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RULES

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CLEARBAKK ENERGY SERVICES INC V SUNSHINE OILSANDS LTD, 2022 ABQB 506

(JONES J)

Rules 1.2 (Purpose and Intention of These Rules), 4.29 (Cost Consequences of Formal Offer to Settle), and 5.12 (Penalty for Not Serving Affidavit of Records)

This was a costs decision after Jones J allowed an Appeal of a Master's Decision where Clearbakk Energy Services Inc. ("Clearbakk") obtained Summary Judgment against Sunshine Oilsands Ltd. ("Sunshine").

Jones J noted that the result of the Court allowing the Appeal of the Summary Judgment is that the matter will go to Trial. The Justice who hears the Trial will be in a better position than Jones J to assess costs for the totality of the Action. Jones J accordingly limited the scope of the costs award to the issues of a Security for Costs Application related to the Appeal, the Summary Judgment Appeal itself, and this Application for costs.

The Court noted that Sunshine was the successful party for the matters before Jones J and should be awarded costs.

Sunshine sought enhanced Costs against Clearbakk citing alleged litigation misconduct. Clearbakk had sought solicitor and own client costs against Sunshine by alleging that Sunshine had breached Rule 1.2 and alleging that Sunshine had failed to file a responding Affidavit for the Summary Judgment Application, notwithstanding that it was not required under Alberta law. The Court was not prepared to make any finding in respect of alleged litigation misconduct on the part of Clearbakk and left this matter for Trial.

Sunshine sought a penalty against Clearbakk pursuant to Rule 5.12 arising from Clearbakk's failure to file its Affidavit of Records within the stipulated time. Clearbakk argued that the Master who Ordered the half-day Special Application for Summary Judgment had suspended the requirement for an Affidavit of Records. The Court agreed.

Sunshine also asserted that there were genuine offers to settle in the form of a Formal Offer and two *Calderbank* Offers. Sunshine claimed it was entitled to double costs following the offers pursuant to Rule 4.29. Clearbakk argued that because Sunshine's offers were issued prior to the Summary Judgment Appeal, and not renewed thereafter, that they cannot be considered in assessment of costs relating to the Appeal. Jones J agreed. The Court found that it was more appropriate for the Trial Justice to address any costs consequences of the alleged offers.

The Court awarded Sunshine costs against Clearbakk in accordance with Schedule C of the Rules in respect of the Security for Costs Application, the Summary Judgment Application, and the current costs submission before the Court.

MACKENZIE V ESTATE OF MICHAEL GREGORY, 2022 ABQB 521

(HOLLINS J)

Rules 1.2 (Purpose and Intention of these Rules), 4.14 (Authority of Case Management Judge), 6.37 (Notice to Admit), and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs sued for damages arising out of alleged sexual assaults committed by a late teacher. During the proceedings, the Plaintiffs served a Notice to Admit under Rule 6.37 seeking 21 separate admissions. One of the Defendants replied stating that the admissions sought were collectively "irrelevant, improper, or unnecessary." The Plaintiffs brought an application before the Court seeking a direction that the Defendant file a further and better Reply to the Notice to Admit.

The Defendant argued that the Court does not have authority to direct it to do anything other than respond that the admissions are, collectively, "irrelevant, improper or unnecessary" as Rule 6.37(5) only requires a substantive response to "denials" and not to "objections".

In interpreting Rule 6.37, the Court turned to the foundational Rule 1.2. Considering the rationale of the Rule generally, the Court stated that the Trial Judge must have at least enough information about the objection to assess, post-Trial, whether the objection taken was reasonable and thus not deserving of a costs sanction.

The Court held that the drafters intended a different required response where a fact is denied as opposed to an objection taken. However, even allowing for that distinction, Rule 6.37(2)(b)(ii) can only fulfill its objective if the basis for the objection - which is wholly within the knowledge of the responding party - is disclosed. Without it, there is no discernible purpose or intention to the Rule. The Court stated that an objection to an admission sought must: (1) delineate whether the objection is because the admission sought is irrelevant, improper or unnecessary; and (2) offer a basic reason for why that is so in the view of the responding party.

Further, Hollins J referred to the authority under Rule 4.14(1)(g)(iii) to deal with the issue of admissions in the capacity as Case Management Justice but did so only to the extent necessary to move the matter forward by outlining the general expectations of a party objecting to admission sought.

The Court also noted that while the new Rule 6.37, in comparison with the former rule, no longer contains a possible costs penalty for refusing to make an admission which was subsequently proven by the other party at trial, Rule 10.33(2)(b) states that a judge may consider a denial or refusal to admit anything that ought to have been admitted as a factor in assessing costs.

The Court granted the Plaintiffs' Application.

BLUME V BLUME, 2022 ABQB 539

(WHITLING J)

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

The Plaintiff applied for an interim distribution of matrimonial property and an Order directing the Defendant to provide responses to Undertakings. The Defendant cross-applied pursuant to Rules 4.31 and 4.33 to dismiss the Plaintiff's claim for delay. The Plaintiff commenced the Action by the filing of a Statement of Claim for Divorce on September 2, 2016. The Defendant never filed a Defence but Questioning of the Defendant was conducted. There was very little progress since Questioning.

The Court noted that there is discretion on the part of the Court to deny a Delay Application even when the moving party has established inordinate delay and significant prejudice. One circumstance which has been recognized as justifying the denial of a Delay Application is where the limitation period applicable to the underlying claim has not yet expired.

In the Action, the limitation period applicable to the Plaintiff's matrimonial property claim is two years from the date of the divorce judgment pursuant to the *Matrimonial Property Act*. No Divorce Judgment had yet been issued and thus, the limitation period for the matrimonial property claim had not yet started to run.

The Plaintiff advised that if the Action were dismissed for delay, she would file and serve a new action for the same relief. The Court noted that she would be entitled to do so.

The Court denied the Defendant's Cross-Application to dismiss for delay. Sending the parties back to the start of litigation would not be in the interests of justice or fit the overarching purpose of the *Alberta Rules of Court* as stated in Rule 1.2.

RATH & COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2022 ABQB 556

(JOHNSTON J)

Rules 1.2 (Purpose and Intention of these Rules), 1.7 (Interpreting these Rules), 3.26 (Time for Service of Statement of Claim), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.13 (Appointment for Review), 10.14 (Client-Obtained Appointment: Lawyer's Responsibility), 10.17 (Review Officer's Authority), and 13.5 (Variation of Time Periods)

This is a decision from two appeals relating to a Notice of Appointment filed by the Appellant client, for the review of a retainer agreement and lawyer charges involving the Respondent law firm (the Appointment).

The first decision under Appeal set aside the Appointment because it was filed but not served within six months of the final account being rendered by the Respondent. Instead, it

was served ten days prior to the Appointment date (Master Prowse's Decision).

The second decision under Appeal extended the time for service of the Appointment, notwithstanding that the period for service had expired (Master Farrington's Decision).

In allowing the Appeal of Master Prowse's Decision and dismissing the Appeal of Master Farrington's decision, the Court underscored the tenets of statutory interpretation and the Rules. The Court reviewed the modern approach to statutory interpretations and reviewed foundational Rules 1.2 and 1.7(1), finding that Master Prowse's interpretation of Rules 10.10 and 10.13 ran contrary to the plain language of the Rules. Master Prowse had interpreted those Rules to mean that an appointment must be filed *and* served within six months after a retainer agreement was terminated (or a last account rendered) (the Time Frame). The Court found that an appointment must be filed within the Time Frame but need not be served within the same. The Court also analogized to Rule 3.26 which provides that a Statement of Claim must be served on the defendant within one year after the date the Statement of Claim was filed.

The Court found that Rule 10.13(4) addressed the time requirement for service of an Appointment relative to the review, providing that an appointment must be "served" at least ten days before the appointment date. The Court also emphasized that 10.13, 10.14(3) and 10.17 allow for discretion on the part of a review officer in relation to filing deadlines.

The Court found that when examined in their entire context, the express words of Rule 10.10 support an interpretation that an Appointment must be filed but not served, within the six-month period articulated in that Rule. The Court added that this conclusion is consistent with a contextual and purposive analysis, while concurrently giving effect to the plain language of the relevant Rules and the authority given the review officer by them.

The Court noted that, having allowed Applicant's Appeal of Master Prowse's Decision, the issue of whether the time for service of the Appointment should be extended was moot. The Court added that, even if the Appeal of Master Farrington's Decision was not moot, the Court would have dismissed that Appeal. Finally, the Court reviewed six non-exhaustive factors to be considered in a Rule 13.5 Application to extend time for reviewing a retainer agreement and/or lawyer's charges, including: delay, prejudice, first intent to tax accounts, evidence of overcharging, agreement as to amount, and the relationship between lawyer and client (the Factors). The Court ultimately found that, based on its weighing of the Factors, the interests of justice supported an extension of time.

ALTALINK LP V SNC-LAVALIN ATP INC, 2022 ABQB 585

(FEASBY J)

Rules 1.2 (Purpose and Intention of These Rules), 3.46 (Third Party Defendant Becomes Party), 5.18 (Persons Providing Services to Corporation or Partnership), 5.25 (Appropriate Questions and Objections), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), and 10.31 (Court-ordered Costs Award)

The Applicant/Defendant in this Matter sought to compel the Respondent/Third-Party Defendant's representative to answer questions and undertakings refused during Questioning. The Respondent cross-applied to amend its Third-Party Statement of Defence and submitted that the amendment, if granted, would defeat the Applicants' Application to compel answers.

As a preliminary matter, the Applicant submitted that it had an absolute right to cross-examine the Respondent's affiant and sought an adjournment of approximately one month citing Rule 6.7, which provides for a general right to cross-examine. Rule 1.2 suggests that a pragmatic and flexible approach to Rule 6.7 may be appropriate in exceptional circumstances.

The Court found that the present case was an exceptional circumstance because: 1) the parties, counsel, and the Court committed to a strict pre-trial schedule and reserved significant trial time; and 2) the matter was case managed by Feasby J and therefore the Court was able to assess whether the Applications could be resolved fairly and justly without cross-examination. Feasby J found that cross-examination prior to the hearing of the Application was not required to decide the matter and denied the Applicants' adjournment request.

The Respondent sought to amend its pleadings to narrow the scope of the dispute to only focus on one project in which it was involved (rather than other projects on which it conducted remediation work); it submitted that it should then not be required to answer any questions related to remediation work.

The Court noted that the scope of Questioning is determined by the pleadings at the time of Questioning. Parties plan their case strategy based on pleadings and prepare for Questioning as the pleadings are, and not as they might be. A party cannot refuse relevant questions and undertakings then amend its pleadings after the fact to avoid giving answers. As such, the Respondent was stuck with the pleadings as they existed at the time of Questioning.

Rule 5.25 requires a person during Questioning to answer relevant and material questions. The questions that the Respondent refused to answer could logically be expected to significantly help determine one or more of the issues raised in the pleadings.

The Respondents submitted that if the Applicants' wished to obtain information relating to the remediation work, it must meet the requirements of Rule 5.18, i.e., the Respondents should be treated as a stranger to the litigation regarding the remediation work and that the Applicants' must show that the information they seek is not available from any other party to the litigation.

The Court found this position to be untenable. Rule 3.46 provides that a Third-Party Defendant is "a party to the action between the plaintiff and defendant". Absent the Third-Party Claim being severed from the main Action, the

relevance and materiality for Questioning of Third Parties is determined by all the pleadings in an Action. The Court required the Respondent to answer the refused questions and undertakings.

The Respondent submitted that the burden of discovery fell disproportionately upon its shoulders as a "minor party". The Court agreed and used its discretion pursuant to Rule 10.31 to allocate the financial burden of answering undertakings through a costs award. The Court found that the Respondent was in a position that was analogous to a stranger in litigation that was subjected to Questioning pursuant to Rule 5.18 where the questioning party bears the costs of the party being questioned. Accordingly, the Court ordered that once the Respondent answered the undertakings, it could apply to the Court for costs.

MOSTAFA ALTALIBI PROFESSIONAL CORPORATION V LORNE S. KAMELCHUK PROFESSIONAL CORPORATION, 2022 ABCA 239

(VELDHUIS, WAKELIN, AND SCHUTZ JJA)

Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 1.7 (Interpreting these Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), and 14.5 (Appeals Only with Permission)

The Appellants sought to appeal a Master's Order permitting Questioning to be conducted remotely by video conferencing, and to comply with the Alberta Protocol for Remote Questioning. The Master granted the Order for five reasons: (i) as a matter of general knowledge that COVID-19 cases were on the rise and restricted social interactions correlated with decreased case numbers; (ii) Questioning is a lengthy interaction in a relatively small space; (iii) videoconferencing had been ordered before the pandemic; (iv) transcripts, prepared from Questioning, do not reflect witness demeanour; and (v) Questioning should not be postponed indefinitely until the pandemic subsides.

The Court of Appeal upheld the Master's Order. The Court of Appeal relied on the "foundational rules" for guidance and, specifically, Rules 1.2, 1.4, and 1.7. Pursuant to those foundational rules, the Court found that the Master had the authority to direct remote Questioning, and that the Court had jurisdiction to grant that Order.

The Court of Appeal also affirmed the following factors supporting Questioning by video-conference: (i) the Court of Appeal previously endorsed remote Questioning on affidavits as far back as 2000; (ii) the absence of any rule expressly barring or restricting remote Questioning on Affidavits; (iii) Rule 6.10 expressly allows Courts to order "electronic hearings"; (iv) prior Court decisions reflect the possibility, and fact, of remote Questioning; (v) the Court has increasingly accepted, since mid-March of 2020, remote proceedings; (vi) the overall improvement in video-link technology; (vii) growing recognition of the utility of remote evidence; (viii) and the foundational-rule imperative to apply, and as necessary augment, the Rules to ensure the fair, just, and timely resolution of parties' claims.

The Court of Appeal rejected the Appellants' concern that videoconferencing would impair counsel's ability to assess the credibility of the person being Questioned.

The Court of Appeal declined to consider the timelines imposed by the lower Court because the Appellants failed to seek permission to appeal the timeline as required by Rule 14.5(1)(b).

The Court of Appeal upheld the Master's decision to impose costs. The Court rejected the Appellants' argument that the issue of videoconferencing was a novel issue. The Court also relied on the discretion given to Courts in Rules 10.29(1) and 10.31.

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ROMERO V THE MEAT SHOP AT PINE HAVEN, 2022 ABKB 621

(NEILSON J)

Rules 2.2 (Actions by or Against Partners and Partnerships), 2.5 (Actions by and Against Sole Proprietors), 11.13 (Service on a Corporation Using Another Name), and 13.18 (Types of Affidavit)

Two procedural issues arose in the context of an Application by the Representative Plaintiff for Certification of a Class Action.

First, one of the Defendants argued that it was not a legal entity and ought not to be the subject of the Class Action, if certified. The Court found that this Defendant was merely a tradename used by the two other corporate Defendants. Justice Neilson stated that Rules 2.2 and 2.5 allow a partnership or sole proprietorship to sue or be sued in the name of a tradename. His Lordship also noted that Rule 11.13 provides for service upon a corporation carrying on a business or operating by a name other than its own. The Court therefore ordered that the Style of Cause be amended to include only the two corporate Defendants, followed by reference to their operation under the tradename Defendant.

Next, the Defendants objected to Affidavit evidence which was brought in relation to the common issues identified by the proposed Class. The Defendant argued that such evidence was hearsay which was obtained from the records of non-parties. The Court held that Rule 13.18 provided for the admissibility of Affidavit evidence based on information and belief on procedural interlocutory Applications, and so accepted the evidence.

In the result, Justice Neilson granted the Certification Application.

CLEANIT GREENIT COMPOSTING SYSTEM INC V DIRECTOR (ALBERTA ENVIRONMENT AND PARKS), 2022 ABQB 582

(FETH J)

Rules 3.15 (Originating Application for Judicial Review), and 3.23 (Stay of Decision)

The Application arose from the Appeal by the Applicant of the cancellation of its registration by the Director (Alberta Environment and Parks) to the Environmental Appeals Board. The Board refused to hear the Appeal due to lack of jurisdiction. Subsequently, a closure plan was submitted to the Director; the closure plan was not approved.

The Applicant sought Judicial Review of the decisions made by the Director and the Board. The Applicant brought an application for an Interim Stay, an Interlocutory Injunction, or an Order in the nature of *mandamus* allowing the business to continue operating pending the outcome of the Judicial Review.

In accordance with Rule 3.23, the Court may stay the operation of a decision or act sought to be set aside under an Application for Judicial Review pending the determination of the Application. However, a stay should not be ordered if it is detrimental to the public interest or public safety. In this instance, as government authority was involved, the public interest was a special factor considered in determining whether to grant a stay. The Court also noted a similar analysis would apply for an interlocutory injunction, except where a mandatory injunction is sought.

Further, the Court noted that an Order in the nature of *mandamus* is similar to a mandatory injunction and a public authority or decision maker is compelled to take positive steps by performing a statutory duty owed to the applicant. Rule 3.15 confirms that an order in the nature of *mandamus* may be granted as a remedy in an application for judicial review; this authority is also echoed in the *Judicature Act*. Notably, however, *mandamus* is only available when no other adequate remedy is available.

In general, the Court noted that an Application for Judicial Review to set aside a decision or act of a person or body must be filed within six months after the date of the decision. Failure to comply with the limitation period is fatal to review of that decision and Rule 3.15(2) is strictly construed. The Court has no discretion to extend the deadline. As the Applicant did not file its Application for Judicial Review until 14 months after the decision was made, the Court held that Judicial Review of that decision was out of time.

The Applicant argued that the limitation period was not engaged until the company knew definitively that the Board had declined to take jurisdiction. Until then, it argued, Judicial Review was premature. Consequently, until the Board issued its decision, the limitation period was out of time. The Court disagreed and held that the six-month limitation period commenced the date the Director made the decision to cancel the registration.

MACKENZIE V ALBERTA (REGISTRAR, NORTH ALBERTA LAND REGISTRATION DISTRICT), 2022 ABCA 277

(WAKELING, KHULLAR AND KIRKER JJA)

Rule 3.15 (Originating Application for Judicial Review)

The Appellants brought an Application for a declaration that the Registrar of the North Alberta Land Registration District (the Registrar) did not have the authority to amend the description of the Respondents' title nor to register a 2018 Plan of Survey indicating that certain accreted land belonged to the Respondents. The Chambers Judge denied the Appellants' Application, partly on the basis that the Appellants' Application was actually an Application for Judicial Review, and was time barred by Rule 3.15(2).

Rule 3.15(2) states that an Originating Application for Judicial Review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act.

The Court of Appeal granted the Appeal and held that the Appellants' Application was not an Originating Application for Judicial Review, and thereby not time-barred. The Court of Appeal found that the Appellants were not seeking an order of *mandamus*, which are orders targeted at an administrative body's unreasonable delay or failure to make a decision. The Court of Appeal held that *mandamus* does not refer to *any* order requiring an administrative body to do something, including an order requiring an administrative body to reverse an incorrect exercise of authority, which is precisely what the Registrar had done. The Court of Appeal also held that seeking an order requiring an administrative body to do something does not distinguish judicial reviews from statutory appeals. The Appellants were seeking a statutory appeal brought under s. 184 of the *Land Titles Act*. Accordingly, the time-limit in Rule 3.15 did not apply to the Appellants' Application, and the Application was not time-barred.

NORMKO RESOURCES INC. V ALBERTA (MINISTER OF ENVIRONMENT AND PARKS), 2022 ABQB 474

(YUNGWIRTH J)

Rules 3.18 (Notice to Obtain Record of Proceedings), and 5.11 (Order for Record to Be Produced)

The Applicant sought Judicial Review of a decision of the Minister of Environment and Parks. In the meantime, the Applicant applied to obtain a Briefing Note that formed part of the records reviewed by the Minister to make the decision under appeal, and over which the Minister asserted crown/ public interest privilege.

The Applicant sought disclosure of the Briefing Note under Rule 3.18(2)(e) and section 124 of the *Public Lands Act*, RSA 2000. Rule 3.18(2)(e) required the Respondent to send the Applicant "anything... relevant to the decision or act in the possession of the person or body" or provide an explanation as to why it could not be sent.

In the alternative, the Applicant asked the Court to review the Briefing Note under Rule 5.11(2)(a) to determine if it should be produced. Rule 5.11(2)(a) gives the Court permission to inspect a privileged record to determine whether the claim for privilege has been properly asserted.

Madam Justice Yungwirth considered the factors for balancing the public interest in confidentiality with the disclosure of documents concerning public decision making. The onus for establishing that a document should not be disclosed because of public interest privilege or immunity rested with the government. Her Ladyship applied the six factors listed by the Supreme Court of Canada in *Carey v Ontario,* [1986] 2 SCR 637 and held that the Crown failed to establish public interest privilege.

After finding that public interest privilege did not apply, Madam Justice Yungwirth followed the Supreme Court of Canada's caution in *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia,* 2020 SCC 20 and inspected the Briefing Note in private, nonetheless. Yungwirth J held that the Briefing Note was relevant and material to the Minister's decision and not subject to crown/public interest privilege. The Briefing Note was ordered to be produced under Rule 3.18(2)(e) as part of the Minister's Certified Records of Proceedings for the Judicial Review.

GOODWIN V GOODWIN, 2022 ABQB 520

(KRAUS J)

Rules 3.26 (Time for Service of Statement of Claim), 3.28 (Effect of Not Serving Statement of Claim in Time), 4.34 (Stay of Proceedings on Transfer or Transmission of Interest), 11.27 (Validating Service), 12.3 (Application of Other Parts), 12.55 (Service of Documents), 12.57 (Proof of Service), and 12.58 (Rules that Do Not Apply)

The Applicant Plaintiff applied in regular family law chambers to validate service of a Statement of Claim for Divorce and Division of Matrimonial Property upon the Defendant, or in the alternative, to grant an extension of time for service.

Counsel for the Plaintiff gave a copy of the Statement of Claim to counsel for the Defendant and stated that they would personally serve the Defendant. Personal service never occurred. After the Statement of Claim was given to Defendant counsel, the Plaintiff had passed away and his son had become litigation representative.

Service of a Statement of Claim for Divorce and Division of Matrimonial Property is governed by Rules 12.55 and 12.57. Service must be made on the individual and not their lawyer, by a person other than the Plaintiff, and must include a picture of the individual served unless the Court otherwise orders. There was no dispute that the Plaintiff did not meet the textual requirements of Rules 12.55 and 12.57.

The Court noted that service is a practical question and that the point of service is that the Defendant has knowledge of the Claim and can choose to defend. Rule 11.27 allows the Court on application to make an Order validating service. Rule 12.3 provides that other parts of the Rules apply to family law proceedings unless they are expressly excluded by a rule in Part 12. Rule 12.58 is an exclusionary rule that states that Rule 11.25 (not at issue in the present Application) does not apply to service

of a Statement of Claim for Divorce and Division of Matrimonial Property.

The Court found on a balance of probabilities that the Statement of Claim was brought to the Plaintiff's attention.

Although Plaintiff counsel indicated that formal service would follow, they did not indicate that the Statement of Claim was provided for informational purposes only and counsel for the Defendant made no representations that the provision of the Statement of Claim did not constitute service or engage legal rights. In fact, counsel for the Defendant communicated about issues with the Divorce and Division of Matrimonial Property and participated in Court Applications which fully engaged the legal rights of the parties.

The Court validated service on the Defendant.

Rule 4.34 stays an Action until an Order is granted to continue an Action when the Action has been transferred or transmitted to another person by the death of a party. Therefore, this Action was stayed upon the Plaintiff's death. The Court granted an Order under Rule 4.34 to continue the Action in the name of the Plaintiff's son as litigation representative.

BREEN V FOREMOST INDUSTRIES LTD, 2022 ABQB 478

(YAMAUCHI J)

Rules 3.44 (When a Third-Party Claim May Be Filed), 3.45 (Form of Third-Party Claim), 3.56 (Right to Counterclaim), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), and 13.5 (Variation of Time Periods)

The Plaintiff by Counterclaim sought permission from the Court to amend its Counterclaim. The Defendant by Counterclaim opposed those amendments. Specifically, the Plaintiff by Counterclaim sought permission to add several related parties as Plaintiffs by Counterclaim, amend the pleadings to add particulars and relief sought, and remove a claim for damages related to a specific issue.

Rule 3.65 allows the Court to grant permission to amend a pleading before or after the close of pleadings. The Court noted that whether to amend pleadings is a discretionary decision, but the general rule is that amendments to pleadings should be allowed, no matter how late or careless, unless there is prejudice to the other side. The Court also noted four exceptions to general rule, where:

The amendment would cause serious prejudice to the other party, not compensable in costs;

The amendment requested is hopeless such that if it were in the original pleadings, it would have been struck as being vexatious or an abuse of process or does not disclose a cause of action and is not relevant to a cause of action;

Unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; or

There is an element of bad faith associated with the failure to plead the amendment in the first instance.

The Court allowed the Plaintiff by Counterclaim to add, as Plaintiffs by Counterclaim, those

related parties that were named as Defendants in the Statement of Claim.

The Court did not, however, allow the addition of other additional parties ("Additional Parties") who were not named as Defendants in the Statement of Claim. The Court noted that Rule 3.56 permits only an original Defendant the right to file a Counterclaim against the Plaintiff.

Furthermore, the Court did not permit the Plaintiff by Counterclaim to add a Third-Party Claim against the Additional Parties pursuant to Rule 3.45, notwithstanding that the Additional Parties consented pursuant to Rule 13.5 to extend the 6-month time period to file and serve a Third-Party Claim. The Court found that the proposed Third-Party Claim was not a true Third-Party Claim under Rule 3.44 because the Plaintiff by Counterclaim's claims against the Additional Parties were unrelated to the Plaintiff's claim against the Plaintiff by Counterclaim.

CANJURA V NEUFELD, 2022 ABQB 594

(ROOKE ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), and 4.10 (Assistance by the Court)

The Defendant referred the Statement of Claim to Rooke ACJ for review as an Apparently Vexatious Application or Proceeding pursuant to Civil Practice Note No. 7 ("CPN7"). CPN7 is a specialized mechanism that allows the Court to strike out claims under Rule 3.68.

Associate Chief Justice Rooke reviewed the claim and noted that, despite being a close call, the claim was not suitable for CPN7. The allegations in the claim were not bald and unsubstantiated, and the claims, while unexpected, did not reach the threshold of "absurd, highly implausible, or hyperbole".

However, Rooke ACJ determined that the Statement of Claim was nonetheless problematic when viewed in light of the several other lawsuits commenced by the Plaintiff. In pursuit of a claim for alleged conspiracy of stalking and monitoring, the Plaintiff had misused various courts and tribunal processes. Notably, the Plaintiff had to conduct a Rule 4.10 case conference prior to filing further applications naming the Defendant. The Plaintiff had an extended record of unsuccessful litigation where he sought impossible and excessive damage awards and engaged in persistent and repeated appeals. The evidence before Rooke ACJ made it clear that the Plaintiff was an abusive litigant who could not be managed except by prospective litigation gatekeeping.

Associate Justice Rooke noted that the Court has no inherent jurisdiction to manage abusive litigants by issuing "vexatious litigation orders". Instead, the Court can invite parties to file a *Judicature Act*, RSA 2000, c J-2 ss 23-23.1 [Vexatious Proceedings] application, with notice to the Alberta Minister of Justice and Solicitor General, when "faced with a persistent abusive litigant whose litigation misconduct is not suitable for case management".

Accordingly, Rooke ACJ invited the Defendant to initiate a *Judicature Act* ss 23-23.1 application to impose court access restrictions on the Plaintiff and, in the meantime, ordered interim access restrictions until the *Judicature Act* application was resolved.

Y V ALBERTA (WORKERS' COMPENSATION BOARD), 2022 ABKB 597

(LEE J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Application to strike the Statement of Claim of the Plaintiff pursuant to Rule 3.68. The Statement of Claim related to alleged mishandling of the Plaintiff's claim for benefits from the Defendant, the Workers' Compensation Board. In addition to disputing the Defendant's decision to deny benefits, the Plaintiff alleged various civil causes of action against the Defendant.

The Court struck the Statement of Claim on the basis that it lacked jurisdiction to review the Defendant's decision outside the legislatively mandated review process. The remaining causes of action were struck for failure to plead vital facts in support of legal conclusions or in recognition of absolute statutory and other defences.

In connection with its determination, the Court noted that Applications to strike Statements of Claim place a high onus on the Applicant and that Statements of Claim should be read generously to allow for drafting deficiencies and to protect causes of action which are supported by pleaded facts, even where the cause of action, itself, is not properly pleaded. The Court also noted that there is an exception to the rule that the Court must accept allegations of fact as true where the allegations are based on assumptions or speculations, or where they are patently ridiculous or incapable of proof, adding that this is particularly so where few facts are pleaded amidst many allegations made against a large entity.

ANGLIN V RESLER, 2022 ABKB 631

(LEMA J)

Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 14.88 (Costs Awards)

The Court considered the appropriate Costs to be awarded to the Defendant after the Plaintiff's Statement of Claim was struck.

The Defendant had made a Formal Offer that was not accepted and was therefore entitled to double Costs for steps taken after the Formal Offer was made pursuant to Rule 4.29(3). The Court therefore awarded double Costs for the Questioning on an Affidavit that had taken place.

The Court declined to award Costs for the Defendant's participation in an Appeal to the Alberta Court of Appeal. The Appeal related to whether another Defendant was a proper party to the dispute. This Appeal was dismissed and the Court determined that the Defendant could not fairly be said to be the "successful party" within the meaning of Rule 14.88.

One of the issues before the Court was whether an Interlocutory Application for which

Costs had already been determined counted as a "step taken in the action" under Rule 4.29(2), qualifying it for double Costs treatment under Rule 4.29(3). The Defendant had been successful in an Interlocutory Application that occurred after the Formal Offer was rejected. The Court noted that Rule 10.29 states that a successful party to an Application is entitled to Costs "notwithstanding the final determination of the application, proceeding or action." The Court determined that Rule 10.29 means that Interlocutory Application Costs are awarded regardless of whether a Formal Offer was made.

Interlocutory Applications with Costs that have already been addressed do not count as a "step taken in the action". Accordingly, the Defendant was not entitled to double Costs for the Costs awarded for the Interlocutory Application.

ZIOLKOSKI (RE), 2022 ABQB 548

(FRASER J)

Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), and 13.18 (Types of Affidavit)

Both parties in the matter brought Applications. Both parties sought to have portions of the opposing party's Affidavit struck for, among other things, including legal conclusions and hearsay when each party was also seeking final determination of matters through Summary Judgment. The Defendants, specifically, sought to have the Action dismissed for long delay.

The Court noted that Rule 13.18 was applicable because both parties had sought final determination of matters through Summary Judgment; the Affidavits had to have been sworn on the basis of personal knowledge and to comply with the common law, in addition to the Rules.

The Court noted that both the Plaintiff's and the Defendants' Affidavits contained hearsay or were "based on information by counsel" and contained legal conclusions which were not appropriate for the respective Affidavits. The Court, therefore, stuck those portions from each Affidavit.

As a result, the Court found that neither party's Affidavit (absent the evidence that had been struck) provided the necessary basis on which the Court could grant Summary Judgment in favour of either Applicant.

The Court noted that, even if the portions of the Defendants' Affidavits were not struck, their Delay Application pursuant to Rules 4.31 and 4.33 would have failed, nonetheless. The Court found that in accordance with the three-step process set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49, the Defendants did not prove the necessary facts. The Court did not agree with the date the Defendants asserted was the last significant step in the Action.

More specifically, the Court found the Defendants' decision to delay Trial through an adjournment so as to be able to be granted access to the Plaintiff's psychological records (for an expert report) contributed to the delay. The Court determined that the Defendants could not benefit from their decision to delay the Trial and that the Defendants were at least partially responsible for the lack of communication that occurred after access to the Plaintiff's psychological records had been granted. The Court understood that rewarding the Defen-

dants for delaying the Trial would be contrary to Rule 4.31(3) such that the delay was not inordinate or inexcusable.

The Court additionally found that the Rule 4.33 three-year drop-dead rule had also not been triggered on the basis significant steps had been taken less than three years apart. The Court understood the significant steps included: the granting of an Order, the Plaintiff's request for a new trial date, and subsequent Case Management Meetings.

CONDOMINIUM CORPORATION 052 0580 (O/A THE TRADITION AT SOUTHBROOK) V CARRINGTON HOLDINGS LTD, 2022 ABKB 623

(MANDZIUK J)

Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 5.20 (When Questioning is to Take Place)

The Defendants/Applicants applied to dismiss the Action pursuant to Rules 4.31 and 4.33. The Action had been commenced 11 years prior.

After surveying the steps which had taken place in the litigation, Justice Mandziuk turned to the Application under Rule 4.31. His Lordship summarized the analysis to be applied under Rule 4.31. Applicants have the onus to prove, on a balance of probabilities, that the delay has resulted in significant prejudice. If inordinate and excusable delay is established, the delay is presumed to have resulted in significant prejudice. The Respondent may rebut the presumption of significant prejudice based on evidence. However, the decision whether to dismiss for delay is ultimately discretionary.

The Court held that the relevant period for assessing the delay in this case was between the date the Statement of Claim was filed (in 2011) and either the date a previous delay Application was filed (in 2018) or when this delay Application was filed (in 2019). No Questioning had occurred in that time period.

The Court observed that the Plaintiff/Respondent had not progressed the Action at a reasonable pace, and that the delay was considerably in excess of what is reasonable in the context of litigation of this nature. The Court specifically noted that the Plaintiff/Respondent's failure to amend its Statement of Claim, which it had represented it would do, was a key issue: the Defendants/Applicants delayed scheduling their Questioning based on the expected amendment. Notwithstanding Rule 5.20, which sets out that Questioning by the Defendant should take place any time after a Statement of Defence has been served, the Court stated that the Defendants/Applicants were entitled to wait for the expected amendment in order to avoid the necessity of further Questioning based on the expected amendment.

The Plaintiff/Respondent provided no evidence to establish an explanation or excuse for its delay, but rather blamed the Defendants/Applicants failure to advance their Third Party Claim. The Court held that this was no excuse for the Plaintiff/Respondent's delay.

The Court further held that the Plaintiff/Respondent had failed to rebut the presumption of significant prejudice which had arisen due to the inordinate and inexcusable delay.

Finally, Mandziuk J. held that there was no compelling reason that would persuade the Court

not to exercise its discretion to dismiss the Action. Because the Court dismissed the Action pursuant to Rule 4.31, there was no need to consider the Rule 4.33 Application.

The Court awarded Costs against the Plaintiff/Respondent.

KELLEY (RE), 2022 ABQB 465

(MASTER FARRINGTON)

Rule 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)

The Applicant appealed a Disallowance of a Proof of Claim in Bankruptcy. The underlying bankruptcy matter was whether there can be a matrimonial property-based claim by the spouse of the bankrupt.

Master Farrington noted that Rule 4.34 acts to stay matrimonial property proceedings in the event of bankruptcy but that this stay could be lifted if necessary. In the current proceedings, Master Farrington noted that no matrimonial property action was filed, and there was nothing to stay. To be careful, Master Farrington lifted the stay "if necessary" while noting that he did not think it was necessary in the present case.

The spouse was entitled to pursue a claim under the *Matrimonial Property Act,* RSA 2000, c M-8, provided that the Claim was filed within two months of issuance of Master Farrington's reasons. The trustee in bankruptcy could then decide whether to intervene.

QUESTOR TECHNOLOGY INC V STAGG, 2022 ABQB 578

(NIXON J)

Rules 5.1 (Purpose of this Part), 5.6 (Form and Contents of Affidavit of Records), and 6.26 (Inspection or Examination of Property)

The Plaintiff in the underlying Action applied for the production of records and the Defendants made a Cross-Application concerning the production of records. The parties in the dispute were direct competitors and the subject matter of the dispute deal with intellectual property. The Defendants through their Cross-Application sought to protect some of their confidential information.

Nixon J noted that the purpose of the Part 5 of the *Rules* was to encourage the early disclosure of records, discourage conduct that unnecessarily delays proceedings or increases their costs, and to facilitate the resolution of issues in dispute. His Lordship stated that the Court had broad authority inherent in Rule 5.1 to enforce these obligations. In accordance with the principles in Rule 5.1, and as set out in Rule 5.6, the parties to civil litigation bear an onus to provide all relevant and material records in their possession. Pursuant to Rule 5.10, the

parties bear an ongoing obligation to disclose relevant and material records. Records and property are distinct matters. Pursuant to Rule 6.26, an application is needed if a litigant wants to inspect property and the Courts are liberal in giving orders for the inspection of property.

Ultimately Nixon J determined that there were relevant and material records that had not been disclosed and that must be produced. His Lordship ordered that the Defendants produce a further and better Affidavit of Records and that some of the production be made on a "counsel's eyes-only basis" to protect highly secret and confidential design records and financial data that could create a significant business risk.

THE CANADA TRUST CO (MCDIARMAID ESTATE) V ALBERTA (INFRASTRUCTURE), 2022 ABCA 247

(WAKELING, KHULLAR AND KIRKER JJA)

Rules 5.1 (Purpose of This Part), 5.2 (When Something is Relevant and Material), and 9.13 (Re-opening Case)

The Appellants appealed an Order by a Case Management Judge refusing to admit various settlement agreements and supporting correspondence (the "Settlement Documents") as evidence. The Settlement Documents consisted of documents relating to two separate parcels of land: the Triple S Lands and the Leeds Lands.

The Case Management Judge originally ruled that the Settlement Documents were not relevant and material (the "Decision"). The Appellants later asked the Case Management Judge to re-open and vary the Decision pursuant to Rule 9.13 on the basis that new evidence not available at the original hearing justified a change or modification to the Decision. The Case Management Judge found that most of the new evidence could not have been obtained by the Appellants earlier and that it was credible and admissible under the ordinary rules of evidence, allowing her to revisit her ruling pursuant to Rule 9.13. However, the new evidence, considered globally with the existing evidence, did not reveal a manifest error nor make the Settlement Documents relevant and material.

On Appeal, the Court considered Rule 5.1 and Rule 5.2. Rule 5.1 concerns the purpose of the disclosure of information part of the Rules and Rule 5.2 discusses when a question, record, or information is relevant and material.

The majority of the Court of Appeal found that the Case Management Judge decided that the Settlement Documents were not relevant and material because they did not assist in resolving an issue in the pleadings per Rule 5.2(1)(a). However, the Case Management Judge did not address whether information in the Settlement Documents could reasonably be expected to ascertain evidence that could significantly help resolve an issue in dispute as per Rule 5.2(1)(b).

On that basis, the majority allowed the Appeal with respect to the Settlement Documents for the Triple 5 Lands and upheld the Case Management Judge's Decision for the Leeds Lands.

In a dissenting opinion, Khullar JA agreed with the Court's decision regarding the Settlement Documents for the Leeds Lands. However, Khullar JA would also uphold the Case Management Judge's Decision regarding the Settlement Documents for the Triple 5 Lands.

SPADY V SPADY ESTATE, 2022 ABQB 591

(MARION J)

Rules 5.2 (When Something is Relevant and Material), and 6.14 (Appeal from Applications Judge's Judgment or Order)

The Plaintiff appealed the decision of an Applications Judge to summarily dismiss the Action relying on significant additional evidence that was not before the Applications Judge.

Justice Marion noted that Rule 6.14(3) provides that an Appeal from a Applications Judge's Judgment or Order is based on the record of proceedings before the Applications Judge, but may also be based on additional evidence that, in the opinion of the Court, is relevant and material. The test for additional evidence under Rule 6.14(3) has been described as having a low threshold.

Rule 5.2, for the purposes of Part 5 of the Rules, states that something is relevant and material if it could be reasonably expected to significantly help or determine one or more of the issues in the pleadings or ascertain evidence that could be expected to do so. His Lordship noted that a reasonable interpretation of relevant and material in Rule 6.14 could be whether the new evidence might be expected to significantly help determine one or more of the issues raised on the Appeal. Accordingly, His Lordship considered the new evidence together with the record that was before the Applications Judge and allowed the Appeal.

METROWEST DEVELOPMENTS LTD V FLYNN CANADA LTD, 2022 ABKB 616

(HORNER J)

Rules 5.18 (Questioning - Persons Providing Services to Corporation or Partnership), and 13.5 (Variation of Time Periods)

In this decision, the Court granted the Defendant an extension to file its Statement of Defence and two Actions relating to the same dispute were consolidated by consent. The Consent Order provided that the Defendant was not required to file a Statement of Defence but imposed a deadline if the Defendant elected to do so (the "Deadline"). The Defendant did not file a Statement of Defence before the Deadline. At the start of Trial, the Defendant applied to extend the Deadline. The Court granted the extension pursuant to Rule 13.5, which allows the Court to extent or shorten time periods for filing a Statement of Defence.

One issue that arose during Trial was whether one of the Plaintiff's experts should be allowed to testify. The Defendant objected to the Plaintiff's expert because the Defendant had not had an opportunity to question the expert pursuant to Rule 5.18. The Court determined that the only suitable remedy was to bar the expert from testifying. The Court noted that the Plaintiff had other experts testifying and that the denial did not jeopardize the Plaintiff's ability to meet its burden of proof.

The Court dismissed the Plaintiff's claim against the Defendant and granted the Defendant's

counterclaim against the Plaintiff. The Court awarded costs to the Defendant pursuant to Column 4 of Schedule C of the Rules.

GISELBRECHT V KICHTON CONTRACTING LTD, 2022 ABQB 473

(DUNLOP J)

Rules 5.33 (Confidentiality and Use of information), and 6.11 (Evidence at Application Hearings)

The Court was responsible for the case management of six separate Actions.

Two of the Actions were commenced by Originating Applications ("Originating Application Actions"). The Respondents in the Originating Application Actions sought an Order permitting them to "use" or "utilize" Affidavits of Records and Transcripts of Questioning for Discovery from the other Actions. The Court noted that the Respondents' argument relied on lifting the implied undertaking of confidentiality in accordance with Rule 5.33 (1)(a) or (b) and the use of evidence from other Actions on application pursuant to Rule 6.11(f).

The Court noted that the Respondents had provided two notices in accordance with Rule 6.11(f) to the Applicants (with respect to each of the Originating Application Actions), seeking the Court's permission to consider certain evidence from the other Actions and the ability to "utilize" that evidence.

The Court rejected the Respondents' assertion that the Applicants' earlier provision of a similar Rule 6.11 notice ("Applicants' Notice") was relevant to the lifting of confidentiality in accordance with Rule 5.33, noting:

> the Applicants' Notice did not constitute an agreement;
>
> there was no evidence the Respondents had agreed to what the Applicant had given notice of in their Rule 6.11 notice;
>
> there were different parties to the Actions; and
>
> notice pursuant to Rule 6.11 does not automatically result in evidence being admitted.

The Court further determined that although the issues and parties in the Originating Application Actions were similar, they were not the same. The Court found that even in the event the Actions involved the same issues and parties, it would not make the evidence from the other Actions relevant and material to the issues in the Originating Application Actions.

The Court dismissed the Respondents' Application to "use", "utilize", or have the Court consider in the Originating Application Actions, evidence from Affidavits of Records and Transcripts of Questioning for Discovery from the other Actions.

AGRIUM V ORBIS ENGINEERING FIELD SERVICES, 2022 ABCA 266

(WAKELING, CRIGHTON, AND HO JJA)

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

The issue on appeal was whether a decision of a Master in Chambers to stay proceedings under the Arbitration Act ("AA") is barred from an appeal to a Justice of the Court of Queen's Bench by s. 7(6). Stay decisions under the AA are not appealable to the Court of Appeal by virtue of s. 7(6) of the AA.

In dismissing the appeal, the Court of Appeal held that s. 7(6) does not bar the appeal of a Master's decision to stay proceedings under the AA to a Justice.

Section 12 of the *Court of Queen's Bench Act* ("CQBA") expressly stipulates that an appeal of a Master's decision lies to a Justice. Rule 6.14 also captures this legislative right of appeal. Further, the majority of the Court of Appeal held that there was no inconsistency between s. 7 of the AA, s. 12 of the CQBA, and the *Interpretation Act.*

The majority of the Court of Appeal relied on Professor Sullivan's work in *Sullivan on the Construction of Statutes* to explain that there is a presumption of coherence and consistency that applies to Acts and bodies of law. Strategies such as "the specific overrides the general" or "reading legislation down in certain situations and liberally in others" must be avoided unless a clear conflict arises. Here, there was no conflict between the two levels of statutory decision making within the Court of Queen's Bench and the lack of appeal of a stay decision under the AA.

However, Wakeling JA dissented on the basis that a decision of a Master in Chambers is nonetheless a decision of the Court of Queen's Bench. Section 7(6) of the AA expressly prohibits appeals of stay decisions granted by the court, including the Court of Queen's Bench.

2007513 ALBERTA LTD V PET PLANET FRANCHISE CORP, 2022 ABCA 310

(SCHUTZ, STREKAF AND PENTELECHUK JJA)

Rule 6.22 (Obtaining Evidence Outside Alberta)

The Appellants appealed the Order of the Case Management Justice which had dismissed their Application to examine a proposed witness outside of Alberta (the "Proposed Witness") for the purpose of a pending Application to certify a Class Action against the Respondents. The Court noted that Rule 6.22 governed the Application. The Proposed Witness refused the Appellants' request to provide an Affidavit and advised that he would only provide information if compelled to do so by a Court Order.

The Appellants purported to provide evidence of the supporting requirements for certifying a Class Action via Affidavits proffered of the Appellant's counsel, where one Affidavit specified that the Proposed Witness had relevant information to give on key issues with respect to the Certification Application.

The Court noted that there was little case law with respect to Rule 6.22 or its predecessor Rule 270. The Court determined that the

applicable test places a heavy onus on the Applicant seeking the Order where the evidence sought must be material and not merely corroborative; the particulars of the evidence to be given must both be provided and it must be shown what the evidence will be. However, the test does not require the Applicant to show that all other avenues have been exhausted and hearsay evidence may be used in support of the Application. The Court additionally noted that even if the Applicant meets the test, the Court may decline to grant the Order where the particular circumstances inform the exercise of the Court's discretion.

The Court concluded that although the Case Management Justice's reasons were "brief and somewhat conclusory", the Case Management Justice was aware of the correct test governing an Order under Rule 6.22. The Court determined that the Case Management Justice's conclusion that the Appellant's evidence was insufficient to discharge the "heavy onus" was a reasonable conclusion supported by the Court's review of the record and sufficient to dispose of the Appeal, as such it was unnecessary to consider whether the proffered Affidavit evidence was appropriately given no weight.

The also noted that the practise of proffering evidence through a lawyer's Affidavit is discouraged and evidence should be provided by the parties themselves.

The Court rejected the proposition that logical inferences are sufficient to meet the standards of a Rule 6.22 Application, explicitly noting that deposing that evidence will "likely be relevant and material" or "is necessary in the interests of justice" amounts to "inadequate bald assertions". The Court additionally found that the Appellants had failed to articulate how any evidence the Proposed Witness possessed related to one or more of the statutory requirements for certification. The Court noted that the certification record had already been filed by the Appellants at the time of the Application, and while not complete, the Case Management Justice was in "a far superior position" to that of the Appellate Panel in assessing whether the proposed evidence was material not merely corroborative.

The Court dismissed the Appeal.

PARKS V MCAVOY, 2022 ABQB 489

(HOLLINS J)

Rule 7.3 (Summary Judgment)

This Action involved claims against a general contractor and its principal in respect of their allegedly improper construction of a residential building.

The Defendants issued Third-Party Claims against various subcontractors. Prior to the Third-Party Claims being filed, however, one of the Third-Party Defendants signed a settlement agreement and accompanying release with the Plaintiff. When the Third-Party Claim against it was filed, that third party sought summary dismissal based on the release.

Applying Rule 7.3, the Court noted that the test for summary dismissal requires assessment as to whether it is possible to make a fair summary determination based on the available record and the nature of the disputes between the parties and, if so, whether summary determination will be a more expeditious route to resolution than trial.

Applying this test and case law on the subject of claims for contribution, the Court held that the release was not sufficient to dismiss the Third-Party Claim against the third party that had settled because the scope of the release was narrower that of the Third-Party Claim. Accordingly, there remained triable issues which were not excluded by the release and the Third-Party Claim could not be summarily dismissed.

SUN V TESLA, 2022 ABQB 464

(ROOKE ACJ)

Rules 9.4 (Signing Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), and 10.33 (Court Considerations in making a Costs Award)

An an earlier decision, the Court imposed court access restrictions on the Plaintiffs. The Plaintiffs brought an Application to satisfy the leave requirements as set out by the Court in the earlier decision.

After canvassing the jurisprudence regarding the test for leave to file further records, Rooke ACJ concluded that the Plaintiffs failed to establish a factual, or alleged factual, basis for continuing the underlying litigation. Rooke ACJ held that the Defendant is entitled to costs pursuant to Rule 10.29(1). Further, after considering factors under Rule 10.33, Associate Chief Justice Rooke ordered a costs award against the Plaintiffs. Rooke ACJ further noted that there was no Appeal mechanism available to the Plaintiffs under Rule 10.45(4) and dispensed with the Plaintiffs' approval of the Order pursuant to Rule 9.4(2)(c).

CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN, 2022 ABQB 498

(ROOKE ACJ)

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

The Plaintiff brought this debt collection action against the Applicant/Defendant. The Defendant is subject to a court access restriction and is required to obtain leave from the Court prior to filing documents or commencing litigation.

The Defendant attempted to file in an improper Application without first receiving leave from the Court. In order to penalize this litigation misconduct, Rooke ACJ found it appropriate to penalize the Defendant pursuant to Rule 10.49, which allows a Court to penalize a party for failing to comply with a direction from the Court.

Rooke ACJ further dispensed with the Defendant's approval of the arising Order giving effect to the Decision pursuant to Rule 9.4(2) and reminded the Defendant that there is no Appeal to the Court of Appeal pursuant to Rule 14.5.

VAILLANCOURT V CARTER, 2022 ABQB 603

(ARMSTRONG J)

Rules 9.4 (Signing Judgments and Orders), and 9.13 (Re-opening Case)

The Applicant sought Judgment pursuant to s. 84(1) of the *Civil Enforcement Act*, RSA 2000, c C-15, against garnishees who, initially, did not respond to a Garnishee Summons, and later, responded but did not pay funds into Court. After the Hearing of that Application, a Respondent Garnishee sought leave to provide an additional Affidavit. This Decision considered both the Applicant's Application for Judgment and the Respondent's Application to admit additional evidence.

Justice Armstrong noted that Rule 9.13 permits the Court to hear more evidence and change or modify its Judgment, Order, or Reasons anytime before a Judgment or Order is entered. His Lordship observed that, in this case, the Application to adduce additional evidence was brought after the hearing of the matter, but before any Decision had been rendered. As such, the test for re-opening a case or for adducing fresh evidence on Appeal did not apply here.

Rather, per Armstrong J., the test under Rule 9.13 is simply whether the Court is satisfied that there is good reason to allow additional evidence. In this case, the Court held that there was good reason because: (1) the timelines leading up to the hearing were unusually tight; (2) the late submission caused no unfairness to the Applicant, who was aware of the information contained therein for several months prior; and (3) the additional evidence was helpful to the Court.

With respect to the Application under the *Civil Enforcement Act*, the Court awarded Judgment and Solicitor-Client Costs in favour of the Applicant, due to the Respondents' blatant disregard for the authority of the *Civil Enforcement Act* and the Court.

Justice Armstrong also invoked Rule 9.4(2)(c), which allowed the Applicant to submit the Order directly to the Court without seeking approval from counsel for the Respondents.

CANJURA V NEUFELD, 2022 ABKB 628

(ROOKE ACJ)

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

The Court noted that the Plaintiff was a problematic litigant with numerous proceedings in the Court of King's Bench and Federal Court. The Plaintiff further had a history of improper email communications with the Court of King's Bench. As a result, Associate Chief Justice Rooke ordered that the Plaintiff be prohibited from communicating with the Court of King's Bench by email. Should the Plaintiff fail to comply with the Order, Rooke A.C.J. cautioned that the Plaintiff could be subject to Costs penalties pursuant to Rule 10.49(1).

The requirement for the Plaintiff's approval of the Oder giving effect to the Decision was waived pursuant to Rule 9.4(2)(c).

CONDOMINIUM CORPORATION NO 0313153 V IOURKOVA, 2022 ABKB 630

(ROOKE ACJ)

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

This Decision relates to improper conduct by a Defendant in several foreclosure and debt collection proceedings and another proceeding initiated by her to thwart one of the foreclosure proceedings.

Rooke A.C.J. surveyed the litigant's improper conduct, which included improperly adding third parties to her documentation without authorization and deluging the Alberta Court of King's Bench with email communications containing complaints of alleged misconduct by opposing parties, lawyers, and Court staff.

Noting the Court's inherent jurisdiction to control its processes, as well as responsibilities pursuant to the *Occupational Health and Safety Act*, RSA 2000, c O-2.1 to take reasonable and practical steps to prevent workplace harassment and bullying, Rooke A.C.J. ordered that the litigant be prohibited from communicating with the Court by email, except where represented by a member in good standing of the Law Society of Alberta, or another authorized person. The litigant remained entitled to Court access through personal attendance, using a lawyer or by documents delivered consistent with any Court practice, but was warned of penalties pursuant to Rule 10.49(1) or Orders striking proceedings initiated by her in the event that the harassing emails continued.

The requirement for the Plaintiff's approval of the Oder giving effect to the Decision was waived pursuant to Rule 9.4(2)(c).

067876 BC LTD V BENNETT JONES LLP, 2022 ABQB 599

(JEFFREY J)

Rules 9.12 (Correcting Mistakes or Errors), 9.13 (Re-Opening Case), 9.14 (Further or other Order after Judgment or Order Entered), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 9.16 (By Whom Applications Are to be Decided), 10.52 (Declaration of Civil Contempt), and 10.53 (Punishment for Civil Contempt)

The Applicant applied to find the Respondents in civil contempt of a Court Order to retrieve and destroy solicitor-client privileged information improperly disclosed to third parties. Some of the Applicants also applied have the Respondent's Statement of Claim struck.

The Court reviewed civil contempt cases and noted that, for each allegation of civil contempt, the Applicants must demonstrate beyond a reasonable doubt that:

The Order stated clearly and unequivocally what the Respondent must do or must not do;

The Respondent had actual knowledge of that requirement; and

The Respondent intentionally failed to satisfy that requirement.

The Court noted that a Court Order requires

a person to make all reasonable efforts to comply. This requirement is consistent with the wording of Rule 10.52(3), which allows a person to avoid a finding of civil contempt by demonstrating a reasonable excuse for non-compliance.

The Court found the Respondents in civil contempt. Among other things, the Respondents argued that the Court of Appeal placed privileged information on the public record and that constituted a reasonable excuse for failing to comply with the Court Order. The Court of Appeal addressed this issue and determined that privilege had not been lost. Justice Jeffrey noted that Rules 9.12-9.16 mean that a Court Order believed to be made in error continues to stand and be binding until it is set aside on appeal, lawfully quashed, or set aside by its author.

After finding the Respondents in civil contempt, Justice Jeffrey noted the broad discretion the Court has to impose a penalty for civil contempt under Rule 10.53. The Court invited the parties to arrange a second hearing to make submissions on the appropriate penalty.

SSG V SKG, 2022 ABQB 518

(DEVLIN J)

Rule 9.13 (Re-Opening Case)

The Court considered an Application to modify an earlier Judgment and corresponding Order pursuant to Rule 9.13. The underlying Judgment related to a parenting arrangement. Justice Devlin reviewed the facts of the dispute and the jurisprudence related to the application of Rule 9.13 in the family law context. His Lordship concluded that the fresh evidence adduced satisfied the legal criteria for the admission of the Application and, therefore, opted to exercise the Judicial discretion granted under Rule 9.13 to alter the earlier Judgment.

INGRAM V ALBERTA (CHIEF MEDICAL OFFICER OF HEALTH), 2022 ABQB 595

(ROMAINE J)

Rule 9.13 (Re-Opening Case)

The Applicants applied to reopen a Hearing from a previous Action (the "Prior Action"), recall the Prior Action's central witness for further cross-examination, and to have the entirety of the documents listed in the Certified Record of Proceedings in the Prior Action (the "Documents") admitted as evidence in a subsequent case.

The Applicants relied on Rule 9.13. Rule 9.13 provides that, at any time before a Judgment or Order is entered or on Application, the Court may vary it, and if the Court is satisfied that there is good reason to do so, the Court may hear more evidence and change or modify its Order or Judgment or its reasons.

The Court noted that the onus of satisfying Rule 9.13 is on the Applicants, and that they must establish that there are exceptional circumstances to justify the reopening of the Hearing. The Court added that the Court's discretion to do so must be exercised sparingly and with the utmost care. The Court provided the test for whether to admit further evidence or to vary a pronounced judgment or order: (1) could the evidence have been obtained earlier if due diligence had been observed?; (2) is the evidence credible?; (3) would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced?; and (4) is the evidence in its present form admissible under the ordinary rules of evidence? (*CZ v RB*, 2019 ABCA 445).

The Court added that, in deciding whether there is good reason to hear more evidence and change its Order, the threshold for a Court to exercise its discretion should be high to avoid Applications that are in fact a 'second kick at the can'. A Court should also ensure that the proposed errors to be corrected are objectively demonstrable (ex. an incorrect statement of law), and that Rule 9.13 not be a vehicle for seeking consideration of a judgment call (*Aubin v Petrone*, 2020 ABQB 708). The Court emphasized that the need for finality and certainty in legal proceedings is a factor to be considered by a Court in exercising its discretion under Rule 9.13.

In dismissing the Application, the Court found that, amongst other things: (1) the Applicants failed to observe reasonable due diligence with respect to the Documents that were publicly available, and that the onus was not on the Respondents to disclose the Documents; (2) the Documents, properly characterized, were not relevant; (3) the Applicants' Application was an attempt at a 'second kick at the can'; (4) new evidence proffered by the Applicants in support of the Application to reopen the hearing and to recall the central witness for further cross-examination would not impeach the credibility of that witness, and would not be determinative in changing the outcome of the Prior Action; and (5) the submissions of the Applicants were based on a mischaracterization of the Documents and the central witness' evidence from the Prior Action.

GUNDA V ALLIED SHORTRIDGE CIVIL ENFORCEMENT AGENCY, 2022 ABKB 638

(DEVLIN J)

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

The Court of King's Bench had previously dismissed an Appeal from the Provincial Court (the "Appeal Decision"). The Applicant law firm and lawyer represented the Respondent Appellant in the Appeal Decision.

In the Appeal Decision, the Court reviewed the Applicants' conduct and determined that the Applicants took a series of steps which appeared to have been opposite to the Respondent's financial interests and benefited another of the Applicants' clients. The Applicant law firm and another Applicant applied to vary the Appeal Decision under Rule 9.15 to remove the findings, conclusions, and assessments made regarding the Applicants.

The Court dismissed the Application as the Applicants lacked standing. Rule 9.15(1)(b) allows an "affected person" who did not

appear at a Trial or hearing to apply to vary or discharge a Judgment or Order. The Court determined that "affected person" means someone who is legally affected by a Judgment or Order and does not extend to individuals who may have a personal or moral stake in a legal proceeding. The Court also noted that any legal or disciplinary proceedings against the Applicants would provide the Applicants a full opportunity to respond.

RANA V RANA, 2022 ABCA 306

(VELDHUIS JA)

Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal an Order varying the earlier Order in which he was declared a vexatious litigant, following an Application brought by the Respondent. Earlier in the litigation, the Applicant was declared a vexatious litigant, and therefore the Applicant required the Court's permission to Appeal pursuant to Rule 14.5(1)(j).

Veldhuis J.A. identified the test for permission to Appeal as outlined in the jurisprudence and provided relevant factual background of the litigation.

While canvassing the litigation background, Veldhuis J.A. noted that the Respondent had failed to comply with section 23.1 of the *Judicature Act*, RSA 2000, c J-2, which would have required the Respondent to provide notice to the Minister of the vexatious litigant Application. Counsel for the Minister, in response to the Respondent's ultimately giving notice of the Application, advised that it would not be taking any position on the matter. Following this, the Respondent had successfully applied to vary the vexatious litigant Order pursuant to Rule 9.15.

Veldhuis J.A. ultimately found that this procedural deficiency had no significant impact on the litigation, or the finding that the Applicant was a vexatious litigant.

Ultimately, Veldhuis J.A. dismissed the Application for permission to Appeal as the Applicant had failed to show that there was important question of law or precedent, there was a reasonable chance of success on Appeal, and the delay would not unduly hinder the progress of the Action or cause undue prejudice.

FAZEL V SINGER (WILSON LAYCRAFT), 2022 ABCA 259

(WATSON JA)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 14.5 (Appeals Only with Permission), 14.36 (Case Management Officers), and 14.39 (Case Management Officers)

The Applicant applied for permission to appeal the decision of Poelman J. The Poelman decision dismissed the Applicant's application for extension of the time to appeal and to allow the appeal, from the decision of Review Officer related to the Respondent's "Lawyer Charges."

The Appellate Court noted that it needed to determine whether or not permission to appeal was required. His Lordship noted that Rule 14.5(1)(g) provides that permission is required for an Appeal where the controversy in the Appeal could be quantified and did not exceed $25,000 exclusive of costs; in this case, it did.

Initially, the Application for permission to Appeal went before a Case Management Officer (the "CMO"). The CMO provided written reasons stating the Applicant was required to seek permission to Appeal under Rule 14.5(1)(e) on the basis that the proposed Appeal was as to a "decision as to costs only" under that subrule.

Watson J noted that the CMO had made an administrative direction which appeared to be grounded in Rule 14.39. The direction was to set the matter down before a single Appeal Judge, as it had been. Accordingly, this was not an Application under Rule 14.36(3) to rescind, confirm, amend or enforce the CMO's decision. Regardless, the opinion of the CMO as to whether the proposed Appeal was governed by Rule 14.5 was an opinion on a question of law and was therefore reviewable for correctness.

Watson J noted that "costs" are distinguished from "charges" in the Rules of Court. Further, the factors under Rule 10.2 could be distinguished from the factors related to assessing costs in legal proceedings. Additionally, "lawyer's charges" and "costs awards" are defined separately in the Appendix to the Rules. Ultimately, His Lordship concluded that the Applicant has an appeal as of right to the Alberta Court of Appeal from the decision of Poelman J.

PRODANIUK V CALGARY (CITY), 2022 ABQB 568

(EAMON J)

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

This Costs Endorsement concerned the costs involving a claim commenced by the Respondent who alleged harassment as against the Applicants which included the Calgary Police Service and the Calgary Police Association, among others.

In determining costs, the Court noted that:

> Pursuant to Rule 10.29, a successful party to an Application, a proceeding or an action is entitled to a Costs Award against the unsuccessful party, subject to a variety of considerations including the Court's general

discretion under Rule 10.31;

A Costs Award is the "*prima facie* entitlement of the successful party, but it is not an entitlement they always obtain";

Rule 10.31 reflects the basic rule that the quantum of a Costs Award must be reasonable and proper; and

The discretion to depart from the normal rule may be exercised when the case is one of public interest.

Specifically, the Court noted that *Pauli v ACE INA Insurance Co*, 2004 ABCA 253 is the leading authority when departing from the usual rule in cases of public interest and that it sets out the following non- exhaustive considerations from the jurisprudence when determining whether a case is one of public interest:

The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;

The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;

The issues have not been previously determined by a Court in a proceeding against the same Defendant;

The Defendant has a clearly superior capacity to bear the costs of the proceeding; and

The Plaintiff has not engaged in vexatious, frivolous, or abusive conduct.

Applying the relevant factors and principles noted in the Rules and jurisprudence, the Court noted:

The Respondent's claim relating to the grievance system was a genuine public interest concern;

Although the Respondent's claim regarding jurisdiction failed, it was important because when finally resolved it would provide certainty to other officers, the police force, and the Calgary Police Association;

A constitutional claim in light of a jurisdictional issue would be a significant financial burden to a person of average means such that Costs would be an "absolutely unacceptable burden" to place on the Respondent if in fact they were discriminated against and marginalized in the manner alleged;

It was undisputed that the Respondent had been on stress leave for several years and was receiving worker's compensation benefits, providing the assurance that the claims were serious issues;

The Applicants could bear the Costs; and

The record did not indicate that the Respondent was seeking a free ride for a private or frivolous claim.

The Court concluded that the Respondent was not to be awarded costs and was not liable for costs arising from reasonable steps taken to resolve the jurisdictional issue, including tariff items for commencing the action, cross-examinations, and full day attendance on the jurisdictional applications (including written brief). The Respondent would however not be absolved from costs if any unreasonable actions were taken in the preparatory steps leading up to the jurisdictional applications. Conversely, the Court additionally noted that if Applicants committed such conduct the Respondent would be compensated for costs directly arising from it.

PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2022 ABQB 592

(NIXON J)

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

This is a Costs Decision pertaining to several Applications brought in an Action. The Court first addressed whether costs should be awarded in the cause. The Court noted that Rules 10.29 and 10.31 apply where a party is "substantially successful in a proceeding", highlighting that the party who has won in the litigation is "not only the litigant who has been totally successful on each aspect of the claim, but the litigant who has been substantially successful - the one who has enjoyed the greater success" (*AE v TE*, 2017 ABQB 674). The Court also noted that, while costs are typically awarded in a 'pay as you go' manner, Rule 10.31 allows the Court to depart from this standard and order 'costs in the cause' instead. The Court further noted that Rule 10.31(4) allows for a party liable to pay a costs award to set if off against an amount that party is entitled to receive.

The Court reviewed Rule 10.33, determining that only 10.33(f) was relevant in this case as one of the parties was late in filing costs submissions. Rule 10.33(f) allows a Court to vary a costs award when a party does not comply with the Rules or an Order.

Finally, the Court summarized the circumstances under which a multiplier may be added to a costs award, noting that a multiplier may be warranted where the trial is long and complex, and the quantum of damages claimed is significantly greater than $1.5 million. The Court declined to apply a multiplier in this case nothing that this was "simply a summary application, and the matter needs to go to trial." The Court added that, in its view, a summary application that 'front loads' heavy legal costs on a party at the outset of litigation poses a risk to litigants who do not have deep pockets, adding that, as a matter of policy it would be inappropriate to award a significant multiplier in such circumstances.

WHYTE AVENUE LANDSCAPE SUPPLIES LTD V 406362 ALBERTA LTD, 2022 ABQB 601

(LEMA J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May Be Made) And 10.33 (Court Considerations in Making Costs Award)

This was a costs decision following the Court's dismissal of a tenant's request for an Injunction for the return of goods distrained by the landlord.

The Court concluded that costs should be awarded in the amount proposed by counsel for the unsuccessful tenant. In doing so, the Court listed several points which had influ-

enced its decision: (1) that it remained too early to gauge the likelihood of the tenant's ultimate success based on as-yet undetermined facts; (2) that there was an absence of litigation misconduct; (3) that the urgency with which the Injunction Application was brought was reasonable; (4) that Column 1 costs are typically, or at least often, awarded in the Injunction context; (5) that Schedule C Costs are still often regarded as a benchmark for costs awards; (6) that the absence of a written lease precludes analogy to scenarios involving written leases in which solicitor-client costs are often provided; and (7) that the tenant's request for consideration of additional issues generated minimal additional work for the landlord.

In an Appendix to the Decision, the Court summarized several cases in which the above principles were confirmed, including those expressly considering Rules 10.29, 10.30 and 10.33. The Court specifically noted its reliance on the decision of Mah J. in *Orbis Engineering Field Services v Taifa Engineering Ltd*, 2019 ABQB 592 in which costs of an urgent injunction were ordered payable forthwith, absent enhancement to account for inflation or to achieve partial indemnity.

JBRO HOLDINGS INC V DYNASTY POWER INC, 2022 ABCA 258

(CRIGHTON, STREKAF AND FEEHAN JJA)

Rules 10.30 (When Costs Award May be Made), 10.31 (Court-Ordered Costs Award), and 14.88 (Costs of Appeals)

The parties asked the Court to address the costs arising from an Appeal and a decision granting a Stay pending Appeal and dismissing a Cross-Application to strike. The parties agreed that the Respondents were entitled to costs. The issue was the quantum of costs of the Appeal and stay Application.

The Court considered Rule 10.30 which lays out when costs may be awarded - for example, after an application has been decided or judgment awarded - and 10.31 which lays out the discretion the Court has to award a varying quantum of costs to the successful party. It further noted that 14.88 allows a successful party upon appeal to be entitled to a costs award.

The Court noted that costs awards are discretionary, informed by judicial principles of reasonableness, fairness, balance, and equity. The purpose of costs is to provide a degree of relief from litigation expenses to a successful party. They are considered holistically and depend in part upon the degree of success in the Court below, degree of success on Appeal, success or lack of success on interlocutory Applications, the relative sophistication of the parties, remedies granted in the Court below and remedies granted on Appeal.

The Appellant was successful on the preliminary Application for a Stay and a Cross-Application to strike. On Appeal, both parties' Applications to admit new evidence were dismissed. The Respondents were substantially successful on Appeal, but the Appellant prevailed in having the remedy returned to the Special Chambers Judge. Both parties were relatively sophisticated and were arguably similarly situated.

The Court, taking into account these factors, held that the costs on all matters should be set at $89,000.00, all inclusive, payable to the Respondents.

GHEBREMESKEL V TESFU, 2022 ABQB 469

(SULLIVAN J)

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

This costs decision arose from a divorce action following a long and protracted litigation with hundreds of documents filed including pleadings, applications, affidavits, and Orders.

Prior to Trial, the Plaintiff alleged that the Defendant spouse was hiding funds and that he had transferred property into the hands of non-arm's length parties. The Plaintiff was unsuccessful in establishing the allegations at trial. Regardless, the Plaintiff argued that the parties had mixed success and neither party should be awarded their costs.

The Defendant argued for solicitor-client costs and, while recognizing that it was difficult litigation, the Court held that it could not be found that there was positive misconduct by the Plaintiff that was reprehensible, scandalous, or outrageous to award such costs.

In the alternative, the Defendant sought costs under column 4 or column 5 of Schedule C. Notably, the Plaintiff sought child and spousal support and an equal distribution of the parties' matrimonial property which would put her in the range of column 4 but the Court, applying the principles under Rule 10.33 and 10.31, determined it could not support a costs award in this range and awarded a lesser amount.

In making its finding, the Court noted that the Plaintiff erred in pursuing her claims as aggressively as she did since the certainty she sought through her ceaseless requests for disclosure was unattainable given the way the parties dealt with their assets and co-mingled funds. Further, while successful, the Defendant spouse's record-keeping made the litigation much more difficult. Additionally, non-spouse Defendants were added to the litigation given the Defendant spouse's record keeping, fluid understanding of money, and intermingled transactions which made it difficult for the Plaintiff to understand what amounted to matrimonial property and what did not.

KAB V RMB, 2022 ABQB 542

(KENDELL J)

Rule 10.33 (Court Considerations in making a Costs Award)

This costs decision arises following a family law Trial in which the Father was granted primary care of the children as well as sole decision-making responsibility, despite unfounded allegations by the Mother that he had sexually and physically abused the children. The Court also suspended any and all parenting time or contact of the Mother until a Psychological Report was received by the Court detailing the Mother's successful completion of mental health interventions.

The Father sought solicitor-client costs of the Action. The Father argued that the Mother

must be accountable for her actions and intentionally misleading and lying to the Court, the police, Child and Family Services, and the Court-appointed Parenting Expert.

In accordance with Rule 10.33, the Court noted that costs are discretionary and found that the Father was successful on the primary issues in dispute, being parenting and the enforceability of a Post-Nuptial Agreement, while there was mixed success on a number of secondary issues. The Court noted that while the trial was lengthy and the litigation highly conflictual, the matters themselves were not all that complex. Neither party engaged in conduct that intended to shorten the action, however, the Mother's actions lengthened the Action. Ultimately, bearing in mind the Mother's litigation behavior was not motivated by malice, but rather came from a place of mental illness, the Court awarded Costs to the Father of $75,000.00, including disbursements.

LLOYD GARDENS INC V CHOHAN, 2022 ABQB 549

(MAH J)

Rule 10.33 (Court Considerations in Making Costs Award)

Following her decision to dismiss the Plaintiff's application for an extension of a Mareva Injunction and an Attachment Order against the Defendants and a Non-Party, Justice Mah ruled on costs.

Justice Mah applied the principles from *Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92, where the Court of Appeal held that (a) cost awards must be exercised in line with the factors from Rule 10.33; (b) generally, the successful party is awarded costs on a party-and-party basis which should represent partial indemnification for approximately 40 to 50% of actual costs; and (c) the Court must balance the competing interests behind party-and-party costs: the unfairness of a successful party having to bear any costs versus the chilling effect on the unsuccessful party for having to pay all of the costs.

Justice Mah found that the Defendant and Non-Party were each entitled to costs, payable under Column 3 on a 2x multiplier. Explaining why costs were awarded on a multiplier, Her Ladyship relied on *Athabasca Minerals Inc v Syncrude Canada Ltd*, 2018 ABQB 551 where Jones J explained that the individual lines in Column C sometimes do not reflect the amount of work required to address the issues on an application. The Application before Justice Mah was not only for a Mareva Injunction and Attachment Order, but involved the determination of a fraudulent conveyance. Further the matter was factually dense and had a complicated litigious background which involved a Trial and two trips to the Court of Appeal.

UBAH V UBAH, 2022 ABQB 512

(ROOKE ACJ)

Rule 10.49 (Penalty for Contravening Rules)

The Plaintiff is an active litigant and has a long history of abusive litigation misconduct. As a result, he is under court access restrictions in the Court of Queen's Bench and the Federal Court. The Plaintiff must seek court permission before initiating new proceedings or taking any litigation steps in the Court of Queen's Bench.

Further, the Plaintiff had a pattern of sending "persistent and harassing abusive communications" to Associate Chief Justice Rooke's office. Therefore, the Court restricted its communications with the Plaintiff to matters related to leave to file applications.

Not surprisingly, the Plaintiff continued to ignore leave to file requirements imposed on him by the Court. Instead of submitting a leave to file application to Rooke ACJ, as required by the court access restrictions, the Plaintiff filed materials without informing the Court officers of his restrictions.

Associate Chief Justice Rooke found the Plaintiff to be in *prima facie* contempt of Court for repeatedly breaching the court access procedure. Rule 10.49(1) gives the Court power to impose penalties on litigants who abuse the leave to file process. Accordingly, the Plaintiff was asked to provide written submissions as to why Rule 10.49(1) sanctions should not be imposed on him.

UBAH V UBAH, 2022 ABQB 534

(ROOKE ACJ)

Rules 10.49 (Penalty for Contravening Rules), and 14.5 (Appeals with Permission)

One of the Plaintiffs was very active, highly problematic litigant with an extensive record of abusive litigation and court- and tribunal-related misconduct which resulted in court access restrictions in the Alberta Court of Queen's Bench and the Federal Court. The court access restrictions required the Plaintiff to obtain leave of the Court prior to initiating any new proceedings or litigation steps.

Notwithstanding the access restrictions, the Plaintiff purported to file documents without leave of the Court seeking a restraining order against his wife and her father on an *ex-parte* basis. Those filings led to two court appearances before the litigation misconduct was discovered by Carruthers J, who subsequently struck out the Plaintiff's filing. The matter was then referred to Rooke ACJ.

Justice Rooke considered penalties imposed pursuant to Rule 10.49(1) where a litigant abuses the leave to file process. The Court considered the long history with the Plaintiff as well as evidence of consistent breaches. In light of the Plaintiff's dismal record of abusing the Court and its leave to file process, plain and obstinate response to the Court's attempts

to manage him and his litigation, and blatant attempts to cover up his improper conduct, the Court imposed a $4,000.00 penalty pursuant to Rule 10.49(1) to be paid forthwith.

The Court also noted that its Decision and that of Carruthers J striking the Plaintiff's filings were not appealable to the Court of Appeal pursuant to Rule 14.5(4).

MCCLELLAND V HARRISON, 2022 ABQB 554

(KISS J)

Rule 10.49 (Penalty for Contravening Rules)

The Court's decision was made without any appearance of the parties, in response to abusive communications made by the Respondent relating to divorce proceedings. The Respondent sent frequent emails to the Court (usually without any valid basis), had been repeatedly cautioned about the appropriate conduct of a litigant, and was aware that her behaviour was not acceptable. The Court, relying on its inherent jurisdiction to control its own processes, ordered that the Respondent was prohibited from any future communication with the Court of Queen's Bench by email, unless the Respondent received specific authorization by Court order, or became represented by counsel.

The Court used Rule 10.49(1) to impose a penalty on the Respondent in response to her abuse of the Court, its staff, judiciary, and facilities.

ROYAL BANK OF CANADA V ANDERSON, 2022 ABQB 577

(ROOKE ACJ)

Rule 10.49 (Penalty for Contravening Rules)

The Defendant was a highly active Organized Pseudolaw Commercial Argument litigant with a long history of illegal and abusive court conduct, which had led to numerous court access restrictions and being designated as a vexatious litigant.

In a prior decision, the Court imposed penalties pursuant to Rule 10.49(1) for misconduct and attempting to file improper documents. ACJ Rooke imposed further penalties under Rule 10.49(1), because the Defendant continued to engage in misconduct. The Court also ordered payment of $40,000.00 from a trust account held for the Defendant as part of her deceased father's estate, thereby reducing her inheritance by that penalty amount.

SEDGWICK V EDMONTON REAL ESTATE BOARD CO-OPERATIVE LISTING BUREAU LIMITED (REALTORS ASSOCIATION OF EDMONTON), 2022 ABCA 264

(WATSON, WAKELING, AND KIRKER JJA)

Rule 14.5 (Appeals only with Permission)

This Appeal concerned, among other issues, a decision of the Chambers Judge to dismiss the Appellant's Application for an Order which would have granted an oppression remedy under s.357(1) of the *Cooperatives Act* (the "Act") against the Respondent ("Refusal to Grant the Oppression Remedy").

The Respondent sought to resist the Appeal of the Refusal to Grant the Oppression Remedy, on the basis the Appellant required permission to appeal pursuant to s.360 of the Act and in accordance with Rule 14.5(1)(f). The Court considered both the wording of Rule 14.5 as well as s.360 of the Act and found that the Respondent's position was correct; an Appeal of the Chamber's Judge's decision relating to s.357(1) of the Act could not be acted upon by the Court without a grant of prior permission by the Court.

The Appellant proposed that the panel could grant permission to appeal *nunc pro tunc* ("now for then"), but the Court rejected this proposition on the basis it would reduce the permission requirement imposed by the Legislature to a dispensable irregularity as opposed to a gate keeping decision the Legislature had intended. The Court determined that permission to appeal was required by the Rules and that it had not been obtained in the circumstances which was sufficient in and of itself to dismiss the Appeal of the Refusal to Grant the Oppression Remedy.

RANA V RANA, 2022 ABCA 270

(WAKELING JA)

Rules 14.5 (Appeals only with Permission) and Rules 14.37 (Single Appeal Judges)

The Applicant had been previously declared a vexatious litigant under the *Judicature Act*, RSA 2000, c J-2 (the *Judicature Act*). The Case Management Judge in this Action granted an Order, on the Applicant's application, that allowed him to visit his mother under specific conditions (the Visitation Order). The Applicant sought permission to Appeal the Visitation Order.

Justice Wakeling held that the appropriate test governing Applications for permission to Appeal made by a vexatious litigant is set out in the case law applicable to Rule 14.5(1) together with the statutory test embedded in s. 23.1(7) of the *Judicature Act*. As such, a single Appeal Judge hearing an Application by a vexatious litigant for permission to Appeal must ask the following questions:

> Is the application for permission to Appeal an abuse of process?
>
> Does the Applicant have reasonable grounds for applying for permission to Appeal? Is the

likelihood a proposed Appeal will succeed roughly the same as the likelihood it will fail?

Does the proposed Appeal present an important question of law?

If permission to Appeal is granted, is there a reasonable chance of success on Appeal? is the likelihood a proposed Appeal will succeed roughly the same as the likelihood it will fail?

Will an Appeal unduly burden the progress of the action or cause the non-moving party undue prejudice?

Wakeling J.A. further held that an Applicant for permission to Appeal must clear each of the five hurdles and that the Applicant fell far short of meeting these tests.

In reaching his conclusion, Wakeling J.A. found that the Applicant did not identify an important question of law that underlined his dissatisfaction with the Visitation Order. The Applicant also failed to provide a valid reason for his dissatisfaction with the Visitation Order. Nor did the Applicant establish a reasonable chance of success if he were permitted to Appeal.

Based on the foregoing, Wakeling J.A. held that it would be a hopeless Appeal. An Appeal that is hopeless is an abuse of process. The Court of Appeal, having found no error of law or a factual determination that was clearly wrong, stated that it should not substitute its views for those of the Case Management Judge on the Visitation Order. The Application for permission to Appeal was therefore dismissed.

CHRISTOFI V JEFFREY V KAHANE PROFESSIONAL CORPORATION, 2022 ABCA 284

(DEVLIN JA)

Rule 14.5 (Appeals Only with Permission)

The Plaintiff is subject to a permanent court access restriction order after being declared a vexatious litigant. Pentelechuk J heard three applications. First, the Defendant applied to extend a previously granted Permanent Court Access Restriction Order issued in the Court of Queen's Bench against the Plaintiff to the Provincial Court and the Court of Appeal. Second, the Plaintiff sought permission to Appeal the Permanent Court Access Restriction Order. Third, the Plaintiff also sought permission to Appeal an earlier Order striking out his Statement of Claim. Ultimately, Pentelechuk J dismissed all three Applications.

With regards to the Defendant's Application, Pentelechuk J considered the *Judicature Act*, RSA 2000, c J-2, and stated that the absence of litigation in the Provincial Court did not support extending the Permanent Court Access Restriction Order. Further, Pentelechuk J noted that, pursuant to Rule 14.5, the Plaintiff is required to seek permission to Appeal any Decision to the Court of Appeal from the Court of Queen's Bench. As such, procedurally, there is little difference between the existing restrictions imposed by the Rules of Court and an extension of the Permanent Court Access Restriction Order.

In considering the Plaintiff's Applications, Pentelechuk J first stated that Rule 14.5 requires permission to Appeal when the Applicant has been declared vexatious. Pentelechuk J then identified the test for permission to Appeal as established in the jurisprudence and the *Judicature Act*. Ultimately, considering Rule 14.5 and the conduct of the Plaintiff, Pentelechuk J dismissed the Plaintiff's Applications to Appeal.

SALDIRAN V SALDIRAN, 2022 ABCA 318

(FEEHAN JA)

Rule 14.5 (Appeals Only with Permission)

The Appellant's Application for an extension of time to Appeal parts of a Case Management Order was dismissed by Feehan J.A. The Appellant re-applied before Feehan J.A. for permission to Appeal His Lordship's Decision to a panel of the Court of Appeal.

Rule 14.5(2) stipulates that a party who wishes to Appeal the Decision of a single Appeal Justice must secure that Justice's permission before appealing to a three Justice panel of the Court of Appeal.

Permission to Appeal is granted "only if there is a *compelling reason* to require the applicant and respondent to re-argue and three judges of the Court of Appeal to decide an issue". Justice Feehan held that unless the Appellant could establish at least one of the following criteria, it was not in the public's interest for a Court of Appeal panel to review His Lordship's decision. The criteria required the Appellant to establish: (a) that a question of general importance to the community or of sufficient importance to the parties justified the allocation of the public and private resources associated with an Appeal; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts.

The Appellant could not establish a compelling reason that justified another level of review and the Application for permission to Appeal was dismissed. Further, the Court noted that the Appeal of the Case Management Order lacked a reasonable chance of success because the Trial had already been decided, and the Trial Decision itself was under Appeal.

LAUSEN V DIRECTOR OF SAFEROADS ALBERTA, 2022 ABCA 273

(HO JA)

Rules 14.16 (Filing the Appeal Record - Standard Appeals), 14.47 (Application to Restore an Appeal), and 14.64 (Failure to Meet Deadlines)

The Appellant applied to restore his Appeal of a decision dismissing his Application for Judicial Review. The Appellant's Appeal was struck pursuant to Rules 14.16(3) and 14.64(a) because the Appeal Record was not filed on time.

Justice Ho reviewed Rule 14.47, which governs Applications to restore standard Appeals. Pursuant to Rule 14.47, such an Application must be filed and served as soon as reasonably possible, and returnable no later than six months after the Appeal was struck. In determining an Application to restore an Appeal, the Court will consider: (1) the arguable merit to the Appeal; (2) any explanation provided for the defect or delay which caused the Appeal to be struck; (3) whether there was reasonable promptness in moving to cure the defect and restore the Appeal; (4) whether there was an intention in time to proceed with the Appeal; and (5) whether there was prejudice to the Respondent, including due to the length of the delay.

Justice Ho observed that no single factor is determinative; the factors must be considered holistically in determining whether it is in the interests of justice to restore the Appeal.

In applying the factors to the matter at hand, Justice Ho held that there was arguable merit to the Appeal in light of the important legal issues raised. The Court also considered that the explanation for the delay had to do with errors caused by turnover at the Appellant's counsel's office, and was not attributable to the Appellant himself or any intention to take advantage of the stay which was in effect pending Appeal.

Justice Ho held that it was in the interests of justice to restore the Appeal, and therefore granted the Appellant's Application.

LAUSEN V ALBERTA (DIRECTOR OF SAFEROADS), 2022 ABCA 313

(HO JA)

Rules 14.37 (Single Appeal Judges) and 14.48 (Stay Pending Appeal)

The Applicant, the Director of SafeRoads, applied to set aside a Consent Order for a Stay pending an Appeal. The Stay was to remain in place pending "decision or abandonment" of the Appeal. The Respondent's Appeal was struck due to an administrative error by his legal counsel, but the Appeal was restored at the time of this Application.

The Court found that a single Justice of the Court of Appeal has jurisdiction to set aside a Stay incidental to an Appeal under Rule 14.37, or as an Application under Rule 14.48(b).

The delay in this case did not amount to a material change in circumstances that would justify lifting the Stay. The Court considered the balance in delaying enforcement of the Respondent's license suspension against the Respondent's right to challenge the SafeRoads regime and dismissed the Application by the Director of SafeRoads to set aside the Consent Order.

TOWN OF CANMORE V THREE SISTERS MOUNTAIN VILLAGE PROPERTIES LTD, 2022 ABCA 274

(HO JA)

Rule 14.57 (Adding, Removing or Substituting Parties to an Appeal) and 14.58 (Intervenor Status on Appeal)

This Application involves three parties who were seeking to get involved in an Application for permission to Appeal a Tribunal's Decision. One sought leave to be added as a party, and in the alternative, as an intervenor to the Application; two others sought leave to be added as interveners.

Ho JA noted that the Court could add a party to an Appeal pursuant to Rule 14.57 or pursuant

to the Court's inherent power. The relevant test was (1) whether it was just and convenient to add the Applicant, and (2) whether or not the Applicant's interest would only be adequately protected if it were granted party status.

A party could only be granted intervenor status pursuant to Rule 14.58. The factors to be considered were whether the intervenor (1) was directly affect; (2) was necessary to properly decide the matter; (3) had interests in the proceedings that would not be fully protected; (4) could contribute useful and different submission expertise; (5) would not unduly delay the proceedings; (6) would suffer any possible prejudice; (7) would widen the dispute between the parties; and (8) would transform the court into a political arena.

Ho JA found that one of the proposed intervenor's prior involvement in the deal between the Plaintiff and Defendant was of central important to the proceedings, and confirmed that that entity had a unique role and interest, and it did not seek to adduce any fresh evidence or broaden the dispute. One of the other proposed intervenors - a First Nation - indicated their lands encompassed the developments plans at issue and were still used for traditional and cultural practices. Ho J found that the Nation was uniquely positioned to address their interests which would not be advanced by the other parties. Ultimately Her Ladyship was satisfied that those two parties met the test to be added as intervenors; the third did not.

TERRIGNO V BUTZNER, 2022 ABCA 275

(HO JA)

Rule 14.83 (Orders Restricting Access to Appeal Proceedings)

The Applicant sought an Order sealing certain records (the "Records") that a Case Management Justice ("CMJ") ordered to be produced (the "Production Order"). The Production Order specified that the Records would remain confidential. The Applicant Appealed the CMJ's Decision and the Production Order was stayed pending resolution of the Appeal.

The Applicant argued that the Alberta Court of Appeal should review the Records but was concerned about uploading them to the Court's electronic filing system given the confidentiality provisions of the Production Order.

Justice Ho concluded that Rule 14.83 resolved the issue. Rule 14.83 provides that when a restricted access Order made by the Court is appealed, it continues in force and applies to the Appeal until otherwise ordered. As such, Justice Ho directed that the Applicant file the Records as a separate volume marked confidential. Justice Ho also directed that a separate cover letter should accompany the Records indicating that, pursuant to the Production Order, the Records shall be provided to the Appeal Panel only and the Respondent shall not have access to them unless otherwise ordered.