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RULES

Jensen Shawa Solomon Duguid Hawkes LLP is pleased to provide summaries of recent Court Decisions which consider the Alberta Rules of Court. Our website, **www.jssbarristers.ca**, also features a fully functional Rules database, giving users full search capabilities of all past summaries up to, and including, our latest release. The interface now improves the user experience through the ability to search and filter summaries by Rule, Judges and Masters, and keywords.

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MONAGHAN V OPTRICS INC., 2022 ABQB 16

(HILLIER J)

Rules 1.2 (Purpose and Intention of these Rules), 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.18 (Reference to Court), 10.45 (Decision of the Judge), and 10.48 (Recovery of Goods and Services Tax)

This was an Appeal challenging the jurisdiction of a Review Officer in hearing and determining the amount payable by the Appellant to the Respondent lawyer.

A lawyer is entitled to be paid a reasonable amount, considering the factors set out in Rule 10.2. Pursuant to Rule 10.18(1)(a), any dispute regarding the terms of a retainer agreement must be referred to the Court for decision or direction. Rule 10.45 provides that, on Appeal, the Court has broad powers to vary, revoke, substitute, refer back, or make any other appropriate Order.

The Court found that, despite the purpose of Rule 1.2 - to provide a means by which claims can be fairly and justly resolved in or by a Court process in a timely and cost-effective way - the Review Officer was required to refer the matter to the Court, to the extent that the matter concerned a question about a term of the retainer agreement, within the scope of Rule 10.18(1)(a). However, the Court noted, the Appellants arguments regarding GST were within the specialized knowledge of the Review Officer, based on the best-case representations of the parties, as contemplated by Rule 10.48.

In sum, notwithstanding that the Review Officer should have referred the retainer agreement portion of the dispute to the Court, the Court found that the Review Officer had arrived at the correct conclusion, less a reduction for a disbursement that had been double billed. Costs were awarded in favour of the Respondent.

SIGNALTA RESOURCES LIMITED V CANADIAN NATURAL RESOURCES LIMITED, 2022 ABQB 89

(SIDNELL J)

Rules 1.2 (Purpose and Intention of These Rules), 5.1 (Disclosure of Information), 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records), 5.8 (Producible Records for Which There is an Objection to Produce), 5.10 (Subsequent Disclosure of Records), 5.11 (Order for Record to be Produced), 5.15 (Admissions of Authenticity of Records), and 5.16 (Undisclosed Records Not to be Used Without Permission)

The Plaintiff sought to introduce records at trial that were not included in either the Plaintiff's Affidavit of Records or the Defendant's Affidavit of Records.

The Court considered that this issue engaged several Rules relating to the production and use of records in the Alberta *Rules of Court*. Rule 5.1 encourages early disclosure of facts and records while Rules 5.2 and 5.6 require relevant and material records to be produced in an Affidavit of Records. Rule 5.8 sets out how parties deal with records that are otherwise producible, but which a party objects to producing. Rule 5.10 imposes a continuing obligation on the parties to produce relevant and material records which are found, created, or obtained after the initial affidavit of records is served. Rule 5.15 creates rebuttable presumptions of authenticity and fact of transmission, while Rule 5.16 sets out the consequences for failing to produce a relevant and material record.

Rule 5.16 also *prima facie* prevents undisclosed records from being produced at trial. In conjunction with Rule 5.10, Rule 5.16 prevents trial by ambush by requiring the production of relevant and material records prior to trial. The Court noted that a party in a civil action cannot avoid its obligation to produce records in accordance with Part 5 of the *Rules* by simply relying on the "documents in possession" rule. The documents in possession rule means that documents in the possession of a party will be admissible against it to show knowledge of the contents. The contents will further be admissions if the party has in any way recognized, adopted, or acted upon them.

The Plaintiff repeatedly asserted that the documents should have been produced by the Defendant. The Court noted that the process for addressing failure to produce relevant and material records is found in Rule 5.11 which allows an Order for a record to be produced. It was not enough for the Plaintiff to only show that the documents were relevant and material and were not disclosed by the Defendant. This would have the effect of making Rule 5.16 meaningless.

NATIONAL HOME WARRANTY GROUP INC V BURTON, 2022 ABQB 123

(MALIK J)

Rules 1.2 (Purpose and Intention of these Rules), and 4.33 (Dismissal for Long Delay)

This was an Appeal of a Master's Decision dismissing the Action for long delay pursuant to Rule 4.33. The Appellant asserted that the Action had been materially advanced in the three years after Questioning when the Respondents completed replies to undertaking responses which were not provided to the Appellant.

Rule 4.33 is mandatory and does not allow for discretion. The Court stated that it must consider the steps by both parties in determining whether the Action had been materially advanced.

Justice Malik noted that while the foundational rules (including Rule 1.2) may inform the functional analysis of whether something significantly advanced an action, they do not operate to provide a Court with discretion to allow an action to proceed if three or more years passed without a significant advance in the Action.

Rule 4.33 requires a functional analysis that focusses on substance and effect, but not form.

The Court determined that, while the Respondents failed to engage and respond to the Appellant's inquiries and did not comply with their obligations pursuant to Rule 1.2, their conduct did not disentitle them from bringing the Rule 4.33 Application.

The Court found that there had been no material advance in the Action in the three years after Questioning. The Court noted that the mere collection of information by one party to comply with its obligations to answer undertakings does not materially advance the Action, particularly where the opposing party had no knowledge that this was done.

RANA V RANA, 2022 ABCA 106

(VELDHUIS JA)

Rules 1.2 (Purpose and Intention of These Rules), and 14.5 (Appeals Only With Permission)

The Applicant applied to Appeal an Alberta Court of Queen's Bench decision denying him leave to continue a debt claim against the Respondents (the "Decision").

Having previously been declared a vexatious litigant, the Applicant required permission to Appeal any decision to the Alberta Court of Appeal pursuant to Rule 14.5(1)(j). The Court noted that Rule 14.5(4) prevents a vexatious litigant from Appealing an Order denying the vexatious litigant permission to start or continue proceedings. The Court determined that it lacked jurisdiction to grant the Applicant permission to Appeal the Decision and this was sufficient to dismiss the Application.

However, the Court also determined that the

Applicant's Appeal had no reasonable chance of success. In coming to this conclusion, the Court referred to Rule 1.2, which requires claims to be fairly and justly resolved in a timely and cost-effective way.

TERRIGNO V FOX, 2022 ABQB 199

(MASTER PROWSE)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.68 (Court Options to Deal with Significant Deficiencies), 5.32 (When Something is Relevant and Material), and 5.33 (Modification or Waiver of this Part)

The Applicants sought an Order to ban the Respondent from making use of a secret recording, as well as a costs sanction for breaching an implied undertaking of confidentiality.

While at the Calgary Courts Centre for a separate foreclosure application involving both parties, the Respondent secretly recorded a heated conversation with one of the Applicants. The Applicant complained to the Calgary Police Service about the conversation, wrote letters to the Court and published the Respondent's statements on Facebook. The Respondent sued, alleging that the letters and comments were defamatory.

The Respondent did not disclose that he was in possession of the recording in his Affidavit of Records. The Respondent had also wanted to file the transcript of the Applicant's Questioning, but the Applicants refused. In response, the Respondent filed an Application for Summary Judgment, and included the transcript of Questioning as an exhibit to his supporting Affidavit. The Respondent also provided a copy of the transcript to the RCMP, alleging that the Applicant committed perjury.

Master Prowse found that the Respondent's failure to produce an accurate Affidavit of Records referencing the secret recording was grounds for striking his Statement of Claim pursuant to Rule 3.68(4)(b)(i). He found that the Respondent deliberately withheld the recording for the collateral purpose of trying to prove that the Applicants committed perjury. However, the Applicants had not asked for the Action to be struck and Master Prowse did not order so.

Master Prowse held that the Respondent's conduct was a contravention of the Rules of Court and banned the Respondent from making use of the recording under Rule 1.5(4)(c).

Master Prowse also held that filing the transcript of Questioning, and providing a copy to the RCMP, was contrary to the implied undertaking of confidentiality referred to in Rule 5.33. The Respondent did not comply with Rule 5.32, which only allows a party to read admissions from discovery into the record at an application, proceeding or trial. Instead, the Respondent submitted the entire transcript of Questioning. Master Prowse imposed a costs award as a sanction for the breach of Rules 5.32 and 5.33, in the amount of $5,000.00.

GALL ESTATE V TURPIN, 2022 ABQB 25

(ARMSTRONG J)

Rules 2.14 (Self-appointed Litigation Representatives), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), and 12.3 (Application of Other Parts)

Ms. Gall and the Respondent were divorced. Ms. Gall passed away approximately two years later, leaving behind a son. Three years after Ms. Gall's death, the Respondent filed an Application for retroactive and ongoing child support against Ms. Gall's Estate and sought certain relief on behalf of the child. On the same day, the Estate filed an Application to strike the Divorce Action for long delay.

The Court confirmed that Rules 4.31 and 4.33 apply to Divorce Actions, noting that Part 12 of the Rules applies to proceedings under the *Divorce Act*. The Court added that Rule 12.3 expressly provides that the other parts of the Rules apply to proceedings and Appeals under Part 12, which includes Rules 4.31 and 4.33.

The Court found that, in this case, there was no basis for the delay Application as there was no outstanding Action to strike. The Judgment in the Divorce Action had already been granted. Therefore, the Court dismissed the Estate's Application to strike the Divorce Action pursuant to Rule 4.31 or 4.33.

The Estate also claimed that the Respondent lacked standing to apply for relief under the *Wills and Succession Act*, SA 2010, c W-12.2(the "Act") on behalf of the child. The Estate argued that, among other things, the Respondent had not filed the required Affidavit pursuant to Rule 2.14 to become a self-appointed litigation representative.

The Court disposed of this argument, stating that the Respondent, who was the child's father, had standing to make an Application for relief, as s.90 of the Act permits an Application to be made on behalf of a family member who is under 18 years of age by that family member's parent or guardian.

VIZOR V 383501 ALBERTA LTD (VAL BRIG EQUIPMENT SALES), 2022 ABQB 5

(FRIESEN J)

Rules 2.23 (Assistance before the Court), 4.22 (Considerations for Security for Costs Order) 6.14 (Appeal from Master's Judgment or Order), 9.15 (Setting aside, varying and discharging Judgments and Orders), 10.44 (Appeal to Judge), and 13.5 (Variation of Time Periods)

The Plaintiffs appealed four separate but related Orders of a Master including Summary Judgment against the Plaintiffs on a Counterclaim, and also appealed an Assessment Officer's Decision regarding costs. The Defendants made an Application for Security for Costs.

A preliminary issue was whether the Individual Plaintiff could appear on behalf of the Corporate Plaintiff. Justice Friesen noted that Rule 2.23(4) allowed some flexibility for a closely held corporation to access court processes and to have an agent speak on its behalf. Rule

2.23(4) did not, however, remove the requirement that a corporation must retain counsel to conduct legal proceedings. Accordingly, Justice Friesen put the Individual Plaintiff on notice that he would need to hire a lawyer to represent the Corporate Plaintiff, and that he must seek leave if we wished to represent the Corporate Plaintiff in argument or in audience before the Court in all future proceedings.

Justice Friesen noted that, pursuant to Rule 6.14, a Notice of Appeal from a Master's Order must be filed and served within 10 days after the Order or Judgment is entered and served. Pursuant to Rule 10.44, an Assessment Officer's Decision may be appealed within one month of the date of the Decision. Rule 13.5 provides the Court discretion to "stay, extend or shorten" any time period specified in Rules. Factors that guide the Court in exercising its discretion under Rule 13.5 include whether: there was a bona fide attention to Appeal while the right existed; there was an explanation for the failure to Appeal in time that excused or justified the lateness; there was an absence of serious prejudice such that it would not be unjust to disturb the Judgment; the Applicant took benefits of the Judgment under Appeal; and whether there was a reasonably arguable Appeal.

In relation to the Master's earliest Order, the Plaintiffs failed to file a Notice of Appeal within the 10 days outlined in Rule 6.14 and they took advantage of the terms of the Order that benefitted them. Accordingly, Justice Friesen denied the Application for leave to file a late appeal and the Appeal of the Order itself was denied.

In relation to two of the Master's Orders the Plaintiffs also failed to file a Notice of Appeal within 10 days — despite this, Justice Friesen found there was no prejudice to the Defendants arising from the delay. However, Her Ladyship dismissed the Appeals because, in both cases, the Plaintiffs provided no substantive argument as to why the Court should allow the Appeal, and in one case, the Plaintiffs failed to provide a record of proceedings, pursuant to Rule 6.14(5).

The Plaintiffs did file a Notice of Appeal of one of the Master's Orders within the 10 day window proscribed by Rule 6.14. However, the Plaintiffs failed to provide any substantive argument as to why the Court should allow the Appeal. Accordingly, the Appeal was dismissed.

Similarly, the Plaintiffs failed to file a Notice of Appeal of an Assessment Officer's Decision in respect of the Costs Award within the appeal period as laid out in Rule 10.44. The first time the Plaintiffs clearly stated an intention to Appeal was several months after the expiration of the appeal period. As in the other orders, Justice Friesen confirmed that the Plaintiffs provided no explanation as to why a formal Appeal was not made within the appropriate time period. The Plaintiffs did not benefit from the costs award and there was no prejudice to the Defendants in allowing an extension of the time to appeal. There was a reasonably arguable Appeal. However, the Plaintiffs, again, did not do anything they were required to do to pursue the Appeal, such as ordering a transcript of the Assessment Officer's Decision or providing arguments as to why the Decision was wrong. Accordingly, Her Ladyship dismissed the Appeal.

The Defendant sought Security for Costs pursuant to Rule 4.22 which states that a party may be ordered to provide Security for Costs if the Court considers it just and reasonable to do so after considering: whether it was likely the Applicant would be able to enforce an Order or Judgment against assets in Alberta; the ability of the Responder to pay the costs award; the merits of the Action; whether granting the Order would prejudice the Respondent's ability to continue the Action; and any other matter the Court considered appropriate. The Court considered the above elements and issued the requested Security for Costs Order.

Lastly, one of the previously issued Master's Orders required the Defendants to return a Maserati to the Plaintiffs — the Defendants sought the return of that vehicle and argued that Rule 9.15(4) allowed the Court to vary or

discharge an interlocutory order because information arose or was discovered after an order was made. After the Defendants highlighted new evidence to the Court, Her Ladyship directed the Plaintiffs to return the Maserati to the Defendants.

LUPULIAK V CONDOMINIUM PLAN NO 8211689, 2022 ABQB 65

(FEASBY J)

Rules 3.13 (Questioning on Affidavit and Questioning Witnesses), 3.68 (Court Options to Deal with Significant Deficiencies), and 6.20 (From of Questioning and Transcript)

The Court in this decision addressed an Application of a condominium owner requesting that portions of the Respondent condominium board's Affidavit evidence be struck, pursuant to Rule 3.68. The Court expressed the view that Applications to strike Affidavit evidence often constitute a poor use of the Court's time, as objectionable Affidavit evidence is typically disregarded in any event. Moving to the Application's substance, the Court held that much of the impugned Affidavit evidence amounted to permissible evidence that had arguably been infused with value judgments through the inclusion of descriptive language. To the extent that such language was the sole issue, the Court refused to strike. Other passages, which spoke to the Affiants' emotional response to, or perspective on, a particular behaviour were also maintained. Some passages, however, were struck on the basis of hearsay and irrelevance.

The Court also addressed the Applicant's request that it draw an adverse inference against the condominium board based on its failure to tender evidence from the condominium board's president. In refusing to draw such an inference, the Court noted that it had been open to the Applicant to cross-examine the condominium board's president, pursuant to Rules 3.13(4) and 6.20(2). The Court held that this, among other reasons, militated against drawing an adverse inference.

TSUU T'INA GAMING LIMITED PARTNERSHIP V ALBERTA (GAMING, LIQUOR AND CANNABIS COMMISSION), 2022 ABQB 162

(ARMSTRONG J)

Rule 3.15 (Originating Application for Judicial Review)

The Applicants originally filed an Originating Application for Judicial Review ("Originating Application") and then later filed an Amended Originating Application ("Amended Application"). The Amended Application removed all reference to Judicial Review and references to relief by way of Orders for mandamus and prohibition while requesting the same declaratory relief as the Originating Application for Judicial Review.

The Court considered whether the Amended Application was, in fact, an Application for Judicial Review and whether the Amended Application was time barred pursuant to Rule 3.15(2).

The Court noted that Rule 3.15 applies when the Application seeks declaratory relief and that the defining characteristic of Judicial Review is not the form of relief sought but whether there is a decision, act, or omission of a public body or administrative tribunal that is being challenged.

The Court found that the Amended Application requested Judicial Review because it challenged act of the Government of Alberta and the Alberta Gaming, Liquor, and Cannabis Commission (the "Commission").

The Court noted that Rule 3.15(2) requires an Originating Application for Judicial Review to be filed and served within six months of the date of the decision or act to be reviewed (the "Review Period") and that the Review Period cannot be extended by the Court.

The Court additionally noted that if an impugned act or decision is alleged to be void for want of jurisdiction, a claim could be advanced outside the Review Period. However, the other challenges which were initiated outside the Review Period could not be advanced. The Court determined that the Applicant's allegation that the Commission operated without jurisdiction could proceed despite being initiated outside the Review Period. The Court dismissed other allegations unrelated to jurisdiction because they were not initiated within the Review Period.

CANADIAN NATURAL RESOURCES LIMITED V FISHING LAKE MÉTIS SETTLEMENT, 2022 ABQB 53

(HAYES-RICHARDS J)

Rules 3.22 (Evidence on Judicial Review), and 3.62 (Amending Pleadings)

This Judgment arose from an Originating Application for Judicial Review of policies passed by the Métis Settlements General Council in relation to the taxation and assessment of property within the Fishing Lake Métis Settlement. The Applicants sought to amend

their Amended Originating Application to allege procedural unfairness. The Respondents disputed the Applicants' entitlement to amend the Amended Originating Application and to rely on additional Affidavit evidence filed in connection therewith.

The parties agreed that, pursuant to Rule 3.62, leave is not required to amend pleadings prior to their closing and that there is no rule expressly closing pleadings in Judicial Review Applications commenced by Originating Application. They disagreed, however, as to whether pleadings had closed prior to the Applicants' Application to amend. Further, the parties disagreed as to whether the additional Affidavit evidence, which spoke to claims proposed to be added through amendment to the Amended Originating Application and historical and other background, should be permitted to be relied upon, pursuant to Rule 3.22.

The Court concluded that, while the Rules do not specify a time for close of pleadings on Applications for Judicial Review, leave would be required for amendments introduced after the originally scheduled hearing date, which in this case had passed prior to filing of the Application to amend. Nevertheless, the Court held that the Applicants' proposed amendment should be permitted, as the new claim could not properly be characterized as "hopeless", though costs were awarded to the Respondents. Further, the Court allowed reliance on the additional Affidavit evidence in order to provide useful context for the Originating Application and evidence in support of the added claim.

SWAN RIVER FIRST NATION V ALBERTA (AGRICULTURE AND FORESTRY), 2022 ABQB 194

(FRIESEN J)

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

The Respondent applied to strike an Affidavit in support of the Applicant's Application for Judicial Review on two grounds, in part, because no leave to admit extrinsic evidence was sought under Rule 3.22.

In striking out significant portions of the Affidavit, Justice Friesen explained that an application for Judicial Review is not a "second kick at the can".

Rule 3.22 sets out what evidence the Court may consider on Judicial Review. Mainly, a certified copy of the record of proceedings of the Decision subject to the Judicial Review is required. Sometimes the Court permits Questioning in support of an Application for Judicial Review and thus a copy of that transcript is also required. Lastly, the Court may consider any other evidence permitted by the Court or other enactments.

While not closed categories, new evidence on a Judicial Review is admitted to (a) address standing; (b) show an apprehension of bias where the facts in support of such allegation are not on the record; (c) demonstrate a breach of the rules of natural justice not apparent on the record; and (d) reveal the evidence actually placed before the decision maker where the decision maker provided an inadequate or no record of proceedings.

Justice Friesen held that it would have been prudent for the Applicant to seek leave prior to filing the Affidavit, but that, in and of itself, did not make the Affidavit inadmissible. None of the cases put forward by the Applicant

established that an affidavit ought to be struck merely because no leave was sought under Rule 3.22.

In line with the Court's discretion under Rule 3.22, the jurisprudence allows for a flexible approach to the admission of affidavit evidence. However, Friesen J explained that there is no *automatic* entitlement to introduce supplementary evidence at the Judicial Review. Properly construed, some of the evidence in the Affidavit was not new evidence going to the merits of the decision. Therefore, Friesen J admitted portions of that evidence for the purposes of providing background and context relevant to the issues on Judicial Review.

However, large parts of the Affidavit were duplicative, argumentative, and in some cases, improper. In such instances, the Court has discretion under Rule 3.68(4) to strike all or parts of the affidavit.

Justice Friesen exercised this discretion and struck duplicative paragraphs in the Affidavit because they summarized matters already on the record, and the same summary could have been provided in written or oral argument by reference to the existing record. The Affidavit also contained opinion and argument paragraphs that were not relevant to the issues on Judicial Review and were accordingly struck. Lastly, the Affidavit contained hearsay evidence for which neither the affiant's source of information nor his belief in its truth was disclosed. These paragraphs were also struck from the Affidavit.

CLUB INDUSTRIAL TRAILERS V PARAMOUNT STRUCTURES, 2022 ABQB 34

(FETH J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), and 6.14 (Appeal from Master's Judgment or Order), and 13.7 (Pleadings: Other Requirements)

The Defendant appealed a Master's Order disallowing certain amendments to its Statement of Defence and certain aspects of a proposed Counterclaim.

Justice Feth began by discussing the Standard of Review on Appeal from a Master's Order. The Court stated that such an Appeal is *de novo*, and that new evidence may be admissible pursuant to Rule 6.14(3) if the new evidence is relevant and material.

His Lordship then turned to the principles guiding amendments to Pleadings, observing that the Court may give permission to amend before or after the close of Pleadings pursuant to Rule 3.65. Justice Feth stated that the "classic rule" is that amendments are allowed no matter how careless or late, unless there is prejudice to the other side that cannot be repaired (by a Costs Award or otherwise). The result is that there is a "presumption in favor of allowing amendments." The exceptions to this general rule are: (1) if the amendment seeks to add a new party or cause of action after the expiry of a limitation period; (2) if the amendment is hopeless; (3) if the amendment would cause serious prejudice to the opposing party, not compensable in Costs; and (4) if there is an element of bad faith associated with the failure to plead the amendment in the first instance.

Hopeless amendments are those which involve a proposed pleading that, if in the original

pleading, would have been struck for suffering from one or more deficiencies under Rules 3.68(2) and (3).

Justice Feth then turned to an analysis of each of the proposed amendments in the context of the guiding principles described above.

His Lordship held that the Appeal, and thus the proposed amendments, should be allowed. The narrow exception to this was with regard to instances where the Defendant sought to plead that a certain misrepresentation by the Plaintiff was made "negligently or otherwise." Justice Feth held that the phrase "or otherwise" ought not to be included in the amendment because it implied fraud, which must be specifically pleaded pursuant to Rule 13.7.

Justice Feth therefore allowed the Appeal, subject to the clarification regarding fraud.

INGRAM V ALBERTA (CHIEF MEDICAL OFFICER OF HEALTH), 2022 ABQB 164

(ROMAINE J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), and 13.5 (Variation of Time Periods)

The Applicants challenged the constitutionality of several Orders of the Alberta Chief Medical Officer of Health (the "CMOH Orders"). Following the close of the pleading period, the Applicants applied for leave to amend their Originating Application to include two orders that were not previously included in the scope of the Action.

Rule 3.65(4) allows the Court to grant permission to a party to amend its pleading after the pleading period has closed, including as late as at trial. The Court will generally allow for an amendment unless it is prejudicial and not compensable in costs, hopeless, or brought in bad faith.

Justice Romaine explained that, when the Court assesses the merits of an Amendment Application, it must consider the public interest. Justice Romaine cited the Supreme Court of Canada in *Ernst v Alberta Energy Regulator*, 2017 SCC 1, and explained that when the constitutionality of a law is decided, the public interest "requires that the fullest and best evidence possible be put before the Court."

Justice Romaine dismissed the application to amend under Rule 3.65(4). Her Ladyship found that the amendment would cause prejudice to the Respondents, not compensable in costs. The application to amend was brought late and during the course of the proceedings, which triggered issues of hearing fairness since neither party had addressed the two CMOH Orders through affidavit evidence. If the Court were to allow the amendment, it would require a lengthy adjournment that would run against the public interest of resolving litigation as expediently and economically as possible.

The Court then turned its attention to determine whether the Applicants can rely upon Rules 9.15(4) and 13.5 to account for the inclusion of the two CMOH Orders by varying a previous Interlocutory Order of the Court. Rule 9.15(4) allows the Court to vary an Interlocutory Order based on information that had been discovered after the Order was made or on any grounds the Court considers just. Rule 13.5 gives the Court discretion to vary time periods.

However, Justice Romaine declined to vary the

Oral Hearing Order. The Applicants did not adduce any new information nor made any new submissions that would justify the variation.

PETRONE V AUBIN, 2022 ABQB 219

(LITTLE J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants brought an Application pursuant to Rule 3.68 to strike two Statements of Claim on the grounds that they disclosed no reasonable claim or constituted an abuse of process, or both. Each of the Statements of Claim alleged that the Defendants were liable for breaches of trust and misappropriation of corporate funds.

The Court confirmed that the test for striking a pleading which discloses no reasonable claim is as follows: For the purpose of the analysis, the facts pled are presumed to be true; The claim must have no reasonable prospect of success to be struck; and Striking is a tool which must be used with care since the law evolves, and striking should not be used to foreclose novel claims. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

Justice Little stated that the onus on a defendant is no higher than proving that it is "plain and obvious" that the pleading discloses no reasonable claim. The Court found the Defendants in this case failed to prove that the Plaintiff's claims had no reasonable prospect of success.

However, the Court struck both Statements of Claim because they constituted an abuse of process based on the following criteria that often characterize litigation that is both vexatious and an abuse of process: Collateral attacks on decisions of the courts; Hopeless proceedings; Escalating proceedings and Making unsubstantiated allegations of conspiracy, fraud, and misconduct.

KERSWELL V BENOIT, 2022 ABQB 93

(LITTLE J)

Rule 3.72 (Consolidation or Separation of Claims and Actions)

The Applicant sought to consolidate a Surrogate Action with a related Action pursuant to Rule 3.72(1)(a). Alternatively, the Applicant sought to have the two Actions heard concurrently under Rule 3.72(1)(b).

Justice Little reviewed the common law factors for consolidating actions. These include: (i) whether there are common claims, disputes, and relationships between the parties; (ii) whether consolidation will save time and

resources in pre-trial procedures, (iii) whether time at trial will be reduced, (iv) whether one party will be seriously prejudiced by having two trials together, (v) whether one action is at a more advanced stage than the other, and (vi) whether consolidation will delay the trial of one action which will cause serious prejudice to one party.

After considering the common law factors, and relevant jurisprudence, in turn, Justice Little satisfied himself that the factors did not favour consolidation and ultimately dismissed the Application.

BAINS V ADAM, 2022 ABCA 72

(VELDHUIS, HUGHES AND KIRKER JJA)

Rules 4.1 (Responsibilities of Parties to Manage Litigation), 4.10 (Assistance by the Court), and 4.13 (Appointment of Case Management Judge)

The self-represented Appellant appealed a prior Order which addressed numerous outstanding procedural issues. This Order arose from a Rule 4.10 case management conference that the Appellant failed to attend.

The Court of Appeal recognized that procedural decisions by a Case Management Judge are typically subject to significant deference. After the Court of Appeal identified the purposes of case management, as enumerated in Rule 4.13, the Court of Appeal recognized that neither a case management conference pursuant to Rule 4.10, nor case management under Rule 4.13, relieves the parties the responsibilities of managing the litigation under Rule 4.1. Ultimately, considering the Appellant's conduct, the Court of Appeal confirmed that the Order was reasonable and dismissed the Appeal.

TWINN V TRUSTEE ACT, 2022 ABQB 107

(HENDERSON J)

Rules 4.14 (Authority of Case Management Judge), and 4.15 (Case Management Judge Presiding at Summary Trial and Trial)

This decision arose from an Application for advice and direction concerning the interpretation of a Consent Order approving the transfer of assets from one trust (the "1982 Trust") to another (the "1985 Trust"). At the time the Application was heard, the Consent Order had been issued approximately five years previous in the same litigation.

The Application sought advice and direction as to whether the Consent Order's intended effect was to transfer both the legal and beneficial interest, such that the trust assets would be held by the 1985 Trust for the benefit of the 1985 Trust beneficiaries, or only the legal interest, such that the assets would be held by the 1985 Trust for the benefit of the 1982 Trust

beneficiaries. The Court noted that its determination would be consequential, as its effect, regardless of its decision, would be to exclude individuals from the benefit of valuable trust assets.

A threshold issue was whether the Court could issue the advice and direction sought. In particular, the Respondents argued that, while the Case Management Judge could issue advice and direction in respect of whether, pursuant to the Consent Order, the trust assets were being held for the benefit of the 1985 Trust beneficiaries, he could not, in the event it was concluded the trust assets were not held for such beneficiaries, go on to identify the proper beneficiaries. To do so, the Respondents argued, would effectively grant a remedy, which a Case Management Judge cannot do.

In reaching its conclusion, the Court noted guidance from the Supreme Court of Canada calling for a culture shift from strict formalism to embrace litigation procedures and tests that provide fair, just, but efficient and proportionate mechanisms to resolve legal issues. Noting the importance and relative urgency of the matter, the parties' ample opportunity to argue their positions and the quality of the record, which the Court found was sufficient to fairly evaluate the matter, the Court concluded that it was appropriate and necessary to provide the requested advice and direction.

In reaching this conclusion, the Court further noted Rules 4.14 and 4.15, which respectively empower the Case Management Judge to resolve issues in ongoing litigation and preclude the Case Management Judge from hearing an Application for Judgment by way of Trial or Summary Trial. As the Application was neither a Trial nor a Summary Trial, Rules 4.14 and 4.15 did not preclude the Court from providing the requested advice and direction.

ORUBOR V BORDEN LADNER GERVAIS LLP, 2022 ABQB 149

(DEVLIN J)

Rule 4.22 (Security for Costs)

The Plaintiffs appealed an Order for Security for Costs granted by Master Robertson. Justice Devlin found no error in Master Robertson's analysis but lowered the amount of security award because the Plaintiffs abandoned a large portion of their claim, which would have accounted for most of the costs going forward.

Rule 4.22 governs applications for Security for Costs. When making these discretionary decisions, the Court must consider (a) whether the Applicant can enforce a judgment against the Respondent's assets in Alberta, (b) the Respondent's ability to pay the cost award, (c) the merits of the Action, (d) whether a Security for Costs award would unduly prejudice the Respondent's ability to continue the Action, and (e) any other matter the Court considers appropriate.

Justice Devlin, in making his decision noted that it appeared that the Order for Security for Costs prompted the Plaintiffs to abandon parts of their claim and focus only on its most justifiable aspect. As a result, the litigation costs going forward were drastically reduced.

After finding that the Defendants did not cause the Plaintiffs' impecuniosity, and that the Defendants moved quickly to apply for security for costs, Devlin J. exercised His Lordship's discretion to significantly reduce the Award of Security for Costs.

KOSTIC V SCOTT VENTURO RUDAKOFF LLP, 2022 ABQB 188

(ROOKE ACJ)

Rules 4.22 (Considerations for Security for Costs Order), 4.23 (Contents of Security for Costs Order), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.20 (Form of Questioning and Transcript), and 13.18 (Types of Affidavit)

The Plaintiff applied for Summary Judgment against the Defendants and the Defendants cross-applied for Security for Costs pursuant to Rules 4.22 and 4.23. The Defendants filed an Affidavit in support of their Security for Costs Application, upon which the Affiant was cross-examined by the Plaintiff. This Decision dealt with the limits on exploration of the merits of underlying litigation when cross-examining on an Affidavit in support of a Security for Costs Application.

Rooke ACJ discussed the law governing Security for Costs Applications, and in particular the limits of cross-examination on an Affidavit filed in support of such. Rooke ACJ considered Rule 13.18(3) which requires that an Affidavit used in support of an Application that may dispose of all or part of a claim, must be sworn on the basis of the personal knowledge. However, His Lordship determined this Rule did not apply to Applications under Rule 4.22, because such Applications do not end the Action (without further contingencies taking place).

Associate Chief Justice Rooke noted that Rule 4.22 governs Security for Costs, but that, for the purposes of this Application, Rule 4.22(c) was most relevant. Rule 4.22(c) states that in considering a Security for Costs Application, the Court will take into account "the merits of the action in which the application is filed".

The regard to the limits on cross-examination, Rooke ACJ listed the following governing principles: 1. an objection to a question as being previously "asked and answered" is a valid objection, except where new information is revealed that calls for revisiting previous testimony; 2. repetitive and abusive questions are not allowed; 3. on cross-examination on an Affidavit, a witness has no obligation to attest to information outside their knowledge or to inform themselves on matters outside their control; 4. hypothetical questions may be posed, but they cannot become speculative or unrealistic, and cannot go beyond the pleadings or ask for comments on other persons' actions or inactions; 5. questions need not be confined to the "four corners of the Affidavit", but must be relevant to the underlying Application; 6. in determining the relevance and materiality of both questions and undertaking requests, the effort required to answer must be proportionate to the benefits of the answers; 7. as implied by Rules 6.7 and 6.20, cross-examination on an Affidavit is different from Questioning under Part 5 of the Rules, and must not be used as a gate into the field of examination for discovery; and 8. undertakings should only be directed on a cross-examination on an Affidavit where the Affiant has referred to information or documents in the Affidavit, or could only have made assertions contained in the Affidavit after reviewing same, and there is greater restraint in direction undertakings than in the context of questioning for discovery.

With these principles in mind, and turning back to Rule 4.22(c), Rooke ACJ stated that, in the context of a Security for Costs Application, "the depth of the cross-examination and undertakings as to the merits must be severely curtailed…because otherwise…it would 'defeat the whole rationale' for [the Application]".

HENDERSON (RE), 2022 ABCA 43

(PENTELECHUK JA)

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

The Applicant applied for an Order for Security for Costs. Justice Pentelechuk noted that Rule 14.67(1) permits a single appeal judge to order Security for Costs, and Rule 4.22 outlines the considerations in determining whether Security for Costs is just and reasonable, based on the following factors: a. whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta; b. the ability of the respondent to the application to pay the costs award; c. the merits of the action in which the application is filed; d. whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action; e. any other matter the Court considers appropriate.

Pentelechuk J. stated that the onus is on an applicant to establish that these factors weigh in their favour. The Court found that failure to pay costs in a previous trial court process, along with a demonstrated inability to pay costs if an appeal is successful, is sufficient to grant a Security for Costs Order in most cases.

The Court held that it was appropriate to grant Security for Costs. The Respondents had an outstanding costs award arising from the proceedings leading to the Order under appeal, and failed to pay those costs despite requests for payment and execution attempts.

BARKWELL V MCDONALD, 2022 ABQB 208

(BELZIL J)

Rules 4.24 (Formal Offers to Settle), 10.31 (Court-Ordered Costs Award), and 10.33 (Court Considerations in Making Costs Award)

This was a Judgment on costs arising from a Trial. The Defendant argued they were successful in the litigation and should be entitled to enhanced costs and full reimbursement for disbursements. Justice Belzil noted that Rule 10.31 dealt with court-ordered costs and that Rule 10.33(1) outlined several factors the Court may consider in making a costs award. His Lordship found that the Defendant was overwhelmingly successful at trial, the litigation engaged a number of significant issues arising from the interpretation of the *Matrimonial Property Act*, RSA 2000, c M-8, and the litigation was complex and document intensive.

His Lordship found that the Defendant previously made three offers to settle the litigation, found that the Plaintiff's failure to disclose bank accounts constituted litigation misconduct, and determined that the Defendant was entitled to enhanced costs.

His Lordship further found that the Defendants could recover their non-expert disbursements relating to photocopying, courier and related charges. Rule 10.31 provided that an unsuccessful party may have to pay the reasonable costs of expert reports and Justice Belzil found that the Defendant were entitled to recover from the Plaintiff the costs of their Expert Report.

SUNRIDGE NISSAN INC V COLONY HOMES INC, 2022 ABQB 15

(MALIK 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 Plaintiff argued that they were successful in the final result of the underlying Decision and as such they should be entitled to costs pursuant to Column 3 of Schedule C, doubled for all items after its Formal Offer to Settle was served. The Defendant argued that they were entitled to an Award of Solicitor Client costs, on an enhanced scale, or alternatively, a 40-50% level of indemnification of their incurred expenses as the Plaintiff failed to prove its allegations of wrongful and fraudulent conduct and that the matter should have proceeded summarily.

Malik J noted that, pursuant to Rule 10.29, a successful party is *prima facie* entitled to costs from an unsuccessful party and that, in determining an appropriate quantum, the court considers the factors in Rule 10.33. His Lordship found that the Plaintiff's claim was neither important in terms of the issues being litigated or complex and that the Plaintiff was successful on the ultimate issue of entitlement of the funds held in Court. Conversely, Malik J agreed that the matter should have proceeded summarily or, at most, in a one-and-a-half-day trial as opposed to the 5-day trial that took place. The fraud allegations against the Defendant were serious and were not proven — while His Lordship was not inclined to award the Defendant costs as a result of this, he was prepared to reduce the costs awarded to the Plaintiff.

Rule 10.31 grants the Court broad discretion to craft an award that is reasonable and proper, appropriate in the circumstances, or both. Justice Malik found that the Plaintiff's reasonable costs should be fixed at a level of indemnification of 10% of its incurred expenses plus GST and disbursements. However, Rule 4.29(3) would grant the Plaintiff double the costs it would ordinarily be entitled to if a Formal Offer to Settle was reasonable. Accordingly, His Lordship found that the Plaintiff was entitled to a total level of indemnification of 20% for all items following service of its Formal Offer to Settle.

LLOYDMINSTER (CITY) V ALBERTA ASPHALT ENTERPRISES, 2022 ABQB 55

(BELZIL J)

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

The Appellant appealed a Master's decision to dismiss an action for delay pursuant to Rules 4.31 and 4.33. The Parties to the claim had exchanged documents and discussed a litigation plan. No litigation plan was ever agreed to by the Parties or ordered by the Court nor was Questioning conducted.

Rule 4.33 requires a significant advance of the Action within a three-year period. For the purposes of Rule 4.33, the three-year period is measured from the last uncontroversial significant advance. In this case, this was the filing of a Statement of Defence to Third Party Notice on September 21, 2015. This meant that the three-year period was to be measured from September 21, 2015, to September 21, 2018.

On Appeal, the Appellant argued that there were three significant advances that occurred in the three-year period including: the filing of a boiler plate Statement of Defence to Counterclaim, substantial efforts to schedule Questioning, and proposing a litigation plan. The Court disagreed and found that none of these steps constituted a significant advance in the Action.

Regarding Rule 4.31, the Appellant argued that it had, in effect, been ambushed when the Defendants raised the delay issue. The Court did not accept this argument. The Plaintiff bears the responsibility to prosecute its claim. There was no evidence that any of the Defendants obstructed, stalled, or delayed the prosecution of the Claim. The Defendants at all times were willing to conduct Questioning which the Plaintiff bore the responsibility for arranging.

The Appeal was dismissed.

ALSTON V HAYWOOD SECURITIES INC., 2022 ABCA 84

(VELDHUIS, HO AND KIRKER JJA)

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

The Appellant appealed a Chambers Judge's Decision (the "Decision") upholding the decision of a Master to dismiss her Action for delay pursuant to Rules 4.31 and 4.33.

The Court determined that the standard of review was palpable and overriding error. A Chambers Judge's decision to dismiss an Action for delay under Rule 4.31 involves an exercise of discretion and is owed deference. The Court noted that determining whether delay is inordinate and inexcusable or whether there has been significant prejudice are largely questions of fact. With respect to Rule 4.33, the Court noted that determining whether an Action has been significantly advanced is a question of mixed fact and law.

The Court found no palpable and overriding error in the Decision. To the contrary, the Court

found that the Chambers Judge stated the correct legal test and made factual findings on the record before him. The Chambers Judge reviewed the history of the proceedings and determined that: The Appellant was responsible for all delay after 2016; The Respondent suffered substantial litigation prejudice because of the Appellant's inexcusable and inordinate delay; and The steps taken after March 8, 2016, did not narrow the issues, complete or advance discovery, or clarify the parties' positions or otherwise stop the clock.

As a result, the Court dismissed the Appeal.

DARBY V CITIFINANCIAL, 2022 ABQB 9

(KISS J)

Rules 4.33 (Dismissal for Long Delay), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), and 9.16 (By Whom Applications are to be Decided)

On November 7, 2019, the Defendants filed an Application pursuant to Rule 4.33 for dismissal for long delay (the "Delay Application"). Later that same day, the Plaintiff was granted an Order directing the Defendants to provide a complete and proper set of answers to Undertakings and a further and better Affidavit of Records within 60 days (the "Undertakings Order"). On August 20, 2020, the Defendants applied, unsuccessfully, to have the Undertakings Order set aside (the "Application to Set Aside"). The Defendants appealed the outcome of the Application to Set Aside.

The Court first determined whether the Master was properly able to hear the Application to Set aside. The Defendants had argued that the Undertakings Order had been granted *ex parte*, and accordingly, sought to have the Undertakings Order set aside pursuant to Rule 9.15(1)(a). The Court determined that, because the Master had found that the Defendants did not have notice of the Plaintiff's intention to obtain the Undertakings Order, relief under Rule 9.15 was available to the Defendants. Further, the Court found that the Defendant's Application to Set Aside was properly brought, pursuant to Rule 9.16, before the same Master and the Master was not *functus officio*.

The Court then dealt with whether the Undertakings Order was granted *ex parte*. The Court determined that, because service was not properly affected, pursuant to the requirements of Rule 6.3(3), the Undertakings Order was granted *ex parte*, and should, therefore, be set aside under Rule 9.15(4).

Lastly, the Court addressed the issue of timing for when a Rule 4.33 Application freezes an Action. The Court reviewed the case law and concluded that a Delay Application freezes an Action when the Application is filed. A Plaintiff cannot take any further steps to advance an Action until the Delay Application is heard.

BUHLER V BUHLER, 2022 ABQB 206

(MANDERSCHEID J)

Rule 5.13 (Obtaining Records from Others)

The Applicant filed a Family Application against the Respondent, her ex-husband, for an Order compelling the Respondent to comply with a forensic audit to determine his true income and child support obligations and a share evaluation of a company. The Applicant was also seeking disclosure of the Respondent's wife and the company's financials.

The Court denied the Applicant's request for financial disclosure of the Respondent's current wife and the company's financials because the Applicant failed to comply with Rule 5.13. Rule 5.13 requires an Applicant to provide notice to a person who is not a party to an action that he or she is seeking certain records. The Applicant failed to provide notice.

VAN GRINSVEN V KORTBEEK, 2022 ABQB 138

(LOPARCO J)

Rule 5.31 (Use of Transcript and Answers to Written Questions), 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Expert's Reports), 5.37 (Questioning Experts Before Trial), 6.14 (Appeal from Master's Judgment or Order), and 7.3 (Application and Decision)

This is an Appeal of the Master's Decision to summarily dismiss a medical malpractice claim pursuant to Rule 7.3.

The Plaintiffs sought to file new evidence on appeal. The Court, relying on Rule 6.14(3), noted that the rule gives the Court broad authority to admit new evidence on appeal from a Master. It must, however, meet the "very lax test" for relevance and materiality.

However, the Plaintiffs proposed "evidence" was only appended to their submissions and none of the proposed documents were exhibits in an Affidavit. In recognizing that the Plaintiffs were self-represented, the Court noted that the *Rules of Court* apply to all litigants; inconsequential errors can be overlooked, but substantive law, including the rules of evidence, must be observed. The Court did rule, however, that the Questioning transcripts submitted by the Plaintiffs were admissible as read-ins under Rule 5.31.

In considering expert reports, the Court noted that the Plaintiffs failed to file any formal expert reports pursuant to a prior procedural order in accordance with Rule 5.35, which requires that expert reports be in Form 25 and contain the information required by the form. The Court noted that Rule 5.37 provides that parties may agree to, or a party can apply to the Court to permit, Questioning an expert on their report. As such, expert evidence must be in a form that permits cross-examination of the expert.

PURE ENVIRONMENTAL WASTE MANAGEMENT LTD V LONQUIST FIELD SERVICE (CANADA), ULC, 2022 ABQB 30

(JOHNSTON J)

Rules 6.11 (Evidence at Application Hearings), 7.3 (Summary Judgment), and 13.18 (Types of Affidavit)

The Applicants applied for Summary Dismissal of the Respondents' claims.

The Court noted that Rule 7.3 allows a party to apply for Summary Dismissal where there is no merit to a claim or part of it. The Court also noted that Summary Judgment is an appropriate procedure if there no genuine issue for trial such that the Court can reach a fair and just determination on the merits.

The Respondents argued that summary dismissal was inappropriate in part because the Applicants' Affidavit in support contained hearsay evidence. Rule 13.18(3) says that an Affidavit in support of a Summary Judgment Application must be sworn on the basis of the personal knowledge of the affiant. The Court noted that affiants can rely on information and belief in Summary Judgment Applications where the information is derived from a review of relevant and reliable documents. The Court therefore determined that the parts of the Applicant's Affidavit where the affiant informed himself from books and records maintained by the Applicants could be relied upon for the Summary Judgment Application but disallowed evidence where the affiant informed himself based on information from other people.

The Court ultimately declined to grant Summary Dismissal. The Court noted that there were significant conflicts in the affidavit evidence on the record and found that there were credibility issues that could not be resolved without *viva voce* evidence. The Applicants argued that *viva voce* evidence could be used to address any conflicts in the evidence; the Court determined that the Rule 6.11(1) process (which identifies what evidence can be considered at Application Hearings) was inappropriate as there were numerous material conflicts in the evidence on multiple issues.

DURI HOMES LTD V QUEST COATINGS LTD, 2022 ABQB 166

(MACLEOD J)

Rule 7.3 (Summary Judgment/Dismissal)

The Defendant appealed the decision of a Master dismissing its Application for Summary Judgment. The Defendant sought Summary Judgment declaring that it was an unnamed insured under a builder's risk insurance policy and, therefore, protected by a subrogation clause against any action by the Plaintiff or its insurer.

The Court confirmed that the applicable test for Summary Judgment was recently summarized in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49. MacLeod J. found that the Court could resolve the Action on a summary basis and allowed the Appeal. He rejected the Plaintiff's argument that the Action involved a complex factual scenario

with credibility concerns. The Court found that the Defendant had proven the facts on which it relied on a balance of probabilities, which were the core facts of the case. The Could also found that the Defendant had met its onus for summary judgment on a balance of probabilities, and there was no genuine issue requiring trial. The Court granted Summary Judgment and held that the Defendant was an unnamed insured under the builder's risk policy.

OPTRICS INC V LLOYD'S UNDERWRITERS, 2022 ABCA 26

(KHULLAR, PENTELCHUK AND KIRKER JJA)

Rules 7.3 (Summary Judgment), and 10.33 (Court Considerations in Making Costs Award)

The Appellant appealed an Order denying its request for a declaration that the Respondent underwriters had a duty to defend certain the Appellant. The Appellant also appealed the Chambers Judge's Decision to award double costs. The Chambers Judge was asked to determine whether the underwriters had defence obligations under one, or both of two insurance policies.

The Chambers Judge determined that there was no duty to defend under one policy and determined she could not fairly determine whether a duty to defend was triggered under the second policy on a summary basis and referred this question to a Trial.

The Court found Chamber Judge's decision to refer the question of the second policy to Trial engaged the principles that guide determination of Summary Judgment Applications under Rule 7.3(1). The Chambers Judge's Decision to refer the question to Trial was discretionary and entitled to deference. Costs awards are also discretionary and owed deference on appeal.

The Court also disagreed that the Chambers Judge failed to consider the factors for a costs award in Rule 10.33. In determining that double costs were appropriate, the Chambers Judge specifically considered the Underwriters' *Calderbank* offer, the complexity of the Application and the failure of the Appellant to concede one of its main arguments until the commencement of the Hearing. The Court found no error justifying appellate intervention. The Appeal was dismissed.

RANA V RANA, 2022 ABQB 111

(ROOKE ACJ)

Rules 9.4 (Signing Judgments and Orders), 10.49 (Penalty for Contravening Rules), and 13.45 (Notice to be Given to Court Officers)

In an attempt to prevent further misconduct from the Applicant, the Court had previously imposed interim court access restrictions on the Applicant. Despite these restrictions, the Applicant submitted a request to file an additional Statement of Claim and an "Application for Permanent Injunction" in a proposed Action.

After canvassing the case law, Rooke ACJ denied the Applicant leave to file the Statement of Claim and "Application for Permanent Injunction." As a result of the continued misconduct of the Applicant, and pursuant to Rule 10.49(1), Rooke ACJ ordered the Applicant to pay the Clerk of the Court a penalty of $2,500. Rooke ACJ specified that the resulting Orders were to be served on the Clerk of the Court pursuant to Rule 13.45 and that the Applicant's approval of the Order is dispensed with under Rule 9.4(2)(c).

RANA V RANA, 2022 ABQB 114

(ROOKE ACJ)

Rules 9.4 (Signing Judgments and Orders), 10.49 (Penalty for Contravening Rules), and 13.45 (Notice to be Given to Court Officers)

The Applicant had an extensive record of litigation misconduct and was declared a vexatious litigant subject to prospective court access gatekeeping. He applied to the Court for leave to file a "Notice to Admit Facts" in the Alberta Court of Queen's Bench.

The Court rejected the Applicant's leave to file request. The Applicant failed to adhere to the requirements for a valid leave to file a request as ordered by the Court. The Court also found that the Notice to Admit Facts was a collateral attack on prior litigation.

Repeated abuse of the Court's leave to file process is a basis for a Court to award a penalty pursuant to Rule 10.49(1). In the earlier decision, *Rana v Rana*, 2022 ABQB 111, Rooke ACJ ordered the Applicant to pay a Rule 10.49(1) penalty of $2,500. Here, this was "done the same again, in an even more egregious and obnoxious manner." As such a further Rule 10.49(1) penalty was warranted, with an increased quantum of $4,000 to deter further abusive litigation.

The Court ordered counsel for the proposed Respondent to prepare the Order for this Decision in two separate Orders. One for substance and the other pursuant to Rule 10.49(1) (as required for service on the Clerk of the Court pursuant to Rule 13.45). The Court dispensed with the Applicant's approval of the Orders pursuant to Rule 9.4(2)(c).

MACARONIES HAIR CLUB AND LASER CENTER INC V BOFA CANADA BANK, 2022 ABQB 143

(ROOKE ACJ)

Rule 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Costs-Ordered Costs Award), and 10.32 (Costs in Class Proceeding)

This cost ruling arises from an approval of a class proceedings settlement as against two of the Defendants. The Defendants argued that costs should not be awarded as against them because the *Alberta Rules of Court* do not permit an award of costs against objectors.

The Court agreed with the Applicant Plaintiff, however, in finding that Rule 10.32 applies only to an unsuccessful representative plaintiff, which the Defendants were not. Further, the Court noted that, in speaking only to costs against unsuccessful representative plaintiffs, Rule 10.32 does not preclude a costs award against objectors.

In applying Rules 10.29 and 10.32, the Court found no reason to depart from the general principle that the Applicant, being the successful party in the Approval Application, was entitled to its costs against the Defendants as the unsuccessful parties.

In quantifying costs, the Court noted that Rule 10.31(3)(b) allows the Court to order payment of costs equal to a multiple of an amount set out in any column of Schedule C. The Court noted that the application for the approval of the settlement would not be characterized as extraordinarily complex; however, the value of the settlement of at least $45 million, significantly exceeds the threshold for Column 5. As a result, the Court awarded costs in accordance with Column 5 of Schedule C with a multiplier of three.

The Court found that no approval of the resulting Order by the Respondents was required in accordance with Rule 9.4(2)(c).

HOGUE V JOHNSTON (ESTATE), 2022 ABQB 77

(HAYES-RICHARDS J)

Rules 9.12 (Correcting Mistakes or Errors), and 9.13 (Re-Opening the Case)

After an earlier Judgment, counsel provided written submissions to address potential errors in the original Decision. In response to the written submissions, Justice Hayes-Richards made two alterations, pursuant to Rule 9.12 which allows a Court to correct a mistake or error in a judgment or order arising from an accident, slip or omission. A third change was made pursuant to Rule 9.13 to modify the earlier Judgment.

FISET V FEENEY, 2022 ABQB 211

(ROOKE ACJ)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), and 10.49 (Penalty for Contravening Rules)

he Applicant was subject to Court access restrictions as a result of "unmanageable, persistent and repeated abuse" of the Court's processes. The Applicant sought leave to file an Application that, amongst other things, sought to quash an Order granted in an Application filed by the Respondent.

The Applicant, relying on Rule 9.15, also argued that the Application filed by the Respondent should be reopened because allegedly false information was submitted by the Respondent. The Court found that the legal defects alleged by the Applicant were not a basis for a Rule 9.15 Application, as the Rule only addresses scenarios where a Court process was conducted without notice or where a party was unable to attend. In dismissing the Application, the Court cautioned the Applicant that should he continue to abuse the Court's processes to obtain leave to file and continue litigation, the Applicant may be subject to Rule 10.49(1) penalties.

DSM V KLS, 2021 ABQB 1024

(LEE J)

Rule 10.4 (Charging Order for Payment of Lawyer's Charges)

The Applicant brought an Application against the lawyer Respondent for the return of certain trust monies, and the lawyer Respondent brought a Cross-Application for a Charging Order over those monies under Rule 10.4. Pursuant to Rule 10.4, the Respondent could apply to the Court to get a Charging Order over the remaining monies being held in trust by him, so long as the Respondent met the following conditions: The lawyer's charges are unlikely to be paid without a charging order; The lawyer ran or defended litigation; The lawyer's efforts in the suit resulted in the recovery or preservation of the property that is the subject of the charges; The charges are limited to fees and disbursements incurred in the suit; and Notwithstanding these conditions having been met, the Court need not give this charge if it seems unfair.

The Court held that it would be unfair to grant the Charging Order. The Respondent held $25,000.00 in trust for the Applicant for 14 years before deciding to seek a Charging Order to secure payment of an outstanding account in the sum of $892.24, dating January 25, 2008. The Respondent held the monies in trust for the Applicant as a means of security to pay arrears in child support in the event that the Applicant was forced into bankruptcy and could not pay his ex-spouse. The Applicant's dispute with the ex-spouse had resolved, however, and the Applicant forgot about the trust funds. The Court found that while the Respondent's outstanding account was unlikely to be paid, the 14-year delay was not necessary and not reasonable. Accordingly, the Court ordered the Respondent to return the trust monies to the Applicant.

COLD LAKE INDUSTRIAL PARK GP LTD V ABT (ESTATE), 2022 ABCA 23

(HO JA)

Rules 10.26 (Appeal to Judge), and 14.5 (Appeals Only with Permission)

This Application was brought pursuant to Rule 14.5(1)(e), as an appeal to costs only, and sought permission of the Court to appeal a Chamber Judge's Decision dismissing an Appeal of a Review Officer's Decision. The Applicant alleged that the Chambers Judge erred in ruling the Appeal of the Review Officer's decision was time barred and erred in upholding the assessment to allow doubling up of costs as against the liable Defendants.

The Court considered Rule 10.26 which addresses appeals of a Review Officer's Decision. Specifically, 10.26(2) provides that the Appeal is an appeal on the record of proceedings before the Review Officer; and Rule 10.26(4) provides that the "appellant must file and serve on the respondent to the appeal, within one month after the date of the review officer's decision" notice of the appeal, the record of proceedings and any further written argument. Based on the above, the Court held that new arguments are not properly presented on appeal, and certainly not as the basis for permission to appeal.

The test for permission to appeal a decision that relates to costs only is: (i) the applicant must identify a good, arguable case having enough merit to warrant scrutiny by the court; (ii) the issues must be important, both to the parties and in general; (iii) the appeal must have some practical utility; and (iv) the court should consider the effect of delay in proceedings caused by the appeal. The Court denied permission to appeal because it concluded that the Applicant did not meet the test for permission to appeal.

WANG V ALBERTA, 2022 ABCA 79

(VELDHUIS, HUGHES AND HO JJA)

Rules 10.28 (Definition of "party")

This was an Appeal of two Costs Orders.

The Appellants argued that, as the Case Management Judge concluded that AHS was not a party to the Action and did not need to be named in the style of cause, the Case Management Judge had no authority to award costs in favour of AHS as Rules 10.29 - 10.34 provided guidance about awarding costs to a "party".

The Court found that while these circumstances are rare, there was jurisdiction to award costs in favour of non-parties to an Action pursuant to s. 21 of the *Court of Queen's Bench Act*, RSA, 2000, c C-31, jurisprudence, and the definition of "party" in Rule 10.28.

Having regard to the standard of review, the Court found that there was no basis to interfere with the Case Management Judge's exercise of discretion.

THOBANI V CHAHAL, 2022 ABQB 159

(EAMON J)

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

The Parties sought direction from the Court on an award of costs. The Respondents had filed an Originating Application claiming a debt or unjust enrichment from the Applicants. The Applicants did not appear in Court before the Master in Chambers, and the Respondents were granted Judgment against the Applicants. Eamon J. set aside the Judgment on application by the Applicants. The Applicants submitted that they were entitled to costs because they were successful in setting aside the Judgment. The Respondents submitted sought thrown away costs.

The Court awarded the Respondents thrown away costs for post-judgment enforcement steps. Relying on the costs principles set out in Rules 10.29 and 10.31, Eamon J. found that the Respondents were entitled to thrown away costs for post-judgment writ proceedings against the Applicants' house, as well as an ex-parte application to assess their costs of the lawsuit.

The Court also awarded costs to the Applicants. Eamon J. did not accept that acting reasonably in response to the set aside application should deprive the Applicants of their costs.

JWS V CJS, 2022 ABCA 63

(VELDHUIS, HUGHES AND KIRKER JJA)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award may be Made), and 10.31 (Court-ordered Costs Award)

This was an appeal of a costs award in a family dispute.

The Father argued that the Judge who awarded costs erred in determining that the Mother was successful at trial. The Court noted that, pursuant to Rule 10.29, the successful party was presumptively entitled to costs. The Mother was successful on the primary issue of which party would have the day-to-day parenting of the children. Though the Mother did not receive all the ancillary relief requested in her Statement of Claim, the Court noted that costs were not normally awarded on an issue-by-issue basis and dismissed this ground of appeal.

The Father further argued that the Costs Judge erred by awarding costs for interim orders that were silent on Costs. The Court of Appeal noted that pursuant to Rule 10.30 "a costs award may be made [...] in respect of trials and all other matters in an action, after judgment or a final order has been entered." The Appellate Court found that the Judge applied a "costs in the cause" approach; the Court dismissed this ground of appeal.

Lastly, the Father argued that the Judge erred in awarding the quantum of solicitor-client costs when there was no Bill of Costs provided by the Mother. The Mother presented a lump

sum estimate of the solicitor-client costs incurred and provided submissions about the various calculations and deductions. The Court of Appeal noted that Rule 10.31(b)(ii) authorized the Judge to accept the approach of the Mother and dismissed the last ground of appeal.

KLEBANOWSKI V JOHNSON, 2022 ABQB 172

(WHITLING J)

Rule 10.30 (When Costs Award may be Made)

The Plaintiff in this case urged the Court to not make a Costs award as there had been no formal Judgment entered.

The Plaintiff relied on Rule 10.30(1)(c) which states that "[u]nless the Court otherwise orders or these rules otherwise provide, a costs award may be made in respect of trials and all other matters in an action, after judgment or a final order has been entered."

The Court rejected the Plaintiff's argument, stating that Rule 10.30(1)(c) "allows the Court to make a costs award even after judgment or a final order has been entered on the substantive issues in dispute": Kent v MacDonald, 2021 ABQB 953 at para. 26. Indeed, the Rule allows a costs award to be made notwithstanding the entry of a Judgment or final Order, but does not require that procedure to be followed.

The Court added that even if the Plaintiff's argument was accepted, the Court would exercise its discretion to order that each party should bear its own costs. The Court determined that, while the Defendant was largely successful at Trial, and was therefore presumptively entitled to costs, the Defendant had engaged in conduct that should carry costs consequences.

WANG V ALBERTA (HUMAN RIGHTS COMMISSION), 2022 ABQB 99

(EAMON J)

Rules 10.31 (Court-Ordered Assessment of Costs), and 11.21 (Service by Electronic Method)

This Decision was a reconsideration of a request for costs by the Applicant who successfully set aside the Decision of the Alberta Human Rights Commission to summarily dismiss his human rights complaint against his former employer, the Alberta Energy Regulator (AER).

The Applicant took issue with the Court emailing a Costs Decision to him. However, the Court noted that the Applicant's materials and submissions filed in support of the initial decision included his email address in the "Address for Service and Contact Information and Party Filing this Document". As such, the Applicant

objectively indicated he was prepared to receive service by email pursuant to Rule 11.21. The Court also noted that the Applicant was allowed the opportunity for additional submissions and an opportunity to obtain the AER's submissions if he had not received them. The Court held the Applicant had been treated fairly.

ALBERTA (CHILD, YOUTH & FAMILY ENHANCEMENT ACT, DIRECTOR) V NL, 2022 ABQB 120

(HILLIER J)

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

This is a "somewhat unusual" appeal. The Appellant, the Director of the *Child, Youth and Family Enhancement Act* ("CYFEA") took no issue with the substance of a Provincial Court's refusal to provide an Application for a permanent guardianship order ("PGO") of a child. However, the Appellant asserted on appeal that the Provincial Court lacked authority to award costs in such circumstances. The Respondent Mother argued that she alerted the Director through counsel that if the matter proceeded to trial and she successfully contested the PGO, she would claim costs on a solicitor-client basis.

The underlying decision Provincial Court Decision found that the Director acted contrary to the best interests of the child in proceeding with the PGO and ordered the Director to pay full indemnity Costs to the Respondent.

Hillier J. noted that, for proceedings under the *CYFEA*, the language of Reg 10(2) purports to restrict the general power to award costs specifically against the Director. The Court relied upon Rule 10.31 which prescribes the Court's discretion to award costs having regard to factors listed in Rule 10.33. The Court held that the circumstances in this case were exceptional and merit the exercise of discretion to redress the impact on the Mother and her family. The Court also held that there were a number of cases which confirmed that an award of costs against the Director must meet a test of special or unusual circumstances. As such, the Court upheld the order for the Director to pay the full costs the Mother incurred in respect of the application for a PGO including the steps to recover costs at the Provincial Court Level. The Court also awarded costs to the Mother for the Appeal on a full indemnity basis.

WITT V JOHNSON, 2022 ABQB 105

(NIELSON ACJ)

Rules 12.51 (Appearance Before the Court), and 13.1 (When One Judge May Act in Place of or Replace Another)

The Father in this family law dispute filed a family Application seeking to vary a parenting and child support Order, an amended Order, and a child support Order.

The Mother filed a family Cross-Application seeking an Order granting her sole decision-making authority for school and medical decisions relating to the child, an order attributing certain income to the Father, and retroactive child support.

The matter was heard before a Justice who reserved but passed away before issuing a decision. The Court exercised its jurisdiction pursuant to Rule 13.1 and considered the Application and Cross Application on the basis of the record and the evidence that was before the late Justice. Both parties consented to the procedure without the requirement for further submissions.

The Court determined that because there was conflicting affidavit evidence and the fact that Summary Judgment is unavailable for proceedings under the Family Law Act, a final determination of the parties' parenting issues must be determined by way of trial pursuant to Rule 12.51.

COURTOREILLE V MELCHIOR, 2022 ABQB 7

(DARIO J)

Rule 13.6 (Pleadings: General Requirements)

The Applicants applied for Summary Judgment against the Respondent and the Respondent cross-applied for Summary Dismissal of the Applicants' Action.

The Applicants argued that the facts of the claim gave rise to the equitable remedy of a resulting trust. The Respondent argued that the Applicants did not plead a resulting trust in the Statement of Claim. The Court noted that Rule 13.6 requires pleadings to state the facts on which a party relies, matters that defeat or raise a defence to a claim of another party, and remedies claimed. The Court found that the Statement of Claim plead sufficient facts to give rise to a claim of resulting trust.

The Court, however, granted the Respondent's Summary Dismissal Application; it found that the Respondent rebutted the presumption of resulting trust.

TRANSALTA CORPORATION V ALBERTA (UTILITIES COMMISSION), 2022 ABCA 37

(WATSON, O'FERRALL AND CRIGHTON JJA)

Rule 14.5 (Appeals with Permission)

TransAlta Corporation (TransAlta) obtained permission to appeal a decision of the Alberta Utilities Commission (AUC).

At the Permission Application, the AUC argued that the decision under consideration was interlocutory in nature, and that practice and policy reasons prohibited appeals of interlocutory decisions. The permission Judge allowed the appeal on the basis that there would be duplication of efforts and expense for the parties in the AUC proceeding.

Writing for the majority, Watson and Crighton JJA dismissed TransAlta's appeal. Justice O'Ferrall concurred in the result.

O'Ferrall JA confirmed that Rule 14.5(1)(c) and the jurisprudence precluded the Court of Appeal from reviewing interlocutory rulings absent exceptional circumstances. Rule 14.5(1)(c) provides that appeals from any ruling before the conclusion of a trial to the Court of Appeal are prohibited unless permission to appeal is obtained. The jurisprudence related to obtaining such permission was similar to that articulated by the AUC. Without the finding of an exceptional circumstance, appellate intervention was premature.

1664694 ALBERTA LTD V BELJAN DEVELOPMENT MANAGEMENT, 2022 ABCA 41

(ANTONIO JA)

Rule 14.23 (Filing Factums - Standard Appeals), 14.55 (Responsibility of Parties to Manage an Appeal), and 14.65 (Restoring Appeals)

The Applicants sought to restore their Appeal, which had been struck for failing to file their factum in time pursuant to Rule 14.23(1). The Applicants attempted to file their factum one day after the applicable deadline, because they had mis-diarized the deadline. Rule 14.65 allows a struck appeal to be restored either by written consent of the parties or by order of a single appeal judge. The Applicants sought consent from the Respondent to restore the appeal, but the Respondent declined to provide its consent.

The Court of Appeal held that the Applicants met the test for restoring a struck appeal, because it was in the interests of justice to do so. To determine whether restoring an appeal is in the interests of justice, the Court may consider the following: (1) whether there is arguable merit to the appeal; (2) any explanation for the defect or delay; (3) whether the applicant moved reasonably promptly in moving to cure the defect and have the appeal restored; (4) timely intention to proceed with the appeal;

and (5) potential prejudice to the respondents, including the length of the delay. Antonio J. found that the Appeal had already been found to have arguable merit in a prior decision. She also found that the one-day delay in filing was explained by a simple diarization error, and that a mere slip of counsel will not prevent restoration of an appeal, because some human error is inevitable in the legal system. Further, the one-day delay was only a minor temporal error. Antonio J. also found that the Applicants moved quickly, and as promptly as possible to have the Appeal restored, with a timely intention to proceed to the Appeal.

Finally, the Court of Appeal held that there was no prejudice to the Respondent. The Respondent did not claim any prejudice, and merely explained that they were frustrated with repeated procedural delays, for which they blamed the Applicants. The Court of Appeal found that past delays in the matter were not solely or primarily the fault of the Applicants. Moreover, the Respondent did not oppose restoration of the Appeal because it had no basis for doing so. Antonio J. also highlighted Rule 14.55(1) in respect of responsible party management and found that responsible management of an appeal includes reacting responsibly to non-prejudicial slips.

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