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ALSTON V THE MUNICIPAL DISTRICT OF FOOTHILLS NO. 31, 2021 ABQB 951

(HOLLINS J)

Rules 1.1 (What These Rules Do), 9.2 (Preparation of Judgments and Orders), 9.4 (Signing Judgments and Orders), and 10.52 (Declaration of Civil Contempt)

The Defendant applied for Civil Contempt after the Plaintiff breached a Case Management Order. In response, the Plaintiff cross-applied to vacate the Order. Madam Justice Hollins dismissed the Plaintiffs' application to vacate the Order and granted the Defendant's Civil Contempt Application.

In dismissing the Application to vacate the Order, Hollins J. emphasized that Rule 9.2(2)(b) does not entitle a party to approve or refuse every Court Order in an Action. Only parties that appear in Court can approve the form of an Order or direct the Clerk of the Court to sign an Order without approval of the parties under Rule 9.4(2)(c). Typically, the Court invokes Rule 9.4(2)(c) when it believes that a self-represented litigant will refuse to approve an Order or will seek to improperly delay an Action.

A Judge may declare a person to be in civil contempt of Court under Rule 10.52(3)(a)(i) if, without reasonable excuse, that person has failed to comply with a Court Order. The Applicant has the burden of proving that the Respondent is in contempt of the Order. Since imprisonment is one of the remedies available for contempt, civil contempt must be proven beyond a reasonable doubt.

Hollins J. relied on *Builders Energy Services Ltd v Paddock,* 2009 ABCA 153 to outline the well-established test for civil contempt: (1) the Order states clearly and unequivocally what should not be done; (2) the Respondent had actual knowledge of the Order; and (3) the Respondent intentionally did what the Order directed should not be done. The Applicant must prove each element beyond a reasonable doubt. On

the facts, Hollins J. found the Respondents to have "blatantly, repeatedly and unequivocally" breached the Order. The Respondents had no reasonable excuse for breaching the Order and were found in contempt of Court.

Rule 10.53 sets out the range of remedies once a finding of contempt has been made, including imprisonment, fines, cost awards or stays of future court proceedings. Hollins J. relied on *Oommen v Capital Housing Corp,* 2015 ABQB 283 (affirmed 2017 ABCA 143), where Veit J. outlined the factors that should be considered when fashioning a suitable remedy. The factors are similar to the ones employed in criminal law sentences. Accordingly, the remedy for civil contempt needs to be proportionate to the level of wrongdoing, in line with similar cases, and serve as a deterrent of future contemptuous conduct.

Justice Hollins imposed a $1,000 fine on the Plaintiffs and awarded the Defendant full-indemnity solicitor-client costs on both Motions.

BARBE V EVANS, 2021 ABQB 796

(KENDELL J)

Rules 1.2 (Purpose and Intention of These Rules), 4.29 (Cost Consequences of Formal Offer to Settle), 5.38 (Continuing Obligation on Expert), 10.31 (Court-ordered Costs Award), and 10.33 (Court Considerations in Making Costs Award)

This was a costs decision arising from a Judgment wherein a Defendant doctor was found liable while the Plaintiff's suit was dismissed as against the other Defendants: the hospital and Alberta Health Services (the "Hospital Defendants"). The parties agreed the Plaintiff was entitled to costs but were unable to agree on three issues: 1) who was responsible for paying the Hospital Defendants' costs; 2) what amount of costs the Hospital Defendants were entitled to recover; and 3) whether the Plaintiff was entitled to double costs.

The Court noted that the general costs Rules are designed to foster three fundamental purposes: 1) to partially indemnify successful litigants; 2) to encourage settlement; and 3) to discourage and sanction inappropriate behaviour.

Prior to Trial, the Hospital Defendants had served a Formal Offer to Settle and were prepared to waive their entitlement to costs. The Plaintiff did not accept. The Court noted that there is an overriding public interest in favour of settlement and that this policy is entrenched in Rule 4.29. The Court determined that, because of the Plaintiff's decision to not release the Hospital Defendants prior to Trial, and to not consent to the Hospital Defendants' non-suit Application, the Plaintiff should bear the costs of the Hospital Defendants.

The Plaintiff argued that the Hospital Defendants should not be entitled to recover their portion of the cost of retaining experts, a fee which was split with the Defendant doctor. The Court, however, found that the cost was properly incurred and, in fact, noted that the choice of co-Defendants to share in the cost of experts should be encouraged by the Court in light of Rule 1.2. "To penalize a litigant for conducting themselves in a timely and cost-effective way, runs contrary to Rule 1.2."

Pursuant to Rule 10.31, the Court has considerable discretion in awarding costs and the Court considered Rule 10.33 which lays out

the factors to be considered in making a costs award. The Court found that the amounts set out in the Hospital Defendants' Bill of Costs were reasonable and, thus, the Hospital Defendants were entitled to be reimbursed for the full amounts claimed.

The Plaintiff also argued that the doctor should pay double costs, in part because he did not advise the other parties in writing that his expert had changed his opinion and, therefore, did not comply with Rule 5.38. In the circumstances, the Court was not convinced the doctor had contravened Rule 5.38. As such, there was no basis to award enhanced or double costs.

1490703 ALBERTA LTD V CHAHAL, 2021 ABQB 853

(MALIK J)

Rules 1.2 (Purpose and Intention of These Rules), 4.29 (Costs Consequences of Formal Offer to Settle), 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff previously applied for Summary Judgment against a selection of the Defendants. Those Defendants cross-applied for Summary Dismissal. The Master denied the Plaintiff's Application and granted the Application for Summary Dismissal. Justice Malik previously dismissed the Plaintiff's Appeal of the Master's decision. This was a decision regarding costs arising from the Appeal.

The Plaintiff argued that it should not be responsible for any costs, as an award of costs would be contrary to the purposes of the Rules in that it would discourage litigants from asserting their rights. Justice Malik disagreed, citing Rule 1.2 to state that the Rules are in fact designed to facilitate quick resolution of Claims and to encourage Parties to resolve Claims on their own. Justice Malik further stated that the matter at issue was a straightforward limitations question, and that there was therefore no public interest in the litigation that would weigh against a costs award. Justice Malik therefore considered the appropriate costs award.

The Defendants had made a Formal Offer prior to the Appeal and therefore asserted that they are entitled to double costs pursuant to Rule 4.29. Justice Malik considered Rule 10.29, which states the general rule that a successful party is entitled to costs, and Rule 10.33, which sets out factors the Court may consider in awarding costs. Justice Malik stated that the analysis then turns to Rule 10.31 which grants the Court broad discretion to craft a costs award that is reasonable and proper in the circumstances. Justice Malik also relied on Rule 10.2 in considering what legal costs are reasonable.

Having regard to the above, Justice Malik granted the Defendants 50% of their actual incurred expenses, and further doubled that amount on the basis of Rule 4.29. The Applicant Defendants applied for costs after being successful at a Summary Dismissal Application.

CANADA TRUST CO (MCDIARMAID ESTATE) V ALBERTA (INFRASTRUCTURE), 2021 ABQB 873

(LOPARCO J)

Rules 1.2 (Purpose and Intention of These Rules), 5.8 (Producible Records for Which There is an Objection to Produce), 9.13 (Re-opening Case), and 9.14 (Further or Other Order after Judgment or Order Entered)

The Case Management Justice, Madam Justice Loparco issued a Case Management Endorsement ("CME") stating that certain settlement agreements and supporting documentation were not relevant and material to an issue in dispute.

The Plaintiffs challenged the CME. They applied to Justice Loparco for two Orders. First, they applied under Rule 9.14 (which allows the Court to make a further Order in certain circumstances) to compel the Defendants to list all documents that had not been produced, but that Justice Loparco privately reviewed in rendering the CME. Second, they applied under Rule 9.13 to re-open and vary the CME based on new evidence.

Relying on *Yassa v Parker,* 2018 ABQB 305, Justice Loparco explained that Rule 9.14 is used to "give effect to the judge's original intention". Here, the Plaintiffs requested access to documents that were held by Justice Loparco to be irrelevant. An Order to produce irrelevant documents would not give effect to Loparco J's CME. The CME did not depart from the Rules of Court since Rule 5.8 already required privileged documents to be listed with specific reasons for their privilege. The Plaintiffs' application under Rule 9.14 failed.

Under Rule 9.13(b), the Court can, if is satisfied that there is good reason to do so, hear more evidence to modify an Order before it is entered. In conjunction with Rule 1.2, a Judge can investigate whether a Judgment contains an error and whether to fix it. This avoids unnecessary and costly appeals.

Justice Loparco relied on *CWT v KAT,* 2015 ABQB 68 to describe the Court's powers under Rule 9.13(b): (1) the Court may act only on Application by a party, (2) the Court may hear more evidence and change or modify its Judgment or Order or reasons for it, and (3) the Court must be satisfied that there is good reason to make such a change or modification.

To determine whether to admit the Plaintiffs' new evidence under Rule 9.13, Justice Loparco applied the test from *CZ v RB,* 2019 ABCA 445, and stated that the test must be used sparingly and requires consideration of whether: (a) the evidence could have been obtained earlier if due diligence had been observed, (b) the evidence is credible, (c) the evidence would have been conclusive in producing the opposite result to that earlier pronounced, and (d) the evidence in its present form was admissible under the rules of evidence.

To determine whether there was good reason to hear more evidence to modify the CME, Justice Loparco considered the factors outlined in *Aubin v Petrone,* 2020 ABQB 708: (a) The desirability of avoiding unnecessary and costly appeals; (b) The desirability of the appeal court having a fully developed factual and legal record; (c) The need for finality and certainty in legal proceedings; (d) That errors to be corrected should be objectively demonstrable (such as an incorrect statement of law or interpretation of a contract which all parties agree is incorrect); (e) The rule is not a vehicle for seeking

reconsideration of a judgment call; and (f) The threshold for a court to exercise its discretion should be high to avoid applications which are in reality, a 'second kick at the can'.

Her Ladyship held that there was good reason to hear more evidence in this case, as to avoid unnecessary and costly appeals, and to provide finality and certainty in legal proceedings.

In applying the test to admit new evidence under Rule 9.13, Justice Loparco held that the new evidence could not have been obtained earlier. The evidence was credible and admissible. However, Justice Loparco was unable to conclude that the new evidence would make the documents determined by the CME to be irrelevant, relevant. Therefore, the Plaintiffs failed to vary the CME.

BOLL V WOODLANDS COUNTY, 2021 ABQB 1002

(MANDZIUK J)

Rules 1.2 (Purpose and Intention of these Rules), 7.3 (Summary Judgment), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award), and 10.33 (Court Considerations in Making Costs Award)

The Applicant Defendants applied for costs after being successful at a Summary Dismissal Application. At the Summary Dismissal Application, Mandziuk J granted enhanced costs.

At the Summary Dismissal Application, it was clear that the Applicants were not appropriate parties to the Action. The Action was an attack on the constitutionality of a bylaw. The Defendant Applicants were the county subdivision and development appeal board and the municipal planning commission. The Court noted that when they make their decisions, they must presume the validity of the bylaws that are operational at the time. While the Court found that enhanced costs were justified during the Summary Dismissal decision, the Court did not conclude that the conduct of the Plaintiff Respondents attracted solicitor-client costs.

The Defendant Applicants sought 75% of their costs as an appropriate measure of enhanced costs. The Plaintiff Respondents argued that Schedule C costs would be appropriate.

Rule 10.29 states that successful parties are entitled to costs against unsuccessful parties, "notwithstanding the final determination of the application, proceeding or action". The general rule in Rule 10.31 is that the Court has broad discretion to make a costs award that it considers appropriate after considering the factors in Rule 10.33. The general discretion in Rule 10.31 can be read in conjunction with Rule 1.2(4) which provides a framework for the Court's application of the Rules.

There are three primary types of costs awards. Solicitor and own client (full indemnity); solicitor-client (substantial indemnity); and party-party costs (partial indemnity). Party-party costs are the usual costs awarded pursuant to Schedule C. Schedule C allows courts to award costs quickly and efficiently, however, Schedule C does not automatically apply unless the Judge chooses to utilize it. The presumption that Column 1 of Schedule C applies where a non-monetary remedy is sought is rebutted where the Court orders enhanced costs.

The weight of Alberta authority is that party-party costs should partially indemnify the successful party for 40-50% of their actual costs in cases where no wrongdoing is alleged.

Enhanced costs can be awarded where the conduct of one of the parties falls short of what is expected from a responsible litigant but does not represent the sort of egregious behaviour that attracts full indemnity costs.

The parties conceded that the Court had awarded enhanced costs at the Summary Dismissal Decision. On the facts, the Court found that an appropriate quantum for costs would be for the Plaintiff Respondents to pay 65% of assessed solicitor-client costs, plus reasonable disbursements and GST.

SONG V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2021 ABCA 361

(SLATTER, SCHUTZ, AND GRECKOL JJA)

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 5.13 (Obtaining Records from Others)

The Appellant appealed a Chambers Judge's Decision that dismissed an Action for delay, pursuant to Rule 4.31.

The Appeal Court cited *Royal Bank of Canada v Levy,* 2020 ABCA 338 ("*Levy*"), which laid out the Standard of Review applicable to a Chambers Judge's Decision concerning an Application to dismiss for delay under Rule 4.31. In *Levy* the Court stated that whether an Action should be dismissed for delay engages an element of discretion, and that deference is warranted. The Court in Levy asserted that there is no fixed methodology that must be followed in 4.31 delay Applications, and that the analysis is largely a question of fact. A decision will not be disturbed unless it discloses a palpable and overriding error.

In allowing the Appeal, and ordering the matter proceed to Trial, the Appeal Court reviewed *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 ("T*ransamerica*"), where the Court emphasized that all parties bear responsibility for managing their dispute. The Court in *Transamerica*, citing Rule 1.2, stated that the Rules expressly impose obligations on all parties to advance the Action, including engaging in timely communication. Similarly, Rule 1.2(3)(a) confirms that parties must jointly and individually facilitate the quickest means of resolving a claim. Further, Rule 4.1 states that parties are responsible for managing their dispute and for planning its resolution in a timely way. Further still, Rule 4.2 confirms that this responsibility falls on all parties.

The Court of Appeal in this case found that the Chambers Judge erred in her conclusion that the Appellant was primarily responsible for the delay in finalizing the pleadings. The Court found both parties were responsible for the delay and that a "culture of complacency" had been created between the parties.

The Court of Appeal also found that the Chambers Judge erred in her assessment that the Appellant was responsible for the delay involved in securing a third-party investigative file. While the Appellant could have expedited the process of securing the investigative file by a Rule 5.13 Application, the delay was largely beyond the Appellant's control and was, therefore, excusable.

Lastly, because the inordinate delay was attributable to both parties, the proviso in Rule 4.31(2) that where delay in an Action "is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice" was not applicable. There was no evidence of actual prejudice and, therefore, the Court found the Chambers Judge erred in her conclusion that prejudice had necessarily been shown by the long delay.

ZACHRY ENERGY INTERNATIONAL INC V SINOPEC SHANGHAI ENGINEERING CO. LTD, 2021 ABQB 969

(ROOKE J)

Rules 4.3 (Categories of Court Action), 4.31(Application to Deal with Delay), and 4.33 (Dismissal for Long Delay)

The Applicant sought to dismiss the Respondent's Counterclaim filed pursuant to Rule 4.33 or, alternatively, pursuant to Rule 4.31. The Court granted the Application to dismiss the Respondent's Counterclaim pursuant to Rule 4.31.

Rule 4.31 provides that when there is delay in an Action, the Court may dismiss all or any part of a claim, "if the Court determines that the delay has resulted in significant prejudice to a party". Rule 4.31(2) provides that: "[w]here … the Court finds that the delay in an action is inordinate and inexcusable, the delay is presumed to have resulted in significant prejudice…". This is a rebuttable presumption in law.

The Court noted there is a "presumptive ceiling of 10 years beyond which delay will be presumed to be inordinate and unreasonable" though, in this case, the Court relied on the particular facts to find inordinate delay.

The Court found that the progress of the claim was grossly beyond the time that a litigant would take noting that: the Counterclaim was nearly 14 years old; 11 years had elapsed since the end of a Standstill Agreement; questioning had still not been completed; the Respondent had not provided a Damages Brief which was a pre-requisite to finish the questioning of the Respondent; and the matter would not be set down for Trial for at minimum two years.

The Court determined that a Counterclaim, by definition, was a standard and not complex case under the Rules because neither of the parties had asserted that it was complex under Rule 4.3 and the Court had not declared it as such.

The Court, in finding for the Applicant, found that there was no justification for the inordinate delay and there was significant prejudice to the Applicant as the delay had weakened the memories of several witnesses.

LONCIKOVA V GOLDSTEIN, 2021 ABCA 390

(MCDONALD, KHULLAR, AND FEEHAN JJA)

Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay), and 14.5 (Appeals Only with Permission)

The parties had previously filed a Form 37 and set a Trial date. Because of new evidence brought by the Appellant, the Parties entered into a Consent Order adjourning the Trial *sine die* and permitting the parties to obtain a new Trial date once the evidentiary issues had been resolved.

Several years passed and the Respondent applied to a Master for dismissal for long delay pursuant to Rule 4.33. The Master made a preliminary Order stating that a Master has jurisdiction to hear an Application to dismiss for long delay notwithstanding that a Form 37 has been filed and Trial date has been adjourned *sine die* by Consent Order.

The Master's Order was upheld on appeal to a Justice in Chambers. The Appellant appealed the Justice's decision to the Court of Appeal.

The Appellant raised five Grounds of Appeal: 1. whether the Chambers Judge's refusal to consider the written Brief of the Appellant was contrary to natural justice; 2. whether the Chambers Judge erred in law in finding that a Master has jurisdiction to hear a delay Application that would have the effect of varying or rescinding an Order of a Justice, contrary to s. 9(1)(a)(i) of the *Court of Queen's Bench Act*, RSA 2000, c C-31 (the "*Act*"); 3. whether the Chambers Judge erred in law in finding that a Master has jurisdiction to hear a delay Application in a Trial matter, contrary to s. 9(3)(a) of the *Act*; 4. whether the Chambers Judge erred in law in not finding that the effect of the Consent Order was that the Action had been adjourned by Order within the meaning of Rule 4.33; and 5. whether the Chambers Judge erred in law by allowing a pre-Trial Application to dismiss for delay after both parties had certified and filed a Form 37.

The Respondent argued that the first Ground of Appeal was not properly before the Court because the Applicant had never obtained permission to Appeal pursuant to Rule 14.5(1)(b). The Court disagreed that permission was required because the substance of this Ground of Appeal was not the denial of an Adjournment, as suggested by the Respondent. In any event, the Court declined to decide the question because the Appellant raised four further Grounds of Appeal which were characterized as errors in law, reviewed on a standard of correctness. The Court therefore held that any breach of natural justice would have no material effect on the outcome of the Appeal.

The Court dismissed the second Ground of Appeal on the basis that the Master's dismissal did not vary or rescind the Consent Order. The Consent Order provided that the Action needed to be rescheduled for Trial, which did not occur. It did not have any effect on the operation of Rule 4.33.

The Court dismissed the third Ground on the basis that a dismissal Application is not a "Trial matter" as contemplated by the *Act*. A dismissal Application, as evidenced by the location of Rule 4.33 in the Rules, is inherently a pre-Trial matter.

With regard to the fourth Ground of Appeal, the Court stated that pursuant to Rule 4.33(2)(a), Rule 4.33 does not apply when "the action has been stayed or adjourned by an order". The Court dismissed this Ground of Appeal on the basis that the Consent Order adjourned the

Trial, but not the Action itself. The parties were left to resolve outstanding issues and carry on with the litigation, which the Appellant failed to do.

On the fifth Ground of Appeal, the Court held that the initial Form 37 was ineffective to provide a new Trial date and was therefore not operative and did not prevent the Master from granting dismissal pursuant to Rule 4.33.

The Court held that the Appellant's position would mean that once a Form 37 was filed, and an Order adjourns the Trial date sine die, a party could wait for longer than three years, do nothing, and suffer no consequences. Such an interpretation would be contrary to the principles set out in Rule 1.2.

The Court, therefore, dismissed the Appeal.

CHAK V LEVANT, 2021 ABQB 946

(LEONARD J)

Rules 1.3 (General authority of the Court to provide remedies), and 13.6 (Pleadings: General Requirements)

The Plaintiff sued the Defendants in defamation. The Defendants did not dispute whether the statements were defamatory, and the Court determined that the defence of justification had not been made out. The Defendants asserted that general, aggravated, and punitive damages could not be awarded because they were not pled. The Court ultimately found that they could be awarded.

The Court confirmed that, pursuant to Rule 1.3(2) it had broad jurisdiction to award damages. Justice Leonard considered that Rule 13.6(2)(c) requires that a pleading state the type of damages claimed and the precise amount of punitive damages sought is less important "so long as the amount pleaded does not impair trial fairness."

KNELSEN SAND & GRAVEL LTD V HARCO ENTERPRISES LTD, 2021 ABCA 385

(ROWBOTHAM, VELDHUIS, AND WAKELING JJA)

Rules 1.3 (General Authority of the Court to Provide Remedies), and 3.65 (Permission of Court for Amendment Before or After Close of Pleadings)

The Appellants appealed Judgment against them for breach of contract. One of the Appellants' grounds of appeal was that the Trial Judge improperly awarded the Respondent damages for certain unpaid invoices (the "Unpaid Invoice") as such damages were not expressly claimed in the Respondent's Amended Statement of Claim (the "Claim").

The Court noted that Courts should generally avoid granting remedies that are not expressly or implicitly sought in the pleadings. The pleadings inform the parties and the Court of the

facts on which the plaintiff bases its claim, and the defendant bases its defence. However, the Court also noted that section 8 of the *Judicature Act,* RSA 2000, c J-2 and Rule 1.3(2) provides Courts with a discretionary power to grant remedies that are not claimed or sought in the pleadings if it is fair and just to do so.

The Court found that the Claim made it sufficiently clear that the Respondent claimed for the Unpaid Invoice and dismissed this ground of appeal.

HML CONTRACTING LTD V TWISTED PAIR TECHNICAL SERVICES INC, 2021 ABQB 899

(HARRIS J)

Rules 1.4 (Procedural Orders), and 14.48 (Stay Pending Appeal)

The Plaintiff was granted Summary Judgment against an individual Defendant, which the Defendant appealed to the Court of Appeal. Pending the determination of the Appeal, the Defendant applied for a Stay of Execution of the Judgment.

Rather than applying under Rule 14.48, the Defendant applied under section 17 of the *Judicature Act*, RSA 2000, c J-2 citing the Court's inherent jurisdiction and discretion to grant Stays of Execution of its own judgments. Nevertheless, Madam Justice Harris noted that Rule 1.4(2)(h) also gave the Court authority to "adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order".

Madam Justice Harris denied the Application for a Stay of Execution because the Applicant failed to establish that there exists a "plausible counterclaim or set off" or "exceptional circumstances" required for such a Stay pursuant to Rule 1.4.

MATTA V MATTA, 2021 ABQB 826

(HARRIS J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.68 (Court Options to Deal with Significant Deficiencies), 6.3 (Applications Generally), 6.12 (If Person Does Not Get Notice of Application), 12.43 (Application of Part 6, Division 1), and 12.44 (Application Within Course of Proceeding)

This was an Application brought pursuant to Rule 3.68(4), to strike parts of two Affidavits ("Application to Strike"), both of which had been filed in the context of an Application to extend a Queen's Bench Protection Order ("Application to Extend").

Mr. Matta was the Defendant, Applicant in the Application to Strike, and Respondent in the Application to Extend. The Plaintiff, Ms. Matta,

was the Respondent in the Application to Strike and Applicant in the Application to Extend.

Contrary to the requirements set out in Rules 6.3, 12.43 and 12.44, Mr. Matta failed to provide notice of the Application to Strike; he did not serve a filed Application and accompanying Affidavit. Instead, he informally communicated to Ms. Matta's Counsel a general objection to certain Exhibits and sought to strike portions of the Affidavits during the course of oral argument in respect of the Application to Extend. Ms. Matta objected to the Application to Strike on the basis that she had not received any, or any proper, notice of the Application or the grounds on which it was based.

After surveying case law considering Rule 6.3, which lays out service requirements, the Court concluded that Mr. Matta's Application should fail on the basis of non-compliance with that Rule.

Noting Mr. Matta's failure to give adequate notice notwithstanding that he had several months to voice his objections, the Court further held that the Application to Strike should be dismissed, pursuant to Rule 1.5(2), which requires that an Application to set aside based on a Rule contravention be brought within a reasonable time. The Court held that Mr. Matta's informal objection to certain Exhibits did not constitute adequate notice of the Application to Strike, as the objection did not comply with the Rules, was far narrower than the complaints later raised, and failed to convey information necessary for Ms. Matta to prepare a meaningful response.

Notwithstanding these conclusions, the Court went on to consider the Application to Strike, pursuant to Rule 6.12(c), which allows the Court to decide an Application even if the Respondent had not been served. Ultimately, the Court held that, while it was appropriate for both the Application to Extend and the Application to Strike be heard by the same Judge - who would be well-positioned to consider issues such as admissibility and weight - adequate notice remained a necessity, particularly in light of the short time allocated for hearing of the Application to Extend. Accordingly, the Court refused to grant the Application to Strike and invited Mr. Matta to file and serve a proper Application and accompanying Affidavit in advance of the now-adjourned Application to Extend - to be heard in conjunction with the Application to Extend.

LUX V LUX, 2021 ABCA 413

(KHULLAR, PENTELECHUK, AND KIRKER JJA)

Rules 2.11 (Litigation Representative Required), 2.15 (Court Appointment in Absence of Self-Appointment)

The Appeal arising from a pension division Order was scheduled to be heard prior to the death of the Respondent. The Appeal was adjourned to allow counsel to, amongst other things, bring an Application to appoint a litigation representative of the estate.

The Court noted that an estate must have a litigation representative to bring or defend an Action, or otherwise participate in an Action pursuant to Rule 2.11. Where an estate does not have a litigation representative, the Court may appoint one pursuant to Rule 2.15(2).

The deceased's will appointed an executor; however, the beneficiary of the estate agreed to be appointed as litigation representative to defend the Appeal.

The Appellant refused to consent to the Order appointing the beneficiary as litigation representative on the belief that the litigation representative must be a lawyer. The Court held that was not correct and appointed the beneficiary as litigation representative under Rule 2.15 for the limited purpose of responding to the Appeal.

THOBANI V CHAHAL, 2021 ABQB 919

(EAMON J)

Rules 3.2 (How to Start an Action), 3.9 (Service of Originating Application and Evidence) and, 9.15 (Setting Aside, Varying and Discharging Judgements and Orders)

This decision arose from an Application brought to set aside a Default Judgment pursuant to Rule 9.15(1).

The Court considered the three-part test for setting aside a default judgment under Rule 9.15, specifically: (i) that there be an arguable defence; (ii) that the Defendant did not intend to allow the judgment to go by default and offers some reasonable excuse for the default such as illness or a solicitor's inadvertence; and (iii) that once the noting in default came to the Defendant's attention, they promptly applied to set it aside.

The Court noted that setting aside a default judgment does not require satisfaction of each part of the test, but rather the Court is obligated to grant relief where fairness requires it. Additionally, the Court clarified that Rule 9.15(1) mandates proof of insufficient notice or failure to appear through accident or mistake and that Rule 9.15(2) imposes the corresponding time-limitation to bring an Application to which Rule 9.15(1) applies.

The Court determined that the Applicants' failure to appear was due to insufficient notice on the part of one Applicant (where he was out of the country, not accessing his email and social media, and service was shorter than the time period prescribed by Rule 3.9) and, on the part of the other to Applicants, they failed to appear due to accident or mistake.

The Court additionally found that the Applicants acted reasonably promptly notwithstanding the fact the Application was not filed in accordance with the time frame in Rule 9.15(2); the Respondents had notice that the Judgment would be challenged well before counsel for the Applicants filed the Application to set aside.

The Court set aside the Judgment.

The Court further determined that the Claim should have been started by Statement of Claim in accordance with Rule 3.2(2)(a) and that the Court was entitled to correct this pursuant to Rule 3.2(6) where the Applicant borrower could assert his limitations defence.

METIS NATION OF ALBERTA ASSOCIATION LOCAL COUNCIL #63 V ALBERTA (CORPORATE REGISTRY), 2021 ABQB 982

(MAH J)

Rules 3.2 (How to Start an Action), and 3.12 (Application of Statement of Claim Rules to Originating Applications)

This was an Application under Rule 3.12 to convert an Action started by Originating Application to a Statement of Claim.

The Court noted that Rule 3.2 requires that an Action must be started by way of Statement of Claim unless there is no factual dispute where an Originating Application may be utilized. The Applicant claimed there were substantial factual disputes and, therefore, the Originating Application Action must be converted to a Statement of Claim Action using Rule 3.12.

The Court found the Applicant's proposed Statement of Claim introduced "whole new areas of inquiry" which in its view were not relevant to a determination of the Originating Application. The Court dismissed the Applicant's Application.

LANGEVIN V AURORA CANNABIS INC, 2021 ABQB 887

(HOLLINS J)

Rule 3.31 (Statement of Defence)

The Plaintiffs filed a prospective Class Action lawsuit against a host of cannabis industry companies. The Applicant Defendants, collectively applied for an Order deferring their obligations under Rule 3.31 to file Statements of Defence until after the Certification Hearing was heard and decided.

The normal rule is that Statements of Defence are due before the Certification Hearing. The Court cited *Poundmaker Cree Nation v Canada*, 2017 FCC 445 for principles guiding the Court for a decision to defer the filing of Defences. These principles are: a) The decision is discretionary; b) That discretion should balance flexibility with efficiency and fairness; c) The burden of justifying the deferral lies on the Defendant; and d) Factors to consider may include whether the Statement of Defence is helpful to the Certification process, the cost and time involved in filing Defences, the nature and complexity of the matter, and any prejudice to the Plaintiff.

The Court agreed with the Plaintiffs that the filing of Defences may assist the Plaintiffs and the Court in preparing for the Certification Hearing. The Court noted that Certification is not a decision on the merits of the claims and thus Defences may not be necessary to examine whether the Statement of Claim discloses a cause of action; however, the question is not whether Defences are necessary but whether they are likely to be helpful. The Defendants filed Affidavits for the Certification, but Affidavits are not pleadings and under-

standing the legal claims and defences may be helpful to the Court in analyzing the causes of action pleaded.

On the facts, the Court decided that the benefits of having complete pleadings outweigh the balance of work for the Defendants in drafting their Statements of Defence. To prepare their evidence for the Certification Hearing, the Defendants would have to formulate their defences, whether in the form of a filed pleading or not.

The Court dismissed the Defendants' Application to defer filing of the Statements of Defence.

ROY V ROY, 2021 ABQB 788

(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 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, Rooke ACJ concluded that the Plaintiff 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 Plaintiff's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c). This was an Application, pursuant to Rule

GRANDIN PARK PROPERTIES INC V 803677 ALBERTA LTD, 2021 ABQB 805

(NEILSON J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.31 (Application to Deal with Delay), 5.17 (People who may be Questioned), and 7.3 (Summary Judgment)

This decision arose from an Application by the Plaintiff to strike the Statement of Defence for spoliation of evidence and for Summary Judgment. In the alternative, the Plaintiff sought Questioning of an accountant. The Individual Defendant cross-applied to strike the Statement of Claim for inordinate and inexcusable delay.

The Court held that the issues relating to the claims of spoliation were best left for Trial. As such, none of the conditions for an Order striking a Statement of Defence as set out in Rule 3.68(2) were met. There was no issue with respect to jurisdiction, a reasonable defence to the claim was pleaded, the pleading was not frivolous, irrelevant or improper, nor did it

constitute an abuse of process.

The Court rejected the Plaintiff's request for Summary Judgment pursuant to Rule 7.3, determining that there were several triable issues that should be heard by a Judge.

The Court also considered the Individual Defendant's Application to dismiss the Action for delay pursuant to Rule 4.31 and noted that, while the delay may inordinate, it was not inexcusable. There were periods where the delay was attributed to the Defendant and, as such, the Action was not dismissed for delay.

The Plaintiff also sought to Question the accountant of the Corporate Defendant. The Court held that it was not clear what legal basis would permit the Questioning of the accountant pursuant to Rule 5.17 as he was not the Individual Defendant's accountant and Summary Judgment had previously been obtained as against the Corporate Defendant. The Questioning of the accountant, however, was not before the Court and was a matter pursued pursuant to an adjournment order. Accordingly, the Court made no Order on Questioning.

BENISON V MCKINNON, 2021 ABQB 843

(MASTER SUMMERS)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Application, pursuant to Rule 3.68, to strike a Statement of Claim for failure to disclose a reasonable cause of action and abuse of process.

The Plaintiffs were an RCMP officer posted in Jasper, Alberta and his spouse. At the relevant time, the Plaintiffs leased a home from the Government of Canada pursuant to the *Canada National Parks Act* (the "Act"), which, among other things, required that the Plaintiffs reside at the property for the duration of the lease. Despite the residence requirement imposed under the Act, the Plaintiffs, who were travelling for an extended period, enlisted house sitters to look after their home, whom they charged rent. The Defendants, one of whom was a fellow RCMP officer and one of whom was a Parks Canada employee, learned of the Plaintiffs' arrangement and took steps to lodge formal complaints against the Plaintiffs. As a result of the complaints, the Plaintiff RCMP officer was subjected to a formal professional review and found guilty of unprofessional conduct. In their Claim, the Plaintiffs stated that the Defendants' efforts to investigate their housesitting arrangement, and lodge the complaints, were beyond the scope of their authority and constituted a deliberate attempt by the Defendants to interfere with the Plaintiffs' private affairs, harass the Plaintiffs and prompt the Plaintiff RCMP officer to resign or render him medically incapable of performing his duties. The Plaintiffs sought remedies against the Defendants on the basis of torts of breach of privacy, harassment and conspiracy. The Defendants applied to strike the Action.

Applying Rule 3.68, the Court considered each theory of recovery in turn, ultimately concluding that the facts, as pled, were insufficient to ground any of the alleged torts. Moreover, the Court observed that neither the tort of breach of privacy, nor the tort of harassment have been recognized by Alberta Courts, and that the Claim constituted a collateral attack on the RCMP's internal conduct process and was therefore an abuse of process, as contemplated in Rule 3.68(2)(d). In the result, the Court struck the Action.

MILLER V ALBERTA (HUMAN RIGHTS COMMISSION), 2021 ABQB 852

(NIELSEN ACJ)

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

The Plaintiff had filed a Statement of Claim that was identified as an Apparently Vexatious Application or Proceeding ("AVAP"). The Plaintiff was ordered to provide, within 14 days, a written submission for a CPN7 show-cause document-based review under Rule 3.68.

The Plaintiff wrote to Nielsen ACJ stating that he decided not to defend the Statement of Claim in the AVAP proceeding and asked that his Statement of Claim be struck without financial penalty.

Due to the Plaintiff's acknowledgment that there was no basis for the lawsuit, the Statement of Claim was struck out as an abuse of the Court.

The Court noted that when an Action is terminated via the CPN7 process, the usual practice is to award costs in favour of the litigant who referred the matter to the Court. However, good faith and positive litigation conduct should be acknowledged and encouraged. As such, the Court did not make a Costs Order against the Plaintiff.

The Plaintiff was cautioned that this was the second time that the Court had determined that a lawsuit he filed against government actors was an abuse of the Court and its processes and that repeated abusive litigation may result in serious litigation consequences in the future.

The Plaintiff's approval of the Order was not required pursuant to Rule 9.4(2)(c).

SCHEUCHNER V NEUFELD, 2021 ABQB 863

ROOKE ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders), and 13.45 (Notice to be Given to Court Officers)

This Decision addressed the Applicant's request to file additional materials in an Action terminated pursuant to Rule 3.68 and Civil Practice Note No. 7. Civil Practice Note No. 7 governs Court response to so-called Apparently Vexatious Applications or Proceedings ("AVAP").

In an earlier Decision, Rooke ACJ concluded that the Proceeding satisfied the criteria of an AVAP and ordered that the Applicant "show cause" as to why his Action should be continued, failing which, the Action would be struck pursuant to Rule 3.68. The Applicant failed to respond and the Action was struck. Subsequently, the Applicant filed materials labelled "Writ of Mandamus (EX-PARTE ORDER)", together with a very lengthy Affidavit. The Applicant also delivered materials directly to Rooke J, explaining his

failure to "show cause," as previously ordered.

The Court concluded that the Applicant's request could not be honoured, as the Action had been struck, thereby rendering the Court *functus*, and further, and in the alternative, the new materials continued to satisfy the AVAP criteria. The Court directed that, if the Applicant wished to challenge its earlier decision, he could so by way of Appeal to the Court of Appeal.

In conjunction with dismissal of the Applicant's request, the Court ordered that notice be given to the Court Clerks, pursuant to Rule 13.45, that no further materials should be accepted in relation to the struck Action. The Court further noted that the Order would not require the Applicant's approval, pursuant to Rule 9.4(2)(c).

PRODANIUK V CALGARY (CITY), 2021 ABQB 906

(EAMON J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants applied to strike the Plaintiff's claim under Rule 3.68(2)(a), which allows the Court to strike a claim in cases where the Court has no jurisdiction or alternatively, under Rule 3.68(2)(d), which allows the Court to strike a claim for abuse of process.

The Plaintiff's claim was a labour dispute. The Defendants' position was that a labour arbitrator or the Alberta Labour Relations Board had exclusive jurisdiction.

The Court can only strike a Statement of Claim under Rule 3.68(2)(a) and (d) if it is plain and obvious that the Court has no jurisdiction, after considering evidence on the surrounding facts (as stated in *Kniss v Stenberg*, 2014 ABCA 73). This is a different test than the more commonly used one for Rule 3.68(2)(b) applications, which are concerned with whether the pleadings disclose a reasonable cause of action. In an Application for Rules 3.68(2)(a) and 3.68(2)(d), the Court may consider evidence and the Court does not have to assume every fact plead is true.

When considering whether the Court has jurisdiction, the Court will apply the "exclusive jurisdiction model." This means that when a statute sets out a labour dispute resolution process that is final and binding, the Court will defer to that process. However, if the dispute does not expressly or inferentially arise out of the collective agreement, then the Court may hear it.

The nature of the dispute will be defined by its "essential character." Some aspects of alleged conduct may arguably extend beyond the ambit of the agreement but might not alter the essential character of the dispute.

The Court here found that the essential character of the Plaintiff's claim was within the ambit of the collective agreement's dispute resolution regime. As such, the Court did not have jurisdiction and the Plaintiff's claims must go to the Alberta Labour Relations Board.

ALBERTA UNION OF PUBLIC EMPLOYEES V HER MAJESTY THE QUEEN (ALBERTA), 2021 ABCA 416

(SLATTER, VELDHUIS AND HO JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Appeal concerning the standing of the Respondents to challenge the constitutionality of the *Critical Infrastructure Defence Act,* SA 2020, c C-32.7 specifically where the challenge is based only on hypothetical scenarios without a factual platform established by evidence. The Appellant brought an Application to strike out the Statement of Claim; it challenged both the Respondents' standing and the sustainability of the underlying claim absent a factual record.

The parties disagreed on the scope of the Appellant's Application which would impact the proper test to be applied when determining standing and the test to be applied when considering striking the Claim itself. The Appellant's submission invoked several Rules, but the parties focused on Rule 3.68.

Rule 3.68(2) lays out conditions under which the Court may, pursuant to 3.68(1), strike all or part of a pleading or stay an application. Pursuant to Rules 3.69(1) and 3.68(2), a Court may strike out all or part of a pleading and/or stay an application or proceeding where, among other things, the pleading discloses no reasonable claim or is an abuse of process.

The most commonly invoked subrule is Rule 3.68(2)(b) aimed at striking out a pleading that discloses "no reasonable claim", which triggers the proviso in Rule 3.68(3) that no evidence may be considered on the Application. On such an Application, the pleaded facts are presumed to be true.

However, the Court found that a challenge to a Plaintiff's standing is not made under Rule 3.68(2)(b); it is not an assertion that the claim does not disclose a reasonable claim or that the claim is without merit. Accordingly, Rule 3.68(3) stating that evidence will not be considered does not apply.

When standing is challenged, the Court found that, the Application sought is for a stay under Rule 3.68(1), because the action is an abuse of process under Rule 3.68(2)(d).

The Court found that there were few facts pleaded and none demonstrated by any evidence. Further, the standing issues had been resolved by the implicit admission by the Appellant that the Statement of Claim had correctly set out the Respondent's status. As a result, the Court found that the Claim as pleaded, based solely on hypothetical situations, was not an appropriate method of adjudication and the Statement of Claim should, therefore, be struck under Rule 3.68(2)(d).

The Court ultimately found that the Respondents were not entitled to public interest standing and struck the Statement of Claim.

ALBERTA ELECTRIC SYSTEM OPERATOR V KALINA DISTRIBUTED POWER LIMITED, 2021 ABCA 354

(STREKAF JA)

Rules 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings), 14.37 (Single Appeal Judges), 14.57 (Adding, Removing or Substituting Parties to an Appeal), and 14.58 (Intervenor Status on Appeal)

The Applicant applied to be added as a Respondent or, in the alternative, as an Intervenor, in an Application for permission to appeal a decision of the Alberta Utilities Commission.

Rule 14.57 states that parties may be added to an Appeal in accordance with Rule 3.74, which permits parties to be added by the Court on application where "the Court is satisfied the order should be made." The Court also has inherent power to add parties to an Appeal.

To be added as a party Respondent, the Applicant was required to satisfy the three-part test: (i) a legal interest in the matter; (ii) it is just and convenient; and (iii) its interest would be adequately protected only if it was granted party status.

Parties may be granted permission to intervene by a single Appeal Judge pursuant to Rule 14.37(2)(e) and Rule 14.58. An Applicant seeking intervenor status must establish that it will: (i) be directly and significant affected by the appeals outcome; and (ii) provide some expertise or fresh perspective that will be helpful in resolving the appeal.

Ultimately, the Court found that the Applicant demonstrated it had a legal interest in the outcome of the proceeding, including a statutory mandate to carry out its duties for the safe, reliable, and economic operation of the interconnected electric system and to promote a fair, efficient, and openly competitive electricity market. Further, it was just and convenient that the Applicant be added as a party given its mandate. As the Applicant indicated it would keep to the scheduled set for the proceedings, no delay or prejudice would result from adding the Applicant as a party. Finally, the Applicant would bring a unique and valuable perspective to the leave Application and any subsequent proceedings that may result.

BENGA MINING LIMITED V ALBERTA ENERGY REGULATOR, 2021 ABCA 363

(PENTELECHUK JA)

Rule 3.74 (Changes to Parties), and Rule 14.57 (Adding, Removing or Substituting Parties to an Appeal)

Two Applicants, a Municipal District (the "MD") and a Landowners Group (the "LG"), applied for permission to be named as Respondents, or alternatively to intervene, in three Permission to Appeal Applications.

Justice Pentelechuk noted that the Court's authority to add parties to an Appeal arises from two sources: (1) Rule 14.57, which permits the Court to add parties to an Appeal in accordance with Rule 3.74, where the Court is

satisfied that the Order should be made; and (2) the Court's inherent jurisdiction to do so in the interests of justice.

Justice Pentelechuk stated the test for party status in an Appeal as follows: (1) an Applicant must show it has a legal interest in the outcome; (2) it must be just and convenient to add the Applicant; and (3) the Applicant's interest can be adequately protected if it is granted party status.

The Court found that the MD satisfied all elements of this test and granted its Application to be named as a Respondent to one of the three Permission to Appeal Applications.

The Court found that the LG had not articulated a legal interest aside from the fact that it was granted status below, before the Alberta Energy Regulator Joint Review Panel (the "JRP"). Justice Pentelechuk noted that the JRP had broad discretion to grant standing, and that significant emphasis could not be placed on such standing in this Application, which demanded a stricter analysis.

The Court then considered the LG's alternative Application to be named as an Intervenor. Justice Pentelechuk stated that an Applicant for Intervenor status must show that it will be directly and significantly affected by the outcome and that it will provide some expertise or fresh perspective that will be helpful. The Court held that the LG's perspective was not unique from that of the MD and therefore dismissed the Application.

DENIS V PALMER, 2021 ABQB 786

(ROOKE ACJ)

Rules 4.22 (Considerations for Security for Costs Order) and 4.33 (Dismissal for Long Delay)

When faced with an Application for Spousal Support and an Application to Set Aside a Cohabitation Agreement by the Defendant/Respondent, the Plaintiff/Applicant applied to dismiss or strike pleadings of the Defendant/Respondent on the basis of long delay pursuant to Rule 4.33, or, in the alternative, Security for Costs under Rule 4.22.

Rooke ACJ began with an analysis of Rule 4.33. His Lordship noted that, pursuant to Rule 4.33, if three or more years had passed without a significant advance in the action, the Court, on Application, must dismiss the action. Rooke ACJ also noted that it followed that if three or more years had passed, any supplication under Rule 4.33 also must be dismissed. The Defendant filed her Statement of Defence and Counterclaim on May 21, 2015. On December 1, 2017, the Defendant/Respondent filed her applications for Spousal Support and to set aside the Cohabitation Agreement with leave from Justice Gill on November 27, 2017. Rooke ACJ found that this was approximately two years and six months after the Defendant/Respondent filed her Statement of Defence and dismissed the Plaintiff/Applicant's Application under Rule 4.33 as three years had not passed.

Rooke ACJ then turned to the issue of Security for Costs. His Lordship simply noted, that the evidence and law was strong on the merits of granting Security for Costs. Rooke ACJ ordered Security of Costs of $3,000, offset by $1,350 for the Defendant's success on the Rule 4.33 Application.

BALOGUN V PANDHER, 2021 ABCA 422

(ROWBOTHAM, WAKELING AND FEEHAN JJA)

Rule 4.24 - 4.30 (Formal Offers to Settle), 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Experts' Reports), and 14.45 (Application to Admit New Evidence)

The Defendant appealed a Trial Decision awarding damages and costs to the Plaintiff. The Action arose from a motor vehicle accident that resulted in multiple injuries to the Plaintiff. The Plaintiff cross-appealed on costs.

One of the grounds of appeal was that the Trial Judge failed to consider relevant evidence by refusing to admit the medical reports of four medical practitioners. The Court of Appeal held that the Defendant failed to serve the medical reports with Form 25, pursuant to Rules 5.34 and 5.35, and the medical practitioners were not called as expert witnesses. Accordingly, this ground of appeal was dismissed.

The Plaintiff sought additional costs on the basis that the damages awarded at Trial were higher than the amount sought in an informal Settlement Offer. The Court of Appeal held that informal offers may have the same costs consequences as formal offers made pursuant to Rules 4.24 to 4.30, and that the Court must be guided by the principles embodied in those Rules. Those principles include the content of the offer and the timing for service, and that an offer to settle must be a genuine offer to settle a claim. The Court of Appeal found that the Plaintiff's informal offer was not genuine, because it failed to propose settlement for the most contentious aspect of the Claim and was only open for two-and-a-half hours. This ground of appeal was dismissed.

The Plaintiff also sought to admit new evidence, pursuant to Rule 14.45(1). The new evidence was an Affidavit sworn by the Plaintiff that appended excerpts from written submissions on costs, together with evidence relevant to the Trial Judge's Costs Decision. The Trial Judge had only accepted written submissions on costs and did not accept additional evidence. The Court of Appeal found that the purpose of the Affidavit was to demonstrate factual errors in the Trial Judge's decision. The Court found that while the Affidavit did not technically include new evidence as it existed at the time of Trial, the Affidavit satisfied the other requirements for the admission of new evidence. In particular, the Affidavit related to a decisive issue, was credible, and could be expected to affect the result.

JEGOU V CANADIAN NATURAL RESOURCES LTD, 2021 ABQB 943

(POELMAN J)

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

The Defendant successfully defended an action for wrongful dismissal and sought party-and-party Costs against the Plaintiff based on 50% of its solicitors' bills plus reasonable disbursements.

Justice Poelman referred to Rule 10.29(1) and stated that a successful litigant is presumptively entitled to costs. There is a reasonable expectation that an unsuccessful party is expected to compensate the successful party even where the unsuccessful party acted reasonably throughout the litigation.

Party-and-party costs, which are costs awarded between litigants, fall intro three broad categories: (a) partial indemnity under the Schedule C tariff, (b) solicitor-client costs, and (c) solicitor-and-own-client costs.

Justice Poelman relied upon *McAllister v Calgary (City),* 2021 ABCA 25 to state that the weight of recent authorities typically limits the party-and-party costs of a successful litigant to 40 to 50% of actual costs. The 40 to 50% guideline strikes a balance between fully compensating a successful litigant and the "chilling effect" of a cost award on an individual who was unsuccessful in claiming against a major corporation.

In making the cost award, Justice Poelman considered the following factors in Rule 10.33(1): (a) result of action and success of either party; (b) amount claimed and amount recovered; (c) importance of issues; and (d) complexity of the action. The main factors were that the amount claimed was not large and the issues were not complex. Combined with the fact that the parties were far from equal in their resources, Justice Poelman held that costs based on 40 to 50% of the Defendant's legal fees would be excessive in this case, and instead awarded costs under Schedule C, Column 3.

RIEHS ESTATE (RE), 2021 ABQB 821

(ARMSTRONG J)

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

The Applicants applied for dismissal for long delay pursuant to Rules 4.31 and 4.33. The Respondent was named a joint personal representative of her mother's estate (the "Estate") after her mother (the "Deceased") died.

The Court noted that Rules 4.31 and 4.33 are intended to address litigation delay. Rule 4.33 requires the Court, on application, to dismiss the Action against an applicant where three or more years have passed without a significant advance in the Action. Rule 4.31 allows the Court to dismiss an Action where a delay has resulted in significant prejudice to a party.

The Court dismissed the Action pursuant to Rule 4.33 and, therefore, did not consider the effect of Rule 4.31. The Court determined that the last significant step in the litigation was a Case Management Conference that occurred on July 31, 2017. While Orders granted at the Case Management Conference were formally filed after that date, the Court did not consider the filing of these Orders to significantly advance the Action as they took effect when pronounced and not upon filing. The Court also did not consider collecting records or serving a Notice of Appointment for Questioning on an Affidavit from 2017 to significantly advance the Action.

ROSS V RANCHO REALTY (EDMONTON), 2021 ABQB 921

(MASTER SUMMERS)

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

The Applicants were the Defendants in two unrelated Actions. In both Actions, the Defendants applied for dismissal for delay under Rule 4.33 or alternatively, under Rule 4.31. The unrelated Actions were brought together because counsel for both Actions were the same and the two Actions proceeded in lockstep with respect to the latter steps taken.

The Court noted that Rule 4.33 provides that the Court must dismiss an Action if three or more years have passed without a significant advance in the Action. The Defendants alleged that responses to undertakings given by the Plaintiffs was the last significant advance in each Action.

The Defendants waited to file the Application until August 13, 2021, which would be three years plus 75 days after the last response to undertakings was received. They allowed for extra days due to Ministerial Order 27/2020. The Court summarized the key provisions of Ministerial Order 27/2020 as follows:

Limitation periods are suspended in the enactments under Appendix A from March 17, 2020, to June 1, 2020;

Any period of time within which any step must be taken in any proceeding or intended proceeding is suspended subject to the discretion of the Court, tribunal, or other decision-maker from March 17, 2020, to June 1, 2020; and

For clarity, the limitation period or period of time resumes running on June 1, 2020 and the temporary suspension period shall not be counted.

The Defendants stated that the second paragraph was operative because the time period of three years in Rule 4.33 is not a limitation period. The Court noted that the Court of Appeal has stated that "Rule 4.33 functions like a limitations period". However, the Court did not decide if Rule 4.33 creates a "limitation period" because the second paragraph states that any period of time is suspended, subject to the discretion of the Court. This means that while the Court has discretion to take away the suspension, the starting point is that a suspension is available. In the circumstances, there was no compelling reason to exercise discretion to take away the 75-day suspension under the second paragraph of Ministerial Order 27/2020.

The Plaintiffs argued that a procedural Order approving a Litigation Plan in the first Action was a significant advance in the Action. The Court found that the procedural Order did not significantly advance the Action considering its nature, value, importance, and quality. It was apparent that the procedural Order was not required to advance the litigation and that the Defendants were the ones who repeatedly tried to move the Action forward while the Plaintiffs did not respond.

The first Action was dismissed for delay pursuant to Rule 4.33.

The Plaintiffs argued that a procedural Order approving a Litigation Plan in the second Action was a significant advance in the Action. Additionally, the Plaintiffs argued that they were unable to file an expert report until the Defendants scheduled additional Questioning. Again, the Court found that this was not a significant advance of the Action. As in the first Action, the Defendants were the ones who were most active in attempting forward the Action. The Defendants also made an offer of settlement to which the Plaintiffs did not responded.

The Court asked counsel to provide written submissions on Rule 4.34 because one of the personal representatives of the Plaintiff's estate in the second Action had died. Rule 4.34 stays proceedings when an Action is transferred to another person upon death. The Court found that Rule 4.34 does not prevent a Rule 4.33 Application nor does the period of stay count under a Rule 4.33 Application.

The second Action was also dismissed for delay pursuant to Rule 4.33.

JACOBSEN V WAWANESA MUTUAL INSURANCE COMPANY, 2021 ABQB 938

(KACHUR J)

Rules 4.31 (Application to Deal with Delay), and 6.14 (If Person Does Not Get Notice of Application)

The Applicant appealed a Master's decision denying its Application to dismiss the Respondent's Action for inordinate delay. The Respondent argued that the Appeal was time-barred pursuant to Rule 6.14.

Pursuant to Rule 6.14(2), a Notice of Appeal must be entered and served within 10 days after the Order is entered and served. The Master's Order was signed on October 28, 2020, but was not entered by the Court until nearly a month later. When the Court returned the Order, it was incorrectly stamped with a filing date of October 23, 2020. The Applicant sent a Notice to Appeal for filing on December 8, 2020, but the Notice of Appeal was rejected. After an endorsement from Rooke ACJ, the Notice of Appeal was filed on December 18, 2020, and served on December 21, 2020, along with the original Order. The Applicant argued that, since the Order was not served until December 21, 2020, the Notice of Appeal was not time-barred.

The Court held that the Appeal was not barred by Rule 6.14. The Court found that the efficiency of the Court's filing process was significantly compromised by the COVID-19 pandemic. The electronic filing system that the Court implemented contributed to longer delays and increased error rates in document filing. In this case, the Order was not properly filed when it was signed, and an incorrect filing date was applied when it was filed a month later. The Court also found that since the Applicant was directed to prepare the Order, the Applicant

had control over when the Order would be filed and served. The Notice of Appeal was also served at the same time as the actual Order.

The Court allowed the Appeal and dismissed the Respondent's Action for inordinate delay pursuant to Rule 4.31. Kachur J. confirmed that a Court may dismiss an action where the delay has resulted in significant prejudice to the Defendant. Where the delay is inordinate, it is presumed to cause significant prejudice, unless the prejudice is rebutted by the Plaintiff. A Court may consider the factors outlined in Rule 4.31(2). The Court found that more than 10 years had passed since the Statement of Claim was filed. The only major steps in the file included serving the Respondent's Affidavit of Records, Questioning of the Applicant, and the addition of a new Plaintiff.

The Court held that while a 10-year delay has been deemed a presumptive ceiling whereby delay can be presumed to be inordinate, each case must be assessed on its own facts. In this case, there was no compelling explanation for the delay in the action. Kachur J. also found that the delay caused significant prejudice and the Respondent failed to provide any evidence rebutting the significant prejudice resulting from the delay.

The Court held that it was appropriate to dismiss the Claim despite the new Plaintiff being a party to the action for only three years. The Court held that when a new Plaintiff is added, the new Plaintiff accepts the same responsibilities of the original Plaintiff. The new Plaintiff had an obligation to move the matter forward, but the delay continued without any excuse.

ARMITAGE V ALBERTA, 2021 ABQB 831

(MASTER SCHLOSSER)

Rule 4.33 (Dismissal for Long Delay)

The Applicant applied to dismiss an Action for long delay pursuant to Rule 4.33. Rule 4.33 requires the Court, on application, to dismiss the Action against an Applicant where three or more years have passed without a significant advance in the Action.

The Respondent served an Affidavit of Records listing more than 1,700 producible records. Over two months later, the Respondent provided the records to the Applicant in electronic format. The parties agreed that serving the AOR significantly advanced the Action but disagreed as to whether providing the records in electronic format did so.

After reviewing cases, the Court determined that whether an event constitutes a significant advance is considered in context using a functional approach. The Court also noted that a party's documents are technically produced when the AOR is prepared and served, but that it is more aligned with the practicalities of modern litigation to provide records in electronic format rather than appearing in person to review paper copies individually. As such, the Court determined that providing the records in electronic format significantly advanced the Action and dismissed the Application.

SIGNALTA RESOURCES LIMITED V CANADIAN NATURAL RESOURCES LIMITED, 2021 ABQB 867

(SIDNELL J)

Rules 5.4 (Appointment of Corporate Representatives), 5.17 (People Who May Be Questioned), 5.27 (Continuing Duty to Disclose), 5.29 (Acknowledgment of Corporate Witness's Evidence), 5.30 (Undertakings), and 5.31 (Use of Transcript and Answers to Written Questions)

The Defendant sought to set aside undertaking read-ins presented as part of the Plaintiff's evidence because it had provided an updated response to those undertakings. Before Trial, the Defendant replaced its corporate representative due to retirement. The new corporate representative altered undertaking responses that the former corporate representative had made. The Plaintiff sought to rely on read-ins from the original answers.

Rule 5.31(3) allows an additional portion of a transcript or undertaking to be read-in to provide more context so that the original read-in is not misleading. Neither party in this case could explain how the additional information could be, or would not be, misleading.

Rule 5.29(1) permits evidence given by a corporate witness when the corporate representative acknowledges the evidence as the evidence of the corporation. Under Rule 5.4(3), the former corporate representative's evidence was the evidence of the Defendant. Rule 5.30(1) provides for undertakings which can be subject to cross-examination and a transcript can be produced.

The corporate representative has an obligation under Rule 5.4(2) to be reasonably prepared to answer questions. The former corporate representative had done so.

However, Rule 5.27 (1) allows corrections. These corrections must be made by affidavit and served on the other parties as soon as practicable after the person realizes that the answer was, or has become, incorrect or misleading. In this case, the Defendant did not comply with Rule 5.27 and issued the corrections only five days before Trial, providing the Plaintiff no opportunity to cross-examine on the corrections.

As a result, the Court disallowed the amended responses to undertakings.

BANOVICH V BANOVIC, 2021 ABQB 790

(BURROWS J)

Rules 5.17 (People who may be Questioned), 5.18 (Persons Providing Services to Corporation or Partnership), 5.33 (Confidentiality and Use of Information), 5.37 (Questioning Experts Before Trial), and 6.8 (Questioning Witness Before Hearing)

The Defendant applied for a Declaration that the Plaintiff had breached Rule 5.33 by using transcripts of the Questioning of the Defendant in another Action. The Plaintiff cross-applied for after-the-fact permission to use the Questioning transcript in another Action.

The Plaintiff was engaged in two separate ongoing Actions: (1) the present Action, for divorce and division of matrimonial property; and (2) an Action in Unjust Enrichment against the Defendant's adult son.

The Plaintiff filed portions of the transcript from Questioning of the Defendant in this Action in the Unjust Enrichment Action.

Justice Burrows turned to a discussion of Rule 5.33, which codifies the implied undertaking of confidentiality in respect of information obtained through Questioning. His Lordship stated that Rule 5.33 mitigates the imposition on the party required to submit to Cross-Examination before Trial by requiring that the evidence given on Questioning be kept confidential except for the uses that the party who did the Questioning is permitted to make of it at Trial.

Justice Burrows held that, while the Plaintiff's conduct was clearly a breach of Rule 5.33, it was only a technical breach and was done by a self-represented litigant who may not appreciate the operation of the Rule.

His Lordship also considered the Plaintiff's argument that the Defendant in this Action was not someone who could be questioned in the Unjust Enrichment Action as specified in Rules 5.17 (which identifies who can be questioned), 5.18 (which allows Questioning of a person who has provided services for a corporation), and 5.37 (which discusses pre-Trial Questioning of experts). The Court patently disagreed with this argument and stated that the Defendant could be subject to Questioning pursuant to Rule 6.8. This rule allows a person to be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the Application.

In the result, the Court held that since the Plaintiff's breach of Rule 5.33 was merely technical, no consequences should flow from it. The Court disposed of both Applications by ordering that the Plaintiff not make use of the transcripts from this Action in any other Action unless she complies with the requirements of Rule 5.33.

WADE V WADE, 2021 ABQB 865

(LEMA J)

Rules 6.3 (Applications Generally), 10.51 (Order to Appeal), 10.52 (Declaration of Civil Contempt)

The Court needed to determine what the process for obtaining an Order finding a party in Civil Contempt was. The Applicant asserted that its Application set the stage for a contempt finding. The Respondents stated that the relief sought in the Application was limited to a show-cause Order, with a contempt finding (if any) necessarily downstream.

Arising from non-compliance of a prior order of the Court, the Applicant filed an Application, styled, in part, under Form 27, Rules 6.3 (which lays out the requirement for Applications), and 10.52(1), (which discusses requirements for an Application seeking a declaration of civil contempt). The Applicant sought an Order pursuant to Rule 10.51 for the Respondents to appear before the Court to show cause that they should not be held in civil contempt of Court. The Respondents argued that compliance of the prior Order was not possible and that no contempt findings could be made at the hearing of the Application, given the clear show-cause nature of the relief sought, as opposed to determination of contempt.

The Court noted that an interested person perceiving that another or others are in civil contempt faces a two-stage process: (1) an initial application (per Rule 10.51) where allegations of contempt are raised and, if apparent or ostensible contempt is shown, a "show cause" order can be issued; and (2) the "show cause" hearing itself, conducted pursuant to Rule 10.52.

The express wording of the Application described "remedy" as a Rule 10.51 "show cause" Order. Accordingly, the Court found that it was at the stage of determining whether a Show-Cause Order should be issued. The Court then issued an Order that directed the Respondents to appear before Lema J to show cause why they should not be declared to be in civil contempt of Court.

CAMPBELL V PARADISE PETROLEUMS LTD, 2021 ABQB 864

(PRICE J)

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

The Applicant applied for an Order for Summary Judgment pursuant to Rules 7.2 and 7.3. The Order was granted by a Master; the Respondent appealed.

Justice Price held that Rule 6.14 governs appeals from a Master's decision. His Lordship confirmed that an appeal from a Master's decision is *de novo* and that the standard of review is correctness. The Court also confirmed that Rule 6.14(3) allows the Court to consider additional evidence that is relevant and material. The appeal before Justice Price did not include any additional evidence. Justice Price

held that where the record before the Court is unchanged, the Judge may frame his or her reasons with reference to the Master's decision, and particularly where the Judge agrees with those reasons.

Justice Price upheld the Master's decision that the Application was suitable for Summary Judgment pursuant to Rules 7.2 and 7.3. The Court confirmed that the Alberta Court of Appeal's decision of *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 is the leading case in Alberta on Summary Judgment. Justice Price held that the Application was appropriate for Summary Judgment because the parties agreed on many of the essential facts of the Action, despite that each party framed the facts in ways that supported their position.

CONDOMINIUM CORPORATION NO 072 8880 V SULLY, 2021 ABQB 901

(HARRIS J)

Rules 6.14 (Appeal from Master's Judgment or Order), 7.2 (Application for Judgment), 7.3 (Summary Judgment), 10.30 (When Costs Award May be Made), and 10.33 (Court Considerations in Making Costs Award)

The Applicant sought an Order for Summary Judgment pursuant to Rules 7.2 and 7.3. The Order was granted by a Master, but the Master fixed an amount of costs to be awarded to the Applicant, despite the Applicant's request for costs on a solicitor-client basis. The Master's Order also omitted a declaration that the Respondent owed interest to the Applicant. The Applicant appealed the Master's decision pursuant to Rule 6.14, and asked the Court to consider the Application afresh, without any deference to the Master's decision.

Justice Harris confirmed that, pursuant Rule 6.14(3), the standard of review of a Master's decision is correctness on issues of fact and law. Further, the parties are entitled to file additional evidence. Justice Harris confirmed that the Judge hearing the appeal from a Master's decision is entitled to conduct a *de novo* analysis of the issues, reviewing all relevant and material evidence. Deference to the Master's decision is not required.

Justice Harris granted the Applicant Summary Judgment against the Respondent for amounts owing. In respect of Rules 7.2 and 7.3, Justice Harris held that the key issue in a Summary Judgment Application is whether there is no genuine issue requiring trial, such that the Court is able to reach a fair and just determination on the merits. Justice Harris held that there was no question that the Applicant was entitled to the amounts owed plus interest. There was no evidence of a waiver of interest.

In respect of costs, Justice Harris confirmed that Rule 10.30 grants the Court authority to make a costs award in respect of an Application, and that a Court must exercise its discretion judicially and in line with the facts listed in Rule 10.33. Justice Harris declined to award costs on a solicitor-client basis. Relying on the factors in Rule 10.33, Justice Harris noted the mixed degree of success of each party, the comparatively small amounts claimed, the lower importance of the case, the lack of complexity, and the absence of delay caused by either of the parties; Her Ladyship ruled that each party would bear its own costs.

MARCOUX BROS TRUCKING LTD V MARITIME-ONTARIO FREIGHT LINES LIMITED, 2021 ABQB 998

(HOLLINS J)

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

The Defendant appealed a Master's Decision to dismiss an Application for Summary Dismissal. Prior to determining the Summary Dismissal Appeal on the merits, Justice Hollins noted that, under Rule 6.14(3), an Appeal from a Master to the Court of Queen's Bench is an Appeal on the record. However, Appellants from Master's Chambers may introduce new evidence which results in a different record before the Court of Queen's Bench than was before the Master. Justice Hollins further noted that the appropriate Standard of Review is correctness.

Justice Hollins identified that Summary Judgment/Dismissal is enabled under Rule 7.3. Ultimately, Justice Hollins dismissed the Defendant's Appeal as the Defendant failed to meet the Burden of Proof for Summary Dismissal.

BRUNO V SAMSON CREE NATION, 2021 ABCA 381

(WAKELING, CRIGHTON, AND PENTELECHUK JJA)

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

The Appeal challenged parts of a Decision certifying a class proceeding and granting Summary Judgment on some of the common issues.

The Court considered Summary Judgment in the context of Rules 7.2 and 7.3 and held that Summary Judgment is not available if there is a genuine issue requiring Trial. In this case, the Court found there were genuine issues requiring trial and quashed the Lower Court's decision granting of Summary Judgment.

LDS V SCA, 2021 ABQB 818

(BELZIL J)

Rule 7.3 (Summary Judgment - Application and Decision)

The Plaintiff filed an Application for Summary Judgment. The Court reviewed the seminal decision *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49, confirming that, with respect to Rule 7.3, Summary Judgments must be granted whenever there is no genuine issue requiring a Trial.

A Court should not use a categorical approach when assessing whether there is a genuine

issue requiring Trial but should focus on the goals and principles underlying whether to grant such an Application.

The Court underscored that the key issue in determining whether it can be said that there is no genuine issue requiring Trial is whether the Judge is able to reach a fair and just determination on the merits. In this case, Justice Belzil found that there was no genuine issue requiring a Trial and granted Summary Judgment.

SUN V HUANG, 2021 ABQB 781

(ARMSTRONG J)

Rules 7.5 (Application for Judgment by Way of Summary Trial), and 10.31 (Court-ordered Costs Award)

The Plaintiff brought an Application for Summary Trial pursuant to Rule 7.5; the Defendants did not object. The Court noted that the appropriate test for whether a Summary Trial is appropriate is if the Court (1) could decide disputed questions of fact on affidavits or by other proceedings authorized by the Rules of Court for summary trials, and 2) whether it would be unjust to decide the issues in such a way.

The Court found that a Summary Trial was appropriate because (1) the affidavits of the Plaintiff and *viva voce* evidence by the Defendant were sufficient to determine the issues, (2) there were few facts in dispute, (3) a fair outcome of the Claim did not depend on findings of credibility that could not be resolved on the evidence before the Court, (4) the issues for determination were not complex, and (5) the Court noted that, because neither party objected to the Summary Trial process, it would be unjustified to put them through the expense and delay associated with sending the matter to a full trial.

The Plaintiff's claim against the Defendants was ultimately dismissed. The Court determined that it may award costs to self-represented litigants pursuant to Rule 10.31(5) in an amount equivalent to the fees specified in Schedule C, however it was obligated to ensure the objectives of discouraging frivolous litigation and encouraging settlement were met.

The Court considering costs in accordance with Rule 10.31(5) noted that the Defendants (1) were the successful parties who had no choice but to respond to the claim against them, and (2) they did nothing to prolong the litigation and had no interest in doing so. Additionally, the Plaintiff (1) had a claim which was wholly without merit, (2) served lengthy and repetitive affidavits on the Defendants, and (3) grossly inflated the claim amount in way that could only be interpreted as an attempt to intimidate the Defendants. The Court found that the Plaintiff's conduct must be discouraged, and the costs award was the means by which to achieve that objective. It exercised its discretion to award costs to the successful Defendants.

KENT V MACDONALD, 2021 ABQB 953

(LOPARCO J)

Rule 9.2 (Preparation of Judgments and Orders), 9.12 (Correcting Mistakes or Errors), 9.13 (Re-opening case), and 10.30 (When Costs Award May be Made)

The Applicants sought leave for Justice Loparco to revisit her trial decision on costs. At Trial, Justice Loparco found that the Applicants were 25% liable to the Respondents and awarded costs against the Applicants. On appeal, the Applicants were found not liable, and the Court of Appeal held that the Applicants would not be responsible for any portion of costs to the Respondents. Justice Loparco considered whether the Court was *functus officio*, and therefore unable to revisit the costs decision at Trial. The doctrine of *functus officio* allows finality of Judgments from Courts which are subject to appeal. This doctrine applies whether the Judgment relates to the Trial Decision or the related costs decision, unless an exception applies.

Justice Loparco held that she could not revisit her Trial Decision on costs because the Court was *functus officio*. Justice Loparco held that when the Order was entered pursuant to Rule 9.2(2)(c), her dealings with the lawsuit were terminated, and she did not retain any jurisdiction to re-visit costs.

Justice Loparco considered three Rules that may be considered a narrow exception to *functus officio* but held that none of the exceptions applied. The first exception was Rule 9.12, which allows the Court to correct a mistake or error in a Judgment arising from an accident, slip, or omission. Rule 9.12 was not relevant. The second exception was Rule 9.13, which allows a Court to vary a Judgment before the Judgment is entered. This Rule also did not apply. Finally, the third exception was Rule 10.30(1)(c), which allows the Court to make a costs award even after Judgment on the substantive issues. Justice Loparco found that the exception allowed by Rule 10.30(1)(c) applies in circumstances where the Court has not made any determination on costs in the initial Decision. Rule 10.30(1)(c) did not apply. Accordingly, Justice Loparco found that the Court was *functus officio* and the Applicants were not entitled to revisit the costs decision at Trial.

FLETCHER V DAVIDSON & WILLIAMS LLP, 2021 ABQB 842

(ROOKE ACJ)

Rules 9.4 (Signing Judgments and Orders), and 10.49 (Penalty for Contravening Rules)

The Applicant was previously declared a Vexatious Litigant and made subject to expanded Court Access Restrictions. Notwithstanding these measures and explicit instructions from the Court, the Applicant continued to send packages of pseudo-legal documents to Justices of the Court. Associate Chief Justice Rooke had written in a previous Decision that the Applicant was being given a "last warning".

Given the Applicant's continued conduct, Rooke ACJ ordered that the Applicant pay $1,000 to

the Clerk of the Court as a penalty for contravening the Rules pursuant to Rule 10.49(1).

The Court dispensed with the need for the Applicant's approval of the Order pursuant to Rule 9.4(2)(c).

SALDIRAN V SALDIRAN, 2021 ABQB 894

(HAYES-RICHARDS J)

Rules 9.4 (Signing Judgments and Orders), and 10.49 (Penalties for Contravening Rules)

The Plaintiff was a self-represented litigant in a divorce Action. The Plaintiff engaged in escalating misconduct including attempted Judge shopping, allegations of wrongdoing by Clerks of the Court, failure to abide by Court instructions, and allegations of conspiracy by various participants in the Justice System.

Justice Hayes-Richards found this misconduct necessitated Court intervention. Justice Hayes-Richards stated that, pursuant to Rule 10.49(1), monetary penalties are an appropriate response when litigants fail to comply with Court instructions or the Rules of Court. Her Ladyship outlined an Order preventing the Plaintiff from further misconduct and also ruled that the Plaintiff's approval of the Order was dispensed with pursuant to Rule 9.4(2)(c).

CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN, 2021 ABQB 985

(ROOKE ACJ)

Rules 9.4 (Signing Judgments and Orders), 10.49 (Penalty for Contravening Rules), and 14.5 (Appeals Only with Permission)

The Defendant is a vexatious litigant who can file documents only with the Court's permission. The Defendant sought leave from Associate Chief Justice Rooke to appeal a Decision of Master Mason.

His Lordship denied leave because (1) the Applicant's proposed filings were inadequate; (2) she failed to provide necessary materials, and (3) she was attempting to relitigate a previously decided issue.

Despite not granting leave, Rooke ACJ noted that his Lordship would consider another leave Application if the Defendant corrected the issues in the proposed motion and provided the Court with the proper materials.

Rooke ACJ informed the Defendant that, pursuant to Rule 14.5(4), there is no appeal of His Lordship's decision to the Alberta Court of Appeal. However, the Defendant could seek leave from the Supreme Court of Canada to appeal the Court's decision.

Lastly, Rooke ACJ relied on Rule 10.49(1) to penalize the Defendant $2,500 for persisting with abusive litigation and invoked Rule 9.4(2)(c) to dispense with the Defendant's approval of the Order.

LAM V GOVERNORS OF THE UNIVERSITY OF CALGARY, 2021 ABCA 367

(KHULLAR J)

Rules 9.5 (Entry of Judgments and Orders), 14.8 (Filing a Notice of Appeal), and 14.36 (Case Management Officers)

The Applicant sought to overturn the ruling of a Case Management Officer. This Application was governed by Rule 14.36(3) which allowed a person affected by the decision of a Case Management Officer to apply to a single judge of the Court of Appeal to have it rescinded, confirmed, amended or enforced.

Among other things, the Applicant wanted the Court of Appeal to confirm that he had an Appeal from a Decision of Whitling J to the Court of Appeal. During oral arguments, the Applicant submitted that because no formal Order recording Whitling J's decision had been entered pursuant to Rule 9.5, the Applicant was not out of time to Appeal the decision.

The Court of Appeal noted that Rule 14.8 made it clear that the time for filing and serving an Appeal starts on the date of the pronouncement of the Decision, or when reasons are given after a Decision is pronounce. Rule 14.8 further stated that any Appeal must be filed within one month of a Decision. Accordingly, the lack of a filed formal Order was irrelevant. The Application was ultimately dismissed in its entirety.

SUNRIDGE NISSAN INC V COLONY HOMES INC, 2021 ABQB 928

(SULLIVAN J)

Rules 9.13 (Re-Opening Case), 9.20 (Time Writ Remains in Force), 9.21 (Application for New Judgment or Order), and 13.5 (Variation of Time Periods)

The parties advanced competing claims to funds paid in Court arising from foreclosure proceedings. The Court previously provided counsel with a Decision which had not yet been filed (and therefore, not "entered" pursuant to Rule 9.13). Counsel sought clarification regarding the Decision with respect to the priority of funds. Up to that point, no Decision had been issued on a limitations issue. The Court exercised its discretion to expand upon the original Decision pursuant to Rule 9.13(a).

The limitations issue arose from a failure to renew a Judgment, but a subsequent action had arguably constituted a new action advanced within the ten-year period with the effect that the party's Judgment remained in force. The Court noted that a Court may grant a new Judgment or Order (without commencing a fresh Action) on a former Judgment that has not been paid provided the Application is made prior to the expiry of the 10-year limitation period pursuant to Rule 9.21. A Writ of Enforcement remains in force for as long as the underlying Judgment is in force pursuant to Rule 9.20.

The Court held that there was no reason why the party could not have made an Application under Rule 9.21 for a renewal of her Judgment. Had the application been opposed, she could have sought a procedural order from the Court pursuant to Rule 9.21(6) that might, with the exercise of the Court's discretion pursuant to Rule 13.5, have resolved the issue, or would have placed the party on notice that failing to take any action, her Judgment would expire. As such, the party was limitation-barred from enforcement of her Judgment.

ZAVERS V MAGMA SURFACES INC, 2021 ABQB 952

(LEMA J)

Rules 9.21 (Application for New Judgment or Order), and 11.4 (Methods of Service in Alberta)

The Applicant applied for a "renewal" of his Judgment, originally issued on November 22, 2011. Noting that there was no "renewal" process under the Rules, the Court regarded the Application as one requesting a new Judgment pursuant to Rule 9.21.

The Court first determined that the Application was filed in time, considering the R. 9.21(3) deadline - namely, the expiry of the limitation period under the *Limitations Act*, RSA 2000, c L-12 for an Action on a Judgment.

The Court noted that Rule 9.21(3) further provides that the Application must be served on the Judgment Debtor in the same way which a commencement document must be served. The Judgment Debtor here was a corporation, but the corporation had been struck in October 2021.

The Court further noted that, Rule 11.4 permits service of a commencement document via a method of service provided by an enactment, like the *Business Corporations Act.*, RSA 2000, c B-9 ("*BCA*"). The *BCA* permits service on a corporation via registered mail to its registered office.

Putting Rules 9,.21 and 11.4 together, the Court found that the Application could be served via registered mail on the corporation's registered office (or its registered office at the date of its striking).

REAL ESTATE COUNCIL OF ALBERTA V MOSER, 2021 ABQB 787

(GROSSE J)

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

The underlying Originating Application seeking a declaration that the Respondent was disqualified from membership of the Real Estate Council of Alberta ("RECA") was moot. The parties, however, disagreed on whether costs should be awarded, and if so, on what terms they should be awarded.

The Respondent argued that since the Applicant discontinued the Action, the Applicant should pay costs unless the parties otherwise agree, or the Court otherwise orders. Justice Grosse noted that costs were at the discretion of the Court as guided by the Rules. Rule 10.29 provides that a successful party is generally entitled to costs. Rule 10.33 sets out a list of non-exhaustive factors to be considered by the Court.

Her Ladyship found that Rule 10.29 and some of the factors in 10.33 reflected the fact that costs were awarded where there was some success on the merits which could then be assessed. In this instance, as the underlying action was moot, there was no outcome on the merits to judge. Justice Grosse found that on the facts of this case, various principles supported awarding the Respondent costs as: the Applicant had commenced the litigation; the Respondent ceased to be a member of RECA even though the Applicant did not need to make its case; and there were allegations of unprofessional and improper conduct on the part of the Respondent that she would never have the chance to address. Her Ladyship further noted that a RECA bylaw could fully indemnify the Respondent for her costs; however, she was not able to make a determination based on the record in front of her.

Justice Grosse concluded that the Respondent was entitled to some costs and noted that she would be open to further submissions regarding the amount of such costs.

AG GROWTH INTERNATIONAL INC (AGI-WESTEEL) V DUPONT, 2021 ABQB 793

(LITTLE J)

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

This was an Application to determine costs payable following an Appeal of a Provincial Court Judgment. The underlying Action involved a claim for compensation for alleged wrongful dismissal.

The Plaintiff succeeded in his Claim at first instance but was unsuccessful on Appeal. Counsel for the Plaintiff argued that each party should bear its own costs given the Plaintiff's minimal assets and difficulties he would face in

paying any costs award that might be rendered.

In considering an appropriate costs award, the Court noted Rules 10.29 and 10.33, highlighting both the general rule that successful litigants are entitled to costs, as well as the Court's residual discretion. Turning to the Plaintiff's argument, the Court held that it could not disregard the general rule on the basis of hardship that might be suffered by the unsuccessful litigant or on the basis of impecuniosity. However, the circumstances of the case, including the Plaintiff's success at first instance, pointed away from an award completely in favour of the Defendant employer.

Ultimately, having regard to the importance of the Appeal, which clarified significant issues for employer policies and procedures to be adopted in similar situations, the Court awarded costs in favour of the Defendant for the Appeal, with each party to bear its own costs of Trial.

AUER V AUER, 2021 ABQB 860

(ROTHWELL J)

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

The Intervenor in the original Judicial Review, the Attorney General of Canada, sought costs arising from its participation. The Intervenor sought triple costs for all steps of the Judicial Review on Column 1 of Schedule C.

Rule 10.31 contemplates a costs award issued at the conclusion of a matter and Rule 10.33 sets out factors that the Court may consider. The Court noted that, pursuant to Rule 10.29, the successful party is generally entitled to costs and that the Court has discretion over costs.

The Applicant cited the proposition that Intervenors are generally not entitled to costs. The Court considered the factors in *Lynnview Ridge Residents' Action Committee v Imperial Oil Limited,* 2005 ABCA 375, for the circumstances under which an Intervenor with a special interest should be awarded costs. These factors are: (1) Has the Intervenor contributed to the Court's deliberations by adding a viewpoint that otherwise would not have been considered or did the parties present the same point of view? (2) Is there legislation relevant to the case to suggest whether the Intervenor has a special interest or important role to play? (3) What is the nature of the Intervenor's special interest? The interest may be financial, proprietary, non-pecuniary or other. (4) The Court noted that the original Respondent did not participate in the Judicial Review making the Intervenor's participation essential to present fulsome argument.

The Court also found that the Attorney General of Canada had a special role in defending Canada's legislation. The third Lynnview factor had no real application in the present case.

In the present case, Justice Rothwell determined it was appropriate for the Intervenor to seek costs. The Intervenor was essential and helpful. His Lordship decided that the Intervenor's ability to seek costs fell within the "rights and duties of a party".

The Court noted that there is discretion to depart from the normal costs rule when a case is of public interest. In addition to the typical Court considerations in making a costs award as laid out in Rule 10.33, Rothwell J considered

several factors specific to the facts of the matter, and ultimately decided that the present case involved some of the hallmarks of public interest litigation and it was appropriate to moderate the costs award, though not triple costs as sought by the Intervenor.

SKANDS V ALLERGEN INC, 2021 ABQB 870

(ROOKE CJ)

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

This Decision concerns a determination of costs following a negotiated certification of a Class Action where the Representative Plaintiff ("RP") agreed to certify fewer claims, causes of action, and common issues than originally claimed.

The Court determined that the RP would receive costs as a result of the "quite a bit narrower certification order" to cover the basic costs of certification, but neither party would receive costs for unnecessary material filed and hearing time prior to settlement that could have been avoided.

The RP sought enhanced costs for certification in accordance with Rule 10.29 and pursuant to Rule 10.31 at a 3x multiplier of Schedule C, but the Court ultimately declined to grant the multiplier.

The Court noted that the exercise of its discretion pursuant to Rule 10.33(1) was usually within the context of Schedule C but that counsel's actions, which lengthened and complicated the matter, were considerations under Rule 10.33(2)(a), (b), (d).

FOLEY V LEAVITT, 2021 ABQB 875

(NATION J)

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

This was an Application to determine costs payable upon conclusion of a contested Application to set arrears resulting from a prior Order for spousal and child support. The Applicant was successful is setting arrears, but in an amount significantly less than alleged. The Respondent was successful in terminating spousal support. Cost and progress of the Application were impacted by the Respondent's failure to tender required disclosure in a timely fashion.

Considering the Application's outcome and the Respondent's conduct in relation thereto, and applying the principles and factors set out in Rules 10.29 and 10.33, the Court awarded

solicitor client costs against the Respondent for steps taken to compel disclosure. Remaining costs were assessed on the basis of Column 1 (for domestic matters) of Schedule C of the Alberta Rules of Court.

UNIVERSITY OF CALGARY V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2021 ABQB 795

(HORNER J)

Rule 10.31 (Court Ordered Costs Award)

Justice Horner conducted a Judicial Review of a Delegate of the Information and Privacy Commissioner's decision regarding potentially privileged documents that the University of Calgary had refused to disclose.

The Supreme Court of Canada previously rendered a Decision that the University of Calgary's evidence of Solicitor-Client Privilege met all the requirements of the Civil Litigation standard at the time, and there was no reason to doubt this evidence. Nonetheless, the Privacy Commissioner subsequently appointed a second Delegate to determine whether certain documents were improperly withheld under the Solicitor-Client Privilege Claim considering alleged new evidence that the was not before the Supreme Court of Canada. Ultimately, Justice Horner determined that all evidence was before the Supreme Court of Canada, and it was unreasonable for the Delegate to have parsed the Supreme Court's reasons so as to reject their conclusion on the validity of the Solicitor-Client Privilege.

The University of Calgary requested costs be awarded on a full indemnity basis. Justice Horner considered the costs implications and noted that, under Rule 10.31, the Court has wide discretion when awarding costs. After canvassing the case law and a reviewing the evidence, Justice Horner found that, while the circumstances were not sufficiently egregious to warrant a Solicitor-Client costs award, the Commissioner's conduct of continuing to review the Solicitor-Client issue after the determination from the Supreme Court was deserving of sanction. Justice Horner determined that costs be granted against the Commissioner on Schedule C Column 2 of the Rules.

ROCKY VIEW (COUNTY) V WRIGHT, 2021 ABQB 930

(DEVLIN J)

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

The Respondent was an elected councillor for the Applicant municipal district. The Applicant brought two Applications to have the Respondent disqualified from her elected office. The parties could not agree on costs after the Court dismissed both Applications; the Court, therefore, had to determine the appropriate costs award.

The Court noted that the successful party is normally entitled to costs. The Court also noted that costs are highly discretionary and subject to a principled application of the factors set out in Rule 10.33. The Court awarded enhanced costs because:

The Applications were complex and more akin to a three-day trial than a half-day Application;

The Applicant's fees were paid by the public while the Respondent was left to defend her office and livelihood from personal funds;

The Applications were driven in whole or in part by improper political motivations; and

The Applicant did not treat the Respondent fairly or provide her with the appropriate due process.

In the result, the Court awarded the Respondent lump sum costs pursuant to Rule 10.31(1)(b)(ii) in the amount of $40,000 in costs inclusive of disbursements, GST and costs submissions.

BERMAN V BERMAN, 2021 ABQB 933

(LABRENZ J)

Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.50 (Costs Imposed on Lawyer), and 14.59 (Formal Offers to Settle)

This is a costs decision pursuant to an Application decided in favour of the Defendant. The Defendant asked for enhanced costs, citing a *Calderbank* offer to settle, and costs against the Plaintiff's lawyer personally.

With respect to *Calderbank* offers, the Court cited *Bruen v University Calgary,* 2019 ABCA 275, where the Court stated that, while Rule 14.59 "provides for the doubling of costs when a formal offer to settle an appeal is made, and the party making the offer achieves greater success on the appeal," informal offers, such as *Calderbank* offers, "are also relevant to costs, although doubling is not automatic or presumed…the court has a wide discretion…".

Labrenz J then determined that, while the *Calderbank* offer supported some increase in the award of costs, doubling was not warranted.

With respect to costs against the Plaintiff's counsel, a costs award against a lawyer is guided by Rule 10.50 which requires that a lawyer must have had engaged in serious misconduct, such as an act that seriously undermines the authority of the Courts, or serious interference with the administration of justice. A mere mistake by a lawyer or an error in judgment does not justify a costs sanction. Justice Labrenz found that an award of personal costs against the Plaintiff's lawyer was not justified, despite Applications that were "ill-founded and misguided."

Finally, the Court cited Rules 10.31 and 10.33 in awarding a lump sum costs award to the Defendant in the amount of $5,000, which the Court then increased to $7,500 considering the Defendant's *Calderbank* offer.

CHISHOLM V BOARDWALK GENERAL PARTNERSHIP, 2021 ABQB 991

(HENDERSON J)

Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), and 10.42 (Actions within Provincial Court Jurisdiction)

This is a costs decision. Justice Henderson had previously dismissed an Appeal brought by the Respondent in this decision.

The Applicant, who was the successful party, sought costs in relation to the Appeal of 75% of double Column 1 of Schedule C of the Rules. The successful party cited Rule 10.42 which restricts costs to not more than 75% of Column 1, where an Action is brought in the Court of Queen's Bench, but where the amount sued for is within the jurisdiction of the Provincial Court. However, it sought double costs because of the two *Calderbank* offers it made to the Respondent.

The Court cited Rule 10.31, emphasizing the Court's broad discretion in awarding costs. The Court added that, a costs award made with reference to Schedule C is only one of several options open to a Court in awarding costs to a successful party. The Court further added that awarding a percentage of assessed costs is expressly permitted.

The Court then applied the factors to consider in making a costs award, as delineated in Rule 10.33: (1) the Applicant was entirely successful on the Appeal; (2) the amount claimed by the Respondent was very small; (3) the issues at stake had "no particular importance"; (4) there was no complexity to the issues; (5) there was no apportionment of liability; and (6) neither party took any steps to shorten the proceedings.

Rule 10.33 also allows a Court to consider "any other matter" related to reasonable costs. Consequently, the Court here also considered that: (1) the Respondent suffered from a disability, was on AISH, and had limited means; (2) the Respondent was a self-represented litigant; (3) this was Appeal from the Residential Tenancy Dispute Resolution Service (RTDRS), a tribunal established in a way to enable self-represented litigants to have access to justice in an efficient way; (4) the costs awarded by the RTDRS were $75; and (5) the *Calderbank* offer expressly told the Respondent that if she did not accept the offer, then the Applicant would seek costs of $7,087.50.

The Court stated that, considering all of the circumstances, costs at the level sought by the Applicant were not appropriate. The Court

added that, if costs at that level were granted, it would have a chilling effect on those seeking to Appeal from a decision of the RTDRS.

The Court concluded that $150 would be an appropriate award for costs. The Court added that, since the Applicant made a successful *Calderbank* offer, the Cost award should be doubled to $300.

RUMANCIK V HARDY, 2021 ABQB 917

(SULLIVAN J)

Rule 10.33 (Court Considerations in Making Costs Award)

This Cost ruling arises out of a previous Decision of Sullivan J in which he ruled on numerous refused undertakings and objections and directed that the Defendants answer substantially all of the questions that were put to them at Questioning. The Court stated the successful party is entitled to costs and assessed the factors set out in Rule 10.33 emphasizing that Schedule "C" costs are not the default rule for making costs awards and cannot realistically achieve an appropriate level of costs in the context of complex and protracted litigation. Ultimately, the Court held that a percentage indemnity approach should be applied and awarded 50% of the amount assessed by the Review Officer, being the amount charged to the Plaintiff by their counsel for items related directly to the matters of the Application that was heard.

WADE V WADE, 2021 ABQB 994

(LEMA J)

Rules 10.51 (Order to Appear), and 10.52 (Declaration of Civil Contempt)

This Decision arose from an Application, pursuant to Rule 10.51, requiring that the Respondents show cause as to why they were not in contempt of an Order to pay disputed monies into trust.

The Court agreed with the Applicant that the Respondents had failed to comply with the Order on its face. In so finding, the Court dismissed the Respondents' argument that a contempt Order would amount to a finding of contempt in relation to "an Order to pay money," in contravention of Rule 10.52(3). Rule 10.52(3)(a)(i) allows a judge to declare a person to be in civil contempt "if the person, without reasonable excuse, does not comply with an order, other than an order to pay money…".

The Court confirmed that there are two types of Judgments or Orders which direct a person to pay money: those which direct a person to pay money to another person and those which direct a person to pay money into court.

The Court cited *Dickie v Dickie,* 262 DLR (4th) 622 for the proposition that: "Where money is

ordered to be paid not to the creditor but into court, and where the effect of the order is not to create a fixed debt obligation but to secure a debt obligation, then the order is not an order for the payment of money under [now Rule 10.52(3)(a)(i)]."

The Court found the Respondents in contempt.

ALBERTA HEALTH SERVICES V SCOTT, 2021 ABQB 812

(GERMAIN J)

Rule 10.53 (Punishment for Civil Contempt of Court)

The Respondent was found in contempt of a Court Order requiring the Respondent to assist in enforcing community compliance with restrictions imposed by Alberta Health Services directed at mitigating the risks of the spread of COVID-19. The Court reviewed the law on sanctions for contempt in Alberta. The Court cited Rule 10.53 which sets out the various penalties for contempt that a Judge may order, including imprisonment and a fine.

In his legal analysis, Justice Germain first noted that Rule 10.53 is purposely broad and not exhaustive of the remedies a Court may impose. For example, while the Rule does not delineate it, a Court may order community service as a sanction for contempt. Justice Germain also noted that where a dispute is solely between litigants, as opposed to a matter that has a public or community impact, imprisonment is rare.

The Court emphasized that fines are a significant tool utilized to control contempt. The Court added that, fines for the breach of a Court Order differ from unpaid civil debt. While the former is contempt, and therefore can yield imprisonment, the latter is not contempt, so for that failure the successful party must resort to other collection techniques. Justice Germain emphasized that when considering a fine, it is prudent that the Judge imposing the sanction inquire about the contemnor's ability to pay.

Justice Germain underscored that the central idea of sanctioning contempt is that the Courts have a right to protect the dignity of their own proceedings and are entitled to discipline. His Lordship added that, conduct that tarnishes, undermines or impedes the Court's role in society as the principal administrator of justice must be discouraged.

Lastly, the Court noted that, in considering an appropriate sanction for contempt, some attention must be given to whether the contemnor apologized for the contempt. It added that, while an apology will not extinguish a contempt, a heartfelt apology may ameliorate a sanction. Importantly, a failure to apologize should not add a punitive element to the sanction.

ALBERTA HEALTH SERVICES V PAWLOWSKI, 2021 ABQB 813

(GERMAIN J)

Rule 10.53 (Punishment for Civil Contempt of Court)

The Court considered the appropriate sanction after the Respondents were found in contempt of two Court Orders.

The Court noted that Rule 10.53 provides that a person declared in civil contempt of Court is liable for imprisonment for up to two years or a fine, but that the Rule is not exhaustive of the remedies that the Court may impose. After reviewing case law, the Court determined that it must consider the following factors when imposing a penalty for contempt: the proportionality of the sentence to the wrongdoing; the presence of aggravating or mitigating factors; deterrence; and the reasonable of any fine or term of imprisonment; (collectively, the "Paddock Factors").

After considering the Paddock factors, the Court noted that the Respondents' conduct was extremely aggravating including one of the Respondents taunting the Court to imprison him. The Court determined that one Respondent had conducted a political rally masked as a religious service despite being aware of the restrictions previously ordered by the Court. The Court also noted that the Respondent had relished in the notoriety he obtained through opposing healthcare measures to address the COVID-19 pandemic.

The Court fined each Respondent and sentenced the Respondents to three days in prison (fully satisfied by time served), probation, and community service.

KEEPING V KEEPING, 2021 ABQB 892

(LEONARD J)

Rules 11.2 (Service Not Invalid), 11.22 (Recorded Mail Service)

The Respondent sent a notice of relocation ("Relocation Letter") by registered mail to the Applicant in accordance with the requirements set out in section 16.9(1) of the *Divorce Act*. The mail was not collected by the Applicant and the Relocation Letter was returned to the Respondent. The Applicant asserted that he did not receive the Relocation Letter and the corresponding move occurred without notice and that the Respondent was not entitled to rely on the applicable provisions of the *Divorce Act* to relocate their child.

The Court considered whether service of the Relocation Letter was valid and specifically in compliance with Rules 11.22 and 11.2. The Court determined that the delivery method used by the Respondent did meet the definition of "Recorded Mail" as required in Rule 11.22 noting that the Relocation Letter sent via Canada Post had a tracking number assigned, and the Respondent was able to access the delivery attempt records. Further, the Court found that Relocation Letter had been properly served on the Applicant noting that it was sent

to the Applicant's last known address and that, pursuant Rule 11.2(2), service by recorded is not invalidated by reason only that the addressee has refused to take delivery of the recorded mail.

JWS V CJS AKA CJH, 2021 ABCA 375

(KIRKER J)

Rules 12.36 (Advance Payment of Costs), and 14.5 (Appeals Only with Permission)

The Applicant filed a Notice of Appeal of a costs decision made by the Lower Court. The Court of Appeal considered, as a preliminary issue, whether permission to appeal the costs decision was required, and if so, whether permission should be granted. The Respondent also requested payment of advance costs pursuant to 12.36 to answer the Appeal.

The Court of Appeal held that permission to appeal the costs decision was required. Pursuant to Rule 14.5(1)(e), no appeal is allowed from a "decision as to costs only" without permission from the Court of Appeal, unless a substantive decision is also being appealed. The purpose of Rule 14.5(1)(e) is to bring finality to costs Orders and conserve the Court's time by screening out hopeless Appeals on the issue of costs alone. The Court of Appeal held that Rule 14.5(1)(e) does not apply where a substantive decision and a related costs decision are delivered at different times, resulting in separate appeals. In those cases, the costs appeal and appeal of the related substantive decision would have otherwise been heard together if the case followed a more normal course. In this case, however, the costs decision included costs for various applications that were heard after the Trial on the merits, and from which no appeals were made. The Court of Appeal found that with the separation in time and scope between the costs decision and the Trial decision, the Applicant's appeal was an appeal as to costs only.

The Court of Appeal ultimately granted permission to hear the Applicant's costs appeal. The Court confirmed that permission to appeal a costs decision is granted sparingly, and that an applicant must meet the requirements of the following test: a good, arguable case of sufficient merit to warrant scrutiny by this Court; the issues are important, both to the parties and in general; the costs appeal has some practical utility; and that the effect of delay in proceedings caused by the costs appeal does not weigh against granting the permission sought.

The Applicant met each of the requirements of the test.

The Court of Appeal also granted an advance of costs to the Respondent. The Court's jurisdiction to make an advanced Costs Order is included under Rule 12.36. The considerations for granting advance costs as articulated by the Supreme Court of Canada in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, at para 36, are as follows:

The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claim must be ` of sufficient merit to warrant pursuit. There must be special circumstances sufficient to satisfy the court that the case is within the

narrow class of cases where this extraordinary exercise of its powers is appropriate

The Court of Appeal found that each of the considerations applied.

BRODA V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2021 ABCA 402

(GRECKOL JJA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought permission from Justice Greckol to appeal Her Ladyship's previous Decision dismissing the Applicant's previous Application to restore a prior Appeal.

Justice Greckol dismissed the Appeal. Pursuant to Rule 14.5(1)(a), no Appeal is allowed to the Court of Appeal from a Decision of a single Appeal Judge, unless permission to appeal is granted. Rule 14.5(2) states that permission to appeal decisions of a single Appeal Judge must be sought from the same Judge who made the Decision that is to be appealed.

The Court held that, in order to be successful, the Applicant must satisfy the Appeal Judge that there are *bona fide* reasons for a full panel of the Court to review the Order under appeal. Review may be justified where the Decision: (a) raises a question of general importance which on its own deserves panel review; (b) rests on a reviewable and material issue of law worthy of panel review; (c) involves an unreasonable exercise of discretion which had a meaningful effect on the outcome of the decision and the outcome is worthy of panel review; or (d) rests on a palpable and overriding error of important facts affecting the Order made and the Order is worthy of panel review.

The Court of Appeal held that the Appeal did not raise questions of general importance deserving of a panel review. Greckol J found that many of the arguments raised by the Applicant had already been argued in a prior Appeal Decision. The Court also determined that the Applicant's claim was one of personal importance, as opposed to general importance.

CARBONE V BURNETT, 2021 ABCA 432

(ROWBOTHAM JA)

Rule 14.5 (Appeals Only with Permission)

The Appellant appealed a Queen's Bench Decision which upheld an Assessment Officer's confirmation of the costs payable by the Appellant to the Respondents in the amount of $8,205.12.

The issues in this Appeal were: (1) whether permission to Appeal was required pursuant to Rule 14.5; and (2) if so, whether permission to Appeal ought to be granted.

Justice Rowbotham observed that permission to Appeal is required under Rule 14.5 when the Appeal is of a Decision as to costs only (Rule 14.5(1)(e)), and, separately, where the amount at issues does not exceed $25,000 (Rule 14.5(1)(g)). The Appellant argued that she was appealing a "substantive decision" of the Chambers Judge. The Court disagreed, finding instead that the only Decision before the Court was the confirmation of a costs assessment. The Appellant also argued that the dispute included significant costs which had been awarded against her earlier in the proceedings, such that the amount at issue was above $25,000. The Court held that the only controversy on Appeal was the assessment of costs in the amount of $8,205.12. The Court therefore held that both grounds were triggered in this case and that permission was required.

The Court then set out the test for granting permission to Appeal under Rule 14.5(1)(e), as described in *Bun v Seng*, 2015 ABCA 165. This test requires that the Applicant demonstrate: (1) a good arguable case; (2) issues of importance to the parties and in general; (3) that the Costs Appeal has practical utility; and (4) no delay in proceedings caused by the Costs Appeal. Justice Rowbotham held that the Appellant should not be granted permission as her Appeal did not have sufficient merit.

The Court also set out the test for granting permission to Appeal under Rule 14.5(1)(g), as described in *Rocks v Ian Savage Professional Corporation,* 2015 ABCA 77. This test requires that the Applicant demonstrate: (1) a reasonable prospect of success on Appeal; and (2) an issue of law or jurisdiction of importance to the public. For the same reasons, Justice Rowbotham held that permission should not be granted.

Justice Rowbotham therefore dismissed the Appeal with costs.

ALBERTA HEALTH SERVICES V PAWLOWSKI, 2021 ABCA 344

(STREKAF JA)

Rules 14.8 (Filing a Notice of Appeal), 14.9 (Appeals from Several Decisions), and 14.37 (Single Appeal Judges)

The Applicants applied for an extension of the time to file a Notice of Appeal. Rule 14.8 requires that a Notice of Appeal be filed within one month of the date of the decision being appealed.

The Applicants were found to be in Civil Contempt by the lower Court, however, the sanction arising from the finding of Contempt was to be determined at a later date. The Applicants filed a Notice of Appeal more than a month after the date of the Contempt Decision, but prior to the sanction being issued. The Notice of Appeal was accompanied by an Application seeking, if necessary, to extend the time to Appeal.

The issues on this Application were (1) whether the Notice of Appeal was in fact filed late; and (2) if so, whether the time to Appeal should be extended.

The Applicants argued that the contempt proceedings were not concluded, since the sanction phase had not occurred. The Applicants' argument was based on the approach followed in criminal matters, where the Appeal Period does not commence until sentencing

has occurred. Justice Strekaf held that the contempt finding was a "decision" within the meaning of Rule 14.8, and that the Appeal Period ran from that date. The Court compared it to Rule 14.9 which makes a single appeal of two related decisions possible in some circumstances, but does not change the deadline under Rule 14.8. The Court held that notwithstanding the comparisons to criminal proceedings, civil contempt proceedings are governed by the Rules, and not the *Court of Appeal Criminal Rules*. Justice Strekaf therefore held that the Appeal Period expired on July 29, 2021.

Turning to consideration of the extension issue, Justice Strekaf stated that Rule 14.37 permits a single judge to extend the time to appeal when a Notice of Appeal is not filed within the time limit. Justice Strekaf set out the test to be met on such an Application. The Applicant must show: (1) a *bona fide* intention to appeal while the right to appeal existed; (2) an explanation for the failure to appeal in time that excuses or justified the delay; (3) the absence of prejudice such that it would be unjust to disturb the judgment; (4) that the Applicant has not taken the benefit of the judgment under appeal; and (5) that there is a reasonably arguable appeal. Justice Strekaf also noted that the Court ultimately has discretion in extending the time to appeal, such that this test should not be applied rigidly.

Justice Strekaf held that the Applicants did in fact intend to appeal the contempt finding since the date of the Decision and that their delay was not the result of "gamesmanship" as suggested by the Respondent. The Court held that a mistaken interpretation of the Rule should not limit the Applicants' ability to appeal the Contempt finding. The Court therefore the Application.

LDS V SCA, 2021 ABCA 429

(FEEHAN J)

Rules 14.8 (Filing a Notice of Appeal), 14. 37 (Single Appeal Judges), and 14.90 (Sanctions)

The Respondent appealed an Alberta Court of Queen's Bench Decision granting the Applicant Summary Judgment against the Respondent (the "Decision"). The Applicant applied to strike the Respondent's Appeal because the Respondent failed to serve the Notice of Appeal on the Applicant in time pursuant to Rule 14.8(2)(b).

The Court noted that Rule 14.90(1)(b) allows a single Appeal Judge to strike from the record any document including a Notice of Appeal for failure to comply with a Rule. The Court also noted that Rule 14.37(2) allows a single Appeal Judge to either strike an Appeal for failure to comply with a mandatory Rule or extend the time limit to appeal. The Court determined that the decision to extend time to appeal is discretionary and should consider whether: a *bona fide* intention to appeal held while the right to appeal existed; an explanation for the failure to appeal in time that serves to excuse or justify the lateness; an absence of serious prejudice such that it would not be unjust to disturb the judgment; the applicant must not have taken the benefits of the judgment under appeal; and a reasonable chance of success on the appeal, which might better be described as a reasonably arguable appeal.

After reviewing cases and above principles, the Court declined to grant an extension and struck the Respondent's Appeal. The Court found that there were no exceptional circumstances present nor a reasonable justification for the

Respondent's failure to file the Notice of Appeal in time. The Court also found that the Respondent's Appeal had little chance of success and that the Respondent engaged in litigation misconduct.

EDMONTON POLICE SERVICE V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2021 ABCA 428

(WATSON JA)

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

The Applicants in this matter sought intervener status.

The Court noted that the test for interventions on Appeal was set out in *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)* [*Grand Prairie*], 2017 ABCA 280. In *Grand Prairie* the Court stated that Rules 14.37(2)(e) and 14.58 permit a single Judge to consider an Application to intervene and to impose conditions.

While granting intervenor status is discretionary and ought to be sparingly exercised, the Court in *Grand Prairie* noted several factors to consider in determining whether to grant intervenor status in an Appeal, including: (1) whether the presence of the intervenor is necessary for the Court to properly decide the matter; (2) whether the intervenor's interest in the proceedings might not be fully protected by the parties; (3) whether the intervention will unduly delay the proceedings; (4) whether there might be prejudice to the parties if intervention is granted; (5) whether intervention will widen the dispute between the parties; and (6) whether the intervention will transform the Court into a political arena.

Here, the Court granted intervener status to both Applicants but limited them from raising any new grounds of Appeal, expanding the subject matter of the Appeal, or applying to introduce any fresh evidence. Further, the Applicants would have a limited time to speak and would not be allowed to seek costs for participation in the Appeal.

719491 ALBERTA INC V CANADA LIFE ASSURANCE COMPANY, 2021 ABCA 419

(ROWBOTHAM, HUGHES AND HO JJA)

Rules 14.38 (Court of Appeal Panels), and 14.46 (Application to Reconsider a Previous Decision)

The Plaintiff lost an arbitration and applied to the Court of Queen's Bench to set aside the arbitral award. The Application was dismissed in full and leave to appeal the arbitration award was denied.

In the context of the *Arbitration Act*, RSA 2000, c A-43, there is an established line of authority that prevents an appeal to a higher Appellate Court from an intermediate Court's refusal to grant leave to appeal an arbitrator's award.

Despite this line of authority, the Plaintiff applied to the Court of Appeal for leave to reconsider *Sherwin-Williams Company v Walls Alive (Edmonton) Ltd*, 2003 ABCA 191, "which held that s. 48 of the *Arbitration Act* does not vest jurisdiction in this Court to hear an application for leave to appeal where the Court of Queen's Bench has refused leave to appeal an arbitrator's award under s. 44 of the *Arbitration Act* ". The Plaintiff also sought to appeal the Chamber Judge's Order dismissing the Application and denying leave to appeal the arbitration award.

Rules 14.38 and 14.46 allow a party to apply before a Court of Appeal panel for leave to reconsider a previous Court Decision. The Court emphasized that this power is exercised cautiously in light of the following five factors: (a) the age of the decision, (b) whether the decision has been relied upon so as to create settled expectations, (c) the treatment of the issue by other appeal courts, (d) whether the decision has some "obvious, demonstrable flaw", and (e) whether the decision was a memorandum of judgment delivered from the bench or a reserved, circulated one.

The Court analyzed each factor and held that there was no obvious, demonstrable flaw in Sherwin-Williams that would justify the Court to reconsider the decision.

SNOWBALL V HAM ESTATE, 2021 ABCA 358

(STREKAF JA)

Rule 14.48 (Court of Appeal Panels)

The Applicant sought a stay of a Queen's Bench decision to release certain funds to the Respondents. The Court noted that Rule 14.48 allows a single Appellate Judge to grant a Stay pending Appeal if the Applicant can establish the three-part test in *RJR-MacDonald Inc v Canada (Attorney General).*

The Court found that the Applicant met the *RJR-MacDonald* test and granted a Stay pending Appeal. The Court found that the Applicant had demonstrated (1) that the serious question element of the test had been met because the Appeal was not frivolous or vexatious, (2) that the Applicant would suffer irreparable harm if a Stay was not granted because the Respondent was insolvent and the funds at issue could be distributed and expended before the Appeal could be heard, and (3) the balance of convenience justified a partial Stay which would enable the Respondent to use a portion of the funds to pay the costs in defending the Appeal and the balance of the Funds would remain in trust pending Appeal.

KNELSEN SAND & GRAVEL LTD V HARCO ENTERPRISES LTD, 2021 ABCA 362

(WAKELING J)

Rules 14.48 (Stay Pending Appeal), and 14.68 (No Stay of Enforcement)

The Applicant applied for a Stay of Enforcement of a money judgment in favour of the Respondent pending the Applicant's appeal of that decision.

Rule 14.48 allows a party seeking a Stay of Enforcement of a decision to apply to the Judge who granted the decision or to a single Appeal Judge. Rule 14.68 states that filing an Appeal or an Application for Permission to Appeal does not operate as a Stay of Enforcement unless otherwise ordered under Rule 14.48.

The Court set out the test for a Stay of Enforcement, which considers whether the: (1) Applicant's claim presents a serious issue to be tried; (2) Applicant would suffer irreparable harm if relief were not granted; and (3) Applicant would suffer greater harm than the Respondent if relief were denied or would the harm to the Respondent from granting the Application exceed it.

The Court determined the Applicant met the elements of the three-part test. The Applicant raised a serious issue to be tried as it challenged a significant portion of the damages awarded at trial and sought judgment on its Counterclaim. The Applicant could suffer irreparable harm if the Stay were not granted if the Respondent seized specialized equipment that the Applicant needed to conduct its business. The Court also found that the balance of convenience favoured the Applicant and therefore granted a Stay of Enforcement pending Appeal.

ALBERTA HEALTH SERVICES V PAWLOWSKI, 2021 ABCA 392

(STREKAF JA)

Rule 14.48 (Stay Pending Appeal)

This was an Application to stay enforcement of a Judgment pending Appeal. The Applicants sought to stay various Orders granted against them in connection with their contempt of previous Court Orders.

In deciding the Application, the Court noted that Rule 14.48 provides that a Stay pending Appeal can be granted by a single Appellate Judge. The Court observed that the legal test for a Stay pending Appeal requires that the Applicant show that (i) there is a serious question to be tried, such that the Appeal is not frivolous or vexatious; (ii) there will be irreparable harm if the Stay is not granted; and (iii) the balance of convenience favours granting the Stay.

The Respondent conceded the existence of a serious question to be tried. The Court found that the Applicants had demonstrated that they would suffer irreparable harm if the Stay of at least some of the Orders was not granted. Accordingly, two of the Orders were stayed pending Appeal, with all remaining Orders to remain in effect.