
10.49	**HARDY V RUMANCIK,** 2021 ABQB 484
10.52	**TAQA DRILLING SOLUTIONS INC V YAR HOLDINGS INC,** 2021 ABQB 309
	BREITKREUZ V BREITKREUZ, 2021 ABQB 339
	ALBERTA HEALTH SERVICES V STREET CHURCH EVANGELISM MINISTRIES INTERNATIONAL FOUNDATION (STREET CHURCH), 2021 ABQB 489
	LAW SOCIETY OF ALBERTA V BEAVER, 2021 ABCA 163
	JLZ V CMZ, 2021 ABCA 200
10.53	**JLZ V CMZ,** 2021 ABCA 200
10.55	**JLZ V CMZ,** 2021 ABCA 200
11.25	**TALBOTT V TALBOTT,** 2021 ABQB 291
11.27	**TALBOTT V TALBOTT,** 2021 ABQB 291
11.28	**BREITKREUZ V BREITKREUZ,** 2021 ABQB 339
13.1	**ZAK V ZAK,** 2021 ABQB 360

13.4	**AR V JU,** 2021 ABCA 199
13.5	**TAQA DRILLING SOLUTIONS INC V YAR HOLDINGS INC,** 2021 ABQB 309
13.7	**MILLER V JACKSON,** 2021 ABQB 281
13.18	**TAM V MOG,** 2021 ABQB 351
	SAITO V LESTER ESTATE, 2021 ABCA 179
13.25	**MITCHELL V PYTEL,** 2021 ABQB 403
14.4	**ALSTON V FOOTHILLS NO 31 (DISTRICT OF),** 2021 ABCA 150
	CHADWICK V CHADWICK, 2021 ABCA 229
14.5	**MACDONALD V KING,** 2021 ABCA 149
	ALSTON V FOOTHILLS NO 31 (DISTRICT OF), 2021 ABCA 150
	BILAWEY V BILAWEY, 2021 ABCA 178
	WOLFE V MORRISSEAU, 2021 ABCA 205
	LAANEP V LAWSON, 2021 ABCA 214
	CHADWICK V CHADWICK, 2021 ABCA 229
14.8	**WANG V ALBERTA,** 2021 ABCA 175
	AR V JU, 2021 ABCA 199
	WOLFE V MORRISSEAU, 2021 ABCA 205
	CHADWICK V CHADWICK, 2021 ABCA 229
14.9	**AR V JU,** 2021 ABCA 199
14.13	**GAUVREAU V LEBOUTHILLIER,** 2021 ABCA 130
14.14	**GAUVREAU V LEBOUTHILLIER,** 2021 ABCA 130
14.24	**THE BANK OF NOVA SCOTIA V ELLENTEE CONSULTING INC,** 2021 ABCA 169
14.32	**MCLELLAND V MCLELLAND,** 2021 ABCA 238
14.36	**FEENEY V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA,** 2021 ABCA 185
14.37	**MAILER V MAILER,** 2021 ABQB 423
	WANG V ALBERTA, 2021 ABCA 175
14.38	**WAQUAN V CANADA (ATTORNEY GENERAL),** 2021 ABCA 212
	MCLELLAND V MCLELLAND, 2021 ABCA 238
14.42	**MCLELLAND V MCLELLAND,** 2021 ABCA 238

14.47	**THE BANK OF NOVA SCOTIA V ELLENTEE CONSULTING INC,** 2021 ABCA 169
14.48	**GAUVREAU V LEBOUTHILLIER,** 2021 ABCA 130
14.51	**GAUVREAU V LEBOUTHILLIER,** 2021 ABCA 130
14.65	**THE BANK OF NOVA SCOTIA V ELLENTEE CONSULTING INC,** 2021 ABCA 169
14.67	**PINDER V HML CONTRACTING LTD,** 2021 ABCA 207
14.68	**PINDER V HML CONTRACTING LTD,** 2021 ABCA 207
14.75	**BILAWEY V BILAWEY,** 2021 ABCA 178
14.88	**TERRIGNO V BUTZNER,** 2021 ABCA 125
	1705221 ALBERTA LTD V THREE M MORTGAGES INC, 2021 ABCA 192
	MCLELLAND V MCLELLAND, 2021 ABCA 238
14.92	**TAHN V LAW SOCIETY OF ALBERTA,** 2021 ABCA 139
Schedule C	**MUDRICK CAPITAL MANAGEMENT LP V WRIGHT,** 2021 ABQB 242
	CANA MANAGEMENT LTD V CONDOMINIUM CORPORATION NO 0513341, 2021 ABQB 470

CANADA (ATTORNEY GENERAL) V SMYKOT, 2021 ABQB 457

(POELMAN J)

Rules 1.1 (What These Rules Do) and 3.15 (Originating Application for Judicial Review)

The Court reviewed whether the Applicant's Application in the Court of Queen's Bench could proceed, or whether it must await the conclusion of the Provincial Court proceedings. One issue that the Court needed to resolve was whether a reference under section 74(1) of the *Firearms Act,* SC 1995, c 39 ("*Firearms Act*") to the Provincial Court of Alberta should be characterized as a criminal or civil proceeding.

The Court found that proceedings under the *Firearms Act* are more akin to administrative, civil proceedings than criminal proceedings. The Court went on to note that, procedurally, all *certiorari* Applications are governed by the Rules, because the Rules govern all civil Actions pursuant to Rule 1.1(2). The Court also noted that the Rules govern *certiorari* Applications in criminal cases pursuant to Rule 3.15.

KOSTECKYJ V PARAMOUNT RESOURCES LTD, 2021 ABQB 225

(SIDNELL J)

Rules 1.2 (Purpose and Intention of These Rules), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 4.28 (Confidentiality of Formal Offer to Settle) and 10º.33 (Court Considerations in Making Costs Award)

A Summary Trial was held regarding an Order to determine the damages resulting from the wrongful dismissal of the Plaintiff, Ms. Kosteckyj. There were two preliminary Applications which Justice Sidnell addressed before turning to the substantive matter.

The first was an Application by the Plaintiff to strike certain paragraphs in the Statement of Defence. In the Statement of Defence, the employer Defendant, Paramount Resources Ltd., had disclosed the settlement offer made at the time of the Plaintiff's termination and asserted that it was unreasonable for the Plaintiff to refuse the settlement offer.

Justice Sidnell found that including the settlement offer in the pleadings was inappropriate. In support of this finding, Justice Sidnell considered Rule 4.28 which states that a Formal Offer to Settle is to be kept confidential from the Court until accepted or until a remedy is decided. Justice Sidnell also noted Rule 10.33(2)(h), which permits the Court to consider settlement offers for the purposes of Costs. The Defendant acceded that the paragraphs which pled the settlement offer should be struck. Justice Sidnell then ordered that those paragraphs be struck from the Statement of Defence and would be ignored in the Summary Trial.

The second Application was an Application by the Plaintiff to amend her Amended Statement of Claim to include a claim for constructive dismissal which, if proven, had occurred a few weeks prior to the actual termination of employment. Justice Sidnell advised that Rules 1.2 and 3.65 inform the Court as to whether

to allow the proposed amendment. Rule 3.65 gives the Court the discretion to permit amendments. Justice Sidnell noted that the general rule from the jurisprudence directs the Court to allow an amendment, as doing so reflects the purpose of the Rules as described in Rule 1.2 for fair and just resolution in a timely and cost-effective manner. Justice Sidnell cited four major exceptions to the general rule: (i) the amendment would cause serious prejudice to the opposing party, not compensable in Costs; (ii) the amendment is hopeless; (iii) unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; and (iv) there is an aspect of bad faith associated with the failure to plead the amendment at first instance.

Justice Sidnell went on to review *McDonald v Fellows,* (1979) 17 AR 330 (Alta CA), which addresses when serious prejudice could occur. As stated in that case, prejudice is "virtually inevitable" where evidence has been completed and the Action was conducted without reference to the amendment. Evidence had been concluded in the case by the time the Plaintiff applied to amend her Amended Statement of Claim. Justice Sidnell considered the evidence and whether the Defendant would suffer prejudice, and concluded that no serious prejudice would occur. As a result, the Application to amend the Statement of Claim was granted.

HUK V HUDSON'S BAY COMPANY, 2021 ABQB 236

(MALIK J)

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

A Provincial Court Judge had dismissed the Appellant's Action for long delay pursuant to Rule 4.31. The Appellant appealed this Decision to the Court of Queen's Bench. Justice Malik dismissed the Appeal, finding no palpable and overriding error in the Provincial Court Judge's findings.

Justice Malik first noted that Rule 1.2 promotes the resolution of disputes in a timely, efficient, and cost-effective manner. Justice Malik also noted that Rule 4.31 allows the Court to dismiss all or part of a claim where a party's delay in prosecuting the Action results in significant prejudice to the other party. Under Rule 4.31(2), a delay that is inordinate and inexcusable is presumed to have caused significant prejudice.

Justice Malik found no palpable and overriding error in the finding that the delay was inordinate and inexcusable. The delay was two weeks less than the three years required to bring an Application for long delay pursuant to Rule 4.33. The Appellant argued that the delay was caused by her lawyer's failure to follow up with her and the Appellant's difficulty retrieving documents from storage and from her physicians. The Court noted that the Appellant was represented by a lawyer, and it is ultimately the Plaintiff's obligation to prosecute his or her Action in a timely manner.

Justice Malik also found no palpable and overriding error in the finding that the Appellant failed to rebut the presumption that the delay had caused prejudice. The Provincial Court Judge found that there was clear evidence of prejudice: in particular, one of the Respondent's key witnesses no longer lived in Canada and would likely be testifying 7-8 years after the events giving rise to the Appellant's claim.

EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 239

(MALIK J)

Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

The Defendants brought Applications to dismiss the Action for delay pursuant to Rule 4.31 or alternatively, Rule 4.33.

Justice Malik first noted Rule 1.2, which promotes the resolution of disputes in a timely, efficient, and cost-effective way, and is applicable to delay Applications. His Lordship noted that it is the burden of the Plaintiff to advance their lawsuit in a timely manner, but also noted that a Defendant cannot complain of prejudice arising from their own delay. Justice Malik also noted the difference between Rule 4.31, a discretionary remedy for inordinate and inexcusable delay which is presumed to cause prejudice, and Rule 4.33 a mandatory remedy to dismiss an Action that is not significantly advanced in three years. Finally, His Lordship also noted that one of the Defendants, William Edward Curtis, had passed away in the intervening years of litigation. The deceased's passing triggered a stay of the proceedings pursuant to Rule 4.34, but Justice Malik cited *Kametani v Holman*, 2018 ABQB 18 and Willard v Compton Petroleum Corp, 2015 ABQB 766 to decide that a Rule 4.34 stay does not preclude parties from bringing delay Applications.

The Action had been initiated in 2011 and had significantly advanced until 2013. From 2014 to 2019 Justice Malik categorized the efforts of the Plaintiff into two categories: (i) efforts to substantiate their damages claim, and (ii) efforts to set the matter down for Trial and obtain agreement on procedural next steps.

With respect to the first category, there was continual back and forth in 2013 and 2014 regarding damages and production. In April 2016, the Plaintiff provided a second breakdown of their damages claim with new invoices. On November 8, 2016, a further answer to Undertaking was provided which produced new documentation. In April 2018, a Supplemental Affidavit of Records was filed. In April 2019, the Plaintiff provided the Defendants with an assessment of damages. Further Questioning of the Plaintiff's corporate representative was completed in February 2020. Both the corporate representative and Plaintiff's counsel categorized the Supplemental Affidavit of Records as being a presentational difference in records rather than substantive difference, which was designed to better organize the damages.

With respect to the second category, the Plaintiff filed their first Application for a Trial date in November 2015, their second Application in February 2017, and their third Application in July 2019. All Applications were adjourned. Throughout this period the Plaintiff also proposed a number of consent Orders for procedural steps, but none were agreed upon.

Justice Malik found that there had been inordinate delay since the Plaintiff's first Application in 2015 to set a Trial date, and considered the period from 2013 to 2019 as a "six-year period of inactivity" with respect to the completion of substantive pre-Trial steps. This six-year period was, in Justice Malik's determination, inordinate and inexcusable. As noted by His Lordship, despite the Plaintiff being frustrated by perceived delay by the Defendants, they did not utilize the Rules to compel the Defendants' participation. As a result, Justice Malik was unable to find that the prejudice presumption was rebutted.

Justice Malik went on to consider whether His Lordship was required to dismiss the Action pursuant to Rule 4.33. The Applications to dismiss for delay were filed in October 2019. Justice Malik found that no significant step had occurred in the preceding three years. Specifically, His Lordship noted that steps such as a filed Notice of Appointment for Questioning, filed Applications or requests for Trial dates, and unreciprocated proposals which do not crystallize into enforceable obligations, are not steps which significantly advance the Action. Although the Plaintiff provided an assessment of damages in April 2019 and a Supplemental Affidavit of Records in April 2018, Justice Malik found that this assessment did not provide materially new information and was of minimal consequence. Although His Lordship did not find the production efforts to be merely perfunctory, he did not find these steps to advance the Action in any meaningful way. And although these steps were taken in response to the Defendants' requests, Justice Malik did not find that to be determinative as to His Lordship's decision on Rule 4.33.

Justice Malik found that it was just and appropriate to strike the Action for delay as per Rule 4.31 or Rule 4.33.

DIRTT ENVIRONMENTAL SOLUTIONS LTD V FALKBUILT LTD, 2021 ABQB 252

(SIDNELL J)

Rules 1.2 (Purpose and Intention of These Rules), 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

Pursuant to Rules 6.14 and 7.3, the Applicant appealed a Master's Decision declining to grant a partial Summary Judgment. Justice Sidnell noted that Rule 6.14 requires an Appeal from a Master to be heard by a Judge. Rule 7.3 allows an Applicant to apply for Summary Judgment in respect of a claim or part of a claim.

Justice Sidnell then reviewed Rule 1.2, which states that the Rules are meant to provide a means to resolve claims in a fair, just, timely and cost-effective way. Justice Sidnell determined that, considering Rule 1.2 and the case law on partial Summary Judgment, there were three main questions that must be answered in the affirmative for the Court to grant a partial Summary Judgment.

First, the Court must assess whether the issue to be determined on a partial Summary Judgment Application can be severed from the remainder of the issues that will proceed to Trial. Second, the Court must determine whether the proposed partial Summary Judgment will advance the Action as a whole. Lastly, the Court must determine whether the proposed partial Summary Judgment will significantly advance access to justice, and be the most proportionate, timely and cost-effective approach.

With respect to the first question, the Court determined that the proposed issue to be determined summarily could not be severed from the remainder of the issues that would proceed to Trial. Second, the Court determined that a partial Summary Judgment Application would not advance the Action as a whole. Lastly, the Court determined that proceeding with a partial Summary Judgment would

cause problems for the Trial and would not be beneficial to the parties, therefore negatively affecting the Applicant's access to justice. In sum, Justice Sidnell dismissed the Appeal of the Master's Decision, finding that the proposed partial Summary Judgment was not the most proportionate, timely and cost-effective manner in which to address the issues.

STEPANIK V TIMMONS, 2021 ABQB 287

(GATES J)

Rules 1.2 (Purpose and Intention of These Rules), 4.22 (Considerations for Security for Costs Order) and 4.23 (Contents of Security for Costs Order)

This was an Application for Security for Costs, pursuant to Rules 4.22 and 4.23, arising in the context of a family and child custody dispute. The Application followed from the Respondent's declaration that he intended to bring ten to twelve witnesses in support of his position at Trial, the anticipated effect of which would be to extend the hearing by 8 days.

In assessing the Application, the Court noted the interplay between Rules 4.22, 4.23 and 1.2, and the requirement that Courts exercise their discretion to award or not to award Security for Costs with a view to balancing the reasonable expectations of both parties and promoting fairness and justice, generally. The Court also noted the uniquely sensitive tact required where such Applications are brought in the context of disputes involving child custody.

Applying the criteria enumerated in Rule 4.22, the Court concluded that the circumstances warranted an award of Security for Costs. In particular, the Court held that the Respondent had a low chance of success in light of the available evidence, would be unable or unwilling to pay a Costs Award granted against him and that the Applicant was unlikely to succeed in enforcing against the Respondent's assets located in Alberta. Finally, the Court held that granting an award of Security for Costs was unlikely to unduly prejudice the Respondent's participation, given his failure to adduce specific evidence as to his financial circumstances and his unwillingness to limit the number of witnesses to be brought at Trial. The Court granted the Application for Security for Costs, along with an Order limiting the number of witnesses to be brought at Trial with a view to reducing the number of Trial days from 10 to 5.

RE GOW ESTATE, 2021 ABQB 305

(FETH J)

Rules 1.2 (Purpose and Intention of These Rules) and 6.8 (Questioning Witness Before Hearing)

The Applicants were challenging the will of their late father and applied to the Court for advice and direction as to whether a party can be compelled to attend and produce records for Questioning ahead of an Application in Surrogate Court.

The Applicants had an outstanding Surrogate Court Application to set aside an informal grant of probate and to direct a Trial to formally prove the will. They alleged that their father either lacked testamentary capacity or that undue influence was exercised over him by other family members. The Applicants sought to compel the deceased's other children, who were the personal representatives of the deceased's estate, to attend Questioning and produce certain potentially relevant records.

Rule 774(1)(b) of the *Surrogate Rules,* Alta Reg 130/95 (the "*Surrogate Rules*"), states that on Application by a person interested in the estate, the Court may set aside an informal grant of probate and require formal proof of a will. The personal representatives argued that the *Surrogate Rules* governed, and despite Rule 6.8 of the *Alberta Rules of Court*, pre-Application Questioning was not available. Rule 6.8 permits Questioning to assist with an Application before the Court.

The Court noted that Rule 2(1) of the *Surrogate Rules* confirms that the *Alberta Rules of Court* generally apply to Surrogate proceedings and applications. Although the *Surrogate Rules* contemplate pre-Trial rather than pre-Application discovery, Questioning under Rule 6.8 is not discovery because the scope of questions and document production is limited. Additionally, Rule 64(1)(a) of the *Surrogate Rules* expressly contemplates the possibility of oral evidence for an Application, although the process for collecting and presenting that evidence is not described. Rule 6.8 supplies the necessary procedure.

The Court noted that the foundational principles in Rule 1.2 apply to the *Surrogate Rules* as well. These foundational principles balance the Court's truth-seeking function against the objective of timely and affordable process. The Court therefore allowed Rule 6.8 Questioning to be conducted ahead of the Surrogate Court Application.

BAHADAR V REAL ESTATE COUNCIL OF ALBERTA, 2021 ABQB 395

(DARIO J)

Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 6.14 (Appeal from a Master's Judgment or Order)

Justice Dario heard an Appeal of the Defendants of a Master's Decision. The Defendants sought to strike all, or a portion of the Plaintiff's Statement of Claim pursuant to Rule 3.68 on the grounds that it disclosed no reasonable cause of action. After considering relevant case law, Justice Dario confirmed that the onus on an Applicant seeking to strike a Statement of Claim is high. If there is any reasonable prospect the claim will succeed, the Statement of Claim should not be struck. Justice Dario relied on *Grenon v Canada Revenue Agency,* 2017 ABCA 96, in recognizing that this philosophy is consistent with the underlying philosophy of the Rules, including Rule 1.2. Ultimately, Justice Dario struck small portions of the Plaintiff's Statement of Claim; however, the Plaintiff was largely successful in defending the Appeal.

Prior to addressing the factual issues, Justice Dario addressed the standard of review. While both parties agreed that the standard of review on Appeal from a Master is correctness, the Plaintiff argued that a Master's Decision should not be disturbed unless the Master made a clear error in the interpretation of the law. The Defendants took the position that the Appeal is an Appeal *de novo*. Justice Dario confirmed that, under Rule 6.14, an Appeal from a Master's Decision is an Appeal on the record.

BOLL V WOODLANDS COUNTY, 2021 ABQB 406

(MANDZIUK J)

Rules 1.2 (Purpose and Intention of These Rules), 3.15 (Originating Application for Judicial Review), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Respondents named the Applicants as parties to an Originating Application for Judicial Review. The Applicants were the Woodlands County Municipal Planning Commission ("MPC") and the Woodlands County Subdivision and Development Appeal Board ("SDAB"). The Applicants applied for Summary Dismissal under Rule 7.3 and, in the alternative, to strike out parts of the Originating Application under Rule 3.68.

One of the Respondents ("Pipistrel") was a corporation that had applied to the MPC for a development permit to build a hanger on lands owned by Pipistrel's principal, Jonas Boll, who was the second Respondent. The MPC granted the permit but did not grant additional relief that Pipistrel sought. Pipistrel unsuccessfully appealed the MPC's decision to the SDAB, and the Alberta Court of Appeal (the "ABCA") denied leave to appeal the SDAB's decision.

The Respondents then filed the Originating Application for Judicial Review in the Court of Queen's Bench naming the MPC and SDAB as parties and alleging that the SDAB erred in law by upholding the MPC's decision. The Originating Application also alleged that a bylaw that

the MPC and SDAB relied upon was constitutionally invalid.

The Court noted that Applications for Summary Judgment are governed by Rule 7.3 and reviewed the test as summarized in *Bruno v Samson Cree Nation,* 2020 ABQB 504. The Court also noted that Rule 1.2 emphasizes the importance of cost-effectiveness, efficiency, fairness, justice, and overall efficacious functioning of the legal system. The Applicants argued that the Respondents' Originating Application should be summarily dismissed because it was filed outside the 6-month period outlined in Rule 3.15 to file an Originating Application seeking *certiorari*.

The Court determined that whether the Originating Application was filed in time was moot. The Respondents appealed a question of law to the ABCA pursuant to section 688 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*"). Mandziuk J. noted that the Court should be reluctant to exercise its jurisdiction where an alternative remedy exists such as an Appeal to the ABCA. MPC and SDAB's role in the Appeal process in the *MGA* concluded when the Appeal to the ABCA failed. The Court thus determined that MPC and SDAB were not proper parties to the Action and granted the Application for Summary Dismissal.

The Court also considered the Rule 3.68 Application in the event that granting the Application for Summary Dismissal was incorrect. As the Originating Application disclosed no reasonable claim against either party, the Court struck several paragraphs of the Originating Application.

With respect to Costs, the Court determined that enhanced Costs were appropriate as it was clearly unnecessary to keep MPC and SDAB in the Action.

ASHRAF V MUNN, 2021 ABQB 472

(ROOKE ACJ)

Rules 1.2 (Purpose and Intention of these Rules), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 3.62 (Amending Pleading), 3.67 (Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 4.36 (Discontinuance of Claim) and 9.4 (Signing Judgments and Orders)

This was an Application reviewed by Associate Chief Justice Rooke that considered the duplication of an Action that had previously been identified as an Apparently Vexatious Application or Proceeding under Rule 3.68. The Plaintiff filed a second Statement of Claim, containing substantially similar allegations to a prior Statement of Claim, which the Defendants' counsel submitted was a candidate for AVAP pursuant to Civil Practice Note No 7 ("CPN7").

Rooke A.C.J. considered whether the second Statement of Claim was an abuse of process. The Plaintiff took the position that he had filed an Extension of Service Application, pursuant to Rule 3.27; however, this Application was adjourned *sine die*. The Plaintiff further submitted that the first Statement of Claim "had died in its embryonic phase", basing his argument on the fact that because the Defendants did not know of the first Statement of Claim, the

second Statement of Claim was not a collateral attack. The first Statement of Claim was not served within the timeline set under Rule 3.26. He further analogized his situation to Rule 3.62 which governs the amendment of pleadings. The Defendants asserted that the second Statement of Claim was an abuse of the Court process due to the common law rules rejecting duplicative proceedings.

Rooke A.C.J. analyzed the second Statement of Claim and concluded that it constituted a duplicative proceeding and an abuse of process that should be struck under Rule 3.68 and CPN7. In the alternative, Associate Chief Justice Rooke held that if he was incorrect in this conclusion, he also rejected the Plaintiff's position that his second Statement of Claim constituted an amendment under Rule 3.62, as the time for pleadings had closed under Rule 3.67. Further, enabling a second Statement of Claim would be contrary to the intention of the Rules set out in Rule 1.2. Finally, Associate Chief Justice Rooke concluded that the Plaintiff had failed to discontinue the Action commenced by the first Statement of Claim, and further failed to acknowledge that it would be necessary to pay Costs to the Defendants under Rule 4.36.

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

HUNEAULT V HUNEAULT, 2021 ABCA 203

(MARTIN, STREKAF AND ANTONIO JJA)

Rules 1.2 (Purpose and Intention of These Rules), 4.13 (Appointment of Case Management Judge) and 4.14 (Authority of Case Management Judge)

A Case Management Judge was appointed to manage a high conflict divorce, where the focus of the dispute was on spousal support and the division of the matrimonial property. After the Trial it was determined that the division of the sale proceeds for the Respondent's corporation had been miscalculated, which resulted in an overpayment to the Appellant.

The Respondent brought an Application to the Case Management Judge to resolve the overpayment post-Trial. The Appellant argued that the Case Management Judge lacked jurisdiction to decide the overpayment issue. The Case Management Judge disagreed and found that he had the authority pursuant to Rules 4.14 and 4.13. The Case Management Judge found that the error in calculating was obvious and undisputable, ordering a correction. He also ordered Costs payable to the Respondent.

The Appellant appealed the Decision of the Case Management Judge, alleging that he exceeded his authority and arguing that a second Trial should have been ordered. The Court of Appeal found that the Case Management Judge properly exercised his role and resolved the matter in a timely and cost-effective way pursuant to Rules 1.2 and 4.14. The Appeal was dismissed.

ROYAL BANK OF CANADA V GODBOUT, 2021 ABQB 321

(ROOKE ACJ)

Rules 1.4 (Procedural Orders), 2.14 (Self-appointed Litigation Representatives), 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions), 6.14 (Appeal from Master's Judgment or Order), 9.28 (Abandoned Goods) and 9.4 (Signing Judgments and Orders)

This Decision concerned: the Applicant's self-appointment as administrator of and litigation representative for an estate (the "Estate"); the ability of the Applicant to appeal a Master's Order regarding foreclosure on a condominium owned by the Estate (the "Condominium"); and issues surrounding personal property in the Condominium.

The Applicant was the nephew of the deceased. The Applicant's mother, the deceased's sister, became personal representative of the Estate. The Royal Bank of Canada ("RBC") initiated foreclosure proceedings in relation to the Condominium, and the Estate was found in default and foreclosure was granted by a Master. The Applicant filed an Application to appeal the Master's Order, indicating that he was a self-appointed litigation representative pursuant to Rule 2.14. Associate Chief Justice Rooke had previously stayed the Applicant's Appeal because the Estate's personal representative was the Applicant's mother, and because the Applicant had not filed an Affidavit in support of his self-appointment, as required by Rule 2.14.

The Applicant had now filed the required Affidavit, and Rooke A.C.J. ordered that the Applicant replace his mother as personal representative of the Estate pursuant to Rule 2.21. His Lordship found that there was evidence showing that the Estate's affairs would not be completed in a timely manner if the Applicant's mother were not replaced, and that the Applicant would discharge these responsibilities appropriately.

In previous proceedings, it was determined that the Applicant could not advance an Appeal on behalf of the Estate because the Applicant had not satisfied the criteria to be a self-appointed litigation representative. Having satisfied these criteria and having now been appointed as personal representative of the Estate, the Applicant could now pursue the Appeal. However, Rooke A.C.J. noted that the Estate must be represented by a lawyer to appear in Court pursuant to section 106(1) of the *Legal Profession Act,* RSA 2000, c L-8. Therefore, His Lordship, pursuant to Rule 1.4(1)(h), extended the deadline to appeal a Master's Order under Rule 6.14(2) to allow the Applicant to retain counsel on behalf of the Estate.

With respect to the personal property located in the Condominium, Associate Chief Justice Rooked held that RBC had the right to treat this property as abandoned pursuant to Rule 9.28. His Lordship ordered that this property be inventoried and transported to storage by RBC to be stored for a period of one month, during which time the Applicant would have access to the property.

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

TAQA DRILLING SOLUTIONS INC V YAR HOLDINGS INC, 2021 ABQB 309

(LEMA J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 10.52 (Declaration of Civil Contempt) and 13.5 (Variation of Time Periods)

The parties had previously agreed to a litigation plan by way of Consent Order. Questioning and responses to Undertakings were to be completed by January 8, 2021, and a list of Summary Trial witnesses was to be exchanged by February 26, 2021. Following the expiration of those deadlines, and without advance notice, the Defendant advised on March 8, that it sought to rely on two additional Affidavits which had been sworn on January 27, 2021. The Court found that the manner in which the Defendant provided the Affidavits was "less than courteous", noting that the Defendant had failed to apologize for or even acknowledge the breach of the deadlines contained in the litigation plan.

Justice Lema reviewed a number of cases which discuss what Rules apply to the breach of a Consent Order, and the appropriate Court response to breaches of a Consent Order. Justice Lema noted that in *Custom Metal Installations Ltd. v Winspia Windows (Canada) Inc.,* 2020 ABCA 333, the Court referenced Rule 9.15(4)(c), which allows an interlocutory Order to be varied on grounds that the Court considers just; Rule 13.5(2)(b), which allows the Court to adjust time periods set out in an Order; Rule 1.5(4), which instructs the Court not to cure contraventions unless certain circumstances can be met and specifically, where prejudice "can be remedied by generous thrown-away costs"; and Rule 10.52, which sets out when a person may be in civil contempt of the Court. Justice Lema also noted that in *Cornelson v Alliance Pipeline Ltd,* 2013 ABCA 378, Justice Slatter held in dissent that Rule 1.5(4) will apply unless prejudice can be cured, which requires the Case Management Judge to have sufficient information before them to conclude on the effect of prejudice.

Justice Lema permitted the late Affidavits, finding that the Affidavits contained narrow evidence that would not surprise TAQA, and that TAQA would be able to conduct cross-examinations of the affiants prior to the scheduled Summary Trial. As TAQA failed to show any prejudice, Justice Lema limited the remedy for the late Affidavits to Costs in the amount of $1,000.00.

COTE V ALBERTA (SAFEROADS), 2021 ABQB 313

(DUNLOP J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.15 (Originating Application for Judicial Review) and 7.3 (Summary Judgment)

This Decision considered the intersection between a Judicial Review Application under Rule 3.15, and a Judicial Review Application of an adjudicator's decision pursuant to section 24(3) of the *Provincial Administrative Penalties Act,* SA 2020, c P-30.8 (the "Act"). The question that the Court had to determine was whether Ms. Cote (the "Applicant") had to serve and file the Judicial Review Application within the 30 days required by the Act, or if she had six months as set out in the Rules.

In December 2020, a police officer issued an immediate suspension of the Applicant's driver's license. The Applicant appealed, and the adjudicator dismissed the appeal and upheld the suspension. The Applicant then filed a Judicial Review Application within 30 days but served it on the Respondents on the 31st day, failing to comply with the 30-day deadline set out in the Act. She was within the six-month limitation period prescribed by Rule 3.15(2). Government counsel argued that an Application could not be served after the 30-day deadline set by the Act and made an Application for Summary Dismissal.

The Judicial Review Application had two parts. The first was a review of the adjudicator's decision. The second was a constitutional challenge of the Act. Justice Dunlop noted that any limitation on the Court to grant constitutional relief must be express, and noted that the Act created a 30-day limitation period for review of an adjudicator's decision only. Justice Dunlop found that the constitutional portion of the Judicial Review Application was not subject to the Act's 30-day limitation period.

With respect to the portion of the Application which asked for a review of the adjudicator's decision, the Applicant argued that Rule 1.5 permits the Court to cure the failure to serve in time. Justice Dunlop noted two authorities from the Court of Appeal which would not permit His Lordship to cure the late service: *Blomer v Workers Compensation Board,* 2020 ABCA 334 and *Kehewin Cree Nation v Mulvey,* 2013 ABCA 294.

His Lordship then dismissed part of the claim, but permitted the part which sought constitutional relief to continue, pursuant to the authority set out in Rule 7.3(3) to dismiss part of the claim.

CANA MANAGEMENT LTD V CONDOMINIUM CORPORATION NO 0513341, 2021 ABQB 470

(MASTER ROBERTSON)

Rules 1.7 (Interpreting these Rules), 10.48 (Recovery of Goods and Services Tax) and Schedule C

This was an Application for the removal of a builder's lien on the basis that the lien was registered out of time. The Application was argued entirely in writing, including through Affidavits and Briefs of Law. Cross-examination was also conducted on the Affidavits.

In dismissing the Application, the Court concluded that the lien had been registered prior to abandonment or completion of the work, and thus within the required time. On the question of Costs, the Court set out a tentative Judgment, subject to comment from the parties.

Noting that the Schedule C Tariff Schedule does not include a particular line item for "desk Applications" (an Application conducted entirely in writing), the Court awarded Costs on the same basis as a half-day oral Application requiring Briefs of Law. Similarly, the Court noted that Schedule C does not include any line item for Questioning other than pursuant to Part 5 of the Rules, which the cross-examination was not; however, applying the "analogy rule" at Rule 1.7(2), the Court ordered Costs on the same basis. Finally, the Court raised Rule 10.48(2) to hold that the successful Respondent should not be entitled to recovery of Costs relating to Goods and Services Tax, as those amounts would be refundable under the *Excise Tax Act,* RSC 1985, c E-15.

BOYKO V BOYKO, 2021 ABQB 266

(SULYMA J)

Rules 2.11 (Litigation Representative Required), 2.13 (Automatic Litigation Representatives), 2.14 (Self-appointed Litigation Representatives), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 6.14 (Appeal from Master's Judgment or Order)

The Appellant appealed from a Master's Decision which had determined that the two sons of the deceased Plaintiffs had standing as litigation representatives to continue this Action on behalf of their parents. The Master also dismissed the Appellant's Application for dismissal due to long delay pursuant to Rules 4.31 and 4.33.

Justice Sulyma began by discussing the standard of review on Appeal from a Master's Decision, which is a correctness standard. Justice Sulyma noted that it is not strictly true to refer to these types of Appeals as being *de novo.* This is so because, pursuant to Rule 6.14, the addition of new evidence is not automatic (although the bar is not high) and because the

record before the Master, and the Master's reasons, are being reviewed. The reviewing Judge is not hearing the matter anew.

With respect to the matter of the standing of the litigation representatives, Sulyma J. observed that the Master properly limited the analysis to the necessity of a litigation representative, as described under Rules 2.11, 2.13, and 2.14. Justice Sulyma also noted that no case law was provided that would require the litigation representatives to prove underlying matters of standing to an Applicant. Justice Sulyma upheld the Master's Decision to permit the two sons to continue acting as litigation representatives and to continue the Action.

With respect to Rules 4.31 and 4.33, Sulyma J. held that the Master was correct in finding that unsuccessful settlement discussions which took place in 2015 constituted a significant advance in the Action because these settlement discussions had the effect of narrowing the issues in dispute, and therefore were progress towards resolution. Justice Sulyma agreed with the Master that there was no period of three or more years without a significant advance in the Action, as required by Rule 4.33.

Justice Sulyma therefore dismissed the Appeal.

KARDYNAL V SHUMLICH, 2021 ABQB 357

(DEVLIN J)

Rule 2.11 (Litigation Representative Required)

The Plaintiff applied for Summary Judgment as litigation representative of an estate. The claim was in relation to a debt owed by the Defendant to the deceased. The Defendant resisted the Summary Judgment Application on the basis that the Action was limitation-barred.

The issue before the Court was the interpretation of an ambiguous provision of the *Limitations Act,* RSA 2000, c L-12 (the "*Act*"). Section 3(2)(c) of the *Act* states that a limitation period will begin to run against a personal representative of an estate when the representative "was appointed". Neither "personal representative" nor "appointed" are defined in the Act. This created two possible interpretations: (1) the limitation period begins to run at the moment of the testator's death, when a personal representative is "appointed" by operation of the will; or (2) the limitation period begins to run when a personal representative is "appointed" by the Court through the issuance of a grant of probate.

Justice Devlin's analysis relied in part on Rule 2.11, which stated that an estate may launch an Action only through a personal representative appointed under a grant of probate or a Court-appointed litigation representative. His Lordship held that while the *Act* was indeed ambiguous, it would be illogical for the litigation period to begin running against a personal representative who cannot legally bring an Action prior to them being appointed by the Court, per Rule 2.11.

Justice Devlin therefore held that the latter of the above two possible interpretations was correct: the limitation period begins to run when a personal representative is "appointed" by the Court through the issuance of a grant of probate.

Given that the sole issue in dispute was with respect to the limitation period, Justice Devlin granted the Summary Judgment Application.

NAMMO V CANADA (JUSTICE AND ATTORNEY GENERAL), 2021 ABCA 245

(MARTIN, VELDHUIS AND ANTONIO JJA)

Rules 2.88 (Change in Lawyer of Record or Self-Representation) and 4.33 (Dismissal for Long Delay)

This was an Appeal of a Chamber Judge's Decision to uphold a Master's Decision to dismiss and strike a Statement of Claim against the Respondent on the grounds that: (1) the Statement of Claim was a collateral attack, (2) the Statement of Claim was filed outside of the limitations period, and (3) three or more years had passed without a significant advance in the Action under Rule 4.33.

The Appellant was involved in a motor vehicle accident in 2006 and sued another individual in Provincial Court in 2007. The Respondent, who was the Defendant's insurer, hired legal counsel and the claim was dismissed. The Appellant appealed that Decision. That Appeal was heard in September 2008 and dismissed. The Appellant then filed a complaint regarding the claim with the Calgary Police Service ("CPS"). After receiving an unsatisfactory response, the Appellant then filed a complaint with the CPS regarding their investigation of his initial complaint. Multiple complaints and Appeals to the Alberta Law Enforcement Review Board, Calgary Police Commission and Chief Judge of the Provincial Court were filed and dismissed.

The Appellant commenced the underlying Action in July 2014 alleging that the police, lawyers, Judges, and the insurance industry were part of a conspiracy to extort citizens. A number of other justice system participants were named in this Action. Several Defendants to the underlying Action had applied to have the claim struck or dismissed against them. The Appellant's appeals of those Decisions were dismissed as were his two Applications for leave to argue at the Supreme Court of Canada. The last Application for leave was dismissed on January 17, 2019.

On June 28, 2016, the Appellant wrote to the Chief Justice of the Alberta Court of Queen's Bench seeking a jury Trial. The Chief Justice responded on August 2, 2016, noting that there were no Defendants remaining and that no jury Trial would be permitted. The Appellant wrote on August 4, 2016, clarifying that the Action remained against the Respondent.

On February 20, 2019, the Respondent applied seeking to strike or summarily dismiss the underlying Action as against them. The Application did not refer to Rule 4.33 but the Affidavit and submissions before the Master made it clear that the Respondent was relying on a period of long delay pursuant to Rule 4.33. The Respondent did not refer to Rule 3.68 in the Application when making its arguments on collateral attack and limitations, however the language used in the Application and Affidavit made it clear that the arguments were before the Court and the parties provided submissions.

On the Rule 4.33 argument, the Master had determined that the last step in the Action was a Court of Appeal decision in 2015 and that the communication with the Chief Justice in 2016 did not significantly advance the litigation. On the limitation period argument, the Master considered the history and successful Applications of the other Defendants regarding limitations periods. The Master had also concluded that the Appellant's claim was a collateral attack on a number of other proceedings. Ultimately, the Master dismissed the underlying Action against the Respondent and remaining Defendants. The Chambers Judge found no errors in the Master's reasons.

In the current Appeal the Appellant argued, amongst other things, that the Chambers Judge erred: in his Rule 4.33 analysis by concluding no steps had been taken to advance the Action; by granting the 4.33 Application and dismissing the Action against the other Defendants who were not Applicants; and that the Chambers Judge violated his rights and allowed the Respondents to violate Rule 2.28 by allowing a lawyer to make representations when no notice of change of lawyer was filed.

The Appellant argued that the communications with the Chambers Judge in 2016 and the Supreme Court of Canada's Decision to deny leave in 2019 constituted steps that advanced the litigation. The Court of Appeal was not satisfied that any of these steps advanced the litigation and dismissed this ground of appeal.

The Appellant argued that the Master exceeded their jurisdiction by dismissing the Action against the other Defendants when deciding the Rule 4.33 Application. The Court of Appeal found that the Master did not exceed their authority in granting that remedy, and that the Chambers Judge did not make a jurisdictional error in upholding the Decision.

The Court of Appeal noted that there was no language in Rule 2.28 stating that an Application must be dismissed or that a Court must not hear submissions if notice of change in legal counsel was not provided to a party. Counsel for the Respondent provided the Chambers Judge with a copy of the notice which was filed before the second appearance in front of the Master. There was no evidence that the notice was served on the Appellant. The Appellant did eventually learn of the identity of counsel for the Respondents and did not suffer any harm or prejudice. Accordingly, the Court of Appeal dismissed this ground of appeal.

After considering all of the Appellant's arguments, the Court of Appeal dismissed the Appeal.

ZAROOBEN V WORKERS' COMPENSATION BOARD, 2021 ABQB 232

(LOPARCO J)

Rules 3.2 (How to Start an Action), 3.8 (Originating Applications and Associated Evidence), 3.15 (Originating Application for Judicial Review) and 3.22 (Evidence on Judicial Review)

This was an Originating Application for Judicial Review/a Statutory Appeal of the Appeals Commission of the Workers Compensation Board of Alberta. Justice Loparco began by addressing a preliminary procedural issue, namely, whether the proceeding was properly filed as either a Judicial Review or a Statutory Appeal.

The Applicant had filed an Originating Application stating that it was a "statutory/judicial appeal". Her Ladyship noted that section 13.4 of the *Workers' Compensation Act,* RSA 2000, c W-15 (the "Act") sets out the statutory process for an Appeal of a decision of the Appeals Commission, and it required that an Appeal be commenced by an Application.

Justice Loparco noted that the relevant provisions of the Rules included Rules 3.2, 3.8, 3.15 and 3.22. The Applicant had filed their Appeal and Judicial Review as an Originating Application under Rule 3.8 using Form 7 and listed the decision and record of proceedings as evidence in support. Her Ladyship noted that if it was

intended to be a Statutory Appeal pursuant to the Act, it should have been filed under Rule 3.2 using Form 5. If it was intended to be a Judicial Review, it should have been filed using Form 7 and served on the Minister of Justice and Solicitor General. It was filed using Form 7 but was not served on the Minister of Justice and Solicitor General. The pleadings therefore did not meet the requirements of either process and the question was whether the Court could accept the pleading as both a Judicial Review as well as a Statutory Appeal.

Her Ladyship noted that prior to the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 ("*Vavlilov*") it was common for Applicants with claims under the Act to seek Judicial Review and a Statutory Appeal. In *Vavilov* the Supreme Court of Canada made it clear that the standard of review for Statutory Appeals was distinct from that of a Judicial Review, however it was possible to proceed with a Judicial Review and Statutory Appeal at the same time. Further, the Applicant commenced their Originating Application three days before the publication of *Vavilov*. Justice Loparco noted that the Statutory Appeal process under section 13.4 of the Act limited the process to questions of law or jurisdiction, and that the right of Appeal under the Act did not preclude the Applicant from bringing an Originating Application for Judicial Review.

Her Ladyship was satisfied that the Court could hear both a Statutory Appeal and Judicial Review in the proceeding. Justice Loparco noted that Rule 3.2(6) allowed the Court to make a procedural Order to correct and continue a proceeding if an Action was started in one form when it should have been started in another. Accordingly, Her Ladyship made an Order that the proceeding should be treated as though the Applicant had filed an Originating Application seeking both a Statutory Appeal and a Judicial Review and noted that future claims before the Court that raise a Statutory Appeal and Judicial Review must be properly distinguished in the pleadings and served on the "Minister of Justice and Solicitor General or the Attorney General for Canada, or both, as the circumstances require" in order to comply with Rule 3.15.

Ultimately, after dealing with the procedural issue, Justice Loparco found that the Appeals Commission's decision was unreasonable and remitted the matter to the Appeals Commission for reconsideration.

NORHEIM V CHIEF JUDGE OF THE PROVINCIAL COURT OF ALBERTA, 2021 ABQB 465

(WILSON J)

Rules 3.15 (Originating Application for Judicial Review) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Chief Judge of the Provincial Court of Alberta (the "Chief Judge") and the Minister of Justice and Solicitor General of Alberta (the "Attorney General") applied to strike three Actions filed by the Honourable D.C. Norheim, Judge of the Provincial Court of Alberta ("Judge Norheim"). All three Actions flowed from the Chief Judge's decision not to reappoint Judge Norheim for another year as a part-time Judge pursuant to section 9.24 of the *Provincial Court Act*, RSA 2000, c P-3 (the "PCA").

In April 2019, the Chief Judge informed Judge Norheim that he would not be reappointed

for another year as a part-time Judge (the "Decision"). The Decision was defined as an administrative decision according to the section 41.1(a)(i2) of the *Judicature Act*, RSA 2000, c J-2 (the "Act"). Judge Norheim then made a complaint to the Alberta Judicial Council, which dismissed the complaint (the "Council Decision"). Judge Norheim did not seek Judicial Review of the Council Decision within the six-month limitation period set out in Rule 3.13(2). Instead, Judge Norheim filed: (1) an Originating Application for Judicial Review of the Decision; (2) a Notice of Constitutional Question seeking a declaration that section 9.24(4) of the PCA was unconstitutional; and (3) an Amended Notice of Constitutional Question seeking a declaration that sections 9.23 and 9.24 of the PCA were unconstitutional (collectively, the "Three Actions").

The Court considered the Applicants' Application to strike the Three Actions pursuant to Rule 3.68(2)(d) on the basis that they were an abuse of process. The Court first determined that Judge Norheim was entitled to seek Judicial Review of the Council Decision but did not do so.

The Court noted that one category of abuse of process is re-litigating settled issues regardless of the litigant's motive. Wilson J. determined that the Three Actions were an attempt to re-litigate the Council Decision. The Court determined that this was not an appropriate circumstance where re-litigation was necessary to enhance the credibility and integrity of the judicial system. Wilson J. also determined that the Three Actions were a collateral attack on the Council Decision. As a result, the Court dismissed the Three Actions pursuant to Rule 3.68.

JACOBSON V NEWELL (COUNTY), 2021 ABQB 505

(ROTHWELL J)

Rules 3.18 (Notice to Obtain Record of Proceedings), 3.19 (Sending in Certified Record of Proceedings) and 3.22 (Evidence on Judicial Review)

The Applicants applied for a Judicial Review challenging bylaw 1998-20 (the "Bylaw") passed by the Respondent on the grounds that it did not comply with the *Municipal Government Act*, RSA 2000, c M-26. The Bylaw had reduced the number of electoral divisions in the County.

The Respondent sought to include in the Certified Record of Proceedings (the "Record") a copy of the challenged Bylaw as well as copies of bylaws from other counties that were similar to the Bylaw. The Applicants consented to the inclusion of the challenged Bylaw; however, the Applicants applied to have these other bylaws struck out from the Respondent's Book of Authorities because they were evidence and not argument, and the Respondent had failed to bring an Application under Rule 3.22 for the bylaws' inclusion. The Respondents cross-applied for the other counties' bylaws inclusion into the Record.

Justice Rothwell concluded that, when considering materials in a legal brief, that evidence must be set out in an Affidavit, oral testimony, or through an authorized manner. As such, the additional bylaws were struck from the Respondent's Book of Authorities.

In considering the Respondent's request to have the materials added to the record, Justice Rothwell noted that Judicial Review is conducted upon the basis of the documents that were before the decision maker whose decision is being reviewed. Justice Rothwell further identified that Rules 3.18 and 3.19 enumerate the procedure for the filing of the Record.

Justice Rothwell ultimately concluded that the attempt to enter the other bylaws was not in accordance with Rules 3.18 or 3.22. As such, due to a lack of relevance and the fact the Record is to contain documents considered by the decision maker, Justice Rothwell declined the Respondent's Application to include the other counties' bylaws.

MÉTIS NATION OF ALBERTA ASSOCIATION FORT MCMURRAY MÉTIS LOCAL COUNCIL 1935 V ALBERTA, 2021 ABQB 282

(WHITLING J)

Rules 3.19 (Sending in Certified Record of Pleadings), 3.22 (Evidence on Judicial Review) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant sought Judicial Review of a decision of the Aboriginal Consultation Office ("ACO"), which had found that a project proponent did not have to consult with any Aboriginal organization regarding a certain oil sands mining project (the "Decision").

The Respondents, Her Majesty the Queen in Right of Alberta and the ACO (the "Alberta Respondents") applied to strike the Applicant's Originating Application as an abuse of process.

The Applicant applied (i) to admit evidence that was not before the ACO when it made the Decision; (ii) for an Order directing the Alberta Respondents to file an unredacted copy of the ACO's records so that the Court could review the validity of certain redactions; and (iii) for an Order to amend its Originating Application to add a "basket clause" into its prayer for relief.

The Court first considered whether the Applicant's Originating Application should be struck as an abuse of process. Whitling J. noted that Rule 3.68 allows the Court to strike out all or part of a claim if it constitutes an abuse of process. The test for striking pleadings for an abuse of process is "whether it is plain and obvious the action will fail" (*Lameman v Alberta,* 2013 ABCA 148). The Court found that the Originating Application was a collateral attack on a previous decision of the Ministry of Indigenous Relations that the Applicant did not make a credible assertion of Métis Aboriginal rights. As a result, the Court struck the Applicant's Originating Application.

In the event that striking the Originating Application was an error, Whitling J. considered the Applicant's Application to admit fresh evidence. Whitling J. noted that Rule 3.22 allows the Court to permit additional evidence on a Judicial Review, though the general rule is that evidence that was not before the original decision-maker is inadmissible on Judicial Review (*Gowrishankar v JK,* 2019 ABCA 316). The Court determined that the Applicant's proposed evidence did not fall within an exception to the general rule and denied the Application to admit new evidence.

The Court then considered the Applicant's request to order the Alberta Respondents to file an unredacted copy of the ACO's records. Whitling J. noted that Rule 3.19(3) allows the Court to make such an Order if the Court is not satisfied with the explanation for not

sending all or part of the record of proceedings. The Alberta Respondents explained that the redactions concerned privileged information and information submitted by another community respecting a potential duty to consult that community. The Court was satisfied with the Alberta Respondents' explanation for the redactions and denied the Applicant's request.

Finally, the Court denied the Applicant's request for an Order to amend its Originating Application as it had already been necessary to strike the Originating Application on the basis that it sought unavailable relief.

ECOJUSTICE CANADA SOCIETY V ALBERTA, 2021 ABQB 397

(HORNER J)

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

The Government of Alberta recommended a public inquiry into anti-Alberta energy campaigns supported by foreign organizations (the "Inquiry"). The Lieutenant Governor in Council initiated the Inquiry by Order in Council 125/2019 (the "OIC"). In the OIC, Jackson Stephens Allan was appointed as the Commissioner to conduct the Inquiry (the "Commissioner"). Ecojustice Canada Society ("Ecojustice") brought an Application for Judicial Review requesting that the Court find the Inquiry unlawful. The named Respondents included the Commissioner.

A preliminary issue was the substance of the evidentiary record for the purposes of determining the issues in the Application. Pursuant to Rule 3.22, when making a decision on an Application for Judicial Review, the Court may consider: (a) the certified copy of the record of proceedings; (b) a transcript of Questioning, if it was permitted under Rule 3.21; (c) anything permitted by any other Rule or by enactment; and (d) any other evidence permitted by the Court.

The Commissioner submitted his record and a supplemental record (the "Record"). The Commissioner argued that the Record would provide the Court with fulsome evidentiary materials that would assist in putting the submissions of Ecojustice in a proper context. The Commissioner further argued that if he did not provide the Record, then Ecojustice could have requested that the Court grant it the right to question the Commissioner under Rule 3.21 and enter any resulting transcript under Rule 3.22(b). Finally, the Commissioner argued that in cases where an allegation of bias is made, additional evidence may be admitted to fill gaps in the evidence (*Bergman v Innisfree (Village),* 2020 ABQB 661). In sum, the Commissioner chose to file the Record in order to avoid delay, additional expense and to enhance the efficiency of the proceedings.

The Court accepted that the Record, which included correspondences between the Commissioner and Ecojustice, and details of the Commissioner's political donations prior to the OIC, was necessary to fill gaps in the evidence and was helpful to the Court in its consideration of the allegation of bias. The Court admitted the Record pursuant to Rule 3.22(d).

MILLER V JACKSON, 2021 ABQB 281

(MASTER SUMMERS)

Rules 3.61 (Request for Particulars), 3.68 (Court Options for Dealing With Significant Deficiencies), 7.3 (Summary Judgment) and 13.7 (Pleadings: Other Requirements)

This Action arose from a dispute between the Defendant farm operators and their Plaintiff workers. The Plaintiffs sued for: (i) unpaid wages due to one of the Plaintiffs, Mr. Miller, (ii) damages for tools destroyed in a fire; (iii) revenues owing on a crop share arrangement; and (iv) damages for defamation. The Defendants counterclaimed for a mortgage debt against the Plaintiffs. The Defendants applied for partial Summary Judgment and/or Summary Dismissal, and conceded that some issues at bar required a full Trial, while the Plaintiffs argued that all issues must proceed to Trial.

The Defendants had served a Request for Particulars of the defamation claim pursuant to Rule 3.61. While the Plaintiffs had provided a response to the Request for Particulars, that response still did not clarify to whom the alleged defamatory statements were made. Master Summers found that the allegation that defamatory statements were made to "certain persons" was insufficient to satisfy Rule 13.7(f), which necessitates pleading the specifics of a defamation claim. The Plaintiffs were required to identify a specific recipient of that statement. As such, the defamation claim was struck pursuant to Rule 3.68 due to this deficiency.

The Court also found that the evidentiary record was unsatisfactory to summarily dismiss the unpaid wages claim based on a limitations issue, and therefore declined the Application for Summary Dismissal brought by the Defendants pursuant to Rule 7.3. Similarly, the Defendants' Application for Summary Judgment with respect to the Counterclaim was also dismissed, as there remained an outstanding accounting of farm profits which played into the amount owing under the mortgage agreement via the crop sharing arrangement.

MELCOR REIT LIMITED PARTNERSHIP (MELCOR REIT GP INC) V TDL GROUP CORP (TIM HORTONS), 2021 ABQB 379

(MASTER SCHLOSSER)

Rules 3.61 (Request for Particulars) and 3.68 (Court Options to Deal with Significant Deficiencies)

The main issue in the underlying lawsuit was whether the shutdown of a restaurant due to the COVID-19 pandemic was grounds for terminating a commercial lease. The narrow question was whether this could be determined by the Court or whether it needed to go to arbitration. The Defendant gave Notice of Termination on their lease after a public health order was issued. The Plaintiff then sued for injunctive relief preventing the Defendant from terminating. The Defendant sought to rely on an arbitration clause in the lease and applied for a stay pending arbitration, or alternatively, to strike any injunctive relief.

In seeking to strike the injunctive relief, the Defendant relied on Rule 3.68(2)(b), which would allow the Court to make an Order if a commencement document or pleading disclosed no reasonable claim. The Defendant sought to rely on the Plaintiff's Statement of Claim and response to a Notice to Admit. Pursuant to Rule 3.61, a response to a Notice to Admit was evidence and not a pleading. Accordingly, the response to the Notice to Admit could not be considered for Rule 3.68 and the Court was limited to considering the Statement of Claim itself. The Court found that the Plaintiff's request that the Defendant's Notice of Termination be declared invalid is not an unreasonable claim and should not be struck.

Notwithstanding the above, the arbitration clause in the lease was mandatory and ultimately, Master Schlosser stayed the Action pending the decision of the arbitrator or the agreement of the parties.

CLUB INDUSTRIAL TRAILERS (2012) LTD V PARAMOUNT STRUCTURES INC, 2021 ABQB 480

(MASTER SUMMERS)

Rules 3.62 (Amending Pleadings) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

CLUB INDUSTRIAL TRAILERS (2012) LTD V PARAMOUNT STRUCTURES INC, 2021 ABQB 480 (MASTER Summers)

Rules 3.62 (Amending Pleadings) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

This was an Application to amend a Statement of Defence and add a Counterclaim following close of pleadings, pursuant to Rules 3.62 and 3.65. The Application was made contemporaneous to the Respondent's Application for Summary Judgment. This Decision dealt only with the Application to amend and add.

The underlying dispute concerned a commercial contract for construction and an alleged failure to pay amounts owing thereunder. Litigation was initiated in 2015, but resolution was delayed in part due to the Applicant's failure to cooperate with procedural steps, including delivery of records and attendance for Questioning.

Noting that there is a minimal, but necessary, evidentiary threshold for introducing amendments after the close of pleadings, the Court considered several categories of proposed amendments, some of which amounted to mere clarifications and others which amounted to new allegations of fact or reversals of earlier statements. The Court noted that the evidentiary threshold for each amendment must be considered in the context of the nature of the amendment and in the context of other evidence before the Court.

The Court permitted some amendments and additions and refused others. Amendments and additions were permitted where they merely particularized, added to, or slightly varied statements made in the original Statement of Defence. The Court refused to permit other amendments where the Applicant failed to adduce sufficient or any evidence to corroborate the amendments and/or meaningfully dispel earlier contrary statements made by

the Applicant in its Statement of Defence or on cross-examination. The Court also found that these amendments were sought in bad faith, in light of their substance and timing. Other amendments, which spoke to Counterclaims arising from a related, but separate contract, were also refused based on the failure to address them in the original Statement of Defence and limitation time bars.

LISCHUK V K-JAY ELECTRIC LTD, 2021 ABQB 280

(RICHARDSON 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 7.3 (Summary Judgment)

The Plaintiffs appealed a ruling by Master Schlosser (the "Ruling") which had summarily dismissed a portion of the Plaintiffs' Amended Statement of Claim (the "Added Claims"). The Defendant also appealed the Ruling not to dismiss all of the Plaintiffs' Added Claims. As a preliminary issue, the Plaintiffs argued that by granting the amendments, the Court had already ruled that the basis for the amendments was proper.

In dismissing both Appeals and upholding the Master's Decision, the Court first reviewed Rule 3.65, confirming that it gives the Court jurisdiction to allow amendments after pleadings have closed. The Court accepted the Plaintiffs' argument that the Master's Decision to allow the Added Claims meant that the Master did not find the Added Claims "hopeless". The Court noted that examples of "hopeless" amendments include claims that do not disclose a cause of action, claims that have less than a modest degree of evidence in support, and claims that would be struck out under Rule 3.68. Claims that could be struck out pursuant to Rule 3.68 include claims where the Court has no jurisdiction and where the pleading discloses no reasonable claim or defence to a claim. On this point, the Court concluded that by allowing the Added Claims, the Master had to have found that they could not be struck under Rule 3.68.

The Court went on, however, to distinguish between the test for striking claims and summarily dismissing them. The Court stated that although an Application to strike pleadings and an Application for Summary Dismissal both serve the same broader purpose of weeding out unmeritorious claims at an early stage, they are not equivalent Applications, and the analyses underlying the two remedies is significantly different. The Court underscored that an Application to amend pleadings is a procedural step and a relatively easy bar meet. An Application to amend is not an adjudication on the merits of the amendments sought.

By contrast, the test for Summary Dismissal pursuant to Rule 7.3 requires the Court to conduct a review of the entirety of the claim. While no evidence may be adduced for an Application to strike, a robust evidentiary record is required in a Summary Dismissal Application. The Court emphasized that the Defendant's Summary Dismissal Application was not a collateral attack on the decision by the Master to permit the Added Claims, and upheld the Master's Decision to summarily dismiss a portion of the Plaintiffs' claim.

The Court determined that the Master's Decision was correct and dismissed both of the Appeals.

INGRAM V ALBERTA (CHIEF MEDICAL OFFICER OF HEALTH), 2021 ABQB 343

(KIRKER 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 9.4 (Signing Judgments and Orders)

The parties each brought a preliminary Application in the context of proceedings regarding the validity of Public Health Orders made by the Chief Medical Officer of Health. The Applicants applied to amend their Originating Application pursuant to Rule 3.65 to add claims for additional declaratory relief. The Respondents applied to strike portions of the Originating Application as disclosing no reasonable claim pursuant to Rule 3.68.

The Court began its analysis by discussing the law in relation to striking all or part of a pleading pursuant to Rule 3.68. Justice Kirker stated that a claim may be struck if it has no reasonable prospect of success and cited *Clark v Hunka,* 2017 ABCA 346 for the proposition that it is the Respondent's burden to prove this beyond a reasonable doubt. Justice Kirker also cited *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.,* 2021 ABCA 16 for the analysis that the Court must undertake: the facts as pled are assumed to be true; the claim will be read generously and will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action; and a claim will not be struck merely because it is novel, nor will it be allowed to proceed merely because it is novel.

With respect to the Applicants' Application to amend the Originating Application, the Court set out the general rule that any pleading can be amended, no matter how careless or late, unless an established exception to the rule applies. Justice Kirker cited *AARC Society v Canadian Broadcasting Corporation,* 2019 ABCA 125 for the three established exceptions, namely: (1) if an amendment would cause the non-moving party significant prejudice not compensable in Costs; (2) if the amendment seeks to advance a hopeless claim; and (3) if the amendment is a product of bad faith. In this case, the Respondents opposed the amendments on the basis that they were hopeless.

Given that the above analyses both asked the Court to consider the merits of the claims (being struck or being added, respectively), Justice Kirker surveyed the law in relation to each impugned claim. Her Ladyship dismissed the Applicants' amendment Application, except insofar as it pertained to certain limited amendments, and that the Respondents' Application to strike was granted in part.

REMINGTON DEVELOPMENT CORPORATION V ENMAX POWER CORPORATION, 2021 ABQB 261

(HOLLINS J)

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

The Appellant and Plaintiff, Remington, had been locked in litigation with the Defendant, Enmax, for many years. Remington purchased land that it intended to develop but the land was occupied by Enmax's equipment and transmission lines. Enmax was accessing its lines under a series of transmission agreements with the previous landowner. In 2010, Remington obtained a Decision confirming its right to terminate the transmission agreements. Enmax subsequently went to the Surface Rights Board ("SRB") to obtain a right-of-entry Order granting it access to Remington's land. Remington objected to Enmax's application to the SRB, saying that Enmax violated an agreement to not make such an Application. After a series of Decisions from the Court of Queen's Bench and the Court of Appeal, it was determined that both the SRB compensation process and the current Action would proceed. However, Remington wished to amend its Statement of Claim to add damages arising from Enmax's initiation of the SRB proceedings.

Master Robertson had dismissed Remington's Application to amend its pleadings, and Remington appealed to a Justice of the Court of Queen's Bench. This was the Appeal of Master Robertson's dismissal of the Application to amend.

The Court noted that an Appeal from a Master is often described as an Appeal *de novo* notwithstanding that the wording of Rule 6.14(3) clearly describes it as an Appeal "on the record". This refers to the standard of review (now settled to be correctness) and not to the evidence allowed on appeal. Not all Appeals from a Master are automatically Appeals *de novo* but rather, there is a low threshold for the introduction of new evidence on appeal, meaning that a true "appeal on the record" will be the exception rather than the rule. On such an Appeal the decision of the Master was not disregarded as though it had not been made (which would be a true *de novo* hearing). The Appeal is a review of the Decision, and there remains a burden on the Appellant to show that the Decision was not correct although the Court owes no deference to the Master.

The Court noted that as in *Dow Chemical Canada v Nova Chemicals Corporation,* 2010 ABQB 524, amendments should generally be allowed unless: (a) the amendments would cause serious prejudice not reparable in Costs; (b) the amendments are hopeless; (c) the amendments are time-barred because of limitations; or (d) the amendments are not pleaded or required in good faith.

The parties agreed that the only contested ground was whether Remington's proposed amendments were hopeless. The Court described "hopeless" as a claim that would have been "strikable" from the original pleading under Rule 3.68 for disclosing no cause of action had it initially been included. While this description may leave the impression that no evidence may be considered on a motion to amend pleadings, this is not the case. The Applicant generally must introduce some evidence to support the amendments, albeit to a very low evidentiary threshold. As such, a proposed amendment is hopeless where it is not "arguable" or "viable".

The Court found that in the circumstances, the proposed amendments were not hopeless and allowed the Appeal from the Master's Decision.

WIDNEY ESTATE (RE), 2021 ABQB 361

(LEMA J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Counsel for the personal representatives of an estate brought an Application to strike contents of an Affidavit in support of an Application for an estate freeze, an accounting, and case management. The challenged contents of the Affidavit included complaints to the Law Society of Alberta and follow up correspondence related to this complaint. Justice Lema considered whether the complaint letter submitted to the Law Society of Alberta was relevant to the beneficiary's requested relief, or alternatively, whether it should be struck out under Rule 3.68(4).

Justice Lema considered the complaint letter, and determined that, on its own, the letter was not relevant because its existence does not impact whether either lawyer's performance was inadequate. Justice Lema did acknowledge that the contents of the Law Society complaint may be relevant; however, this analysis was not impacted by the existence of the complaint itself. As a result, Justice Lema ordered the challenged sections of the Affidavit to be struck under Rule 3.68.

ALBERTA UNION OF PUBLIC EMPLOYEES V HER MAJESTY THE QUEEN (ALBERTA), 2021 ABQB 371

(Leonard J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Alberta Union of Public Employees (the "AUPE"), along with Guy Smith, Susan Slade, and Karen Weiers, filed a Statement of Claim against the Provincial Government raising constitutional challenges against the *Critical Infrastructure Defence Act,* SA 2020, c C-32.7 (the "*CIDA*").

The Defendant applied to strike the Statement of Claim pursuant to Rule 3.68 as an abuse of process, alleging that the pleading disclosed no reasonable claim, and challenging the Plaintiffs' standing. Justice Leonard applied the "stringent" test for striking a claim pursuant to Rule 3.68(2), noting that a claim should only be struck where it is "plain and obvious" that the claim cannot succeed or is "bound to fail". Her Ladyship noted that the power to strike must be used sparingly.

Justice Leonard noted that the Defendant alleged that the Statement of Claim was an abuse of process for lack of standing, but Her Ladyship noted that there was no authority for that proposition. Her Ladyship went on to determine whether the Plaintiffs had standing, as she found that would be determinative of whether there was a reasonable claim pursuant to the Rule 3.68 Application to strike.

The Plaintiffs asserted private and public interest standing. Justice Leonard found that the Plaintiffs had public interest standing only. To establish private interest standing, the Plaintiffs

had to show a "direct relationship between the person and the state" where "the state engages a person in a court process." On that basis, Justice Leonard found that AUPE lacked private interest standing because it was "not a defendant in an action commenced pursuant to the *CIDA*." Similarly, the individual Plaintiffs were found not to have private interest standing.

In determining whether the Plaintiffs had public interest standing, Justice Leonard weighed and considered cumulatively (a) whether the case raised a serious justiciable issue; (b) whether the Plaintiffs had a genuine interest in the outcome; and (c) whether the proposed suit is a reasonable and effective means to bring the case to Court. Justice Leonard found that the constitutional issues raised were serious and far from frivolous, that the law was reasonably foreseeable in application and therefore justiciable, that the Plaintiffs had a genuine interest in the issues, and that the claim was a reasonable and effective means for the Court to assess the constitutional issues.

Since the Plaintiffs had public interest standing to bring the Statement of Claim, Justice Leonard found that the pleadings disclosed a reasonable claim and should not be struck. The Defendant's application to strike the Statement of Claim pursuant to Rule 3.68 was dismissed, with Costs awarded to the Plaintiffs.

ALBERTA UNION OF PROVINCIAL EMPLOYEES V ALBERTA, 2021 ABQB 398

(FETH J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Government of Alberta applied to strike the Respondents' claim pursuant to Rule 3.68. The Respondents' claim alleged that the *Public Sector Wage Arbitration Deferral Act,* SA 2019, c P-41.7 (the "*Arbitration Deferral Act*") offended various workers' constitutional right to freedom of association by substantially interfering with the operation of collective agreements and ongoing bargaining relationships.

Rule 3.68 allows an Action to be struck if a "commencement document or pleading discloses no reasonable claim." Justice Feth noted that a claim will only be struck if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: … Another way of putting the test is that the claim has no reasonable prospect of success" (*R v Imperial Tobacco Canada Ltd.,* 2011 SCC 42).

Justice Feth noted that section 2(d) of the Charter guarantees the right of workers to associate in pursuit of collective workplace goals. The Court also noted that the guarantee protects the right of workers to engage in a meaningful process of collective bargaining. The Respondents' claim alleged that the *Arbitration Deferral Act* constituted "substantial interference" with the right to associate.

After review, Justice Feth determined that the Respondents' claim pleaded a reasonable cause of action and dismissed the Applicant's Application. The Court determined that the pleadings alleged the necessary facts to maintain a claim and that it was not plain and obvious that there was no reasonable cause of action. The Court also noted that the Applicant's justification argument under section 1 of the *Charter* cannot be determined on an Application to strike. Rather, the section 1 argument demands evidence and attracts the Applicant's burden of proof in establishing such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

PAPASCHASE FIRST NATION V MCLEOD, 2021 ABQB 415

(BERCOV J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

In ruling that the Plaintiffs' Statement of Claim (the "Claim") should be struck, the Court reviewed Rule 3.68. The Court found that the Plaintiffs did not have legal capacity to sue for the allegations set out in the Statement of Claim and that therefore the Court lacked jurisdiction on the matter.

The Court found that the first Plaintiff, the Papaschase First Nation ("PFN"), was not a juridical person and thus could not sue in its own name. Although Indian Bands as defined in the *Indian Act,* RSC 1985, c i-5 (the "Act") can be juridical persons, the PFN was not registered under the Act. The Court also found that the second Plaintiff, Chief Calvin Bruneau, could not sue for alleged wrongs such as defamation without amending the Claim to sue in his personal capacity. The Plaintiffs were unwilling in oral argument to amend the named Plaintiffs to Calvin Bruneau and the Papaschase Cree Nation Society, which both would have standing.

While, given the Court's conclusion that the Plaintiffs lacked capacity to sue, it was not necessary for the Court to consider whether the Claim should also be struck on the basis that it disclosed no reasonable cause of action, was frivolous or constituted an abuse of process, Bercov J. conducted the analysis in the event the Court was wrong. The Court first reviewed the test for determining whether an Action should be struck for disclosing no reasonable claim (or cause of action), emphasizing that a claim should only be struck if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" (*R v Imperial Tobacco Canada Ltd.,* 2011 SCC 42). The Court found that, assuming the allegations in the Claim were true and considering the Claim in a broad and liberal manner, the Action as currently pled had no reasonable prospect of success.

The Court concluded that this was not a case where it was more efficient to amend the pleadings as opposed to strike them entirely. The Court advised that for the Action to proceed, parties with legal capacity to sue must be substituted for the current Plaintiffs. Further, some of the alleged wrongdoings, such as breaches of privacy, must be brought by individuals whose privacy rights were violated.

ANDERSON V OSSOWSKI, 2021 ABQB 456

(ROOKE ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making a Costs Award)

Associate Chief Justice Rooke considered whether elevated Costs were appropriate after striking an Action that Sandra Anderson ("Anderson") initiated against 11 individuals. Anderson was an organized pseudolegal commercial argument ("OPCA") litigant and horse smuggler. On two separate occasions in 2019, the Canada Border Service Agency ("CBSA") seized horses that Anderson attempted to smuggle into Canada.

In response to horse smuggling fines, Anderson commenced an Action against CBSA staff and employees as well as a prosecutor with the Public Prosecution Service of Canada. Associate Chief Justice Rooke ruled the claim to be an Apparently Vexatious Application or Proceeding ("AVAP"), and ordered, pursuant to Civil Practice Note No 7, that Anderson had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68 ("Anderson #1").

The Court then struck the Action when Anderson failed to provide written submissions ("Anderson #2"). Rooke A.C.J. noted that Anderson had emailed the Court a document titled "NOTICE: Trespass, Liability and Fee Schedule" along with several "Exhibits" that purported to fine Associate Chief Justice Rooke and counsel for the Defendants 25 ounces of gold (the "Notice"). The Court determined that the Notice was a further abuse of the Court and a second basis to strike the Action.

In Anderson #2, Associate Chief Justice Rooke requested that Anderson provide written submissions on why she should not be subject to an elevated Costs Award. Anderson responded by sending the Court an email that stated, "Notice to agent is notice to principal" and "Notice to principal is notice to agent". Attached to the email were copies of the Decisions in Anderson #1 and Anderson #2 annotated with a Sharpie pen to include the date and the phrases "No Trespass", "Contract declined", and "All rights reserved".

Turning to Costs, Rooke A.C.J. noted that successful litigants are presumptively due Schedule C Costs, unless the Court orders otherwise pursuant to Rule 10.29(1). Associate Chief Justice Rooke also noted that the Court has broad authority to vary a Costs award and that OPCA litigation demands elevated Costs consequences. The Court determined that Anderson was still attempting to use pseudolaw to evade the consequences of her abusive and illegal activity. The Court determined that Anderson's litigation misconduct warranted an elevated Costs Award of $2,500 per Defendant to be paid forthwith. Anderson's approval of the Order was not required pursuant to Rule 9.4(2)(c).

GAUVREAU V LEBOUTHILLIER, 2021 ABCA 130

(CRIGHTON JA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 14.13 (Standard Appeals), 14.14 (Fast Track Appeals), 14.48 (Form and Content of Affidavits) and 14.51 (Applications without Oral Arguments)

Pursuant to Rule 14.48, the Applicants (the Appellants) sought an Order extending time to file their Appeal material, an Order staying the payment of the Costs awarded, and a stay of the Appeal proceedings pending the Respondent's response to a written demand for further information. The Respondent did not oppose the stay of Costs pending the outcome of the Appeal or the extension of time; however, the Respondent did oppose the Application to stay the proceedings pending a response for further information.

This Application was dealt with in writing pursuant to Rule 14.51.

In the underlying Appeal, the Applicant was attempting to Appeal the Decision of Associate Chief Justice Nielsen. The Applicant's claim had been brought before Associate Chief Justice Nielsen as an Apparently Vexatious Application or Proceeding ("AVAP"). Associate Chief Justice Nielsen had ordered, pursuant to Civil Practice Note No 7, that the Applicant had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant Rule 3.68. Associate Chief Justice Nielsen reviewed the written submissions provided by the Applicant and determined that the AVAP should be struck pursuant to Rule 3.68.

In ultimately dismissing in the Appellants' Applications, Justice Crighton identified that, in accordance with Rule 14.13 and 14.14, the Applicants' Appeal is a standard Appeal. In dismissing the Applications, Justice Crighton held that the Applicants' should not require more time, that the Notice of Appeal did not identify an arguable issue, and that the Applicants failed demonstrate why the proceedings should be stayed pending the Respondent's response to the written demand.

QUAYE V LAW SOCIETY OF ALBERTA, 2021 ABCA 167

(GRECKOL, PENTELECHUK AND FEEHAN JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant appealed Associate Chief Justice Rooke's decision (the "Decision") to strike out the Appellant's Originating Application under Rule 3.68 as an Apparently Vexatious Application or Proceeding ("AVAP") after following the procedure in Civil Practice Note No 7 ("CPN7").

In 2006, the College of Physicians and Surgeons of Alberta (the "College") struck the Appellant's father from the College register for failing to upgrade his skill level. The Appellant later commenced a private prosecution against the College and the Registrar in place at the time, which the Chief Crown Prosecutor stayed.

After the Chief Crown Prosecutor stayed the proceedings, the Appellant filed an Application for Judicial Review and filed a complaint against the Chief Crown Prosecutor with the Law Society of Alberta (the "Law Society"). The Law Society dismissed the Appellant's complaint and the Appellant appealed to the Law Society of Alberta Appeal Committee ("Appeal Committee"), which dismissed the Appeal. The Appellant then filed an Originating Application seeking Judicial Review of the Appeal Committee's decision, which Rooke A.C.J. struck as an AVAP in the Decision.

On Appeal, the Appellant argued that the Decision erred in failing to recognize that the Respondents' invoking CPN7 was itself abusive and failing to consider an alleged *Charter* breach. The Appellant also applied to admit new evidence filed concurrently with his Originating Application as part of his CPN7 response.

The Alberta Court of Appeal dismissed the Appeal. The Court determined that there was nothing improper about the Respondents' relying on the CPN7 process. The central issue below was whether the Originating Application failed to set out a "reasonable claim" such that it could be struck under Rule 3.68(2). The Court noted that no evidence is permitted on this question as Rule 3.68 is "not about evidence, but the pleadings" (*R v Imperial Tobacco Canada Ltd.,* 2011 SCC 42). The Court noted that the Appellant failed to set out any facts in his Originating Application.

FEENEY V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2021 ABCA 185

(STREKAF JA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 14.36 (Case Management Officers)

The Plaintiff/Appellant applied to, among other things, direct that this Appeal be heard prior to two corresponding Appeals. Rooke A.C.J., in the decision below, held that the Plaintiff/Appellant's Application to file an Originating Application to judicially review an earlier decision which found the Plaintiff/Appellant's Application to be an Apparently Vexatious Application or Proceeding under Rule 3.68 was a collateral attack on corresponding Actions.

The Court of Appeal Case Management Officer determined that the various Appeals being advanced would be heard on the same day. Strekaf J.A. confirmed that the procedural decision of the Court of Appeal Case Management Officer fell within the mandate of the Case Management Officer under Rule 14.36, and that the Appeals would be heard on the same day.

GEOPHYSICAL SERVICE INCORPORATED V PLAINS MIDSTREAM CANADA ULC, 2021 ABQB 359

(ROOKE ACJ)

Rule 4.10 (Assistance by the Court)

This was an Application for advice and directions pursuant to Rule 4.10 as to whether the Defendant was required to provide an Affidavit of Records ("AOR") before it could proceed with a long-planned Application for Summary Dismissal against the Plaintiff. In support of its position that no AOR need be filed before proceeding with the Application, the Defendant argued that the dispute could be resolved by reference only to the law and known facts, and that therefore no AOR was necessary for purposes of the Application for Summary Dismissal.

The Defendant also noted previous Orders from the Case Management Judge that first, directed that all requirements pursuant to Part 5 of the Rules would thereafter be suspended pending an Order to the contrary, and second, that imposed a litigation timeline which contemplated hearing of the Summary Dismissal Application before delivery of an AOR. After reviewing the transcript associated the second Order, the Court agreed with the Defendant and directed that an Order be agreed setting out dates and times leading to the Summary Dismissal Application.

PINDER V HML CONTRACTING LTD, 2021 ABCA 207

(PENTELECHUK JA)

Rules 4.22 (Considerations for Security for Costs Order), 14.67 (Security for Costs) and 14.68 (No Stay of Enforcement)

The Applicant ("HML") previously secured Summary Judgment against the Respondent ("Pinder"), and Pinder appealed. The Applicant then applied for an Order for Security for Costs on Appeal and Security for Judgment.

The Court emphasized that Security for Judgment is an extraordinary remedy that is granted only in exceptional circumstances. Instead, Courts typically encourage the use of enforcement proceedings under the *Civil Enforcement Act,* RSA 2000, c C-16 given that an Appeal does not operate as a stay of enforcement in Alberta pursuant to Rule 14.68. In this case, evidence that Mr. Pinder sold a $9,000 piece of equipment still subject to HML's security interest, coupled with acrimonious receivership proceedings, did not rise to the level needed to grant the remedy of Security for Judgment.

In granting a portion of the Security for Costs however, the Court reviewed Rules 14.67 and 4.22. Rule 14.67 permits a single Appeal Judge to order security for payment of Costs. If the security is not provided as ordered, the Appeal is deemed to have been abandoned and the other party is entitled to a Costs Award. Rule 4.22 outlines the factors to be considered in determining whether an order for Security for Costs is just and reasonable, including the ability of the Respondent to pay the Costs

Award and any other matter the Court considers appropriate. Here, the Court found that Mr. Pinder resided in British Columbia, had nominal assets of less than $2,500, shares in two active corporations valued at $0, and no source of income aside from the Canada Emergency Relief Benefit. This evidence, coupled with the fact Mr. Pinder failed to pay any portion of the Judgment or Costs to date, was deemed by Justice Pentelechuk sufficient to demonstrate concern with Mr. Pinder's ability to pay future Costs in the event his Appeal is unsuccessful. As a result, the Court granted the Application for Security for Costs.

Finally, the Court noted that the Applicant provided no breakdown or particulars of the requested $50,000 in security, and in turn, granted Security for Costs in the amount of $25,000, assuming an average hourly rate of $500 and 50 hours of legal work on the Appeal.

SS V AS, 2021 ABQB 294

(MAHONEY J)

Rules 4.24 (Formal Offers to Settle), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making a Costs Award)

This was a Costs Decision arising out of a high conflict parenting and child support case that was decided at Trial. The Court determined that the Defendant (the "Father") was substantially more successful than the Plaintiff (the "Mother") and was thus entitled to Costs. The Father sought enhanced Costs based on factors such as his pre-Trial written offers (the "Offers") and the Mother's litigation conduct (the "Conduct").

The Court noted that, subject to the Court's discretion, the successful party is entitled to Costs from the unsuccessful party. The Court also noted that the strong public policy reasons and decided legal authority compels the Court to not treat Costs differently in family law cases (*Metz v Weisgerber,* 2004 ABCA 151). The Court set out the considerations in Rule 10.33 to be considered when making a Costs Award.

The Court first considered the Offers. Mahoney J. noted that Rule 10.33(h) permits the Court to consider any offer for settlement in making a Costs Award, not just a Formal Offer under Rule 4.24. The Court determined that the Father made a settlement offer that was more favourable to the Mother than the Trial outcome. The Court awarded Schedule C Costs under Column 1 with a 25% Costs enhancement due to the Offers.

The Court then considered the Conduct. The Father pointed to the Mother's many unsuccessful Applications, lack of cooperation and compliance in moving the matter along, serious unfounded allegations, and a last-minute acceptance of the Father's spousal support and matrimonial property offer. Mahoney J. noted that the Court may award enhanced Costs for blameworthy litigation conduct where a party's conduct demonstrates blatant disregard for the rights of other parties. The Court found that the Conduct did not rise to the level necessary to award enhanced Costs and declined to do so.

Given the above, the Court awarded Schedule C, Column 1 Costs enhanced by 25% for a total of $36,000. In addition, the Court awarded disbursements claimed by the Father with some adjustments and GST on applicable fees and disbursements.

KHALIL V DURANT, 2021 ABQB 424

(LABRENZ J)

Rules 4.29 (Cost Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.42 (Actions within Provincial Court Jurisdiction)

This was a Decision regarding the quantum of Costs payable to the Plaintiff following a Decision in respect of a failed real estate transaction.

Justice Labrenz began by citing Rule 10.29 for the presumption that the successful party is entitled to Costs from the unsuccessful party. The Plaintiff was the successful party at Trial, but the outcome was one of mixed success. The Plaintiff originally claimed for damages in an amount as high as $446,455.63. At Trial, the claim was reduced to a range from $253,024.63 to $391,455.63. The Plaintiff was ultimately awarded a fraction of that: $47,083.71. Despite this mixed success, Justice Labrenz made clear that His Lordship was not awarding Costs on a split-issue basis; the Plaintiff was successful, albeit modestly so. The Court stated that the issue of mixed success is relevant to the quantum of a Costs Award, but not whether or not a Costs Award should be made at all.

Justice Labrenz quoted Rule 10.33 for the factors to be considered in making a Costs Award. His Lordship also cited *McAllister v Calgary (City),* 2021 ABCA 25 for the general principle that a Costs Award of 40–50 per cent indemnification is implied by the phrase "reasonable and proper Costs" as found under Rule 10.31. The Plaintiff sought 60–80 per cent indemnification. Justice Labrenz stated that this rate of indemnification was not supported by the Plaintiff's degree of success or the amount ultimately recovered, as contemplated by Rule 10.33.

The Defendant argued that the ultimate Trial damages award fell within the jurisdiction of the Provincial Court of Alberta, and that the Costs Award should be reduced accordingly pursuant to Rule 10.42. Justice Labrenz disagreed, observing that while the amount payable by this particular Defendant was within the jurisdiction of the Provincial Court, when taking into account the contribution of the Realtor Defendants, the total damages award was above the Provincial Court's jurisdiction.

Justice Labrenz further observed that both parties spent unnecessary time at Trial on futile arguments, and that this must be accounted for in any Costs Award as contemplated by Rule 10.33.

Finally, Justice Labrenz dealt with the consequences of the Plaintiff's Formal Offer to Settle in the amount of $50,000 inclusive of pre-Judgment interest, taxable Costs, and disbursements, as governed by Rule 4.29. The Plaintiff calculated his Schedule C Costs under Column 1 at $28,387.50 without doubling. Justice Labrenz found this to be excessive. The Court also noted that Rule 4.29 does not apply to mandate the doubling of a lump-sum Costs Award made pursuant to Rule 10.31(1)(b), but that a Formal Offer may still be considered in such circumstances, as observed in *Jones v Gerosa,* 2016 ABQB 614.

In this case, Justice Labrenz found it appropriate to award a lump sum of $12,500 pursuant to Rule 10.31(1)(b)(ii), and to double this amount notwithstanding the non-application of Rule 4.29.

The Court therefore ordered the Defendant to pay to the Plaintiff $25,000 in Costs and $3,553.45 in disbursements plus GST as applicable.

MHK INSURANCE INC V GURR (ESTATE), 2021 ABQB 328

(MASTER SCHLOSSER)

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

The Applicant applied to dismiss the Plaintiff's claim for delay pursuant to Rules 4.33 and 4.31. The Applicant died in 2018 and his wife had been appointed as his litigation representative.

The Court first considered the Rule 4.33 Application. Rule 4.33 requires the Court to dismiss an Action on Application if three or more years have passed without a significant advance. The Court determined that a 2017 Procedural Order to compel Undertaking responses provided for an exchange of information that would assist both sides and significantly advanced the Action. The Court also noted that the Applicant's estate acquiesced to the Plaintiff's 2020 Application to appoint a litigation representative. As such, the Court dismissed the Rule 4.33 Application.

The Court then considered the Rule 4.31 Application. Rule 4.31 allows the Court to dismiss an Action on Application if the Court determines that delay has resulted in significant prejudice to a party. The Applicant's litigation representative provided an Affidavit stating that the Action primarily depended on witness memories and that she had been prejudiced by the Applicant's death. The Court disagreed that the Action primarily depended on witness memories, noting that the Applicant's litigation representative had provided insufficient particulars of the prejudice suffered. Master Schlosser also determined that the delay was not attributable to the Plaintiff, nor was the delay inordinate.

As a result, the Court dismissed the Rule 4.31 Application. The Court noted that prejudice is not presumed under Rule 4.31(2) where the delay is neither inordinate nor inexcusable. As the Applicant's litigation representative did not provide sufficient evidence of actual prejudice, there was no basis to dismiss the Action pursuant to Rule 4.31(a).

CONDOMINIUM CORPORATION NO 082 9220 (TERWILLEGAR TERRACE) V YAN, 2021 ABQB 429

(MASTER SUMMERS)

Rules 4.36 (Discontinuance of Claim), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant Condominium Corporation unilaterally filed a Discontinuance of Action pursuant to Rule 4.36, offered to pay $8,000 in Costs, and invited the Respondents to bring an Application in the event they believed they were entitled to a greater Costs Award. The Respondents brought this Application for, among other things, an enhanced Costs Award.

The Respondents asserted that the Condominium Corporation's Discontinuance amounted to abuse of process. Master Summers highlighted that the Condominium Corporation was entitled to Discontinue the Action under Rule 4.36. Further, Master Summers concluded that this matter was distinguishable from previous jurisprudence that had found a Discontinuance to be an abuse of process, and as such, rejected the Respondents' assertion of abuse of process.

With regards to the Respondents request for enhanced Costs, Master Summers noted the starting point in considering Costs is Rule 10.33, followed by the application of Rule 10.31 to consider options available to the Court in determining Costs Awards. Master Summers applied Rules 10.33 and 10.31 to the evidence before him and determined that the Condominium Corporation should pay two-thirds of the Respondents' reasonable legal fees due to, in part, failure of its representative to prepare for Questioning.

OUELLETTE V MAY, 2021 ABCA 124

(MCDONALD, O'FERRALL AND SCHUTZ JJA)

Rules 5.6 (Form and Content of Affidavits) and 5.10 (Subsequent Disclosure of Records)

The Applicant/Plaintiff appealed the Decision of a Chambers Judge who had dismissed his Appeals from two Orders granted by two separate Masters. The Respondents to the Appeal included two Provincial Crown Prosecutors, the Federal Crown, and the Provincial Crown. One of the issues on Appeal was whether the individual Respondents should be required to provide further and better Affidavits of Records, despite the fact the Provincial Crown disclosed the relevant and material records in its Affidavit of Records.

Both the Masters and the Chambers Judge concluded that the relevant and material records were in the control of the Provincial Crown, and the individual Respondents were not required to produce these records in their respective Affidavits of Records. The Appellant took the position that the prosecution records can be in the control of both the Provincial Crown and the individual Prosecutors, pursuant to *Kaddoura v Hanson,* 2015 ABCA 154 and Rule 5.6(1)(b)(ii). The Court of Appeal held that there

is no practical reason nor prejudice requiring the individual Respondents to reproduce the relevant material and dismissed the Appeal on these grounds.

The Court further reminded all parties that under Rule 5.10, there is a continuing obligation to disclose all relevant and material records after service of an Affidavit of Records.

HARDY V RUMANCIK, 2021 ABQB 484

(SULLIVAN J)

Rules 5.12 (Penalty for Not Serving Affidavit of Records) and 10.49 (Penalty for Contravening Rules)

The Plaintiff applied for an Order to produce further relevant and material records from the Defendants and for penalties to be paid to the Plaintiff pursuant to Rule 5.12 and to the Court pursuant to Rule 10.49.

The Plaintiff was suing the Defendants for conspiracy, malicious prosecution, unlawful arrest, and unlawful confinement. The Defendants were Candice Rumancik and various members of the Calgary Police Service. Ms. Rumancik was the ex-wife of one of the Defendant officers.

The Defendants agreed to produce all the information requested in the Application aside from "personal relationship records" that would speak to personal relationships between the Defendants and which the Defendants characterized as not relevant and "an improper fishing expedition".

The Court noted that "relevant" refers to the issues in the pleadings and "material" refers to whether that information can help, directly or indirectly, prove a fact in issue. It was an admitted fact that some of the Defendants were friends, socialized together and had a significant friendship. Much of the personal history and relationship of the Defendants was admitted in a Notice to Admit Facts.

The Court found that the production of a large volume of personal communications would not assist in the proper prosecution of the Action, rather, it would likely "impair the proper progress of this matter to trial, allowing for irrelevant, extraneous and collateral matters to unnecessarily hinder or delay arriving at the truth of the facts."

The Application was dismissed with respect to the Plaintiff's demand for production of the "personal relationship records".

MITCHELL V PYTEL, 2021 ABQB 403

(RENKE J)

Rules 5.34 (Service of Expert's Report), 8.4 (Trial Date: Scheduled by Court Clerk), 8.17 (Proving Facts) and 13.25 (Use of Filed Affidavits)

The Plaintiff had transferred an apartment building to the Defendant pursuant to a real estate purchase contract. The purchase price was $78,000.00. The Plaintiff also provided the Defendant funds to renovate the apartment building. The Defendant had not paid anything to the Plaintiff. The contract was signed in January 1999, and the transfer was signed in February 1999 and registered in April 1999. The Plaintiff registered caveats on the title for the apartment building in 2000 and 2001 as a result of the Defendant's failure to pay. The Plaintiff's counsel sent correspondence to the Defendant demanding payment and eventually commenced this litigation on July 5, 2007, leading to this Trial.

There were a number of evidentiary issues leading up to and during the Trial. The first of these was regarding the testimony of a realtor that was proposed as an expert witness by the Plaintiff. Form 25 was filed, however there was no expert report provided — Justice Renke found that the documentation provided did not satisfy Rule 5.34(a) or Form 25. The information and assumptions upon which the expert's opinion was based were not described and no summary of the expert's opinion was provided. This undermined the ability of opposing counsel and the Court to evaluate the opinion. Secondly, the Form 25 that was provided was dated December 7, 2020, shortly before the Trial commenced that month. Pursuant to Rules 8.4(2) and 8.4(3)(c), an expert report should have been provided before the matter was set down for Trial. Accordingly, Justice Renke did not allow the expert to testify during Trial.

The 86-year-old Plaintiff applied under Rules 8.17 and 13.25 for his evidence in chief to be provided by way of an Affidavit sworn in 2007, closer to the time the events took place. The grounds for the Application were that the Plaintiff was elderly, and it took considerable time for him to listen to and to answer questions. Justice Renke denied the Application. The Court noted that as a matter of principle, the general rule is that evidence at Trial is provided orally rather than in recorded or written form. This is reflected by the opening words of Rule 8.17 which state that "A fact to be proved at trial by the evidence of a witness must be proved by questioning the witness in open court". During the Trial, as the Plaintiff testified in chief, it was clear that his memory was failing him, and he was not responsive to questions. Justice Renke revisited the issue of the admissibility of the Affidavit and, relying on the "principled exception" to the hearsay rule, admitted the Affidavit. The Plaintiff was still cross-examined.

Ultimately, Justice Renke found that the Plaintiff's claims regarding payment for the apartment building and amounts that they advanced for renovations to be statute-barred and unenforceable.

HARPER V CANADA (AG), 2021 ABQB 233

(LEE J)

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

This was an Appeal from Master Schulz' Decision to dismiss a paragraph of the Appellant's Amended Statement of Claim pursuant to a Summary Dismissal Application filed by the Respondent Attorney General of Canada.

The original Amended Statement of Claim alleged that the Royal Canadian Mounted Police (the "RCMP") wrongfully arrested and assaulted the Appellant. The Appellant also alleged that the Respondent was responsible for his alleged mistreatment at the Edmonton Remand Centre (the "ERC").

The Court confirmed that Rule 6.14(3) provides that an Appeal from a Master, in addition to being an Appeal on the record, may also be based on new evidence that is relevant and material. The Court also reviewed Rule 7.3(1)(b) and confirmed that a Defendant may apply for an Action to be summarily dismissed if there is no merit to a claim or part of it.

With respect to Summary Dismissal Application, the Court cited *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49, and noted that in assessing a Summary Dismissal Application, a Court must first determine whether it is possible to fairly resolve the dispute on a summary basis or whether uncertainties exist in the facts, record, or law that reveal a genuine issue requiring Trial. Next, a Court must determine whether the moving party has met its burden to show that the Action is meritless or has no defence. Lastly, if the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a Trial.

After conducting an analysis of the facts, Rules and case law, the Court dismissed the Appeal from the Master's Decision and struck out the impugned paragraph in accordance with the Respondent's initial Application for three reasons. First, the Court found that the Federal Crown cannot be responsible for the actions of the employees of the Provincial Government of Alberta. Second, the Court found that the Appellant's detention at the ERC was as a result of an intervening judicial act by a Justice of the Peace and Canada. Lastly, the Court concluded that no duty of care is owed by Canada to the Appellant with respect to his alleged treatment at the ERC. In sum, the Court found the claims in the impugned paragraph to be meritless.

ABBAS V ESURANCE INSURANCE COMPANY OF CANADA, 2021 ABQB 303

(JOHNSTON J)

Rules 6.14 (Appeal from Master's Judgment or Order), 7.2 (Application for Summary Judgment) and 7.3 (Summary Judgment)

The Respondent Plaintiff advanced a claim against the Appellant Defendant insurance company for insurance coverage. The insurance company claimed that the Plaintiff forfeited his right to recover indemnity pursuant to sections 554(1)(b) and (c) of the *Insurance Act,* RSA 2000, c I-3 (the "*Insurance Act*"). These sections state that the right to recover indemnity is forfeited in cases of fraud.

The insurance company applied for Summary Dismissal of the Plaintiff's claim pursuant to Rules 7.2 and 7.3. The parties filed an Agreed Statement of Facts and no facts were in dispute. The Master noted that this was a pure question of law and interpretation of the Insurance Act and ultimately declined to summarily dismiss the Plaintiff's Action. The insurance company then brought this appeal of the Master's Decision.

The Court noted that the standard of review for an Appeal under Rule 6.14 is correctness. The Appeal is *de novo* and no deference is owed. The Court cited *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49 for the test for Summary Judgment, namely that the Court "must be left with sufficient confidence in the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute".

The Court concluded that this was an appropriate case for Summary Judgment. There were no facts in dispute and the matter involved a pure question of law. The fraud by the Plaintiff was admitted and therefore he had forfeited his right to indemnity in accordance with the *Insurance Act*. The claim was without merit and there was no genuine issue requiring a Trial. The Court allowed the Appeal of the Master's Decision and dismissed the Plaintiff's Action.

SIGNAL HILL MANUFACTURING INC V CANADA REVENUE AGENCY, 2021 ABQB 460

(ARMSTRONG J)

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

The Plaintiff ("Signal Hill") appealed a Master's Decision to summarily dismiss its claims against the Canada Revenue Agency ("CRA") and a CRA employee ("Pearcey"). Signal Hill only appealed the Master's Decision to summarily dismiss its claims against the CRA and Pearcey in negligence and unlawful interference with economic relations.

The parties agreed that the standard of review on an Appeal of a Master's Decision is correctness. The Court noted that while the Appeal is

on the record per Rule 6.14(3), no deference is due to the Decision below.

The Court then set out the test for Summary Judgment pursuant to Rule 7.3. A party may apply for Summary Judgment where there is no defence to a claim or part of it, there is no merit to a claim or part of it, or the only real issue is the amount to be awarded. The Court set out what the Summary Judgment procedure considers pursuant to *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49.

The Court considered Signal Hill's negligence claim first. Armstrong J. noted that negligence requires the CRA to owe Signal Hill a duty of care. The Court determined that CRA auditors do not owe a duty of care to taxpayers based on *Grenon v Canada Revenue Agency,* 2017 ABCA 96. Signal Hill argued that such a duty may arise where a public official acts in a manner inconsistent with the proper and valid exercise of statutory duties, in bad faith, or in some other improper fashion. The Court determined that even if a duty arises in such circumstances, there was no triable issue absent some factual basis for allegations of impropriety or bad faith.

The Court then considered the claim for unlawful interference with economic relations. Armstrong J. agreed with the Master below that the CRA and Pearcey committed no wrongful acts to establish the tort.

Given the above, the Court determined that the Master's Decision was correct and dismissed Signal Hill's Appeal.

VALSTAR V VSTAR ENTERPRISE LTD, 2021 ABQB 404

(GRAESSER J)

Rules 6.40 (Appointment of Court Expert), 6.41 (Instructions or Questions to Court Expert), 6.42 (Application to Question Court Expert) and 6.43 (Costs of Court Expert)

The Applicants applied for an oppression remedy, but in the context of a divorce/matrimonial property matter. The main remedy sought was the appointment of an Inspector under the Alberta *Business Corporations Act,* RSA 2000 c B-9 (the "*BCA*") in order to conduct an investigation into the family business and its assets. The Court awarded the Applicants the sought oppression remedy under the *BCA*, but noted that an alternate route to a similar remedy would have been an Application for the appointment of an expert under Rules 6.40-6.43 - a little-used process that "bears consideration where expert evidence on an issue is undoubtedly required and the economics of the case warrant that an entirely neutral expert be retained at the start with the hope that a costly war with dueling experts might be avoided".

The Court stated that if it had been concerned with its ability to order a valuation under the *BCA*, it would have invited the Applicant to make an Application in the divorce/matrimonial property Action for the appointment of a Court expert.

UNTERSCHULTZ V CLARK, 2021 ABQB 492

(LEMA J)

Rule 7.1 (Application to Resolve Particular Questions or Issues)

Following an Arbitral Award regarding spousal support, the Applicant applied for a review of the monthly support awarded and a variation of the lump-sum and arrears awards. In the context of Case Management of that Application, the Respondent sought a direction as to whether there should be a preliminary hearing regarding the "material change" of the Applicant's circumstances prior to the variation aspect of the Application being considered.

Justice Lema considered the Alberta Court of Appeal authority of *Smigelski v Smigelski,* 2015 ABCA 320, wherein the Chambers Judge had directed a preliminary Trial of an issue pursuant to Rule 7.1 and the Alberta Court of Appeal overturned this Order finding that there would be overlap between the issue at the preliminary Trial and those issues that would have to be explored at the main Trial. The Court of Appeal held that a Trial should not be split pursuant to Rule 7.1 unless the financial savings are clear, and in that case there was little probability of any meaningful savings.

Justice Lema applied this principle, amongst others, to the matter and held that the piecemeal approach being proposed was an exception to the traditional approach, there was no judicial support for such a bifurcation, and the proposed approach raised the risk of multiple Appeals and would not increase efficiency.

Justice Lema therefore denied the Respondent's request for the Applicant to make out a preliminary "material change" case and held that the variation Application would unfold in the typical manner.

GINN V FENG, 2021 ABQB 292

(GROSSE J)

Rules 7.3 (Summary Judgment), 9.21 (Application for a New Judgment or Order) and 9.24 (Fraudulent Preferences and Fraudulent Conveyances)

The Appellants appealed two Decisions of a Master. The Appellants had previously obtained a Judgment against the Respondents (the "2009 Judgment") and subsequently attacked the Respondents' house transfer as a fraudulent conveyance (the "2015 Action"). The Respondents later declared bankruptcy and were discharged. The Appeal from the Master turned on the following issues: (1) Did the 2009 Judgment survive the Respondents' bankruptcy and stop the limitation period for suing on or renewing the 2009 Judgment?; and (2) Were the Respondents entitled to immunity in the 2015 Action based on the passage of the 2-year limitation period set out in section 3 of the *Limitations Act,* RSA 2000 c L-12 (the "*Limitations Act*")?

The Court first considered whether the 2009 Judgment survived the Respondents' bankruptcy.

The Court noted that the Rules do not set an expiry date for money Judgments but that the *Limitations Act* grants the Defendant immunity from liability if the Judgment creditor does not seek a Remedial Order within 10 years.

The Court determined that the 2009 Judgment did not survive bankruptcy. Rule 9.21 permits an Application for a new Judgment or Order on a former Judgment without commencing a fresh Action. The Appellants argued that they sought a Remedial Order in 2018 when they filed an Application requesting that the 2009 Judgment be recognized as not released in bankruptcy. The Court noted that relief is remedial if it requires the Defendant "to comply with a duty or pay damages for violating a right", citing *Yellowbird v Samson Cree Nation No 444,* 2006 ABQB 434.

The Court then considered whether the Respondent was entitled to immunity in the 2015 Action. The record showed that the Appellants knew about the fraudulent conveyance alleged in the 2015 Action by at least August 28, 2009. The Court noted that if the 2015 Action amounted to seeking a Remedial Order, then the limitation period under section 3(1) of the *Limitations Act* had expired before the 2015 Action was commenced and the Respondents are entitled to immunity.

After reviewing case law, the Court determined that the relief sought in the 2015 Action was a Remedial Order. The relief sought in the 2015 Action was in substance demanding that the Respondents comply with their duty to pay the 2009 Judgment. As a result, the Court determined that Summary Judgment was appropriate in the circumstances (as the Master had found) and dismissed the Appeal.

BRYANT V PARKLAND SCHOOL DIVISION, 2021 ABQB 391

(ROTHWELL J)

Rule 7.3 (Summary Judgment)

Three former employees of Parkland School Division had brought an Action for wrongful dismissal and common law damages for pay in lieu of common law notice.

The Plaintiffs brought a Summary Judgment Application, and the Defendant brought a Summary Dismissal Application, both which centered around the interpretation of the termination provision, which read:

This contract may be terminated by the Employee by giving the Board thirty (30) days or more prior written notice, and by the Board upon giving the Employee sixty (60) days or more written notice.

The Plaintiff argued that the termination provision was ambiguous and did not limit the Plaintiffs' entitlement to notice of termination without cause. In response, the Defendant argued that the clause was unambiguous and a full answer to the amounts owed for pay in lieu of notice upon termination without cause.

Justice Rothwell considered Rule 7.3(1) in determining whether the Plaintiff's claim was appropriate for summary determination and cited to *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49 ("*Weir-Jones*") as the leading authority, confirmed recently in *Hannam v Medicine Hat School District No 76,* 2020 ABCA 343.

Justice Rothwell found that the only real issue was the amount for severance to be paid by the employer upon termination without cause based on the interpretation of the termination provision. This satisfied Rule 7.3(1)(c), and Justice Rothwell found that summary determination would be fair having regard to the state of the record and issues and that the relevant facts were proven on a balance of probabilities. His Lordship further found no genuine issue requiring Trial and had sufficient confidence in the state of the record to decide the matter summarily. In other words, the *Weir-Jones* factors were satisfied.

Justice Rothwell considered the termination provision and found that it was not ambiguous, as there were not two or more reasonable interpretations arising from the wording. As found by His Lordship, "a plain reading yields one meaning: 60 days or something greater." The "or more" did not create ambiguity in the contract but granted the Defendant discretion to provide lengthier notice if it so chose. Justice Rothwell concluded that "or more" did not equate to common law reasonable notice. Justice Rothwell also noted the "entire agreement" clause in the contract and gave it meaning to preclude the negotiations or discussions that were alleged by the Plaintiffs. The Defendant's Summary Dismissal Application was granted on that basis, and the Plaintiffs' Summary Judgment Application was dismissed.

JBRO HOLDINGS INC V DYNASTY POWER INC, 2021 ABQB 463

(ROMAINE J)

Rule 7.3 (Summary Judgment)

The Applicants applied for Summary Judgment against the Respondents in relation to claims of oppression. After a lengthy review of the parties, facts, and procedural history, Justice Romaine turned to the issue of whether the Application was capable of being determined on a summary basis.

Her Ladyship stated that the analysis under Rule 7.3 requires the Court to determine whether there is merit to a claim or an absence of a defence to it. Justice Romaine stated that, pursuant to *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49, Summary Judgment is appropriate when the record before the Court and the issues involved: (1) allow the Judge to make the necessary findings of fact; allow the Judge to apply the law to the facts; and (3) satisfy the Court that summary disposition is a proportionate, more expeditious, and less expensive means to achieve a just result.

In this case, Justice Romaine held that, despite conflicting evidence, there was sufficient uncontested admissible evidence to resolve the specific issues before Her Ladyship summarily. Justice Romaine noted that the conflicts in the evidence did not affect essential facts. The Applicant had met the burden of establishing that there is no merit or defence on the basis of uncontested facts, and the Respondent had failed to demonstrate, with respect to the allegations within this Application, that there was a genuine issue requiring a Trial.

Justice Romaine therefore granted Summary Judgment with respect to the claims of oppression which were before Her Ladyship in this Application, and directed the parties to apply for a date for a Case Management Application to identify and discuss the process of resolution of the outstanding issues, if they so chose.

MARTIN V KUBES, 2021 ABQB 479

(PRICE J)

Rules 7.3 (Summary Judgment) and 9.21 (Application for New Judgment or Order)

In 2019, the Respondent obtained a Judgment from the Ontario Superior Court based on the enforcement of a Judgment obtained in 2010 against the Appellant. The Respondent filed a Civil Claim in the Provincial Court of Alberta to enforce the latest Ontario Judgment. Summary Judgment was granted in the Respondent's favour in the amount of the Ontario Judgment. The Appellant appealed the Order granting Summary Judgment.

Price J. began by setting out Rule 7.3, which provides the test for determining whether Summary Judgment is appropriate as described in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49. Namely, when the process (1) allows the Judge to make the necessary findings of fact; (2) allows the Judge to apply the law to the facts; and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result.

Justice Price stated that the Appellant's arguments on Appeal were the same as those before the Provincial Court. The Appellant argued that the Respondent's Action was time-barred by the *Limitations Act,* RSA 2000, c L-12 because the Provincial Court Action was in relation to a Judgment obtained in 2010.

Justice Price disagreed, stating that the Appellant was confusing the limitation period for commencement of Actions with a party's ability to enforce a Judgment.

In Ontario, there is no limitation period in respect of a proceeding to enforce an Order or Judgment. In Alberta, pursuant to the *Civil Enforcement Act,* RSA 2000, c C-15, Judgments expire ten years from the day the Judgment takes effect, unless that Judgment is renewed or an Action is brought on that Judgment. The Appellant therefore argued that, by commencing an Action on the 2010 Judgment in Ontario, the Respondent was avoiding the Alberta limitation period.

Justice Price again disagreed, stating that Judgments in Alberta can be renewed or a new Action can be brought, as long as the renewal or Action is filed within ten years of the date of the Judgment. Further, under Rule 9.21, the Court may grant a Judgment creditor a new Judgment on a former Judgment or any part of a former Judgment that has not been paid.

Justice Price therefore concluded that the Respondent's Action in Alberta to enforce the Ontario Judgment was brought within time. Justice Price upheld the Decision of the Provincial Court and dismissed the Appeal.

SAITO V LESTER ESTATE, 2021 ABCA 179

(SLATTER, KHULLAR AND PENTELECHUK JJA)

Rule 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Appellant appealed an Order of a Chambers Judge granting the Respondents Summary Dismissal of the Appellant's claims against the estate of the Defendant (the "Estate") under Rule 7.3.

The Appellant argued that the personal representative of the Estate's Affidavit was in violation of Rule 13.18 as it was not strictly based on personal belief. In determining whether the personal representative of the Estate had correctly sworn the Affidavit, the Court of Appeal noted that the Chambers Judge correctly found that there is flexibility in interpreting the requirement of personal knowledge under Rule 13.18, specifically in relation to individuals swearing on behalf of estates or corporations. The Court of Appeal held that the Chambers Judge did not err in granting Summary Judgment based on the admissible evidence before him and dismissed the Appeal.

JEGOU V CANADIAN NATURAL RESOURCES LIMITED, 2021 ABQB 401

(POELMAN J)

Rule 8.15 (Notice of Persons Not Intended to be Called as Witnesses)

The Plaintiff was a paramedic terminated from the Defendant oil and gas company, CNRL. The primary issue was whether CNRL had just cause for summarily dismissing the Plaintiff on the grounds that he had failed to act according to the standards of his profession and CNRL's requirements for paramedical employees.

The Plaintiff served the Defendant with a notice under Rule 8.15 with an objection to the Defendant's decision not to call the Plaintiff's platoon chief, Ian McLeod, as a witness at Trial. Mr. McLeod was an employee of the Defendant and under the Defendant's exclusive control, so the Plaintiff's position was that an adverse inference should be drawn regarding evidence that Mr. McLeod would have given.

The Court cited *Howard v Sandau,* 2008 ABQB 34 for a list of factors to consider on whether to draw an adverse inference. These factors are: (a) whether there is a legitimate explanation for not calling the witness; (b) whether the witness could provide material evidence; (c) whether the witness is the only or best person who could provide that evidence; and (d) whether the witness is within the exclusive control of the party and not equally available to both parties.

On the facts, Poelman J. concluded that this was not a proper case to draw an adverse inference. Mr. McLeod was clearly not directly involved with the Plaintiff's alleged breaches of protocol and other witnesses were better suited to testify on these matters. The Court was also not satisfied that Mr. McLeod would have added anything material.

UNITED INC V CANADIAN NATIONAL RAILWAY COMPANY, 2021 ABQB 356

(ROTHWELL J)

Rule 8.17 (Proving Facts)

The Plaintiff in this Action claimed damages arising from environmental contamination of certain lands that were previously owned by the several of the Defendant railway companies ("CN Defendants").

The CN Defendants applied under Rule 8.17 for an Order permitting certain facts to be proven at Trial by admitting an Affidavit sworn by Mr. Don Hussey (the "Hussey Affidavit"). Mr. Hussey was a former employee of one of the CN Defendants. The Hussey Affidavit was sworn in support of an unsuccessful Summary Judgment Application. Mr. Hussey died before the Summary Judgment Application was heard.

The Court noted that Rule 8.17 requires facts to be proved at Trial by the evidence of a witness unless the Court orders otherwise. The parties agreed that the Hussey Affidavit was hearsay but that it could potentially be admitted if it meets the principled exception to hearsay. In other words, the Hussey Affidavit could be admitted if it was necessary and reliable *(Canmore Mountain Villas Inc. v Alberta (Minister of Seniors and Community Supports,* 2010 ABQB 498).

The Court was satisfied that the Hussey Affidavit met the criteria for necessity. The Plaintiff did not dispute that Mr. Hussey would have been one of the CN Defendants' key witnesses. Rothwell J. noted that the death of a witness will, in most situations, be sufficient to meet the necessity criteria. The Court also noted that Mr. Hussey's death was unexpected and that this was not a situation of the CN Defendants ignoring an unhealthy witness.

The Court was also satisfied that the Hussey Affidavit met the threshold test for reliability. The CN Defendants relied on reliability factors set out in *Jans v Jans,* 2015 SKQB 226, which the Court accepted as relevant considerations. The Hussey Affidavit was sworn under oath and the Court inferred from Mr. Hussey's past involvement in the litigation that he would have anticipated being cross-examined on his evidence. The Court also noted that Mr. Hussey was questioned and that this evidence would assist in assessing the consistency of Mr. Hussey's evidence. Rothwell J. also noted that Mr. Hussey was not motivated to lie and that the Court had no concerns with the circumstances in which the Hussey Affidavit was sworn.

Finally, the Court considered whether the Plaintiff had established prejudice weighing in favour of excluding the Hussey Affidavit. Rothwell J. determined that the Plaintiff's inability to cross-examine Mr. Hussey created the most significant prejudice for the Plaintiff. However, the Court determined that the CN Defendants would be more prejudiced by the Hussey Affidavit not being admitted.

Given the above, the Court exercised its discretion to admit the Hussey Affidavit. However, the Court noted that its ruling on admissibility was subject to a final determination on the Plaintiff's objections to admitting certain paragraphs of the Hussey Affidavit.

ANGLIN V ALBERTA (CHIEF ELECTORAL OFFICER), 2021 ABQB 353

(ROSS J)

Rule 9.13 (Re-opening Case)

On January 31, 2017, the Respondent, the Chief Electoral Officer, found the Applicant had breached section 19.1 of the *Election Act,* RSA 2000, c E-1 (the "Act") and imposed an administrative penalty of $500 under section 153.1 of the Act. The Applicant then brought an Application appealing the Respondent's decision on administrative grounds and challenging the constitutionality of the Respondent's authority to impose a penalty. The administrative law arguments were heard January 23-24, 2020, and the constitutional arguments were to be heard April 16-17, 2020, before they were adjourned *sine die* due to the COVID-19 pandemic.

On March 23, 2020 Justice Ross rendered a Decision on the administrative arguments: (1) dismissing the grounds of appeal alleging palpable and overriding error on the part of the Respondent, error of the Respondent in their interpretation of section 19.1 of the Act, and bias; and (2) determining that the ground of appeal alleging a lack of procedural fairness had been made out, and that the appropriate remedy was to remit the decision back to the Respondent for further consideration. The Minister of Justice and Solicitor General of Alberta, an Intervener on the constitutional challenge, intended to bring an Application declaring the Applicant's constitutional challenge moot due to the administrative law Decision. The Applicant then applied for reconsideration pursuant to Rule 9.13 — this was a Decision arising from both of those Applications.

The Applicant sought reconsideration of Justice Ross' determination that the Respondent did not make a palpable and overriding error. Her Ladyship determined that the Applicant's arguments on this point were in essence a "second kick at the can" and declined to reconsider.

The Applicant also sought a reconsideration of the remedy and argued that Justice Ross did not consider section 153.3 of the Act. Section 153.3 arose from amendments that took place in 2017 after the Applicant commenced their Appeal. At the conclusion of the hearing on the administrative law arguments, Justice Ross noted that she would allow the parties to address a remedy following an adjournment but overlooked this when she issued her first Decision. Her Ladyship noted that failing to consider the applicability of section 153.3 of the Act was an objectively demonstrable error and there was an issue of fairness as the parties were advised they would have an opportunity to address remedy but were not granted that opportunity. As such, Justice Ross determined that the issue of a remedy could appropriately be reconsidered under Rule 9.13. Her Ladyship found that as section 153.3 of the Act dealt with procedure, there was an exception to the presumption against retrospectivity and section 153.3 of the Act did apply. As such, Justice Ross found that the appropriate remedy in this case was to rescind the administrative penalty.

Regarding the Application of the Minister of Justice and Solicitor General of Alberta, Justice Ross agreed that the constitutional challenge was moot — especially so after the recission of the administrative penalty as there was no live controversy. Her Ladyship declined to exercise her discretion to consider the moot constitutional Application.

BREITKREUZ V BREITKREUZ, 2021 ABQB 339

(NEILSON J)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 10.52 (Declaration of Civil Contempt) and 11.28 (Substitutional Service)

In the context of divorce and division of matrimonial property proceedings, the Applicant applied pursuant to Rule 9.15 to set aside several Orders that were issued in 2019. The Applicant argued that he did not receive notice of the Applications that resulted in the Orders.

In 2006, the Respondent obtained an Order for partition and sale of the matrimonial home. No steps were taken by the Respondent to follow through with this Order. In 2019, the Respondent sought to revisit the issue of spousal support, and therefore filed a Notice to Disclose Application. A process server was unable to effect personal service on the Applicant. The Respondent obtained an Order allowing substitutional service pursuant to Rule 11.28. Justice Neilson noted that Rule 11.28 is not a formality, and it is crucial that the Rule's requirements be met.

All further service was accomplished by posting the documents in a sealed envelope on the gate of the Applicant's residence, in accordance with the substitutional service Order. An Order was granted requiring the Applicant to provide complete financial disclosure, failing which the Applicant was required to attend Court personally on a specified date to show cause why he should not be held in contempt. The Applicant did not provide financial disclosure and did not appear, so he was held in contempt and a warrant was issued accordingly.

A further Application was brought by the Respondent (and served substitutionally). An Order was granted regarding the matrimonial home and altering the amount of spousal support payments.

The Applicant was detained when attempting to leave the country on an international flight pursuant to the warrant. In these proceedings, the Applicant argued that he was unaware of any of the aforementioned proceedings, did not receive any correspondence from the Respondent, and did not receive any of the documents served substitutionally by the process server. Based on the evidence, Justice Neilson was not persuaded that it was possible for the Applicant to have missed the substitutionally served documents.

The Applicant argued that given the serious consequences of the civil contempt Order, the underlying documents ought to have been served personally pursuant to Rule 10.52. The Court observed, and the Respondent conceded, that since the Applicant was now before the Court, the contempt issue was moot.

Justice Neilson held that the Orders which were not rendered moot were still in effect, thus dismissing the Application to set them aside.

HAMM V CANADA (ATTORNEY GENERAL), 2021 ABCA 190

(FEEHAN JA)

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

The Appellants were inmates of an Edmonton correctional institution and placed in administrative segregation for 43 consecutive days before successfully applying for habeas corpus to be moved back into the general population. The Appellants bought a civil Action against Canada for the administrative segregation, alleging that this breached their constitutional rights. The Appellants applied for Summary Judgment but were unsuccessful, leading to the one Appeal (the "Summary Judgment Appeal").

In Ontario, two national class actions were filed regarding administrative segregation. Canada applied for a stay of the Appellants' Action based on substantial overlap in the facts and legal issues with their Action and the class actions. Canada subsequently applied to the Alberta Court of Appeal to postpone the Summary Judgment Appeal pending determination of Canada's stay Application. The stay Application was dismissed by a Master but then allowed by a Chambers Judge on Appeal, which had the effect of staying the Action until the conclusion of the class actions or until the Appellants opted out of the class actions. The Appellants appealed the Chambers Judge's stay decision, leading to another Appeal (the "Stay Appeal").

The Appellants then brought this Application to have the Summary Judgment Appeal and the Stay Appeal heard together.

The Court noted that pursuant to Rule 9.15, the Court may set aside, vary or discharge an interlocutory Order (a) because information arose or was discovered after the Order was made; (b) with the agreement of every party; or (c) on other grounds that the Court considers just.

The Appellants submitted that the Summary Judgment Appeal raised a distinct legal issue not answered in the Ontario class actions: whether a successful habeas corpus Application by an inmate in administrative segregation holds any evidentiary value in a collateral civil damages claim that advances the tort of false imprisonment for the same deprivation of liberty.

Canada submitted that in the class actions, Summary Judgment had already been granted and that the Appellants were entitled to seek individual damages beyond their portion of the aggregate damages award. Further, the Summary Judgment Appeal was not yet perfected with the intervenor, Alberta Prison Justice Society, having yet to file its factum and Canada having yet to respond to the intervenor factum. Having the Appeals heard together would require parties to draft further facta and prepare for a hearing that may be rendered moot if the Appellants were fully compensated through the Ontario class actions by recovering the amount of damages sought in their Alberta claim.

Feehan J.A. decided that the most efficient and appropriate course was for the Stay Appeal to be heard first. It was premature to raise the topic of whether the Court should decide to answer the unique issue estoppel question despite the potential of mootness. If the Stay Appeal was dismissed, then no further preparation for the Summary Judgment Appeal would need to be done. But if the Stay Appeal is allowed, then the Appellants may then seek to have the Summary Judgment Appeal restored to the fast-track list.

TALLCREE FIRST NATION V RATH AND CO., 2021 ABQB 234

(LEE J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Requirements), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.18 (Reference to Court) and 10.27 (Decision of a Judge)

The Court heard an Appeal from the Review Officer's Decision with respect to the Tallcree First Nation's ("Tallcree") contingency fee agreement (the "Agreement") entered into with Rath & Company and their former counsel Jeffrey Rath (collectively, "Rath"). Pursuant to the Agreement, Rath was entitled to 20 percent of the $57.5-million-dollar agricultural benefits settlement payment from the Federal Government to Tallcree.

Justice Lee found that the Review Officer had made two reversible errors. First, the Review Officer applied a lower standard of review than required by Rule 10.9 in assessing the reasonableness of the retainer fee. Second, the Review Officer erred in finding that the Agreement's 20% contingency fee was a reasonable "low end minimum" payment without hearing any evidence or supporting caselaw to justify Rath's $11.5 million dollar bill.

Justice Lee emphasized that reviewing a contingency agreement pursuant to Rule 10.9 inquires whether the Agreement was unreasonable, not "unexpectedly unreasonable", as per the Review Officer's decision. With respect to the second error, His Lordship noted that automatically finding the Agreement's 20% contingency fee was reasonable without any supporting authorities neglected the factors relevant to that inquiry. These factors arising from Rule 10.2(1) are: (a) the nature, importance, and urgency of the matter; (b) the client's circumstances; (c) the trust, estate or fund, if any, out of which the lawyer's charges are to be paid; (d) the manner in which the services are performed; (e) the skill, work and responsibility involved; and (f) any other factor that is appropriate to consider in the circumstances.

In this respect, Justice Lee stated that the matter had settled quickly with little time spent by Rath, as well as the fact that Rath was a small 6-person law firm. The Court also noted that what little inquiry into the reasonableness of this fee conducted by the Review Officer was inconsistent with his own statement that he had never encountered a fee this high before.

Having found these two palpable and overriding errors, Justice Lee applied his authority under Rule 10.27 to override and substitute his Decision for the Review Officer's. His Lordship noted that Rule 10.27(1)(d) also grants the Court the authority to make any Order the Court sees fit. In this case, that Order included a return of any excess fees collected by Rath, as is permitted by Rule 10.27(2). The Court also found that the Agreement contained an arbitration clause which contravened the requirements of Rule 10.7(7) permitting the client to request a review of the Agreement or any resulting statements of account.

After considering the factors in Rule 10.2(1), Justice Lee re-emphasized the Court's authority to alter or find any or all of a contingency agreement void as per Rule 10.18(3)(b). As such, His Lordship found that Rath was entitled to $3 million dollars as final payment, inclusive of all disbursements.

BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2021 ABCA 129

(PAPERNY, WATSON AND SCHUTZ JJA)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyer's Non-compliance with Contingency Fee Agreement), 10.18 (Reference to Court) and 10.44 (Appeal to Judge)

This was an Appeal of the Chambers Judge's review of a Review Officer's decision, pursuant to Rule 10.44. The Appeal was brought by the former client of a law firm (the "Client") in respect of fees payable under a Contingency Fee Agreement ("CFA").

The underlying facts involved a patent infringement case before the Federal Court. Following Questioning in that case, the law firm advised the Client that it would continue to represent him under the CFA only if the client would agree to negotiate a settlement. The law firm put forward a settlement proposal to settle the Action, which was accepted by the opposing party. Subsequently, the Client took the position that no settlement had been reached. The law firm disagreed and advised that it could not continue to act. Though the Client challenged the settlement agreement before the Federal Court and Federal Court of Appeal, the settlement agreement was found to have been binding on the Client.

Later, relying on a term in the CFA which stated that no fees would be payable in the event that the law firm withdrew from representation based on low likelihood of success at Trial, the Client asserted that it was not required to pay the law firm's fees. The Review Officer examined the CFA and found that it failed to satisfy the particularity requirements, pursuant to Rule 10.7(2), and accordingly, was unenforceable. The Review Officer then relied on Rule 10.8 to find that, notwithstanding the CFA's unenforceability, the law firm's fees remained payable, pursuant to a reasonableness review under Rule 10.2. The Chambers Judge agreed, noting that the Review Officer is entitled to consider under Rule 10.2 the Client's reasonable expectations for payment based on the terms of the contract.

The Court of Appeal agreed with the Chambers Judge in full. In addition, the Court rejected the Client's submission that a finding of unenforceability, pursuant to Rule 10.7, required interpretation of the CFA such that the matter should have been referred to the Court of Queen's Bench under Rule 10.18. The Court also rejected the Client's contention that he should have been entitled to rely on language in the CFA excusing payment of fees payable upon withdrawal notwithstanding that the CFA was found to be unenforceable. In rejecting the Client's argument on this point, the Court held that it was appropriate for the Review Officer to consider the reasonableness of the law firm's fees, in light of the context, which included both the CFA and the circumstances in which the law firm withdrew from representation. Further, a finding of unenforceability need not necessarily apply for the benefit of the Client only. The Court held that the Review Officer's decision was reasonable in the circumstances and, accordingly, dismissed the Appeal.

MUDRICK CAPITAL MANAGEMENT LP V WRIGHT, 2021 ABQB 242

(HOLLINS J)

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

The Plaintiffs were unsecured creditors of Lightstream Resources Inc ("Lightstream"). The Defendants consisted of the officers and directors of Lightstream. Each group had separate counsel. Both groups applied for Summary Dismissal of the Plaintiffs' claims. All of the Defendants were successful on that Application except for John Wright, the President and CEO of Lightstream, and one of the two officers. This was the reasons for a Decision on Costs.

Justice Hollins noted that per Rule 10.29, an unsuccessful party must pay the Costs of the successful party, subject to the Court's discretion. Per Rule 10.31, Justice Hollins could assess those Costs as what was reasonable and proper, or in any amount Her Ladyship felt was appropriate, after considering the factors enumerated in Rule 10.33(1).

All the parties agreed that fees should be assessed under Column 5 of Schedule C and had identified the same line items for recoverable fees. However, the successful Defendants sought a 3x multiplier, and the Plaintiffs argued for a 1.5x multiplier. Justice Hollins did not accept the Plaintiffs argument that their successful defence of John Wright's motion should decrease their liability for Costs of the Defendant directors — the liability of the directors and officers were based on different facts and their defenses were different. Her Ladyship noted that while there had been no litigation misconduct, this was an incredibly complex matter with a record of approximately 1700 pages of material and hearings that took place over three days. Accordingly, Justice Hollins thought a multiplier of 2.5x was appropriate for all items except for items 19 to 21 of Schedule C. Her Ladyship noted that the per Rule 10.31(2)(d), Costs do not include the fees of an expert unless ordered by the Court. Justice Hollins found that it was reasonable and proper that the Defendant directors recover the full Costs of expert fees.

The defence of the former CFO of Lightstream was presented together with that of John Wright. The former CFO was successful in his defence and asked for 3x his Column 5 Costs divided in half to account for the fact his Costs were shared with John Wright. John Wright argued that there was mixed success and no Costs should be awarded against him — Her Ladyship rejected that argument. John Wright also argued that since he remained a Defendant, the only Costs that should be awarded against him were those respecting his unsuccessful Application. Justice Hollins noted that in a case like this it was extremely difficult to separate the legal fees related to the underlying Action from those related to the Application and thought the best approach would be to award the Plaintiffs their Costs of all items to this point.

Ultimately, Justice Hollins awarded the Defendant directors Costs of 2.5x Column 5 of Schedule C, and their disbursements, including expert fees; the former CFO Costs of 2.5x Column C of Schedule C, and disbursements divided in half; and the Plaintiffs their Costs against John Wright at 2.5x Column 5 of Schedule C, and their disbursements.

PATEL V CHIEF MEDICAL SUPPLIES LTD, 2021 ABQB 355

(JONES 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 had arrived at a settlement but had left open the matter of Costs. The Applicants sought solicitor-client Costs on a full indemnity basis, and the Respondents argued that Schedule C Costs were appropriate.

Despite the matter concluding without Trial, the Applicants argued that they were successful in the litigation and that therefore, they should be presumptively entitled to Costs, pursuant to Rule 10.29. Justice Jones rejected the Applicants argument, finding that they could not rely on Rule 10.29, as they could not claim to have been successful in the Action when it was settled with no finding on the merits. Justice Jones noted that the Applicants must rely on the Court's general discretion to award Costs pursuant to Rule 10.31, independent of success of a party. The Court added that the correct approach was to confine its analysis to the Applicant's three successful Applications.

The Court confirmed that, pursuant to Rule 10.33 and the case law, it is correct to consider pre-litigation conduct and the complexity of the matter, in determining the appropriateness of solicitor-client Costs. With respect to the Respondents' argument that the Court should apply Schedule C Costs, Justice Jones confirmed that Schedule C is not the default rule, but only one of the options that may be used to achieve a reasonable Costs Decision under Rule 10.31(1)(a). For two of the three Applications, Justice Jones awarded the Applicants 50% of their assessed solicitor-client Costs. For the third Application, Justice Jones awarded the Applicants 75% of their assessed solicitor-client Costs, due to the complexity of the matter.

EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2021 ABQB 392

(MALIK J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.34 (Court-ordered Assessment of Costs)

Malik J. had previously ordered that the Plaintiffs' Statement of Claim be struck for delay pursuant to Rules 4.31 and 4.33. The parties could not agree on Costs. The Plaintiffs argued that Costs should be awarded according to Column 5 of Schedule C for the Application and the Action and disputed several items. The Defendants argued that Costs should be based on a 40% indemnity of their legal fees, plus disbursements and taxes.

Malik J. noted that pursuant to Rule 10.29, a successful party is entitled to Costs from an unsuccessful party and that the Court will consider the factors enumerated in Rule 10.33 in determining what the Costs Award should be. Rule 10.33 grants the Court broad discretion to craft a Costs Award that is reasonable and proper. Specifically, Rule 10.31(1)(b) allows the Court to award any amount it considers appropriate in the circumstances, and that there is no

presumption that Costs should be awarded on the basis of the appropriate Column of Schedule C. Malik J. noted that the Court of Appeal had previously confirmed that a 40% - 50% level of indemnification provides a reasonable guideline for reasonable and proper Costs.

Malik J. considered the factors in Rule 10.33 and found that the Action was not particularly important in terms of the issues being litigated, and that the Action was not particularly complex. The Defendants were successful in the ultimate result. Although the Plaintiffs did not engage in misconduct, their delay did unnecessarily lengthen the Action and justified a dismissal of the Action. His Lordship ordered that all of the Defendants were entitled to an indemnity of 40% of their assessed Costs, plus GST and disbursements including expert fees, and that the Defendants' Costs would be assessed by an Assessment Officer in accordance with Rule 10.34.

JWS V CJS, 2021 ABQB 411

(KENNY 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 underlying Trial of this matter on a parenting issue was heard by Brooker J. The Decision was issued on October 31, 2018, and further Applications concluded in August of 2019. Brooker J. retired before submissions were made on the issue of Costs. Kenny J. authored the current reasons on Costs.

The mother sought solicitor and her own client Costs from the start of the litigation in 2012 until its conclusion in August 2019. $400,000.00 in Costs had already been paid to her pursuant to an interim Order. She sought further reimbursement for Costs for experts and for legal counsel for the children as well as the Application for Costs. The father argued that success was mixed and that each party should be responsible for their own Costs. In the alternative the father argued that Costs should be awarded on Column 1 of Schedule C with a reduction to reflect mixed success. He also sought the return of advance Costs he had paid the mother.

The Court noted that Rule 10.29, subject to the Court's discretion under Rule 10.31, states that a successful party is presumptively entitled to a Costs Award against the unsuccessful party. Rule 10.33 provides a list of factors for the Court to consider, after which the Court can use its discretion to award any amount of Costs it considered appropriate.

The Court noted that it was important that the reason for litigation was kept in perspective. An incident occurred in September 2012 where the mother was hospitalized as the result of a drug overdose (which Brooker J. had found to be an accident). While the mother was in the hospital the father obtained an *ex parte* Order granting him custody of their five children. From that point forward it was an uphill battle for the mother to obtain any time with the children until the Trial Decision, and the differences in financial resources of the parties was stark. The parties consented to a PN 8 report that was issued in 2013 recommending that the mother have primary parenting and that the father undergo psychiatric and psychological therapy. Regardless, the litigation continued. After 19 days of Trial the Court ordered a PN 7 report

which indicated that the father should not be the primary parent with respect to the children. It also indicated that the father coached the older children on what to say and to lie to their lawyer. The children, however, had not lied and had instead told their lawyer everything, including the truth of their father's actions. The report was received by the parties in December of 2017 and the litigation. In the Trial Decision issued October 2018 the mother was awarded primary parenting of all the children. Kenny J. found that the mother was wholly successful.

The father argued that the interim Orders that dealt with Costs could not be revisited and that the Orders that were silent on Costs should not now attract Costs. Kenny J. found that for the Orders that were silent on Costs, Costs would follow the outcome of the Trial.

Justice Kenny noted that the father had forced, manipulated, and threatened his own children into lying for him to the Court, the experts, the doctors, their teachers, the police and their own counsel. The conduct of the father and his manipulation of the children propelled the litigation for over 7 years. The matter was originally set for Trial in 2014 but was delayed due to the father's actions. Kenny J. noted that the mother had no choice but to agree to a PN 8 to prove that what the father was saying was not true. Further, legal counsel for the children was extremely helpful to the Trial Judge.

Based on the conduct of the father during the litigation, the delay caused by the father, the complete success of the mother, and the efforts of the father to deceive or defeat justice amongst numerous other factors, Kenny J. found that this was an appropriate case for solicitor-client Costs. Kenny J. awarded the mother $424,000.00 in solicitor-client Costs.

WANG V ALBERTA, 2021 ABCA 175

(VELDHUIS JA)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award), 14.8 (Filing a Notice of Appeal) and 14.37 (Single Appeal Judges)

This Decision addressed three related Applications. The Applicants sought leave to Appeal several Court Orders that flowed from Applications that declared the Applicants to be vexatious litigants, some of which Orders had subsequently been vacated. Additionally, the Applicants sought an extension of time to appeal, per Rules 14.8 and 14.37, and to stay two Costs Orders, pending Appeal.

In considering the Application to extend time to appeal in respect of two of the Orders, the Court held that, notwithstanding that the reason for the delay was a Court access restriction Order that was subsequently vacated, no extension should be granted, as the Appeals were unmeritorious, and in any event moot following the Orders to vacate.

The Court did, however, grant leave to appeal in respect of the Costs Orders, based on the Applicants' argument that the Application Justice had misapplied Rules 10.29 and 10.33, and the Court's conclusion that appellate consideration of the Costs Orders would be of significance to the Applicants and the general public. In granting leave in respect of these Orders, the Court applied the five part test

from *Brill v Brill,* 2017 ABCA 235: (a) the Applicant must identify a good, arguable case having enough merit to warrant scrutiny by the Court; (b) the issues must be important, both to the parties and in general; (c) the Appeal must have some practical utility; and (d) the Court should consider the effect of delay in proceedings caused by the Appeal.

Finally, the Court declined to grant a stay in respect of the Costs Orders, pending Appeal, on the basis that the Applicants would not suffer irreparable harm as a result of the Orders.

ROMSPEN INVESTMENT CORPORATION V STEPHENSON, 2021 ABQB 486

(SHELLEY J)

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

The Defendant guaranteed a corporate loan which was made by the Plaintiff to a corporation owned in part by the Defendant's daughter. A collateral mortgage was provided on the Defendant's property and the Plaintiff sought to foreclose upon default of the loan. After a series of failed Applications by the Defendant, the Plaintiff now seeks Costs on either a full indemnity basis or two times Column 5 of Schedule C of the Rules. The Defendant did not reply to the Application for Costs.

Pursuant to Rule 10.33(2), Justice Shelley considered the Defendant's misconduct during the proceedings, which included collateral attacks on Orders that were not appealed, tactics to lengthen the litigation, and serious allegations of dishonesty and misrepresentation. In addition, Her Ladyship noted that the Defendant's guarantee provided for Costs as between the Plaintiff and its solicitors. Pursuant to Rule 10.31(1), Justice Shelley awarded Costs on a full indemnity basis and directed any disputed items to be referred to the Review Officer.

TERRIGNO V BUTZNER, 2021 ABCA 125

(STREKAF, KHULLAR AND PENTELECHUK JJA)

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

The self-represented Appellant was successful on Appeal and sought Costs from the Respondent under Schedule C of the Rules. Rule 14.88 provides that the successful party in an Appeal is entitled to a Costs Award against the unsuccessful party, unless otherwise ordered.

The Court noted that the primary purpose of a Costs Award is to partly indemnify the successful party for the Costs of litigation. However, a self-represented litigant does not incur any legal fees and thus, the ordinary objective of indemnification is not achieved. Rule 10.31(5) allows the Court to award Costs to encourage settlement, prevent frivolous, vexatious or harassing litigation, and can be used to encourage economy and efficiency.

The Court noted that awarding Costs to self-represented litigants may sometimes invert the usual objectives and an unrepresented litigant could potentially experience a windfall from a Costs Award. As such, a self-represented litigant should not generally receive Costs unless it would serve a specific policy reason. The Court awarded Costs to the self-represented Appellant in the amount of his disbursements and GST on those disbursements only.

1705221 ALBERTA LTD V THREE M MORTGAGES INC, 2021 ABCA 192

(WATSON, PENTELECHUK AND FEEHAN JJA)

Rules 10.31 (Court-Ordered Costs Award) and 14.88 (Cost Awards)

This was a Decision on Costs following the dismissal of two Appeals relating to a Receivership and associated Order for Vesting and Sale. The Court noted that Rule 14.88(2) indicates that the Rules under Part 10 are applicable to Appeals and that, per Rule 10.31, the Court has broad discretion to award Costs as between parties.

As the Appeals had not involved a monetary award, the Court awarded Costs against the unsuccessful Appellants based on Column 1 of Schedule C.

IRONSTAND V PRIOR, 2021 ABQB 267

(MICHALYSHYN J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was an Application for Costs following the Respondent's non-appearance and the Applicant's partial success at an oral Emergency Protection Order ("EPO") hearing. At the EPO hearing, the Applicant sought to confirm a previously ordered EPO and add a child to the EPO. The Respondent's absence was not explained but was found not to be frivolous or otherwise an abuse of the Court's process. Though the Applicant was successful in confirming the EPO, she was not successful in adding the child to the EPO. Later, the Applicant sought Costs pursuant to Schedule C for various steps taken. The Court dismissed the Application for Costs.

In denying the Application for Costs, the Court considered case law indicating that the award of Costs is generally inappropriate in the context of Applications to seek or confirm EPOs. The Court explained that this limitation may be seen, generally, as being of benefit to prospective Applicants. An Applicant should not need to worry about the potential for an adverse Costs Award in seeking an EPO. As a corollary, the Court held that equity demanded that Costs Awards not be granted against unsuccessful, or partially unsuccessful, Respondents. Among other authorities, the Court cited its earlier Decision in *Denis v Palmer,*

2016 ABQB 54, wherein it was held, pursuant to Rule 10.33, that Decisions as to Costs Awards must take into account the importance of the issues in light of applicable legislation. Here, the pressing objectives of the *Protection Against Family Violence Act,* RSA 2000, c P-27 indicated that it would be inappropriate to limit vulnerable Applicants' access to EPOs on the basis of concerns relating to adverse Costs Awards, and similarly inappropriate to impose Costs on an unsuccessful Respondent.

HAACK V SECURE ENERGY (DRILLING SERVICES) INC, 2021 ABQB 342

(WOOLLEY J)

Rules 10.33 (Court Considerations in Making Costs Awards) and 10.41 (Assessment Officer's Decision)

Justice Woolley considered, among other things, whether the Plaintiff was entitled to an award of solicitor-client Costs based on the conduct of the Defendant prior to and during litigation. Justice Woolley noted that while the Rules do not directly reference the effect of pre-litigation conduct on Costs Awards, Rule 10.33(1) references that a Court may consider "any other matter related to the question of reasonable and proper costs that the Court considers appropriate."

Justice Woolley canvassed the relevant jurisprudence, and considered Rule 10.33, and noted that while there is still disagreement regarding the effect of pre-litigation conduct on an award of solicitor-client Costs, Justice Woolley considered the pre-litigation misconduct relevant to the determination, if not sufficient to ground the award on their own. Ultimately, Justice Woolley found that solicitor-client Costs were justified based on the Defendants' improper conduct, which included taking unreasonable steps and adding complexity to the proceedings during litigation.

Justice Woolley further stated that, with an award of solicitor-client Costs, the Defendants were only required to pay Costs that were reasonably incurred by the Plaintiff and enumerated under Rule 10.41. Justice Woolley reduced the award of solicitor-client Costs to account for certain fees not reasonably incurred by the Plaintiff.

ALBERTA HEALTH SERVICES V STREET CHURCH EVANGELISM MINISTRIES INTERNATIONAL FOUNDATION (STREET CHURCH), 2021 ABQB 489

(GERMAIN J)

Rule 10.52 (Declaration of Civil Contempt)

Alberta Health Services ("AHS") applied to hold Artur Pawlowski ("Pawlowski") in contempt of a Court Order (the "Order"). Pawlowski was a Calgary-based pastor with Street Church Evangelism Ministries International Foundation (the "Church").

The Church operated out of a Calgary property on Saturdays (the "Property"). The Order

allowed AHS to inspect the Property pursuant to section 59 of the *Public Health Act,* RSA 2000 c P-37 (the "Act"). The Order restrained Pawlowski from obstructing, molesting, hindering, or interfering with the inspection powers of the executive officers under the Act.

Pawlowski admitted that he did not permit an AHS Officer to enter the Property. However, one of Pawlowski's arguments was that he had a reasonable excuse for not allowing AHS to enter the Property. Pawlowski also argued that AHS must factually negate a reasonable excuse to succeed on the contempt Application. The Court disagreed based on the Alberta Court of Appeal Decision in *Envacon Inc. v 829693 Alberta Ltd.,* 2018 ABCA 313 ("*Envacon*").

In *Envacon,* the Court of Appeal stated that a reasonable excuse is considered only after the party making the Application for contempt has proven a *prima facie* breach. Rule 10.52(3) sets requirements for a Court to declare a person in civil contempt and includes the phrase "without reasonable excuse". The Court of Appeal considered whether Rule 10.52(3) alters the burden on the party alleging contempt or imposes a burden on the alleged contemnor. The Court of Appeal determined that, in many cases, the moving party's burden will be met by proving non-compliance with the Order because the Court can infer "no reasonable excuse" absent persuasive evidence to the contrary.

Based on *Envacon*, the Court determined that Pawlowski's evidence did not constitute a reasonable excuse. Absent persuasive evidence to the contrary, the Court inferred that Pawlowski had no reasonable excuse for refusing to allow AHS to enter the Property to conduct an inspection. The Court therefore found that Pawlowski had breached the Order and was in contempt of it.

LAW SOCIETY OF ALBERTA V BEAVER, 2021 ABCA 163

(WATSON, PENTELECHUK AND FEEHAN JJA)

Rule 10.52 (Declaration of Civil Contempt)

The Applicant disbarred lawyer appealed a Judgment and a sanction for civil contempt. A Chambers Judge had found him in civil contempt of Court for breaching an Injunction prohibiting him from providing legal services. In a separate Decision, the Applicant was imposed a sanction of one year in jail.

The Court noted that determining the appropriate sanction for civil contempt involves the exercise of discretion and that the standard of review is reasonableness. Civil contempt is quasi-criminal in nature and must be proven beyond a reasonable doubt. However, an Appellate Court should not find a verdict unreasonable simply because, on its own review of the evidence, it has a reasonable doubt. It is not the role of an Appellate Court to reweigh the evidence and retry the case.

The Applicant had two arguments on Appeal of the Judgment: 1) that the Injunction was interlocutory and expired when his status changed from suspension to disbarment such that his actions post-disbarment were not in violation of the Injunction; and 2) the Chambers Judge's findings on credibility were unreasonable. The Court found that the Applicant was not prejudiced by the Injunction being in effect permanent. The Applicant's status change from suspended to disbarred did not affect his legal authority to practice law. The Court also found that the Chambers Judge's findings on credibility were reasonable and well supported by the evidence.

The Applicant asked that the Court consider the issue of proportionate sanction and review the aggravating and mitigating factors for the reasonableness of the sanction imposed upon him. The Court found that the Chambers Judge's findings that the Applicant was deliberately and repeatedly engaging in contemptuous conduct was deserving of deference. However, it was an error in principle to wholly reject the mitigating factors of the Applicant's personal circumstances, character, current pro-social lifestyle, evidence of a changed attitude, realization of a need to change his behaviour, and effect of imprisonment on his family. The Court noted that these mitigating factors are considered during sentencing in the criminal Courts and cannot be wholly rejected.

The Court dismissed the Appeal from the finding of civil contempt, but allowed the Appeal from the sanction. The original jail sentence was replaced with a sentence of 90 days to be served intermittently on weekends plus a period of probation.

JLZ V CMZ, 2021 ABCA 200

(PAPERNY, ROWBOTHAM AND ANTONIO JJA)

Rules 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and 10.55 (Inherent Jurisdiction)

A Case Management Judge in a family law matter had found that a mother was in contempt of an Order directing her to take the children at a specified date and time to facilitate a visit with the father. Having regard to the circumstances leading up to and including the finding of contempt, the Case Management Judge ordered that primary care of both children be changed to the father until the matter could be fully heard. The mother brought forward this Appeal.

The Court of Appeal noted that a finding of contempt involves the application of a legal standard to the facts and is a question of mixed fact and law reviewed for palpable and overriding error. Parenting decisions are exercises of discretion and the Court will only interfere if the Trial Judge erred in law or made a material error in the appreciation of the facts.

The mother submitted that the Case Management Judge erred in failing to adjourn a hearing to permit *viva voce* evidence and cross-examination of the parties on their Affidavits. Decisions regarding adjournments are highly discretionary and attract considerable appellate deference. The Court found no reviewable error on the decision to refuse to adjourn the hearing. The mother also submitted that the Case Management Judge erred in considering reports from experts that were not cross-examined. The information in these reports were contemplated in various practice notes issued by the Court and central to the Case Management Judge's task of determining the best interests of the child. As such, the Court of Appeal held that there was no merit to this submission.

Rule 10.52 provides that a Judge may declare a person to be in civil contempt of Court if the person does not have a reasonable excuse for failing to comply with an Order. The Case Management Judge considered the mother's evidence and her actions and concluded that the mother had no reasonable excuse. This conclusion was entitled to deference absent palpable and overriding error and was supported by the record.

Rule 10.53 sets out the available sanctions for civil contempt of Court. Rule 10.55 specifically provides that nothing in the Rules takes away from the superior Court's inherent power to find someone in contempt.

The Court noted that the Rules governing civil contempt do not exclude their application to parenting Orders however, Courts generally exercise restraint in such cases. The Court's discretion to order consequences for contempt must be proportionate and reflect the gravity of the offence and the personal culpability of the contemnor. The Court noted that there is no consensus across Canada, and some Courts have used a change in parenting as consequence/sanction for contempt. However, a change in parenting is viewed as an extreme remedy that should not be lightly ordered. The overriding principle is whether the Order is in the best interests of the child.

The Court found that the Case Management Judge had considered the best interests of the children and did so regarding the *Divorce Act,* RSC 1985, c 3 and the entire record. This was not the first finding of contempt for the mother, and there was a previous finding that the mother had alienated her children. The Court of Appeal found that a fine or imprisonment was unrealistic in the circumstances and the Case Management Judge did not have other realistic options in this case other than changing the parenting arrangement. The Appeal was dismissed.

TALBOTT V TALBOTT, 2021 ABQB 291

(JEFFREY J)

Rules 11.25 (Real and Substantial Connection) and 11.27 (Validating Service)

This was an Appeal of a Master's Decision to refrain from setting aside a Noting in Default and associated Default Judgment. The Appellant was a Defendant in the underlying Action, which involved a contractual claim. Though it was not disputed that the claim had a real and substantial connection to Alberta, the Appellant was ordinarily resident in Ontario and was served there. The Appellant, who was represented by a litigation representative, argued that the Noting in Default and Default Judgment should be set aside (1) on the basis of a "non-trivial flaw" in the Respondent's process, and (2) in light of the ordinary test for setting aside a Default Judgment, which she argued was satisfied.

Regarding the first basis for setting aside, the Appellant argued that the Respondent had failed to adequately disclose in the Statement of Claim the grounds for service outside of Alberta, as required pursuant to Rule 11.25(1)(b), and that such failure constituted a non-trivial error. While the Court agreed that the existence of "real and substantial connection" to the jurisdiction was a non-trivial matter, it distinguished the requirement to indicate such connection from the requirement to specifically set out the grounds for service, which, the Court noted, will typically simply indicate that the responding party is situated outside of the jurisdiction. Failure to make such indication where the Statement of Claim otherwise indicates that there is a real and substantial connection between the Action and the jurisdiction is "most often" trivial. The Court further held that, if it was wrong in its assessment

of triviality generally, it would nonetheless exercise its discretion pursuant to Rule 11.27 to excuse the error. Accordingly, the Court held that the Default Judgment should not be set aside on the basis of non-trivial flaw.

Regarding the second basis for setting aside the Default Judgment, the Court found that the Appellant had failed to satisfy the second and third branches of the applicable test, namely, she had failed to show that she had a reasonable excuse for letting the Judgment go to Default, and she had failed to show that she had acted promptly to set aside the Noting in Default/Default Judgment. The Court noted that the onus rests with the Applicant (in this case, the Appellant) to demonstrate satisfaction of the test. In this case, the evidence established that the Appellant had consulted with counsel following receipt of the Statement of Claim and the Default Judgment, and had nonetheless failed to respond in a timely fashion or at all. The Appellant had not adduced evidence to establish that she was incapable of responding on the basis of health reasons or otherwise at the relevant time. Accordingly, the Appeal was dismissed.

ZAK V ZAK, 2021 ABQB 360

(PRICE J)

Rule 13.1 (When One Judge May Act in the Place of or Replace Another)

This was an Application requesting removal and replacement of a Case Management Justice on the basis of bias or improper conduct, pursuant to Rule 13.1. The Application arose in the context of a highly contentious family law matter and was the second of its kind in four months.

The Application was brought following receipt by counsel of an email from the Case Management Justice referencing a media report that the two children of the marriage had been abducted and were believed to be with two adult relatives. At a hearing conducted on the day of the abduction, and before ordering the Applicant to remit the children to their father, the Case Management Justice had been informed by the Applicant that the children were in the care of the Applicant's mother. The email 'encouraged' counsel to contact the Applicant and encourage her to take immediate steps to have the children returned. In the Application that followed, the Applicant asserted that the email improperly assumed guilt on the part of the Applicant and, together with other alleged improper conduct, showcased a pattern of bias against the Applicant.

In hearing the Application, the Case Management Justice noted that Rule 13.1 is more typically applied in situations where a Judge is ill or passes away before rendering a Decision. Nevertheless, she applied the test for recusal and reasonable apprehension of bias (would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude that it is more likely than not that the decision maker, consciously or unconsciously, would not decide fairly?) to conclude that no reasonable apprehension of bias had been shown. In reaching this decision, the Case Management noted that there is a strong presumption of judicial impartiality and neither simple allegations of bias, nor single or repeated unfavourable results, are, without more, sufficient to displace the presumption.

Though the Case Management Justice concluded that neither the email, nor any of the other

grounds of bias, were sufficient to justify her recusal, she ultimately determined that, given the Applicant's singular focus on this point and anticipated future Applications of the same variety, it would be preferable from a procedural and efficiency standpoint to recommend that a new Case Management Justice be appointed.

AR V JU, 2021 ABCA 199

(KHULLAR JA)

Rules 13.4 (Counting Months and Years), 14.8 (Filing a Notice of Appeal) and 14.9 (Appeals from Several Decisions)

Justice Khullar heard an Application to extend the time to file an Appeal. The Applicant requested a declaration that her Notice of Appeal was not filed out of time or, alternatively, if the Notice of Appeal was out of time, sought an extension of one-day to file.

The Applicant had previously filed a Notice of Appeal of an Interim Order related to the Action. A Final Order was subsequently filed. The Applicant believed that under Rule 14.9, there was no obligation to file a Notice of Appeal of the Final Order, as the Applicant took the position that the Final Order fell under the exception at Rule 14.9(c), which provides that a Notice of Appeal does not need to be filed where "the appeal is of a decision that varies, confirms, explains, or provides for the enforcement of a previous decision, and the previous decision is also being appealed" as the Applicant understood that the Final Order simply confirmed the Interim Order. Justice Khullar disagreed with this position and found that the Final Order permanently crystallized the parenting arrangement in questions, and therefore, did more than confirm the Interim Order.

Further, under Rule 14.8(2), the Applicant was obligated to file the Notice of Appeal within one month following the date of the Decision. Justice Khullar confirmed that the Notice to Appeal of the Final Order was filed one day late under Rule 13.4(1). Despite failing to meet the deadline for filing a Notice of Appeal, Justice Khullar granted the extension as there was no prejudice to the Respondent.

TAM V MOG, 2021 ABQB 351

(FETH J)

Rule 13.18 (Types of Affidavit)

The Applicant applied to obtain a DNA test and a declaration that the Respondent was the biological father of her 14-year-old son pursuant to the *Family Law Act,* SA 2003, c F-4.5. One of the Respondent's several challenges to the Application involved the Applicant's Affidavit.

Citing the Alberta Court of Appeal in *JCC v NCC,* 2018 ABCA 115, Feth J. noted that an

Application for permission to obtain a DNA test does not require evidence sworn on the basis of personal knowledge. Instead, the Affidavit may be sworn on the basis of "information known to the person swearing the affidavit and that person's belief" pursuant to Rule 13.18(1)(b).

The Respondent submitted that the Applicant's Affidavit was untruthful and should be disregarded because of a lack of credibility. Feth J. noted that credibility cannot usually be assessed in a Chambers Application on Affidavit evidence, absent cross-examination on the Affidavit or *viva voce* evidence.

The Applicant was successful in obtaining an Order for a DNA test, however, the Court declined to make a declaration that the Respondent was the biological father prior to the DNA test being completed.

ALSTON V FOOTHILLS NO 31 (DISTRICT OF), 2021 ABCA 150

(SCHUTZ JA)

Rules 14.4 (Right to Appeal) and 14.5 (Appeals Only with Permission)

Justice Schutz considered whether the Applicants were required to obtain judicial permission to appeal as a prerequisite to proceed with an Appeal of an Order. The Applicants appealed the entirety of the Order in question and the Court of Appeal Case Management Officer advised that because the Order related to a preliminary matter, permission to appeal should be reviewed by a Justice of the Court of Appeal.

The Respondent submitted that Rule 14.5(1)(b) is a complete bar to the Applicants' appeal of the Order due to the fact certain paragraphs of the Order related to pre-Trial procedural decisions and adjournments. Justice Schutz disagreed with the Respondent's position and identified that Rule 14.5 stipulates exceptions to the general rule, enumerated at Rule 14.4(1), that an Appeal lies to the Court of Appeal from a Decision of Court of Queen's Bench Judge. As such, if parts of the Order do not fit in one of the exceptions listed in Rule 14.5, there is no bar to an Appeal with respect to those portions of the Order.

Justice Schutz further stated that, while Rule 14.5(1)(b) may be interpreted broadly, it is primarily a gate-keeping function to prevent certain Appeals which do not affect one the appealing party's substantive rights. Justice Schutz concluded that only certain portions of the Order required permission to appeal. Due to the fact certain portions of the Order were not captured under the exceptions in Rule 14.5, Justice Schutz concluded that the Applicants were able to proceed with these select portions of their Appeal, without first obtaining permission to appeal.

CHADWICK V CHADWICK, 2021 ABCA 229

(WATSON JA)

Rules 14.4 (Right to Appeal), 14.5 (Appeals Only With Permission) and 14.8 (Filing a Notice of Appeal)

The Applicant applied to extend time to file a Notice of Appeal in relation to a family law matter pursuant to Rules 14.4(5) and 14.8. The proposed Appeal arose from a Decision by a Chambers Judge that proceeded by way of desk Application.

The Court noted that processes have evolved to the point where certain family Applications can proceed by desk Application pursuant to *Notice to the Profession & Public - Family Applications with Written Argument*-2020-06 and *Notice to the Profession & Public - Family Law Simple Desk Applications*-2020-04, both dated May 8, 2020. As a result of this, parties do not appear in Court for these Applications and do not have an actual pre-schedule date for the rendering of a Decision. Consequently, Decisions can potentially emerge without all counsel becoming immediately aware of the release of the Decision.

The Court noted that pursuant to the Decision in *Balisky v Balisky,* 2019 ABCA 404, the Court has discretion to extend the time to appeal. In the current circumstances, the extension of time was close to the time limit provided for in the Rules. Watson J.A. also took judicial notice of "a rather monstrous pandemic situation that has engulfed the planet for quite some months now." Ultimately, Watson J.A. granted the Application for an extension of time to appeal.

His Lordship also considered whether this case concerned an amount less than $25,000 and required permission to appeal pursuant to Rule 14.5(g). The Applicant was principally seeking spousal support of $500/month indefinitely. Based on the submissions from the parties, it was at least arguable that the amount involved was more than $25,000 so the Applicant's ability to appeal was not affected by Rule 14.5(g).

MACDONALD V KING, 2021 ABCA 149

(PAPERNY JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant and Respondent were former spouses whose family property was divided by a Consent Judgment entered in the Court of Queen's Bench. The Applicant sought permission to appeal the Consent Judgment, pursuant to Rule 14.5(1)(d), on the basis that her consent had been obtained through duress, intimidation and coercion. The Applicant also sought a stay of the Consent Judgment pending Appeal.

The parties presented very different accounts of the relevant facts. The Applicant alleged that, while she had initially consented to the Consent Judgment's terms, that consent was promptly and clearly revoked. Further, she maintained that while the Respondent had assured her that the Consent Judgment had been destroyed, she later learned that it had been submitted to the Court and granted. She stated that she was not

served with any of the originating documents until after the Consent Judgment had been entered.

The Court of Appeal did not make any finding as to whether the Applicant had revoked her consent. However, it did find that the Applicant had not had the benefit of legal advice and did not receive financial disclosure prior to execution of the Consent Judgment. The Court also found that the Consent Judgment resulted in a reversion of between 80% and 90% of the matrimonial property to the Respondent.

The Court noted that the test for granting permission to appeal pursuant to Rule 14.5 is stringent and requires the Applicant to demonstrate that the Appeal raises an important question of law or precedent, has a reasonable prospect of success, and the resulting delay will not unduly hinder the progress of the Action or cause undue prejudice to the parties. The Court further noted that the proposed Appeal's preferability as a remedy was not to be considered.

On the facts, the Court concluded that there were serious issues to be tried, that the Applicant had a reasonable prospect of success, and that permission to Appeal was otherwise appropriate. The Court reached this conclusion and granted the Application, notwithstanding that the Applicant could alternatively have pursued an Application to set aside the Consent Judgment. In addition, the Court held that in the circumstances, it was appropriate to grant a stay pending Appeal.

BILAWEY V BILAWEY, 2021 ABCA 178

(WATSON JA)

Rules 14.5 (Appeals Only With Permission) and 14.75 (Disposing of Appeals)

The Applicant applied for permission to appeal a Decision of a Chambers Judge pursuant to Rule 14.5. The Chambers Judge directed that both non-recurring capital gains and a 2019 settlement payment from an employment dispute should be included in the Applicant's income for the purposes of recalculating the child support payable by the Applicant from 2013–2018.

Rule 14.5(1)(g) requires an Applicant to obtain permission to appeal where the controversy in the Appeal can be estimated in money and does not exceed $25,000, such was the case here.

Justice Watson cited *PWM Loss Prevention Services Inc. v Alberta,* 2014 ABCA 376 for the test for granting permission to appeal under Rule 14.5(1)(g). This test asks the Court to consider the following factors: whether there is an arguable case having regard to the standard of review on appeal; whether there is a question of law or jurisdiction at issue; whether the law or precedent is of importance to others or the public; the practical effect on the parties and the result in the particular case; whether there will be undue prejudice to a party; whether there is a bar to the Appeal; whether the expense of a further Appeal is commensurate with the value to be gained from the Appeal; and the standard of review on the Appeal if leave were to be granted.

Justice Watson held that, in this case, the proposed grounds of appeal did not raise clear issues of law, but rather concerned the exercise of judicial discretion to which deference applies.

The Applicant raised the issue of the Chambers Judge's treatment of evidence regarding

the proper characterization of the capital gains. Specifically, the Applicant alleged that the Chambers Judge was over reliant on representations made by counsel and that the conclusions drawn by the Chambers Judge in the absence of proper evidence amounted to an error of law. Justice Watson disagreed, but held that in any event such an error would properly fall under Rule 14.75(2). This Rule allows the Court of Appeal to dismiss an Appeal despite an error in the Court below in certain circumstances.

Justice Watson therefore dismissed the Application for permission to appeal for not meeting the requirements of an arguable case, questions of law, or importance to the public.

WOLFE V MORRISSEAU, 2021 ABCA 205

(PENTELECHUK JA)

Rules 14.5 (Appeals Only with Permission) and 14.8 (Filing a Notice of Appeal)

The Applicant sought to extend the time to appeal Orders to pay monthly child support that had been granted in her absence. She also appealed an Order to pay Costs arising from an adjournment Application. The Applicant sought to rely on the Court's residual discretion to allow an extension of time to appeal even if all of the elements of the appropriate test were not met.

Under Rule 14.8(2) the Applicant had one month from the date the Orders were made to file an Appeal. Pentelechuk J.A. noted that the Applicant had significantly missed this deadline. The Applicant filed a lengthy Affidavit setting out her familial history and the stress and trauma she had endured. Pentelechuk J.A. was satisfied that the Appellant did experience significant stress and trauma, and this provided an explanation for her delay in filing an Appeal.

Her Ladyship also noted that the Respondent failed to point to any personal prejudice aside from thrown-away Costs that he had incurred. Further, Pentelechuk J.A. found that the Applicant had met the low threshold of establishing a reasonable chance of success on Appeal as there was a live issue on whether the parties stood *in loco parentis*.

Ultimately, Pentelechuk J.A. noted that Rule 14.5 requiring permission to appeal was not engaged and exercised her residual discretion to allow an extension of time to Appeal. Her Ladyship also noted that the Respondent was entitled to a portion of his thrown-away Costs and ordered that the Applicant pay the Respondent $2,000 within 14 days of the Decision. Each party was to bear their own Costs of the Application.

LAANEP V LAWSON, 2021 ABCA 214

(O'FERRALL JA)

Rule 14.5 (Appeals Only With Permission)

This was an Application pursuant to Rule 14.5(d) for permission to appeal a Consent Divorce Judgment. Permission was sought on the basis that the Consent Divorce Judgment had been entered without the Court having considered or resolved all essential issues, specifically certain questions regarding co-parenting. A hearing to address all outstanding matters, including those relating to co-parenting, was scheduled for approximately one month after the Application for permission to appeal.

In deciding whether to grant permission to appeal, the Court considered: (1) whether there was an important question of law to be decided; (2) whether the Appeal had a reasonable chance of success; (3) whether there were exceptional circumstances justifying why the Applicant should be given permission to appeal a Judgment to which he consented; and (4) whether permitting the Appeal would resolve any of the issues in dispute.

The Court declined to grant permission to appeal on the basis that the proposed Appeal did not disclose a novel issue to be decided, was unlikely to succeed, and was unlikely to resolve the issues in dispute, as those issues would likely be dealt with at the upcoming hearing for outstanding matters. No exceptional circumstances were identified.

THE BANK OF NOVA SCOTIA V ELLENTEE CONSULTING INC, 2021 ABCA 169

(MCDONALD JA)

Rules 14.24 (Filing Factums - Fast Track Appeals), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

The Appellants applied for an Order pursuant to Rule 14.47 to restore their Appeal.

The Appellants had filed a Notice of Appeal in response to an Order which required them to complete a Form 13 Statutory Declaration of Debtor pursuant to the Civil Enforcement Act, RSA 2000, c C-15. The Appellants had also applied for a stay of enforcement pending Appeal, which was granted.

The Appellants missed the deadline for filing their Factum as set out in Rule 14.24(1)(a). The Appeal was therefore struck, leading to this Application.

Justice McDonald observed that the decision to restore an Appeal pursuant to Rules 14.47 and 14.65 is discretionary, and that the Court must be satisfied that: there is arguable merit to the Appeal; there is an explanation for the delay; the Applicant acted with reasonable promptness to have the Appeal restored; the Applicant always intended to proceed with the Appeal; and that the Respondent has not suffered prejudice from the delay.

Justice McDonald held that, based on these factors, the Appellants were entitled to have the Appeal restored, but on the condition that the Appellants met certain deadlines regarding the filing of their Factum, the payment of the fee for restoring an Appeal, and the payment of Costs to the Respondent.

MCLELLAND V MCLELLAND, 2021 ABCA 238

(O'FERRALL, WAKELING AND CRIGHTON JJA)

Rules 14.32 (Oral Argument), 14.38 (Court of Appeal Panels), 14.42 (Applications to Court of Appeal Panels) and 14.88 (Cost Awards)

The Applicant applied to reopen or reargue an Appeal pursuant to Rule 14.38(2). The main Appeal was heard virtually, and the Applicant requested that the Registry not sign the formal Order until after the current Application was heard.

The Court of Appeal noted that the purpose of reopening an Appeal is to address situations where: a) the Court has been misled about the record or the issues; b) the Court has overlooked or misapprehended the evidence in a significant respect; or c) patent errors are found in the Decision or calculations. The Court has inherent jurisdiction to control and regulate its own process including to set aside a Judgment or Order, but this power is narrow and discretionary. It will only be exercised if: 1) there has been no delay in applying; 2) no party has taken the benefit of the Judgment or Order; 3) no party will suffer prejudice; and 4) the interests of justice favour setting aside entry.

The main Appeal concerned an estate matter that was being probated in British Columbia. The Applicant commenced a separate Action in Alberta regarding three condominiums located in Calgary that were not listed as estate assets. The Applicant had discovered that shortly before the testator's death, the testator had gifted those three condominiums to the Respondent and the Respondent's brother. The Alberta Action raised claims of undue influence, lack of testator capacity, resulting or constructive trust, and unjust enrichment.

The Alberta Action was struck on the main Appeal as an abuse of process. The majority concluded that British Columbia had jurisdiction to address the relief sought in the Alberta Action. The Applicant had written to the Court stating that she would be self-represented at the main Appeal Hearing but failed to attend. The Applicant did not contact the Registry or opposing counsel to advise of any difficulties she may have had connecting to the Hearing. Pursuant to Rule 14.32, the main Appeal was then heard in the Applicant's absence.

The Court noted that the Applicant had been granted an extension on her deadline for filing the Application to reargue, but even with the extension the Application did not comply with Rule 14.42, and Costs submissions were filed outside the timeline that the Court imposed. Notwithstanding this, the Court considered the Applicant's Affidavit and Memorandum in support of her Application.

In her Affidavit, the Applicant stated that the reason why she did not attend the main Appeal Hearing was that she "was unable to sustain an internet connection which triggered a severe panic reaction and resulted in a medical emergency." The Registry delayed the main Appeal Hearing until later that day while attempting to

contact the Applicant by telephone and email. The Applicant finally emailed the Registry more than a month following the date of the Hearing and did not indicate that she had any issues connecting or had experienced any medical issues.

On the facts, the Court of Appeal found that the Applicant's failure to immediately notify the Registry of her connectivity issues and to seek a rehearing on a timely basis was inconsistent with the requirement that she do so without delay. Further, the Applicant did not satisfy the Court that she was misled about the record or the issues, or that the Court had overlooked or misapprehended the evidence in a significant respect. She had also not demonstrated that any such error would have affected the result.

In the Court's view, the Applicant's allegations were simply expressions of her dissatisfaction with the majority Decision and not on any procedural or fairness issues. The Application to reopen or reargue the Appeal was therefore dismissed.

The Court noted that this was not an appropriate case to award enhanced Costs or solicitor client Costs to either party. However, the Court did award the Respondent Costs of the main Appeal under Column 1 of Schedule C in accordance with the default Rule 14.88.

MAILER V MAILER, 2021 ABQB 423

(LEMA J)

Rule 14.37 (Single Appeal Judges)

The parties in family litigation proceedings had agreed to arbitrate select issues in a binding arbitration agreement (the "Arbitration Agreement"). After the arbitration, the Applicant applied to challenge the Arbitrator's decision (the "Arbitration Award").

The Court first determined that the Arbitration Agreement required the challenging party to seek leave to appeal a question of law. The *Arbitration Act,* RSA 2000, c A-43 (the "Act") in section 44(2) requires leave of the Court for a party to appeal an arbitration award on a question of law. The Arbitration Agreement stated that the parties "agree that the decision of the Arbitrator shall be subject to an appeal only on questions of law in accordance with s 44(2) of the Act."

The Court then determined that the Applicant failed to meet the deadline to apply for leave to appeal. The Act in section 46(1) required the Applicant to apply for *permission to appeal* within 30 days of receiving the Arbitration Award. However, the Applicant filed a Notice of Appeal instead of an Application for leave to appeal. Justice Lema thus determined that it was too late for the Applicant to apply for leave to appeal.

The Court then considered whether the Act allowed the 30-day deadline to apply for leave to appeal to be extended. The Applicant relied on Rule 14.37, which allows the Court to extend the time to appeal. The Respondent argued that the Rules do not allow a statutory deadline such as section 46(1) of the Act to be extended. Justice Lema agreed and held that the Act does not provide for extension of the section 46 deadline directly or indirectly by incorporating the extension powers in the Rules.

Regardless, the Court determined that the expiry of the deadline to seek leave to appeal likely was of no practical consequence. The Court determined that there were likely no

questions of law on appeal. Since the Arbitration Agreement only allowed appeals on questions of law, the Appeal was likely bound to fail.

WAQUAN V CANADA (ATTORNEY GENERAL), 2021 ABCA 212

(ROWBOTHAM, GRECKOL AND STREKAF JJA)

Rule 14.38 (Court of Appeal Panels)

In a previous Decision, an Appeal was allowed in part with respect to a Case Management Judge's Decision striking the Statement of Claim. On Appeal, certain portions of the Statement of Claim were reinstated while the balance remained struck. Flowing from the Appeal Decision, the Plaintiffs filed an Amended Statement of Claim.

In this Application before the Court, the Defendants asserted that the latest iteration of the Statement of Claim did not comply with the Appeal Decision. The Defendants therefore applied for an Order pursuant to Rule 14.38(2)(d) directing the Plaintiffs to amend their Statement of Claim.

Rule 14.38 outlines what types of Applications must be heard by a panel of the Court of Appeal as opposed to a single Judge of the Court of Appeal. Rule 14.38(2)(d) states that an Application for directions required to give effect to an Appeal Decision must be heard by an Appeal Panel unless otherwise directed.

The Court held that this Application was not contemplated by 14.38(2)(d). The Court explained that the Appeal Decision was an adjudication of the types of claims which should be allowed to proceed and was not about the specific manner in which the Plaintiffs should plead their case. The Court held that pleadings are within the purview of the Trial Court and, in dismissing the Application, directed the parties to the Court of Queen's Bench Case Management Judge to resolve concerns with the latest amendments to the Statement of Claim.

TAHN V LAW SOCIETY OF ALBERTA, 2021 ABCA 139

(STREKAF, HUGHES AND ANTONIO JJA)

Rule 14.92 (Authority of the Registrar)

The Appellant lawyer sought to appeal preliminary rulings made by a Hearing Committee of the Law Society of Alberta. The Court of Appeal Registrar referred the matter for preliminary determination pursuant to Rule 14.92(3) of the Rules, which permits the Registrar to refer any matter to a panel of the Court of Appeal for determination, where the Registrar considers the matter to be frivolous or vexatious or significantly irregular, or that can otherwise be determined on a summary basis. After being referred to the Court of Appeal panel, the Appeal was ultimately dismissed the basis that it was premature and outside the Court's jurisdiction, pursuant to the relevant legislation and the right of appeal provided therein.