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RULES

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FERGUSON V TEJPAR, 2022 ABKB 656

(DARIO J)

Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

The dispute concerned the future use of a lot (the "Property") purchased by the Respondents. A caveat was registered against the Property (the "Caveat"), with the primary issue being whether the Caveat was binding against the Respondents.

The Respondents had filed an Application to discharge the Caveat and a corresponding removal Order was granted, which had the effect of removing the Caveat (the "Removal Order"). The Applicant subsequently brought an Application pursuant to section 21 of the *Land Titles Act*, RSA 2000, c L-4 for a restoration Order, which had the effect of restoring the Caveat (the "Restoration Order").

Among other issues, the Applicant and the Respondent had applied to set aside, vary or discharge the prior Orders in accordance with Rule 9.15(a) on the grounds that each Application that the prior Orders were granted under had been brought without notice to one or more affected persons.

The Court noted that Rule 9.16 codified the principle setting out that the Master or Justice who gave the respective Order has the authority to hear the Application to be able to vary or discharge it. The Court further noted that the Parties were in agreement that the Court had the authority to hear all issues in the dispute in accordance with Rules 1.2 and 1.4 and that this was an appropriate case to set aside the time restriction in Rule 9.15(2), which provides that an Application to set aside, vary or discharge an Order must be made within 20 days after the Order is served on the Applicant.

The Court found that both the Applicant and Respondent were aware of other interested Parties when they had brought their respective Applications which resulted in the Removal Order and Restoration Order but failed to give notice to those parties. The Court additionally noted that the Respondent and Applicant were respectively a practicing and retired lawyer such that the obligation to notify interested parties could not have been a surprise to either of them. The Removal Order and the Restoration Order were set aside on the basis that notice ought to have been provided to all affected Parties.

TRI CITY CANADA V CANADA (PUBLIC WORKS), 2022 ABKB 735

(APPLICATIONS JUDGE PROWSE)

Rules 1.2 (Purpose and Intention of These Rules) and 1.4 (Procedural Orders)

When previously granting a scheduling Order on this matter, Applications Judge Prowse included a clause that required counsel for the Plaintiff to respond to counsel for the Defendants in a fulsome manner within one week. Belated responses from Plaintiff's counsel had impeded the litigation from progressing in a timely and cost-effective fashion, resulting in

Court-ordered Questioning dates being missed, and further unnecessary Court appearances.

Citing Rule 1.2, Applications Judge Prowse noted that the Court has discretion under Rule 1.4 to implement procedural Orders that oblige the Parties to communicate in a timely way, and to resolve disputes in a timely and cost-effective way.

ANGLIN V RESLER, 2022 ABKB 737

(GILL J)

Rules 1.2 (Purpose and Intention of These Rules), 3.76 (Action to be Taken When Defendant or Respondent Added) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

This was an Application by the Defendant, Pankiw (one of two Defendants in the Action, the other being Resler) to set aside a Noting in Default obtained by the Plaintiff, Anglin.

The underlying Action related to claims against Pankiw and Resler for alleged interference with Anglin's campaign for election as a Member of Legislative Assembly. The Statement of Claim originally named Resler and a further unknown individual referred to as "John Doe". Later, Anglin determined that the unknown individual was Pankiw and purported to serve Pankiw without amending the Statement of Claim to reflect Pankiw's identity. Upon being served with the Statement of Claim, Pankiw retained counsel, who advised counsel for Anglin that there was no obligation to file a Statement of Defence, pending amendment to the Statement of Claim to specifically name Pankiw. Despite being so advised, Anglin proceeded to note Pankiw, as John Doe, in default. Subsequently, Anglin applied to amend the Statement of Claim and Noting in Default to name Pankiw, which Application was granted.

Summarizing the law, the Court noted that a Party seeking to hold an opposing Party in default must strictly comply with the procedural Rules and that, where there is a flaw in the procedure leading up to Default Judgment, a Defendant, proceeding promptly, is entitled to open up the Default Judgment as of right. Further, the Court noted that on Application pursuant to Rule 9.15, a Court may open up a Noting in Default where there is an arguable defence, the Defendant did not intend to allow the Judgment to go by default and has a reasonable excuse for the default, and once the Noting in Default came to the Defendant's attention they promptly applied to set it aside.

Seeking to set aside the Noting in Default, Pankiw argued that Anglin's failure to amend the Statement of Claim upon becoming aware of Pankiw's identity was a procedural flaw, contrary to Rule 3.76. The Court agreed, noting further that Anglin's decision to proceed with the Noting in Default after having been made aware of his obligations to amend and being notified that Pankiw would defend following the amendment, constituted a breach of Anglin's obligations pursuant to Rule 1.2. Further noting the availability of a reasonable defence on the part of Pankiw, the reasonableness of Pankiw's position that no defence was required pending amendment to the Statement of Claim, and Pankiw's prompt action upon being noted in default, particularly as compared to the lackadaisical approach adopted by Anglin, the Court allowed the Application.

DUNN V CONDOMINIUM CORPORATION NO 0420105, 2022 ABKB 782

(BERCOV J)

Rules 1.2 (Purpose and Intention of These Rules), 4.2 (What the Responsibility to Manage Litigation Includes), 4.16 (Dispute Resolution Processes), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 10.42 (Actions Within the Provincial Court Jurisdiction)

The Parties were unable to reach agreement on the Costs obligation arising from a three-day Trial. The Plaintiffs were successful at Trial, with Justice Bercov finding the Defendants liable for nuisance, and awarding $25,250 in damages less settlement funds received under a Pierringer Agreement with a settling Defendant.

The Parties agreed that the Plaintiff, having been successful at Trial, was entitled to Costs; however, they disagreed on the quantum of the Costs Award. First, Justice Bercov considered whether Rule 10.42 was applicable based on the damages claimed. Justice Bercov noted that, because the Defendant's bylaws were made under the Condominium Property Act, RSA 2000, c C-22 (the "Act"), and the Provincial Court's jurisdiction does not extend to bylaws created under the Act, it was not possible for the issue to be raised in Provincial Court. Accordingly, Justice Bercov exercised judicial discretion under Rule 10.42 and did not apply it to the case at bar.

Justice Bercov next considered whether enhanced Costs were appropriate. Prior to considering the conduct of the litigants, Justice Bercov recognized that, under Rule 1.2, the purpose of the Rules is to encourage a fair and just resolution of claims, Rule 4.2 enumerates the responsibilities of the Parties in the litigation process, and Rule 4.16 requires the Parties to engage in alternative dispute resolution processes in good faith. Further, Justice Bercov identified that Rules 10.31 and 10.33 enable the Court to award Costs for either the reasonable Costs that a party incurred or an amount that the Court considers appropriate. Ultimately, noting that the Defendants refused to attend alternative dispute resolution processes, Justice Bercov concluded that when a party refuses to attend alternative dispute resolution on the basis that there is no merit to the claim, enhanced Costs are appropriate where it is determined at Trial that there was merit to the claim.

ESFAHANI V SAMIMI, 2022 ABKB 795

(MARION J)

Rules 1.2 (Purpose and Intention of these Rules), 3.18 (Notice to Obtain Record of Proceedings), 14.16 (Filing the Appeal Record-Standard Appeals), 14.18 (Contents of the Appeal Record-Standard Appeals) and 14.20 (Contents of the Appeal Record- Appeals from Tribunals)

Upon the Parties' marital breakdown, they had their child support and property division matters determined by way of an arbitration (the "Arbitration"). The Appellant sought to Appeal and set aside the Arbitrator's matrimonial property award pursuant to Section 44 of

the *Arbitration Act*, RSA 2000, c A-43 (the "Act") (the "Arbitration Appeal"). Among the other issues considered by the Court, the Respondent took issue with the record relied on by the Appellant, specifically alleging that the Appellant had failed to produce the entire record of the Arbitration.

The Respondent argued that the Appellant had filed only excerpts of the Arbitration transcript but was obligated to provide the entire transcript and record that had been before the Arbitrator. The Respondent asserted that the Arbitration Appeal was a Judicial Review and was a case that involved an Application to set aside an arbitration award under Section 45 of the Act, and not an Appeal under Section 44 of the Act.

The Court determined that the Rules relating to records on Judicial Reviews do not necessarily apply to an arbitration Appeal. The Court noted that a Judge's review of an arbitration decision on Appeal was distinct from a Judicial Review as understood and applied in administrative law.

The Court noted that although neither the Act nor the Rules expressly set out what an Appeal record must contain or what should be put before the Court in an arbitration Appeal, an arbitration Appeal is not a trial *de novo* and should be considered on the same basis as an Appeal from the Court of King's Bench to the Court of Appeal.

The Court found that: (1) some of the Rules governing an Appeal to the Court of Appeal pursuant to Part 14 of the Rules may provide guidance, but do not directly apply to Court of King's Bench arbitration Appeals; and (2) the strict application of Court of Appeal type procedures to an arbitration Appeal may create unnecessary procedural formalities not helpful to an arbitration Appeal. The Court ultimately noted that it maintained the discretion and flexibility to deal with a variety of arbitration processes on Appeals before it.

The Court determined that where a transcript of an arbitration proceeding exists or where documents in the nature of the "Pleadings" or "Final Documents" exist, similar to those described in Rule 14.16, 14.18(1)(b) and (c), and 14.20(a), they should be provided to the Court. The Court additionally noted that where an arbitration agreement provides that this is the contractual responsibility of the arbitrator to prepare, the arbitrator is not required to prepare the record in the same way as an administrative tribunal is pursuant to Rule 3.18.

The Court additionally set out that not all evidence before the arbitration tribunal must be provided to the Court on an arbitration Appeal. Specifically, the Court noted that only evidence that is "necessary to resolve the issues on the appeal" should be included with the exclusion of "any evidence, exhibits and other materials unlikely to be needed". The Court further noted that a "wholesale data dump" of everything filed in an arbitration proceeding is inappropriate and inconsistent with Rule 1.2. The Court also set out that Parties may seek Court direction pursuant to Part 4, Division 2 of the Rules, to ensure the efficient use of Court resources.

The Court found in the circumstances that the several volumes of Affidavit materials and ultimately the full transcript provided to the Court, did not amount to a deficiency in the record. The Court ultimately focused its review on the portions of the record that were referred to in argument or were necessary to resolve the issues on the Arbitration Appeal.

MOSTAFA ALTALIBI PROFESSIONAL CORPORATION V LORNE S KAMELCHUK PROFESSIONAL CORPORATION, 2022 ABCA 364

(VELDHUIS, WAKELING AND SCHUTZ JJA)

Rules 1.2 (Purpose and Intention of These Rules), 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 14.59 (Formal Offers to Settle) and 14.88 (Cost Awards)

This was a Costs Decision resulting from an unsuccessful Appeal of an interlocutory Order.

Prior to the Appeal, the Respondent formally offered settlement pursuant to Rules 4.24 and 14.59 in exchange for consent to a discontinuance on a without Costs basis. Steps were taken between the time of the offer and its expiration, during which time the Appellant did not accept the offer. Following its success in the Appeal, the Respondent sought double Costs, pursuant to Rules 4.29, 14.59 and 14.88.

The Appellant opposed the Respondent's request on the basis that the offer was not a Formal Offer within the meaning of the Rules as it related to settlement of an interlocutory issue and not the Action itself, the offer did not contain a sufficient and identifiable compromise, and the Appellant raised concern that a double Costs award carried the potential for over-indemnification. The Court disagreed with all three bases.

Noting Rule 1.2 and policy preference in favour of negotiated resolution over litigation, the Court held that the applicable Rules applied whether a Formal Offer is made in respect of the entire Action or an interlocutory component thereof. Noting that the Formal Offer in issue was made in contemplation of steps ultimately taken, resulting in litigation costs to the Respondent, the Court further held that the offer contained a sufficient and identifiable compromise and satisfied the elements of a Formal Offer. Finally, noting the absence of evidence demonstrating over-indemnification, the Court held that it should not exercise its discretion not to award double Costs in view of the mere possibility of that outcome.

In the result, the Court granted double Costs in favour of the Respondent.

BALL V 1979927 ALBERTA LTD, 2022 ABKB 814

(NIXON J)

Rules 1.4 (Procedural Orders), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 3.28 (Effect of Not Serving Statement of Claim in Time), 11.25 (Real and Substantial Connection), 11.26 (Method of Service Outside Alberta), 11.27 (Validating Service), 11.33 (Definitions), 11.34 (Service in Contracting State) and 13.5 (Variation of Time Periods)

This was an Application by the Plaintiffs for an Order validating service or extending time for service of a Statement of Claim on two individual Defendants, resident in the United States and United Kingdom, respectively. The Statement of Claim was filed May 16, 2019. In August 2019, the Plaintiffs submitted a desk Application seeking an Order authorizing service *ex juris* on the two Defendants; however, no Order resulted. Subsequently, counsel for several of the other Defendants indicated in a letter to counsel for the Plaintiffs that it anticipated that it would be retained by the two un-served Defendants in the event the Applicants decided to proceed against and serve them. Since service was never effected, the un-served Defendants did not retain counsel and no steps were taken by that counsel on the Defendants' behalf.

In the Application, the Applicants argued that service should be validated or time for service extended in light of the Applicants' reasonable belief that the individual Respondents were aware of the Statement of Claim. In support, the Applicants cited communications with the Defendants' prospective counsel and the fact that a corporation in respect of which the two Defendants were believed to be directors was served with the same Statement of Claim. The Applicants relied on Rules 1.5, 11.27, 3.27 and 1.4.

Regarding the Applicants' belief that the Defendants were aware of the Statement of Claim, the Court noted that awareness of a Statement of Claim is not tantamount to service since, in the absence of service, the Defendants' legal rights were not engaged. Similarly, the Court found that the Applicants' interactions with prospective counsel were insufficient to give rise to a reasonable belief as to service since the prospective counsel indicated only that it anticipated being retained in the event that service was effected, which it was not.

Regarding Rule 1.5, the Court held that, notwithstanding the general curative power provided by Rule 1.5, the Rule is subject to limitations. In particular, the Court held that, since Rule 1.5 restricts the Court's power to extend time periods that are otherwise prohibited from being extended, and Rule 3.26 restricts the Court's power to vary or extend timelines for service pursuant to Rule 13.5, Rule 1.5 could not be relied upon to extend time for service of the Statement of Claim. Relying on previous case authority, the Court also held that Rule 1.5 could not be relied upon to cure non-compliant service on Parties located outside of Canada.

Regarding Rule 11.27, the Court held that the Applicants could not rely on Rule 11.27 to validate service since Rule 11.27 includes a specific exception for documents required to be served in accordance with Division 8, including Rules 11.33, 11.34. As the Statement of Claim was required to be served pursuant to that Division, Rule 11.27 did not apply. Further, since Rules 11.25 and 11.26 make service outside of Canada contingent on an Order permitting service *ex juris*, the Court held that the absence of such an Order precluded validation.

Regarding Rule 3.27, the Court held that time for service could not be extended because the Applicants' failure to serve arose a result of their own counsel's oversight and not any conduct on the part of the Respondents or a third party.

Regarding Rule 1.4, the Court held that time to serve could not be extended since Rule 3.26(3) limited the Court's power to do so and Rule 1.4 applies only in the absence of specific limitations provided by the Rules.

In the result, the Court held, pursuant to Rule 3.28, that no further proceedings could be taken against the two Respondents.

SPARK POWER CORP V PEACOCK LINDER HALT & MACK LLP, 2022 ABKB 853

(KRAUS J)

Rules 1.4 (Procedural Orders), 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.13 (Appointment for Review) and 10.18 (Reference to Court)

The Respondent law firm previously had represented the Applicant. The Applicant filed an Appointment for Review of a Retainer Agreement/Lawyer's Charges (a "Review") and the Review Officer referred three issues to the Alberta Court of King's Bench regarding the interpretation of a retainer agreement pursuant to Rule 10.18.

The first issue was what effect Ministerial Order 27/2020 had on Rule 10.10(2), which provides that a lawyer's charges may not be reviewed if one year has passed since the account was sent to the client. The Court determined that the Ministerial Order extended the one-year period in Rule 10.10(2) by 75 days and the Review was therefore filed on time.

The second issue was what accounts fell into the review period under Rule 10.10(2). The Parties disagreed as to whether Rule 10.10(2) requires a Review to be filed within one year of the date the account was sent to the client, or if it needed to be both filed and served within one year. The Court noted that Rule 10.13(4) requires a Review and associated materials must be served at least 10 days before the scheduled date of the Review. As such the Court determined that a Review must only be filed within one year and served pursuant to Rule 10.13(4).

Finally, the Court considered whether the Review at issue should be stayed pending the resolution of the Applicant's claim in negligence against the Respondent. The Applicant argued that there were exceptional circumstances allowing the Court to stay the Review pursuant to Rule 1.4(2)(h). The Court applied the test for staying a proceeding when there is an overlapping proceeding set out in *Alberta v AUPE*, 1984 ABCA 130, which requires the Applicant to show that: (1) the questions in the Actions are substantially similar; (2) a continuance of the Action sought to be stayed would be oppressive or vexatious to the Applicant or otherwise abuse the powers of the Court; and (3) the Stay would not cause an injustice to the Respondent.

The Court declined to grant a Stay of the Review. The Court noted that there was some overlap in the negligence Action and the Review but not complete duplication. The Court found that continuing the Review would not be oppressive or vexatious to the Applicant

or otherwise an abuse of process. Finally, the Court was not satisfied that granting a Stay would not cause injustice to the Respondent. To the contrary, the Court noted that granting a Stay would create a risk that the Respondent would have to wait years for the negligence Action to be completed before the Review was completed.

ANGLIN V PANKIW, 2022 ABCA 362

(SLATTER, STREKAF AND FEEHAN JJA)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.30 (Defendant's Options), 3.42 (Limitation on When Judgment or Noting in Default May Occur), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 3.76 (Action to be Taken When Defendant or Respondent Added), 6.2 (Application to the Court to Exercise its Authority) and 11.31 (Setting Aside Service)

The Appellant sought to Appeal a Decision that allowed the Respondent to replace the "John Doe" Defendant, originally named and Noted in Default in the Statement of Claim, with the Appellant's name. With regards to the required amendments to correct the name of the Defendant, the Court noted that if the Appellant was concerned by the Respondent's delay in correcting the situation, the Rules contained available remedies including Rules 3.30, 3.42, 6.2, or 11.31.

The Appellant also took issue with the fact that the Respondent served the Appellant with the Statement of Claim prior to amending the style of cause to correctly name the Defendant. The Court, considering whether this was a fatal failure, noted that Rule 3.76 provides the Plaintiff the same rights with regards to service of the re-named Defendant as it had the originally named Defendant. As a result, the Respondent had one year to re-serve the Appellant following the granting of the Order to replace the original Defendant.

Finally, while recognizing that the Application to amend was late, the Court, citing Rules 1.5 and 3.74, noted that late amendments may be permitted provided there is not prejudice that cannot be addressed through Costs.

Ultimately, the Court allowed the Appeal in part, on the condition that the Noting in Default be set aside.

SLATER ESTATE (RE), 2022 ABKB 859

(FUNK J)

Rules 2.11 (Litigation Representative Required), 2.12 (Types of Litigation Representatives and Service of Documents), 2.13 (Automatic Litigation Representatives), 2.15 (Court Appointment in Absence of Self-Appointment) and 2.16 (Court-appointed Litigation Representatives in Limited Cases)

This was an Application for advice and direction brought by the personal representative of the estate concerning certain assets which were the subject of a prior designation to the benefit of the deceased's common law partner, Ms. Scovil, now also deceased.

The Court considered whether the estate of Ms. Scovil required a litigation representative in the matter. As Ms. Scovil's estate has an interest in the Action, by operation of Rule 2.11, the Court held that her estate must have a litigation representative, unless the Court otherwise orders. The Court specifically noted that if the earlier beneficiary designations in favour of Ms. Scovil are held to be unaffected by the will of the estate of the Applicant, then her estate would be entitled to receive the benefits of certain accounts. As there appeared to be no heirs to her estate, the Public Trustee would mostly likely receive and hold these funds, by operation of the relevant provisions of the *Public Trustee Act*, SA 2004, C P-44.1. Ultimately, the funds may be transferred to the Minister, by operation of the *Unclaimed Personal Property and Vested Property Act*, SA 2007, c U-1.5.

Given the possible outcomes, the Court found that Rule 2.11 not only operates such that Ms. Scovil's estate must have a litigation representative, but that it is imperative her estate be represented in the within Action. By operation of Rules 2.15 and 2.16, the Court held it could appoint a litigation representative and noted that the Public Trustee would appear the most likely and appropriate litigation representative. As the Public Trustee did not have notice of the Application, the Court declined to appoint the Public Trustee as litigation representative and directed the Applicant to provide the Public Trustee with notice. At that time, in the event that the Public Trustee wished to make submissions as to why it should not be the litigation representative, it was directed to do so by bringing the matter before the Court in morning Chambers in advance of the Application for further advice and direction, failing which objection, it would be presumptively appointed as the litigation representative for Ms. Scovil's estate.

DEBUT DEVELOPMENTS INCORPORATED V THE TOWN OF REDCLIFF, 2022 ABKB 809

(DEVLIN J)

Rule 2.23 (Assistance Before the Court)

The Action stemmed from a commercial residential housing development for which the Plaintiff solely existed and was a corporate vehicle for the individual joint owners. The venture was ultimately unsuccessful and the Plaintiff sued the Defendant, together with two of its officials with whom the Plaintiff had dealings. The lawsuit arrived at its second Trial date and, contrary to a prior Order of the Court, the Plaintiff remained unrepresented. The spokesperson for the Plaintiff, one of the joint owners, sought an adjournment of the Trial date to attempt to secure counsel for a future third attempt at conducting the litigation. The spokesperson was also a named Defendant in a defamation Action commenced by the two individual Defendants and another senior employee of the Defendant. That Action was joined with the first Action and the spokesperson also sought an adjournment on her own behalf with respect to the latter Action.

The Plaintiff company and the spokesperson had a series of counsel representing them since the start of the litigation. A series of case management appearances and motions were heard by Ashcroft J. and, arising from those, an Order was issued which required the Plaintiff to retain counsel prior to the exchange of case conference summaries. No counsel was retained. Throughout the case management process, Ashcroft J. had granted the spokesperson a right of audience to speak on behalf of the Plaintiff corporation - which culminated in an Application by the spokesperson to act for both herself and the Plaintiff company at Trial. Justice Ashcroft heard the Application in April 2022 and had concluded that the newly added Rule 2.23(4), which preserves the Court's discretion to grant a "right of audience" for a non-lawyer to speak on behalf of another Party, did not extend to allowing such an individual to fully conduct a Trial.

On the Application for an adjournment, Devlin J. confirmed whether the spokesperson was again seeking permission to appear for the Plaintiff company pursuant to Rule 2.23(4) and she confirmed she was. Counsel for the opposing Parties did not oppose her being granted a right of audience and Devlin J. found it was appropriate that she be permitted to speak on behalf of the Plaintiff company. The Court noted that individuals who choose to act through corporations must take the good with the bad. One of the consequences of the legal separateness of corporations from their shareholders is that the corporation requires someone to speak on its behalf at Court proceedings. A director, officer or shareholder may be allowed to fulfill this role on a limited basis as a spokesperson under the new Rule 2.23(4). They may not, however, effectively practice law by representing the corporation as Trial counsel.

Ultimately, the Court denied the Plaintiff company's Application for an adjournment and the necessary consequence of such finding was that the Plaintiff company stood before the Court unrepresented and unable to advance its claim. As such, the Action was dismissed.

BAIRN CORPORATION V GABERT, 2022 ABKB 668

(FETH J)

Rule 3.2 (How to Start an Action)

The Applicants applied for determination of the extent of easement rights on land owned by the Respondents. The Applicants also asked the Court for equitable relief to impose a "lasting solution" for the land.

The Applicants brought this Action by Originating Application. Rule 3.2(2) directs that a Statement of Claim must be used to start an Action, unless "there is no substantial factual dispute", among other factors. The Court found that the Applicants' equitable claim was not properly pleaded and particularized, so the facts essential to the claim could not be determined and the Court could not assess whether a substantial factual dispute existed.

The Court declined to grant equitable relief based on the "ill-defined" claim and directed the Applicants that they could continue to pursue equitable relief by filing a Statement of Claim.

STEPHEN V ALBERTA (DIRECTOR OF ALBERTA HUMAN RIGHTS COMMISSION), 2022 ABCA 390

(CRIGHTON, STREKAF AND KHULLAR JJA)

Rule 3.15 (Originating Application for Judicial Review)

The Plaintiff, Mr. Stephen, appealed an Order requiring him to serve the Alberta Labour Relations Board with his Application for Judicial Review of an Alberta Human Rights Commission decision. The Appeal was dismissed.

Rule 3.15 requires an Application for Judicial Review be served on any person "directly affected" by it. The Court rejected Mr. Stephen's submissions that only those who participated in an administrative board's decision can be "affected" by an Application to judicially review it and that the Labour Relations Board was not "affected" as it did not participate in the proceedings. It did so having found that there was no authority for such Rule and there were reported decisions contrary to it: *Yuill v Alberta (Workers' Compensation Appeals Commission)*, 2016 ABQB 369 at paras 63, 75; *ENMAX Corporation v Alberta (Labour Relations Board)*, 2018 ABQB 431 at para 12.

The Court commented that participation in an administrative body's decision does not necessarily determine who is affected by a Judicial Review of that decision. The question in every case is whether a person will be affected by the Application for Judicial Review, not their involvement in prior administrative proceedings.

NORMKO RESOURCES INC V ALBERTA (MINISTER OF ENVIRONMENT AND PARKS), 2022 ABCA 388

(SLATTER, FEEHAN AND KIRKER JJA)

Rules 3.18 (Notice to Obtain Record of Proceedings) and 3.19 (Sending in Certified Record of Proceedings)

The Defendant appealed an Order requiring the Defendant to produce a briefing note sent by the Public Lands Appeal Board to the Minister of Environment and Parks. The Defendant argued that the briefing note was privileged under Rule 3.19.

The Court of Appeal dismissed the Appeal. The Court found that Rule 3.18 requires a tribunal subject to Judicial Review to provide its record, including the reasons for the challenged decision and anything relevant to the decision. In this case, the Court found that the administrative structure consisted of a recommending body (the Public Lands Appeal Board) and a deciding body (the Minister). This structure made it foundational that the contents of a recommendation from the Public Lands Appeal Board (the briefing note) be produced to the Plaintiff. The Court also found that the *Public Lands Act,* RSA 2000, c. P-40 (the "Act") requires the Public Lands Appeal Board to submit a report to the Minister, including recommendations. The Court found that the Act intended for those recommendations to be disclosed to citizens and could therefore not be protected by privilege.

CM V ALBERTA, 2022 ABKB 716

(DUNLOP J)

Rule 3.22 (Evidence on Judicial Review)

The Applicants applied for Judicial Review of CMOH Order 08-2022, which dealt with masking in schools in response to the COVID-19 pandemic.

There was a preliminary dispute about whether portions of the Applicants' Affidavit evidence were properly before the Court. The Respondent argued that information about COVID-19 contained in the Applicants' Affidavits should be ignored because it did not form part of the record before the administrative decision maker, which, the Respondent argued, should be the extent of the record on Judicial Review.

Justice Dunlop disagreed with the Respondent's argument, based in part on Rule 3.22. Justice Dunlop stated that the traditional categories of admissible additional evidence on a Judicial Review were based on the former Rules. The former Rules did not allow for the additional categories of new evidence now recognized under the current Rules.

The Court stated that these additional categories include: (1) information that was well-known to the parties in content and substance, and therefore should have formed part of the record in the first instance; (2) records

which disclose content and substance which was before the decision maker, despite the records themselves not having been; (3) useful contextual information; and (4) records which provide necessary background and context to a Judicial Review and to related constitutional argument.

The Court therefore admitted the Applicants' evidence.

JELONEK V MONTERROSA-RENAUD, 2022 ABKB 738

(FEASBY J)

Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 6.14 (Appeal from Applications Judge's Judgment or Order)

In the underlying Decision, after the expiry of the one-year period of time within which it was required to serve a Statement of Claim under Rule 3.26, the Plaintiff applied pursuant to Rule 3.27 for an extension of time to serve a Statement of Claim. Applications Judge Farrington granted a two-month extension on the grounds that the course of dealings between the Parties gave rise to a belief that the strict deadlines in the Rules would not be strictly relied upon, or in the alternative that there were special or extraordinary circumstances that justified an extension. The Defendant appealed that Decision. Justice Feasby noted that pursuant to Rule 6.14, an Appeal from an Applications Judge's Judgment or Order is an Appeal on the record of the proceedings before them and may also be based on additional relevant material, however no additional material was provided.

The underlying claim arose from two car accidents. The Plaintiff's initial counsel filed the Statement of Claim and exchanged emails with an adjuster for the Defendant's insurer. The adjuster, knowing that his client had not been served, asked that no steps be taken without notice and that a Statement of Defence not be required and the Plaintiff's initial counsel agreed. The Plaintiff's initial counsel asked for information required to enable them to serve the Defendant twice, but the adjuster did not respond to those. Subsequently, the Plaintiff's initial counsel took an in-house role and another lawyer agreed to represent the Plaintiff. That lawyer was provided an incomplete hard copy file and no electronic copy. The new lawyer served an Affidavit of Records on all Parties and settled the matter with some of the Defendants involved in the first accident by way of a Pierringer Agreement that was assigned by the adjuster for the Appellant in this matter.

Justice Feasby noted that Rule 3.27(1)(a)(iii), which states that a Court may grant an extension of time when a Defendant or a Party acting for a Defendant has caused a Plaintiff or their lawyer to believe that a time limit or time period relating to an Action will not be relied upon or waived, could be viewed as a sort of codification and modification of promissory estoppel in the limited context of extensions for the filing of a Statement of Claim. His Lordship found that the circumstances in this immediate instance, including settlement discussions, gave rise to a reasonable belief that service of the Statement of Claim would not be required without prior notice, and that the execution of Pierringer Agreement could also operate as an admission that service was in order or as an estoppel to that effect. Accordingly, Justice Feasby dismissed the Appeal.

SASSINE CONSTRUCTION CORP V PROSERVE CLEANING & RESTORATION SERVICES INC, 2022 ABKB 832

(ANGOTTI J)

Rule 3.27 (Extension of Time for Service)

This was an Appeal from a Provincial Court Order allowing a Civil Claim to proceed despite the Plaintiff's failure to serve commencement documents in manner consistent with the *Provincial Court Civil Procedure Regulation*, Reg 176/2018 (the "*Regulation*") within the applicable limitation period. The Defendant challenged the Provincial Court's Decision on the basis that the Provincial Court Judge did not have the authority to apply Rule 3.27 or a similar test to relieve the Respondent from the consequences of its failure to serve within the necessary time.

The Court agreed with the Defendant, finding that the applicable section of the *Regulation* was a complete code and, unlike its analog in Rule 3.27, did not provide for the exercise of discretion to excuse the Plaintiff's non-compliance. Accordingly, the Appeal was granted.

HAZELWOOD V SCHLOTTER, 2022 ABKB 821

(ROOKE ACJ)

Rules 3.45 (Form of Third Party Claim) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants had previously applied to file a Third Party Claim more than six months after the Statement of Defence was filed. The Defendants required permission from the Court to file the Third Party Claim outside the timeline set out in Rule 3.45. The Plaintiff applied to refer the matter to Civil Practice Note No. 7 ("CPN7") review.

The Court rejected the proposed Third Party Claim as a candidate for CPN7 review. Rooke A.C.J. determined that the CPN7 process does not apply to whether the Court should grant the Defendants permission to file the Third Party Claim. The Court noted that CPN7 is a method to conduct a Rule 3.68 process in which alleged facts are presumed to be true and evidence such as Affidavits are excluded. In contrast, the Plaintiff challenged both the merits of the Third Party Claim and whether the Court should allow the Defendants to file it. The Court determined that this was outside the narrow scope of review by CPN7.

The Court instructed the Parties to contact the Clerk of the Court to reschedule the Defendants' Application to file the Third Party Claim. The Court declined to award Costs.

BREWIN V MAGYAR, 2022 ABKB 729

(POELMAN J)

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

The Defendant appealed from the Decision of the Applications Judge to permit the Plaintiff's Application to amend her Statement of Claim. An Application to amend Pleadings after the close of Pleadings is governed by Rule 3.65. Poelman J. cited *Balm v 3512061 Canada Ltd,* 2003 ABCA 98 for the proposition that any Pleading can be amended no matter how careless or late the amendment sought is. However, there are four commonly recognized exceptions, where the discretion to allow amendments should not be exercised: (1) Where they would cause serious prejudice not compensable in Costs; (2) Where the amendment requested is "hopeless"; (3) Where the amendments seek to add a new Party or a new cause of action after expiry of limitation period, unless permitted by statute; and (4) Where there is an element of bad faith associated with the failure to plead the amendment in the first instance.

Serious prejudice not compensable in Costs is likely to be established where the proposed amendments relate to events that occurred long ago, there have been many years of litigation on original Pleadings, or the amendments fundamentally change the issues and will cause further delay. A proposed amendment is "hopeless" where it does not disclose a cause of action or is so inconsistent with the record. When amendments are sought after possible expiry of a limitation period, it is preferable to resolve the limitation issues when the Application is made. Where complexity of the facts or records preclude a final Decision, the amendments should be allowed, the Defendants should be permitted to plead the limitations defence, and the issue should be resolved at Trial. A Party opposing an amendment on the ground of bad faith must prove the allegation on a balance of probabilities. Bad faith exception is not intended to punish negligent delays.

Poelman J. ruled that although evidentiary threshold is not enumerated as one of the exceptions, it may lead to a finding that an amendment is hopeless. Although the evidentiary threshold usually is low, some evidence is required to amend after the close of Pleadings. The Applicant does not need to show the amended Pleading can be proved at Trial or would meet the test for Summary Judgment. However, it does not preclude weighing of evidence. While the mere presence of contradictory evidence does not necessarily prevent an amendment, merely providing some evidence on each point is insufficient.

Poelman J. further held that where there are allegations of fraud, highhandedness, or malicious conduct, the evidentiary threshold is significantly elevated. The Applicant must, with significant evidence, show "good ground" or "exceptional circumstances" for such amendments.

In this case, the amended Statement of Claim alleged that the Defendant, among other things, "fraudulently misrepresented and withheld information". Specifically, it was alleged that the Defendant excluded from the inventory contained in the Application for probate "any information about or reference to or quantification of the bank accounts and financial assets". The Plaintiff acknowledged that she signed the probate Applications, but had not been allowed to participate in compiling the information and involuntarily signed the documents "by being bullied, manipulated, threatened and coerced".

Poelman J. agreed with the Decision of the Applications Judge to allow some of the amendments sought but differed from the

Applications Judge on the others. The amendments for the wrongful conversion of banking assets or other assets were not permitted, nor were the amendments related to estate administration. Poelman J. found that there was prejudice not compensable in Costs for the categories of wrongful conversion and estate administration and that higher evidentiary threshold for fraud was not met.

ROONEY V GSL CHEVROLET CADILLAC LTD, 2022 ABKB 813

(FEASBY J)

Rule 3.65 (Permission of Court to Amendment after Close of Pleadings)

The Plaintiff, Edward Rooney ("Mr. Rooney"), claimed that he was constructively dismissed by the Defendant, GSL Chev City ("GSL"). Mr. Rooney claimed that GSL changed the nature of his employment without any increase in compensation. GSL responded that there was no substantial unilateral change in Mr. Rooney's terms of employment and that it was entitled to reasonably discipline Mr. Rooney including suspending him without pay. The Trial for this matter took place in November 2022.

Mr. Rooney secretly recorded discussions between himself and his supervisors concerning disciplinary actions that GSL had taken against him and changes to his role at GSL. At the commencement of Trial, GSL sought permission to amend its Statement of Defence to allege that Mr. Rooney was dismissed for cause. GSL sought this based on its argument that the secret recording of his supervisors breached the terms of his employment.

The Court considered Rule 3.65. GSL contended that amendment should be allowed because there was no prejudice to the Plaintiff: Mr. Rooney knew about GSL's concerns with the recording, as the recordings were explored in Questioning. On the other hand, Mr. Rooney submitted that amendment should not be allowed more than 12 years after the termination of the employment relationship and commencement of legal proceedings. Counsel for Mr. Rooney further submitted that he would have adopted a different approach to Questioning and Trial if termination for cause had been pleaded.

Justice Feasby denied the Application to amend GSL's Statement of Defence because of GSL's inordinate delay in seeking an amendment, and noting the intrinsic difference between litigating a constructive dismissal claim versus a dismissal with cause claim. The Court noted that character of employment dismissal litigation changes when there is an allegation of termination for cause, as it raises both the financial and reputational stakes for the former employee. A former employee facing an allegation of termination for cause may adopt different litigation and settlement strategies than the former employee would have in litigation without an allegation of termination for cause.

WEIDENFELD V ALBERTA (MINISTER FOR SENIORS AND HOUSING), 2022 ABKB 688

KENDELL J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

In 2020, Mr. Weidenfeld filed a Statement of Claim ("2020 Lawsuit") naming Alberta and Canada as Defendants, demanding a number of declarations and that the Court order Alberta to implement certain steps to provide for and fund housing.

Justice Rooke A.C.J. issued *Weidenfeld v Alberta*, 2020 ABQB 451 ("Weidenfeld #1") which concluded that Mr. Weidenfeld's claims in the 2020 Lawsuit were *prima facie* hopeless and illegal, and an abuse of the Court. Mr. Weidenfeld voluntarily discontinued his Action against Alberta and Canada. In a later written Decision reported as *Weidenfeld v Alberta,* 2020 ABQB 472 ("Weidenfeld #2"), Rooke A.C.J. did not assess Costs against Mr. Weidenfeld. His Lordship took note that Mr. Weidenfeld acknowledged his actions against Alberta and Canada had no basis in law, and apologized to the Court and Premier Kenny.

In 2021, Mr. Weidenfeld filed an Application ("2021 Application"), seeking Court declarations that: (1) certain sections of the *Residential Tenancies Act*, RSA 2000, c R-17 are unconstitutional as they breach section 7 of the Canadian *Charter of Rights and Freedoms* (the "*Charter*") (2) housing is a "necessity of life", protected by section 7 of the *Charter* and therefore the *Alberta Housing Act*, RSA 2000, c A-25 must be amended accordingly and that regulations are enacted in relation to "unreasonable" "deprivation of housing" and "degradation … of housing"; and (3) section 7 of the *Charter* includes "adequate and affordable housing", with rents of no more than 30% of monthly income.

Alberta applied to strike out the 2021 Application pursuant to Rule 3.68 on the basis that Mr. Weidenfeld was re-litigating issues decided in Weidenfeld #1 and Weidenfeld #2. Alternatively, Alberta argued that the remedies sought were non-justiciable and hopeless.

Justice Kendell noted that evaluation of the 2021 Application under Rule 3.68 had two discrete and separate aspects that yielded two separate questions: (1) was the 2021 Application a prohibited collateral attack and re-litigation of issues decided by Weidenfeld #1 and #2; and (2) were the claims made in the 2021 Application legally hopeless and/or non-justiciable, and therefore was the 2021 Application an abuse of the Court and Alberta?

Under the first aspect, Kendell J. found that the 2021 Application was a collateral attack in two separate senses: (1) Mr. Weidenfeld was re-litigating issues, and (2) Mr. Weidenfeld was attacking the Court's conclusions on those issues. Either was held to be an independent basis to strike out the 2021 Application. Kendell J. therefore ordered that the 2021 Application be struck out pursuant to Rule 3.68.

Under the second aspect the Court agreed with Alberta that Mr. Weidenfeld had not raised any valid claim because: (1) the *Charter* does not provide for property and economic rights, including a right to housing, and (2) the issues and remedies sought were non-justiciable.

Kendell J. concluded under Rule 10.29(1) that Alberta had been completely successful in the Application, and therefore was presumptively due Costs. Considering the broad implications of Mr. Weidenfeld's claims, that Mr. Weidenfeld

had engaged in three-fold re-litigation, and that Mr. Weidenfeld had persisted in continuing his claims in the face of settled law that he was entirely aware of, Kendell J. further concluded that the litigation implicated many of the criteria for an elevated Cost Award as identified in Rule 10.33. Based on the foregoing, Kendell J. ordered that Mr. Weidenfeld pay Alberta $4,000 in Costs.

BERMAN V 905953 ALBERTA LTD, 2022 ABKB 701

(NIELSEN ACJ)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Respondent sought to refer two interlocutory applications filed by the Applicant in separate actions as candidates for Apparently Vexatious Applications or Proceedings ("AVAP"), pursuant to Civil Practice Note No. 7 ("CPN7"). The Court declined the CPN7 referral. The Respondent had not provided admissible documentation establishing that re-litigation by the Applicant had occurred.

Further, the Court noted that CPN7 is a limited scope process that targets filings that are clear cases of abuse. As a mechanism to conduct a Rule 3.68 process, the alleged facts in a CPN7 referral are presumed to be true, with the narrow exception where allegations are absurd, highly implausible, or hyperbole. The Court held, however, that an Application under Rule 3.68 was still available absent the CNP7 referral.

BAINS V DAY, 2022 ABKB 844

(ROOKE ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 10.52 (Declaration of Civil Contempt)

The Respondent, Dr. Jagdev Bains, commenced three interrelated Actions regarding three motor vehicle accidents. In the course of those Actions, the Alberta Court of Appeal imposed a Court access gatekeeping restriction on Dr. Bains which prohibited Dr. Bains from filing any further claims against individuals related to his existing Actions. He proceeded to file an additional claim against the lawyers who acted adverse to him in his other Actions (the "Lawyer Action").

The Defendants in all four Actions collectively filed an Application to, among other things, strike the Lawyer Action and find Dr. Bains in Contempt of Court.

Associate Chief Justice Rooke held that the Lawyer Action was an abuse of process, among other issues, and struck the Pleading pursuant to Rule 3.68. However, he did not find Dr. Bains in Contempt, pursuant to Rule 10.52, citing the high bar for Contempt set in *Pintea v Johns,* 2017 SCC 23 and the caution to be taken in finding self-represented litigants in Contempt.

PATEL V CUNNINGHAM HIGH PERFORMANCE EXECUTION TEAM CORP, 2022 ABCA 323

(STREKAF, ANTONIO, AND KIRKER JJA)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.1 (Application to Resolve Particular Questions or Issues), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Court of Appeal considered when a Certificate of *Lis Pendens* can be discharged by Court Order and whether the Chambers Judge erred in doing so. The Applicants submitted that the Chambers Judge did not have the jurisdiction to discharge the Certificate of *Lis Pendens* as certain required conditions defined in the *Land Titles Act*, RSA 2000, c L-4 had not been satisfied.

The Court of Appeal canvassed the relevant statutory and jurisprudential authorities. Ultimately, the Court of Appeal noted that a Certificate of *Lis Pendens* can be addressed through an Application to strike that aspect of the underlying claim pursuant to Rule 3.68 on the basis that Statement of Claim did not disclose a reasonable cause of action. In the alternative, the Court of Appeal noted that an Application can be brought pursuant to Rules 7.1, 7.2, or 7.3 for dismissal of that aspect of the claim.

The Court of Appeal granted the Appeal without prejudice to the Respondents' ability to bring an Application challenging the allegations in the Pleadings under Rules 3.68, 7.1, 7.2, or 7.3.

LLOYD V DE WALLE, 2022 ABCA 321

(SCHUTZ, STREKAF AND KIRKER JJA)

Rules 4.5 (Complex Case Obligations) and 4.10 (Assistance by the Court)

The underlying Action concerned an Enduring Power of Attorney executed by the Appellant appointing the Respondents as his attorneys. During a Case Conference, the Appellant requested an "immediate declaration" that he had regained capacity. This request was dismissed, and the Appellant appealed the dismissal.

During the Case Conference, the Case Conference Judge was not satisfied that she could make the necessary findings to summarily dispose of the issue of the Appellant's capacity based only on Affidavit evidence. The Case Conference Judge ordered a Trial on the issue of the Appellant's current capacity. As part of this, she instructed the Parties to prepare a Litigation Plan in accordance with Rule 4.5.

The Court noted that Case Conference Decisions, like Case Management Decisions, are afforded a high level of deference on Appeal. Here, there was nothing unreasonable or unjust about the Case Conference Judge's Decision.

The Court noted that the Appellant's evidence was not uncontested. The Case Conference was convened to address procedural questions only, pursuant to Rule 4.10(4) and the agenda set by the Case Conference Judge. Therefore, it was understandable that the Respondents

had not yet conducted cross-examinations or tendered any evidence of their own. In these circumstances, it was reasonable for the Case Conference Judge to conclude that she could not make the necessary findings of fact regarding the Appellant's capacity.

The Court found that the Appellants had failed to demonstrate any reviewable error. The Appeal was dismissed.

TWINN V ALBERTA (OFFICE OF THE PUBLIC TRUSTEE), 2022 ABCA 368

(SLATTER, SCHUTZ AND FEEHAN JJA)

Rules 4.14 (Authority of Case Management Judge), 4.15 (Case Management Judge Presiding at Summary Trial and Trial), 7.1 (Application to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)

The Appellants appealed from a Case Management Judge's Decision involving the interpretation of an earlier Court Order regarding the transfer of assets from one trust to another.

The Appellants raised procedural issues as part of their Appeal. The Appellants argued that it was not open to the Case Management Judge to grant substantive and final relief on an Application for advice and direction. The Appellants further argued that the Case Management Judge exceeded his mandate by raising issues that had not been raised by the Parties.

With respect to the first procedural issue, the Court of Appeal held that the Case Management Judge did not err. The Court noted that Case Management Judges have all the powers of other Judges of the Court—under Rule 7.1 they can decide discrete issues, and under Rule 7.3 they may hear Applications for Summary Judgment for some or all of the issues in dispute between the Parties. The Court observed that Rule 4.14 demonstrates the breadth of a Case Management Judge's powers, which states that their mandate includes "adjudicating any issues that can be decided before commencement of the Trial". A restriction on their authority exists under Rule 4.15, which states that a Case Management Judge must not preside over the Trial or Summary Trial unless each Party consents.

With respect to the second procedural issue, the Court held that the Case Management Judge overstepped by raising issues not raised by the Parties. The Court of Appeal stated that all Judges must remain neutral and should avoid becoming a protagonist in the litigation or giving the impression that they are predisposed to a particular outcome.

In the outcome, the Court of Appeal set aside the Order under Appeal.

KOSTIC V SCOTT VENTURO RUDAKOFF LLP, 2022 ABCA 392

(ROWBOTHAM, VELDHUIS AND SCHUTZ JJA)

Rule 4.22 (Considerations for Security for Costs Order)

The Appellant submitted that the Case Management Judge erred in failing to consider the scope of relevant evidence for the Security for Costs Application (the "Security for Costs Application") with respect to Rule 4.22(c). The Appeal was ultimately dismissed on all grounds.

The Court of Appeal noted that a cross examination on an Affidavit in support of an Application seeking Security for Costs is not meant to determine the merits of the underlying Action and is limited in what information may be sought and what questions may be answered.

The Court of Appeal found that the Case Management Judge did not err in his statement or application of the law with respect to relevance for a Security for Costs Application. The Court noted that the Case Management Judge's assessment of relevance regarding his refusal to order answers to undertakings and production of records was appropriate because they were not relevant to the Security for Costs Application. More specifically, the Court noted that this was a discretionary Decision entitled to deference which would not be interfered with absent an error in principle or unless clearly unreasonable. The Court additionally found that it was noteworthy that many of the records sought by the Appellant had been produced. The Court determined that the Appellant's assertions that the Respondents had not produced all relevant and producible records was not relevant to the Security for Costs Application.

The Court of Appeal also noted that determining the relative merits of the Action is not the primary issue on a Security for Costs Application. The Court acknowledged that even if there were errors in the factors applied by the Case Management Judge, the Appellant had not demonstrated that the Case Management Judge had erred in evaluating the Appellant's likelihood of success in the Action as weak in assessing the merits of the Security for Costs Application.

ALSTON V HAYWOOD SECURITIES INC, 2022 ABKB 797

(EAMON J)

Rules 4.24 (Formal Offers to Settle), 4.29 (Cost Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and Schedule C

The Costs endorsement followed the Defendants' request for Costs of the Appeal of the Court's Decision to dismiss the Plaintiffs' Action due to delay. The Court had dismissed the Appeal. The Defendants sought double Costs in accordance with Rule 4.29(1) on the basis they had served a Formal Offer to settle (the "Formal Offer"), and the dismissal of the Action was ultimately more favorable to the Defendants than the Formal Offer.

The Court noted that the successful Party to an Application 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. The Court additionally noted that the Court of Appeal had affirmed that the general approach was to quantify reasonable and appropriate Costs at a level approximating 40-50% of actual Costs. The Court noted that Schedule "C" may be appropriate in routine high volume chambers Applications, and can also be a useful default to which Parties may defer, or which Trial Judges may adopt in a variety of circumstances including for example cases where there is a significant imbalance in the power and means of the Parties.

Among other things, the Court additionally noted that: (1) the Plaintiffs' claim that the Defendants were guilty of litigation misconduct including lying and misleading the Court was unproven; (2) the Plaintiffs' materials, particularly the supplemental Affidavit, contained a mixture of opinions on the Court's conclusions of fact or law, assertions of fact, and allegations of fraud that did not satisfy the fresh evidence standard nor were they practically conclusive in demonstrating fraud; (3) the Plaintiffs' claims of unlawful garnishment summonses was not relevant to the Costs issue; and (4) the Court did not agree with the Plaintiffs' claim that there had been mistreatment arising from being a self-represented litigant.

The Court held that in order to grant the Cost consequences under Rule 4.29, the Formal Offer must: (1) comply with the specific requirements of Rule 4.24(2); and (2) be a genuine offer to compromise. The Court found that the technical requirements of the Rules were satisfied. The Court noted that there is a presumption that an offer is genuine with the onus to rebut on the losing party. In considering the second element, the Court noted that the Plaintiffs had not made submissions with respect to the Formal Offer, nor had they asserted that it was neither genuine or not in compliance with the Rules. The Court also note that the Plaintiffs did have an adequate opportunity to assess the strength of their position well before the Formal Offer had expired.

The Court awarded Costs against each of the Plaintiffs jointly and severally for $3,000 in accordance with Rule 10.29(1).

EWASHKO V HUGO, 2022 ABCA 420

(WATSON, VELDHUIS AND SCHUTZ JJA)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations In Making Costs Award) and 14.88 (Cost Awards)

The Respondents had successfully defeated the Appellants' Appeal in an earlier Decision from the Alberta Court of Appeal, and were seeking enhanced Costs pursuant to Rule 4.29. The Respondents had made a Formal Offer under Rule 4.29(1) related to the Appeal. As the successful Party, the Respondents were seeking double Costs. As the successful party, the Respondents were entitled to Costs as set out under the appropriate schedule of fees for the Appeal, authorized by Rule 14.88(1). The Court of Appeal noted that the ordinary discretion as to Costs is under Schedule C at partial indemnity (between 30% and 50%) under Rules 10.29, 10.31 and 10.33.

The Court of Appeal awarded double Costs pursuant to Rule 4.29(1). The Court rejected the

Appellants' argument that the Respondents' offer relating to the Appeal was not a genuine offer. The Court also rejected the Appellants' argument that the double Costs should not be awarded because, while unsuccessful, the Appeal was not unsound. The Respondents were successful in the Appeal, and had made a genuine Offer that the Appellants rejected. The Respondents were entitled to a double Costs Award.

COCHRANE (TOWN) V AUSTECH HOLDINGS INC, 2022 ABCA 377

(WATSON, STREKAF AND HO JJA)

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

This was an Appeal from the Decision of a Case Management Judge which had dismissed the Appellants' Actions for delay pursuant to Rule 4.31. The Application was with respect to two Actions relating to failures of retaining walls in a residential property development in Cochrane. The first claim was commenced in April 2011 by the town as against 58 Defendants. In July 2011, 69 homeowner Plaintiffs filed a second Statement of Claim as against 89 Defendants, including the Town of Cochrane.

In May and June of 2019, five groups of Defendants successfully applied to have the Actions dismissed for delay, which Applications were heard together. On Appeal, the Court considered the standard of review applicable to a Decision under Rule 4.31, noting that whether an Action should be dismissed for delay engages a certain element of discretion and unless the exercise of that discretion is based on an error in principle, or is clearly unreasonable, deference is warranted on Appeal.

The Court commented on the wording of Rule 4.31 which refers to delay in an Action and requires a review of the entire Action, and not segments. Delay is always a matter of degree; the differential between the theoretical standard of what point on the litigation spectrum a reasonable litigant would have reached, and any particular case is incapable of precise definition. In upholding the Decision of the Case Management Judge, the Court of Appeal noted that the proper framework was followed and, in particular, the Court found that a reasonable litigant, after eight years, would have at least conducted some, if not all, Questioning. In addition, after eight years, the Appellants had not obtained a single expert report that could be used at Trial. At the time the dismissal Applications were filed, the Actions were far from being ready for Trial and there was virtually no activity on most of the essential steps necessary to move the litigation forward.

The Court further upheld the decision of the Case Management Judge with respect to rejecting the argument that the Defendants had acquiesced to delay through their conduct or silence and the consideration of prejudice. Noting the Case Management Judge was aware of the meaning of "prejudice" and "significant prejudice", the Case Management Judge was also aware that the prejudice must arise from the delay. The conclusion that there had been significant prejudice is a question of mixed fact and law and the Court of Appeal found that the Appellants failed to establish that the Case Management Judge had made palpable and overriding errors.

EASY LOAN CORPORATION V BASE MORTGAGE & INVESTMENTS LTD, 2022 ABKB 803

(NEUFELD J)

Rule 4.31 (Application to Deal with Delay)

The Applicant sought an Order authorizing the seizure and sale of certain residential property pursuant to an assignment of a receiver's rights in the Applicant's favour.

In response, the Respondent argued that the Application should be dismissed due to the delay in pursuing it, pursuant to Rule 4.31. The Respondent argued that if the receiver wanted to pursue this Application, it could and should have done so when the Application was originally filed several years prior. The Respondent stated that the delay led to prejudice; namely, his inability to refinance, sell, or take financial management of the residential property for several years.

The Court did not accept the Respondent's argument and found no evidence of the significant prejudice required under Rule 4.31.

Notwithstanding the failure of the Respondent's delay argument, the Court denied the Application for seizure and sale on the basis that it was premature.

EDINBURGH TOWER DEVELOPMENT LTD V CURTIS, 2022 ABCA 419

(WAKELING, PENTELECHUK AND ANTONIO JJA)

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

The Respondents applied to dismiss the Action for delay under Rules 4.31, 4.33, and 4.34(4). Malik J., the Chambers Justice, had dismissed the Action under Rules 4.31 and 4.33. The Appellants appealed that Decision. The Appeal was dismissed.

Having found that a six-year period of inactivity on a straightforward litigation was inordinate, Malik J. had dismissed the Action under Rule 4.31. The delay was also found to be inexcusable as the Appellants failed to take steps to advance the Action and to avail themselves of remedies available. The inordinate and inexcusable delay was held to give rise to a presumption of significant litigation prejudice, which the Appellants failed to rebut. Malik J. had held that, alternatively, the Action could be dismissed under Rule 4.33 as steps taken after 2013 had not significantly advanced the Action. In reaching this conclusion, Malik J. commented that steps such as filing a Notice of Appointment for Questioning or an Application to set a Trial date typically would not qualify a significant advance. While the Appellants' ongoing document production efforts was relevant, it was not determinative given the overall lack of progress in moving the Action forward.

The Court of Appeal held that the Appellants failed to identify any reviewable error under the Rule 4.31 Application. The Court of Appeal

further noted that Malik J.'s Decision to dismiss the Action was a discretionary one subject to deference on Appeal.

The Court of Appeal noted that the Appellants bore the primary obligation in moving the Action forward and should have resorted to available remedies. Malik J. had made no reviewable error in concluding that there was no support for the allegation that the Respondents deliberately obstructed or otherwise stalled the Action. The Court of Appeal found that, under the Rule 4.33 Application, Malik J. correctly stated and applied governing tests and principles. Malik J. correctly considered substance and not form in determining what constitutes a "significant advance". The Court of Appeal further held that Malik J.'s finding that the Appellants had failed to advance the Action in a meaningful way was supported by the record and should not be disturbed on Appeal.

The Appeal was decided without resorting to Rule 4.34(4), which would allow an Application to dismiss the Action for delay under Rule 4.31 if an Order to continue an Action is not made within a reasonable time after the date on which the Action is stayed.

DIOTTE V 2 CUZ'N TRUCKING LTD, 2022 ABKB 741

(APPLICATIONS JUDGE SCHLOSSER)

Rules 4.33 (Application to Strike for Delay) and 13.18 (Types of Affidavit)

This was an Application to strike for delay pursuant to Rule 4.33.

The Court noted that Rule 13.18(3) provides that if an Affidavit is used in support of an Application that may dispose of all or part of a claim, the Affidavit must be sworn on the basis of the personal knowledge of the deponent. The Court also noted that Rule 13.18(3) has been treated as a restatement of the best evidence rule.

The Court emphasised that a Rule 4.33 Application is a "final Application" in that it may dispose of all or part of a claim. As such, a high standard of evidence is required. The supporting Affidavit on this Application was based entirely on hearsay, and the Court noted that hearsay evidence may be received in a final Application if it meets those criteria and would otherwise be admissible at Trial. The Court noted that the Applicant should swear to the events that are not reflected on the Court file. Some of this may be based on information and belief, given that the Applicant may not be privy to every event on the file.

The Court ultimately dismissed the Application, having found that the Applicant had failed to establish a *prima facie* case with personal firsthand evidence, or evidence that would otherwise be receivable at Trial.

TASCHUK V TASCHUK, 2022 ABKB 786

(LOPARCO J)

Rule 4.33 (Dismissal for Long Delay)

This was an Application to dismiss two related proceedings pursuant to Rule 4.33 for long delay.

The underlying proceedings were an Action between a husband and wife for divorce and related relief, and a surrogate Action for maintenance and support, initiated by the wife against the husband's estate following the husband's passing. The Application to dismiss for long delay was brought by the deceased husband's estate. The last non-controversial step to advance the divorce Action was the issuance of a divorce Judgment, filed August 15, 2016. The last non-controversial advancing step in the surrogate Action was a Chambers appearance on November 29, 2017, wherein hearing of the wife's Application for maintenance and support was adjourned to Special Chambers. The Special Chambers hearing was later adjourned *sine die* by consent.

The Court noted several general principles applicable to Applications pursuant to Rule 4.33 and whether a step "significantly advances" the Action, so as to preclude Rule 4.33. The inquiry considers whether the purported advance moves the lawsuit and its resolution forward in an essential way, considering the step's nature, value, importance and quality. The genuineness and the timing of the advance in the Action are also relevant, with a focus on substance and effect over form. In addition, the Court clarified that a step required by the Rules is not necessarily a significant step and that the Court does not have discretion to allow the Action to continue if the requirements of the Rule are met. The Plaintiff bears the ultimate responsibility of prosecuting its claim.

Turning to the arguments before it, the Court concluded that correspondence between counsel for the wife and previous counsel for the husband prior to his passing did not qualify as a standstill agreement for purposes of a Rule 4.33 and could not be relied upon, particularly in the absence of notice to counsel for the husband's estate, following the husband's passing. Further, the Court held that the wife's Application to consolidate the two Actions, filed February 21, 2019, but later adjourned *sine die* by consent, did not represent a significant advance, since the Application was not ultimately prosecuted. On this point, the Court noted that, upon the husband's estate filing its Application pursuant to Rule 4.33, the wife became unable to insist that the consolidation Application be heard in priority and the husband became entitled to refuse further participation in the Action, pending the Rule 4.33 Application. Other steps, including service of an Affidavit of Records, were not found to have significantly advanced the Action in the absence of argument that they had, since no presumption could be made as to their advancement of the Action.

Both Actions were struck pursuant to Rule 4.33.

ROSS V RANCHO REALTY (EDMONTON) LTD, 2022 ABKB 820

(NEILSON J)

Rule 4.33 (Dismissal for Long Delay)

The Plaintiffs in two concurrent Actions sought to appeal Orders of an Applications Judge dismissing the Actions for long delay, pursuant to Rule 4.33.

In both Actions, responses to undertakings were provided on or around May 29, 2018. Applications to approve a litigation plan were then filed in each Action on July 20, 2021. These Applications were approved on August 10, 2021 and entered on August 31, 2021.

The Applications to dismiss the Actions for long delay were made on August 13, 2021.

Neilson J. considered the extension granted to limitation periods due to Covid-19 under Ministerial Order 27/2020. His Lordship held that the extension applied to the computation of time under Rule 4.33, and to apply to dismiss the Actions before the additional 75 days had lapsed would be premature.

Applying the extension, Neilson J. found that the Orders to approve the litigation plans were applied for, and heard, within the allotted 3 years and 75 days under Rule 4.33. He then considered whether the Orders to approve the litigation plans significantly advanced the litigation. Citing to *Patil v Cenovus Energy Inc*., 2020 ABCA 385, Neilson J. reversed the Decision of the Applications Judge, holding that obtaining the litigation plans did significantly advance the litigation for the purposes of Rule 4.33. In His Lordship's Judgment, Neilson J. emphasized that Rule 4.33 was not intended to determine what a "reasonably diligent litigant" would do, but to "prune out actions that have truly died."

CRAWFORD V MARSH, 2022 ABKB 815

(HOLLINS J)

Rule 4.33 (Dismissal for Long Delay)

Justice Hollins considered the Defendant's Application to dismiss the Plaintiff's claim for long delay pursuant to Rule 4.33. Specifically, Justice Hollins considered whether the Defendant's Reply to a Notice to Admit Facts was a step that significantly advanced the Action. Justice Hollins canvassed the jurisprudence and emphasized that the Court is to undertake a functional analysis to determine whether a step significantly advanced the Action.

Ultimately, Justice Hollins noted that the admission contained in the Reply to the Notice to Admit Facts was a needless admission as the Defendant had previously, during the Questioning process, substantially admitted to the fact in question. Therefore, the Action was not advanced by the Reply to the Notice to Admit Facts. As a result, Justice Hollins dismissed the Action pursuant to Rule 4.33.

MF V RM, 2022 ABKB 721

(MATTIS J)

Rules 5.2 (When Something is Relevant and Material), 5.11 (Order for Record to be Produced) and 5.33 (Confidentiality and Use of Information)

In the context of litigation related to allegations of abuse during childhood foster care, the Plaintiff applied for the production of certain records. Under Rule 5.11, which permits the Court to order the production of relevant and material records where such records have been omitted from an Affidavit of Records, the Plaintiff sought: (1) the names and last-known contact information of other children who were placed in the same foster home; and (2) the complete, unredacted childcare file relating to a child who had made similar allegations.

The Court considered the framework for the disclosure of records under both the Rules and the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 (the "*CYFEA*"). The Court stated that disclosure in this context was governed by the *CYFEA*, but its analysis was also informed by the Rules.

Under section 126.11(8)(c) of the *CYFEA*, the Court must consider the rights of the Parties to a fair hearing in making a determination on disclosure. The Court considered Rule 5.33, which requires that records disclosed in litigation be treated as confidential and used only in the Action in which they are produced. The Court weighed this requirement against the potential harm to the dignity and rights to privacy of the persons affected by the potential disclosure. The Court held that the Plaintiff's right to a fair hearing was an important consideration to be taken into account.

The Court also considered whether the records sought were relevant, material, and likely to advance the Plaintiff's position as set out under Rule 5.2, and which is an overlapping consideration under the *CYFEA.*

The Court stated that relevance is primarily determined by the issues raised in the Pleadings, while materiality relates to whether the information sought can help, directly or indirectly, to prove a fact in issue in the dispute. The Court held that the Plaintiff had not demonstrated that the records sought were relevant and material. Rather, the records sought would simply assist the Plaintiff in contacting the other children, which might possibly result in relevant and material information later being obtained.

The Court ultimately dismissed the Plaintiff's Application with respect to the majority of records sought, but held that a number of the records sought should be provided to the Court for further review as set out under the *CYFEA.*

ALTALINK, LP V SNC-LAVALIN ATP INC, 2022 ABKB 772

(FEASBY J)

Rules 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

The Plaintiff claimed against the Defendants in relation to an electrical line construction project. The construction project at issue previously formed part of a larger construction project, but the larger construction project was divided into two portions due to the availability of parts.

At Questioning, the Plaintiff's corporate representative refused to answer questions related to the second portion of the construction project on the basis that such questions were irrelevant and immaterial, because the parts at issue in this litigation, related to the first portion, were not used in second portion of the construction project.

The Defendants applied pursuant to Rule 5.25 for an Order compelling the Plaintiff's corporate representative to answer the questions which were objected to and undertakings which were refused.

The Court considered Rule 5.2(1), which provides that a question is relevant and material only if the answer to the question could reasonably be expected "to significantly help determine one or more of the issues raised in the pleadings" or "to ascertain evidence that could reasonable be expected to significantly help determine one or more of the issues raised in the pleadings". Under Rule 5.2, the Court explained, relevance is primarily determined by the Pleadings, whereas materiality relates to whether the information can help prove a fact in issue (directly or indirectly). The Court also observed that Rule 5.2 requires that, to be material, the information sought must have a degree of significance, measured by the potential of the information sought to prove a disputed fact.

The Court framed the issue here as whether broad Pleadings that put in issue the design of one piece of infrastructure make information about a second piece of infrastructure not mentioned in any Pleadings, relevant and material.

In the result, the Court ordered the Plaintiff's corporate representative to answer the refused questions and undertakings. The Court held that information about the second portion of the construction project could prove, by inference or otherwise, points in dispute in this litigation. This conclusion was due in large part to the many similarities between the projects.

WATSON V SCHLUMBERGER CANADA LIMITED, 2022 ABKB 646

(SIDNELL J)

Rules 5.11 (Order for Record to be Produced) and 7.5 (Application for Judgment By Way Of Summary Trial)

The dispute at issue concerned an employee's termination without cause which was set to be heard as a Summary Trial in accordance with the Rules. The Plaintiff requested the disclosure of particular records, but that request was refused by the Defendant (the "Disputed Disclosure"). The Plaintiff posited that an adverse inference should be drawn for failure to produce the Disputed Disclosure. The Court distinguished case law advanced by the Plaintiff with respect to the Disputed Disclosure where adverse inferences had been found, and additionally found that it would be improper to draw an adverse inference for the Disputed Disclosure at Summary Trial, because the Summary Trial Application did not set out such relief and only relief sought in an Application may be granted.

The Court noted that the correct procedure for obtaining undisclosed records that are relevant and material requires an Application under Rule 5.11, but determined that the Plaintiff had not provided a reason for not availing herself of a remedy in accordance with the Rule.

The Court additionally noted that the burden of proof to be met at Summary Trial under Rule 7.5 was on a balance of probabilities.

MAURIER V MAURIER, 2022 ABKB 856

(RENKE J)

Rules 5.35 (Sequence of Exchange of Experts' Reports) and 5.36 (Objection to Expert's Reports)

Justice Renke considered, *inter alia*, the Defendant's annual income with respect to child support payment obligations. The Defendant filed an expert report, which was filed late pursuant to an earlier granted Order. Justice Renke noted that this expert report was not provided in accordance with Rules 5.35 or 5.36.

Justice Renke, noting that the Plaintiff took no position on the late expert report except as to Costs, found the expert report to be admissible.

O'KANE V LILLQVIST-O'KANE, 2022 ABKB 661

(FEASBY J)

Rules 5.39 (Use of Expert's Report At Trial Without Expert), 5.40 (Expert's Attendance At Trial), 6.40 (Appointment of Court Expert) and 8.16 (Number of Experts)

The Parties were involved in a contested divorce with the main issues being the division of matrimonial property and spousal support. One of the issues that arose was the valuation of the Plaintiff ex-husband's business. In particular, the Plaintiff challenged the report of the business valuation expert. The business evaluation expert had been appointed by the Court pursuant to Rule 6.40. The Plaintiff hired his own expert to challenge the Court-appointed expert, resulting in a battle between the two experts. The Court took notice that the Parties had each influenced the views of the experts.

One component of the valuation included a condominium complex. The Plaintiff had produced multiple appraisals, and not all of those experts were called to testify. The Court held that it would have excluded all but one of the experts pursuant to Rule 8.16(1), but for the Parties agreeing on the admissibility of the expert reports. Accordingly, the Plaintiff was allowed to submit all of the expert reports.

The Plaintiff submitted an expert report form another appraiser on a different property. The expert was required to testify at Trial pursuant to Rule 5.40(1), but the expert was unable to do so. As a result, the Court held that the appraiser's report was removed from the agreed exhibits between the Parties, pursuant to Rule 5.39(1).

AMF V GHP, 2022 ABKB 758

(SIDNELL J)

Rules 6.3 (Applications Generally), 12.61 (Appeal from Provincial Court Order to Court of King's Bench), 12.62 (Duty of Court Clerks), 12.63 (Transcript) and 12.68 (Evidence)

The Appellant appealed the Order of a Provincial Court Judge granted on April 5, 2022 (the "April Order"). She initially sought to introduce new evidence on Appeal but withdrew that Application.

Sidnell J. noted that, per Rule 12.61, an Appeal of a Decision in family matters from the Provincial Court to the Court of King's Bench required an Appellant to file a Notice of Appeal in Form FL-33 within one month following the date on which the Order being appealed was pronounced. Per Rule 12.63, the Appellant was required to file a transcript of the hearing before the Provincial Court no later than 3 months following the filing of the Notice of Appeal, unless an Order had been made by a Judge of the Court of King's Bench prior to the expiry of the relevant period. Per Rule 12.62(2), upon receipt of the Notice of Appeal filed under Rule 12.61, the Clerk of the Provincial Court must forward the Order along with documents related to the Order, to the Court of King's Bench Clerk. Per Rule 12.68, the documents forwarded by the Provincial Court Clerk pursuant

to Rule 12.62 and the transcripts of the hearing form the record for the hearing of the Appeal.

The Appellant took umbrage with a January 25, 2022, interim without prejudice parenting Order ("January Order"), however she did not appeal this Order. Counsel for the Appellant argued that on April 5, 2022, he made an oral Application to lift the suspension of the Appellant's in-person parenting of some of the children under the January Order. Outside of certain questions in oral submissions, the record did not show that any Application was ever made or dismissed. The preamble of the April Order referred to the consent of counsel, however it was not labeled a "Consent Order". The April Order did not itself mention any Application made by the Appellant to lift the suspension of her in-person parenting time.

Her Ladyship noted that without a written Application, it was not clear what documents the Appellant referred to, which made establishing the Appeal Record more difficult. At the Appeal hearing, counsel for the Appellant referred to the Appellant's previously filed Affidavits but there was no record to show that they were before the Provincial Court on April 5, 2022. Sidnell J. listed several documents the Provincial Court Clerk had forwarded per Rule 12.68, which became the Appeal Record, and only one of them was an Affidavit from the Appellant. There was no Application to add records to the Appeal Record. Her Ladyship stated that without a written Application, there was nothing to bring to the attention of the Provincial Court what the Appellant thought was important. Sidnell J. further noted that at the Court of King's Bench, an Application must be brought in accordance with Rule 6.3, and the purpose of giving notice and compliance with Rule 6.3 is to ensure that a Respondent knows of the arguments to be addressed and to allow the Court to properly prepare for the hearing. Ultimately Her Ladyship found that counsel for the Appellant's submissions at the April 5, 2022, hearing did not constitute an Application and dismissed the Appeal.

CONSOLIDATED CIVIL ENFORCEMENT INC V SHIPALESKY, 2022 ABKB 718

(FETH J)

Rules 6.4 (Applications without Notice) and 13.18 (Types of Affidavit)

The Applicant applied by way of a without notice desk Application for a "permanent injunction" directing the Respondents to assist and co-operate with efforts to locate, seize and remove a loader, and an Order allowing the Applicant and any bailiff to seize and remove the loader from any location or the premises of any person.

The Applicant relied on section 5 of the *Civil Enforcement Act*, RSA 2000, c C-15 (the "Act") for the relief it sought, however that particular section stated that an Application made under the Act shall not be made on an *ex parte* basis unless expressly authorized by the Act or by the Rules. Rule 6.4 states that notice of an Application is not required to be served on a Party if the Court is satisfied that no notice is necessary or that serving notice may cause undue prejudice to the Applicant. Justice Feth noted that Applications without notice are extraordinary because they offend the fundamental principle that a Party has the right to be heard in Court before their rights are negatively affected. The instances in which the Court would hear such an Application were limited to instances where (i) the delay associated with

notice would result in harm, or (ii) where there was fear that the other Party would act improperly if notice was given.

Feth J. reviewed the evidence and noted that any assertion that the Respondents would try to avoid the Applicant or a bailiff was pure conjecture, and that there was no evidence that delay caused by serving the Respondents would harm the Applicants. Additionally, though Rule 13.18(3) directs that an Affidavit used in support of an Application that disposes of part of all of a claim must be sworn on the basis of personal knowledge of the person swearing the Affidavit, the Affiant in the immediate instance had relied upon hearsay evidence. Ultimately, His Lordship ordered that if the Applicant wished to proceed with the Application, it would need to do so on notice to the Respondent before His Lordship or before another Justice.

HARVEST OPERATIONS CORP V OBSIDIAN ENERGY LTD, 2022 ABKB 848

(ROMAINE J)

Rule 6.14 (Appeal from Applications Judge's Judgment or Order)

The Defendant appealed a Decision of an Applications Judge who had found that certain invoice amounts sought by the Plaintiff were not barred by the *Limitations Act*, RSA 2000 c L-12 and could be set off against the Defendant's counterclaim. Justice Romaine dismissed the Appeal and upheld the Applications Judge's Decision.

Rule 6.14 allows for the Appeal of an Applications Judge's Decision. The Appeal before Romaine J. was de novo, and the standard of review was correctness on all issues.

Under the agreements between the Parties, the Plaintiff had 180 days after each year-end to adjust certain invoices and provide them to the Defendant for payment. The invoices at issue were provided well after the 180-day period. Justice Romaine noted that the Applications Judge referred to *Bellatrix Exploration Ltd. v Penn West Petroleum Ltd.*, 2013 ABCA 10 for the proposition that the 180-day provision is rarely complied with in the oil and gas industry. Rather, the question is whether the delay in accounting was unreasonable in the circumstances. Like the Applications Judge, Romaine J. found that the Plaintiff's accounting delay was reasonable and in line with the Parties' business relationship and industry practice.

With respect to the Defendant's counterclaim, Justice Romaine agreed with the Applications Judge's analysis. When a Defendant is sued, it can raise any defences without fear of "being met by a period of limitation". In other words, no defence is subject to a time-bar. The Plaintiff, as Defendant-by-Counterclaim, was allowed to set-off time-barred claims against the Defendant's Counterclaim.

NOVOSELL V BOLSTER, 2022 ABKB 804

(LEMA J)

Rules 7.1 (Application to Resolve Particular Questions or Issues) and 10.31 (Court-Ordered Costs Award)

This was a Costs Decision resulting from a successful Application for partial Summary Dismissal. The successful Applicant sought 75% recovery of legal expenses incurred prior to issuance of a *Calderbank* offer and 100 % of expenses incurred thereafter.

The Summary Dismissal Application had involved an Application to dismiss one of 11 claims for declaratory relief respecting the ownership of parcels of land. The Applicant sought enhanced Costs on the grounds that the issues were complex, the Respondent had raised unnecessary arguments that had to be addressed, and the Respondent did not beat a *Calderbank* offer made by the Applicants. The Respondent argued that the issues were not complex, that it had advanced reasonable arguments, and that the Applicants had not properly proven their legal expenses. The Respondent also argued that any Costs Award should be set off against Costs awarded to it in earlier proceedings.

The Court awarded Schedule C Costs for steps taken up to the time of the *Calderbank* offer and double Costs for steps taken afterward. In making its determination, the Court noted that the facts were effectively common ground, the issues, though somewhat complex, were no more complex than those often encountered in similar contexts, and the "irrelevant and unnecessary" arguments advanced by the Respondent were not asserted in her Pleadings and so were not required to be addressed by the Applicant. The Court also observed that the partial Summary Dismissal Application should not have proceeded in the first place since it did not dispose of the Action or a material subset of it, there was no urgency necessitating partial summary adjudication, and no positive spill-over effects resulted. The Court also expressed concern that the 10 outstanding claims could similarly be subject to unnecessary Applications for partial Summary Dismissal. In support of its conclusion, the Court quoted case law discussing the rarity of Applications for partial summary adjudication and policy concerns associated therewith. In obiter, the Court commented that the same conclusion would likely follow had the Application proceeded pursuant to Rule 7.1.

Regarding the Respondent's claim for setoff against Costs previously awarded in her favour, the Court held that, while setoff in costs may be appropriate pursuant to Rule 10.31(4), the absence of quantification of the prior Costs Award made setoff premature.

1921645 ALBERTA LTD V FCT INSURANCE COMPANY LTD, 2022 ABCA 400

(SLATTER, PENTELECHUK AND FEEHAN JJA)

Rules 7.1 (Application to Resolve Particular Questions or Issues), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

This was an Appeal with respect to whether a title insurance policy covered local improvement charges that became payable in the years after the closing of the transaction.

The Defendant appealed a Chambers Judge's Order determining the Trial of an issue pursuant to Rule 7.1 and granting Summary Judgment pursuant to Rules 7.2 and 7.3. The entirety of the analysis considered principles of contractual interpretation.

Ultimately, Slatter J.A. and Pentelechuk J.A. found that local improvement charges that became payable commencing in 2016 were not covered by the policy of title insurance and allowed the Appeal, dismissing the claim. Feehan J.A. dissented.

ARDMORE PROPERTIES INC V STURGEON SCHOOL DIVISION NO 24, 2022 ABKB 674

(NEILSON J)

Rule 7.3 (Summary Judgment)

This was an Application for injunctive relief by the Plaintiff, and a Cross-Application for Summary Dismissal of the underlying Action by the Defendant. The underlying Action concerned alleged leakage from a sewage lagoon, giving rise to tort liability and substantial associated damages.

The Court denied injunctive relief based on the Plaintiff's failure to demonstrate satisfaction of the applicable test. The Cross-Application for Summary Dismissal of the Action was granted pursuant to Rule 7.3, on the basis that the Defendant had demonstrated that the Plaintiff's Statement of Claim had no merit based on the well-developed evidentiary record.

In granting Summary Dismissal of the Action, the Court noted that Summary Dismissal may be granted where the Court is able to reach a fair and just determination on the merits, having regard to the available evidentiary record. If the Defendant is the moving party, it must prove that there is "no merit" to the claim and that there is no genuine issue requiring Trial. The Plaintiff can resist Summary Dismissal by persuading the Court that there is a genuine issue requiring a Trial, or in other words that the Defendant has not met that aspect of its burden.

WESLEY V ALBERTA, 2022 ABKB 713

(NEUFELD J)

Rule 7.3 (Summary Judgment)

This was an Application brought pursuant to Rule 7.3 by the Defendants, Alberta and Canada, for Summary Dismissal of a wide-ranging Action concerning alleged Indigenous rights and land. The Defendants' Application, which followed significant pre-Trial discovery and litigation, was argued on the basis of defences under the *Limitations Act,* RSA 2000, c L-12 and the equitable doctrine of laches. In response, the Plaintiffs argued that the Action was for declaratory relief and, therefore, statutory time bars did not apply. Additionally, the Plaintiffs raised constitutional and related arguments.

In deciding the Application, the Court cited governing case law for the proposition that Summary Dismissal may be granted where it is procedurally fair to do so in light of factual and legal questions before the Court, having regard to the four-part test articulated in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49.

Considering the undisputed facts and law in issue, the Court went on to conclude that some, but not all, of the Action could be summarily dismissed. In particular, claims for remedial relief and declarations of breach of fiduciary duty and trust obligations, which were found to be necessarily remedial, were dismissed. Other requests for relief were left intact. In severing those parts of the Action that should not be dismissed, the Court noted, among other things, the value of declaratory relief as a mechanism for clarifying the rights and entitlements of Indigenous people and informing actions required to maintain the honor of the Crown, the time and expenses already poured into the litigation, and uncertainty in the law regarding application of limitations and laches to claims for declarations of Indigenous rights and title. The Court also noted the desirability of reserving matters of treaty interpretation to determination in the context of a properly pleaded and litigated civil Trial.

GEOPHYSICAL SERVICE INCORPORATED V PLAINS MIDSTREAM CANADA ULC, 2022 ABKB 722

(POELMAN J)

Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal pursuant to Rule 7.3. Poelman J. considered Rule 7.3 and canvassed the leading Alberta jurisprudence on Summary Judgment. Of significance to Justice Poelman's analysis was that the Plaintiff had previously applied for partial Summary Judgment; however, Justice Eidsvik had found that the Plaintiff failed to prove its damages.

In response to the Defendants' Summary Dismissal Application, the Plaintiff suggested that one of the claims made against the Defendants still remained alive (being a claim that a notice provision was breached in a contract),

but the Plaintiff did not submit any additional evidence to support its claim or to rebut the Summary Dismissal Application this point. The Defendants put forward a full record in support of their Summary Dismissal Application. Justice Poelman found that it would be perverse to allow the claim for a technical breach of contract to survive in the absence of any evidence from the Plaintiff, since in the earlier Summary Judgment Application that was advanced by the Plaintiff, Eidsvik J. had dismissed the Application. Poelman J. concluded that the Defendants were entitled to Summary Dismissal in respect of the remaining claims and dismissed the Action in its entirety.

ALI V PAKISTAN CANADA ASSOCIATION OF EDMONTON, ALBERTA, 2022 ABKB 812

(ACKERL J)

Rule 8.20 (Application for Dismissal at Close of Plaintiff's Case)

The Plaintiff sued the Defendant corporation for breach of contract and defamation. At the close of the Plaintiff's case, the Defendant applied for a non-suit pursuant to Rule 8.20. The Court allowed the Defendant's Application in part.

Under Rule 8.20, at the close of the Plaintiff's case, the Defendant may ask the Court to dismiss an Action on the ground that no case has been made. Ackerl J. noted that when making an Application for a non-suit under Rule 8.20, it is no longer necessary for the Defendant to elect whether they will call evidence.

Ackerl J. cited *Capital Estate Planning Corp v Lynch*, 2011 ABCA 224, which sets out the test for a non-suit, and noted that there are two relevant principles that guide the inquiry: (1) if a Plaintiff puts forward some evidence on all elements of its claim, the Judge must dismiss the motion; (2) in assessing whether a Plaintiff has made out a *prima facie* case, the Judge must assume the evidence to be true and must assign 'the most favourable meaning' to evidence capable of giving rise to competing inferences. Ackerl J. commented that at this stage, the Trial Judge does not weigh the evidence or assess credibility, but assumes the Plaintiff's evidence is true and draws all reasonable inferences from it. Ackerl J. further commented that the question is whether there is "evidence against the respondents with respect to the elements of each cause of action, which, if left uncontradicted, a reasonable trier of fact could find in its favour".

Ackerl J. granted the Application for a non-suit with respect to the breach of contract claim. His Lordship did so having found that the Plaintiff failed to provide any evidence that the Parties intended to enter into a legal relationship. Ackerl J. also granted the Application for a non-suit with respect to one of the defamation claim having found that there was no evidence on the record to show that the defamatory statement was published to a third party. Ackerl J. did not grant the Application for a non-suit with respect to another defamation claim, having found that the Plaintiff had put forward enough evidence, which, if true, would support that claim.

MCCLELLAND V HARRISON, 2022 ABKB 852

(NIELSEN ACJ)

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

The Parties were simultaneously adverse in family and civil proceedings. One party, Ms. Harrison, was self-represented. She engaged in abusive and bullying conduct via email with the Court. She was prohibited from further email communications with the Court but breached that prohibition, sending over seventeen emails to the Judicial Assistant repeatedly using profanity directed at the Judicial Assistant and the Justice in the family Action.

In recognition of the Court's inherent jurisdiction to make Orders to control its own process, Nielsen A.C.J., ordered that Ms. Harrison be prohibited from all communication with the Court except filed or mailed documents. Justice Nielsen warned that if Ms. Harrison failed to abide by this Order, she would face penalties under Rule 10.49. Consent to the form of Order was not required from Ms. Harrison pursuant to Rule 9.4(2)(c).

ANGLIN V RESLER, 2022 ABKB 685

(GILL J)

Rule 9.12 (Correcting Mistakes or Orders)

The court considered the issue of when a Court can correct a signed Order. Justice Gill, as Case Management Judge, signed an Order arising from a reconsideration filed by the Plaintiff (the "Reconsideration Application"). Justice Gill dismissed the Reconsideration Application and counsel for the Plaintiff provided a form of Order to the Respondent's counsel (the "Reconsideration Order"). The Plaintiff revised the Reconsideration Order to state that "The Plaintiff is entitled to [C]osts", instead of the Respondent.

In response to the Reconsideration Application, the Respondent requested the Application be dismissed with Costs. Justice Gill dismissed the Reconsideration Application, but the Court failed to specify dismissal "with Costs" in the Reconsideration Order. Justice Gill stated that it was his intention to award the Respondent Costs as requested. Justice Gill retained jurisdiction to correct the error. The Court also recognized that by making this Application, the Plaintiff was trying to take advantage of the errors made by the Court and force the Respondent to pay Costs. However, the Court noted that such an outcome would be absurd and grossly unfair to the Respondent.

The Court granted the Rule 9.12 Application with Costs to the Respondent and amended the Reconsideration Order to award Costs to the Respondent.

AAG V JLG, 2022 ABKB 818

(DILTS J)

Rules 9.12 (Correcting Mistakes or Errors), 9.14 (Further or Other Order after Judgment or Order Entered) and 10.29 (General Rule for Payment of Litigation Costs)

Following a Trial Decision, issues arose between the Parties with respect to the Defendant's non-payment or late payment of child support, and his inability to pay the Costs awarded following Trial. Justice Dilts noted at the outset that Costs, when ordered, are payable forthwith pursuant to Rule 10.29, absent other direction from the Court.

Some time after the Trial Decision, the Defendant filed for bankruptcy. The Plaintiff brought several Applications in relation to the consequences of the Defendant's bankruptcy, but relevant here was the Plaintiff's Application seeking an apportionment of the Costs awarded following Trial to family support and maintenance.

Justice Dilts, who presided over the Trial, began the analysis by considering the rule of *functus officio*, which states that "the court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been error in expressing the manifest intention of the court." The Court observed that the exceptions to the rule are codified in Rule 9.12, which grants the Court the power to correct certain mistakes or errors in a Judgment or Order.

Justice Dilts also noted that Rule 9.14 gives the Court authority, following a Judgment or Order, to make any further Order that is required to give effect to the Court's original intention. The Court cited several examples of Rule 9.14 being applied in family proceedings to apportion a Costs Award in order to clarify and give effect to the Court's intention, including *Yassa v Parker,* 2018 ABQB 305.

Justice Dilts concluded that had she been aware of the Defendant's intention to make an assignment into bankruptcy at the time of issuing the Costs Decision following Trial, she would have addressed the apportionment of Costs at that time. In the result, the Court held that the majority of the time spent at Trial involved evidence or argument bearing on child support and spousal support and that therefore it was appropriate to allocate 70% of the Costs Award as relating to family support and maintenance and thus was not extinguished by the Defendant's discharge following bankruptcy.

VINAGREIRO V VINAGREIRO, 2022 ABKB 678

(ANGOTTI J)

Rule 9.13 (Re-opening Case)

This was an Application for variation of both retroactive and ongoing child support. As a preliminary matter, the Court addressed an issue arising two days following oral submissions at which time the Respondent contacted the Court seeking to provide further information. The Respondent clarified that he wanted to make further submissions, as opposed to introduce new evidence, as he argued that the submissions of the Applicant's counsel were too confusing and long such that he was unable to respond. He was concerned with time as he had booked a doctor's appointment in the afternoon, and he was a self-represented party and found it difficult to be prepared for Court.

The Court, in denying the Respondent's request for further submissions, found that the Rules do not deal directly with a situation after a Hearing and prior to any Order or Judgment being given. While Rule 9.13 sets out the rules for further submissions when an Order or Judgment has been given but not entered, that power is exercised only in exceptional circumstances such as procedural irregularity, abuse of process, the need to correct an inadvertent and obvious error, fraud, or the discovery of new evidence. It is not meant to permit re-argument of a case.

Noting that the Court had jurisdiction to hear further submissions on the matter, as with Rule 9.13, Angotti J. held that such jurisdiction should be exercised sparingly and only in exceptional circumstances. The Court held that when a litigant does not take responsibility for preparation of their matter or does not ensure that other personal matters do not interfere with their ability to present the case, the litigant has not established the exceptional circumstances necessary for the Court to exercise its discretion to permit further argument.

HOFFMAN V DE BAENE, 2022 ABKB 715

(KUBIK J)

Rules 9.13 (Re-opening Case), 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

Following Trial, the Defendant applied for a reconsideration of Justice Kubik's finding as to the valuation of a corporation pursuant to Rule 9.13. The Parties also sought a determination by the Court as to Costs.

Justice Kubik declined to vary the Trial Decision because Her Ladyship found no error to be corrected as contemplated by Rule 9.13.

With respect to Costs, Justice Kubik cited Rule 10.29 for the general proposition that the successful Party in an Action is entitled to a Costs Award, subject to the Court's discretion. Her Ladyship considered the factors under Rule 10.33 and held that due to their mixed success, and the absence of any other intervening factor, the Parties should bear their own Costs.

SSG V SKG, 2022 ABCA 379

(SCHUTZ, KHULLAR AND KIRKER JJA)

Rule 9.13 (Re-opening Case)

This Appeal considered the limits of a Trial Judge in a high-conflict family law dispute. Following a 27-day Trial over 23 months, the Parties could not agree on the final terms of the Order despite a detailed parenting plan and terms contained in the Judgment (the "Order"). Thus, the Trial Judge prepared the Order for them. The Order required the Parties to retain a parenting coordinator with powers to arbitrate day-to-day parenting plan conflicts or decision-making conflicts. The Order also limited the circumstances in which the Parties could apply to vary the child support.

Citing new developments since the closing of evidence, the father successfully applied under Rule 9.13 to vary the terms of the Order. Rule 9.13(b) states that "At any time before a judgment is entered, the Court may … on application, and if the Court is satisfied there is good reason to do so, hear more evidence and change or modify its judgment or order or reasons for it". Rule 9.13 Applications are decided by the Judge or Applications Judge who granted the original Judgment or Order.

After the Trial Judge varied the Order under Rule 9.13, the mother appealed it on the grounds that arbitration was imposed on the Parties without their consent, and that the Order improperly restricted the Court's jurisdiction to vary the child support for the Parties. The Court of Appeal allowed the Appeal.

Writing for the Court, Kirker J.A. noted that despite the Trial Judge's noble intention to discourage ongoing litigation, a Judge does not have the jurisdiction to order Parties to arbitrate their disputes, unless the Parties agree or are required to do so by statute. There was no agreement and no statutory requirement for the Parties to use a parenting coordinator to arbitrate their parenting disputes.

Lastly, the Court of Appeal noted that neither the Divorce Act, RSC 1985, c 3 (2nd Supp) nor the *Federal Child Support Guidelines*, SOR/97-175 authorized the Trial Judge to limit the circumstances in which the Parties could apply to vary the child support.

BIG PLANS FOR LITTLE KIDS LTD V SOUSTER, 2022 ABCA 384

(MARTIN, FEEHAN AND HO JJA)

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

The Appellants had previously sought to set aside a without notice preservation and replevin Order. In the Decision below, the Chambers Judge had refused to hear the Appellant's Application because it was brought outside the 20-day statutory period under Rule 9.15(2).

Consequently, the Appellants had applied to extend the 20-day deadline. The Application had been dismissed and the Appellants then appealed it.

The Court of Appeal noted that Rule 9.15(2)

stipulates that a Party can apply to set aside, vary or discharge a without notice an Order provided that "unless the Court otherwise orders", it applies within 20 days after the earlier of the (a) the date of service and (b) the date on which the Order came to its attention. The Court of Appeal noted that the interpretation of a Rule is a question of law reviewed on the correctness standard. The application of the Rule to particular facts is a question of mixed fact and law and is reviewed for palpable and overriding errors. Absent an error of law or principle, Rule 9.15 decisions are entitled to deference and will be varied only if unreasonable.

The Appellants had waited for over a year before they applied to set aside the preservation and replevin Order. They then waited a further three-and-a-half months before they applied to extend the 20-day period. The Court of Appeal held that there was no need for appellate intervention because the Chambers Judge did not commit an error of law or principle, nor did she misapply the case law on time extensions. The Court of Appeal held that it was appropriate for the Chambers Judge to consider the timing of the Appellant's Application given that Rule 9.15(2) contains express language requiring an Application to be made within 20 days.

The Court of Appeal held that while Rule 9.15 is discretionary, if a party has willfully or intentionally delayed applying for an extension of time, the Court may require an explanation for such delay and assess its reasonableness in the circumstances.

The Court of Appeal dismissed the Appeal.

BARRY V INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC (IAF), 2022 ABKB 706

(FEASBY J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyer's Non-Compliance with Contingency Fee Agreement) and 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review)

The Application concerned a Costs Award granted against a Defendant assessed as a percentage of a contingency fee agreement between the Plaintiff and their counsel. The Defendant advanced an argument contesting the validity of the Contingency Fee Agreement (the "CFA") and the reasonableness of the contingency fee and asserted Costs such that they should be calculated in accordance with Rule 10.2, and not as a percentage of the damages Award.

The Court noted that the CFA did not meet several of the requirements set out in Rule 10.7, which sets out requirements to ensure the terms of a contingency fee are clear and that the client has executed and been provided with a copy of the agreement. The Court noted that in accordance with Rule 10.8, a Court is required to assess a lawyer's reasonable compensation pursuant to Rule 10.2 where an invalid contingency fee agreement is found, with no weight given to the invalid contingency fee agreement.

The Plaintiff had been successful on a Summary Judgment Application. The Court noted that the CFA only provided percentage recoveries for the lawyer where the matter was settled or where there was Court Order

after the matter had proceeded to Trial. The Court noted that Summary Judgment was a dispositive Application occurring prior to Trail and therefore distinct from a settlement or a Court Order after a Trial. The Court found that the Plaintiff and their counsel entered into an agreement with respect to the circumstance at issue (re: the successful Summary Judgment Application), and although it was a reasonable compromise, it was an agreement after the fact and therefore did not comply with Rule 10.7 and as such the Court was not bound by the agreement in its assessment of reasonableness of the fees as between the solicitor and client.

The Court noted that even if the CFA had specified the fee applicable when the case was determined by a dispositive pre-Trial Application and had complied with Rule 10.7, Rule 10.9 enables a Court to review a contingency fee provided by a valid agreement for reasonableness. The Court additionally understood there was nothing in Rule 10.2 that operated to preclude a reasonable amount of compensation for a lawyer's services being calculated based on a percentage of a Court's damages Award, and that a Court may determine a lawyer's reasonable compensation as a percentage of a damages Award in the absence of a contingency fee agreement.

In accordance with Rule 10.2, the Court noted that the nature of the matter and circumstances of the client and found that the only realistic way that the claim could have been advanced was if counsel took on the financial risk of working for free and bearing the cost of disbursements. The Court found that the circumstances merited compensation based on a percentage of damages Award. The Court distinguished the present circumstances from other cases on the basis the claim advanced was complex, required an investigation in a foreign country, and the Defendant had made it clear from the outset that the claim would be resisted. The Court found that the Plaintiff was faced with a determined adversary and that their counsel "delivered an outstanding result".

The Court noted that the claim was resolved by Summary Judgment which avoided the effort and expense of a full Trial, and as therefore the "high percentage success fees" that are sometimes justified when a complex matter goes to Trial were not warranted in the circumstances. The Court determined that a 25% success fee applied to the damages Award and the interest which had accrued to the date of payment of the damages Award was appropriate. The Court additionally stipulated that the success fee would not be calculated on the Costs Award or disbursements. The Court ultimately found that the Plaintiff was entitled to recover 75% of the 25% success fee from the Defendant in addition to reasonable disbursements.

RATH & COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2022 ABKB 784

(JOHNSTON J)

Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Applicant sought Costs against the Respondent in relation to an Applications Judge's Decision and the Appeal from that Decision, as well as the Appeal from a separate Applications Judge's Decision. The Applicant sought a multiplier of three times Column 5 of Schedule C of the Rules. The Respondent argued that the Applicant should not be entitled to any Costs or, in the alternative, that Costs should be calculated under Column 3 of Schedule C with no multiplier.

The Applicant had been entirely successful in all proceedings. It argued that an enhanced Costs Award was appropriate due to the amount of the claim, its success, and the importance of the litigation.

The Court stated the general proposition that the successful Party is entitled to Costs, and that Rule 10.31 confirms that the Court should consider the factors under Rule 10.33 in ordering Costs.

The Court observed that the amounts involved in the claim were large, but may be subject to reductions by a Review Officer. Justice Johnston also noted that the matter was relatively lengthy, but that the issues were not complex (though voluminous materials were involved). The Court raised some concerns with respect to the Applicant's conduct in regard to the timing of its service of the Appointment under Rule 10.10.

In light of these considerations, the Court ordered Costs in favour of the Applicant under Column 5 of Schedule C of the Rules but, awarded no multiplier.

RATH & COMPANY BARRISTERS & SOLICITORS V STURGEON LAKE CREE NATION, 2022 ABCA 373

(KIRKER JA)

Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 13.5 (Variation of Time Periods) and 14.5 (Appeals Only with Permission)

The Applicants applied for permission to Appeal an Order of the Court of King's Bench, which had been an Appeal of a decision of an Applications Judge. The underlying issue was extending the time for service of a Notice of Appointment filed by the Respondent for a review of the Applicant's retainer agreement and fees invoiced for legal services rendered.

After the Applicant had rendered a final account to the Respondent, the Respondent filed a Notice of Appointment within six months, which was the time limitation in Rule

10.10. However, the Respondent did not serve the Notice until 10 days before the scheduled appointment with a Review Officer. The Chambers Judge heard an Appeal from an Application Judge's Decision where the Respondent applied to extend the time for service of the Appointment pursuant to Rule 13.5. This was allowed by the Applications Judge and upheld by the Chambers Judge.

The Respondent alleged that the Applicant required permission to Appeal an Order dealing with the extension for time for service. Rule 14.5(1)(b) states that permission to Appeal must be obtained for "any pre-trial decision respecting adjournments, time periods or time limits". The Applicant stated that this Rule should not apply because Rule 14.5(1)(b) would have the effect of determining the Applicant's substantive right to contest the Review Officer's jurisdiction to proceed with a Review. The Applicant argued that Rule 14.5(1)(b) is engaged only where an Appeal does not determine all or some significant part of a Party's substantive rights and is confined to Appeals of "interlocutory orders that schedule litigation steps or hearing dates".

The Court of Appeal noted that time limit variation pursuant to Rule 13.5 is a discretionary decision that attracts a highly deferential standard of review. The test for permission to Appeal is: "(a) the proposed appeal involves an important question of law or precedent; (b) the applicant has a reasonable chance of success; and (c) the appeal will not unduly hinder the progress of the action or cause undue prejudice".

The Court of Appeal noted that "where no error of law or fact can be identified, the decision to grant or refuse an extension will not be disturbed unless it is so aberrant that 'no reasonable judge regardful of his duty to act judicially could have reached it'". In the Court of Appeal's view, the Applicant did not have a reasonable prospect of success considering such a high threshold of standard of review, and granting permission to Appeal would unduly delay the Review. The Court of Appeal denied the Application for permission to Appeal.

IFP TECHNOLOGIES (CANADA) INC V ENCANA MIDSTREAM AND MARKETING, 2022 ABKB 807

(ANDERSON J)

Rules 10.20 (Action for Payment of Lawyer's Charges) and 10.33 (Court Considerations in Making Costs Award)

The Applicants applied for permission to Appeal an Order of the Court of King's Bench, which had been an Appeal of a decision of an Applications Judge. The underlying issue was extending the time for service of a Notice of Appointment filed by the Respondent for a review of the Applicant's retainer agreement and fees invoiced for legal services rendered.

After the Applicant had rendered a final account to the Respondent, the Respondent filed a Notice of Appointment within six months, which was the time limitation in Rule 10.10. However, the Respondent did not serve the Notice until 10 days before the scheduled appointment with a Review Officer. The Chambers Judge heard an Appeal from an

Application Judge's Decision where the Respondent applied to extend the time for service of the Appointment pursuant to Rule 13.5. This was allowed by the Applications Judge and upheld by the Chambers Judge.

The Respondent alleged that the Applicant required permission to Appeal an Order dealing with the extension for time for service. Rule 14.5(1)(b) states that permission to Appeal must be obtained for "any pre-trial decision respecting adjournments, time periods or time limits". The Applicant stated that this Rule should not apply because Rule 14.5(1)(b) would have the effect of determining the Applicant's substantive right to contest the Review Officer's jurisdiction to proceed with a Review. The Applicant argued that Rule 14.5(1)(b) is engaged only where an Appeal does not determine all or some significant part of a Party's substantive rights and is confined to Appeals of "interlocutory orders that schedule litigation steps or hearing dates".

The Court of Appeal noted that time limit variation pursuant to Rule 13.5 is a discretionary decision that attracts a highly deferential standard of review. The test for permission to Appeal is: "(a) the proposed appeal involves an important question of law or precedent; (b) the applicant has a reasonable chance of success; and (c) the appeal will not unduly hinder the progress of the action or cause undue prejudice".

The Court of Appeal noted that "where no error of law or fact can be identified, the decision to grant or refuse an extension will not be disturbed unless it is so aberrant that 'no reasonable judge regardful of his duty to act judicially could have reached it'". In the Court of Appeal's view, the Applicant did not have a reasonable prospect of success considering such a high threshold of standard of review, and granting permission to Appeal would unduly delay the Review. The Court of Appeal denied the Application for permission to Appeal.

IFP TECHNOLOGIES (CANADA) INC V ENCANA MIDSTREAM AND MARKETING, 2022 ABKB 807

(ANDERSON J)

Rules 10.20 (Action for Payment of Lawyer's Charges) and 10.33 (Court Considerations in Making Costs Award)

Justice Anderson was tasked with determining the amount payable to the Plaintiff pursuant to an accounting in this protracted litigation. Specifically, Justice Anderson considered what Costs were appropriate in relation to a six-week Trial that was held in 2011. The Defendants sought 75% of their Trial Costs, including disbursements for experts.

Justice Anderson considered relevant jurisprudence and noted that, under Rule 10.20, the successful Party is *prima facie* entitled to Costs. However, Justice Anderson noted that pursuant to Rule 10.33, the Court may consider any factor enumerated in the Rule. Further, Rule 10.33(2) enables the Court to consider if the conduct of a Party to the litigation unnecessarily lengthened the Action when imposing or varying a Costs Award.

After considering the relevant jurisprudence, Justice Anderson noted that despite the fact the Plaintiff was successful in some aspects of its claim, the majority of the Trial was spent

arguing an issue that they were ultimately unsuccessful on. As a result, Justice Anderson concluded that the Defendant was entitled to recover two thirds of its taxable Costs from the Plaintiff, while the Plaintiff was entitled to recover one third of its taxable Costs from the Defendant.

KIRK MONTOUTE DAWSON LLP V HEARN, 2022 ABKB 775

(HOLLINS J)

Rule 10.26 (Appeal to Judge)

The Appellant appealed a Review Officer's Decision to certify the amount the Appellant owed to the Respondent law firm. The Respondent previously represented the Appellant in an arbitration involving the division of matrimonial property and a claim for spousal support. After the arbitration, the Appellant refused to pay the outstanding invoices of the Respondent.

The Court noted that an Appeal of a Review Officer's Decision is an Appeal on the record pursuant to Rule 10.26. As such, the Court may only consider evidence that was before the Review Officer. The Court also noted that Rule 10.26 provides a great deal of discretion and allows the Court to confirm, vary, or revoke the Review Officer's Decision, send all or any part of it back to the Review Officer for reconsideration or substitute the Court's Decision for the Review Officer's Decision. The Court further noted that it is required to show deference to the Review Officer's Decision because the Review Officer has expertise in assessing legal Costs that most Judges of the Alberta Court of King's Bench do not.

The Court dismissed the Appeal. The Appellant argued that she was given less time to speak than the Respondent. However, after reviewing the transcript, the Court determined that the Appellant was given equal or more time to speak than the Respondent. The Appellant also argued that the Review Officer ought to have reduced the amount owing because the Respondent continued to work on her file after she told the Respondent to stop and due to various complaints about the Respondent's advocacy. After reviewing the underlying materials, the Court disagreed and upheld the Review Officer's Decision. The Court also dismissed the Appellant's arguments regarding breach of the *Charter* and breach of confidentiality after the Respondent accidently revealed the Appellant's address to opposing counsel.

CITF V THE MUSLIM COMMUNITY OF EDMONTON MOSQUE AND MUSLIM HOUSE, 2022 ABKB 672

(LEMA J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May be Made), 10.35 (Preparation of Bill of Costs) and 10.37 (Appointment for Assessment)

The Applicants sought quantification of their Costs entitlement after being successful in an earlier Application. After the Application, the Parties agreed to an arbitration. The Respondents asserted that the Costs from the earlier Application were folded into the issues to be determined at arbitration. Alternatively, the Respondents asserted undue delay by the Applicants in bringing the Application to seek quantification of the earlier Costs Award.

Justice Lema denied that the Costs had been folded into the arbitration and noted that the Respondents failed to identify any authority for the crystallization of a Costs Award. Justice Lema considered Rule 10.29 and identified that, typically, Costs must be paid forthwith. However, given that the quantum of the Costs Award was not finalized after the Application, Costs were not payable forthwith. Under Rule 10.30, Justice Lema noted the Rule enumerates that a Costs Award is to be made after a Judgment or final Order has been entered with respect to all other matters in the Action. Therefore, after the Costs Award is made, steps to quantify it are permitted. Justice Lema noted that none of the party-and-party Costs Rules, specifically Rules 10.28 through 10.45, imposed a deadline for quantifying a Costs Award.

Finally, Justice Lema stated that the absence of a strict time limit for awarding Costs can be dealt with pursuant to Rule 10.30. Notably, under Rule 10.30, either Party may request an Assessment of Costs pursuant to Rule 10.37. Further, Justice Lema noted that the Respondents could have requested a Bill of Costs pursuant to Rule 10.35.

Ultimately, after considering the relevant Rules related to Costs Awards, Justice Lema granted Costs to the Applicants.

FODOR V FODOR, 2022 ABKB 854

(FETH J)

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

This was a Costs Decision following a mixed success family law Summary Trial. The Defendant, Ms. Fodor, sought elevated Costs on the basis that she had been substantially successful and had previously attempted to reach a settlement by providing a *Calderbank* offer. The Plaintiff, Mr. Fodor, submitted that each Party should bear their own Costs since neither Party was substantially successful.

The Court noted general propositions relating Costs Awards made in light of *Calderbank* offers including that, while *Calderbank* offers are rel-

evant to Costs, double Costs or elevated Costs are not presumed; *Calderbank* offers, like any settlement proposal, must be clear, precise and certain to make a binding contract if accepted; and the Court may consider *Calderbank* offers in assessing Costs even where the offer falls short of the Trial outcome, including where the offer would have been a reasonable and proportionate compromise in all the circumstances. Referencing Rules 10.29 and 10.33, the Court further noted the general rule that a successful Party is entitled to Costs against the unsuccessful Party subject to the Court's general discretion and in light of the result of the Action, the degree of success of each Party, and other factors.

Noting successes by both Parties and agreements reached between the Parties based on Court-determined income and exemptions, the Court held that neither Party was substantially successful. The Court further noted that, unlike the Judgment, which provided for variation of spousal support, the *Calderbank* offer offered a fixed amount and that the *Calderbank* offer over-assessed Mr. Fodor's income by $100,000, the result of which would have been substantial overpayment of child support, had the offer been accepted. Given the modest additional litigation expense leading to Summary Trial, the Court held that the *Calderbank* offer was reasonably rejected. Considering the Parties' mixed success, the Court ordered that each party bear its own Costs.

BRILL V BRILL, 2022 ABKB 827

(NIXON J)

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

This was a Costs decision arising from an Action wherein the Defendant was the substantially successful. The litigation between the Parties had been ongoing since February 2009 and the Court procedure card was 21 pages long, listing 20 different Judges as having heard various Applications over the 13 years that the file had been with the Court system.

The Court turned to Rule 10.33, which lists the considerations that go into the determination of the amount of a Costs Award, as well as the options that the Court has in making a Costs Award as set out in Rule 10.31, specifically, the authority of the Court to direct one Party to pay to another Party a percentage of assessed Costs. The Court noted that the intention of a Costs Award is to balance the unfairness of requiring a successful Party whose conduct is not blameworthy to bear any Cost, and the chilling effect on Parties bringing or defending claims if the unsuccessful Party is required to bear all the Costs.

Ultimately, the Court considered all aspects of the file, including the fact that the Defendant was substantially successful on most issues. The Court exercised discretion to award approximately 40% of the legal fees incurred, and applied an additional 40% discount, as the conduct of the Defendant warranted a further reduction given his aggressive financial positions. Effectively, the Court noted that the Defendant was not an innocent party and his actions contributed to the 21-page procedure card.

GG & HH INC V 2306084 ALBERTA LTD, 2022 ABKB 834

(EAMON J)

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

Justice Eamon issued a Costs Endorsement related to two Applications. In the first Application, the Plaintiffs had previously obtained an interim injunction from Devlin J. In the second Application, Eamon J. set it aside in favour of the Defendants.

Justice Eamon noted that subject to the Court's discretion under Rule 10.31, a successful Party to an Application is entitled to a Costs Award against the unsuccessful Party. The purpose of Rule 10.31 is to ensure that the quantum of a Costs Award is reasonable and proper. As such, Rule 10.31 invites the Court to consider the matters described in Rule 10.33, including the complexity of the Action, the importance of the issues between the Parties, the conduct of a Party that shortened the Action, the degree of success of a Party, and apportionment of liability. Further, the Court may determine a reasonable and proper quantum based on any matters it considers relevant. Justice Eamon also noted that the Court may order Costs under Rule 10.31 to be payable with or without reference to the Schedule C tariff, on a multiple or fraction of the Schedule C tariff, on a percentage of assessed Costs, or in full or in part with respect to a particular issue or Application in a proceeding.

The Defendants sought enhanced Costs, being 70% of their solicitor and clients Costs. The Plaintiffs argued that the Defendants acted unreasonably and made unsubstantiated accusations, which should disentitle them from Costs. Furter, any Costs should be assessed by an Assessment Officer.

The Court noted that the interim injunction Application was "hotly contested". The Parties had lengthy and conflicting evidence. The complexity of the matter required the Parties to spend substantial effort to test the evidence. The Parties "went to great lengths to demonstrate the other had no credibility, should not be believed, or was guilty of bad motivations or intentions or bad conduct". Accordingly, a Costs Award based on the Schedule "C" tariff would be inadequate.

Justice Eamon found that an award of solicitor and Client Costs in favour of the Defendants was reasonable in the circumstances, but should not exceed 40%. This was in line with the Court of Appeal's decision in *McAllister v Calgary (City*), 2021 ABCA 25 which held that a partial indemnity of 40-50% of solicitor and client Costs is a reasonable target. Enhanced Costs were not appropriate on the facts. The Defendants did not receive Costs for steps taken that were unnecessary, led to inadmissible evidence, or in which they were substantially unsuccessful.

The Parties were directed to apply to the Assessment Officer if they disagreed on their respective solicitor and client accounts.

GOODSWIMMER V CANADA (ATTORNEY GENERAL), 2022 ABKB 841

(SULYMA J)

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

This was a Costs Decision arising from an Application to strike and/or summarily dismiss claims over a Treaty Land Entitlement (TLE) Agreement. The Plaintiffs unsuccessfully appealed the Decision and then unsuccessfully sought leave to Appeal.

The Court considered Rules 10.33 and 10.31 regarding the ability of the Court to impose, deny or vary a Costs Award as well as the relevant jurisprudence regarding party and party Costs as representative of partial indemnification of actual Costs incurred, assuming no misconduct by either Party.

The Defendant, Alberta, sought costs on Column 5 on two of the proposed Bill of Costs whereas the Defendant, Canada, sought Column 5 on all of its Bill of Costs. The Plaintiff argued that Costs should be based on a Column less than Column 5, asserting that the primary relief sought in relation to land was declaratory relief and that the damages were related to other live claims in the Action, such as the destruction of wildlife, the destruction and conversion of natural resources, and interference with aboriginal rights to use land in traditional territory.

The Court concluded that some multiplier of Column 5 is justified simply on the basis of the amount of the claims as well as the other factors set out in Rule 10.33, including that the claims were related to breaches of fiduciary and constitutional duties; had the Plaintiffs been successful, a large damages award and significant awards of lands would have significant fiscal and budgetary effects; the ultimate decision was lengthy and dismissed many arguments of the Plaintiffs ranging from abuse of process, effect of a release and indemnity, limitation periods, and the duty to consult; there were unfounded allegations of misconduct; and there were unnecessary and improper steps and Applications.

CMB V AMB, 2022 ABKB 847

(LEMA J)

Rule 10.31 (Court-ordered Costs Award)

The Costs Endorsement addressed the Costs arising from a property-and-support Trial (the "Property and Support Trial") and parenting Trial (the "Parenting Trial") between a mother (the "Mother") and a father (the "Father"). The Court determined that the Mother and Father would bear their own Costs for the Property and Support Trial, noting that overall success was evenly divided. The Court awarded $25,000 in Costs to the Father with respect to the Parenting Trial. Costs included the lead-up to the Parenting Trial, the applicable Schedule C activities, and any legal work associated with the Parenting Trial not falling under any of the Schedule C categories.

The Court understood that with respect to the Parenting Trial, the impact of the Father's self representing status was a threshold issue. The Court determined that Rule 10.31(5) was applicable. The Court reviewed the law with respect to Rule 10.31(5) and determined that the germane factors which impacted Costs in the circumstances were: the overall success of the Father, the Father's self representation, actual legal costs for the time that the Father had a lawyer, the Father's loss of employment during the Parenting Trial which the Court found was unrelated to the Parenting Trial, settlement offers made by the Father, none of which were matched or exceeded by the Parenting Trial outcome, and the sexual abuse allegations made against the Father.

The Court additionally noted that it was entitled to perform its own overall assessment of the reasonableness of Costs and that the ability to pay is typically not a factor when gauging Costs and awarded the Father Costs accordingly.

ROYAL BANK OF CANADA V ANDERSON, 2022 ABKB 733

(ROOKE ACJ)

Rule 10.49 (Penalty for Contravening Rules)

The Defendant was a highly active Organized Pseudolaw Commercial Argument litigant and vexatious litigant who was prohibited from any communication with the Alberta Court of King's Bench, with few exceptions, failing which, the Defendant would be subject to a penalty. The Defendant violated the Court's Order, twice communicating or attempting to communicate with the Court, and attempting to appear in Chambers, contrary to the Order.

The Court imposed penalties for all three incidents violating the Order, pursuant to Rule 10.49(1). In response to the Defendant's express promise not to pay any penalties, the Court also ordered the Defendant's banking institution to transfer payment for the penalties as Security for Costs within thirty (30) days. The banking institution was also allowed to recover the Costs of the transaction, which was to be approved by the Court on a subsequent Application.

The Court also ordered the Defendant's banking institution to transfer another amount as Security for Costs against the Defendant for future Court Costs and Rule 10.49(1) penalties.

R V AYYAZI, 2022 ABKB 836

(ROOKE ACJ)

Rule 10.49 (Penalty for Contravening Rules)

The Accused, Ali Mohamed Ayyazi (the "Accused"), was facing criminal Trial for cocaine trafficking. Following multiple failed appearances for Court hearings, an arrest warrant was issued for the Accused. On May 31, 2022, the Court received a package of materials that had been notarized by an Alberta lawyer (the "Lawyer"). The Lawyer had notarized pseudolaw documents for the Accused, which purported to defeat the arrest warrant, which the Court characterized as a "get of out jail free card". These pseudolaw strategies are known as Organized Pseudolegal Commercial Argument ("OPCA") concepts.

The Court's Decision in this case centred around the cost consequences for the Lawyer. Rooke A.C.J. found, in an earlier decision, that by notarizing the pseudolaw documents, the Lawyer participated in the Accused's OPCA schemes, either knowingly or by being willfully blind to her participation. Rooke A.C.J. invited the Lawyer to make submissions as to why she should not be personally liable for a monetary penalty pursuant to Rule 10.49.

The Lawyer argued that she was simply acting in her capacity as a Notary Public to ensure that the Accused was the actual person signing the pseudolaw documents. She also argued that she verified the Accused's identification and believed that the Accused did sign the pseudolegal documents. Further, the Lawyer stated that the documents she notarized did not include four pages that were part of the package received by the Court.

The Court rejected the Lawyer's arguments. The signature on the pseudolaw documents did not match the alleged government-issued identification, which was a fraudulent document. The Lawyer failed to respond to any legal authorities stating that what the Lawyer did was prohibited. The Lawyer is a Notary because she is a lawyer; she was not a Notary as a free-standing, independent status. Even as a Notary, the Lawyer did not comply with Notary obligations. The Lawyer was acting in her capacity as a lawyer, and she was potentially liable for the negative consequences of the pseudolaw documents.

The Court held that the Lawyer breached her duties as a lawyer and as a Notary. She had also obviously and clearly disregarded a direction of the Court, per Rule 10.49(1)(a), and had interfered with the proper or efficient administration of justice by notarizing the pseudolaw documents, per Rule 10.49(1)(b). Accordingly, the Court issued a penalty in the amount of $10,000.00, pursuant to Rule 10.49.

PEREZ V BREEUWSMA, 2022 ABKB 805

(ARCAND-KOOTENAY J)

Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Parties to this Action were ex-spouses who were unable to agree on a specified exchange time of their children. The father alleged that the mother had breached two prior parenting Orders issued by the Court. Arcand-Kootenay J. referred to Rules 10.52(3) and 10.53 regarding Contempt of Court and the punishment for Contempt of Court, respectively. Arcand-Kootenay J. stated that the mother must comply with Court's prior Orders, but found that there was insufficient evidence justifying non-compliance. In particular, the evidence before the Court was only in the form of Affidavit evidence, and in the nature of he said/she said allegations. The Court could not make any findings regarding credibility or reliability, and found that there could have been valid reasons for the appearance of non-compliance. Accordingly, the wife was not in Contempt of Court.

ID V DB, 2022 ABKB 831

(FRIESEN J)

Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

At Trial, the Court had previously found that one of the Parties was in Contempt of Court (the "Contemnor") for breaching a consent Order entered into by the Parties (the "Consent Order"). In considering the appropriate sanctions for civil Contempt, the Court noted Rule 10.52(3)(a)(i) and the available sanctions for Contempt of Court set out in Rule 10.53.

The Court stated that a finding of civil Contempt has two goals: (1) securing compliance with Court Orders, and (2) protecting the administration of justice. The Court noted that the common law test for civil Contempt requires that: (1) the terms of the Order in question must be clear, (2) the breaching Party must know about the Order and its terms, and (3) the breaching Party must have intended the act or omission that resulted in the breach.

The Court further set out that in the family law parenting context, (1) jail sentences ranging from 2 to 90 days have been imposed on contemnors, (2) in most cases the contemnor was given the chance to reduce their sentence through subsequent compliance, and (3) higher sentences were imposed in situations where the contemnor had a demonstrated history of verbal and physical abuse.

In determining the consequence for the Contemnor, the Court noted that the Contemnor (1) admitted on a number of occasions, including before the Court, that he knew about the terms of the parenting Orders, but chose to disobey them; (2) was informed of the consequences of Contempt by other Justices; (3) was specifically held in Contempt at one point by Justice Macklin, who ordered him to pay Costs; (4) had been warned on several occasions prior to the Trial continuation that his continued disobedience might one day result in his incarceration; and (5) had been unable to provide the Court

with a reasonable excuse for not following the terms of the Consent Order.

The Court found that the Contemnor had breached the Consent Order beyond a reasonable doubt. The Court determined that the monetary fines in the circumstances would put additional pressure on an already toxic family situation and were simply not a significant enough a consequence given the egregiousness of the breaches. Instead, the Court determined that incarceration was necessary because it would erode the respect for the administration of justice and rule of law to allow the Contemnor to continue to disobey Court Orders. The Court additionally noted that criminal Contempt was distinguishable from civil Contempt because the Contemnor would not accrue a criminal record but would still face the consequences of his intransigence.

The Court determined that the appropriate consequence for the Contemnor was six days of jail, with the implementation of the sentence suspended for six months pending family reunification therapy after which it would be possible that it could be suspended indefinitely, depending on the Contemnor's level of future compliance with the reunification process. The Court reserved the issue of Costs for six months.

FITZPATRICK V FITZPATRICK, 2022 ABKB 862

(HARRIS J)

Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Applicant sought an Order to have the Respondent found in Contempt of Court for failure to comply with a previously granted Order pursuant to Rules 10.52 and 10.53.

The Respondent had failed to take steps required under the previously granted Order in relation to the sale of matrimonial property in a divorce proceeding. Justice Harris considered the law surrounding Rules 10.52 and 10.53 along with each provision of the previously granted Order. Considering the Respondent's conduct, Justice Harris concluded that the Respondent had not only failed to cooperate with specific actions related to the sale of the matrimonial property but had further intentionally taken steps to avoid compliance with the previously granted Order.

Justice Harris also considered an allegation that the Respondent's family had assisted in the Contempt. Justice Harris noted that there was insufficient evidence to support this allegation beyond a reasonable doubt. Ultimately, Justice Harris held the Respondent in Contempt of the previously granted Order.

ALSTON V FOOTHILLS NO 31 (DISTRICT OF), 2022 ABCA 408

(WAKELING, STREKAF AND ANTONIO JJA)

Rule 10.52 (Declaration of Civil Contempt)

The Appellants appealed an Order that found them in Contempt of Court which was issued as a result of them breaching an Order (the "No Contact Order") precluding the Appellants from contacting representatives of the Respondent and partners at the law firm representing the Respondent (the "No Contact Individuals"). The Case Management Judge (the "CMJ") declared the Appellants in civil Contempt for breaching the No Contact Order pursuant to Rule 10.52(3)(a)(i).

The Alberta Court of Appeal dismissed the Appeal. The Court found that the Appellants failed to demonstrate any error made by the CMJ. The Court of Appeal agreed with the CMJ that the terms of the No Contact Order were clear and there was no doubt that the Appellants were made aware of the No Contact Order and acknowledged receiving it. The Court noted that the Appellants contacting the No Contact Individuals was a clear violation of the No Contact Order. The Court therefore found no basis to overturn the CMJ's finding of civil Contempt. The Court also found that the sanction the CMJ imposed for civil Contempt was reasonable.

TORONTO DOMINION BANK V HALLIDAY, 2022 ABKB 764

(APPLICATIONS JUDGE SUMMERS)

Rules 11.18 (Service on Self-Represented Litigants), 11.21 (Service by Electronic Method), 11.27 (Validating Service) and 11.30 (Proving Service of Documents)

The Applicant applied to validate service on a self-represented Defendant under Rule 11.27.

The Court determined that an Order validating service was not required. The Applicant emailed a Statement of Claim to the Defendant and asked the Defendant to confirm whether she was willing to receive the document by email. The Defendant responded, "I confirm that the document is received".

The Court noted that under Rule 11.18, service on a self-represented litigant is affected when the self-represented litigant accepts service of the document in writing, and Rule 11.30 sets out the evidence required to prove service. Accepting service of a document may have previously required a document to be put in evidence with the recipient's handwritten signature. The Court called such a requirement anachronistic and determined that acceptance by electronic transmissions may constitute an acknowledgement or acceptance of service in writing.

The Court noted that Rule 11.21 did not apply to this Application because that Rule does not apply to service of a commencement document such as a Statement of Claim.

BILODEAU V BILODEAU, 2022 ABKB 799

(RENKE J)

Rule 12.10 (Action for Unjust Enrichment)

This was a family law matter scheduled for a Special Chambers Application. The Plaintiff applied to extend the Defendant's post-secondary expenses contribution beyond the period in the divorce Judgment. The Defendant cross-applied for retroactive decrease in child support and for wrongful collection of child support. The Special Chambers Application was adjourned, and the Parties proceed by way of written submissions supplementary to their conscience letters.

Justice Renke dismissed the Plaintiff's Application. He also dismissed the Defendant's cross-Application for retroactive decrease in child support. However, the Defendant's Application for wrongful collection of child support was neither granted nor dismissed, as Renke J. asked counsel for further submissions on its legal and procedural characterization.

The Defendant's claim for unauthorized collection differed from his other claims. It was not a typical recalculation claim. Justice Renke categorized it as a restitution or unjust enrichment claim. In essence, the Defendant would assert a lack of juristic reason for the Maintenance Enforcement Program to have collected, and for the Plaintiff to have received, child support payments not provided for by the divorce Judgment.

Without suggesting whether the Defendant would succeed on this claim, Renke J. held that an unjust enrichment claim must be made by Statement of Claim, as contemplated by Rule 12.10. Justice Renke declined to adjudicate the claim as doing so "in the present procedural context would amount to a form of summary judgment procedure not countenanced by the rules".

GROCH V GROCH, 2022 ABKB 840

(MARION J)

Rule 12.41 (Notice to Disclose Documents)

In family law proceedings related to the variation of child support payments, the Applicant applied for an Order to compel the Respondent to provide financial disclosure as contemplated in a Notice to Disclose. The Applicant had previously filed the Notice to Disclose pursuant to Rule 12.41. The Respondent objected to providing certain items requested in the Notice to Disclose.

Justice Marion noted that in divorce proceedings, where a final determination of child support has been made, and a Notice to Disclose pursuant to Rule 12.41 is employed before a variation Application is filed, the determination of whether an Order should be granted under Rule 12.41(5) should be considered in light of section 17 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp).

Ultimately, after canvassing the jurisprudence, Justice Marion granted an Order pursuant to Rule 12.41(5) directing the Respondent to disclose certain items that were previously objected to.

SANTHA V CARLTON, 2022 ABKB 657

(MARION J)

Rules 12.61 (Appeal from Provincial Court Order to Court of King's Bench), 12.62 (Duty of Court Clerks), 12.68 (Evidence) and 12.70 (Powers of Court on Appeal)

This was an Appeal of a Provincial Court Order pursuant to Rule 12.61 and section 89 of the *Family Law Act*, SA 2000, c F-4.5, relating to child support, for which leave to file a Notice of Appeal with the Court of King's Bench had been previously granted.

In oral argument, both the Appellant and Respondent gave submissions which were indirectly or directly attempting to provide supplemental evidence not before the Provincial Court Judge. In accordance with Rule 12.68, an Appeal of a Provincial Court Decision is normally an Appeal on the record, not a hearing *de novo* as it provides that only documents provided by the Clerk of the Provincial Court pursuant to Rule 12.62(2) and the transcript of the hearing before the Provincial Court form the record of the hearing of the Appeal. No other evidence may be considered by the Court unless the Court otherwise orders. In order to admit new evidence, an Application to admit fresh evidence on Appeal must be filed pursuant to Rule 12.68, which Application must be supported with argument as to why the record contemplated by Rule 12.62(2) is insufficient. The Court noted that neither Party met the test for fresh evidence and, to the extent any of the submissions constituted evidence, they were not given any weight.

Ultimately, the Court considered the merits of the Appeal and concluded that the Provincial Court Judge did not make an error or, alternatively, did not make an error justifying interference on Appeal. As such, the Court confirmed the Order in accordance with Rule 12.70.

JC V KC, 2022 ABKB 707

(MARION J)

Rules 12.61 (Appeal from Provincial Court order to Court of Queen's Bench), 12.62 (Duty of Court Clerks), 12.68 (Evidence) and 12.70 (Powers of Court on Appeal)

The Appellants opposed a Provincial Court Order which increased the Respondent's parenting time (the "Order"). The Appeal was brought under Rule 12.61 and section 89 of the *Family Law Act*, SA 2003, c F-4.5 ("FLA"). Justice Marion dismissed the Appeal.

Justice Marion noted that Appeals of Provincial Court Decisions under section 89 of the FLA

are on the record, and are not *de novo*. For this reason, Rule 12.68 stipulates that "documents provided by the clerk of the Provincial Court pursuant to rule 12.62(2) and the transcript of the hearing before the Provincial Court form the record for the hearing of the appeal, and no other evidence may be considered by the Court unless otherwise ordered by the Court".

Under Rule 12.62(2), the Provincial Court Clerk must "forward the order, together with filed documents relating to the order, including exhibits, to the Court of Queen's Bench court clerk".

Here, the Parties relied on significant evidence from the Provincial Court file going to the conduct of the matter after the date of the Order. Justice Marion held that while this information did not form part of the Appeal record, it can ultimately be relevant to the Court's exercise of discretion under Rule 12.70.

TEMPO ALBERTA ELECTRICAL CONTRACTORS CO LTD V MAN-SHIELD (ALTA) CONSTRUCTION INC, 2022 ABCA 409

(SLATTER, PENTELECHUCK AND FEEHAN JJA)

Rule 13.6 (Pleadings: General Requirements)

This Appeal arose from a dispute between a construction project's owner, general contractor and one subcontractor. The subcontractor registered two liens against the project lands, one of which was removed upon the owner paying money into Court. In a subsequent settlement between the owner and general contractor, the general contractor was assigned a right to the money paid into Court by the owner. Citing cash flow issues, the general contractor filed an emergency Application to replace the money paid into Court with a lien bond in the same amount. The Appeal addressed whether applicable sections of the *Builders Lien Act*, RSA 2000, c B–7 permitted substitution of a lien bond for money paid into Court and whether the money paid into Court was impressed with a statutory trust in favour of the subcontractor such that it could not be removed by the general contractor.

The Court of Appeal held that the proposed substitution of money paid into Court was permitted, but that the subcontractor's issuance of a certificate of substantial performance and resulting impression of a statutory trust prevented the general contractor from accessing the money and replacing it with a lien bond. In response to the general contractor's argument pursuant to Rule 13.6 that no trust argument could be raised in the absence of its having been expressly pled, the Court held that the argument could be raised and considered since it did not take the general contractor by surprise.

JTS V JB, 2022 ABKB 791

(MARION J)

Rule 13.18 (Types of Affidavits)

The Applicants applied to change the surname of two children (the "Children") without the father's consent, after the father of the Children was charged with murder and arson.

The Applicants' Application relied in part on information from police officers that the Children may be a target of retribution from the murder victim's family. However, the Application only included an Affidavit from the Applicants rather than from a police officer. The Court noted that Rule 13.18 requires an Affidavit in support of an Application that may dispose of all or part of a claim to be sworn on the basis of personal knowledge. The Applicants did not assert a hearsay exception. The Court ultimately dismissed the Application to change the surname of the Children without the father's consent.

SCHAFER V SCHAFER, 2022 ABCA 358

(PENTELECHUK JA)

Rules 14.4 (Right to Appeal), 14.5 (Appeals Only with Permission) and 14.74 (Disposing of Appeals)

The Parties sought direction of the Court regarding whether permission to Appeal was required for cross-Appeals arising out of arbitral proceedings, and, if permission was required, the Parties the sought that permission.

By way of background, the Applicant had appealed an arbitral Costs Award to the Court of Queen's Bench, as it was then, taking the position that the automatic right of Appeal arose from the arbitration agreement. The Respondent asserted that the Applicant required permission to Appeal. The Chambers Judge agreed with the Respondent and struck the Applicant's Appeal. The Chambers Judge opted not to award the Respondent solicitor-client Costs pursuant to the arbitration agreement, leading to the Respondent's cross-Appeal for permission to Appeal the Chambers Judge's Cost Award.

Justice Pentelechuk noted that the Applications raise questions regarding the scope of the Court of Appeal's jurisdiction to hear Appeals from the Court of King's Bench in arbitral proceedings. Noting that a single Justice of the Court of Appeal could opine on the issue, Justice Pentelechuk stated that there was merit in having a full panel consider the issue. Justice Pentelechuk further noted that the Respondent was essentially taking the position that the Court of Appeal has no jurisdiction to hear the Appeal, which Application would require a full panel of the Court of Appeal pursuant to Rule 14.74.

In considering the jurisdiction of the Court of Appeal, Justice Pentelechuk noted that broad discretion is awarded under Rule 14.4. Further, Rule 14.5 enumerates instances where permission to Appeal to the Court of Appeal is required. Ultimately, Justice Pentelechuk

granted the Parties permission to Appeal the question of whether the Court of Appeal has jurisdiction to hear both Appeals in front of a panel of Court of Appeal Justices.

BISSKY V MACDONALD, 2022 ABKB 774

(ROOKE ACJ)

Rule 14.5 (Appeals Only with Permission)

The Applicant applied for leave to pursue a child support Order (the "Leave Application"). The Applicant was previously declared a vexatious litigation and was prohibited from initiating any Application in the Alberta Court of King's Bench without leave of the Court.

The Court noted that a person subject to Court access control is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise. A person subject to Court access restrictions must establish reasonable grounds for the litigation, and depose fully and completely as to the facts and circumstances surrounding the proposed claim or proceedings.

The Court rejected the Leave Application. The Applicant did not provide an Affidavit under oath and the Court determined that the Applicant's claim that "there isn't a child support order in place" was false. The Court also determined that the Applicant's claim was a collateral attack on a previous Consent Order, to which the Applicant had previously agreed.

The Court also noted that there is no Appeal to the Alberta Court of Appeal when an Application for leave to Appeal is rejected pursuant to Rule 14.5.

UBAH V UBAH, 2022 ABCA 329

(ANTONIO JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal a Chambers Judge's Decision. Permission to Appeal was required because the Applicant was subject to a vexatious litigant Order in the Court of King's Bench, pursuant to Rule 14.5(1)(j). The Applicant argued the Chambers Judge's Decision to deny the Applicant permission to institute or continue proceedings. The Court of Appeal held that no Appeal is allowed from that Order, pursuant to Rule 14.5(4).

The test for permission to Appeal by a vexatious litigant on other grounds includes a consideration of a general test for permission to Appeal under Rule 14.5 and the requirements of section 23.1(7) of the *Judicature Act*, RSA 2000 c J-2. Specifically, a vexatious litigant must prove the following: (i) that there is an important question of law or precedent; (ii) there is a reasonable chance of success on Appeal; (iii) delay will not unduly hinder the

progress of the Action or cause prejudice; and (iv) that the proceeding is not an abuse of process and that there are reasonable grounds for proceeding.

The Court of Appeal dismissed the Application. Antonio J.A. found that the Applicant's arguments were premised on the frailties of old Orders that were not before the Court and for which the Appeal period had long expired. The Applicant also failed to show that the Chambers Judge had made any errors of fact or law, and the Court found that the Applicant would have a meagre chance of success on Appeal.

STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2022 ABCA 339

(VELDHUIS JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought to Appeal a Decision of the Calgary Subdivision and Development Appeal Board ("SDAB") to the Court of Appeal. The SDAB upheld the Calgary Planning Commission's Decision to approve the Respondent's permit Application to construct a new multi-residential apartment building, which was near the Applicant's home. In a prior Decision Veldhuis J.A. had determined that the Applicant's grounds of Appeal did not meet the test for granting permission to Appeal under section 688 of the Municipal Government Act, RSA 2000, c M-26.

The Applicant was seeking permission to reargue or reopen her Application before the Court, but did not state which Rule she relied upon for her Application. The Court found that the applicable Rule was Rule 14.5(1)(a), which directs that permission to Appeal must be obtained for a Decision made by a single Appellate Judge. Permission to Appeal will only be granted if an Applicant establishes that there is either a question of general importance, a possible error of law, an unreasonable exercise of discretion, or a misapprehension of important facts.

The Court of Appeal dismissed the Application. The Applicant failed to establish any ground for permission to Appeal. She argued that Veldhuis J.A. had misstated the Applicant's grounds of Appeal of the SDAB's Decision. Veldhuis J.A. found that the grounds of Appeal were not misstated.

FENOGLIO V THOMPSON, 2022 ABCA 401

(HO JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant applied under Rule 14.5(1)(h) for permission to Appeal the Chambers Justice's Order (the "Order") requiring the Applicant to pay Security for Costs totalling $594,429.03.

The Court noted that the applicable to test for permission to Appeal the Order under Rule 14.5(1)(h) requires that the Applicant must show: (1) that there is an important question of law or precedent; (2) there is a reasonable chance of success on Appeal; and (3) the delay will not unduly hinder the progress of the Action or cause undue prejudice. The Court additionally noted that the test may manifest slightly differently depending on the Appeal's subject matter and context, however the basic principles set out apply to all types of Applications for permission to Appeal.

The Court determined that the Applicant's grounds relating to whether the Applicant had assets in Alberta sufficient to pay a Costs Award upon determination of the matter and whether the Chambers Justice properly accounted for economies of scale in the circumstances, were insufficient to amount to an important question of law or precedent. The Court found that the Chambers Justice's exercise of discretion was reasonable on the record and determined that appellate intervention was not warranted with respect the Applicant's argument that the Security for Costs set out in the Order should be reduced.

Additionally, the Court noted that granting the Application for permission to Appeal would unduly hinder the progress of the Action because the Security for Costs Application and resulting Order was the first of several interlocutory Applications to be heard in litigation proceedings where the Applicant had named over thirty defendants with wide-ranging allegations. The Court determined that allowing an Appeal to proceed in the context of an interim Security for Costs Award, where the funds are held by the Clerk of the Court and subject to further Order, would not be an efficient use of resources.

As a result, the Court dismissed the Application for permission to Appeal.

HOLDEN V HOLDEN, 2022 ABCA 341

(WAKELING JA)

Rules 14.24 (Filing Factums – Fast Track Appeals), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Defendant applied to restore his fast-track Appeal, which had been struck by the Registrar for his failure to file his Factum and Extracts of Key Evidence on time in accordance with Rule 14.24. The Defendant's Appeal was therefore struck in accordance with Rule 14.64.

Rule 14.65 provides that where an Appeal has been struck by the Registrar, the Appellant

must make an Application to a single Appeal Judge pursuant to Rule 14.47. Rule 14.47(a) requires restoration Applications to be filed and served "as soon as reasonably possible", and returnable no later than three months after a fast-track Appeal has been struck. The element of filing and serving "as soon as reasonably possible" is unique to Alberta and came into effect on March 17, 2020. Unless extraordinary conditions exist, a Party must file a restoration Application within days.

The restoration test is clear and consists of four elements. However, it is onerous and difficult to meet. First, the Applicant must show "an unwavering commitment to prosecute the appeal from the date the applicant filed a civil notice of appeal to the date the Registrar struck the appeal". Justice Wakeling suggested that the Applicant ought to state in a supporting Affidavit that the Appellant's commitment to prosecute the Appeal had not wavered from the time the Appeal was struck until the restoration Application was filed. Second, the Applicant must explain the failure to file the Appeal Record, Factum, or Extracts of Key Evidence within the applicable time limits.

The Court of Appeal stated that time limits are of fundamental importance. Third, and of utmost importance, the Applicant must satisfy the Court that the Appeal has a high enough chance of success to justify its restoration. Fourth, the restoration of the Appeal must not cause the Respondent undue prejudice, either in the form of litigation or non-litigation prejudice.

Lastly, there are two additional factors that the Court must take into account. If the Applicant has satisfied all four elements, the Court should restore the Appeal unless "a compelling reason supports the contrary disposition". Conversely, if the Applicant fails to clear all four hurdles, the Court should refuse to restore the Appeal unless exceptional circumstances apply.

The Defendant failed to file his restoration Application "as soon as reasonably possible"; rather, he waited 51 days after the Registrar had struck his Appeal. He also failed to clear the four elements of the restoration test. The Defendant's Application to restore his Appeal was therefore dismissed.

KOSTIC V SCOTT VENTURO RUDAKOFF LLP, 2022 ABCA 423

(ROWBOTHAM, VELDHUIS AND SCHUTZ JJA)

Rule 14.27 (Filing Extracts of Key Evidence)

The Appellant appealed an Order addressing issues arising from the cross-examination on an Affidavit of one of the Respondents. The Court of Appeal dismissed that Appeal and invited the Appellant to make submissions on Costs. This case was, in part, the hearing of those submissions.

The Respondent sought increased Costs because of the Appellant's vexatious behaviour on Appeal. The Appellant filed Extracts of Key Evidence amounting to 2,035 pages. The Court considered the parameters for Extracts of Key Evidence provided in Rule 14.27. The Court held that the Appellant repeatedly failed to observe the requirements to exclude any evidence, exhibits and other materials unlikely to be needed, and to exclude comment, argument, Trial briefs, legal authorities or new evidence. In conjunction with other vexatious behaviours, the Court held that this warranted enhanced Costs in the amount of double Column 4 costs pursuant to Schedule C.

ALBERTA CROWN ATTORNEYS' ASSOCIATION V ALBERTA (JUSTICE AND SOLICITOR GENERAL), 2022 ABCA 332

(SCHUTZ JA)

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

The Canadian Association of Crown Counsel ("CACC") applied for permission to intervene at an upcoming Appeal. The Appellant and Respondent consented to CAAC's Application, while another Respondent took no position. CACC had intervenor status before the lower Court, but this was not determinative of its continued participation in the Appeal proceeding.

A Party with intervenor status in the lower Court must obtain intervenor status on Appeal. Applications for intervenor status are decided by a single Judge of the Court of Appeal under Rules 14.37(2)(e) and 14.58. In granting intervenor status, the Court of Appeal can impose any terms and conditions on the intervenor's participation in the Appeal.

Justice Schutz held that "[i]nterventions will be permitted when (a) the proposed intervenor can show a particular interest in the outcome of the appeal, or (b) where the intervenor can bring forward some special expertise, perspective, or information that will assist the Court… Intervenors generally are not permitted to raise new issues, or to enhance the record before the Court".

CACC was affected by the outcome of the Appeal and brought a unique perspective to it that neither the Appellant nor Respondents could cover. CACC's Application for intervenor status was therefore granted.

FAWCETT V COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA (COMPLAINT REVIEW COMMITTEE), 2022 ABCA 416

(FEEHAN JA)

Rule 14.48 (Stay Pending Appeal)

The Applicant sought a Stay pending the Appeal of a Judicial Review which found that a decision of the Complaint Review Committee (the "Committee") of the College of Physicians and Surgeons of Alberta (the "College") was reasonable. Feehan J.A. dismissed the Application for a Stay pending Appeal.

As contemplated by Rule 14.48, a single Court of Appeal Justice may hear an Application for a Stay pending Appeal. On such an Application, the Applicant must meet the tri-partite test outlined by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. The Applicant failed to do so here. Feehan J.A. was concerned by the Applicant's intention to litigate by instalment. On a Rule 14.48 Application, litigation by instalment can be considered by the Court at the outset or under the *RJR-MacDonald* test.

Feehan J.A. noted that it is "inappropriate to short circuit an administrative process" by applying for Judicial Review mid-process. Such

short circuits are reserved for rare and exceptional circumstances. The investigation by the Committee into the Applicant was in its early stage, and nothing in the present Application elevated it to the exceptional category. Further, the Court noted that investigated members of the College who seek Judicial Review at every step of the administrative process may be found to be litigating by installment, which can constitute an abuse of process.

On the first branch of the *RJR-MacDonald* test, Feehan J.A. held that it was up to the panel hearing this Appeal to determine whether the Applicant's Appeal of the Judicial Review was premature or constituted litigation by installment. On the second branch of the *RJR-MacDonald* test, Feehan J.A. held that without more, administrative inconveniences did not qualify as irreparable harm. On the third branch of the *RJR-MacDonald* test, Feehan J.A. held that the balance of convenience did not favor the granting of the Stay. The Stay would prevent the College from fulfilling its legislative mandate, and it is against public policy to prevent the College from carrying out its regulatory function. Lastly, the balance of convenience weighed against litigation by installment.

RANA V RANA, 2022 ABCA 378

(ANTONIO, HO AND KIRKER JJA)

Rule 14.74 (Application to Dismiss an Appeal)

The Applicant applied to dismiss the Appeal of the Order declaring the Respondent a vexatious litigant ("Vexatious Litigant Order") for being moot in accordance with Rule 14.74(b). The Court noted that the only live issue on the Appeal was the Applicant's failure to give notice to the Minister before the Vexatious Litigant Order had been granted ("Failure to Give Notice"). The Court subsequently varied the Vexatious Litigant Order, noting that the Failure to Give Notice had been corrected ("Vexatious Litigant Variation").

The Court noted that Rule 14.74(b) permits a panel of the Court of Appeal to dismiss all or part of an Appeal if the Appeal is moot. The Court set out the test for mootness established by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, namely that the Court should first determine whether "the required tangible and concrete dispute disappeared and the issues have become academic" such that the decision of the Court will have no practical effect on the rights of the Parties, thus the essential ingredient is not present and the case is moot. The second step of the test enables the Court to consider whether to exercise its discretion to hear the case even though it is moot.

The Court noted that the Failure to Give Notice was rectified and that the Minister indicated that he would not participate or take a position. The Court of Appeal agreed with the Chambers Justice that the Failure to Give Notice could only have made an impact on the outcome if the Minister had made submissions, and the Chambers Justice had reasonably concluded that the Failure to Give Notice had not substantively impacted his Decision to grant the Vexatious Litigant Order.

The Court concluded that the variation of the Vexatious Litigant Order had the effect of the

curing the Failure to Give Notice with retroactive effect. Therefore, the Court found there was no remedy that it was able to grant to the Respondent.

The Court additionally rejected the Respondent's arguments regarding *res judicata* and *functus officio* noting that they would only be relevant on an Appeal of the Vexatious Litigant Variation and therefore did not have the effect of rebutting the conclusion that the Appeal of the Vexatious Litigant Order was moot.

The Court of Appeal declined to exercise its discretion to hear the Appeal despite its mootness, noting that (1) there was no remaining adversarial context, (2) the issue was of importance only to the Parties and not to the broader public, and (3) nothing justified the further expenditure of judicial resources on the now-answered question of defective notice.

KAUR V BAINS, 2022 ABCA 404

(HUGHES, HO AND KIRKER JJA)

Rule 14.88 (Cost Awards)

After an early-intervention case conference, the Parties entered into a Consent Order that allowed the Plaintiff to purchase the matrimonial home subject to meting certain deadlines. The Plaintiff was unable to meet the deadlines. When the Plaintiff eventually obtained the refinancing and sent it to the Defendant's lawyer with a proposed closing date, the Defendant refused to sign the necessary documentation. The Plaintiff applied on an urgent basis for an order to transfer the home without the Defendant's consent. The Plaintiff was unsuccessful.

The Plaintiff then appealed, and the Court of Appeal allowed the Appeal. The Court of Appeal found that there was evidence of an agreement between the Plaintiff and counsel for the Defendant that extended the financing deadline.

Costs for the Appeal were awarded to the Plaintiff in accordance with Column 4 of Schedule C.