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RULES

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BACANORA MINERALS LTD V ORR-EWING (ESTATE), 2022 ABQB 270

(MCCARTHY J)

Rules 1.2 (Purpose and Intention of These Rules), 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)

This is a costs decision following a Summary Trial in which the Plaintiff's claim was dismissed for being statute-barred. The parties re-appeared before the Court to argue costs; the Plaintiff argued party-and-party costs were appropriate and the successful Defendant claimed full indemnity costs.

The Court observed that, notwithstanding that full indemnity costs are specifically contemplated by Rule 10.31(1)(b), recovery on that basis is reserved for "extraordinary circumstances." The Court considered the factors to determine costs as listed in Rule 10.33 and determined this matter did not raise to the level necessary for an award of full indemnity costs.

Next, the Court turned to the question of Costs awarded on an enhanced scale by adding a multiplier to the Schedule C Tariff of Recoverable Costs. Noting that multiplying Schedule C costs may be appropriate where the value of a dispute exceeds the monetary threshold set out in the Schedule, the Court considered concluded that a 2.5 times multiplier was appropriate.

Finally, the Court considered the Parties' submissions as to whether costs should be available for the entire Action (which had been initiated in the UK before being stayed) or only the Summary Trial. Noting the foundational requirements set out at Rule 1.2 and concerns regarding judicial efficiency, the Court held that it would be inappropriate to deprive the Defendant of costs for the entire Action simply because it chose to seek summary resolution of what was revealed to be a definitive issue.

Ultimately, the Court awarded costs of the entire Action against the unsuccessful Plaintiff, pursuant to Rule 10.29, deducting for unnecessary steps taken outside the jurisdiction (per Rule 10.2) and steps associated with the Defendant's counterclaim.

VOE V LLE, 2022 ABQB 286

(ROOKE ACJ)

Rules 1.2 (Purpose and Intention of these Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments or Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Awards), and 10.33 (Court Considerations in making Costs Awards)

The Plaintiff brought a prior, unsuccessful, referral pursuant to Civil Practice Note 7 ("CPN7") requesting that the Court determine whether the conduct of the Defendant amounted to an Apparently Vexatious Application or Proceeding ("AVAP"). The Defendant sought costs for the Plaintiff's referral.

Justice Rooke stated that, while Rule 10.29 generally sets out that the successful party is entitled to costs against the unsuccessful party, the primary agent conducting the proceeding in the context of CPN7 is the Court. However, because in considering the earlier unsuccessful referral the Court did not undertake a CPN7 process, the Defendant was not required to respond to the unsuccessful Rule 3.68 procedure. As a result, the Defendant was not entitled to costs under Rule 10.29 as the successful party.

However, after canvassing further case law related to the Court's consideration of costs and noting the Court's broad discretion to award costs pursuant to Rule 10.31, Justice Rooke determined a costs reward against the Plaintiff was appropriate. Justice Rooke noted that the Defendant is entitled to costs because of the Plaintiff's poor litigation conduct. Specifically, the Plaintiff concealed the real issue in dispute and caused a waste of Court resources contrary to Rules 1.2 and 10.33.

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

MATTHEWS V LAWRENCE, 2022 ABQB 288

(DEVLIN J)

Rules 1.2 (Purpose and Intention of these Rules), and 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following a decision in which Devlin J upheld the Master's decision to dismiss the Action for long delay. The Defendants of the Action sought costs of $117,256, which they said represents 40-50% of their total legal costs. The Plaintiffs took no issue with an entitlement to Costs but disagreed with the quantum.

Devlin J noted that a costs award is discretionary, but such discretion must be exercised in a principle manner and guided by the principles in Rule 10.33(1) which lay out the considerations in making a costs award. Schedule C of the *Rules* is one avenue for the Calculation of Costs. Here, both parties submitted proposed Bills of Costs based on Schedule C. Devlin J

chose to follow Schedule C but noted that he was not bound to do so.

The Court noted the recent Court of Appeal Decision in *McAllister v The City of Calgary,* 2021 ABCA 825, which endorsed “ordinary-course indemnification to successful parties, in the absence of special considerations warranting significant enhancement of costs, in the range of 40-50% of actual costs”.

The Court considered whether a multiplier of Schedule C Costs would be appropriate. Devlin J found that some enhancement of Costs was justified because of the large value of the lawsuit, and “certain scandalous allegations made in materials” which were not proven and “often appear irrelevant to the underlying merits”.

Further, the Court found that the Plaintiff had commenced and maintained the litigation as a bargaining chip in a commercial dispute which was contrary to the foundational Rule 1.2.

The Court awarded a two-times multiplier to Column Five in Schedule C for Costs as well as reasonable disbursements. This amounted to 39.5% of the actual costs incurred by the Defendants.

SC V JC, 2022 ABQB 318

(FEASBY J)

Rules 1.2 (Purpose and Intention of These Rules), 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders), and 4.20 (Confidentiality and Use of Information)

The parties negotiated a settlement at an Early Intervention Case Conference (EICC) relating to child support. Subsequent to the EICC, the parties attempted to turn the agreement into a formal order and discussions broke down. The parties reverted to their pre-EICC positions and booked an Application concerning child support payments into Special Chambers.

Feasby J held that the agreement that emerged from the EICC was valid and the parties were not at liberty to resile from that agreement even though it was not recorded in a formal order of the Court.

The Court took into consideration rule 1.3(2) which, in addition to the Court’s inherent jurisdiction to control its process, provided jurisdiction to grant the remedy of upholding the EICC agreement whether or not it was claimed in the action. The Court noted that the unusual step of deciding an application on an issue not before the Court was not taken lightly; however, in situations where the parties have no reason to look out for the public interest, or are ill-equipped to do so, the Court must control its process to ensure the appropriate use of Court resources.

The Court also commented that the EICC process, similar to the Judicial Dispute Resolution (JDR) process, is privileged. However, the exception to settlement privilege that privileged communications may be disclosed to prove the existence of a settlement is incorporated into the *Rules of Court* provisions that govern judicial dispute resolution processes. Rule 4.20(4) provides that the general rule against using materials prepared for the purpose of a judicial mediation are privileged and may not be presented as evidence “does not prevent the use of statements made or documents generated for or in the judicial dispute resolution process to prove the fact that a settlement was reached or the terms of a settlement”.

Finally, relying on Rules 1.2 and 1.4, the Court noted that the Application was contrary to the requirements of the administration of justice and an abuse of process as: (a) it sought to relitigate issues settled by agreement in a judicial mediation process; and (b) it did not further the purpose and intention of the *Rules of Court* because it was not an effective use of publicly-funded Court resources. Having found the application was an abuse of process, the Court determined it could remit the matter back to the EICC Justice to settle the terms of the Order or do so at the time. The Court held to remit the matter would be an unnecessary use of judicial resources and settled the terms of the Order.

SCHLICHTER V PEARCE, 2022 ABQB 434

(RICHARDSON J)

Rules 1.2 (Purpose and Intention of these Rules), and 7.1 (Application to Resolve Particular Questions or Issues)

The Appellant appealed the decision of a Master in Chambers to sever the trial issues of liability and quantum in a negligence case, pursuant to Rule 7.1(1). That Rule states that a Court may order an issue to be heard or tried before, at, or after a trial for the purpose of: (i) disposing of all or part of a claim; (ii) substantially shortening a trial; or (iii) saving expense (the "Prerequisites").

In setting aside the Master's Order for severance, the Court confirmed that only one of the Prerequisites to engaging the Rule is necessary for a severance Application to be considered, and that a Court must assess whether there is a real likelihood that one of the Prerequisites can be satisfied. The Court emphasized that splitting a trial into its component parts (as permitted by Rule 7.1) is the exception to the general rule that civil actions will proceed as a single trial.

The Court noted that, in this case, even a finding of split liability would not be captured by the prerequisite of Rule 7.1(a)(i) which requires the disposal of all or part of the claim to justify severance. In the circumstances of this case, any finding of liability by the Respondent would not have the effect of disposing all of the claim, as the quantum portion would then proceed. Similarly, a finding that the Respondent was liable at any level would not dispose of part of the claim since a finding of split liability would require a full trial on quantum.

The Court added that, where part of the consideration in applying Rule 7.1(1) is the efficient use of court resources and the concurrent saving of expense for all involved, it is important to consider the multiple appellate route that could be exposed if the litigation is bifurcated.

The Court rejected the Respondent's argument that once at least one of the Prerequisites is found, the analysis moves on to consider Rule 1.2.

C.M. V ALBERTA, 2022 ABQB 357

(DUNLOP J)

Rules 1.3 (General Authority of the Court to Provide Remedies), 3.15 (Originating Application for Judicial Review), 3.18 (Notice to Obtain Record of Proceedings), and 3.19 (Sending in Certified Record of Proceedings), and 3.61 (Request for Particulars)

The Applicants commenced an Action by an Originating Application alleging numerous defects in a decision of the Chief Medical Officer of Health, Dr. Deena Hinshaw, changing a requirement that people wear masks in public places (the "Decision"). The Applicants also alleged defects in a declaration by the Minister of Education prohibiting school boards from requiring masks in school (the "Declaration"). The Applicants applied for an Order seeking, in part to rely on an Affidavit sworn by Dr. Hinshaw, which was filed in another Action.

The Respondent argued that the Action could only be limited to the Decision, and that the Court could not provide any relief for the Declaration. The Respondent argued that the Originating Application was for Judicial Review only, and the prayer for relief in the Originating Application did not reference the Declaration made by the Minister.

The Court disagreed. Dunlop J. held that Rule 3.15 does not prohibit applicants for Judicial Review from also including other claims and relief in the same pleading. Dunlop J. also held that Rule 1.3(2) allows the Court to grant a remedy even if it is not formally claimed or sought. Dunlop J. stated that the Respondent could have sought particulars under Rule 3.61 if it was truly uncertain about the scope of the Action.

The Court also found that the Parties had inappropriately modified Forms 8 and 9 of Rules 3.18 and 3.19, respectively. The Applicants attempted to add additional requirements on Form 8, a Notice to Obtain Record of Proceedings (the "Notice"), which must be completed where an applicant seeks an Order to set aside a decision. Dunlop J. held that Rule 3.18(3) allows the Court, not an applicant, to modify what is required for Form 8. The Respondent deleted portions of Form 9, a reply to Form 8, whereby the respondent must send a certified record of proceedings in Form 9 or explain why the Notice cannot be complied with. Dunlop J. stated that the Rules do not authorize parties to unilaterally modify Form 8 or Form 9. The Court ordered Dr. Hinshaw to provide a more complete Record of Proceedings.

The Applicants also sought an Order permitting reliance on an Affidavit sworn by Dr. Hinshaw in another Action, pursuant to Rule 6.11(1)(f). The Court declined to grant the Order. Dunlop J. found that it would not be appropriate to admit the Affidavit for the following reasons: the Affidavit addressed issues that were not the same as in the Action; the Affidavit responded to other Affidavits that were not before the Court; the Affidavit would be incomplete and potentially misleading; the Affidavit included a large volume of irrelevant material; and the Affidavit could open the door to questioning Dr. Hinshaw with the potential to prolong, distract, and frustrate the Action.

KUNKEL V WINQUIST, 2022 ABQB 367

(LEONARD J)

Rules 2.11 (Litigation Representative Required), 2.14 (Self-appointed Litigation Representatives), 2.15 (Court Appointment in Absence of Self-appointment), 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions), and 10.47 (Liability of Litigation Representative for Costs)

The Applicant sought to be appointed as the Litigation Representative for an estate of a deceased person in order to continue a lawsuit brought by the deceased person against the Respondent.

The Court granted the Application, appointing the Applicant as the Litigation Representative for the estate. Leonard J confirmed that, pursuant to Rule 2.11(e), an estate must have a Litigation Representative to bring, defend, or continue an Action where no personal representative has obtained a grant under the *Surrogate Rules*, Alta Reg 130/1995. Rule 2.14 allows an interested person to self-appoint as a Litigation Representative by filing an Affidavit setting out the following: (a) the interested person's agreement in writing to be the Litigation Representative; (b) the reason for the self-appointment; (c) the relationship between the Litigation Representative and the individual or estate the Litigation Representative will represent; (d) a statement that the Litigation Representative has no interest in the Action adverse in interest to the party the Litigation Representative will represent; (e) if the litigation representative is an individual, a statement that the Litigation Representative is a resident of Alberta; and (f) an acknowledgment of potential liability for payment of a costs award attributable to or liable to be paid by the Litigation Representative.

In estate matters, Rule 2.14(3) requires that the Affidavit of the interested person must disclose the following: (a) whether the estate has a substantial interest in the Action or proposed action; (b) whether the Litigation Representative has or may have duties to perform in the administration of the estate of the deceased; (c) whether an application has been or will be made for administration of the estate of the deceased; and (d) whether the Litigation Representative does or may represent interests adverse to any other party in the Action or proposed action.

Once an Affidavit of a self-appointed Litigation Representative has been filed, the interested person is the Litigation Representative for the estate. The Litigation Representative must serve notice of the appointment on the beneficiaries and heirs at law of the deceased. Pursuant to Rule 2.15, an interested person or a party that is adverse in interest may apply to the Court for directions about the appointment of a Litigation Representative. Pursuant to Rule 2.21, the Court has a broad power to appoint or replace a Litigation Representative, terminate the appointment of a Litigation Representative, or impose terms and conditions on a Litigation Representative or the appointment of a Litigation Representative.

Leonard J found that the Applicant met the requirements of Rule 2.14, because the Applicant was an "interested person." Leonard J did not opine on whether the meaning of the term "interested" attracts an ordinary meaning or legal meaning, with the latter meaning importing the concepts of right, claim, title, or share in an estate. Leonard J found that the Applicant was an "interested person" on either definition.

DUAN V ALBERTA (LABOUR RELATIONS BOARD), 2022 ABQB 312

(JOHNSTON J)

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

he Applicant applied for Judicial Review of an Alberta Labour Relations Board (the "Board") Decision that dismissed the Applicant's original complaint.

The Board prepared a certified Record of Proceedings in accordance with Rule 3.19 of the *Alberta Rules of Court*. The Applicant filed an Affidavit that was not previously before the Board and was not part of the Record of Proceedings. During oral argument, the Applicant advised the Court that the Affidavit contained new information from Employment Standards that she wished to bring to the Court's attention.

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

The Court found that the new evidence submitted by the Applicant did not meet any of these limited circumstances. The decision of another administrative body was not relevant to the Applicant's Application for Judicial Review. As such, Johnston J declined to admit the new evidence.

The Application for Judicial Review was dismissed.

ANGLIN V RESLER, 2022 ABQB 231

(LEMA J)

Rules 3.26 (Time for Service of Statement of Claim), 3.30 (Defendant's Options), 3.33 (Reply to Defence), 3.62 (Amending Pleading), 3.67 (Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), and 11.31 (Setting Aside Service)

This decision examines the use of a John Doe (placeholder) name for a Defendant. The Statement of Claim identified a Defendant as "John Doe." The Plaintiff discovered the Defendant's actual identity (Rick Pankiw) and served him with the unamended Claim, telling him: "You are the John Doe in this claim." The Court in this decision ruled that: (1) Mr. Pankiw was a Defendant from the time the Statement of Claim was filed; (2) service of the Statement of Claim on Mr. Pankiw was effected; and (3) a name-change amendment should be permitted, even though it is not necessary and four years later.

The Court determined that Mr. Pankiw was a Defendant from the start because the Rules define “Defendant” as “a person against whom a remedy is sought in a Statement of Claim” and Mr. Pankiw performed the role attributed to John Doe as laid out in the Statement of Claim and a remedy was sought against him.

The Court reviewed Rule 3.62(1)(a) which allows a party to amend a pleading before pleadings close; when pleadings close is outlined in Rules 3.67 and 3.33. Alternatively, Rule 3.62(1)(b) allows a party to amend after the close of pleadings wither permission to the Court pursuant to the Court’s discretion as laid out in Rule 3.74. The Court confirmed that no Rule requires that a “John-Doe-style” Statement of Claim be amended before it is served.

The Court then assessed how to determine when pleadings have closed where no Statement of Defence is filed. Justice Lema stated a Noting in Default (or Default Judgment) represents the “close of pleadings”, and that therefore, if the Plaintiff wanted to amend, it would have to get the court’s permission in accordance with Rule 3.74 (pursuant to Rule 3.62).

However, the Court confirmed that even under Rule 3.74, it is not mandatory for a Plaintiff to amend to correct the name of a party. The Court determined that, theoretically, if the Plaintiff was in a position to enter judgment (on which the Court made no ruling), the Plaintiff could do so by continuing with the existing “John Doe” style of cause. The Court stated that any name-correcting amendment now was purely “housekeeping”, but not necessary.

The Court noted that, once Mr. Pankiw had been served, he “knew or should have known that he had been identified as a defendant from the start. Once Mr. Pankiw had been served, he had three options pursuant to Rule 3.30: (1) apply to the Court to set aside service in accordance with Rule 11.31; (2) apply to the Court for an order under Rule 3.68 (court options to deal with significant deficiencies in claims); or (3) file and serve a Statement of Defence or Demand for Notice. The Court noted that instead of pursuing any of these options, Mr. Pankiw did nothing.

The Court found that no prejudice had been caused to Mr. Pankiw by the “John Doe” style of cause: the Plaintiff sued Mr. Pankiw from the start (albeit using a John Doe name), served him in a timely way, and made it clear to Mr. Pankiw that he was the Defendant with the Declaration.

ALTIUS ROYALTY CORPORATION V HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, 2022 ABQB 255

(PRICE J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 Court Options to Deal with Significant Deficiencies, 6.14 (Appeal From Master's Judgment or Order), 7.2 (Application For Judgment), 7.3 (Application and Decision), and 7.4 (Proceedings After Summary Judgment Against Party)

The parties appealed a Master's Order, pursuant to Rule 6.14. The Master's Order granted the Plaintiff's Application to amend its pleadings and the Defendants' Application to summarily dismiss the Plaintiff's claim. The Defendants' Application to strike the Action was denied. Both parties appealed.

The Court noted that Rule 6.14 provides that Appeals are on the record, subject to the addition of relevant and material evidence. If no additional evidence is introduced, a Judge hearing the Appeal may frame their reasons with reference to the Master's decision.

Regarding the Master's decision to permit amendments to the Plaintiff's pleadings, the Court noted that Rule 3.65 stipulates that the Court may give permission to amend a pleading where the amendment is not hopeless. An application to amend requires a modest degree of evidence in support, which existed in this case. Accordingly, the Master's decision to permit the amendment was undisturbed.

The Court also refused to disturb the Master's decision not to strike the Action, pursuant to Rule 3.68. In doing so, the Court found that the Action was not premature, as alleged by the Defendants.

Finally, the Court turned to the summary dismissal of the Plaintiff's claim. Reviewing Rules 7.2 through 7.4, the Court noted that Summary Dismissal will be appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a Trial. The moving party must establish on a balance of probabilities that there is "no merit" to the claim; the resisting party must put its best foot forward and demonstrate a genuine issue requiring a Trial. In the end, the presiding Judge must be left with sufficient confidence that the state of the record permits a fair summary disposition. A plaintiff faced with an application for Summary Dismissal may defeat the application by showing there are disputes on "material facts" such that the Court cannot make the necessary factual findings, that there are "gaps or uncertainties" in the facts or the law, or that the law is sufficiently "unsettled or complex" that it is not possible to apply it to the facts. The Court, in this case, found that Summary Dismissal in favour of the Defendant was appropriate as the Plaintiff's claim was contrary to current jurisprudence from the Supreme Court of Canada.

KOSTECKYJ V PARAMOUNT RESOURCES LTD, 2022 ABCA 230

(WAKELING, PENTELECHUCK, HO JJA)

Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

This was an Appeal by the Defendant employer.

Among other things, the employer appealed the lower Court's decision at the opening of the summary trial hearing to permit amendment to the employee's pleadings (pursuant to Rule 3.65) to specifically plead constructive dismissal.

Noting the strong presumption in favour of allowing amendments after the close of pleadings in the absence of a compelling reason to refuse, the Court considered whether the impugned amendment had caused "significant harm" to the employer's litigation interests or otherwise contravened public interest in promoting expeditious and economical dispute resolution. The Court found it did not.

In so concluding, the Court observed that the issue of constructive dismissal could not have taken the Defendant employer by surprise, having been raised previously by the employee and addressed in summary trial briefs submitted by both parties. Moreover, the Court found that the employer had had opportunity to raise or challenge evidence in response to the amendment and that ample time had been afforded for the employer to consider its position.

This part of the Appeal was therefore denied.

VERMILLION NETWORKS INC V VERMILION ENERGY INC, 2022 ABQB 287

(NIXON J)

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

The Applicant and Respondent were engaged in various legal disputes over trademarks due to their similar names. The Applicants applied to strike or, in the alternative, summarily dismiss the Respondents' Amended Statement of Claim.

Rule 3.68 provides that a claim or part of a claim may be struck if it discloses no reasonable claim. Rule 7.3 provides that a claim or part of a claim may be subject to Summary Judgment if it discloses no claim or no merit to a claim. The Court noted that, "[s]ummary judgment is distinct from the striking of pleadings. A motion for summary judgment may succeed notwithstanding that the matter did not meet the prerequisites that would allow the pleadings to be struck." Generally, if a Defence is filed in an Action, this means that the pleadings raise factual issues and that the Rule to strike pleadings cannot be used. When that happens, Summary Judgment is an alternative that may be considered.

The challenge under Rule 3.68 was focused on jurisdictional issues. The Court found that many of the trademark claims were not within its jurisdiction and were matters over which

the Federal Court has exclusive jurisdiction. As such, part of the Amended Statement of Claim was struck pursuant to Rule 3.68.

The challenge under Rule 7.3 was focused on limitations. The Court found that, as more than two years had passed since the Respondents discovered the wrongful conduct, the claim was statute-barred by the *Limitations Act*, RSA 2000, c L-12.

ARKS V MCAVOY, 2022 ABQB 305

(HOLLINS J)

Rule 3.72 (Consolidation or Separation of Claims and Actions)

The Applicant applied to consolidate two lawsuits. In one lawsuit, the Plaintiff commenced an action against multiple Defendants relating to the deficient construction of the Plaintiff's home. The Defendants in that action filed a Third Party Claim against the Applicant. The Applicant was also named as a Defendant in a separate action brought by the same Plaintiff. The Applicant applied to consolidate the two actions to be tried together, on the basis that the facts and legal issues were intertwined. The Plaintiff resisted consolidation, arguing that the issues were not the same, and would cause prejudice and delay.

The Court granted the consolidation. Pursuant to Rule 3.72(2), Hollins J stated that the Court can order consolidation for any reason, including the fact that the two actions have common questions of law or fact or arise from the same transaction or occurrence. Hollins J held that the list of factors to be considered are as follows: (a) whether there are common claims, disputes, and relationships between the parties; (b) whether consolidation will save time and resources in pre-trial procedures; (c) whether trial time will be reduced; (d) whether one party will be seriously prejudiced by having two trials together; (e) whether one action is at a more advanced stage than the other; and (f) whether consolidation will delay the trial of one action which will cause serious prejudice to one party.

These factors are not exhaustive and are not in themselves determinative of the issue. Hollins J held that a court must be able to conclude that having regard to all the circumstances, on balance, it is in the interests of justice that the actions be consolidated. The focus must be on the impact of consolidation on the parties and the administration of justice. As such, the Court should also consider the possibility of inconsistent verdicts, as well as the prospect of prejudice to the parties and the impact of consolidation and non-consolidation at the pre-trial and trial stages on scarce resources, including administrative, judicial and financial. Each case must be assessed on its own merits and should include consideration of the common claims and distinct claims between the parties.

In this case, the Court found multiple common facts and legal issues between the two actions as they both contemplated deficiencies in the construction of the Plaintiff's home. Her Ladyship also noted there was a real risk of inconsistent findings if both actions proceeded separately and noted that the Plaintiff was essentially seeking the same damages in each action. Further, on the issue of deficiencies, Hollins J. found that it was conceivable that the parties would use the same expert in both actions, and the evidence in one action would be potentially relevant to the other.

The Court also accounted for the status of both actions in the decision to consolidate. Hollins J. found that both actions were at procedurally similar stages. Finally, Hollins J. found that consolidation was appropriate even if the action involving the Applicant as a Defendant would move more slowly.

TRICO DEVELOPMENTS CORPORATION V EL CONDOR DEVELOPMENTS LTD., 2022 ABQB 251

(ROOKE ACJ)

Rules 4.24 (Formal Offers to Settle) and 4.29 (Costs Consequences of Formal Offer to Settle)

The Defendants and the Plaintiff sought direction from the Court with respect to costs issues arising from the Alberta Court of Appeal reversing a Trial Decision.

The issues were twofold. First, by Order in Council dated March 17, 2020, Schedule C of the Alberta Rules of Court was amended to increase recoverable costs effective May 1, 2020. The Court of Appeal Decision was issued after March 17, 2020, but before May 1, 2020. The first issue was, therefore, which version of Schedule C ought to apply in the circumstances. The second issue was whether the first of two Formal Offers made by the Defendants pursuant to Rule 4.24 was genuine, in the sense that it may entitle the Defendants to double costs pursuant to Rule 4.29.

With regard to the first issue, Rooke ACJ noted s. 3 of Schedule C states that the tariff applies whether the services described are provided before, at the time, or after the Rules come into force. Associate Chief Justice Rooke cited *British Columbia v. Imperial Tobacco Ltd.*, 2005 SCC 49 which states that the general presumption against the retroactive application of legislation can be rebutted if retroactive effect is clearly expressed. In light of s. 3 of Schedule C, the Court therefore held that the amended Schedule C should apply.

With regard to the second issue, the Plaintiff argued that the Defendants' first Formal Offer of $100 plus the Plaintiff's Column 5 taxable costs and disbursements was not genuine and did not exhibit an element of compromise. The Court held that a Formal Offer will be genuine if: (1) it is reasonable and realistic in the circumstances present at the time it was served; (2) it includes an element of compromise; (3) it is made with a reasonable expectation that it will be accepted; and (4) it is not sole made as a no-risk litigation tactic.

The Court further held that a Formal Offer must always be considered in its context; here, the first Formal Odder was made after the Defendants had obtained a second valuation of the partnership units in dispute and after the Defendants had made an additional payment to the Plaintiff based on this valuation. The Formal Offer also accounted for the Plaintiff's costs. The Court held that, in view of the Defendants' ultimate success on Appeal, the Formal Offer was genuine.

Associate Chief Justice Rooke, therefore, ordered that costs be assessed based upon the amended Schedule C with double costs to the Defendants for all steps taken after service of the first Formal Offer.

CALGARY (CITY) V DOE, 2022 ABQB 392

(BELZIL J)

Rules 4.36 (Discontinuance of Claim), and 10.28 (Definition of "Party")

The Applicant sought a Permanent Injunction from the Court. However, prior to the Application being scheduled, the Applicant decided to abandon its Application and filed a Discontinuance of the Action (the "Discontinuance") on a Without Costs basis.

Counsel for the Respondents argued that the filing of the Discontinuance a Without Cost basis was in breach of Rule 4.36. That Rule states that, among other things, after a trial date has been set but before a trial starts, a Plaintiff may discontinue an Action only with the consent of every party or with the Court's permission. The Court disagreed that the filing of the Discontinuance on a Without Costs basis was procedurally improper, stating that, by its nature, injunctive relief is granted sparingly and should be kept in place for no longer than is necessary. The Court further noted that the Applicant acted responsibly in filing the Discontinuance as soon as it was practicable to do so.

Counsel for two groups of unnamed Respondents each sought costs.

The Court applied Rule 10.28 and determined that, in the circumstances, unnamed Respondents represented by one counsel were not a party and therefore was not entitled to recover costs. No pleadings were filed on those unnamed Respondents' behalf prior to the filing of the Discontinuance. In fact, the Discontinuance was filed less than 12 hours after counsel for those unnamed Respondents' advised the Applicant that she was retained.

By contrast, the Court determined that, pursuant to Rule 10.28 and in the circumstances, the second group of unnamed Respondents would be considered a party because pleadings were filed on its behalf in contemplation of the Permanent Injunction Application. The Court awarded that group of Respondents Schedule "C" Column 1 Costs.

KENNEDY V SWIENTACH, 2022 ABCA 161

(PENTELECHUK, ANTONIO, AND HO JJA)

Rule 5.6 (Form and Contents of Affidavit of Records), and 5.13 (Obtaining Records form Others)

The Applicant sought an order directing the Respondent to produce records that were created during the Respondent's participation in the Alternative Measures Program. The Respondent had participated in the Alternative Measures Program to resolve criminal proceedings arising from a road rage incident involving the Applicant. The Alternative Measures Program is a statutorily-created program outlined in sections 717 to 717.4 of the *Criminal Code*. The Chambers Judge ordered the production of the Calgary Police Service records, but excluded any records created in relation to the Alternative Measures Program. The Applicant appealed.

The Court of Appeal dismissed the Appeal. First, the Court of Appeal found that section

717(3) prohibits the admissibility of any records containing an admission, confession or statement accepting responsibility in a civil or criminal proceeding. Second, the Court of Appeal found that the records created in the Alternative Measures Program are not records that were within the Respondent's control. Rule 5.6(1) obligates a party to disclosure records (1) that are relevant and material to the issues in the action, and (2) that are or have been under the party's control. The Respondent did not have control over the Alternative Measures Program records because he had neither an absolute nor an exclusive right to those documents. Finally, the Court found that the Applicant could have sought the Alternative Measures Program records through an application for third party records under Rule 5.13, which would have allowed the Chambers Judge to fully consider the release of the documents, including the requirements of section 717.4 of the *Criminal Code*. However, the Applicant did not name the police service, Attorney General, or other departments of the Government of Canada as respondents in an application to produce records.

RT V ALBERTA, 2022 ABQB 376

(GRAESSER J)

Rules 5.32 (When Information May Be Used), 5.33 (Confidentiality and Use of Information), and 6.11 (Evidence at Application Hearings)

During the case management of a class proceeding, the Plaintiff sought leave under Rules 5.33 and 6.11(1)(f) to introduce transcripts and records from other lawsuits on two Applications in the class action: an Advance Costs Application and, eventually, the Certification Application. The leave application was dismissed.

Rule 5.32 codifies the common law implied undertaking of confidentiality. Relief from the implied undertaking can be obtained under Rule 5.33 with the parties' consent or by court order. The Court deciding an application can consider evidence taken in another action if it gives permission under Rule 6.11(f).

The principles from the Supreme Court of Canada's decision in *Juman v Doucette,* 2008 SCC 8 guide the Court on interpreting Rules 5.33 and 6.11(f). *Juman* explains that the implied undertaking strikes a balance between an individual's privacy and the public's interest in the efficient conduct of litigation. Accordingly, if a party wants to lift the implied undertaking, it must demonstrate that a greater public interest exists that should displace the principles the undertaking is designed to protect - namely, privacy and efficient litigation. This will only be achieved in exceptional circumstances, such as where the deponent has given contradictory testimony about the same matters in sequential or different proceedings.

Justice Graesser referred to his own decision in *PL v Alberta,* 2012 ABQB 309 where he canvased the case law and held that on an application to lift the implied undertaking, three elements must be met: (1) the party seeking to lift must have cogent and persuasive reasons; (2) the records sought to be introduced must be relevant and material to the application or action; and (3) the Court must be satisfied that the public interest in seeing justice done in that particular case outweighs the privacy interest of the litigants in the other action and the integrity of the discovery process as a whole.

Justice Graesser looked at the issues in the class proceeding and held that the records sought to be introduced were a distraction and fishing expedition. They were not relevant or material to the causes of action advanced. Further, the records failed the public importance consideration because they did not speak to the public Defendants' legal duties and whether they were met.

Lastly, Justice Graesser commented that Rule 6.11(f) was of no help to the Plaintiff because it deals with evidence only. Arguments and submissions to the Court in other proceedings are of no evidentiary value.

HUGO V EWASHKO, 2022 ABCA 110

(SCHUTZ JA)

Rules 5.36 (Objection to Expert's Report), and 14.5 (Appeals only with Permission)

On the second day of a five-week medical malpractice Trial, the Plaintiffs' family physician Expert Witness was not fully qualified as anticipated. The Trial Judge granted an adjournment *sine die* to allow the Plaintiffs/Respondents time to "shore up" their expert evidence. The Defendants/Applications applied here for permission to appeal the mid-Trial decision.

Prior to Trial, the Plaintiffs served an Expert Report and two rebuttal Expert Reports from their proposed Expert Witness. Days before the Trial, the Defendants/Applicants served and filed Notices of Objection in response pursuant to Rule 5.36. Notwithstanding the Notices of Objection, the Defendants/Applicants argued that notice under Rule 5.36 was not required for challenges to an Expert's qualifications. The Trial Judge agreed, and the Plaintiffs/Respondents' Expert Witness was not fully qualified in all proposed areas of expertise. The Plaintiffs/Respondents therefore sought an adjournment, which was granted.

The Court of Appeal considered the test for granting permission to appeal, which, pursuant to Rule 14.5(1)(c), is required in respect of any ruling made during a Trial where the Trial has not concluded. Justice Schutz stated that such an Appeal may only be entertained in unusual and exceptional circumstances—litigation by installment is discouraged and permission to appeal should be declined where there is an adequate alternative remedy awaiting the final decision and exercising the statutory right of Appeal.

However, Schutz JA acknowledged that permission to appeal may be granted where there may have been a manifest injustice, which may arise in relation to exercises of discretion where the Trail Judge clearly misdirected themselves on the facts or the law or proceeded arbitrarily.

Justice Schutz held that exceptional and unusual circumstances existed in this case. Firstly, a mid-Trail adjournment to secure an alternate or additional expert, the need for which was based on a foreseeable issue, is unusual. Secondly, the delay caused by this proposed Appeal would have no effect, since the alternative is delay due to adjournment *sine die*. The Court further held that the lack of parameters imposed around the adjournment may result in prejudice to the Applicants/Defendants which could, in turn, result in a successful Appeal of the final decision and a retrial. Lastly, Schutz JA observed that the

Trial Judge did not have the benefit of fulsome argument or a comprehensive review of the case law on this issue of Trial fairness, which may have amounted to manifest injustice not compensable in costs.

Justice Schutz therefore granted permission to appeal.

BARRY V INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC (IAF), 2022 ABQB 265

(FEASBY J)

Rules 6.3 (Applications Generally), 7.2 (Application for Judgment), 7.3 (Summary Judgment), and 13.18 (Types of Affidavit)

The Applicant was the beneficiary of her deceased husband's life insurance policy which was purchased from the Respondent. The Applicant's husband died in 2015 in Burkina Faso. The Respondent denied the Applicant's claim under the life insurance policy in reliance on reports that it received from a third-party investigation firm which suggested that the Applicant's husband was not deceased. The Applicant therefore applied for Summary Judgment seeking payment under the life insurance policy.

The primary issues on the Summary Judgment Application were: (1) defects in the Applicant's Application; (2) the standard for obtaining Summary Judgment; and (3) reliance on hearsay in the context of Summary Judgment.

With respect to the first issue, the Respondent argued that the Applicant did not identify all of the sections of the *Insurance Act*, RSA 2000, c I-3 and *Surrogate Rules,* Alta Reg 130/1995 in her Application, as required by Rule 6.3(2)(d). The Court observed that the purpose behind Rule 6.3(2), which contains the caveat "[u]nless the Court otherwise permits", is to avoid surprise and allow the Respondent to meet the case against it. The Court held that the defects here were excusable. First, because the Respondent was a professional litigant and experienced in this specific area of law. Second, because the Applicant filed a lengthy Affidavit and written Brief which fully disclosed her argument. There was no issue of surprise.

With respect to the general standard on Summary Judgment applications, the Court referred to Rules 7.2 and 7.3 which set out the basis upon which Summary Judgment may be granted. Justice Feasby referred to the key considerations set out in *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49: (a) do the state of the record and the issues allow for a fair resolution on a summary basis, or do uncertainties reveal a genuine issue requiring trial? (b) Has the Applicant met the burden of showing that there is either "no merit" or "no defence" on a balance of probabilities? (c) If the Applicant has met its burden, the Respondent must put its best evidentiary foot forward to demonstrate a positive defence or a genuine issue for trial.

Regarding the third issue, both parties sought to rely on hearsay. The Respondent argued that Rule 13.18(3) precludes the Applicant from relying on hearsay but does not apply to respondents. The Court held that Rule 13.18(3) requires some flexibility and does not constitute an absolute bar on hearsay evidence. Rather, it has been interpreted to require the

Court to consider whether the hearsay is of that type that would be admissible at Trial because of its reliability and necessity, for example. Further, Justice Feasby held that although Rule 13.18(3) does not apply to respondents, that does not mean that respondents may, as of right, rely on hearsay evidence; rather, respondents must still put their best evidentiary foot forward.

Justice Feasby did not admit the Respondent's evidence for the truth of its contents. The evidence's defects were numerous and material and could have been easily rectified. Similarly, the Court did not admit certain portions of the Applicant's evidence in instances where the Applicant could have easily obtained an Affidavit from the individuals making the hearsay statements. Justice Feasby did admit some of the Applicant's hearsay evidence where the criteria of necessity and reliability were met.

With the Respondent's evidence entirely excluded, the only evidence on the record was the Applicant's. The Court therefore held that the Applicant's husband was in fact deceased and that the life insurance proceeds were payable by the Respondent. The Court also exercised its discretion and ordered that interest accrue at a rate above what is set out in the *Judgment Interest Act*, RSA 2000, c J-1 and further, that Costs were payable on a 75% indemnity basis due to the Respondent's litigation misconduct.

GUILLEVIN INTERNATIONAL CO V BARRY, 2022 ABCA 144

(SLATTER, CRIGHTON, STREKAF JJA)

Rules 6.3 (Applications Generally), 6.4 (Applications without Notice), 6.6 (Response and Reply to Application), 6.8 (Questioning Witness before Hearing), and 13.18 (Types of Affidavit)

The Appellants had previously obtained *ex parte* Attachment Orders arising from an alleged fraud that were to be reviewed at a scheduled comeback hearing. At the comeback hearing the Chambers Judge excluded some of the tendered evidence and ruled that, without the excluded evidence, the Appellants failed to meet the test for an Attachment Order and set the Order aside.

The Court of Appeal concluded that the Chambers Judge erred in excluding significant parts of the Appellants' evidence.

Specifically, the Court found that Rule 6.6 (which the Chambers Judge interpreted as precluding an applicant from filing any further evidence if the respondent to an application does not file any evidence) does not preclude the applicant from filing further evidence before the hearing, so long as the further evidence is provided "a reasonable time before the application is to be heard."

The Appellate Court stated that Rule 6.6 should not be read as restricting the Court's ability to hear all the relevant evidence. Rule 6.6(2)(b) enables the Applicant to reply to the Respondent's case, but it does not make a reply mandatory. Furthermore, it does not contain any prohibition on either party filing evidence.

The Court found Rule 6.6(2)(b) does not contemplate a "comeback" hearing respecting an *ex parte* Order granted under Rule 6.4, which is premised on new evidence being placed on the record for the first time. The Court determined that the comeback hearing is argued *de novo* and the comeback process falls within Rule 6.3(1) (which applies to applications generally)

as opposed to Rule 6.6(2), thereby additional evidence be filed.

The Court also considered issues the Appellants faced in getting the Respondents' evidence on the record - specifically those in relation to a Notice to Conduct and Examination Under Oath that was issued to a Respondent and subsequently set aside by the Chambers Judge. The Court found that there was no basis on the record for the Chambers Judge to set aside the Rule 6.8 appointment and that, absent an abuse of process, the Appellants were entitled to conduct that examination.

Lastly, the Court found that the Chamber's Judge made an unreasonable finding by ascribing no weight to evidence rendered admissible by Rule 13.18(1) because it functionally negated the Rule that information and belief evidence can be considered in interlocutory Applications. The Court noted that because the Appellants' evidence of fraud was completely uncontradicted, there was no reason to substantially disregard the Appellants' evidence.

NIXON V GRUSCHYNSKI, 2022 ABCA 205

(PAPERNY, SLATTER, FEEHAN JJA)

Rules 6.11 (Evidence at Application Hearings), and 7.3 (Summary Judgment)

The Appellant sued the Respondents—a process serving company and an individual process server—for inadvertently failing to serve the Defendant in a separate Action and swearing a false Affidavit of Service which resulted in the Appellant's separate claim being dismissed for not having been served in time. The Appellant had applied for partial Summary Judgment on the issue of liability and that Application was dismissed. The Appellant now appealed.

Before the Chambers Judge, the Appellant argued that liability could be established by either concluding that the findings in the separate Action were binding, or alternatively, by admitting the Respondents' evidence from the separate Action and independently reaching the same conclusions. The Chambers Judge refused to admit the evidence from the separate Action. The issues on Appeal were whether the Chambers Judged erred in declining to admit that evidence, and by extension, in refusing to grant partial Summary Judgment.

The Court discussed when a party may apply for Summary Judgment in respect of all or part of a Claim pursuant to Rule 7.3(1): when there is no defence to a claim or part of it; when there is no merit to a claim or part of it; or when the only real issue is the quantum of damages. The moving party must satisfy the Court that the record allows the necessary finding of facts to be made, an application of the law to the facts, and that Summary Judgment is a proportionate, more expeditious, and less expensive means to achieve a just result.

The Court then discussed Rule 6.11(1)(f), which allows the consideration of evidence taken in any other Action if the submitting party gives the required notice and obtains the Court's permission. The Court described the purpose of this Rule as being to overcome hearsay arguments and to allow reliance on such evidence when it would not create unfairness.

The Court held that the Chambers Judge erred by not addressing Rule 6.11(1)(f) and by not

identifying why evidence from the separate Action could not be admitted. The Court held that the evidence ought to have been admitted, and so allowed the Appeal and remitted the matter back to the Court of Queen's Bench.

GHALI V JORDAHL USA INC, 2022 ABQB 248

(LABRENZ J)

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

The Appellants appealed a Master's decision to grant the Respondent Summary Judgment. The parties agreed that the dispute was appropriate for Summary Judgment but disagreed on the correct outcome.

The Court reviewed the principles of Summary Judgment and noted that the standard of review was correctness for Appeals of Master's decisions because they are heard *de novo* pursuant to Rule 6.14. The Court noted that Rule 7.3 allows a party to apply for Summary Judgment where there is no defence to a claim or part of it or there is no merit to a claim or part of it.

The Court found that the Master's Decision granting Summary Judgment to the Respondent was correct considering the facts of the matter. The Appellants had no defence to the Respondent's claim against them.

WESTERN ENERGY V SAVANNA ENERGY, 2022 ABQB 259

(PRICE J)

Rules 6.14 (Appeal from Master's Judgment or Order), 7.2 (Application for Judgment), 7.3 (Summary Judgment), and 7.4 (Proceedings After Summary Judgment Against Party)

The Plaintiff appealed a Master's Decision to grant the Defendant's Application for Summary Dismissal. Justice Price noted that, under Rule 6.14(3), an Appeal from a Master's Judgment or Order is an appeal on the record of proceedings before the Master; however, new evidence may be adduced if the Judge hearing the Appeal considers it relevant and material.

Justice Price identified that Rules 7.2, 7.3, and 7.4 govern Summary Judgment. Ultimately, after identifying the relevant common law authorities, and concluding that the Defendant established there was no merit to the Plaintiff's claim, Justice Price dismissed the Appeal and found that the Master did not err in granting the Summary Dismissal.

CONDO CORP NO. 0829220 V YAN, 2022 ABQB 402

(LEONARD J)

Rules 6.14 (Appeal from Master's Judgment or Order), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.34 (Court-Ordered Assessment of Costs), and 10.35 (Preparation of Bill of Costs)

The Appellant commenced and later discontinued its claim against the Respondents. The Respondents applied to the Court for solicitor-and-own-client costs and were granted two-thirds of such costs by a Master. The Appellant appealed the costs award to a Justice.

As a preliminary issue, the Court dealt with the Respondents' argument that the Appeal ought to be struck due to the Appellant's failure to comply with the timelines regarding filing of the Notice of Appeal, filing and service of the Appeal Brief, and filing and service of the transcript of proceedings before the Master as required under Rule 6.14 and Civil Practice Note #2 (and in this case, a Procedural Order). The Court declined to strike the Appeal because this argument was first raised in the Respondents' Appeal Brief rather than by separate Application.

The Court next set out the standard of review on appeal from a Master to a Queen's Bench Justice. The Court stated that the standard of review is correctness. Justice Leonard also noted that the Appeal is on the record, but that new evidence that is relevant and material may be considered pursuant to Rule 6.14(3). Justice Leonard further noted that while the correctness standard applies, costs awards are discretionary and are normally entitled to deference.

The Appellant made several arguments: that the Master erred in the factors considered in making the costs award under Rule 10.33, including by considering pre-litigation conduct and by not adequately considering the Discontinuance; that, in the circumstances, the Master erred in awarding a percentage of assessed costs; and that the Master erred by awarding a percentage of assessed costs without evidence of the actual costs incurred.

Justice Leonard held that considering pre-litigation conduct was not an error, in particular because: (1) the Master did not award *full* indemnity costs based on pre-litigation conduct; and (2) the Master considered pre-litigation *in addition* to litigation conduct. The Court further held that the Master was alive to the effect of the Discontinuance and the steps that followed the Discontinuance and did not err in his consideration of those factors.

With respect to the awarding of a percentage, the Court held that that is an option expressly authorized under Rule 10.31 and that such option is not reserved for matters that are complex or protracted, as was argued by the Appellant. Finally, the Court held that the Master did not err in awarding a percentage of costs without evidence of the actual costs incurred. Justice Leonard explained that the Respondents were not required to provide evidence of their expenses at the Application. Rather, the Master was entitled to award a percentage of costs incurred, which costs would then be assessed pursuant to Rules 10.34 and 10.35.

Justice Leonard, therefore, dismissed the Appeal.

LEVESQUE V EDMONTON REGIONAL AIRPORTS AUTHORITY, 2022 ABQB 411

(HARRIS J)

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

The Applicant appealed a Master's decision that dismissed its Application for Summary Judgment. The Application was brought under Rule 7.2(a) based on two arguments. First, the Applicant stated that the lease agreement between the parties barred the Action brought by the Plaintiffs. Second, it argued that the Action was out of time pursuant to s. 3(1) of the *Limitations Act*, RSA 2000, c L-12.

The parties agreed that the standard of review under Rule 6.14(3) as set out in *Bacheli v Yorkton Securities Inc*, 2012 ABCA 166 applied. Harris J. summarized:

…under Rule 6.14(3), the standard of review that I am to exercise is one of correctness on issues of both fact and law. I am entitled to conduct a de novo analysis of the issues, reviewing all relevant and material evidence, submissions and the record in order to reach a decision. Deference to the Master's decision is not required.

Harris J. contrasted the purpose of Rule 7.2(a) with that of Rule 7.3. The intent of Rule 7.2(a) is "to permit the Court to dispose of claims that have no merit based on admissions made in pleadings, affidavits and/or in cross examination."

Harris J. cited *W(O) v P(W)*, 2012 ABQB 252 for the proposition that "admissions must clearly show that the Action is statute-barred…failing which the summary judgment application will fail".

Harris J. considered *Hryniak v Mauldin*, 2014 SCC 7, where a three-part test was set out to determine when Summary Judgment would be appropriate:

There will be no genuine issue regarding a trial when a judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Justice Harris reviewed the lease agreement and found that the lease provisions did not show a "clear and unequivocal prohibition against the Plaintiffs' claims". Thus, the first test for Summary Judgment was not met.

With respect to the issue of whether the Action was statute barred, Harris J. stated that "since the alleged breach was ongoing, each instance of obstruction…amounted to a new cause of action against Applicant. Therefore, any alleged breaches after May 16, 2018 were not time-barred."

Justice Harris held that Rule 7.3 was not argued at first instance and, as a result, was not considered on Appeal. Harris J. said that the Applicant could still apply under Rule 7.3 and argue that the claim ought to be dismissed due to a lack of damages suffered by the Plaintiffs.

Harris J. found that while the Master's decision to dismiss the Application for Summary Judgment was correct, the decision to uphold the dismissal was based on different reasons. Specifically, that the Applicant had not shown that the admissions relied upon clearly established that the Claim was barred. The Application was therefore dismissed.

10378968 CANADA INC V GSV FUTURES INC, 2022 ABCA 126

(CRIGHTON, FEEHAN, AND HO JJA)

Rules 6.49 (Application for Replevin Order), and 6.50 (Replevin Order)

This is an appeal related to a Replevin Order and, specifically, the Court's decision to remove the requirement that the Respondents post security related to the property at issue.

The Appellants claimed a Warehouser's Lien in respect to property owned by the Respondents. The Respondents sought the return of that property, and the Commercial Chambers Judge ordered the Respondents post security to protect the maximum value of the appellants' asserted claim relative to the lien. The Respondents later brought the matter back to the Court seeking a Replevin Order and to dispense with security. The Commercial Chambers Judge dispensed with the security bond that secured the Warehouser's Lien.

On Appeal, the Court of Appeal noted that, among other things, the Commercial Chamber's Judge's decision correctly applied Rules 6.49 and 6.50 which relate to Replevin Orders and Applications for Replevin Orders. The Court of Appeal further recognized that Rule 6.50 does not explicitly require a specified from of security but rather security satisfactory to the Judge. As a result, the Court of Appeal dismissed the Appeal.

PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2022 ABCA 111

(ROWBOTHAM, KHULLAR, ANTONIO JJA)

Rules 7.1 (Application to Resolve Particular Questions or Issues). and 7.3 (Application and Decision)

This appeal arose from a Summary Dismissal Application. The Appellants (Plaintiffs) argued that the Chambers Judge had erred in law for, amongst other things, determining that the Summary Dismissal Application was not an abuse of process. The underlying Summary Dismissal Application was the second one in this Action and was made before the Decision arising from the Appeal of the first Summary Dismissal Application was released.

In the second Summary Dismissal Application the Respondents (Defendants) applied under Rule 7.3 for Summary Dismissal alleging the claim was unmeritorious.

The Court noted that Rule 7.3(1)(b) permits Summary Judgment of all or part of a claim where there is no merit to a claim or part of it. An Application for Summary Judgment was not an Application to resolve a particular question or issue — an Application seeking that relief would need to be made pursuant to Rule 7.1. A Rule 7.3 Application was meant to determine the merits of a claim. The Court noted that it is conceivable that a chambers judge could direct a Summary Judgment Application to be held in stages, delineating certain issues such that the parties are on notice of how and when issues will be determined, but that is not what

happened here. In the Court's view the Second Summary Judgment Application was a blatant attempt to relitigate, making arguments that were available and reasonably should have been made at the First Summary Judgment Application. The Court, therefore, found that the underlying Summary Dismissal Application was an abuse of process and that the Chambers Jude erred in agreeing to hear it.

PARKS V MCAVOY, 2022 ABQB 294

(HOLLINS J)

Rule 7.3 (Summary Judgment)

Pursuant to Rule 7.3, the Court dealt with the disposition of an Application for Summary Judgment on behalf of the Plaintiff and a Cross-Application for Summary Dismissal by the Defendant.

Ultimately, the Court noted that the record did not allow to it to make a fair disposition in a summary fashion of the Plaintiff's claim, particularly on the issue of causation. Specifically, the Court held that an incomplete record, a dispute on material facts which could not be resolved confidently on the existing record, issues of credibility or the level of complexity of the case are all things that may render a matter inappropriate for determination by summary judgment and the Plaintiff's claim had features of all of those and more.

Further, the Court noted that the Application sought partial Summary Judgment on some issues; however, held that even if the record was sufficient to allow it, partial summary judgment needs to provide some expediency to the lawsuit that would otherwise be lost. The Court assessed the advantages and disadvantages to the participants and found there were few efficiencies to be gained in granting partial Summary Judgment.

Regarding the Defendants' Application for Summary Dismissal, the Court found that the claims against the Defendants arose from two very different sets of facts: (1) relating to the construction of the home; and (2) the project accounting. The Defendants argued that the claims relating to the construction were properly only against the corporation and not against the director thereof, and the accounting-related claims were barred by the *Limitations Act*, RSA 2000, c L-12.

The Court held that the claims relating to the construction were dismissed against the Defendant director personally; however, it did not dismiss the accounting claims brought against the Defendant director.

NUSSBAUM V HALL, 2022 ABQB 388

(LOPARCO J)

Rule 7.3 (Summary Judgment/Dismissal), and Rule 13.18 (Types of Affidavits)

The Plaintiffs appealed the Decision of a Master granting the Defendants' Application for Summary Dismissal. The Defendants had applied under Rule 7.3 to dismiss the entirety of the Plaintiffs' claims on the basis that there was no merit to those claims. The Master agreed, and dismissed the Plaintiffs' claims against the Defendants for negligence, negligent misrepresentation, and breach of contract.

The Court upheld the Master's decision. Loparco J confirmed that the applicable test for Summary Judgment or Dismissal is set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49. With respect to the requirements of Rule 7.3 for Summary Dismissal, Loparco J. noted that Rule 13.18 complements Rule 7.3(2). Specifically, Loparco J. stated that an affidavit in support of Summary Dismissal must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

The Court found that the Action was an appropriate candidate for resolution on a summary basis based on the record before the Court. With respect to negligence, the Defendants were able to show that there was no triable case on the question of whether the Defendants owed the Plaintiffs a duty of care. With respect to the contractual claim, the Court held that it was able to determine on the record that there was no genuine issue requiring trial.

DOW CHEMICAL CANADA ULC V NOVA CHEMICALS CORPORATION, 2022 ABQB 422

(ROMAINE J)

Rule 8.16 (Number of Experts)

The Court considered whether the Defendant's expert report was admissible under Rule 8.16(1) which states: states that "...[u]nless the Court otherwise permits, no more than one expert is permitted to give opinion evidence on any one subject on behalf of a party."

The Defendants sought to introduce an expert report where it had previously introduced another expert report relating to the same issue - the quantum of damages - in an earlier, related decision.

In this decision, the Court determined that the proposed expert report was inadmissible under Rule 8.16(1) after hearing about the proposed expert's qualifications. The Court noted in the previous decision that whether to allow a second expert to give an opinion on the same subject matter as another expert depends on whether the evidence is relevant and whether calling both experts could be considered piling on or duplicative. Evaluating these factors, the Court determined the parts of the expert

report that the Defendant intended to rely on were not sufficiently connected to the issue at hand to be relevant and that allowing the expert report to be introduced as evidence would be duplicative and, thus, prejudicial to the Plaintiffs.

WARKENTIN BUILDING MOVERS VIRDEN INC V LA TRACE, 2022 ABQB 346

(MANDZIUK J)

Rule 8.17 (Proving Facts)

The Applicant brought an interim Application to admit an Affidavit as an expert report; the deponent had died prior to the commencement of Trial. The Defendant opposed the Application.

The Court considered Rule 8.17 as it relates to read-ins at trial of affidavit evidence of a deceased witness. The Court noted that the Rule provides that the Court could order that facts may be proven by affidavit, but where the opposite party has a bona fide desire to cross-examine, and a witness can be produced, the court shall not authorize that the evidence be given by affidavit.

Instead, if the evidence of the deceased was to be admitted by affidavit, it must be by way of exception to the hearsay rule. In that regard, the Court must find that the Affidavit meets the threshold of necessity and reliability, and then weigh the competing prejudice to the parties. At that time, even if the affidavit is admitted under the hearsay rules and Rule 8.17, the affidavit must still conform to other rules of evidence. In other words, evidence that would not be permitted in viva voce testimony should not be permitted by way of Affidavit.

The Defendant acknowledged that the deponent's death established the necessity element of the hearsay test. In assessing reliability, the Court took specific note of the inclusion of several statements of double hearsay in the Affidavit, which are weaker and less reliable and of little probative value as to be no use to the Court. In that vein, the Court provided no weight to specific paragraphs contained in the Affidavit.

Similarly, the Court acknowledged as trite law that all evidence must be relevant to an issue at trial. As such, the Court found a portion of a paragraph irrelevant and not an issue of the Trial and afforded it no weight.

Finally, with respect to consideration of the Affidavit as expert evidence, the Court noted the criteria that governs when expert evidence includes: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert. There was no evidence before the Court that the deponent had expertise and, as such, he was not qualified as an expert.

With respect to whether the prejudicial effect outweighs the probative value of the evidence contained in the Affidavit, the Court noted the time between service of the Affidavit and the death of the deponent, as well as the clear indication of the Defendant's desire to cross-examine on the Affidavit, caused prejudice to the Defendant. On the other hand, the Plaintiffs had no other opportunity to obtain similar evidence from anyone contemporaneous with the dispute and, as such, the prejudice was found to weigh in favour of admission.

ALSTON V FOOTHILLS NO. 31 (DISTRICT OF), 2022 ABCA 231

(PAPERNY, WATSON, KHULLAR JJA)

Rules 9.2 (Preparation of Judgments and Orders), 9.3 (Dispute Over Contents of Judgment or Order), and 9.4 (Signing Judgments and Orders)

In the context of litigation over alleged water contamination, the Appellants appealed a portion of a Procedural Order directing how a contempt hearing should occur.

Amongst other things, the Appellants argued that the Respondent breached Rules 9.2 and 9.3, which govern the preparation of Judgments and Orders, and which allow for a party to Apply to the Court to resolve a dispute over the contents of a Judgment or Order. Specifically, the Appellants argued that the Respondent submitted an Order for filing without the Appellants' approval and despite their objections to its contents.

The Court stated that the Order under Appeal specifically invoked Rule 9.4(2)(c), which, when invoked, dispenses with the need for consent from another party as to the contents of an Order. The Court stated that the Appellants were not, and could not be, prejudiced by the use of Rule 9.4(2)(c) because the content of an Order is not meant to debate the reasons for an Order in any case, as was the Appellants' goal.

The Court therefore dismissed the Appeal.

SHIKINA V ERZYAYKIN, 2022 ABQB 328

(NIELSEN ACJ)

Rules 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award), and 13.1 (When One Judge May Act in Place or Replace Another)

A Summary Trial of the parties' divorce was heard by Justice Hopkins. Unfortunately, Justice Hopkins passed away before rendering his decision. Rule 13.1 allows one judge to act in place of another in case of death. Associate Chief Justice Nielsen agreed to consider the Plaintiff's case.

Nielsen ACJ looked at the transcripts, record, and evidence that was before Justice Hopkins. The Plaintiff agreed with this process and made no further submissions. The Defendant did not appear at trial and failed to participate in proceedings since.

The Plaintiff was successful on most of her requests at trial. In awarding costs in the full amount sought by the Plaintiff, Nielsen ACJ considered the Plaintiff's success at trial, the Defendant's non-attendance at trial, and the amounts owed by the Plaintiff to Legal Aid.

The Court prepared the Judgment and invoked Rule 9.4(2)(c) to dispense with the parties' need to approve its form.

RANA V RANA, 2022 ABCA 167

(STREKAF J)

Rules 9.4 (Signing Judgments and Orders), 10.32 (Costs in Class Proceeding), 10.33 (Court Considerations in making Costs Award), and 14.88 (Cost Awards)

The Applicant appealed the elevated costs that were awarded against him pursuant to Rule 10.33(2)(f) which refers to "a contravention or non-compliance with these rules or an order" and Rule 10.32(2)(g) which refers to "whether a party has engaged in misconduct".

The Court dismissed the Appeal, finding that the Applicant did not establish that his proposed Appeal raised an important question of law or precedent or that there was a reasonable chance of demonstrating that there was an error of principle. The Court added that the costs award, while elevated, was reasonable in the circumstances for the reasons given to him by the Case Management Judge.

The Court awarded additional elevated costs pursuant to Rule 14.88 which provides that, unless otherwise ordered, the successful party in an Application before the Court of Appeal is entitled to Costs at the same scale as the Order appealed from.

The Court also directed that, pursuant to Rule 9.4(2)(c), the Applicant's approval of the form of Order was not required, and that the Respondent's counsel prepare the form of Order for Justice Strekaf to sign.

SUNRIDGE NISSAN INC V COLONY HOMES INC, 2021 ABQB 928

(MALIK J)

Rule 9.13 (Re-Opening Case), 9.20 (Time Writ Remains in Force), and 9.21 (Application for New Judgment or Order)

This decision relates to funds paid into Court arising from foreclosure proceedings. Both the Plaintiffs and the individual Defendant claimed to have priority over those funds.

An earlier decision related to the foreclosure proceedings granting the Plaintiffs priority over those funds, had not been filed. It therefore had not been "entered" pursuant to Rule 9.13; Rule 9.13 allows a Court or vary a judgment or order before it is "entered".

As such, the Court exercised its discretion to expend upon its original decision in this decision, pursuant to Rule 9.13. Specifically, to provide an analysis on a limitations issue before the Court.

The limitation issue arose from the failure of a Defendant to renew a prior judgment related to the foreclosure proceedings and funds paid into Court. The Court noted that, pursuant to Rule 9.21(2), 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 period. The Court found that it was the Defendant's obligation to apply for a new or renewed judgment under Rule 9.21 or bring a fresh action on her judgment under the *Civil Enforcement Act* and the *Limitations Act* within the 10 year period. The Defendant did not. Therefore, the Defendant was limitation-barred from enforcement of her judgment.

TALLCREE FIRST NATION V RATH & COMPANY, 2022 ABCA 174

(SLATTER, WAKELING, FEEHAN JJA)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyer's Non-compliance with Contingency Fee Agreement), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.19 (Review Officer's Decision), 10.26 (Appeals to Judge), and 10.27 (Decision of Judge)

The Respondent First Nation (the "Tallcree") entered into a contingency fee arrangement (pursuant to Rule 10.7(3) and (4)) with the Appellant law firm to negotiate their treaty rights with the Canadian government. However, it was not clear whether full compliance with all of the formal provisions of Rule 10.7 was ever achieved, as required by Rule 10.8.

Ultimately, the Appellant received a 20% fee in the amount of more than $11-million.

The Tallcree had a Review Officer review the agreement. Pursuant to Rule 10.9, retainer agreements and lawyer's accounts are subject to review by a Review Officer. Pursuant to Rule 10.19, the reasonableness of a retainer agreement must be assed based on the circumstances that existed when it was entered into — hindsight may not be used.

Following a hearing, the Review Officer issued a certificate under Rule 10.19(4) that stated the contingency free agreement was reasonable and the resulting fee was not "unexpectedly unfair" or clearly unreasonable.

The Tallcree appealed the Review Officer's decision to the Court of Queen's Bench pursuant to Rule 10.26. The Court reversed the decision of the Review Officer. It found the Review Officer had committed reviewable errors by reviewing the contingency fee agreement according to the wrong standard, determining the resulting fee was "was not unexpectedly unfair" or "clearly unreasonable" instead of determining its reasonableness as required by Rule 10.9.

Pursuant to Rule 10.19, once a contingency fee agreement was found to be unreasonable the appropriate fee was to be determined in accordance with the factors in Rule 10.2. However, the Chambers Judge found the Appellant's efforts were non-legal in nature and stated that, as a result, the factors in Rule 10.2 were not material considerations as they applied to lawyers acting as legal counsel in a typical adversarial case. The Chambers Judge awarded the Appellant $3-million - a fraction of what he would have received from the contingency agreement. The Appellant appealed.

The Court of Appeal noted that courts generally do not review contracts for the adequacy or fairness of the consideration. Retainer agreements, however, are a separate category because Rule 10.9 provides that they could be reviewed for "reasonableness." Pursuant to

Rule 10.19(2), reasonableness was to be determined based on the circumstances that existed when the retainer agreement was entered into.

The majority found that the Review Officer applied the correct standard but were concerned about comments made by the Officer regarding how the agreement was reasonable because its 20% contingency fee was lower than most personal injury matters (especially as this was not a personal injury matter).

Furthermore, the Court of Appeal found the Chambers Judge did not follow Rule 10.19(2) as he used hindsight in its analysis. The Court of Appeal conducted a fresh analysis and found the contingency fee agreement was unreasonable.

The Court then considered what an appropriate fee would be - and confirmed it must be determined in accordance with Rule 10.2. The Majority noted that it was not clear that any of the lawyer's actions expediated a resolution and settlement and noted that the $3 million fee fixed by the Chambers Judge was generous. Ultimately, the Majority found that, in all the circumstances, while it was based on an unsupportable analysis, there was no basis to disturb the fee of $3 million, and that pursuant to Rule 10.27(2), the Appellants must refund the excess fees to the clients.

O'CHIESE FIRST NATION V DLA PIPER (CANADA) LLP, 2022 ABCA 197

(WATSON, SCHUTZ, KHULLAR JJA)

Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), and 10.17 (Review Officer's Authority)

The Applicants applied under Rule 10.10 for a review of accounts rendered by the lawyer Respondents. The Application was denied by the Chambers Judge, who found that the review was out of time. The Applicants appealed, arguing that the limitations period for making an application under Rule 10.10 was extended by the suspension of limitation periods (from March 17 to June 1, 2020) set out in Ministerial Order No 27/2020 (the "Ministerial Order"), which was issued by the Minister of Justice and Solicitor General during the early stages of the COVID-19 pandemic. The suspension of limitations under the Ministerial Order totalled 75 days.

The Court of Appeal granted the appeal and ordered that the Respondents' accounts be reviewed by a review officer. Rule 10.10(2) provides that a lawyer's charges may not be reviewed if one year has passed after the date on which the account was sent to the client. The accounts were rendered more than one year prior to the review application, but within 75 days at the end of the one-year time limit. The Court of Appeal held that the term "limitations period" in the Ministerial Order applied to Rule 10.10(2). The Court of Appeal rejected the Respondents' argument that Rule 10.17 rendered the time limit in Rule 10.10 as being discretionary, and therefore the review officer's decision not to grant an extension was not within his discretion.

MEUNIER ESTATE, 2022 ABQB 246

(FRIESEN J)

Rules 10.28 (Definition of "Party"), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May be Made), 10.31 (Court-Ordered Costs Award), and 10.33 (Court Considerations in Making Costs Award)

The Court considered the appropriate costs award after the Applicants experienced mixed success in an estate dispute. The Applicants applied to validate the deceased's will and remove the Respondent as Personal Representative of the deceased's estate. The Court validated the will but declined to remove the Respondent as Personal Representative.

Rules 10.28-10.33 govern costs awards. The Court noted that the primary purpose of costs is to offset the fiscal impact of a person being forced to appear in Court without a valid legal reason and that costs should be fair, just, efficient, and cost-effective. The Court reviewed the factors in Rule 10.33 for making a costs award.

The Court first determined that the Respondent was entitled to full indemnification from the estate for challenging the validity of the will. The Court reviewed the factors set out in Babchuk that Courts consider in determining whether Costs should be awarded to the unsuccessful party in estate litigation. The Court was satisfied that the Application regarding the validity of the will needed to be heard and fully argued whether brought by the Respondent or the Applicants.

The Court then determined that the Applicants were entitled to costs from the Respondent personally. The Court expressed concern that the Respondent failed to disclose the existence of the will and then determined that the Respondent's conduct did not warrant an Order for solicitor/client Costs against the Respondent personally but did award the Applicants Costs pursuant to Schedule C against the Respondent personally.

EDMONTON RIVER VALLEY CONSERVATION COALITION SOCIETY V COUNCIL OF THE CITY OF EDMONTON, 2022 ABQB 263

(FRASER J)

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

his was a costs decision in which the successful parties sought costs worth three times column five of Schedule C of the *Rules* and reasonable disbursements.

The unsuccessful party submitted that costs should be awarded in its favour due to its position being "truly exceptional public interest litigation".

Rule 10.29(1) entitles a successful party to a costs award against the unsuccessful party.

Rule 10.33 sets out a list of factors that the Court may consider in determining a Costs award. Here, the most important factors were: 1) the result of the Action; 2) the importance of the issues; and 3) the complexity of the case.

The Court found this was a complex case which involved some public interest but that it was not "exceptional." As such, the case did not meet the test for an award of special costs for public interest ligation as laid out in *Carter v Canada (AG)*, 2015 SCC 5. Therefore, the Court declined to award any costs to the unsuccessful party.

Ultimately, the Court awarded the successful party column five Schedule C costs noting that the facts did not warrant any multiplier.

CONCRETE EQUITIES INC. (RE), 2022 ABQB 304

(JONES J)

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

The Applicant was substantially successful on his application and sought solicitor-client costs or, in the alternative, partial indemnity of 70% of the legal fees and disbursements incurred.

Justice Jones noted that Rule 10.29(1) entitles a successful party to costs, payable forthwith by the unsuccessful party. When awarding costs under Rule 10.31, the Court may consider any of the factors under Rule 10.33(1), including the degree of success of each party.

Justice Jones then considered the law on costs in cases of mixed success.

If the Court cannot determine whether a party is "substantially" successful, there should be no costs order and the parties will bear their own costs. While the Court maintains discretion to apportion costs on an issue-by-issue basis, claim-by-claim basis, or even head-of-damages basis, this discretion is rarely exercised. The Court may apportion costs by issue where "separate issues are easily definable and sever-able" and the following matters are taken into account: The degree of success by each party; The conduct of the parties; The necessary length of the proceedings; and The nature and significance of the evidence presented.

Justice Jones found that the Applicant was substantially, but not entirely successful, since he failed to obtain the consequential relief sought. Bearing in mind that costs should not be awarded on an issue-by-issue basis, Justice Jones held that the Applicant's failure to obtain the consequential relief did not detract from his substantial success.

On the facts, the Applicant was awarded 60% of his assessed legal fees and disbursements.

OLSON V OLSON, 2022 ABQB 356

(HARRIS J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.52 (Declaration of Civil Contempt), and 10.53 (Punishment for Civil Contempt of Court)

The Plaintiff was successful on an Application for a parenting and child support order. Leading up to the application, the Defendant had unnecessarily protracted the litigation, was the subject of several cost awards, neglected to pay a per diem fine that accrued for over four years, and was in contempt of court.

The Court awarded costs against the Defendant and considered whether to issue a warrant for his arrest.

In awarding costs, Justice Harris referenced Rule 10.29 and explained that a successful party is entitled to costs. The Court has discretion to award enhanced costs if a party engages in litigation misconduct. Enhanced costs can include an award of solicitor-client costs, but only in exceptional circumstances. Here, the Defendant's outrageous conduct resulted in unnecessary delays and repeated court appearances, which wasted both the Court's and the Plaintiff's time and resources. More importantly, the Defendant attempted to "delay, deceive and defeat justice" by seeking numerous adjournments, concealing materials, and failing to produce financial disclosure. Accordingly, the Plaintiff was awarded solicitor-client costs for her application.

Rules 10.52 and 10.53 govern the contempt of parties in civil matters. Since the remedy for contempt can include imprisonment under Rules 10.53(1)(b) and (c), these provisions are penal in nature and thus subject to the *Charter*. As a quasi-criminal remedy, the "utmost care must be taken in all cases to ensure the contemner's rights are observed".

Under Rule 10.53(4), only the Justice who initially made a declaration of contempt can increase, vary, or remit the penalty or sanction. Justice Harris was not the initial judge who imposed financial penalties on the Defendant and could not vary them. Her Ladyship ordered a new contempt hearing to hear submissions as to why the Defendant should not be held in continued contempt of court and imprisoned under Rule 10.53.

WILLICK V WILLICK, 2022 ABQB 389

(RENKE J)

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

This was a ruling on costs arising from a Family Special Chambers Application. During the Application retroactive the Court found that the Plaintiff bore child support arrears obligations totalling about $90,000.

Justice Renke noted that Rule 10.29 confirmed the general rule that a successful party was entitled to costs. Costs determinations were discretionary with reference to the factors contained in Rule 10.33. The options for costs awards were set out in Rule 10.31 and awarding costs pursuant to Schedule C was one option among many options authorized.

His Lordship referred to the factors in Rule 10.33 and found that the Defendant was substantially successful in her Application and awarded her costs.

NICKOLET V NICKOLET, 2022 ABQB 450

(ACKERL J)

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

Following a seven-day trial, the parties asked the Court for a decision on costs. Each party took the position that they were entitled to costs. The Court noted that generally, pursuant to Rule 10.29, a successful party is entitled to costs from an unsuccessful party. The Court also reviewed Rules 10.33(1) and 10.33(2) and highlighted several factors relevant to this Action that a Court could consider in making a costs award, including: the result of the Action and the degree of success of each party, the amount claimed and the amount recovered, the importance of the issues, the complexity of the Action, and the conduct of a party that tended to shorten the action.

The Court found that overall, amongst other things: (1) the Defendant was successful on most of the trial issues; (2) the Defendant did not receive the amount of spousal support he claimed, but was awarded a larger support Award than the Plaintiff was willing to pay; (3) both parties took steps or failed to take steps that lengthened or delayed the Action; and (4) neither party "beat" their formal offers to settle.

In the result, the Court found that the Defendant was entitled to costs, and ordered the Plaintiff to pay half of the Defendant's Schedule C costs for steps taken up to and including the first half day of trial, in recognition of the narrowing of issues that occurred due to the parties' partial settlement. The Court ordered the Plaintiff to pay all of the Defendant's Schedule C costs from the second half day of trial to the end of trial. The Court declined to order enhanced costs.

MAS V CGL, 2022 ABQB 281

(MAH J)

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

The Applicant sought leave to appeal an Arbitrator's Decision and costs award. By section 44(2) of the Arbitration Act, RSA 2000, c A-43, an appeal was restricted to questions of law. The Court noted that the Applicant did not identify a discrete question of law relating to the costs award but did have several criticisms.

The Applicant acknowledged that costs are discretionary and that the discretion must be exercised judicially and in accordance with the directions and factors set out in Rules 10.31 and 10.33 of the *Alberta Rules of Court*, Alta Reg 124/2010.

The Court noted that awarding costs will generally be a question of mixed fact and law and that "only in narrow circumstances, where an arbitrator applies extraneous factors outside of the matter referred for arbitration, will the costs decision be converted to a question of law".

None of the criticisms raised by the Applicant were outside of the matter referred for Arbitration and all matters complained of were within the discretion of the Arbitrator.

The proposed appeal question, being one of mixed fact and law, was impermissible and leave to Appeal was denied.

GRAY V GOGUEN, 2022 ABQB 273

(GATES J)

Rule 10.52 (Declaration of Civil Contempt)

he Applicant in this family law dispute asked the Court to find the Respondent in contempt of court, pursuant to Rule 10.52(3), after the Respondent allegedly breached a shared parenting order by enrolling the children in a second childcare facility while they were in the Respondent's care. Alternatively, the Applicant sought a contempt ruling based on the Respondent's failure to provide complete financial disclosure as previously ordered and required by the *Family Law Act*, SA 2003, c F-4.5.

The Court noted that the decision to hold someone in contempt of a court is a discretionary decision, dependent on the satisfaction of three criteria: (1) an existing requirement of the court; (2) notice of the requirement to the person alleged to be in contempt; and (3) an intentional act (or failure to act) that constitutes a breach of the requirement "without adequate excuse".

The Court agreed that the Respondent's decision to enroll the children in a second childcare facility without consultation with the Applicant constituted a breach of the shared parenting Order. However, the Court found that the Respondent's interpretation (that doing so, did not constitute a "day-to-day decision" which required consent pursuant to the parenting

order), while incorrect, was genuine and not so unreasonable as to rise to the level of contempt. Accordingly, there could be no finding of contempt. Finally, noting jurisprudence describing civil contempt a "a very serious matter," to be invoked "only in the most extreme circumstances," the Court held that the Respondent's incomplete financial disclosure, while improper, was insufficient to warrant a contempt Order and was better addressed through Orders and remedies granted elsewhere in the Decision.

RIPLEY V RIPLEY, 2022 ABQB 295

(POELMAN J)

Rules 10.52 (Declaration of Civil Contempt)

The Applicant asked that Court find the Respondent in Contempt of Court for denying parenting time. Justice Poelman identified the common law requirements of Civil Contempt and noted that, while Rule 10.52 codified the common law requirements, it also expressly provided that the breach of a Court Order must be without a reasonable excuse. Ultimately, Justice Poelman noted that the Court's powers under Rule 10.52 are discretionary, and that Contempt remedies should be used with restraint. Justice Poelman ultimately denied the application finding that Contempt was not proven beyond a reasonable doubt.

TORNQVIST V SHENNER, 2022 ABCA 133

(VELDHUIS J, KHULLAR J, ANTONIO J)

Rules 10.52 (Declaration of Civil Contempt), 11.3 (Agreement between Parties), 11.5 (Service on Individuals), 11.16 (Service on Lawyer), and 11.17 (Service on Lawyer of Record)

The Appellant appealed an Order finding him in civil contempt. One of the issues on Appeal was whether or not legally sufficient service was effected. Pursuant to Rule 10.52, for allegations of contempt other than those in the face of the court, a notice of an Application for contempt "must be served on the person in the same manner as a commencement document." The Respondents served the contempt Application on the Appellant's lawyers of record by email, fax and courier and provided appropriate evidence of receipt. The Court noted that service by courier, with receipt acknowledged in writing, is a form of recorded mail.

The *Rules of Court* provide a number of ways to effect service of a commencement document on an individual including: as agreed in a contract where applicable as per Rule 11.3; by personal service on or recorded mail addressed to an individual as per Rule 11.5; by service on an individual's lawyer, if the lawyer acts for the individual and accepts service in writing as per Rule 11.16; or by leaving a copy with the individual's lawyer of record, or at their office or other designated address, or by recorded mail addressed to the lawyer at the lawyer's office as per Rule 11.17.

The Appellant argued that Rule 11.5, for service on individuals, displaced other methods of service of commencement documents provided for in the Rules. The Court disagreed and found no error in the Chamber Judge's conclusion that Rule 11.17 provides a proper mode of service for a commencement document and, therefore, for a contempt Application. Ultimately, for reasons other than ineffective service, the Appeal was allowed, and the underlying Order was set aside.

ATB FINANCIAL V WILLIAMS, 2022 ABCA 175

(KHULLAR JA)

Rules 14.4 (Right to Appeal), 14.5 (Appeals Only with Permission), and 14.37 (Single Appeal Judges)

The Applicant applied for permission to Appeal a Decision by Justice Clackson which dismissed Appeals of two Orders by two different Masters in Chambers. The first Master's Order was a Consent Order and the parties agreed that permission to Appeal was required by Rule 14.5(1)(d). While the Applicant sought to Appeal the three decision makers' decisions (Justice Clackson and the two Masters), the Court determined that, pursuant to Rule 14.4(4), only Justice Clackson's Decision may be Appealed to the Court of Appeal.

The Applicant also sought final relief. A single Judge of the Court of Appeal may only grant Applications that are "incidental to an appeal" (R. 14.37(1)) such as granting permission to appeal (R. 14.37(2)).

The Court applied the test for permission to Appeal an Order made with the consent of the parties. Pursuant to Rule 14.5(1)(d): the Appeal must raise an important question of law or precedent, show a reasonable prospect of success, and show that a delay would not unduly prejudice the other party or unduly hinder the progress of the Action (*Macdonald v King*, 2021 ABCA 149).

The Court denied permission to Appeal, finding that the Applicant had not shown that his proposed Appeal had a reasonable prospect of success. The Court found that it was unnecessary then to address whether an Appeal would cause undue delay or undue prejudice to the Respondent.

FEENEY V TD INSURANCE COMPANY, 2022 ABCA 118

(HUGHES JA)

Rules 14.5 (Appeals Only with Permission)

This was an Application for permission to seek leave to appeal a lower Court decision declaring the Applicant a vexatious litigant and imposing Court access restrictions. The Applicant had previously been declared vexatious in a related Court of Appeal Decision and restrictions were placed on his access to the Court of Appeal.

The Court noted that, in addition to permission to seek leave to appeal, actual leave to appeal would be required pursuant to Rule 14.5(1)(j).

In assessing the Application, the Court first set out three primary questions to be considered in assessing an Application for leave to appeal: (1) whether there is an important question of law or precedent; (2) whether there is a reasonable chance of success; and (3) whether the delay will unduly hinder the progress of the Action or cause undue prejudice. The Court observed that, in the context of an Application to appeal a vexatious litigant Order, the most important consideration is whether the proposed Appeal raises a serious question of general importance with a reasonable chance of success.

Ultimately, the Court held that the lower Court's conclusions as to the need for Court restrictions were appropriate and available in light of the facts. Finding further that the requested Appeal did not present an important question of law or precedent or bear a reasonable chance of success, the Court refused the Application for permission to seek leave.

OSHI V CANADIAN IMPERIAL BANK OF COMMERCE, 2022 ABCA 137

(HO JA)

Rule 14.5 (Appeals Only With Permission)

Pursuant to Rule 14.5, the Appellant applied for permission to appeal an order of Associate Chief Justice Rooke declaring him a vexatious litigant. On the application, the Appellant submitted that permission should be granted because ACJ Rooke erred in finding that he was forum shopping and he was not given an opportunity to be heard on the underlying application.

The Court of Appeal set out the test for obtaining permission to appeal when the applicant is a vexatious litigant, specifically: (1) is there an important question of law or precedent?; (2) is there a reasonable change of success on appeal?; and (3) will the delay unduly hinder the progress of an action or cause undue prejudice?

The Court found that to meet the requirement of a reasonable chance of success on appeal, where the Appeal is subject to a deferential standard of appellate review, the burden is high as it is unlikely that the Court of Appeal will overturn discretionary orders. The reasonableness standard applied in this case as a

declaration that a party is a vexatious litigant is a discretionary decision.

The Court denied permission to appeal as the Appellant failed to raise a serious question of law or precedence and there was no reasonable chance of success on appeal.

RANA V RANA, 2022 ABCA 172

(VELDHUIS JA)

Rule 14.5 (Appeal Only with Permission)

The Applicant was declared a vexatious litigant and was required to seek leave with the Court before filing any applications or proceedings. The Case Management Judge had denied the Applicant permission to institute or continue proceedings in four separate lawsuits. The Applicant appealed each of the orders issued by the Case Management Judge in respect of the four lawsuits, pursuant to Rule 14.5(1)(j).

The Court of Appeal dismissed three of the four Appeals. Pursuant to Rule 14.5(4), no appeal is allowed for a vexatious litigant from an order denying the vexatious litigant permission to institute or continue proceedings. Three of the four orders issued by the case management judge fell squarely within the scope of Rule 14.5(4).

The Court of Appeal allowed the Appeal on the fourth order, finding that the Applicant met the following test for permission to appeal: there is an important question of law or precedent, there is a reasonable chance of success on appeal, and the delay will not unduly hinder the progress of the action or cause undue prejudice.

BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2022 ABCA 134

(WATSON J)

Rules 14.37 (Single Appeal Judges), and 14.38 (Court of Appeal Panels)

he Applicant sought an Order to direct that all evidence filed in the underlying Action be deemed confidential and would not be disclosed publicly. The underlying Action was related to an appeal of a review officer's assessment of legal fees charged by the Respondent law firm ("Desired Relief").

The legal fees related a Federal Court patent infringement claim.

As a preliminary question, the Court considered whether it was appropriate for a single judge to grant the Desired Relief or whether it required a panel. The Court determined that it was within a single judge's jurisdiction in accordance with Rule 14.37.

The Court noted that Rule 14.38(2)(d) requires a panel to hear "an application for directions required to give effect to any decision of

the Court of Appeal." However, the Court determined that it did not apply because the decision of the Court in the Appeal at issue had been made, formalized, and nothing relating to what was being sought in the Desired Relief was intended to "give effect" to that judgement.

Ultimately, the Court granted the Application in part indicating that the Desired Relief would be in place for a specified period of time.

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