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RULES

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(MANDZIUK J)

Rules 1.2 (Purpose and Intention of the Rules), 4.1 (Responsibility of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.4 (Appointment of Corporate Representatives), and 13.18 (Types of Affidavit)

The Defendants brought an Application to have the Action dismissed for long delay under Rule 4.31.

Prior to considering the merits of the Application, Justice Mandziuk dispensed with the preliminary evidentiary issue of whether the Affidavit evidence in support of the Application was contrary to Rule 13.18, which requires Affidavit evidence to be based on personal knowledge. Justice Mandziuk noted that having the Defendant's legal assistant swear the Affidavit in support was appropriate given the nature of an Application under Rule 4.31 relates to the procedural aspect of the litigation process. Justice Mandziuk recognized that the client's source of information on the litigation process would be the client's lawyer in any event. Justice Mandziuk concluded that it is unrealistic to require a level of personal knowledge from a corporate client, appointed under Rule 5.4, given the fact the evidence is largely exhibited documents and not the merits of the underlying Action.

Regarding the Application for dismissal for Long Delay, Justice Mandziuk first highlighted that timely litigation is a key objective of Rule 1.2. Justice Mandziuk stated that the Court has discretion not to dismiss a claim under Rule 4.31 even if there has been long delay, and that the Defendant only advanced the claim under Rule 4.31 and not under Rule 4.33. Justice Mandziuk further identified that both parties have an obligation to move the litigation forward under Rules 4.1 and 4.2. After considering the leading jurisprudence, Justice Mandziuk concluded that both parties were responsible for the delay and dismissed the Application.

ALSTON V MUNICIPAL DISTRICT OF FOOTHILLS NO 31, 2021 ABQB 592

(HOLLINS J)

Rules 1.2 (Purpose and Intention of These Rules), 4.1 (Responsibilities of Parties to Manage Litigation), 4.2 (What the Responsibility Includes), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant in this Action applied to dismiss the Action for delay in prosecution, pursuant to Rule 4.31.

The Court noted that "significant prejudice" is the test for actionable delay under Rule 4.31.

The Court added that inordinate delay is a temporal reference to how long the lawsuit has taken to get to the point at which the moving party makes his application under Rule 4.31. The Court highlighted that whether the

passage of time has been too long is a circumstance-specific inquiry and is not formulaic. The Court added that if the Plaintiffs delayed the prosecution of the Action in a way that is inordinate, then the burden of proof shifts to the Plaintiffs to prove that such delay is excusable. If the Defendant proves inordinate delay and the Plaintiffs offer no acceptable excuse for the delay, significant prejudice to the Defendant is presumed.

The Court noted that the 11 years that had passed since the Action commenced was "undeniably a long time." The Defendant had not applied under Rule 4.33(2), despite the longevity of the lawsuit, because there was no three-year period in which nothing had happened.

In assessing the delays to the litigation, the Court found there was inordinate delay, but it was excusable. The Court cited, for example, the constraints caused by COVID-19 and the fact that the Plaintiffs had pushed the matter along with relative consistency (albeit not with rigour).

The Court noted that the Defendant had to establish significant prejudice and it had not. Ultimately, the Court chose to draft a Litigation Plan with specific deadlines, which would become a Procedural Order, pursuant to Rule 4.31(1)(b). The Court added that, when that Rule is combined with Foundational Rules 1.2, 4.1 and 4.2, it has "extremely wide discretion to set deadlines" which would govern the Action onwards. The Court closed with noting that, if the Plaintiffs ignored the draft Litigation Plan, the Defendant could apply to strike the pleadings, seek to dismiss the Action or other steps as a remedy for contempt.

KICHTON CONTRACTING LTD V GISELBRECHT, 2021 ABQB 641

(DUNLOP J)

Rules 1.2 (Purpose and Intention of These Rules), 3.25 (Contents of a Statement of Claim), 3.68 (Court Options to Deal with Significant Deficiencies) and 4.14 (Authority of Case Management Judge)

A dispute arose in which the Plaintiffs were ordered to correct deficiencies in a thrice Amended Statement of Claim; specifically, they were ordered to specify which Plaintiffs were advancing what Causes of Action against which Defendants. They attempted to do so in filing a Fourth Amended Statement of Claim. The Defendants alleged the deficiencies remained uncorrected. The Court agreed.

The Court noted that the Plaintiffs were required to comply with Rule 3.25(b) which requires that a Statement of Claim "state the claim and the basis for it." The Court determined that Rule 3.25 required the Plaintiffs to plead material facts that establish a Cause of Action and that a bald assertion reciting the basic elements of a Cause of Action is insufficient.

The Court determined that two of the claims in the Fourth Amended Claim were bald assertions without any material facts. Specifically, the Plaintiffs alleged conspiracy and unlawful interference with economic interests without pleading the required elements for each Tort. The Court reviewed Rule 1.2 and the broad authority provided to a Case Management Judge by Rule 4.14. The Court determined that the Fourth Amended Claim was an abuse of process and the Court struck several paragraphs pursuant to Rule 3.68.

COCHRANE (TOWN) v AUSTECH HOLDINGS INC, 2021 ABQB 666

(CAMPBELL J)

Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay), 5.34 (Service of Expert's Reports), and 8.4 (Trial Date: Scheduled by Court Clerk)

Several of the Defendants brought Applications to have two Actions dismissed as against them for inordinate and inexcusable delay pursuant to Rule 4.31.

The Court noted that Applications to deal with delay are considered in the context of the Foundational Rules which impose obligations on all parties to advance the Action. As such, the objective of Rule 4.31 is to promote timely, cost-effective, fair and just resolution of claims by providing a remedy when delay in prosecuting a Claim has resulted in presumed or actual significant prejudice to a party. The Court considered the progress during eight years since the Action was commenced and found that there was delay in prosecuting the Actions.

Further, the Court noted that the Actions were still far from being scheduled Trial. Rule 8.4 identifies the steps that must be completed before a Trial date is scheduled; several of these steps had not been undertaken in the case. Rule 5.34 specifically provides that a clerk cannot schedule a Trial date unless expert reports had been exchanged; none had been exchanged in this matter. Additionally, there was no Litigation Plan in place to ensure the completion of all the required steps.

The Court found that there was inordinate delay, noting that, by the time the Actions would be ready to be set down for Trial they would have been ongoing for 12 years and the Trial itself would occur at least 20 years after the events at issue. The Plaintiffs were unable to provide an excuse for such delay and, as a result the Applicants were entitled to rely on the presumption of significant prejudice under Rule 4.31(2). The Actions were dismissed as against the Applicants.

AXLEY V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 685

(ROOKE ACJ)

Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies), and 13.6 (Pleadings: General Requirements)

The Applicant asked the Court to evaluate whether an Amended Originating Application submitted under the "SafeRoads Alberta Accelerated Review Procedure" ("SAARP") should be approved for filing or rejected as abuse of process, pursuant to Rule 3.68.

The Amended Originating Application expanded on allegations included in the original Originating Application by explaining the factual basis for previously bald allegations. The Respondent Director of SafeRoads opposed the Amended Originating Application on the basis that many

of the additions amounted to evidence or argument, rather than facts, as required pursuant to Rule 13.6(2)(a).

Upon review, the Court ordered that the Amended Originating Application be submitted for filing subject to specific revisions. In reaching this conclusion, the Court observed that the line between facts and evidence can be difficult to draw and any blurring of that line in the Amended Originating Application did not cause injury to the Respondent. Moreover, in light of Rule 1.2, the Court found that the Amended Originating Application fulfilled the primary requirement of alerting the opposing party of the case to be met and should not be refused on technical grounds. Finally, the Court ordered that the Amended Originating Application be filed within 14 days from the date of the Decision, failing which the Application would be struck pursuant to Rule 3.68.

KLEIN (RE), 2021 ABQB 687

(GRAESSER J)

Rules 1.2 (Purpose and Intention of These Rules), and 4.10 (Assistance by the Court)

This was an Application by beneficiaries of an estate to have a matter referred for Case Management, pursuant to Rule 4.10.

The Court concluded that, although matters of substance relating to administration of the estate had previously been brought before the Court, those matters had been fully addressed, leaving only "trivial" matters with minimal associated monetary value. Accordingly, bearing in mind the Court's power to dismiss claims determined to be frivolous or without merit pursuant to Rule 1.2(2), and the proportionality provision in Rule 1.2(4), the Court dismissed the Application and maintained the previously issued stay in proceedings.

CARBONE V BURNETT, 2021 ABQB 750

(DEVLIN J)

Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 10.37 (Appointment for Assessment), 10.44 (Appeal to Judge), 10.45 (Decision of the Judge), and 14.88 (Cost Awards)

The Appellant in this matter appealed a Decision of an Assessment Officer confirming Costs previously awarded to the Respondents following their success in defending an Appeal.

Following the initial Costs Award, the Respondents scheduled an Assessment Hearing pursuant to Rule 10.37. The Appellant did not appear at the Hearing and it was adjourned.

The Appellant failed to appear on the adjourned date and the matter proceeded in her absence with the Respondents being awarded Costs pursuant to Schedule C of the Rules.

On Appeal, the Appellant argued that the Hearing proceeding in her absence constituted a breach of Procedural Fairness. The Appellant provided an Affidavit on Appeal. The Court considered the Affidavit, notwithstanding Rule 10.44 which states that an Appeal from an Assessment Officer's decision is on the record of proceedings before the Assessment Officer.

Justice Devlin began by stating that, pursuant to Rule 14.88, the successful party on Appeal is entitled to Costs unless the Court orders otherwise. His Lordship stated that an Appeal of an Assessment Officer's decision is permitted under Rule 10.44, and cited the Court's powers on such an Appeal as under Rule 10.45. Justice Devlin also cited Rules 1.2 and 1.3, which demand that the Court make an Order resolving a Costs issue on its merits with finality when it is able to do so.

The Court held that there was no breach of Procedural Fairness and warned against equating a denial of the right to be heard with a choice not to show up and speak.

The Court held that the merits of the Assessment Officer's decision were also relevant given the Court's remedial mandate under Rule 10.45. Justice Devlin found that the Assessment Officer's decision was correct on the merits and supported by sufficient reasons in the circumstances. The Appeal from the Assessment Officer's Decision was therefore dismissed.

MCDONALD V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 751

(NIELSEN ACJ)

Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 13.6 (Pleadings: General Requirements)

This was an Application to evaluate whether an amended Originating Application should be approved for filing or rejected as abuse of process, pursuant to Rule 3.68. In a previous Application, Nielsen ACJ applied the "SafeRoads Alberta Accelerated Review Procedure" ("SAARP") to determine that the Originating Application submitted by the Applicant was a *prima facie* abuse of process and ordered that the Applicant either 1) discontinue the Originating Application; 2) submit a candidate amended Originating Application; or 3) provide an up to ten-page written submission to explain why the Originating Application constituted a valid action. The Applicant chose to submit a candidate Amended Originating Application.

The Amended Originating Application was prepared with the assistance of counsel and expanded on the allegations included in the original Originating Application by explaining the factual basis for previously bald allegations. The Amended Originating Application also raised an argument based on s. 7 of the *Charter*. The Respondent Director of SafeRoads opposed the Amended Originating Application on the basis that many of the additions amounted to evidence or argument, rather than facts, as required pursuant to Rule 13.6(2)(a). The Respondent also argued that the *Charter* issue should be excluded, as it did not relate to the quality of the underlying administrative Decision.

Upon review, the Court concluded that the Amended Originating Application was largely adequate and ordered that it be submitted for filing, subject to specific revisions. In reaching this conclusion, the Court observed that the line between facts and evidence can be difficult to draw and any blurring of that line in the Amended Originating Application did not cause injury to the Respondent. Moreover, in light of Rule 1.2, the Court that the Amended Originating Application fulfilled the primary requirement of alerting the party opposite of the case to be met and should not be refused on technical grounds. The *Charter* argument was rejected on the basis that it failed to fulfill the specific requirements for claims brought on that basis and uninvolved parties were ordered removed from the litigation. Finally, the Court ordered that the Amended Originating Application be filed within 14 days from the date of the Decision, failing which the Application would be struck pursuant to Rule 3.68.

OUELLETTE ET AL v LAW SOCIETY OF ALBERTA, 2021 ABCA 283

(WAKELING J)

Rules 1.2 (Purpose and Intention of These Rules), 14.5 (Appeals Only With Permission) and 14.37 (Single Appeal Judges)

The Appellants, pursuant to Rule 14.5, sought to Appeal a decision of Justice Wakeling which denied their previous Application to extend their deadline to Appeal and restore their struck Appeal.

Justice Wakeling noted that permission to Appeal a decision of a single judge of the Court of Appeal to a panel of the Court of Appeal would rarely be granted. The reasons for this, Justice Wakeling observed, included that Part 14 of the *Alberta Rules of Court*, assigns a single judge of the Court of Appeal as a gate-keeper. Rule 14.37(1) stipules that a single judge may hear or decide any Application *incidental* to the Appeal. Further, it does not make sense to compel the parties and the Court of Appeal to assign more resources than necessary to resolve matters that are originally assigned to a single appellate judge in accordance with Rule 1.2. Rules 14.5(2) and 14.5(3) require a party who wishes to appeal a decision of a single judge to secure the permission of the judge whose decision the party wishes to appeal and denies any right to Appeal of that decision confirms the existence of the policy decision - no more judges than are necessary should review a matter for which the original jurisdiction was assigned to a single judge.

The Court proceeded to state that such consideration may be made where there is a compelling reason such that it would be an issue of general importance to the community or of sufficient importance to the parties. It would be considered of general importance to the community where it is a legal question, the answer to which would provide precedential value to the area of law engaged. In addition, the adjudicator may grant an Appeal if the earlier decision is the product of a misunderstanding of the law or misapprehension of the evidence, or both. The adjudicator must also be satisfied that the proposed Appeal has a chance of success.

Justice Wakling found that the Applicant's Appeal raised no question of general importance and that there was no arguable issue of bias or procedural fairness and dismissed their application to Appeal.

BACANORA MINERALS LTD V ORR-EWING (ESTATE),2021 ABQB 670

(MCCARTHY J)

Rules 1.3 (General Authority of the Court to Provide Remedies), and Rule 7.9 (Decision After Summary Trial)

The Court in this matter considered whether the Plaintiff/Defendant by Counterclaim's claim was limitation-barred.

In a lengthy decision, Justice McCarthy considered whether the remedy sought by the Plaintiff was "remedial" (such that the *Limitations Act* would apply) or "declaratory" (such that the *Limitations Act* would not apply). On this issue, the Defendant argued that the Plaintiff's prayer for "any further and other relief as may be appropriate" amounted to the potential for a remedial remedy, such as an award of damages.

In discussing this argument, the Court noted that, pursuant to Rule 1.3, the Court has discretion to grant any remedy to which the parties appear to be entitled as a right, whether or not it is claimed or whether or not the boilerplate language, above, is used. The Court held that an alternate claim for damages may exist, but that this is not dispositive of the issue. Rather, a determination regarding the nature of the primary remedy being sought is required.

The Court ultimately held that the Plaintiff's claim in this case was statute-barred.

Finally, the Plaintiff argued that if the claim was statute-barred, the Court should nonetheless exercise its discretion not to award judgment on the basis that it would be unjust to do so as per Rule 7.9(2)(c). Essentially, the Plaintiff argued that, due to an existing Counterclaim by the Defendant, the substantive issue that was statute-barred would need to be decided in any event, notwithstanding the Court's finding on the limitations issue. The Court held that the decision on the limitations issue left the Defendant in the "driver's seat" regarding the continuation of its Counterclaim, and it was therefore not a matter of fact that the substantive issue needed to be decided then and there.

MACDONALD V KING, 2021 ABCA 258

(SLATTER J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), and 14.8 (Filing a Notice of Appeal)

In a prior decision, the Appellant was granted permission to appeal. Subsequently, her counsel failed to ensure that the Notice of Appeal was filed within the 10-day period required by Rule 14.8(2)(a)(ii); Counsel filed the Notice of Appeal within 23 days.

The Appellant applied for an extension of time to file the Notice of Appeal. In consideration of the Application, Justice Slatter noted that Rule 1.5 anticipated non-compliance with the Rules and provided possible remedies for procedural noncompliance. Justice Slatter also reviewed the principles from *Cairns v Cairns*, [1931] 4 DLR 819 which inform when to extend the time to file a Notice of Appeal. Both Rule 1.5 and *Cairns* discuss prejudice. His Lordship found that the Application came down to a question of prejudice, finding that the Respondent would suffer no prejudice if the Application was granted, and that the Appellant would suffer significant prejudice if the Application was denied. Justice Slatter reviewed the factual circumstances that arose from the "human error" and granted the Application.

The Appellant was granted Costs for the Application and for the cross-examination on the Affidavit totalling $1,000.

CHINOOK PARK-KELVIN GROVE-EAGLE RIDGE COMMUNITY ASSOCIATION v MINOR HOCKEY ASSOCIATION OF CALGARY, 2021 ABQB 532

(GATES J)

Rules 2.6 (Representative Actions), and 3.75 (Adding, Removing or Substituting Parties to an Originating Application)

The Applicant sought an Order to (a) add another party (the "New Party") as an applicant to an Action, and (b) to have the New Party and the Applicant be designated as representatives for other parties with a common interest in the claim, pursuant to Rule 2.6.

Justice Gates reviewed Rule 3.75 as the rule governing the adding of a party or person to an action commenced by Originating Application. His Lordship satisfied himself that the New Party consented to being added to the Originating Application and also consented to acting in a representative capacity for other individuals with a common interest. However, an issue arose as to whether the Applicant should be permitted to commence a Representative Action in the circumstances.

The Court considered, pursuant to Rule 2.6, that representative proceedings are governed by the *Class Proceedings Act*, SA 2003, c C-16.5 ("*CPA*"). Despite a dearth of case law considering Rule 2.6 since the introduction of the CPA, the Court relied on Paron v Alberta (Minister of Environment Protection), 2004 ABQB 760, which acknowledged that the issue was not governed by the *CPA*, but the Court could,

nonetheless, rely on its inherent power to adopt the certification process contemplated by *CPA*.

Similarly, the Court relied upon *Champagne v Sidorsky*, 2012 ABQB 522 for the proposition that Rule 2.6(1) continued to have an independent existence over and above the provisions of the *CPA*. As such, the requirements for a representative action to be rectified under Rule 2.6 were the four requirements of a Class Action, namely that: (i) the class must be capable of clear and definite definition; (ii) the principal issues of fact and law must be the same; (iii) success for one of the plaintiffs will mean success for all; (iv) no individual assessment of the claims of individual plaintiffs need to be made.

In this instance, the Applicants advanced no argument to show that it met the requirements of a Class Action under the *CPA* or the requirements of a representative action under Rule 2.6. The Court add the New Party as a party to the Action, but dismissed the Application to permit the New Party or the Applicant to participate in a representative capacity on behalf of others.

GUARDIAN LAW GROUP V LS, 2021 ABQB 591

(JONES J)

Rule 2.11 (Litigation Representative Required)

This unique decision is one of pure law, and as such Justice Jones make no findings of fact, nor did he apply the relevant tests to the facts. His Lordship proposed a novel test for voiding a retainer agreement for incapacity.

This question was brought to the court after a client had retained the Applicant law firm to represent him ahead of a capacity hearing.

Competing expert reports cast doubt on the client's capacity to manage his own financial and legal affairs and, ultimately, the Court ordered that a litigation representative (the "Respondent") be appointed for the client pursuant to Rule 2.11. The matter was settled resulting in the Respondent having guardianship and trusteeship over the client.

The Applicant brought a claim against the Respondent in its capacity as guardian and trustee for the payment of legal fees incurred amounting to more than $90,000.00. The Respondent opposed it on the grounds that the client lacked capacity to retain the Applicant and thus the retainer agreement was null and void. The sole issue before the Court was what requirement must be met by counsel to be validly retained to represent an individual in that context of that individual's own capacity hearing?

Justice Jones noted that a retainer agreement is a contract for legal services between a lawyer and a client and contract law principles applied to retainer agreements, subject to Part 10 of the Rules. However, His Lordship found Part 10 of the Rules concerned independent review of retainer agreements and that was not at issue in this Application. A decision of a review officer under Part 10 of the Rules centered on the reasonableness of fees, they did not interpret retainer agreements — that authority lay with the Court alone.

His Lordship proposed the following test for voiding a retainer agreement for incapacity:

1. Did the client, at the time of entering into the retainer agreement, have the capacity

to understand its terms and form a rational judgment of its effect on his or her interests?

2. Did the lawyer know that the client lacked capacity, and more specifically

(a) Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?

(b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?

NEILSON V LEDUC (COUNTY), 2021 ABQB 735

(ROTHWELL J)

Rule 3.15 (Originating Application for Judicial Review)

The Applicant municipality applied to strike and/or summarily dismiss an Originating Application for Judicial Review commenced by the individual Respondents, who sought to declare a bylaw invalid.

The Applicant made the Application on the grounds that the Originating Application had not been filed within the six-month limitation period provided for in Rule 3.15(2).

The Court noted that Summary Judgment/ Dismissal is granted where an Originating Application had not commenced within the six-month period provided for in Rule 3.15. It found that that a bylaw was a "decision or act" of a municipality within the scope of Rule 3.15 and that the period to file and serve an Originating Application must be strictly interpreted and not varied by the Court. As a result, the Court dismissed the Originating Application.

The Court took into consideration the six-month limitation period provided for in Rule 3.15 and the direction for counting months in Rule 13.4(1) in conjunction with Ministerial Order 27/2020 that provided for an extension of the limitation period by 75 days in its determination that the limitation period ran started running on the date of the bylaw decision on March 10, 2020 to November 24, 2020.

The Court rejected the Respondents' position that the limitation period in Rule 3.15 was impacted by challenges to the bylaw that alleged (1) a breach of procedural fairness; and (2) that the advertisement of the bylaw had not complied with the notice requirements in the Municipal Government Act.

KELLEHER V ALBERTA (DIRECTOR OF SAFEROADS) 2021 ABQB 517

(ROOKE ACJ)

Rules 3.18 (Notice to Obtain Records of Proceedings), 3.68 (Court Options to Deal with Significant Deficiencies), and 9.4 (Signing Judgments and Orders)

Associate Chief Justice Rooke considered seven Applications seeking Orders quashing driving related penalties, including, but not limited to, driving restrictions, fines, and refunds for vehicle impound. Associate Chief Justice Rooke identified the seven Applications as suitable candidates for the Court of Queen's Bench SafeRoads Alberta Accelerated Review Procedure. Accordingly, the Actions were stayed pursuant to Rule 3.68.

Associate Chief Justice Rooke stated that the Applicants had fourteen days to Discontinue the Action, submit an Amended Judicial Review Application that is not an abuse of Court processes, or submit a Written Submission explaining why the existing Application is not an abuse of Court processes. Of note, Associate Chief Justice Rooke clarified that, if an Applicant chose to submit an Amended Judicial Review Application, it should use Form 7 accompanied by Form 8, Notice to Obtain a Record of Proceedings under Rule 3.18.

Associate Chief Justice Rooke also dispensed with the Applicant's approval of the Order, pursuant to Rule 9.4(2)(c).

FOUGERE V ALBERTA (LABOUR RELATIONS BOARD), 2021 ABQB 716

(JOHNSTON ACJ)

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

The Applicant applied for Judicial Review of a Decision by the Alberta Labour Relations Board (the "Board"). The original complaint was summarily dismissed by the Board.

The Board prepared a certified record of proceedings pursuant to Rule 3.19.

The Applicant swore and filed an Affidavit that was not part of the certified record and was considered new evidence. During oral argument, the Applicant sought to rely on an Exhibit appended to her Affidavit. The Applicant withdrew the remainder of her Affidavit.

The general rule is that Judicial Reviews are based on the certified record of proceeding, pursuant to Rule 3.22(a). The Court states, "New evidence may only be admitted at the discretion of the Court and in limited circumstances such as when evidence is necessary to establish a reasonable apprehension of bias, where the facts in support do not appear on the record or where there are deficiencies in the certified record."

In the circumstances, the Court decided that there were no factors that would justify the admission of the Exhibit into evidence and the Court declined to admit it into evidence.

AL-NAAMI V COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA, 2021 ABQB 549

(RENKE J)

Rules 3.22 (Evidence on Judicial Review), and 13.18 (Types of Affidavit)

The Applicant applied for Judicial Review of the decisions of the Complaints Director (the "Director") of the Respondent, the College of Physicians and Surgeons of Alberta.

The Applicant sought to introduce an Affidavit to supplement the record of the Judicial Review. Justice Renke refused to admit the Affidavit based on two reasons. First, pursuant to Rule 3.22, the evidence in a Judicial Review is generally confined to the Record — Affidavits were admitted only in exceptional circumstances, none of which existed here. Second, in Applications that are a "final" proceeding, such as Judicial Review Applications, Rule 13.18 requires that an Affidavit be sworn based on personal knowledge and the Applicant's Affidavit was sworn to matters on information and belief.

ANTONIO v ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 756

(NIELSEN ACJ)

Rules 3.22 (Evidence on Judicial Review), 3.68 (Court Options to Deal with Significant Deficiencies), 7.2 (Application for Judgment), and 7.3 (Summary Judgment)

The Court considered whether the Applicant's Amended Originating Application constituted an abuse of process. The Director of SafeRoads (the "Director") argued that the Applicant should not be permitted to make new arguments or advance new evidence in a Judicial Review as it purported to do pursuant to the Amended Originating Application. Counsel for the Applicant noted that the Director's interpretation is too narrow a description of the limits on evidence in a judicial review, relying on Rule 3.22, and stated that the plenary jurisdiction of reviewing courts means the judicial review should continue to a full hearing.

The Court ultimately held that the proposed Amended Originating Application was not a proper pleading. The Court and counsel both considered whether the factual basis for the Applicant's judicial review was, or was not, adequately provided by his Affidavit, sworn in support of the original Originating Application. The Court stated that the determination of whether the factual basis for a proceeding is adequate is conducted by way of the summary judgment procedure set out in Rules 7.2-7.3.

The Court considered the various allegations and ultimately found that the Charter interests in the underlying procedure raised a breach, presumably in the form of procedural fairness. In so finding, the Court stressed that the Applicant had not initially retained a lawyer and was, therefore, a self-represented litigant and had a special privileged status and additional procedural rights, as a distinct and vulnerable litigant. The Court permitted the filing of the Amended Originating Application and required the removal of certain paragraphs that did not accord with the Rules.

CENTURY HOSPITALITY GROUP LTD V ALBERTA (APPEALS), 2021 ABQB 767

(Graesser J)

Rules 3.22 (Evidence on Judicial Review), and 13.5 (Variation of Time Periods)

This was an Application for Judicial Review of a Decision of the Registrar of Appeals denying the Applicant an extension of time in which to file a Notice of Appeal from a Decision of an Employment Standards Officer.

A preliminary issue was whether the Applicant was able to file Affidavits containing evidence beyond what was before the original decision-maker, contrary to Rule 3.22. The Court held that the Affidavits largely contained evidence that was before the original decisionmaker, and the limited new evidence was not harmful. The Court exercised its discretion to receive this evidence.

Next, the Court considered whether the Registrar of Appeals had any authority to extend the time for appeal under the *Employment Standards Code*. The Court held that the Registrar had no such authority. The Court observed that an Appeal to the Registrar under the *Employment Standards Code* is made pursuant to statute, and as such, the Rules (for example, Rule 13.5) do not apply absent express adoption in the relevant statute. The Registrar, like a Superior Court Judge, has no power under the Rules to extend statutory limitation periods.

Justice Graesser also considered whether an email by the Applicant complaining about the original Order and advising of its intention to appeal can constitute "deemed service". The Court held that such an email is not equivalent to filing a Notice of Appeal, and as such held that this Ground of Appeal was without merit.

Justice Graesser therefore dismissed the Application.

AB V COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA, 2021 ABCA 320

(WAKELING JA)

Rules 3.23 (Stay of Decision), 14.37 (Single Appeal Judges), and 14.48 (Stay Pending Appeal)

The Applicant brought an Application seeking to prevent the Registrar of the College of Physicians and Surgeons from carrying through on its decision (the "Decision") to publish a statement on its public website about the Applicant.

Justice Wakeling found in favour of the Applicant that the Decision was inoperative until the Court of Appeal proceedings were completed. The Court of Appeal had yet to hear the Applicant's Appeal regarding an entire Order of the Chambers Judge.

Justice Wakeling noted that Rule 14.37 stated that a single Appeal Judge may hear and decide an Application "incidental to an appeal." The Court found this Application to be an "application incidental to an appeal."

Justice Wakeling underscored that, pursuant to Rule 3.23, the Court may Stay the operation of a decision or act under an Originating Application for Judicial Review, pending final determination of the Originating Application.

The Court noted that Rule 14.48 did not assist the Applicant as the Court of Queen's Bench had not made an Order that altered the legal status of a challenged statute. In sum, the Court of Appeal was persuaded that the Stay was appropriate pending the determination of the Appeal, as denying the Stay would cause the Applicant irreparable harm, in particular to his reputation, and would severely limit the value of a successful Appeal.

ASENIWUCHE WINEWAK NATION OF CANADA V ACKROYD LLP, 2021 ABQB 728

(FAGNAN J)

Rules 3.26 (Time for Service of Statement of Claim), 4.33 (Dismissal for Long Delay), and 7.3 (Summary Judgment)

The Applicant law firm appealed a Master's decision to dismiss their Summary Dismissal Application. The Applicant sought Summary Dismissal on the basis that the Respondent's claim in Professional Negligence was barred by Rule 4.33.

The Applicant had formerly represented the Respondent on a matter that was ultimately dismissed for long delay under Rule 4.33. The Respondent brought an Action against the Applicant seeking damages for Professional Negligence. The Applicant submitted that the filing of the 4.33 Application in the underlying Action gave rise to potential losses of which the Respondent was aware. As such, the Applicant took the position that the limitation period had began to run at this point, when the Respondent first gained knowledge of the potential loss.

The Respondent conceded that, when served with the 4.33 Application in the underlying Action, they were aware of concerns that the underlying Claim had not been significantly advanced. However, the Respondent took the position that, because that Application involved mixed fact and law, the Respondent was unaware of the negligence until the underlying 4.33 Application was dismissed.

After canvassing the relevant case law, Justice Fagnan concluded that the provisions of the *Limitations Act*, RSA 2000, c L-12, should be interpreted to promote diligent actions of the parties. As such, given the facts, the Respondent correctly should have filed and served a Statement of Claim in accordance with Rule 3.26 when they became aware of the Application, rather than waiting for the result of the underlying Application.

As a result, Justice Fagnan dismissed the Respondent's Claim against the Plaintiff as a Summary Dismissal under Rule 7.3.

DUECK V CALGARY (CITY), 2021 ABQB 510

(ROOKE ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant had previously filed a Statement of Claim which Associate Chief Justice Rooke had ruled to be an Apparently Vexatious Application or Proceeding ("AVAP"), and had ordered, pursuant to Civil Practice Note No 7 ("CPN7"), that the Applicant had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. No written submissions were provided by the deadline, so Associate Chief Justice Rooke determined that the AVAP should be struck pursuant Rule 3.68.

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

IDRIS V MOHAMED, 2021 ABQB 529

(ROOKE JA)

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

This was an Application reviewed by Associate Chief Justice Rooke as being Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Rooke ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

SMITH V PERRIN, 2021 ABQB 570

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies)

Associate Chief Justice Neilsen received, via email, a Dispute Note with Counterclaim which the Plaintiff claimed was an Apparently Vexatious Application or Proceeding ("AVAP"). Of significance, this litigation began in the Provincial Court of Alberta. Associate Chief Justice Nielsen concluded that the Civil Practice Note No 7 ("CPN7"), process is not a suitable process to evaluate actions started in the Provincial Court of Alberta and subsequently transferred to the Court of Queen's Bench due to potentially different standards for valid pleadings. As a result, Associate Chief Justice Neilsen did not invoke the procedure under CPN7.

Associate Chief Justice Neilsen did not make a determination as to whether there was a basis to advance a Rule 3.68 Application in relation to the Dispute Note and Counterclaim but noted that CPN7 is not the appropriate mechanism to respond to that possibility.

WOUSSE V PETER LOUGHEED HOSPITAL CENTRE, 2021 ABQB 606

(ROOKE ACJ)

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

This was a proceeding reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Rooke ordered that the Plaintiffs had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. As the deadline for written submissions passed without a response from the Plaintiffs, Rooke ACJ concluded that the Plaintiffs did not rebut the *prima facie* conclusion that the Statement of Claim is a hopeless and abusive proceeding. Accordingly, the Court determined that the AVAP should be struck pursuant Rule 3.68.

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

MIERKE v ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 664

(ROOKE ACJ)

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

The Action was commenced by way of an Originating Application for Judicial Review of a SafeRoads Alberta Decision. A prior decision of the Court found that the Originating Application was, *prima facie*, an abuse of Court as it failed to provide adequate pleadings. The Applicant submitted an Amended Originating Application as permitted by the Court for consideration in the immediate Application. Counsel for the Respondent submitted that the Amended Originating Application contained evidence rather than alleged facts, in breach of Rule 13.6(2)(a).

Justice Rooke concluded, on a balance of probabilities, that the Applicant had met the minimum pleadings requirements set by law by indicating a specific alleged error and established a basis for Judicial Review. Ultimately, the Court permitted the Amended Originating Application to be filed within 14 days of the decision, failure to file would result in the Judicial Review being struck pursuant to Rule 3.68 without further order of the Court.

SINGH-STRZELINSKI V CANADA, 2021 ABQB 668

(ROOKE ACJ)

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

This was a proceeding reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Rooke ordered that the Plaintiff provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. As the deadline for written submissions passed without a response from the Plaintiff, Rooke ACJ concluded that the Plaintiff did not rebut the *prima facie* conclusion that the Statement of Claim was a hopeless and an abusive proceeding. Accordingly, the Court determined that the AVAP should be struck pursuant Rule 3.68. 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).

CLAUS V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 669

(ROOKE ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant previously filed an Originating Application for Judicial Review of a SafeRoads Alberta decision, which Rooke ACJ had ruled to be a *prima facie* abuse of the Court as it failed to provide adequate pleadings. The Court had ordered, pursuant to the SafeRoads Alberta Accelerated Review Procedure ("SAARP"), that the Applicant had 14 days to either:

• Discontinue the Application;

• Submit a candidate Amended Originating Application in the correct form; or

• Provide written submissions to explain why the Originating Application is a valid Action.

The Applicant submitted an Amended Originating Application the Court considered whether it should be approved for filing. The Court noted that the Amended Originating Application expanded on the factual basis for the Applicant's challenge to the SafeRoads Alberta decision. As a result, the Court Ordered the Applicant to file the Amended Originating Application within 14 days or the Originating Application for Judicial Review would be struck pursuant to Rule 3.68.

IDRIS V MOHAMED, 2021 ABQB 686

(ROOKE ACJ)

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

This was a proceeding reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Rooke ordered that the Plaintiff provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. As the deadline for written submissions passed without a response from the Plaintiff, Rooke ACJ concluded that the Plaintiff did not rebut the *prima facie* conclusion of an abuse of the Court. Accordingly, the Court determined that the AVAP should be struck pursuant Rule 3.68. 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).

MACDOUGALL V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 692

(NIELSEN ACJ)

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

The Action was commenced by way of an Originating Application for Judicial Review of a SafeRoads Alberta Decision. A prior decision of the Court found that the Originating Application was, *prima facie*, an abuse of Court as it failed to provide adequate pleadings. The Applicant submitted an Amended Originating Application as permitted by the Court for consideration in the immediate Application. Counsel for the Respondent submitted that the Amended Originating Application contained evidence rather than alleged facts, in breach of Rule 13.6(2)(a).

The Court rejected this argument and noted that 13.6(2)(a) should be interpreted in light of the Rule 1.2 general purpose provisions of the *Alberta Rules of Court*.

The Court concluded, on a balance of probabilities, that the Applicant had met the minimum pleadings requirements set by law by indicating a specific alleged error and established a basis for Judicial Review. Ultimately, the Court permitted the Amended Originating Application to be filed within 14 days of the decision, failure to file would result in the Judicial Review being struck pursuant to Rule 3.68 without further order of the Court.

WOODWORTH V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 695

(ROOK ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Application to evaluate whether an Amended Originating Application should be approved for filing or rejected as abuse of process, pursuant to Rule 3.68. In a previous Application, Rook ACJ applied the "SafeRoads Alberta Accelerated Review Procedure" ("SAARP") to determine that the Originating Application submitted by the Applicant was a *prima facie* abuse of process and ordered that the Applicant either 1) discontinue the Originating Application; 2) submit a candidate Amended Originating Application; or 3) provide an up to ten-page written submission to explain why the Originating Application constituted a valid Action. The Applicant chose to submit a candidate Amended Originating Application.

After reviewing the Amended Originating Application, the Court concluded that the amended pleading was largely adequate and ordered that the Amended Originating Application be submitted for filing, subject to specific revisions. In addition, the Court confirmed that the SAARP process represents a method for conducting a review to deal with significant deficiencies, pursuant to Rule 3.68 and that, accordingly all pleaded facts must be accepted by the Court as accurate and true for purposes

of the Application, except where alleged facts are bald allegations, or in exceptional cases where the alleged facts are on their face absurd.

LACHANCE V LACHANCE, 2021 ABQB 722

(NIELSEN J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Application where three Court proceedings were referred as Apparently Vexatious Applications or Proceedings ("AVAPs") pursuant to Civil Practise Note 7 ("CPN7"). Two referrals were Court of Queen's Bench lawsuits while one was a Civil Claim filed in Provincial Court. The Court recognised that the CPN7 referrals were accompanied by extensive materials which qualified as an exception to the normally narrow focus of CPN7 review.

The Court rejected CPN7 review for the proceedings because the Court of Queen's Bench lacked the jurisdiction to conduct CPN7 review for a matter underway in Provincial Court and because the two matters before the Court of Queen's Bench were collateral attacks proven by the provided documentation.

The Court noted that the rejection of the CPN7 referrals were not findings of fact and/or law as to the merit of the referred Court of Queen's Bench proceedings and the decisions and conclusions it had made would be irrelevant to any future Applications pursuant to Rules 3.68 or 7.2-7.3 by the Applicants.

LAM V UNIVERSITY OF CALGARY, 2021 ABQB 729

(LITTLE J)

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

The Appellant was appealing a Master's Decision that dismissed his Claim for wrongful dismissal and damages for discrimination and conspiracy. The Master found that, pursuant to Rule 3.68(2)(a), the Court had no jurisdiction because the dispute was governed exclusively by a collective agreement. The Appellant appealed.

The Court found that the Master had correctly determined that the mechanisms in place in the collective agreement had displaced the jurisdiction of the Court to deal with the Appellant's Claim.

The Court noted that the Master had asked if the Applicant was looking for dismissal under Rule 7.3 or striking the pleadings under Rule 3.68. The Appellant elected to proceed under Rule 3.68 and Master struck the Claim. The

filed Order referred to a dismissal of the Action rather than the pleadings being struck but in the Court's view, nothing turned on that and the ultimate decision was correct.

The Court dismissed the Appellant's Appeal.

KANDIZI V EDMONTON POLICE SERVICE, 2021 ABQB 748

(NIELSEN ACJ)

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

This was a proceeding reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No 7 ("CPN7"), Associate Chief Justice Nielsen ordered that the Plaintiff was to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. As the deadline for written submissions passed without a response from the Plaintiff, Nielsen ACJ concluded that the Plaintiff did not rebut the *prima facie* conclusion that the Statement of Claim was a hopeless and abusive proceeding. Accordingly, the Court determined that the AVAP should be struck pursuant Rule 3.68.

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

MCKINNEY V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 754

(NIELSEN ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant applied for the SafeRoads Alberta Accelerated Review Procedure (SAARP) process by Originating Application. Nielsen ACJ concluded that that Originating Application was *prima facie* an abuse of the Court because the Originating Application failed to provide adequate pleadings. The Applicant was given 14 days to submit a candidate Amended Originating Application.

Upon reviewing the candidate Amended Originating Application, the Court rejected many paragraphs as argument or because they did not raise any valid grounds. However, the Court found that the Applicant's allegation that the documentary record for the alcohol sensing device was inadequate was adequately particularized and should proceed to a full Judicial Review.

The Court ordered that counsel for the Applicant file the Amended Originating Application with the rejected paragraphs removed within 14 days from the date of the Decision. If the Applicant failed to file the Pleadings by the deadline, then they would be struck pursuant to Rule 3.68.

BRODA V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2021 ABCA 308

(GRECKOL JA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), and 14.65 (Restoring Appeals)

The Applicant sought to restore an Appeal from a decision that upheld the striking of his Civil Action against the Respondents, the Law Society of Alberta (LSA) and Her Majesty the Queen in Right of Alberta (Alberta). A Master in Chambers had granted an Application by the Respondents to strike an amended Statement of Claim pursuant to Rule 3.68(2)(b) and (d). The Applicant's Appeal of that decision was dismissed. The Applicant then appealed to the Court of Appeal but the Appeal was struck for failure to file the Appeal Record on time. The Applicant filed an Application to restore the Appeal, but the Appeal was deemed abandoned pursuant to Rule 14.65 as the Application to Restore the Appeal was not granted within 6 months of the Appeal having been struck. The Applicant then applied to restore the Appeal.

The Court confirmed that the test to restore an Appeal after the six-month "deemed abandonment" deadline includes: (1) An explanation for the delay that caused the Appeal to be struck in the first place; (2) an explanation for the delay in applying to restore the Appeal; (3) continuing intention to proceed with the Appeal; (4) lack of prejudice to the Respondent; and (5) the arguable merit of the Appeal.

The Respondents submitted that factors 1-3 were fulfilled. The Court added that when an Appeal has been struck for six months, prejudice can be assumed. The Court underscored that the Application turned on whether the Applicant had established the arguable merit of the Appeal against the decisions rendered by the Master and the Chambers Judge striking the Civil Claim against the LSA. The Court found that there was no arguable merit to the Applicant's Appeal and noted that the Chambers Judge made no error in his review of the Master's decision. The Court closed with Obiter that the civil case is, at its root, an impermissible collateral attack on the proceedings of the LSA and that it is not in the interests of the administration of justice that the Applicant be permitted to succeed in the Application to Restore the Appeal.

ZULU PUBLICATIONS INC V WESTJET AIRLINES LTD, 2021 ABQB 629

(PRICE J)

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

The Appellant appealed an Order from a Master requiring it to pay Security for Costs arguing the Master had incorrectly concluded that: Rule 4.22 governed the Application opposed to Section 254 of the *Alberta Business Corporations Act* (*BCA*); and that that there was a change in circumstances that warranted Security for Costs under Rule 4.22 after a previous Application for the same was dismissed.

Price J noted that although Rule 6.14(3) provides that an Appeal from a Master's Decision is de novo and the applicable standard of review is correctness, where an Appeal involves essentially the same record and submissions that were before a Master, the Court is permitted to frame its decisions with reference to the Master's decision where they are correct in law.

After reviewing the applicable case law His Lordship was not persuaded that s. 254 of the *BCA* rendered Rule 4.22 inapplicable as against a corporation in a Security of Costs Application. It was not an error of law to consider either s. 254 of the *BCA* or Rule 5.22 as the burden was the same in any event. The Master's Decision was primarily founded on Rule 4.22 and he was entitled to inform himself of the factors applicable to both provisions.

Justice Price concurred with the Master's analysis that while the initial Application for Costs occurred in 2006 and therefore subject to Rule 593(1) of the Old Rules, the present Application for Costs was correctly considered within the New Rules and therefore subject to the factors in Rule 4.22.

His Lordship found that the Master properly noted that the first two factors under Rule 4.22(a) and (b) were met as the Appellant was defunct and had no assets to pay the Respondent. The fourth factor in Rule 4.22(d) evaluated whether an Order to give Security for Costs would prejudice a party's ability to continue the Action. The Appellant argued that it would have been unable to continue the litigation if the Master's Order was upheld and the Respondent pointed to the Appellant's actions in intermittently paying select creditors while stating it could not pay a Costs Order. The Master expressed concern with a party being able to litigate without any exposure to Costs and concluded a $50,000 Security for Costs Order was fair and reasonable. Justice Price concurred with the Master's reasoning and conclusion and dismissed the Appeal.

TAM v MOG, 2021 ABQB 699

(FETH J)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), and 9.13 (Re-opening Case)

A party to the Action requested that the Court re-open a Costs Award made in a proceeding so that a Formal Offer to Settle and another settlement Offer could be considered. The Court declined to do so.

In reaching its decision, the Court noted that Rule 4.29(2) allows a Defendant to recover Costs for steps taken after service of a Formal Offer when the Offer is rejected and the Defendant ultimately receives a equal or more favourable outcome from the Court.

His Lordship identified several factors that could be considered in deciding whether to reopen a Judgment or Order pursuant to Rule 9.31 but rejected the requested variation of the Costs Award because the Formal Offer would not change the results of the Costs Award under Rule 4.29(2) and no miscarriage of justice arising in refusing to re-open the Costs Award.

422252 ALBERTA LTD V MCLENNAN ROSS LLP, 2021 ABQB 753

(MASTER SMART)

Rules 4.31 (Application to Deal with Delay), and 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges)

This matter arose from a Review Officer's Reference to the Court. Two issues for which the Review Officer needed direction were raised. First, direction was required to determine whether the accounts presented for review were interim or final accounts. Second, if the accounts were final, should the accounts that are not out of time under the *Limitations Act*, RSA 2000, be reviewed, despite Rule 10.10(2) which clarifies that the retainer agreement cannot be reviewed if six months have passed after the date the account was sent to the client? McLennan Ross LLP also raised the issue of inordinate delay under Rule 4.31.

With regards to the inordinate delay concerns, McLennan Ross LLP took the position that the delay was inordinate due to difficulties they would have in demonstrating reasonableness of charges because, over the course of the proceedings, memories would have faded or lawyers working on the matter would have left the firm. Considering the facts, Master Smart did not find the delay in proceeding with the Reference to be inordinate because there was no evidence of actual prejudice.

When considering whether the accounts presented for review were interim or final accounts, Master Smart considered the specific language of the written retainer agreement. Ultimately, Master Smart found no ambiguity in the retainer agreement and concluded that the retainer contemplated that the accounts were interim accounts and subject to review.

CASMAN BUILDING LTD V WEIR-JONES, 2021 ABQB 761

(MASTER SCHLOSSER)

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

This was an Application to deal with delay pursuant to Rule 4.31. The Applicants argued inordinate and inexcusable delay and addressed the issue of significant prejudice. The Court noted that it is incumbent upon Rule 4.31 Applicants to identify and stipulate what significant prejudice they have suffered because of a Plaintiff's delay, or to state why they cannot do that.

Master Schlosser emphasized that, under Rule 4.31, the Court does not have the power to dismiss for delay in the absence of significant prejudice. The Court confirmed that if delay is inordinate and inexcusable then an Applicant enjoys the presumption of significant prejudice, which can be rebutted by the Respondent. The Court noted that significant prejudice includes: substantive prejudice, fading memory of witnesses, unavailability of records, increased difficulty in enforcing a judgment, and interest, expense or income lost. The Court added that the prejudice should be of a type that cannot be cured

with Costs, a provision about interest, or a procedural Order.

The Court observed that Rule 4.31 is discretionary; the Court has the discretion not to dismiss the Action, even if prejudice is demonstrated or presumed. The Court also reviewed Rule 13.18(3), noting that it requires that the evidence in support of a Rule 4.31 Application be firsthand. Indeed, while it is open to a Respondent to rely on hearsay in its response, this option is not open to an Applicant.

In dismissing the delay Application the Court observed that the Applicants were not able to provide firsthand evidence, but instead relied on hearsay. The Court further noted that the Applicants provided no evidence that any material witness was unavailable or would be non-cooperative, adding that the Applicants' arguments about faded memories of witnesses was merely speculative.

In sum, Master Schlosser determined that there had been long delay, but that the blame for the delay had been on all parties. The Court found that significant prejudice had not been established and Master Schlosser noted that he was not persuaded that the lawsuits could not still be determined on their merits. The Court ordered the parties tender a proposed litigation plan so that the matter may be set down for trial.

SCHREIBER v CANADA (ATTORNEY GENERAL), 2021 ABQB 679

(SHELLEY J)

Rules 4.33 (General Rule for Payment of Litigation Costs)

The Plaintiff appealed a decision of a Master to dismiss its claim pursuant to Rule 4.33 upon finding that no step in the Action had occurred since 2009.

The Plaintiff advanced three arguments for why Rule 4.33 does not apply to the Action. First, the Plaintiff argued that constitutional principles of due process and abuse of process would be offended if Rule 4.33 applied in this case. There were allegations of multiple Charter breaches that allegedly remained unresolved which, the Plaintiff submitted, caused significant delay and contributed to the tortious losses claimed in the Action. Further, the Plaintiff argued that the Rules could not be used to override his constitutional right to due process. The Plaintiff argued that his inability to significantly advance the Action was due to his imprisonment and ill health. He submitted that as the imprisonment was caused or contributed to by the Minister's decision to surrender him to Germany, it would be a miscarriage of justice not to deduct that time from the delay calculation. Finally, the Plaintiff submitted that the Defendant engaged in tactics during the course of the litigation which had the effect of causing delay. He alleged that he was held in Canada for five years during an ethics investigation before he was eventually extradited and noted that the Courts have refused to apply Rule 4.33 where a defendant has purposely obstructed, stalled, or ambushed an Action. He argued that equity required the Court to consider whether Canada should benefit from its "incongruous" conduct.

Shelley J held that Rule 4.33(2) is mandatory and the Court's discretion may only be exercised in the "clearest of circumstances". Relying on *Humphreys v Trebilcock*, 2015 ABCA 116, Her Ladyship found that a person's constitutional right to commence a claim or to access the Court is not absolute. While there are cases where the conduct of the Defendant is such

that applying Rule 4.33 would be inequitable, the Plaintiff had failed to point to any specific conduct on the part of the Defendant which could be categorized as intentionally obstructing, stalling or delaying the prosecution of the Action. There were no unfulfilled promises made by counsel for the Defendant and no act of lulling the Plaintiff into thinking that the Defendant would not assert its right to strike the Action.

Her Ladyship found that the Plaintiff's argument that he should be excused from the delay because of his incarceration was not supported by the case law. During this time, the Defendant received documents and phone calls from the Plaintiff's counsel and it was open to the Plaintiff to request a standstill agreement or apply to the Court pursuant to Rule 4.33(9). While the ethics investigation and extradition proceedings, and the Plaintiff's subsequent incarceration and health issues, may have diverted his attention from pursuing the Action, there was no evidence that the governmental activities were undertaken for any purpose related to causing a delay in the Action.

Shelley J held that the Master's Decision to dismiss the Plaintiff's Action on the basis of Rule 4.33 was correct and dismissed the Appeal.

KAHLON V KHALON, 2021 ABQB 683

(MICHALYSHYN J)

Rule 4.33 (Dismissal for Long Delay)

This is an Appeal of a Master's decision to dismiss an Action for long delay. Rule 4.33 provides that, on Application, the Court must dismiss an Action if three or more years have passed without a significant advance the Action. The sole ground on Appeal was whether three undertaking responses (the "Responses") significantly advanced the Action.

The Court examined the legal principles interpreting Rule 4.33 and considered whether the responses advanced the Action with regard to their nature, quality, genuineness, and timing or if they were perfunctory.

The Court examined the responses and characterized them as follows:

• A response producing a Real Estate Purchase Contract and a response confirming that certain documents were no longer in existence had nothing to do with Action, according to the Pleadings;

• An undertaking response producing a copy of a cheque that was relevant but failed to advance the Action in a significant way because it provided information already known to the parties. The undertaking response did not move the parties closer to resolution and functionally did not advance the Action in a significant way;

The Court determined that the Responses did not significantly advance the Action and dismissed the Appeal. The Court noted that under a functional approach, relevance and materiality starts with reference to the Pleadings. An undertaking response cannot become relevant for a 4.33 application even where the party seeking the undertakings at one point believed they were relevant.

MATTHEWS V LAWRENCE, 2021 ABQB 776

(DEVLIN J)

Rules 4.33 (Dismissal for Long Delay), and 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

This was an Appeal of a Master's Decision to dismiss an action for long delay pursuant to Rule 4.33. The lawsuit commenced in 2015 and the last significant step was taken in June 2016 when the Defendants served their Affidavit of Records. On May 26, 2020, new solicitors came on record for the Plaintiffs and wrote a letter to the Defendant's lawyers noting that they were mindful of the lack of progress and enclosed a Notice of Appointment for Questioning (the "Notice") which specified that Questioning should take place on June 15, 2020, the day before the three-year anniversary of the last significant step. The Defendants responded on June 10, 2020, stating that their client would not attend Wuestioning because, in their view, the Action was stayed by the operation of Rule 4.34 as two of the parties has died. They further asked if an Application would be brought to lift the stay of the Action. The next step the Plaintiffs took was to serve a New Statement of Claim on July 6, 2020. On February 3, 2021, the Defendants served an Application to dismiss the Action for long delay. Master Mason granted the motion on.

Justice Devlin noted that the essence of Rule 4.33 is that the Plaintiffs must keep the litigation moving at a meaningful pace or face having their actions dismissed. The Rules ask whether truly substantial steps have taken place. The question in this case was whether the Notice coupled with the Defendant's refusal to comply with it, amounted to a significant step. His Lordship found that, though Questioning was a substantial step, an attempt to commence Questioning was not a significant step and the service of the Notice did not suffice as a significant step. When the Defendants raised a legitimate procedural concern, the Plaintiffs did not try to resolve the issue or obtain an Order compelling attendance at Questioning.

In the underlying decision Master Mason accepted that the Action was stayed pursuant to Rule 4.34. In this Action there were multiple Plaintiffs and Defendants and a Plaintiff and Defendant had died by the time the Notice was served. Rule 4.34 had not been previously addressed by a Court in Alberta. After reviewing the case law surrounding a similar Rule in Ontario, Justice Devlin found that Rule 4.34. stayed the action only against the parties who had passed.

Ultimately, Justice Devlin dismissed the Appeal.

GUILLEVIN INTERNATIONAL CO V BARRY, 2021 ABCA 280

(KHULLAR JA)

Rules 6.6 (Response and Reply to an Application), and 6.8 (Questioning a Witness Before Hearing)

The Applicants applied for a Stay of a Hearing, and a Stay of the deadlines to provide written briefs, pending an Appeal of two Interlocutory Decisions. The Applicants obtained *ex parte* Attachment Orders against several of the Defendants. The parties entered into a Consent Security Order. A Hearing was scheduled to determine whether the Attachment Order of the Plaintiff should have been granted.

In advance of the Hearing, the Applicants served a Notice to Attend for Questioning under Rule 6.8 on a Defendant. The Respondent successfully applied to set aside the Notice due to the fact the information that the Applicants sought was available prior to the initial *ex parte* Application. Allowing the Applicants to supplement the evidence at the Hearing to determine whether the Attachment Order should have been granted was contrary to established common law principles. Further, under Rule 6.6, the Applicants were unable to file an additional Affidavit because the Respondents did not file one in response to the hearing.

The Applicants further intended to rely on two additional Affidavits that post dated the *ex parte* Attachment Order. A number of the Defendants applied to exclude these Affidavits. The Chambers Judge concluded that the Plaintiffs did not have the right to file the Affidavits, because, under Rule 6.6, the Defendants had not filed any in response. The Applicants Appealed these decisions.

Ultimately, Khullar JA concluded that the Applicants did not meet the common law test for a Stay of Proceedings and dismissed the Appeal.

UNTERSCHULTZ V CLARK, 2021 ABQB 635

(LEMA J)

Rule 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

The Applicant sought to set aside a support payment ruling and filed an Affidavit in support. The Respondent sought to cross-examine the Applicant; however, the Applicant objected to the cross-examination on the basis that the Respondent had not yet filed a responding Affidavit.

The Court reviewed the applicable case law and Rule 6.7, which allows a party to question a person who makes an affidavit in support of an application or in response or reply to an Application. The Court concluded that the Respondent's right to cross-examine on the Applicant's Affidavit was not conditional upon the filing of a responding Affidavit. In so concluding, the Court noted case law highlighting the absence of any qualification on a litigant's right to cross-examine on an Affidavit, including any condition that a responding Affidavit be filed in advance of cross-examination of the moving party.

GOLDSTICK ESTATE (RE), 2021 ABQB 745

(ROOKE ACJ)

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

The Defendant, a self-represented litigant, brought an Application for Reconsideration related to a previous Order of the Court.

One issue at play was whether the Defendant would be allowed to cross-examine the Plaintiff on an Affidavit. In a prior Decision, Justice Rooke ordered that any cross-examination of the Plaintiff be done by a member of the Law Society or through the use of written interrogatories. His Lordship found that the Defendant wanted to cross-examine the Plaintiff improperly and broadly rather than on the matters addressed in the Affidavit and the Application it supported.

Justice Rooke reviewed the case law and found in reference to Rules 6.7 and 6.8 that "[a] request to cross-examine may be denied in instances where the examination would be totally frivolous or is only designed to forestall the proceedings." His Lordship stated that a broader cross-examination would not be allowed if it was an abuse of process as it was in the immediate instance. Ultimately, after considering all the issues at play, Justice Rooke dismissed the Application for reconsideration.

FEENEY V HER MAJESTY THE QUEEN IN THE RIGHT OF ALBERTA, 2021 ABCA 255

(KHULLAR JA)

Rule 6.8 (Questioning Witness before Hearing)

The Applicant applied for an Order requiring the Respondents to attend for Questioning before the Court considered a vexatious litigant Application previously brought by the Respondents. Success in this Application would necessitate an adjournment of the vexatious litigant Application.

Neither of the Respondents in this Application had filed an Affidavit in support of the vexatious litigant Application, therefore the Applicant did not have a right to question them under Rule 6.7. Instead, the Applicant relied on the more general Rule 6.8, which allows a person to be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence.

The Court noted that, before ordering a witness to submit to Questioning under Rule 6.8, the Court needs to have some sense of the questions that would be asked and whether the witness has relevant information to offer.

The Applicant's Application to question was denied. The Court was unconvinced that any proposed line of questioning was relevant or material to the vexatious litigant Application.

Because the Respondents were relying on the Court record in their vexatious litigant Application, the Court determined Questioning would not add anything relevant to the record that did not already exist.

HARTSON V PARK PAVING LTD, 2021 ABQB 742

(FETH J)

Rules 6.14 (Appeal From Master's Judgment or Order), and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiff appealed a Master's decision that struck her claim. The Plaintiff argued the Master had incorrectly decided that she had not complied with undertakings given at Questioning and the Master had failed to consider alternatives to striking the Action.

The Court noted that new evidence is admissible on appeal of a Master's Judgment or Order pursuant to Rule 6.14(3) of the Rules. The Court determined and in turn rejected the Plaintiffs' assertions: (1) that a promise to provide a response to an undertaking in the future was a satisfactory response to an undertaking (2) and that responses to undertakings could be clothed in settlement privilege.

The Court relied on *Custom Metal Installations Ltd v Winspia Windows (Canada) Inc* 2020 ABCA 333 in finding that the Consent Order that obligated the Plaintiff to comply with undertakings and document production was an interlocutory procedural matter. The Court thereby determined that it retained the discretion to vary or discharge the Order per Rule 9.15(4) and was entitled to consider whether a variation or discharge of the Order was just.

The Court found that striking the action was just in the circumstances by taking into consideration that:

• Noncompliance with the Consent Order was substantial and persistent,

• No reasonable excuse had been offered,

• No appropriate Affidavit had been proffered explaining the reasons for non-compliance,

• The overall pattern of delay in fully responding to the undertakings extended beyond four years, and

• Even after striking the Action, the Plaintiff had not provided sufficient responses.

The Appeal was dismissed.

QUESTOR TECHNOLOGY INC V STAGG, 2021 ABQB 644

(NIXON J)

Rule 6.25 (Preserving or Protecting Property or its Value)

The Plaintiff applied for a Preservation Order pursuant to Rule 6.25 in relation to an underlying intellectual property dispute. The Plaintiff sought an Order requiring the corporate Defendant to pay all or a portion of its profits into trust until after Trial.

Justice Nixon stated that Preservation Orders, as a form of prejudgment relief, should only be granted in rare instances as guided by the principle of judicial abhorrence for prejudgment execution. The Court must exercise restraint in both deciding to grant a Preservation Order and in determining its appropriate scope.

In exercising its discretion, the Court may grant a Preservation Order when it is satisfied that the Applicant has met the customary three-part test for an Injunction. This test is whether: (i) there is a serious issue to be tried; (ii) the Applicant will suffer irreparable harm in the absence of relief; and (ii) the balance of convenience favours granting relief.

Justice Nixon held that, despite the Plaintiff's evidence being speculative, the issue of the Plaintiff's alleged ownership interest over the intellectual property constituted a serious issue to be tried. However, Justice Nixon found that the Plaintiff had not demonstrated with clear and non-speculative evidence that it would suffer irreparable harm in the absence of relief and further noted that the balance of convenience favoured denying the Preservation Order, due in part to the fact that the Plaintiff was much larger and more established than the corporate Defendant—the marginal benefit that the Plaintiff might receive would be dwarfed by the potential prejudice to the corporate Defendant.

Justice Nixon, therefore, dismissed the Application.

QUINN V FONG, 2021 ABQB 552

(HO J)

Rule 7.1 (Application to Resolve Particular Questions or Issues)

The parties separated and were engaged in a matrimonial property dispute. A previous Order set down the matter for a Rule 7.1 hearing to determine the validity and scope of a pre-nuptial agreement and the scope of a second agreement. Rule 7.1 allows the Court, on application, to order a question to be heard independently from a larger claim to streamline litigation.

Justice Ho confirmed the validity of the pre-nuptial agreement but directed that that the scope of the second agreement ought to be determined at Trial in accordance with Rule

7.1(d) unless the parties mutually agreed to participate in an alternative dispute resolution process or otherwise reach a resolution. The Court determined that there was insufficient evidence to evaluate several of the principles and that it would be inappropriate to make findings based on the limited record that may interfere with the Trial Judge's ability to address any remaining issues at Trial.

HUFFMAN V ALBERTA (DIRECTOR OF SAFEROADS), 2021 ABQB 597

(LEE J)

Rules 7.2 (Application for Judgment), and 7.3 (Summary Judgment)

The Applicant applied for Summary Dismissal of the Respondent's Originating Application for Judicial Review pursuant to Rules 7.2 and 7.3, which allows the Court to give Judgment when admissions of fact are made in a pleading and where there is no merit to the claim.

The Respondent had applied for Judicial Review of a decision outside the 30-day time limitation stipulated in the *Provincial Administrative Penalties Act* (the "*Act*").

Justice Lee noted that the Court cannot extend or shorten a statutory time limit unless the statute gives it that power (*Kehewin Cree Nation v Mulvey*, 2013 ABCA 294). As a result, the Court granted Alberta's Application for Summary Dismissal.

MCMUNN V HOK, 2021 ABQB 601

(SHELLEY J)

Rules 9.4 (Signing Judgments and Orders), 10.49 (Penalty for Contravening Rules), and 14.48 (Stay Pending Appeal)

The Respondent was subject to Court access restrictions as a vexatious litigant. The Respondent applied for leave to file a Stay Pending Appeal Application in relation to a Restraining Order against her, pursuant to Rule 14.48. That Application was denied in an earlier Decision.

Following that Decision, the Respondent wrote to Justice Shelley's Judicial Assistant in an inappropriate and abusive manner demanding a "re-processing" of her previous Application. The Respondent was informed by response email that her further Rule 14.48 Application should be directed to the Alberta Court of Appeal. The Respondent continued to communicate with various Court staff in an abusive way.

Justice Shelley observed that the Respondent had abused Court resources and had not conducted herself appropriately in her dealings with the Court. As such, Justice Shelley ordered the Respondent to pay $2,000 to the Clerk of the Court pursuant to Rule 10.49(1). The Respondent's approval of that Order was dispensed with pursuant to Rule 9.4(2)(c).

TIAMAT RESOURCES INC. V PROCYON RESOURCES CORP., 2021 ABQB 646

(EAMON J)

Rule 9.13 (Re-Opening Case)

This Decision arises from an Application to re-open a prior Decision pursuant to Rule 9.13.

In an earlier Application, the Applicant had applied for, among other things, an Order setting aside various general security agreements between the Respondent and related parties on the basis that the agreements constituted fraudulent preferences pursuant to the *Fraudulent Preferences Act,* RSA 2000, c F-24. The Applicant was unsuccessful in securing the requested relief, as it was unable to demonstrate that it was a creditor, as required by the applicable legislation. Later, the Applicant sought to re-open the Application on the basis of further evidence capable of demonstrating that it was in fact a creditor. The formal Judgment associated with the prior Decision had not yet been signed or entered.

In assessing the Application to re-open, the Court noted that, while empowered to re-open and reconsider its Decision, the weight of jurisprudence held that such power should be exercised sparingly and with great care. The Court went on to note several considerations to be observed in making its determination: (1) would there be a miscarriage of justice without the reopening?; (2) is the applicant trying to raise a new issue which [it] could have raised earlier?; (3) has the re-opening been sought based on new facts, not merely new argument? (4) has any other party relied on the Order to its detriment? (5) does the Applicant's new factual stance contradict its earlier factual assertions or evidence? Among these, the Court observed that the fundamental consideration is avoidance of a miscarriage of justice. The Court also noted the parties' agreement that the Decision should be re-opened if the Appellant could satisfy the test for admission of new evidence: i.e. that the evidence could not have made available at trial through due diligence and that the evidence would, if adduced in the original Application, probably have changed the result.

Turning to the specific evidence, the Court found that the new evidence would likely have changed the result; however, it also found that the evidence was available at the time of the original Application. Noting also that the assessment of whether a miscarriage of justice has occurred requires a consideration of the parties' mutual right to finality, the Court held that the case should not be re-opened notwithstanding the new evidence.

UMPERVILLE V VANBERG, 2021 ABQB 520

(MALIK J)

Rules 10.2 (Payment for Lawyer's Service and Contents of Lawyer's Account), 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)

This Judgment considered Costs payable in respect of an Application to vary an Order directing payment of expenses, pursuant to section 7(1)(a) of the *Alberta Child Support Guidelines*, Alta Reg 147/2005. The Applicant was successful in the underlying Application and therefore sought Costs, calculated in reference to Schedule C of the Rules, as well as in reference to a *Calderbank* offer that was served on the Respondent during the proceedings. Ultimately, the Court awarded Costs on an indemnity basis at 40% of the Applicant's Costs, to be assessed pursuant to Rule 10.34, and doubled for steps taken following deliver of the *Calderbank* offer.

In making its determination, the Court surveyed Rules 10.29, 10.31 and 10.33 and case law applicable thereto, on which basis, it concluded as follows: (1) a successful party is *prima facie* entitled to Costs from the unsuccessful party; (2) in determining what amount of Costs should be awarded, the Court may consider the amount claimed and recovered, the importance of the issue being litigated, the complexity of the Action, the apportionment of liability and conduct of a party that shortened the Action; (3) the Court has broad discretion to craft an award that is reasonable and proper, appropriate in the circumstances, or both; and (4) the Court may award any amount that it considers appropriate in the circumstances, including but not limited to an award of Costs on the basis of an indemnity for a party's legal fees or a lump sum instead of, or in addition to, assessed Costs.

The Court further noted that there is no presumption that Costs should be awarded on the basis of the appropriate column of Schedule C and that the ultimate purpose of a Costs award is to provide the successful party with partial indemnification of its Costs. Finally, the Court noted that, if a trial judge awards Costs on the basis of a percentage indemnity, then either an assessment officer or a judge should consider the reasonableness of the legal services performed and the amounts charged for those services, in light of Rule 10.2, and the factors enumerated therein.

Applying these legal conclusions to the facts, the Court noted that the Application was neither important in terms of the issues litigated nor complex, that the Applicant was entirely successful and that the Applicant had made numerous efforts to resolve the matter, including delivering the *Calderbank* offer, which was not accepted notwithstanding the reasonableness of its terms.

CALGARY (CITY) V TEULON, 2021 ABQB 501

(SIDNELL J)

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

This was a Costs decision for a Special Chambers Application brought by the City of Calgary. The City sought to have Ms. Teulon's land's Certificate of Title cancelled, and a new Certificate of Title issued, excerpting out a disputed portion from the parcel's legal description. The City's Application was dismissed.

As a result of the City's Application being dismissed, Ms. Teulon sought full indemnity Costs from the City. The City submitted that it should only pay Costs pursuant to Schedule C of the Rules of Court.

The Court noted that Rule 10.29 states that a successful party is entitled to Costs against an unsuccessful party. Rule 10.33 states the factors that the Court may consider when making a Costs award. In particular, the Court noted that Ms. Teulon was entirely successful in resisting the City's claim, that Ms. Teulon was a *bona fide* purchaser for value, and that Ms. Teulon had done nothing to give rise to the Application.

One of the Rule 10.33 factors is "the importance of the issues". The Court noted that the Rule does not say whether the importance of the issue should be considered from the perspective of legal precedent or from the perspective of the parties engaged in the litigation. Sidnell J noted that the Application had little legal precedential value, so the Court considered the perspective of the parties.

If the City was unsuccessful, then it would not have ownership of the disputed parcel and would not be able to rely on its road plan. However, Ms. Teulon was prepared to give the City access to the parcel for public infrastructure. If the City was successful, Ms. Teulon's would lose her front yard, accounting for approximately 14% of the parcel.

The Court noted that in this Application, unlike in most claims for full indemnity costs, there was no allegation of misconduct, delay, or increased expense due to improper steps taken in the litigation. Ms. Teulon submitted that this Application was a rare and exceptional case where full indemnity costs are appropriate because only full indemnity costs can result in justice being done.

The Court noted that the circumstances for full indemnity costs are a "rare, exceptional or unusual" case and that full indemnity Costs are "the exception to the rule".

Sidnell J found that the City's Application, although not arising from an invalid expropriation, was somewhat similar to expropriation in that it concerned an individual litigant that had done no wrong and whose only connection is through owning the land. The individual litigant was merely reacting and required to pay legal bills incurred by being brought into the proceedings. This was a rare, exceptional, and unusual case where justice can be done only by awarding Costs to Ms. Teulon on a full indemnity basis.

VLK v CJG, 2021 ABQB 513

(HOLLINS ACJ)

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

This Judgment considered Costs payable following a Trial to determine parenting issues in a family law dispute. In the underlying Judgment, the Court determined that the Plaintiff and Defendant should have divided parenting time, with each parent having the right to make particular decisions respecting their children's upbringing (so-called "parallel parenting"). Both the Plaintiff and Defendant claimed success and both asserted entitlement to Costs, pursuant to Rule 10.29.

Considering the appropriate Costs award, and to whom it should be granted, the Court noted its broad discretion, pursuant to Rule 10.31 and various considerations enumerated in Rule 10.33, including degree of success, the importance and complexity of the issues and conduct of the parties.

In awarding Costs in favour of the Defendant, the Court held that, while the underlying judgment awarded "parallel parenting" rather than "equally divided parenting", as sought by the Defendant, this result was generally consistent with the Defendant's request, and inconsistent with Plaintiff's opposition to shared parenting. As the Plaintiff was unsuccessful in substance, Costs were awarded in favour of the Defendant.

In assessing quantum of the award, the Court noted the Defendant's Calderbank offer, the Plaintiff's litigation conduct and the appropriateness of three expert witnesses, whose fees were claimed as part of the Defendant's Costs. Noting that the Calderbank offer "was virtually identical to [the] judgment", the Court granted double Costs for steps taken following the offer's delivery. The Court similarly granted recovery of all expert fees, notwithstanding the Plaintiff's opposition. In so doing, the Court noted that, while the Plaintiff's inflexibility and other conduct did not justify enhanced Costs, the Plaintiff's actions had complicated the litigation in such a way as may have required all three expert witnesses.

RVW v CLW, 2021 ABQB 546

(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)

Further to an Order that the mother return the parties' child into the father's custody, the father sought full indemnity Costs or, alternatively, enhanced Costs under Schedule C, Column 5 with a multiplier to be applied.

The Court found that Costs in family proceedings are in the Court's discretion pursuant to Rules 10.29(1), 10.31 and 10.33. Rule 10.29(1) states that a successful party is prima facie entitled to Costs from the unsuccessful party.

In determining what amount of costs should be awarded, the Court considers those factors enumerated in Rule 10.33. Following its consideration of Rule 10.33, the Court is directed to proceed to Rule 10.31 which grants the court broad discretion to craft an award that is reasonable and proper pursuant to Rule 10.31(1)(a), or that is appropriate in the circumstances pursuant to Rule 10.31(1)(b).

The purpose of a reasonable and proper costs award pursuant to Rule 10.31(3)(a) is to provide the successful party with partial indemnification of its Costs. Upon consideration of the factors enumerated in Rule 10.33(1), the Court found that father was completely successful in his application, the issues were important, and the Action was relatively complex.

Finally, in assessing the factors in Rule 10.33(2) in conjunction with the circumstances warranting a solicitor-client Costs as set out in *Jackson v Trimac Industries Ltd,* 1993, 138 AR 161, the Court found that the child's wrongful abduction by the mother (her second wrongful abduction) was willful, blameworthy and without any lawful basis.

As such, the factors set out in Rule 10.33 weighed in the father's favour and the mother's actions justified the rare and exceptional circumstances to depart from Costs on a party-party basis. The Court ordered the father to be fully indemnified for his assessed Costs on a solicitor-client basis, with the Costs being assessed by an assessment officer in accordance with Rule 10.34.

QUINN V FONG, 2021 ABQB 637

(HO 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)

Justice Ho released this Costs decision following a Hearing conducted pursuant to Rule 7.1. The Plaintiff submitted they were entitled to Schedule C Costs because they were successful, the Defendant sought the Hearing, it was an unnecessary expense for the parties, and the matter was complicated. The Defendant argued that there was mixed success, each party should bear their own Costs, and Costs should be addressed at the end of Trial.

Her Ladyship noted that Rule 10.29 provided a successful party is entitled to Costs subject to the Courts discretion under Rule 10.31.

Rule 10.31 outlined various forms of Costs awards and Rule 10.33 outlined factors that should be considered in making such an award. The factors included the degree of success of each party, the importance of the issues, the complexity of the action and any other matter the Court considering appropriate. Justice Ho found there was mixed success and that Costs should not be reserved for Trial, accordingly Her Ladyship ordered that each party should bear their own Costs.

MCAULAY v MCAULAY, 2021 ABQB 574

(KUBIK J)

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

The Defendant applied for Costs arising from a Trial in which they were successful. The Defendant sought solicitor and own client Costs of the Action.

The Court stated the general rule that a successful party to an Application, Proceeding or Action is entitled to Costs against the unsuccessful party, and it noted that Rule 10.33 requires consideration of certain factors, including: the result and degree of success of each party, the amount claimed and recovered, the importance of the issues, the complexity of the Action, apportionment of liability, conduct related issues, and any other matter related to the question of 'reasonable and proper' Costs. Subsection (2) of the Rule also includes other considerations for the Court including misconduct or other improper conduct on the part of a litigant. The Court further noted that Rule 10.31 gives discretion to the Court as to the nature of the Costs awarded.

In awarding Costs pursuant to Column 3 of Schedule C, the Court noted that the purpose of Costs awards is to partially indemnify the successful party for the legal expenses incurred during the litigation. Party and party costs are deliberately set such that there is not full indemnity as it discourages unwarranted litigation and promotes proportionality in litigation that is commenced, creating an incentive on all litigants to litigate economically. The Court noted that the Defendant was entirely successful, the issue was important to the parties and that there was an absence of existing jurisprudence in Alberta on the issues at Trial in considering the factors in Rule 10.33. Further, the action was not complex and was conducted expeditiously by both parties through use of the Summary Trial process.

KIM V CHOI, 2021 ABQB 645

(MICHALYSHYN J)

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

The Court was required to determine the appropriate Costs award. This case is unique because, though the Applicants were unsuccessful in the underlying Application, Costs were awarded to them due to the Respondents' conduct leading up to the Application. The Court received written submissions from counsel as to Costs after the parties were unable to agree on the appropriate Costs award.

After the parties provided written submission, the Alberta Court of Appeal released the costs decision *McAllister v Calgary (City),* 2021 ABCA 25. The Court relied on *McAllister* to establish the following principles for costs decisions:

• Costs are generally awarded to the successful party absent misconduct on their part;

• Courts should consider the factors listed in Rules 10.33(1) and (2); and

• A 40-50% level of indemnification for legal fees provides a reasonable guideline to measure "reasonable and proper costs" under the Rules.

The Court awarded the Applicants double Schedule C Costs and disbursements. His Lordship noted that he was not able to fully comply with *McAllister* because with the parties did not provide reliable information as to what 40-50 per cent indemnification should be as for the time period in question.

ROCKY VIEW WATER CO-OP LTD v CIDEX DEVELOPMENTS LTD, 2021 ABQB 715

(WOOLLEY J)

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

This is a Costs decision in which the Court awarded the successful party Schedule C, Column 2 Costs, multiplied by 1.25, with the addition of disbursements and other charges.

In coming to its decision, the Court considered the factors set out in Rule 10.33, including that successful party succeeded in all aspects of the litigation; the legal issues raised were novel; the disputes affected the ongoing relationship between the parties; the parties presented the case in a straight-forward manner with limited evidence; and both parties acted to ensure that the matter proceeded expeditiously with nothing suggesting that either party unnecessarily lengthened or delayed the actions, or disputed matters that ought to have been submitted.

Further, the Court considered the potential relevance of both Schedule C and the actual fees incurred by a party in determining the "reasonable and proper" costs to be awarded pursuant to Rule 10.31(1). Ultimately, the Court noted that a 40-50% partial indemnification is a "reasonable guideline" for a Costs award.

VC v BH, 2021 ABQB 736

(JONES J)

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

This was a Costs Decision following a Trial to determine a parenting arrangement. The Plaintiff alleged that she was successful and, therefore, was entitled to Costs pursuant to Schedule C Column 1. The Court disagreed stating that, in fact, the Defendant was more successful as the Plaintiff's parenting time would be under close scrutiny.

Pursuant to Rule 10.31, Jones J had the discretion to award Costs after considering the

factors outlined in Rule 10.33. Some of those factors included the result of the Action, the apportionment of liability, and any other matter related to reasonable and proper Costs considered appropriate in the circumstances. Jones J noted that an award of full indemnity costs against Plaintiff would have been a reasonable request in this case because the Plaintiff had behaved irresponsibly throughout the proceedings. However, despite the significant sums of money the Defendant expended, he only sought $2,000.00 in Costs. Jones J awarded same.

FLOCK ESTATE V FLOCK, 2021 ABQB 774

(JOHNSTON J)

Rules 10.31 (Court-ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), and 10.34 (Court-Ordered Assessment of Costs)

The Applicant sought a Cost award in the amount of 40-50% of its incurred legal expenses.

The Court noted that a successful party is *prima facie* entitled to a Cost award and this should only be departed from in rare and exceptional circumstances. The Court determined that because the Applicant was the successful party in the broader Action, it was entitled to Costs pursuant to Rule 10.29(1); the only outstanding issue was to determine the appropriate quantum.

The Court considered the factors outlined in Rule 10.33(1) and 10.33(2), specifically noting that the Applicant had:

• unnecessarily contributed to lengthening and delay the matter because it had not taken steps to advance its Originating Application for almost three years,

• been unsuccessful in interlocutory applications despite the Applicant's assertion the interlocutory applications had no impact on the outcome of the Action, and

• filed offending materials despite being given instructions by the Court of Appeal that, if followed, would have avoided them being struck.

The Court determined that after considering the factors in Rule 10.33, it was required to refer to the options for making Cost awards provided for in Rule 10.31. The Court found that because most of the Applicant's Costs were incurred in association with responding to avoidable Interlocutory Applications which could have been avoided if Court directions were followed, that party and party Costs were appropriate in accordance with Column 4 of Schedule C.

KENT V MACDONALD, 2021 ABCA 274

(GRECKOL, PENTELECHUK, AND FEEHAN JJA)

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

Following the Court of Appeal's decision on the merits, the Court of Appeal received submissions from the parties on Costs. The Court noted that, under Rule 14.88(2), Part 10 of the trial Rules is applicable to Appeals. As a result, under Rule 10.31, the Court has broad discretion to render Costs Awards between the parties. The Court considered the Trial Judge's Cost decision, and chose not to interfere with it, save for relieving the successful party on Appeal of 25% of their Queen's Bench Costs.

BENNING V HARDING, 2021 ABQB 605

(SHELLEY J)

Rule 10.33 (Court-ordered Costs Award)

This was on Decision on a Costs Application related to an unsuccessful Application to remove a counsel on the basis of an alleged conflict of interest. Referring to factors in Rule 10.33, the Applicant argued that they should be awarded Costs as they were the successful party, the Application was of importance to the Applicant, and although there was a single issue involved, it was complex and required briefs and many appearances. The Respondent argued that the Applicant should be entitled to no more than $300 in Costs (being the same amount awarded to the Respondent in another Application) as the Application was necessary and important, the complexity was minimal and the Respondent was unable to collect Costs for a successful EPO Application.

Justice Shelley noted that Costs were within the discretion of Court after having regarding to all the factors in the Rules. The fact that the Respondent received $300 in Costs in a previous Application and was unable to collect Costs for an EPO Application were not relevant in this instance. As the Application was akin to a Special Chambers Application, the issue was important and the Applicant was successful, Justice Shelley awarded the Applicant Costs.

PAPASCHASE FIRST NATION v MCLEOD, 2021 ABQB 698

(BERCOV J)

Rule 10.33 (Court Considerations in Making Costs Award)

The Defendants sought Costs of the Action after successfully applying to strike the Action.

The Defendants sought costs on an indemnity basis against the Plaintiffs' lawyer based on alleged improper conduct during the Action and the Hearing.

The Court found that an award of Costs against a lawyer should only be granted in exceptional cases where there is a serious abuse of the judicial system by the lawyer that is deliberate. Lawyers should, otherwise, be free to vigorously advance their client's rights without fear of reprisal if they are unsuccessful. In this instance it was found that the Plaintiff, not the lawyer, was the driving force in the litigation, as he swore the Affidavits and attended Questioning.

The Court considered the factors in Rule 10.33 but noted that there were no factors in Rule 10.33, or otherwise, that justify departing from the presumptive rule that the successful party is entitled to Costs.

The Court stated that party-party costs is the presumptive rule and while there is discretion to depart from party-party costs, the discretion should be exercised in rare and exceptional circumstances.

The Defendants alleged the Plaintiffs made misrepresentations to the Court which amounted to abusive conduct warranting costs on an enhanced or indemnity basis. The Court, upon review of the transcripts, noted that it was unclear that the Plaintiffs made a misrepresentation to the Court. Bercov J ultimately found that the Defendants that were represented by counsel were entitled to recover party-party Costs under Column 4 of Schedule C, allowable GST, and disbursements.

HAGAN V HAGAN, 2021 ABQB 704

(JOHNSTON J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was an Application to determine Costs payable upon conclusion of a Summary Trial concerning the division of property between former spouses and a claim for spousal support. The Summary Trial had minimal Affidavit evidence and oral and written Argument.

The overall successful party sought Costs pursuant to Schedule C, Column 3, in light of the divided property's value. Applying Rule 10.33 and the considerations set out therein, and noting the Summary Trial's relative simplicity, as well as the overall unsuccessful party's success in certain respects, the Court awarded Costs on the basis of Schedule C, Column 1 for both the Summary Trial and the Costs Application that followed.

HENDERSON (RE), 2021 ABQB 661

(SANDERMAN J)

Rule 10.33 (Court Considerations in Making Costs Award)

The Applicant sought Costs related to a number of Applications made by the Respondents in relation to a contested Estate. The Respondents opposed any Costs award in favour of the Applicant, suggesting that the Costs incurred were as a result of the Testator's actions.

The Court observed the factors relevant to awarding costs, as set out in Rule 10.33.

Following a review of the evidence, Justice Sanderman found that the Applicant was successful in the Applications and did not engage in any litigation misconduct. As a result, the Applicant was awarded party-party costs in accordance with Schedule C with a multiplier of 1.75.

CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN, 2021 ABQB 647

(ROOKE ACJ)

Rules 10.49 (Penalty for Contravening Rules), 13.7 (Pleadings: Other Requirements), and 14.5 (Appeals Only with Permission)

The self-represented Defendant had a lengthy and problematic history of litigation in the Alberta courts. This led to the Court requiring the Defendant to obtain leave prior to filing commencement documents in the Alberta Court of Queen's Bench. The Defendant submitted a 144-page Affidavit, sworn by herself, to Rooke ACJ asking for permission to file a Counterclaim for a debt collection action initiated by Canadian Imperial Bank of Commerce.

Rooke ACJ considered the test for leave to file as stated in *Re Thompson*, 2018 ABQB 87. On the facts, Rooke ACJ found that the Defendant's proposed Counterclaim was an abuse of Court processes. One of the defects with the Counterclaim was that the Defendant claimed she was defamed but did not plead the particulars of the alleged defamation as required by Rule 13.7(f).

Pursuant to Rule 14.5(4), there is no appeal to the Alberta Court of Appeal on an Order denying a vexatious litigant from initiating proceedings. Rooke ACJ cautioned the Defendant that Rule 10.49(1) permits it to order that she pay a penalty if she continues to file abusive leave to file Applications.

AED V SRP, 2021 ABQB 567

(RENKE J)

Rules 10.50 (Costs Imposed on Lawyer), and 13.18 (Types of Affidavit)

This was a family law Application concerning the residential care of two children. The Applicant and Respondent were the children's parents.

Two procedural issues arose in the context of the Application. The first procedural issue concerned admissibility of Affidavit Evidence relating to the Respondent's romantic partner, the details of which had been relayed to the Affiant by a third party. The Court noted that, depending on its characterization of the Application, the Evidence might be barred as hearsay by operation of Rule 13.18(3) (which precludes hearsay evidence in the context of an Application that may dispose of all or part of a claim); however, no decision was required on this point as the Evidence was corroborated by the Respondent's own Affidavit Evidence.

The second procedural issue concerned the Respondent's request for an award of Costs against the Applicant's counsel, pursuant to Rule 10.50. The Court refused the Respondent's request, noting that an award of Costs against a lawyer can be justified only on an exceptional basis, where the lawyer's acts have seriously undermined the authority of the Courts or seriously interfered with the administration of justice. The Court held that counsel's procedural missteps, which included failures to meet deadlines and filing requirements were "mere mistakes" and did not rise to meet the high bar for an award pursuant to Rule 10.50, which requires "at the very least gross neglect or inaccuracy".

CHERRY V ALBERTA (CHIEF ELECTORAL OFFICER), 2021 ABQB 672

(MOREAU CJ)

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

The Appellant was self-represented and sought to overturn the Election Commissioner's finding that the Appellant was not a citizen of Canada but had voted in the 2019 Alberta General Election.

Justice Hopkins heard the Appeal and reserved his decision; he pass away prior to issuing the decision.

Rule 13.1 allows a judge to act in place of, or replace, another judge if:

(a) That other judge dies;

(b) That other judge ceases to be a judge; or

(c) It is inconvenient, improper, inappropriate or impossible for that other judge to act.

Based on Rule 13.1(a), Moreau CJ assumed conduct of the Appeal. The parties to the Appeal were contacted and confirmed that the matter could be fairly decided on the Certified Record of Proceedings, their written materials submitted on the Appeal and a transcript of the Appeal Hearing before Hopkins J.

MCCARTHY ESTATE (RE), 2021 ABCA 293

(FEEHAN J)

Rules 13.4 (Counting Months and Years), 14.8 (Filing a Notice of Appeal), 14.37 (Single Appeal Judges), and 14.47 (Application to Restore an Appeal)

This was an Application for extension of time to Appeal pursuant to Rule 14.37(2); an Order restoring a struck Appeal pursuant to Rule 14.47; and for an extension of time of one week from the Reasons of the Application to file the Appeal Record.

The deadline to appeal the decision of the Chambers Judge had expired, pursuant to Rule 13.14 (which lays out how to calculate time by counting months and years) and 14.8(a)(iii) (which requires the Notice of Appeal within one month after the date of the Decision).

Counsel for the Applicants advised that they understood the proper rule to be Rule 13.3 (which lays out how to calculate time by counting days) and, as a result of his reliance on that Rule, he missed the period in which to file the Notice of Appeal and, ultimately, the Appeal was struck.

The Court noted the test for extending time to appeal is discretionary and the relevant principles include: a bona fide intention to Appeal while the right existed; an explanation for the failure to Appeal in time that justifies the lateness; absence of serious prejudice so that it would not be unjust to disturb the judgment; a lack of benefits taken by the Applicant of the Judgment under Appeal; and a reasonable chance of success on the Appeal. The test for restoring an Appeal is also discretionary and the Court will consider: any arguable merit to the Appeal; an explanation for the defect or delay which caused to Appeal to be struck; reasonable promptness in moving to cure the defect and have the Appeal restored; intention in time to proceed with the Appeal; and lack of prejudice to the Respondent.

Justice Feehan explained that the tests for both extending time to Appeal and restoring an Appeal were discretionary and had similar or overlapping factors. No factor was determinative, and each factor had to be weighed. The Applicants sought to extend the time to Appeal by one Court day, a short period of time. They had clearly expressed an intention to Appeal. Counsel had explained the delay in filing the Notice of Appeal. There was no evidence of prejudice to the Respondent if the time for the Notice of Appeal was extended and the Appeal was returned to the list. Whether there was a reasonable chance of success on Appeal was a low threshold to meet. Accordingly, Justice Feehan allowed the Applications.

SCOTT V ALBERTA HEALTH SERVICES, 2021 ABCA 249

(ANTONIO J)

Rule 14.5 (Appeals Only with Permission)

The Respondent obtained an *ex parte* injunction against the Applicant, despite knowing the Applicant was represented by counsel, and not informing the Court of same. The Applicant sought to have the injunction Order set aside. At the hearing of the Application, the Applicant's counsel advised the Chambers Judge that he would like to argue only the *ex parte* procedural issue, and leave Charter arguments for another day, essentially bifurcating the Application Hearing. The Chambers Judge refused to bifurcate the Application Hearing, and the Application was adjourned sine die.

The Applicant now seeks permission to Appeal the Chambers Judge's Decision, pursuant to Rule 14.5(1)(b). Rule 14.5(1)(b) requires permission to Appeal any pre-trial decision respecting adjournments, time periods or time limits.

Justice Antonio cited *Ozark Resources Ltd v TERIC Power Ltd*, 2020 ABCA 51 in noting that an appeal of this nature would usually only be granted if the Appeal raises a serious question of general importance and has a reasonable chance of success. A serious question of general importance "involves a matter of policy, principle or law that might have precedential value." Justice Antonio found that there was authority to support the Chambers Judge's decision regarding the bifurcated Hearing, and that the lower Court's decision was not unreasonable. Her Ladyship found there was no question of general importance and dismissed the Application for permission to Appeal.

KUZIK V HAGEL, 2021 ABCA 241

(SCHUTZ JA)

Rule 14.8 (Filing a Notice of Appeal)

The Applicant applied to extend time to initiate an Appeal. The Judgment being appealed concerned, among other things, division of the parties' matrimonial property.

The Court noted that Rule 14.8(2)(iii) requires a party to file a Notice of Appeal "within one month after the date of the decision". The Court cited Wolfe v Morrisseau, 2021 ABCA 205, which restated the applicable test to extend time to appeal:

1. Did the Applicant form an intention to appeal while the right of appeal existed?

2. Has the Applicant provided an explanation for the failure to file a timely Appeal?

3. If so, does the explanation constitute "some very special circumstance which serves to excuse or justify such failure?"

4. Has the Applicant demonstrated that the

delay has not "so seriously prejudiced the Respondent as to make it unjust" to grant a time extension?

5. Has the Applicant not taken the benefits of the Judgment?

6. Can the Applicant convince the Court that there is a reasonable chance of success for the Appeal?

On the facts, the Court was satisfied that the Applicant met the first factor: that he had a bona fide intention to appeal while the right of appeal existed.

The Applicant's primary argument was that he had the mistaken impression that he had 30 days from the receipt of the Judgment, and not the date of the decision, to file the Appeal. The Court noted that a mistaken view of the law is not enough of an excuse, especially in the absence of due diligence. Additionally, some of the evidence appeared to contradict the Applicant's assertion that he did not know the deadline to appeal was earlier.

The Court noted that self-represented litigants are required to know the rules under which litigation is conducted, as such, a mistaken impression as to the proper filing deadline cannot be called a "special circumstance."

The Judgment was sent to the Applicant after some delay because the Applicant failed to approve the form of Order. As such, it was sent to the Applicant without his signature. Refusing to approve the form and content of the Judgment is also not a "special circumstance".

The Court found that the Respondent would suffer prejudice from the delay in initiating the Appeal. The Respondent had instructed her lawyer to dispose of evidence relevant to the litigation after the time to appeal had passed. The Court also noted the emotional challenges and difficulty of the Trial and considered the Respondent's attestation of a "need for closure".

The Applicant admitted that under the Judgment, he had retained a vehicle which he later sold. The Applicant also submitted a claim to the Respondent's employment pension which he was awarded under the Judgment. The Court found that on the facts, the Applicant had taken the benefits of the Judgment.

The Court noted that standard of review on the division of matrimonial property is highly deferential. At trial, the Trial Judge had found that the Applicant was not a credible witness and had failed to cooperate in various pre-trial processes. The Court found that the Trial Judge had not been unfair to the Applicant and "in a measure of extraordinary fairness", had allowed the Applicant to adduce further evidence during Trial that he ought to have disclosed in advance of Trial.

The Court noted that while the Applicant did not agree with the Trial Judge's findings, the Court on Appeal must consider the proposed grounds of appeal in light of the record, the Judgment under appeal, and the prevailing review standards. "It is trite that an appeal is from judgment, not the trial judge's reasons."

Having weighed the other factors, the Court found that it was not in the interests of justice to extend time to initiate an Appeal. The Applicant's Application to extend time to initiate an Appeal was dismissed. The Respondent's Cross-Application for Security for Costs was also dismissed.

1664694 ALBERTA LTD V BELJAN DEVELOPMENT MANAGEMENT, 2021 ABCA 250

(ANTONIO JA)

Rules 14.8 (Filing a Notice of Appeal) and 14.12 (Contents and Format of Notices of Appeal and Cross Appeal)

The Applicants were granted permission to Appeal. Pursuant to Rule 14.8(2)(a)(ii), a Notice of Appeal must be filed within 10 days after permission is granted. The Applicants did not file a Notice of Appeal in time and brought this Application to extend the time to file pursuant to Rule 14.8(2)(a)(ii).

Antonio JA noted that in determining whether to extend time to file a Notice of Appeal the Court will consider whether:

1. There was a bona fide intention to Appeal while the right existed and that there was a special circumstance that would excuse failure to Appeal;

2. There is an explanation for the delay and whether the other side was so seriously prejudiced by delay that it would be unjust to disturb the original Judgment;

3. The Appellant has taken the benefits from the Judgment from which the Appeal is sought; and

4. The Appeal would have a reasonable chance of success if allowed to proceed.

The Applicants relied on Rule 14.12(3)(a), which provided that where permission to Appeal was required, a Notice of Appeal must include the particulars of or a copy of the Order granting permission to Appeal. It was argued that a Notice of Appeal could not have been filed prior to the receipt of the filed Order. Antonio JA did not find this persuasive. It is trite law that time periods run from when an Order is made, not when they are signed or served.

Antonio JA was satisfied that the Applicant's had explained the delay in filing their Notice of Appeal and the Respondents were not prejudiced by the delay. Accordingly, Antonio JA granted the Application to extend time.

MANITOK ENERGY INC (RE), 2021 ABCA 323

(VELDHUIS J)

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

The Applicants applied for permission to intervene in the Appeal (the "Appeal") of a Chambers Decision.

The Court reviewed the applicable Rules and cases on intervention. Rules 14.37(2) and 14.58 allow a single Appeal Judge to grant leave to a party to intervene and impose conditions on the intervention. Rule 14.58(3) prevents an intervenor from raising new issues on Appeal. The Court relied on *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 and

PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 25 to find that intervenor status will be granted where the Applicant:

• is directly and significantly affected by the outcome of the Appeal; and

• will provide special expertise or a fresh perspective to help resolve the Appeal.

The Court also noted that *Pedersen v Alberta*, 2008 ABCA 192 sets out several factors that the Court considers for intervenor applications.

The Court granted the Applicants' Application to Intervene. Although mindful of the risk of duplicative submissions, the Court noted that one of the Applicants could offer specialized expertise and institutional knowledge that would assist the Court. Similarly, the Court noted that other Applicants could provide a fresh and useful perspective on the existing issues on appeal. The Court granted the Applicants' Application to Intervene and allowed each intervenor to file a factum no longer than 10 pages and make oral submissions during the Appeal.

MCMUNN V HOK, 2021 ABQB 550

(SHELLEY J)

Rule 14.48 (Stay Pending Appeal)

The Applicant sought leave to file a Rule 14.48 Application to Stay operation of the Respondents' restraining Order against the Applicant, pending Appeal.

The Court reviewed the test for a leave application: "[A] person subject to court access control is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise..." (*Re Thompson*, 2018 ABQB 87).

The Court concluded that, while the Applicant's materials appeared to comply with the requirements for a valid leave application, it should be rejected for three reasons. First, the Court concluded that the Applicant had not rebutted the presumption that her Leave Application was an abusive proceeding. Second, the Court concluded that the Applicant's complaints about procedural fairness were not reasonable. Lastly, the Court found that the Applicant's Leave Application exhibited multiple indicia of abusive conduct (scandalous and inflammatory language before the Court, and unsubstantiated allegations of conspiracy, fraud and misconduct).

In sum, in dismissing the Leave Application, the Court found that the Applicant had not rebutted the presumption that her proposed Rule 14.48 interim Stay Pending Leave Application was an abuse of the Court. The Court added that the decision was final, and that the Applicant was prohibited from making any further leave Applications on the subject.

MIDLAND RESOURCES HOLDING LIMITED V SHTAIF, 2021 ABCA 286

(VELDHUIS JA)

Rules 14.48 (Stay Pending Appeal), 14.65 (Restoring Appeals) and 14.74 (Application to Dismiss an Appeal)

The Applicant applied for a Stay of Proceedings of a Chambers Order. The Respondent Cross-Applied for Security for Costs. In granting the Stay of Proceedings, Veldhuis JA confirmed that Rule 14.48 allows an Application for a Stay of Proceedings to be made to a single Chambers Judge.

The Court delineated the legal test for granting a Stay Pending Appeal from *RJR-MacDonald Inc v Canada (AG)* 1 SCR 311: (a) there is a serious question arguable on appeal; (b) the Applicant would suffer irreparable harm absent the Stay; and (c) the balance of convenience favours granting the Stay.

In applying the test, the Court noted that, whether there is a serious question arguable on appeal, is a low threshold, and asserted that the Applicant met the threshold to establish a serious issue. Veldhuis JA then applied the second and third parts of the test, noting that they are inexorably linked and must be considered together. The Applicant argued that he would suffer irreparable harm by having to disclose financial information and further argued that the balance of convenience favours him because of the length of the protracted proceedings and the delay in the Respondent pursuing the Applicant in Alberta. The Court found that the Applicant satisfied the second and third parts of the test and granted the Stay of Proceedings.

The Court then dealt with the Respondent's Cross-Application for Security for Costs and an Order to dismiss the Appeal outright for being vexatious, amongst other remedies. In dealing only with the Security for Costs issue, the Court noted that Rule 14.74 does not grant a single Chambers Judge the jurisdiction to dismiss an Appeal outright; instead that Application must be heard before a panel. With respect to the Security for Costs Application, the Court found that the Respondent did not file an Affidavit in support of his Application and that generally the Application was premature. The Court advised that it would hear the Respondent's Application for Security for Costs at a later date.

Finally, the Court stayed the filing deadlines in the Appeal, pursuant to Rule 14.65.

TAQA DRILLING SOLUTIONS INC V YAR HOLDINGS INC, 2021 ABCA 300

(WATSON J)

Rule 14.48 (Stay Pending Appeal)

The Applicant ("Yar") applied for a Stay Pending Appeal pursuant to Rule 14.48. One of the Respondents, TAQA Drilling Solutions, Inc. ("TAQA"), entered into a transaction with Yar with two different purchase prices depending on whether certain post-closing conditions

were satisfied. When the transaction closed, TAQA deposited the difference between the two purchase prices (the "Funds") into an escrow account.

The Court considered the legal test for granting a Stay Pending Appeal from *RJR-MacDonald Inc v Canada (AG)* 1 SCR 311: (a) there is a serious question arguable on appeal; (b) the Applicant would suffer irreparable harm absent the Stay; and (c) the balance of convenience favours granting the Stay. After applying the test, Justice Watson granted the Application.

The Court determined that there was an arguable case on Appeal and that Yar would suffer irreparable harm if the Funds in the escrow account were returned to TAQA in the form of a lost security. Justice Watson also determined that the balance of convenience favoured granting the Stay Pending Appeal. Particularly after Yar offered to post $1 million USD in a trust account pending Appeal.

ISH ENERGY LTD V WEBER CONTRACT SERVICES INC, 2021 ABCA 281

(O'FERRALL, STREKAF AND KHULLAR JJA)

Rule 14.75 (Disposing of Appeals)

The Appellant appealed a Decision where it was found liable for breach of contract and negligence. The majority of the Court of Appeal upheld the Trial Judge's findings on the Appellant's liability and dismissed the Appeal.

O'Ferrall JA, in his dissenting opinion, would have allowed the Appeal. Rule 14.75 provides that the Court of Appeal may receive further evidence when deciding an Appeal. In the view of O'Ferrall JA, this matter required further evidence and/or argument. O'Ferrall JA also noted that an entirely new trial may not be necessary. The parameters of any trial continuation ought to be in accordance with the Court's reasons but the dissenting opinion would leave it to the parties and the Trial Judge to decide how it would be accomplished. O'Ferrall JA noted that any conclusions made in the Court's decision with respect to the issues directed to be addressed by the Trial Judge are not binding on the Trial Judge.