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RULES

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RYSDYK V SLANEY, 2023 ABKB 5

(EAMON J)

Rules 1.2 (Purpose and Intention of These Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Parties sought direction from the Court in respect of an Application by the Defendant claiming privilege over certain records and requesting that the Court remove the Plaintiff's lawyers from acting for the Plaintiff. The Court held that only one of three records were privileged. The Court also declined to remove the Plaintiff's lawyers as counsel in the Action. The issue was whether the Court should award Costs to the Plaintiff, or direct that both Parties bear their own Costs.

Eamon J. noted that the primary purpose of a Costs Award is to indemnify the successful Party for the costs of the litigation, but may include encouraging settlement, prevent frivolous, vexatious or harassing litigation, and encourage economy and efficiency during litigation. A successful Party to an Application is entitled to Costs subject to a variety of considerations, including the Court's general discretion under Rule 10.31 and 10.29. A Party does not need to be successful on each argument to qualify for Costs, but is entitled to Costs where a Party is substantially successful. Where no Party was substantially successful, each Party will bear their own Costs, but apportionment may be appropriate where success is divided on multiple issues. A Court can award Costs by issue, partial Costs to one Party, or require each Party to bear their own Costs.

The Court awarded the Plaintiff Costs. Eamon J. held that having regard to Rule 10.33, substantial success should be assessed by taking into account all issues in dispute, the outcome and degree of success of each Party, the relative importance and complexity of the issues, relevant conduct of the Parties, and necessary length of the hearing and nature and significance of the evidence presented. Neither Party was substantially successful, but the Court found that the Plaintiff succeeded on most of the principal issues. The Plaintiff did not succeed on one of the important issues, but the finding on that issue would not likely have much practical impact on the Action. The Court found that absent other considerations, the Parties would bear their own Costs. However, the Court found that the Defendant was responsible for necessitating a second hearing, filing written Briefs late and very shortly before the hearing, as well as an adjournment for three months, with revised Briefs that included revised arguments and significantly more authorities.

The Court held that in the circumstances, Costs should be awarded for one of the hearings, including the Brief, in favour of the Plaintiff. The Court found that civil Special Applications are premised on an orderly presentation of arguments in advance of the hearing, so that the real issues can be identified and addressed during the oral hearing. The Defendant added evidence or arguments shortly before the hearing, which undermines timely and cost-effective litigation, as required by Rule 1.2. Moreover, the Court can account for litigation misconduct when assessing Costs, but the Court found that there was no such misconduct.

PR CONSTRUCTION LTD V COLONY MANAGEMENT INC, 2023 ABKB 25

(FRIESEN J)

Rules 1.2 (Purpose and Intention of these Rules), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 4.36 (Discontinuance of Claim), 8.20 (Application for Dismissal at Close of Plaintiff's Case), 13.6 (Pleadings: General Requirements) and 13.7 (Pleadings: Other Requirements)

This Decision addressed an Application by the Plaintiffs/Defendants by Counterclaim, for a non-suit in the Counterclaim, brought pursuant to Rule 8.20. Preliminary issues relating to the adequacy of Pleadings and amendments to Pleadings were also addressed.

The Plaintiffs/Defendants by Counterclaim ("PR") sued the Defendants/Plaintiffs by Counterclaim ("Colony") in contract for failure to pay amounts owing pursuant to a subcontract. Colony defended and counter-sued for costs to complete unfinished work and for fraud, bribery, conspiracy and other torts allegedly committed by PR in league with a former Colony employee and his corporation (together, "Lacroix"). The Trial was longer than anticipated and was adjourned prior to Lacroix being able to call evidence. While awaiting continuation dates, PR and Lacroix brought an Application for a non-suit. Preliminary issues were raised as to whether Colony could amend its Pleadings, pursuant to Rule 3.65, to delete several claims and whether certain of Colony's claims had been inadequately pleaded, pursuant to Rules 13.6 and 13.7.

On Colony's request to amend, the Court noted that amendments are typically granted in all but four exceptional circumstances, none of which had been argued. Instead, PR argued that it was too late for Colony to withdraw the claims without Costs consequences. Noting that Colony's request essentially amounted to a request for a discontinuance pursuant to Rule 4.36, to which Costs consequences automatically attach, the Court allowed the amendment, subject to PR's right to speak to Costs at the end of Trial.

As to adequacy of Pleadings, the Court observed, noting Rule 1.2, that where inadequate Pleadings are identified, the proper remedy is typically rectification of the Pleadings. Regarding Colony's allegations of fraud, the Court held that the appropriate remedy, if one was necessary, was to permit amendments to include specific allegations supported by evidence given at Trial which were arguably captured within the meaning of Colony's umbrella allegation of "further and other fraudulent activities". Other alleged inadequacies were either not inadequate or could be similarly addressed through amendment.

On PR's and Lacroix's request for a non-suit, the Court observed that a non-suit Application demands a limited inquiry to determine whether evidence has been adduced on all elements of the claim and, if so, whether a *prima facie* case has been made out, affording the evidence its most favourable meaning and ignoring any concerns as to credibility. Applying this to the claims at issue, the Court held that a generous reading of the evidence satisfied the low bar required to resist a non-suit. Issues as to inadequate Pleadings were properly dealt with under an Application to strike pursuant to Rule 3.68, and not an Application for a non-suit. Accordingly, the non-suit Application was dismissed.

MARTINDALE V MERCON BENEFIT SERVICES, 2023 ABKB 35

(GRAESSER J)

Rules 1.2 (Purpose and Intention of These Rules) and 2.9 (Class Proceedings Practice and Procedure)

This case involved a proposed class proceeding. The Defendants sought to question the Plaintiffs' affiants on their Affidavits before filing their record in the Plaintiffs' certification Application. The Plaintiffs objected. The Plaintiffs therefore brought a "sequencing" Application for direction as to how the Parties should proceed.

The Plaintiffs argued that the interests of justice and the objectives of class proceedings were better served by having all of the evidence filed, followed by Questioning. The Defendants argued that Alberta civil practice gives the Respondent in an Application the right to question the Applicant and the Applicant's witnesses on any Affidavits before filing a response.

Justice Graesser acknowledged that Rule 2.9 directs the Court to rely on the Class Proceedings Act, SA 2003, c C-16.5 to grant Orders for class proceedings in line with the spirit of the Rules. In light of that, Graesser J. held that procedure for class proceedings in Alberta should follow the foundational principles in the Rules, and should use the Rules themselves as guidelines. However, counsel and the Case Management Judge are free to determine the procedures and processes that are most likely to justly resolve the issues in a timely and cost-effective way, per Rule 1.2(1).

In the result, Justice Graesser found that some economies could be achieved by the Defendants questioning the Plaintiffs' affiants on their Affidavits before they responded to the certification Application. He therefore permitted the Defendants to conduct their first round of questioning on Affidavits before they were required to file their record in the Plaintiffs' certification Application.

CANADIAN NATURAL RESOURCES LIMITED V HARVEST OPERATIONS CORP, 2023 ABKB 62

(JOHNSTON J)

Rules 1.2 (Purpose and Intention of These Rules), 7.3 (Summary Judgment) and 13.6 (Pleadings: General Requirements)

The Applicant sought to set aside six Notices of Default under land agreements (the "Notices") that were served on it by the Respondents. The Respondents cross-applied for partial Summary Judgment for the assignment of 114 agreements, as the Respondents argued that the assignments did not require consent or fell under an exemption to any requirement for consent, relying on Rule 7.3(1). The Applicant argued the Respondents had waived their right to rely on exemptions to consent because of their conduct.

The Applicant argued that the Notices should

be set aside because it was not the operator at the time the Notices were issued. The Court agreed.

The Respondents then argued that the Court must apply the three-part test established in *Hryniak v Mauldin,* 2014 SCC 7, prior to considering the *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 criteria for partial Summary Judgment. The Court disagreed, stating that analysis for partial Summary Judgment is part of the *Weir-Jones* analysis and quoted the applicable test. In the context for an Application for partial Summary Judgment, the Court cited *JBRO Holdings Inc. v Dynasty Power Inc.*, 2022 ABCA 140, and held that under Rule 7.3(1), a Party may apply for Summary Judgment in respect of all or part of a claim.

The Applicant argued that partial Summary Judgment was not appropriate, as the issues were neither simple nor straightforward, and the outcome would have a substantial impact on the oil and gas industry. As such, the issues warranted careful consideration at Trial, based on a full evidentiary record. The Court found this reasoning to be contrary to Rules 1.2 and 7.3(1).

The Court held the case was well suited for partial Summary Judgment for the following reasons: (1) the case was, at its heart, a contractual dispute, and contractual disputes are well-suited for Summary Judgment; (2) the risk of inconsistent results is further minimized because the issues of damages and set-off claimed in both the Statement of Claim and Counterclaim under all the agreements had been reserved for Trial; (3) the Application had the ability to significantly streamline and simplify the Trial; (4) the relevant issues could be easily bifurcated from the remainder of the issues; (5) the Applicant offered little explanation in terms of additional evidence that could be adduced at Trial; (6) there were no credibility concerns or complex expert opinions; (7) partial Summary Judgment would have a fair result, having regards to the state of the record and the issues.

The assignability of the 114 agreements was easily bifurcated from the main Action and could be dealt with expeditiously and in a cost-effective manner, making the case exactly the type of proceedings where partial Summary Judgment was appropriate.

The Court also found that the Respondents had not waived their contractual rights because waiver requires full knowledge of the rights and an unequivocal and conscious intention to abandon them, and there was no evidence to support that the Respondents had intended to abandon their rights. Moreover, the Applicant had not pled waiver or estoppel as is required under Rules 13.6(3)(c) and (m).

For the reasons set out above, the Court set aside the Notices, found waiver had not been established, and granted the cross-Application for partial Summary Judgment in respect of the agreements that were found to be exempt from consent.

MERCHANT LAW GROUP LLP V BANK OF MONTREAL, 2023 ABKB 74

(ARMSTRONG J)

Rules 1.2 (Purpose and Intention of These Rules) and 6.56 (Application for Interpleader Order)

The Government of Alberta ("Alberta") served the Respondent bank (the "Bank") with a Requirement to Pay Money in respect of money owed by the Respondent professional corporation (the "Professional Corp"). The Bank held an account owned by a law firm (the "Law Firm") that was a partner of the Professional Corp. A dispute arose over whether Alberta was entitled to money in the Law Firm's account to satisfy a debt of the Professional Corp.

A Justice in Chambers had previously issued an Order granting interpleader relief to the Bank, and the Law Firm appealed that Order. The Alberta Court of Appeal then dismissed the Appeal and remitted the matter back to the Court of King's Bench for a determination of issues raised by the Order. One of the issues remitted was whether interpleader relief was available to the recipient of a Requirement to Pay Money.

The Court determined that interpleader relief was available to the Bank under Rule 6.56, which allows a Party to apply for interpleader relief when a holder of property who has no claim to that property is faced with two or more claims for that property. The Court determined that the requirements for interpleader relief were met, and disagreed with Alberta's argument that the *Income Tax Act,* RSC 1985, c 1 was a comprehensive scheme that left no room for the Bank to obtain such a remedy. The Court also noted that the Application for interpleader furthered the goals of the Rules, which according to Rule 1.2 are to provide a means to fairly and justly resolve disputes in a timely and cost-effective manner.

GRANDE PRAIRIE (CITY) V APOTEX INC, 2023 ABKB 78

(FEASBY J)

Rules 1.2 (Purpose and Intention of These Rules), 3.26 (Time for Service of a Statement of Claim), 3.27 (Extension of Time for Service) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Appellants appealed a Master's Decision (the "Appealed Decision") to refuse to set aside a previous Decision (the "Previous Decision") allowing an *ex parte* Application to extend the time for service of a Statement of Claim. The Court noted that an Appeal from a Master, now an Applications Judge, is heard *de novo.*

The Court first considered whether the Appellants were out of time to apply to set aside the Previous Decision. Under Rule 9.15, a Party may apply to set aside, discharge, or vary an Order within 20 days of being served with the Order unless the Court orders otherwise. However, the Court determined that the Appellants

applied to set aside the Previous Decision within the time period set out in Rule 9.15 based on the evidence of service before the Court.

The Court then considered the Appeal of the Appealed Decision. The Court noted that Rule 3.26 provides that a Statement of Claim must be served on the Defendant within one year after the date that it is filed. Rule 3.27 allows the Court to extend the time for service at any time including after the time for service has expired where the failure to serve is attributable to the conduct of the Defendant or a person not party to the Action. Rule 3.26(1) provides that an extension to serve a Statement of Claim must not exceed three months but does not specify what reasons or evidence is required to justify an extension.

The Court determined that solicitor negligence led to the failure to serve the Statement of Claim. The Court noted that previous cases have not considered solicitor negligence as a justification for extending the time to serve a Statement of Claim under Rule 3.26 although cases considering Rule 3.27 consistently held that solicitor's negligence is not a "special or extraordinary circumstance" justifying an extension of the time for service. However, the Court noted that, unlike Rule 3.27, Rule 3.26 contains no requirement for special circumstances.

The Court dismissed the Appeal of the Appealed Decision. The Court determined that solicitor negligence could be considered in an Application under Rule 3.26 to extend the time to serve the Statement of Claim. Feasby J. noted that exercising the Court's discretion to set aside service of the Statement of Claim would be contrary to the foundational Rule 1.2, which states that the purpose and intention of the Rules is to resolve disputes in a timely and cost-effective manner. The Court also noted there was no evidence that the delay would prejudice the Defendants.

HO V CONNELL, 2023 ABKB 133

(FEASBY J)

Rules 1.2 (Purpose and Intention of These Rules), 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Experts' Reports) and 5.37 (Questioning Experts Before Trial)

This was an Application for an Order directing production of reports prepared by a private investigator that were later provided to the Defendants' medical expert. The Defendants resisted the Application on the grounds that the investigator's reports are subject to litigation privilege, submitting that litigation privilege attaching to material provided to an expert is not waived until the expert testifies at Trial. The Plaintiff argued that by providing the investigator's reports to the expert and then subsequently disclosing the expert report in accordance with Rule 5.35, the Defendants had waived litigation privilege by implication.

The Court noted that Rule 5.34 provides that expert reports are to be served in the sequence required by Rule 5.35. Rule 5.35 provides that "if a party intends to use the evidence of an expert at trial" the evidence must be exchanged sequentially with the "party who bears the primary onus of proof" going first; however, no deadlines for the exchange of expert reports are specified by Rule 5.35.

The Court made a clear distinction between foundational information, records provided to

an expert to review for the purpose of forming an opinion, and other materials that may comprise an expert's file, such as correspondence with counsel and draft reports. The Court found the investigator's reports in question fell into the former category, foundational information.

Relying on the right to question an expert found in Rule 5.37, the Court found an implied right to explore the foundations of the expert's report. Additionally, the Court recognized it would be unfair to the Plaintiff to have their expert file a reply to the Defendants' expert report without access to the same foundational information. Requiring Parties to provide foundational information concurrently with the delivery of an expert report so that the other side's experts can effectively respond is fair, efficient, and furthers the purpose of the Rules, as reflected in Rule 1.2.

In conclusion, the Court held that waiver of privilege with respect to foundational information occurs when the expert report is exchanged because it is at that time when the Party delivering the expert report signals to the other side its intention to rely at Trial on the expert report, and by extension the foundational information underlying the expert report. As such, the Court directed the investigator's reports be produced forthwith to the Plaintiff.

BALDOCK ESTATE V ABOU RESLAN, 2023 ABKB 149

(SIDNELL J)

Rules 1.2 (Purpose and Intention of These Rules), 5.36 (Objection to Expert's Report) and 8.6 (Notice of Trial Date)

At Trial, the Court held a *voir dire* on the qualifications of the Plaintiff's expert witness. Justice Sidnell ruled that the expert's opinion evidence was not relevant to certain issues because the expert lacked specialized knowledge in pediatric endocrinology under Canadian practices and standards. After the ruling, the Plaintiff moved to adjourn the Trial. The Defendant opposed and the Court denied the adjournment Application.

Once a Trial has commenced, an Application for adjournment may be granted only with leave of the Trial Judge as set out in Rule 8.6(2).

A Judge may exercise discretion to adjourn a Trial after it commences, but only in appropriate circumstances. The Supreme Court of Canada in *Barrette v The Queen,* 1976 CanLII 180 (SCC) cautioned that a judicial discretion Decision can be reviewed on Appeal when it deprives someone of their rights. The Parties referred Sidnell J. to the 11 factors set out in *Royal Bank of Canada v Place*, 2010 ABQB 733 that may be considered by a Court on an adjournment Application.

One important factor is the adjournment Applicant's explanation for not being ready to proceed. There was some debate as to whether qualifications must be raised in a Notice of Objection under Rule 5.36. Rule 5.36(2) states that no objection can be made to the admissibility of an expert's report at Trial unless a reasonable Notice of Objection is provided by the objecting Party or the Court permits the objection to be made. The Defendants did not serve a Notice of Objection. Nonetheless, Sidnell J. held that "the law requires the party tendering the expert to show that the expert is

qualified, and this obligation exists regardless of whether an objection is made" under Rule 5.36.

Justice Sidnell held that "allowing an adjournment so that a party can present better evidence at trial would not be fair or result in a just resolution". To allow a Party to adjourn a Trial already underway so that it can correct an evidentiary issue would impede the Court process and prevent it from operating in a timely and cost-effective manner as directed by Rule 1.2.

While the Plaintiffs were put in a difficult position, Trials must proceed regardless of the mid-Trial rulings. The Court held that "[a]llowing a mid-trial adjournment to remedy expert evidence where it is found to be inadmissible would have a catastrophic effect on all trials where expert evidence is relied upon". Litigants would lose confidence that a Trial could be held in the face of an adverse ruling on admissibility.

MUNICIPAL DISTRICT OF FOOTHILLS NO 31 V ALSTON, 2023 ABCA 46

(ROWBOTHAM, WAKELING AND ANTONIO JJA)

Rules 1.2 (Purpose and Intention of These Rules) and 4.31 (Application to Deal with Delay)

This was an Appeal of a Decision dismissing an Application brought by the Appellant/Defendant under Rule 4.31 to dismiss the Plaintiffs' claim commenced in 2010.

The Respondents/Plaintiffs argued that the Court ought to make allowances for self-represented litigants as they had not failed to advance the Action to a point on the litigation spectrum that a comparator self-represented litigant would have attained. The Court, however, held that is not the law. All litigants, including those that represent themselves, must conduct themselves in accordance with the Rules. The Court held that Rule 4.31 contains one of the norms used to identify Actions that fail to proceed with appropriate expedition.

With respect to a specific delay period between 2013 and 2015 determined by the Chambers Justice to be attributed to the Appellant, the Court held that it was unable to accept that some of the blame rested with the Appellant. The suggestion that the Appellant could have brought an Application for access to evidence when it thought that such Application would be unnecessary would be a foolish use of resources and introduce delays in contravention of Rule 1.2(2)(b).

Similarly, in relation to delay after 2017, the Court took note that the mere taking of steps is no guard against a finding of inexcusable delay if those steps accomplish little to advance the proceedings. The Parties, especially the Plaintiffs, must do more than participate. Neither simply applying to schedule a Trial, or for Summary Judgment, by themselves, necessarily advance an Action.

The Court allowed the Defendants Appeal and dismissed the Plaintiffs claim.

AFOLABI V WEXCEL REALTY MANAGEMENT LTD, 2023 ABKB 68

(MARION J)

Rule 1.5 (Rule Contravention, Non-Compliance and Irregularities)

This case involved a residential tenancy dispute. The Parties had appeared before the Residential Tenancy Dispute Resolution Service, and an Order was made by the Tenancy Dispute Officer in favour of the landlord. The tenants sought to Appeal the Order but had missed the deadline to file a Notice of Appeal. The tenants therefore sought permission to file a late Notice of Appeal.

Justice Marion considered whether he was permitted to allow the tenants to file the Notice of Appeal, given that section 28 of the *Residential Tenancy Dispute Resolution Regulation*, AR 98/2006 (the "Regulation") directed that a Court must dismiss an Appeal which did not comply with the requirements set out therein. In particular, he considered his jurisdiction under the Rules generally, to enlarge timelines and forgive slips or omissions.

Justice Marion found that he had no authority to vary the Appeal period provided by the Regulation given the conflict between the mandatory language in the Regulation and the permissive nature of his general jurisdiction under the Rules. Further, Rule 1.5(5) prohibited him from curing any contravention that would have the effect of extending a time period which he is prohibited from extending.

In closing, Justice Marion remarked that, even if there was a technical argument to be made that he was permitted to allow the filing of the Notice of Appeal, as the Regulation only requires that the Appeal be dismissed, he would not do so as it would be a waste of judicial resources.

POCHA V ADAMSON, 2023 ABKB 118

(MANDZIUK J)

Rules 3.8 (Originating Application and Associated Evidence), 11.4 (Methods of Service in Alberta), 11.5 (Service on Individuals), 11.27 (Validating Service) and 11.28 (Substitutional Service)

The Applicant brought an Action, commenced by way of Originating Application under Rule 3.8, seeking relief related to various declarations needed prior to selling a residential property. The Respondent disputed the validity of service of the Application on two adult children who had an interest on title of the residential property. The Respondent took the position that service was not effected in a manner prescribed under Rule 11.4. As such, Justice Mandziuk considered the preliminary issue of whether service was effective.

Justice Mandziuk recognized that the purported service was not completed in a method contemplated under Rule 11.5. Further, the Applicant had failed to bring an Application either validating service pursuant to Rule 11.27

or for substitutional service pursuant to Rule 11.28. As such, Justice Mandziuk concluded that service had not been affected and the matter was adjourned until such time as the Respondents are successfully served.

DUFFEK V ALBERTA (APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION), 2023 ABKB 18

(GRAESSER J)

Rules 3.14 (Originating Application Evidence) and 3.15 (Originating Application for Judicial Review)

The Applicant applied for Judicial Review of a decision (the "Decision") of the Appeals Commission of the Worker's Compensation Board (the "WCB"), which upheld the decision of the WCB Dispute Resolution and Review Body, which in turn upheld the decision of the Appellant's case worker to reduce the Appellant's benefits after he reached retirement age.

The Court's discussion of the Rules was limited to a preliminary jurisdiction issue. The Appellant applied for Judicial Review of the Decision under Rule 3.15, which sets out the procedural requirements for an Application to invoke the inherent power of the Court to review decisions of administrative bodies. The Court determined that the issues the Appellant raised were on a reasonableness rather than correctness standard. The Court noted that these issues can only be properly raised in a Judicial Review Application under Rule 3.14. However, the Court determined that this error did not prejudice the Respondent and proceeded to deal with the Application as if it had been made under Rule 3.14.

CONDOMINIUM CORPORATION NO 022 6956 V MERCIER, 2023 ABKB 125

(APPLICATIONS JUDGE SUMMERS)

Rules 3.14 (Originating Application Evidence (Other than Judicial Review)) and 6.11 (Evidence at Application Hearings)

The current Action was commenced by Originating Application (the "Current Action"). The Respondent to the Originating Application (the "Cross Applicant") initiated a Cross Application which among other things, sought to use evidence from two related prior Actions (the "Prior Actions") in the Current Action, relying on Rule 3.14(f) and Rule 6.11(1)(f).

The Court found that there was no valid reason for it to not consider evidence and Pleadings from the Prior Actions in the Current Action because (1) the Respondent to the cross Application was fully involved and was intimately familiar with the evidence and Pleadings in the Prior Actions and their relevancy to the issues in the Current Action, and (2) the Cross Appli-

cant could not claim surprise because the Cross Applicant provided notice of its intent to rely upon the Pleadings and evidence from the Prior Actions.

The Court thereby granted an Order allowing the evidence and Pleadings from the Prior Actions to be considered in the Originating Application.

JULIEN V ALBERTA (APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION), 2023 ABCA 81

(VELDHUIS, CRIGHTON AND PENTELECHUK JJA)

Rule 3.15 (Originating Application for Judicial Review)

The Appellant filed an Originating Application to set aside a decision of the Appeals Commission for Alberta Workers' Compensation (the "Appeals Commission"). The Appellant served the Appeals Commission and the Workers' Compensation Board (the "WCB") within the six-month period prescribed by Rule 3.15 but failed to serve his employer or the Minister of Justice within the required time. As a result, the WCB successfully applied to strike. The Appellant appealed.

The central question in the Appeal was whether the Appellant's employer was "directly affected" by the Originating Application, so as to necessitate service pursuant to Rule 3.15. The Court held that the words "directly affected" should be given their ordinary meaning, applied to the particular facts of each case. However, in the case of Judicial Review of a decision of the Appeals Commission, the employer is always "directly affected" since an employee's entitlement to benefits may increase the employer's premium for participation in the worker's compensation scheme. In the present case, the employer was further affected by allegations of discriminatory behaviour included in the Originating Application. The employer's participation in the underlying proceedings was further evidence, though the Court clarified that non-participation in the underlying proceedings would not have removed the employer's affected status.

In reply to the Appellant's argument that the WCB should have informed him of his obligation to serve his employer, the Court held that it was likely open to the WCB to have done so, but the WCB was not obligated to do so. In *obiter*, the Court commented that, given the uncontroversial nature of the requirement to serve an employer, the WCB may wish to consider offering that advice.

Finally, the Court noted that relief from forfeiture was not available since section 10 of the *Judicature Act*, RSA 2000, c J-2, did not apply to time limits imposed by a statute or the Rules.

In the result, the Appeal was dismissed.

LAUZON V EDMONTON (POLICE SERVICE), 2023 ABKB 40

(APPLICATIONS JUDGE SUMMERS)

Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service and 11.28 (Substitutional Service)

The Applicant submitted a without notice Application for substitutional service and an extension of time to serve the Statement of Claim and an Amended Statement of Claim, pursuant to Rules 11.28 and 3.27, respectively. Prior to the without notice Application, the Applicant was granted a first extension to serve the Statement of Claim under Rule 3.26. The Applications Judge denied the without notice Application because there was no authority allowing for a second extension and therefore no basis to permit substitutional service.

In the Application, the Applicant stated that the Statement of Claim and Amended Statement of Claim would be served at the Defendants' place of work and previous place of work. Applications Judge Summers denied the Application for substitutional service on the grounds that the Applicant's Affidavit had not specified how substitutional service was more likely to bring the documents to the attention of the persons being served, as required to satisfy Rule 11.28(2)(c). Simply stating that documents would be served at the Defendants' place of work was not sufficient. The Affidavit needed to specify how the alternative method would get the documents into the hands of the Defendants. Secondly, the Applications Judge stated that the substitutional service could not be accomplished within the service period and an extension would be required, which was not available under the Rules.

The Applicant argued that an extension of time would not prejudice the Respondent, and one could be granted under Rule 3.27(1), relying on subsection (c). Applications Judge Summers noted that evidence of special or extraordinary circumstances was required to satisfy subsection (c). The Applicant had not provided any evidence of delay caused by special or ordinary circumstances resulting solely from the Defendants' conduct, or the conduct of a person not related to the Action.

For the reasons above, the Plaintiff's Application was dismissed.

WADDY V HARTFORD ET AL, 2023 ABKB 47

(FUNK J)

Rules 3.31 (Statement of Defence), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment), 9.2 (Preparation of Judgments and Orders) and 9.3 (Dispute Over Contents of Judgment or Order)

The Appellant appealed an Applications Judge's Decision (the "Decision") to strike the Appellant's Statement of Claim against the Respondent lawyer, who represented a Party opposite the Appellant in a civil claim. The Court dismissed the Appellant's Appeal.

The Appellant argued that the Decision erred

in not allowing her to amend her Statement of Claim under Rule 3.68 and that the Respondent owed her a duty of care under the C*onsumer Protection Act*, RSA 2000, c C-26.3 (the "Act"). However, the Appellant did not suggest any proposed amendments and the Court concluded that there was no legal basis to include the Respondent in any cause of action under the Act.

The Appellant also argued that she had a claim against the Respondent in relation to an Order that Justice Hollins had signed without the Appellant's endorsement. The Court noted that Rule 9.2(2)(a) required the Respondent to prepare a draft Order and serve it on the Appellant within 10 days after the Order was pronounced. The Court found that the Respondent followed Rule 9.2(2)(a) but the Appellant refused to approve the Order and provided no particulars for her objection. The Appellant also did not apply to the Court to resolve a dispute about the contents of the Order under Rule 9.3. The Court determined that the Appellant had no cause of action against the Respondent in relation to the Order.

The Appellant also argued that the Respondent's Application under Rules 3.68 and 7.3 should have been dismissed for various technical reasons including that: (1) the Application was mislabelled as being on a Form 11 (the form used for Statements of Defence) rather than a Form 27 (the form used for Applications); (2) as a result of the Application being on a Form 11, the Rules of service for a Statement of Defence under Rule 3.31 apply and were breached; (3) the Respondent should have filed two separate Applications, one to strike Pleadings under Rule 3.68 and another for Summary Dismissal under Rule 7.3; (4) the Respondent should not have been permitted to file Affidavit evidence because his Application was under Rule 3.68, which does not permit the filing of evidence; and (5) the Respondent's Application improperly referred to Rule 7.3(1)(c), which applies when the only real issue is the amount to be awarded.

The Court determined that there was no basis to dismiss the Respondent's Application for any alleged technical breaches of the Rules.

MCDONALD V ALBERTA HEALTH SERVICES, 2023 ABCA 6

(KHULLAR JA)

Rules 3.36 (Judgment in Default of Defence and Noting in Default), 3.62 (Amending Pleadings) and 14.8 (Filing a Notice of Appeal)

A Chambers Judge had previously dismissed the Applicant's Application to have the Respondents noted in default (the "Decision"). The Applicant applied to extend time to Appeal the Decision set out in Rule 14.8, which is one month after the date the Decision was pronounced.

Khullar J.A. noted that the Court has discretion to extend the time to Appeal if it is in the interest of justice to do so and that the relevant factors to consider are whether: (1) a *bona fide* intention to Appeal while the right to Appeal existed; (2) an explanation for the failure to Appeal in time that serves to excuse or justify the lateness; (3) an absence of serious prejudice such that it would not be unjust to disturb the Judgment; (4) the Applicant must not have taken the benefits of the Judgment under Appeal; and (5) a reasonable chance of success on the Appeal, which might better be described as a reasonably arguable Appeal.

The Court was satisfied that the Applicant had a *bona fide* intention to Appeal and an excuse for filing his Notice of Appeal three days late. The Applicant was self represented and was unaware of the deadline until informed by the Court's Case Management Officer. The Court was also satisfied that the delay in filing the Notice of Appeal did not cause the Respondents any significant prejudice as it was filed only three days after the one-month deadline set out in Rule 14.8. There was also no issue about the Applicant already taking the benefit of the Decision.

However, the Court was not satisfied that the Appeal had a reasonable chance of success and ultimately dismissed the Appeal. The Applicant had filed an initial Statement of Claim on behalf of his company but later agreed to a Consent Order to file an Amended Statement of Claim substituting himself as the Plaintiff. The Consent Order permitted the Respondents to file Amended Statements of Defence but did not require them to do so. The Applicant later applied to note the Respondents in default for failing to file Amended Statements of Defence pursuant to Rule 3.36. The Court noted that there was no evidence that the Respondents were required to file Amended Statements of Defence. The Court also noted that the Respondents were entitled to rely on their original Statements of Defence pursuant to Rule 3.62(5).

MCDONALD V ALBERTA HEALTH SERVICES, 2023 ABCA 49

(KHULLAR JA)

Rules 3.36 (Judgment in Default of Defence and Noting in Default), 3.42 (Limitation on When Judgment or Noting in Default May Occur), 3.62 (Amending Pleading) and 14.5 (Appeals Only With Permission)

The Applicant applied under Rule 14.5 for permission to Appeal the Decision to dismiss his Application for an extension of time to Appeal a Decision declining to note the Respondents in default (the "Decision").

Khullar J.A. cited *Settlement Lenders Inc. v Blicharz*, 2016 ABCA 109 and *TD Auto-Finance (Canada) Inc. v Smith-Johnson*, 2016 ABCA 388 for the proposition that a single Judge may grant permission to Appeal a Decision under Rule 14.5 if the Decision involves "a misapprehension of important facts". Having found that the Applicant failed to show any misapprehension of important facts that would have changed the Decision, Khullar J.A. dismissed the Application.

The Applicant had filed the transcript of the previous proceedings. Khullar J.A. held that the only plausible interpretation of the transcript was that focusing on setting dates for litigation steps to move the litigation forward, the Chambers Judge set a filing deadline for the Respondents in the event that they wanted to file their Amended Statements of Defence. The Chambers Judge, however, did not impose any legal obligation on the Respondents to file their Amended Statements of Defence.

Khullar J.A. further held that, alternatively, the Appeal would lack a reasonable prospect of success for three reasons: (1) the Applicant's claim that the Chambers Judge ordered the Respondents to file Amended Statements of Defence by a certain date was unsupported; (2) the Respondents were entitled under Rule 3.62(5) to rely on the Statements of Defence they had filed before the Applicant had filed

his Amended Amended Statement of Claim. Since the Respondents had filed Statements of Defence, the Applicant could not have them noted in default under Rule 3.36(1); and (3) when the Chambers Judge heard the Application to note the Respondents in default, one of the Respondents had an outstanding Application to strike the Applicant's Amended Amended Statement of Claim. As a result, Rule 3.42(b) prevented that Respondent from being noted in default.

Based on the above enumerated reasons, Khullar J.A. held that Noting in Default was not a remedy available to the Applicant and dismissed the Applicant's Application.

HUANG V JK CANADIAN LAW SERVICES, 2023 ABKB 112

(ROSS J)

Rules 3.37 (Application for Judgment Against Defendant Noted in Default) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendants failed to file a Statement of Defence or Demand for Notice in the Action. As a result, they were noted in default and Judgment was granted against them on a without notice basis. The Defendants applied to set the Default Judgement aside. Justice Ross dismissed their Application because it did not meet the requirements to set aside the Noting in Default or set aside Default Judgment.

Under 3.37(1)(a), a Plaintiff may apply without notice for Judgment if one or more Defendants are noted in default. The Court may grant Judgment under Rule 3.37(3)(a) or direct the claim to proceed to Trial under Rule 3.37(3)(f). The Plaintiffs had noted the Defendants in default and filed a without notice desk Application for Default Judgment. The Application was successful, and Default Judgment was granted against the Defendants.

The Defendants applied to set aside the Default Judgment under Rule 9.15 citing that the Plaintiffs took improper steps to obtain it. Generally, a Party can apply under Rule 9.15(1)(a) to set aside a Judgment that has been obtained without notice. Rule 9.15(3)(b) empowers the Court with discretion to set it aside on any terms it considers just. However, the Application must be brought by the Defendant within the 20-day period contemplated by Rule 9.15(2).

Justice Ross outlined the relevant principles on an Application to set aside Default Judgment under Rule 9.15. First, the Plaintiff must act in the utmost good faith and in strict compliance with the Rules because Default Judgment is not an adjudication on the merits. Second, the Defendant must demonstrate: (a) an arguable defence, (b) that it did not deliberately let Judgment go by default and provide a valid excuse for the default, and (c) that it acted promptly to open up the Default Judgment.

On the first point, Ross J. found that the Plaintiffs acted in good faith and complied with the Rules in obtaining Default Judgment. There was no procedural flaw and their representations on the without notice application were accurate. On the second point, the Court found that the Defendants failed to provide evidence of an arguable defence. While the Defendants did not deliberately let the Judgment go by default, they failed to apply to set it aside within the 20-day period contemplated by Rule 9.15. Given these two findings, the Court did not have to determine whether the Defendant moved promptly to open up the Default Judgment. Accordingly, it dismissed the Defendants' Application.

LOVE V PARMAR, 2023 ABKB 30

(LOPARCO J)

Rules 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 7.3 (Summary Judgment), 13.7 (Pleadings: Other Requirements) and 13.8 (Pleadings: Other Contents)

This was an Appeal of portions of a Decision of Applications Judge Farrington allowing the Plaintiffs' proposed amendments to a Statement of Claim, including allegations of fraudulent and/or negligent misrepresentations, and dismissing the Application for partial Summary Dismissal of claims.

The Court considered amendments to Pleadings pursuant to Rules 3.62 and 3.65 and undertook a review of the proposed amendments to consider whether the amendments would cause serious prejudice to the opposing Party, not compensable in Costs; the amendments requested were hopeless; the amendments sought to add a new Party or new cause of action after the expiry of a limitation period; and whether there was an element of bad faith associated with the failures to plead the element in the first instance. The Court noted that putting too fine a point on the merits is inappropriate at this stage, and that Rule 13.7 requires providing particulars of fraud and misrepresentation in Pleadings. With the amendments sought, the stricter test for fraud or negligence would additionally need to be proven, but the evidence and facts that underpin whether the representation has the additional characteristic would not significantly differ from what would already need to be in evidence.

The Court also stated that the Defendants' Summary Dismissal Applications concerning potential limitations defences were brought under Rule 7.3, and that Rule 13.18 supplements Rule 7.3(2) which requires that an Affidavit in support of an Application that may dispose of all or part of a claim must be sworn on the basis of the personal knowledge of the person swearing the Affidavit. As there were gaps and uncertainties in the facts, the record, and the law, the Court held that summary disposition would not be a fair result and that the limitation issues were genuine triable issues.

Ultimately, the Court held that the claims were not appropriate for resolution on a summary basis as they were based on a common dispute about family dealings, the understanding of the nature of the advances, and general expectations that related to all the other claims. The Court noted that Summary Judgment is only appropriate where the issues at bar are sufficiently discrete from those in the main Action. In this instance, Summary Judgment was determined not to be timely or cost-effective, nor would it eliminate the need for evidence specific to the dismissed claims.

The Court dismissed the Appeal from Application Judge Farrington's Decision and upheld his Order to grant the amendments and dismiss the Application for Summary Dismissal.

GREEN V REDLICK, 2023 ABKB 19

(BIRKETT J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order) and 5.11 (Order for Record to be Produced)

This case involved a claim for a fatal gunshot made by a police officer while on duty.

The Plaintiff sought to amend their Statement of Claim, pursuant to Rule 3.65, to raise the issue of the Defendant's mental health and psychological fitness for duty. In support of that Application, the Plaintiff filed an Affidavit containing evidence about the Defendant's mental health and other incidents where use of unnecessary force was alleged. The Plaintiff also sought an Order to compel production of records related to the Defendant's mental health, pursuant to Rule 5.11.

The Defendant cross-applied for an Order from the Court to strike sections of the Plaintiff's Affidavit, pursuant to Rule 3.68(4)(c), alleging that they contained prohibited and prejudicial character evidence and irrelevant information. The Defendant's Application also sought Security for Costs pursuant to Rule 4.22.

Justice Birkett only considered the Application to strike sections of the Affidavit. The other issues were left to a separate hearing.

Justice Birkett held that the information in the Affidavit must be relevant and material. It should not contain argument, opinion or conclusions. However, the test for admissibility based on relevance is a low one, and the evidence must be considered in context.

She considered whether the potential probative value of the information in the Affidavit outweighed the prejudicial effect. Ultimately, Birkett J. concluded that the evidence did allege facts from which it could be inferred that the facts to be pleaded in the proposed amendment occurred. The Defendant was reported to be suffering from a major depressive disorder and a causal connection was found between the depression and the misconduct. The evidence of other incidents of alleged force were relevant to the issue of the Defendant's psychological fitness at the time of the shooting. Justice Birkett therefore declined to strike any portion of the Plaintiff's Affidavit.

QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP, 2023 ABKB 109

(NIXON J)

Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings) and 6.14 (Appeal from an Application Judge's Judgment or Order)

Justice Nixon considered an Appeal of an Application Judge's Decision, pursuant to Rule 6.14 of the Rules, related to the Applicant's failure to obtain an Attachment Order. Further, the Applicant also sought to amend the Statement of Claim in the Action.

In considering the Appeal pursuant to Rule 6.14, Justice Nixon analyzed the underlying facts related to the Attachment Order and ultimately allowed the Appeal.

With regards to the Application to Amend the Statement of Claim, Justice Nixon noted that amendments to Pleadings are typically easily obtained pursuant to Rules 3.65 and 3.74. After identifying the common law test to amend the Pleadings, Justice Nixon concluded that, given the facts in the dispute and the current state of the law, the test was met and that accordingly the Pleadings could be amended.

MD V ALBERTA (MINISTER OF CHILDREN'S SERVICES), 2022 ABCA 863

(WHITLING J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Applicant filed a *habeas corpus* Application and a supporting Affidavit seeking an Order restoring custody of her daughter to herself. The Respondents did not request that the Court strike out the Application pursuant to Rule 3.68.

The Court noted that it could only commence a Rule 3.68 Application on its own initiative in exceptional circumstances. The Court determined that exceptional circumstances existed, specifically noting that: (1) it was at best doubtful that the Respondents would have any practical ability to bring a Rule 3.68 Application prior to the scheduled hearing date; and (2) the Applicant's request for an Order directing that criminal charges be laid against certain persons raised immediate concerns with respect to its propriety.

The Court concluded that it was appropriate to proceed with a Court-initiated review of this proceeding in accordance with Civil Practice Note 7 and Rule 3.68.

EMMONS V ALBERTA (WORKERS' COMPENSATION BOARD), 2023 ABKB 27

(JONES J)

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

The Applicant sought to bring an end to a protracted dispute by seeking to have the Plaintiff's Action struck or summarily dismissed.

While canvassing the two Parties' dispute history, Justice Jones noted that, in an earlier Action, the Applicant had brought an Application to have the earlier Action struck pursuant to Rule 3.68. The Applications Judge opted to stay the earlier Action while the Workers' Compensation Board's internal administrative processes proceeded.

With regards to the Application at bar, Justice Jones identified and analyzed the test for striking a Statement of Claim pursuant to Rule 3.68. Ultimately, after considering the positions of the Applicant and Respondent, and the relevant statutory authorities, Justice Jones concluded that the Action should be struck as it disclosed no reasonable cause of action and had no reasonable prospect of success.

Justice Jones also considered the alternative position of the Applicant; that the Action be summarily dismissed pursuant to Rule 7.3. After considering the two-year limitation period under the *Limitations Act*, RSA 2000, c L-12, Justice Jones found that should he be incorrect in his conclusion under Rule 3.68, the Application for Summary Dismissal under Rule 7.3 would be granted.

PARADIS V DEGROOT, 2023 ABKB 31

(APPLICATIONS JUDGE SUMMERS)

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

The Defendants filed an Application for Summary Dismissal pursuant to Rule 7.3 and/or to strike the Statement of Claim pursuant to Rule 3.68. The Court reviewed the seminal decision of *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.,* 2019 ABCA 49, confirming that with respect to Rule 7.3, Summary Dismissals must be granted whenever there is no genuine issue requiring a Trial. The Court also confirmed that the procedure and outcome must be just, appropriate and reasonable.

In order to dismiss the Action under Rule 7.3, the Court needed to consider if the Defendants owed the Plaintiff a private law duty of care under the *Fatality Inquiries Act*, RSA 2000, c F-9. The Court determined that none of the Defendants owed a private law duty of care to the Plaintiff.

In dismissing the claim pursuant to Rule 7.3, Applications Judge Summers noted that this case was decided strictly on principle of law, and that there were no contentious facts to be considered, making it appropriate for Summary Dismissal.

WEIDENFELD V ALBERTA (MINISTER FOR SENIORS AND HOUSING), 2023 ABKB 90

(KENDELL J)

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

In a prior hearing, the Originating Application of the Plaintiff, Mr. Weidenfeld, had been struck pursuant to Rule 3.68 because it reflected an attempt to re-litigate previously settled issues and attacked the Court's conclusions on those issues. The Court had also held that the Application had no basis in law.

The Court had previously considered whether Mr. Weidenfeld was an appropriate candidate for litigant management. He had repeatedly re-litigated the same issues, had an aggressive pattern of attacking counsel and Court clerks, and had a history of abusive litigation. An interim Court access gatekeeping Order was placed on Mr. Weidenfeld pursuant to the *Judicature Act*, RSA 2000, c J-2 ("*Judicature Act*"), pending possible further Application by the Defendant for a permanent Order.

The Defendant opted not to make such an Application. Kendell J. therefore opted to instigate the Application on her own motion, pursuant to sections 23 and 23.1 of the *Judicature Act*. Justice Kendell gave Mr. Weidenfeld an opportunity to make written submissions on the Application. He failed to address the matters at issue in his written submissions.

On review of the various claims argued by Mr. Weidenfeld, Kendell J. concluded that he was an abusive litigant. She recognized that the litigation management process relies on the litigant's cooperation. Given Mr. Weidenfeld's behaviour, Justice Kendell concluded that Mr. Weidenfeld should be subject to an indefinite and global Court access gatekeeping Order. The need for Mr. Weidenfeld's approval as to the form of Order was dispensed with pursuant to Rule 9.4(2)(c).

ZIOLKOSKI V UNGER, 2023 ABKB 150

(WHITLING J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 8.20 (Application for Dismissal at Close of Plaintiff's Case)

This Trial consisted of two Actions ("Action 1" and "Action 2"). The Defendants brought a non-suit Application to dismiss Action 2, pursuant to Rule 8.20. The Defendants did not apply to dismiss Action 1.

A central feature of Action 1 was an allegation that the Defendants illegally concealed documents in 1986. The facts pleaded in Action 2 were essentially a continuation of Action 1, with different Defendants. The Amended Statement of Claim in Action 2 pleaded a new set of facts alleging that a letter written by an Action 2 Defendant contained a false representation and that Action 2 Defendants were complicit in a conspiracy to conceal the records from Action 1.

The Defendants made oral submissions at Trial pursuant to Rule 8.20 to dismiss Action 2 on the ground that no case had been made against the Defendants named in the Action. If all of Action 2 could not be dismissed, then the Defendants, who were all represented by the same counsel, agreed that none of the Defendants objected to one or more of the Action 2 Defendants being "let out" of the Trial at this stage. The Defendants did not submit to dismiss Action 1 and conceded that there was "some evidence" with respect to the allegations made in Action 1, such that the Defendants in that Action must be made to call evidence. Effectively, the concession dictated that, regardless of the result of the non-suit Application, the Trial must continue in relation to Action 1.

In assessing Rule 8.20 and non-suit Applications, the Court referred to Capital Estate Planning Corporation v Lynch, 2011 ABCA 224, finding that a non-suit Application will fail if the Plaintiff has adduced some evidence on each of the essential elements of his or her claim. In making such an assessment, a Judge is not to assess the weight or credibility of said evidence and must assume that the Plaintiff's evidence is true, drawing all reasonable inferences from it. Additionally, a Trial Judge's ruling on a non-suit Application will be reviewed on a standard of correctness.

The Court also referred to Rules 7.3 and 3.68, recognizing that the Rules allow the Court to dismiss "a claim or part of it" or that "all or any part of a Claim [...] can be struck out". The Court distinguished Rule 8.20, noting that Rule 8.20 allowed the Court to dismiss "an Action", but not part of an Action. Based on the presumption that different language indicated the legislature intended different meanings, the Court found that the strict language in Rule 8.20 prevented the Court from disposing of part of a claim.

Having considered all circumstances of the case, the Court found that although Action 1 and Action 2 were never formally joined, for practical purposes they were one Action. Since the Defendants only applied to dismiss Action 2, the non-suit did not have the potential to bring the Action to an immediate end, and the potential time savings would be minimal. As the Defendants admitted that Action 1 was supported by evidence, and the issues in Action 2 could not be disentangled from Action 1, an Order granting a non-suit in Action 2 would create a significant risk of inconsistent determinations with respect to the same issues. In summary, the Court held that granting the non-suit Application would not be in the interest of justice. The Application was denied.

FEENEY V HOBBS, 2023 ABKB 153

(NIELSEN ACJ)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order), 4.23 (Contents of Security for Costs Order), 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 14.5 (Appeals Only with Permission)

The Applicant, against whom Court access restrictions had previously been imposed, applied for permission to continue three Actions having recently retained counsel.

The Court set out the test for leave to continue litigation stayed due to Court access restrictions. The Applicant must: (1) establish reasonable grounds for the litigation; and (2) depose fully and completely as to the facts and circumstances surrounding the proposed claim or proceeding. Associate Chief Justice Nielsen further noted that pursuant to Rule 14.5(4), there is no Appeal to the Court of Appeal of a Decision to deny leave to continue litigation.

The Court held that by virtue of the Affidavit evidence filed and the exhibits thereto, the Applicant had satisfied the low threshold to establish that reasonable grounds existed for the three Actions. The Court therefore granted permission, but did so expressly without limitation to the Respondents' ability to challenge the merits of the Applicant's claims in reliance on Rules 3.68, 7.2, or 7.3.

The Court also observed that the Applicant had a highly problematic history in dealing with the Court as a self-represented litigant. Therefore, in waiving the previously imposed requirement for the Applicant to seek leave for any new filing, the Court restricted that waiver only to filings by Counsel on the Applicant's behalf.

The Court also ordered that, if the Applicant were to become self-represented in any of the three continued Actions in the future, then: (1) that Action would be stayed, and the Application would need to apply again for leave to continue that Action; (2) the Applicant would have 60 days to pay $5,000 in Security for Costs to the Clerk of the Court, pursuant to Rules 4.22 and 4.23; and (3) if the Security for Costs is not paid, the Defendants in that Action may apply to strike out the Action.

MAKIS V MCEWAN, 2023 ABKB 184

(INGLIS J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

In the context of an Application by the Applicant to have the Respondents declared vexatious litigants, the Respondents brought a cross-Application to strike the second of two Affidavits filed by the Applicant.

The Respondents relied on Rule 3.68(4), which states that an Affidavit may be set aside if it is frivolous, irrelevant, or improper. The Applicant argued that the second Affidavit satisfied each of those grounds, in that it: (1) compromised

the privacy rights of thousands of medical patients; (2) wrongfully asserts a doctor-patient relationship between the Applicant and thousands of medical patients; (3) included allegations of fraud and conspiracy to commit murder, with no evidence in support; and (4) contained argument, opinion, or conclusions but not facts.

The Court described its review of the second Affidavit and held that it should be struck from the Court record.

WAUD V DAWSON-DIXON, 2023 ABKB 158

(FEASBY J)

Rule 3.72 (Consolidation or Separation of Claims and Actions)

The Applicants/Plaintiffs (the "Applicants") sought a Stay of the Action (the "Duplicate Action") pending the completion of an outstanding Appeal in a California proceeding concerning the same facts and same Parties or enforcement proceedings in Alberta based on the California Action. The Respondent/Defendant (the "Respondent") submitted that the appropriate path forward was for the Applicants to discontinue the Duplicate Action or for the Court to deny the Stay which would permit the Respondent to bring a Summary Dismissal Application.

More specifically, the Applicant sought a Stay of the Duplicate Action pursuant to Rule 3.72 and section 8 of the *Judicature Act*, RSA 2000, c J-2. The Court set out that the appropriate framework for granting a Stay to prevent a multiplicity of proceedings was whether (1) the issues in the Action sought to be stayed were substantially the same as the issues in another Action, (2) the continuance of the Action would work an injustice because it would be oppressive or vexatious to one of the Parties or an abuse of the Court's process; and (3) the Stay would cause an injustice to one of the Parties. The Court noted that there was nothing in Rule 3.72 which restricted the Court's ability to grant a Stay where there was a multiplicity of proceedings and that there was nothing in Rule 3.72 which foreclosed the possibility that a Plaintiff could not make out a Stay of its own Action.

The Court found that the (1) Applicants/Plaintiffs did not establish that the continuance of the Duplicate Action would be unjust on the basis it was vexatious or oppressive to the Applicants, (2) the Duplicate Action was an abuse of process, but the appropriate remedy is not a Stay but instead, the Duplicate Action should be allowed to continue so that the Respondent could bring a Summary Dismissal Application, and (3) granting a Stay would be unjust to the Respondent as it would prevent her from moving forward with a Summary Dismissal Application. The Application was accordingly dismissed.

ZHANG V LI, 2023 ABCA 38

(MCDONALD, CRIGHTON AND STREKAF JJA)

Rules 3.72 (Consolidation or Separation of Claims and Actions), 4.29 (Cost Consequences of Formal Offer to Settle) and 10.31 (Court-ordered Costs Award)

The Appellants appealed a Decision to consolidate divorce and civil proceedings pursuant to Rule 3.72. The Appellants improperly named a lawyer who was involved in a transaction related to the civil proceedings as a Respondent.

The Court noted that consolidation under Rule 3.72 is discretionary and reviewable on the standard of reasonableness. The Court found that the decision to consolidate the Actions was reasonable and dismissed the Appeal.

Turning to Costs, the Court noted that the successful Party on Appeal is generally entitled to Costs. The Court further observed that the Respondent had served a Formal Offer to Settle pursuant to Rule 4.29 which provides that such an Offer, if not accepted, entitles the offering Party to double Costs for all steps taken after service of the Offer if a more favourable Judgment is obtained. The Respondent's Formal Offer was for a dismissal of the Appeal by consent on a without Costs basis.

The Court observed that prior case law states that an Offer to forego Costs can constitute an identifiable compromise sufficient to trigger the consequences of Rule 4.29.

The Court therefore ordered Costs in favour of the Respondent, and double Costs in favour of the Respondent for steps taken after the date of the Formal Offer. With respect to the improperly named lawyer, the Court awarded Costs in his favour notwithstanding that he was self-represented on this Appeal, pursuant to Rule 10.31(5).

D(SJ) V P(RD), 2023 ABKB 84

(LEONARD J)

Rule 4.14 (Authority of Case Management Judge)

This was a Decision regarding the admissibility of text message evidence improperly obtained by one Party from the cell phone of the other Party for use in a family law Action. Leonard J. was not the Case Management Justice but was granted authority to hear the Application pursuant to Rule 4.14(2). Leonard J. noted that the resulting Decision was therefore binding on any future Trial in the matter, pursuant to Rule 4.14(1)(g)(i).

Leonard J. found that the text messages, which spoke to whether one Party was intentionally underemployed or hiding his true income, were probative of an issue in the Action. Since the probative value outweighed the prejudicial effect, the text messages were found to be admissible.

SHANNON V SHANNON, 2023 ABCA 79

(MARTIN, WATSON AND HO JJA)

Rules 4.17 (Purpose of Judicial Dispute Resolution) and 14.5 (Appeals with Permission Only)

The Appellant appealed an Order (the "Final Order") of the Alberta Court of Queen's Bench (as it then was) made after a binding Judicial Dispute Resolution process pursuant to a Binding Judicial Dispute Resolution Agreement.

The Court determined that the Final Order was a Consent Order. The Court noted that the Rules provide a framework under which a Justice of the Court of King's Bench is guided as to the conduct of Judicial Dispute Resolution. The Court specifically noted that Rule 4.17 provides that the purpose of Judicial Dispute Resolution process is to "actively facilitate a process in which the parties resolve all or part of a claim by agreement."

The Court noted that whether the Final Order was a Consent Order was important because Rule 14.5(1)(d) provides that "... no appeal is allowed to the Court of Appeal from ... (d) a decision made on the consent of the parties ...". As such, an Appeal from a Consent Order requires a legal foundation based on a prior permission to Appeal being granted. Regardless, the Court noted that the lack of prior permission to Appeal was not problematic as the Final Order was not unfair or prejudicial to the Appellant.

SONG V 2083878 ALBERTA LTD, 2023 ABKB 166

(FEASBY J)

Rules 4.22 (Considerations for Security of Costs Order) and 7.3 (Summary Judgment)

The Court dismissed the Defendants' Application for Summary Dismissal of the Plaintiff's Statement of Claim, and the Defendants' Application for Summary Judgment of the Defendants' Counterclaim, and the Defendants' Application for an Order requiring the Plaintiff to post Security for Costs.

The Court stated that the test for Summary Judgment or Summary Dismissal is whether there is a genuine issue for Trial. Relying on the principles relating to Summary Judgment set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49, Feasby J. held that there was a genuine issue for Trial and dismissed the Defendants' Application for Summary Dismissal.

Feasby J. held that although the Plaintiff did not file Affidavit evidence in opposition to the Defendants' Applications, the Defendants failed to show that the Plaintiff's claim had no merit.

With respect to the Summary Judgment Application, Feasby J. held that given that he had found that the Plaintiff's claim raised a genuine issue for Trial, he must also conclude that there was a genuine issue for Trial with respect to the Counterclaim.

Turning to the Security for Costs issue, Feasby J. cited *Attila Dogan Construction v AMEC Americas Limited,* 2011 ABQB 175 for the proposition that determining whether to grant an Order for Security for Costs involves two steps: First, the criteria in Rule 4.22 must be considered. Second, the Court must ask whether it is just and reasonable to grant an Application for Security for Costs. Feasby J. further cited *1251165 Alberta Ltd. v Wells Fargo Equipment Company Ltd.*, 2013 ABQB 533 for the following general principles: (1) The existence of a Counterclaim is a factor to be weighed based on the extent to which the Counterclaim is tied to the claim, or whether it involves mainly different issues from the claim; (2) The Court must attempt to look at the merits of the Action, as difficult as that may be on an interlocutory Application; (3) The greater the likelihood of success for the Plaintiff (if that can be reasonably assessed) the more the Court should consider the potential unjustness of preventing a meritorious claim from proceeding; (4) The converse is true: the smaller the likelihood of success for the Plaintiff (if that can be reasonably assessed) the slower the Court should be in denying security when security would otherwise be appropriate; and (5) Any connection between the Plaintiff's financial situation and the Defendant's conduct is relevant, especially if the Defendant's wrongful conduct is alleged to be the cause of the Plaintiff's impecuniosity.

Having found that the Plaintiff's dire financial circumstances were attributable to the Defendants' breaches that were in issue in this proceeding, the Plaintiff appeared to have a reasonable claim against the Defendants and a reasonable position in resisting the Counterclaim, and that the Counterclaim was inextricably linked with the Statement of Claim, Feasby J. concluded that no Security for Costs should be ordered.

COBLE V ATKIN, 2023 ABKB 10

(FETH J)

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 Parties were divorced. The Applicant had commenced an Action against her husband for divorce and division of matrimonial property. The Respondent defended and counterclaimed for the same relief. A few months later, the Respondent passed away.

The Applicant sought the dismissal of the Counterclaim for long delay under Rules 4.33 and 4.31. The Respondent, now represented by the personal administrator of his estate, opposed the Application. Justice Feth dismissed the Applicant's long delay Application finding that the Counterclaim was significantly advanced by the Respondent, and the Applicant had not established significant prejudice.

The Court noted that under Rule 4.33, the Court must dismiss an action if three or more years have passed without a significant advance in the Action. The COVID-19 pandemic suspended the operations of the time periods under the Rules from March 17, 2020 to June 1, 2020. Therefore, the time period during which the Counterclaim had to be significantly advanced was extended by 75 days. Under Rule 4.33, no inquiry is required into whether the Respondent was prejudiced. The method for calculating the time period under Rule 4.33 is to count back from the date that the Application was filed, not heard, to the last step that significantly advanced the Action.

Based on the filing date of the Application, Justice Feth found that the time period of 3 years and 75 days started on March 27, 2019. The Court explained that a genuine and timely advance significantly moves a lawsuit forward "in an essential way considering its nature, value, importance and quality". The Court focuses on the "substance and effect" of a step, not its form. The Courts have historically called this the "functional approach", and under this analysis a step providing meaningful progress is a significant advance.

Justice Feth found that four steps had significantly advanced the Action from March 27, 2019. First, on March 27, 2019, the Respondent obtained a Grant of Probate. Further, Rule 4.34(1) automatically stays an Action upon the death of a Party and an Order is necessary to allow it to continue. Justice Feth held that on this basis alone, the 4.33 Application failed. Second, material information was exchanged about the value of the matrimonial property after March 27, 2019. Third, a Judgment obtained in foreclosure proceedings crystalized the Parties' debts related to the matrimonial home. Fourth, the disclosure of a consumer proposal to the estate significantly advanced the Action between September 2020 and 2021. Therefore, Feth J. dismissed the Application under Rule 4.33.

The Court noted that under Rule 4.31, the Court may dismiss an Action if it determines that the delay significantly prejudiced a Party. The burden of proving prejudice rests with the Applicant. Alternatively, if the Court determines that the delay is "inordinate and inexcusable", the delay is presumed to have resulted in significant prejudice to the Party that brought the Application.

The Applicant adduced no evidence of prejudice. Rather, she asked the Court to find that there was inordinate and inexcusable delay which presumed prejudice.

Justice Feth stated that a Court may analyze a delay application under Rule 4.31 in many different ways without reference to a specific formula. However, one approach is the six-part inquiry from the Alberta Court of Appeal decision in *Humphreys v Trebilcock*, 2017 ABCA 116. Under this inquiry the Court asks: (a) whether the Respondent failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have reached within the time frame under review; (b) whether the shortfall or differential is of such magnitude that it qualifies as inordinate; (c) if the delay is inordinate, whether the Respondent explained the delay, and whether the excuse justifies the inordinate delay; (d) if the delay is inordinate and inexcusable, whether the delay impaired a sufficiently important interest of the Defendant so as to justify overriding the Plaintiff's interest in having its Action determined by the Court; (e) if the Respondent relied on the presumption of significant prejudiced created by Rule 4.31(2), whether the Plaintiff has rebutted the presumption of significant prejudice; and (f) whether there is a compelling reason not to dismiss the Respondent's claim.

Ultimately, Justice Feth relied on a simpler formulation of the *Humphreys* test to hold that delay is found to be inordinate in light of all the circumstances of a case. Essentially, until a "credible excuse is made out, the natural inference would be that (inordinate delay) is inexcusable". Further, whether significant prejudice has been established remains the Court's ultimate consideration.

In analyzing the delay under Rule 4.31, Feth J. found that the pace of litigation was slowed by changes in circumstances, but that the overall delay was not "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case". For example, the passing of the Respondent, the Grant of Probate and the

consumer proposal impacted the pace of the litigation in the circumstances. However, the Respondent did not fail to advance the Counterclaim to the point on the litigation spectrum that a reasonable litigant would have in the circumstances, and there was no prejudice to the Applicant. Accordingly, Feth J. dismissed the Application under Rule 4.31.

ROYAL BANK OF CANADA V AMOR, 2023 ABKB 12

(MALIK J)

Rule 4.31 (Application to Deal with Delay)

The Defendants appealed the Decision of Applications Judge Mason wherein the Court did not dismiss the Plaintiff's Action against them under Rule 4.31. Applications Judge Mason found that there was such delay but declined to dismiss the Action because the Plaintiff had rebutted the presumption of significant prejudice to the Defendants.

On review, Justice Malik concluded that the Plaintiff had not rebutted the presumption of significant prejudice that flows from its own delay in respect of the Defendants' recollection of past events. The Plaintiff had not established that the Defendants' memories were intact such that they could reasonably defend themselves at Trial, nor had the Plaintiff established that its allegations against the Defendants are provable from the available documentary record.

Justice Malik addressed the Applications Judge Mason's consideration that the "defendants have had fraud allegations hanging over their heads while these actions remain undetermined", and Justice Malik concluded that due to the nature of the allegations concerning fraud, the Plaintiff had failed to satisfy the Court that the Defendants will not suffer additional prejudice before this matter can be resolved at Trial.

Justice Malik allowed the Appeal and dismissed the Plaintiff's against the Defendants.

RECYCLING WORX SOLUTIONS INC V HUNTER, 2023 ABKB 51

(MARION J)

Rules 4.31 (Application to Deal with Delay) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicant, Darren Hunter and his corporation (collectively, "Hunter") sought to dismiss the Action by the Respondent, Recycling Works Solutions Inc. ("RWSI") under Rule 4.31 for the second time. Alternatively, Hunter sought to set aside the interlocutory Injunction that had been extant for over nine years under Rule 9.15. The Court had previously directed the Parties to agree to a litigation plan, and gave both Parties leave to apply for a procedural Order to set a litigation plan if they could not agree, however, neither Party proceeded to do so.

Justice Marion considered the law surrounding Rule 4.31, stating that there had been a long and inordinate delay in this Action. When considering if the delay was inexcusable, the Court found that Hunter was jointly responsible for the delay through its conduct over the years. The Court also noted that Hunter was obligated to bring the matter forward to set a litigation plan. Justice Marion concluded that Hunter had not discharged their onus to show that the fading memories during relevant periods of delay had caused or will cause Hunter significant prejudice. Therefore, the Court did not need to consider whether there was a compelling reason to dismiss the Action.

In considering setting aside the Injunction, Justice Marion noted that Hunter had not filed any evidence in support if its Application, and there was still a serious issue to be tried in this Action. The Court considered the previous Decision that granted the Injunction Order and noted that Hunter's subsequent conduct since the Injunction Order had caused irreparable harm to RWSI. Therefore, Hunter's Application to dismiss the Action or to set aside the Injunction Order was dismissed. To avoid further delay, the Court also ordered a procedural Order to move the matter forward.

199925 ALBERTA LTD V NB DEVELOPMENTS LTD, 2023 ABKB 114

(MARION J)

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

The Appellant sought to Appeal an Order of Applications Judge Farrington by which he refused to stay or dismiss the Action or enforcement thereof, and granted an Application to set Judgment amounts. The Appellant argued that delay justified dismissal of the claim against it, or a stay of the Judgment until the case could be concluded.

The Action involved a debt claim for an unpaid loan, secured by personal guarantees of various Defendants. Summary Judgement was granted in August of 2015 against the Appellant. No further steps were taken against the Appellant until June 2020, though steps were taken involving other Parties. At that point, an Application for Judgment Calculation was filed. In response, the Appellant filed an Application to, among other things, dismiss the Action for long delay, pursuant to Rules 4.31 and 4.33.

The lower Court ultimately dismissed the Application and set the Judgment amount against the Appellant. The Appellant filed a Notice of Appeal, but did not seek a Stay of the Order pending Appeal. The Appeal centred on whether the Action should be dismissed for long delay. The Respondent argued that the delay Rules were not available because there was already Judgment against the Appellant.

Justice Marion closely examined the wording of Rule 4.33. He held that an "Action" for the purposes of Rule 4.33, ends when the claim in the Action has been finally determined against a Defendant such that there is no substantive *lis* or justiciable issue between the Parties on the merits. At that point, the Parties become "judgment creditor" and "judgment debtor", rather than Parties to the Action. As the value of the Judgment remained outstanding during the delay period, Rule 4.33 continued to be available. However, since substantial steps were taken by other Parties to the Action during the delay period, the decision to dismiss the long delay Application was upheld.

Justice Marion then considered whether a remedy was available under Rule 4.31. He distinguished Rule 4.31 from Rule 4.33, stating that Rule 4.31 generally applies wherever delay in the "action as a whole" has caused significant prejudice to a Party. He found that, in this case, there was delay, but the Appellant failed to discharge the onus of establishing that the delay was inordinate or inexcusable.

Lastly, Marion J. considered whether the Judgment against the Appellant should be stayed pending the outcome of the claims against the other Defendants, pursuant to Rule 4.31. He held that the possibility of other Defendants raising defences not available to the Appellant was not a reason to stay the Judgment. Further, the Appellant would not suffer irreparable harm if the Stay was not granted. Justice Marion therefore upheld the Application Judge's Decision to dismiss the Application.

GOULD V GOULD, 2023 ABCA 48

(KHULLAR, MCDONALD, AND CRIGHTON JJA)

Rules 4.33 (Dismissal for Long Delay) and 12.36 (Advance Payment of Costs)

The Appellant appealed a special chambers Order dismissing his Application to have the Respondent's distribution of matrimonial property claim dismissed for long delay under Rule 4.33, and granting the Respondent's Application for advance Costs for litigation to be held in trust. The Respondent filed a Statement of Claim for divorce and division of matrimonial property on February 11, 2015. The Parties exchanged Affidavits of Record on in December 2018. The Parties were granted a divorce judgment on March 14, 2019. The divorce was severed from the claim for corollary relief. The Respondent filed an Application for advance Costs on February 27, 2020, which was adjourned sine die due to COVID.

The Appellant applied to dismiss the Respondent's claim for long delay on October 29, 2021, arguing that the Respondent's claim was stalled because of her unwillingness to negotiate a settlement or properly pursue the matter. The Chambers Judge held that the last significant step in the Action was the granting of a divorce and severing of the divorce from the corollary relief. Less than three years had passed since that step. Alternatively, if the last significant step was the exchange of the Affidavits of Records, the Chambers Judge held that the delay due to COVID would not be counted, and so there was no delay.

The Court of Appeal upheld the Chambers Judge's Decision. A Chambers Judge's Decision on an Application to dismiss an Action pursuant to Rule 4.33 is entitled to deference. The Appellant must show an error in principle, or that the exercise in the Judge's discretion was unreasonable. The Court of Appeal found that the divorce judgment was one of the steps sought by both Parties in the Action, and that the Affidavit of Records was significant to the litigation moving forward.

The Court of Appeal also upheld the Order for advance Costs. An Order for advance Costs made under Rule 12.36 is highly discretionary. The Appellant was unable to point to any errors in principle. His Appeal was dismissed.

OWAISE V CONDOMINIUM CORPORATION 8310969, 2023 ABCA 88

(ROWBOTHAM, WAKELING AND ANTONIO JJA)

Rule 4.33 (Dismissal for Long Delay)

The Appellant appealed the dismissal of his claim against the Respondents for long delay under Rule 4.33. The Appellant asserted that informal offers to settle and correspondence related to scheduling and settlement had moved the Action towards Trial. Further, as a self-represented litigant, the Appellant claimed that his former counsel or the Respondents had led him to believe that the settlement discussions had paused the clock in terms of passage of time under Rule 4.33.

The Court of Appeal first noted there was no evidence that the Respondents obstructed or delayed the Action. Further, there was no evidence to support the assertion that former counsel mislead the Appellant. Ultimately, the Court of Appeal concluded that more than three years had passed since the last significant step in the Action and dismissed the Appeal.

GOOLD V ALLEN, 2023 ABKB 66

(MARION J)

Rules 5.1 (Disclosure of Information - Purpose of This Part), 5.2 (When Something is Relevant and Material), 5.5 (When Affidavit of Records Must be Served), 5.6 (Form and Content of Affidavit of Records) and 5.10 (Subsequent Disclosure of Records)

This was an Application by the Plaintiff, seeking production of records respecting the Defendant's employment records (the "Records"). The underlying Action related to a motor vehicle incident, in which the Defendant, while employed by the City of Calgary (the "City") and driving a City transit bus, caused damage to the Plaintiff's vehicle in an admitted "side-swipe" collision. The City opposed the Application.

The Court referred to Rule 5.1, which outlines the purpose of disclosure, also noting that Rules 5.5, 5.6 and 5.10 limit disclosure obligations. Relying on Rule 5.6(b), the Court stated that Parties to a civil Action are required to produce records that are relevant and material to the issues in the Action if they are, or have been, under the Party's control.

In this case, because liability had been admitted, issues in the Action were limited to damages and mitigation of damages. The Amended Statement of Claim included a claim for punitive and exemplary damages. The Plaintiff argued that the Records were relevant and material to the issue of whether punitive or exemplary damages should be awarded. The Court noted that Rule 5.2 outlines the scope of relevance and materiality. Relying on the legal test for punitive damages observed in *Whiten v Pilot*, 2002 SCC 18, and by assessing the evidentiary foundation before the Court, the Court found the Records were relevant and material to issues in the Pleadings, to the City's conduct

in employing and deploying the Defendant as a transit bus driver, to the issue of the City's transit bus driver practices and whether those departed from ordinary standards of decent behaviour, and to the issue of whether punitive or exemplary damages were appropriate.

The City took the position that the request to produce was effectively a "fishing expedition" and the Records contained confidential information. In response to the City's concern of confidential information, the Court noted that confidentiality of non-privileged records is not normally a basis to refuse disclosure and production; however, the Court granted the City leave to redact specific personal information that was not relevant to the Defendant's driving record or medical history.

For the reasons set out above, the Court ordered the City to disclose the Records in a supplemental Affidavit of Records.

BROOKDALE INTERNATIONAL V CRESCENT POINT ENERGY, 2023 ABKB 120

(HORNER J)

Rules 5.1 (Disclosure of Information), 5.2 (When Something is Relevant and Material), 5.4 (Appointment of Corporate Representatives), 5.17 (People Who May Be Questioned) and 5.25 (Appropriate Questions and Objections)

This Application concerned objections at Questioning and objections to Undertakings. During Questioning of the Plaintiffs' corporate representative, the Plaintiffs' counsel objected to certain questions and Undertakings. The Defendants' counsel believed the objections to be improper and that the Plaintiffs ought to be compelled to answer. The Plaintiffs opposed the Application, arguing that the questions and related Undertakings sought to obtain evidence on which the Plaintiffs may have relied on during Trial, rather than facts that were independently known by the Plaintiffs and maintained the objections were appropriate.

While dealing with the permitted scope of questions at Questioning, the Court referred to disclosure's purpose, as defined in Rule 5.1. The Court noted that a person is only required to respond to questions that are material and relevant, and questions in respect of which an objection is not upheld under Rule 5.25(2). The Court then looked to Rule 5.2 to set out when something is relevant and material.

The Court reviewed when counsel can object to an oral or written question, as set out in the parameters of Rule 5.25. In reference to the old Rule 200(1), which allowed for questions "touching the matters in question", the Court noted the narrowed scope of 5.17(1)(d), which allows for the Questioning of Parties adverse in interest on relevant and material information.

The Court then addressed a corporation's right to select a corporate representative of its choosing, as allowed by Rule 5.4. A corporate representative needs to provide evidence on the corporation's behalf, as per Rules 5.4(1) and (3); however, if the corporate representative failed to inform himself or herself or is found unsuitable, the Court has the discretion to appoint an additional or substitute representative pursuant to Rule 5.4(6).

Using the Rules and case law as a guide, the Court reviewed each objection during Questioning and each objection to Undertaking, and determined whether the Plaintiff was required

to answer each one or not. The Court also held, among other things, that pursuant to Rule 5.17(1)(d), only individuals who have or appear to have relevant and material information may be questioned; just because a question seems pragmatic, does not suggest the question is also relevant and material; and sometimes one can overcome an objection by simply rephrasing the question.

CNOOC PETROLEUM NORTH AMERICA ULC V 801 SEVENTH INC, 2023 ABCA 97

(SLATTER, VELDHUIS AND FEEHAN JJA)

Rules 5.1 (Purpose of this Part), 5.3 (Modification or Waiver of this Part), 5.4 (Appointment of Corporate Representatives), 5.5 (When Affidavit of Records must be Served), 5.6 (Form and Content of Affidavit of Records), 5.8 (Producible Records for which there is an Objection to Produce), 5.9 (Who Makes Affidavit of Records), 5.11 (Order for Record to be Produced), 5.13, (Obtaining Records from Others), 5.16 (Undisclosed Records not to be Used Without Permission), 5.17 (People Who May be Questioned), 5.18 (Persons Providing Services to Corporation or Partnership), 5.28 (Written Questions), 5.37 (Questioning Experts Before Trial), 6.38 (Requiring Attendance for Questioning), 14.27 (Filing Extracts of Key Evidence) and 14.28 (Record Before the Court)

The landlord Defendants appealed an Order allowing the tenant Plaintiff to question two consultants hired by the Defendants (the "Order") pursuant to Rules 5.18 and 6.38. The Appeal was allowed because the Order was inconsistent with the Part 5 Questioning practice in Alberta and the Rules. The Court of Appeal found that the Order was based on an over-reading of Rule 5.18 and its effect on the litigation constituted an error of principle.

The Plaintiff terminated the lease claiming the Defendants' building was unfit and unsafe for occupancy due to asbestos. The Defendants counterclaimed for breach of lease, lost rental revenue to the end of term, costs to restore portions of the building, lost revenue from third parties, and loss value of building. To mitigate their losses, the Defendants hired two non-parties, Altus and Colliers, to re-lease the space and negotiate the property tax assessment.

The Order contemplated a deadline for record production and Questioning. By the time the deadline passed, there had been 100 days of Questioning generating 2,300 Undertakings and over 4,000 Interrogatories. The work of Altus and Colliers was also explored, and certain documents under their possession had been produced by the Defendants.

The Order was obtained by the Plaintiff pursuant to an amended Application invoking Rule 5.18 to compel answers to Interrogatories related to the work of Altus and Colliers. Rule 5.18 contemplates Questioning of non-party witnesses if the Court permits it, or if the Parties agree in writing. The Order was premised on the Plaintiff's entitlement to "test the veracity of the re-leasing efforts" as re-leasing efforts were relevant and material to the Action. However, the Order did not impose limits on the topics that could be covered, duration, or costs incurred by the Parties.

The Court of Appeal explained that the Rules

set up a regime that ensures the parties to litigation are fairly informed about their opponent's case. For example, Rule 5.1 summarizes the purpose of pre-Trial Questioning: to disclose evidence, narrow issues, and encourage settlement. Rule 5.3(1)(b) limits the rights under Rule 5.1 in circumstances where the Court finds that compliance with the Rule will lead to expense, delay, danger, and will be disproportionate to the likely benefit.

Further, each Party is required to serve an Affidavit of Records under Rules 5.5, 5.6, and 5.9. Rule 5.11(2)(b) allows Parties adverse in interest to apply for further production to cross-examine on the supporting Affidavit. Therefore, the Court can order the production of missing records under Rule 5.11 if necessary. As part of the regime, undisclosed records cannot be used at Trial by the Party who fails to produce them without the Court's permission under Rule 5.16.

Non-parties can produce relevant and material documents by virtue of Rule 5.13, but they are not required to serve an Affidavit of Records. Parties adverse in interest are questioned on relevant and material topics under Rule 5.17, orally, or by written interrogatories under Rule 5.28. However, the Court of Appeal emphasized that the Alberta pre-Trial Questioning regime is not intended to allow Questioning of every potential witness.

If a Party that is being questioned is a corporation, it is mandated to appoint a corporate representative under Rule 5.4. In addition to the corporate representative, an adverse Party can question a present or former employee of the corporation under Rule 5.17. Notably, there is no right to question agents or third-party contractors who deal with an adverse Party.

The Court of Appeal held that the general Rules on Questioning do not extend to experts, and experts are under no obligation to produce an Affidavit of Records. These principles have been codified under Rules 5.8(5) and 5.18(3). Rule 5.37 allows for the examination of experts before Trial if the parties agree or in exceptional circumstances.

Turning its attention to the Order, the Court of Appeal held that Rule 5.18 was intended to "slightly modify the rules for questioning under Rule 5.17, not override the long-established Rule 5.13 for obtaining records from non-parties". Essentially, the Order authorized the Plaintiff to question non-parties to see if they had relevant and material records. This was contrary to the Rules and case law, which were clear that the Rules cannot be used to engage in a fishing expedition and to obtain document discovery of a non-party.

As a cautionary tale, the Court of Appeal noted that the Extracts of Key Evidence filed by the Parties were excessive in length. Counsel are expected to review the material and include only material that is necessary to solve the issues on Appeal, as prescribed by Rule 14.27(1). Especially since Rule 14.28(1) ensures that all exhibits received by the Trial Court are part of the Appeal record even if they are not filed with the Court of Appeal.

TERRIGNO V FOX, 2023 ABKB 89

(JONES J)

Rules 5.6 (Form and Contents of Affidavit of Records), 5.8 (Records for Which There is an Objection to Produce), 5.11 (Order for Record to be Produced), 5.16 (Undisclosed Records not to be Used Without Permission), 5.33 (Confidentiality and Use of Information) and 6.14 (Appeal from Master's Judgment or Order)

The Appellant appealed an Applications Judge's Decision which prohibited the Appellant from using an audio recording (the "Audio Recording") in support of a Summary Judgment Application and which found the Applicant in breach of Rule 5.33 (the "Decision on Appeal").

The Court also considered whether three Affidavits which the Appellant sought to introduce (the "New Affidavit Evidence") were relevant and material in accordance with Rule 6.14(3). With respect to the New Affidavit Evidence, the Court noted that one Affidavit was an attempt to introduce new argument that the Appellant did not see fit to make before the Applications Judge and found that it was not relevant and material. Justice Jones determined that the two remaining Affidavits had a measure of relevance and materiality, allowing them to be admissible.

With respect to the Audio Recording, the Court noted that Rule 5.6 requires that all records be *disclosed*, regardless of whether the Party *producing* the record objects to producing them. Further, per Rule 5.8, the Appellant was required to not only state that he objected to producing the Audio Recording but not how it fit within the claimed objection. More specifically, because the Appellant claimed litigation privilege over the Audio Recording, he was required to state that the Audio Recording was created when this Action existed or was contemplated. The Court found that the Appellant failed to comply with the requirements and had breached the requirement to serve a satisfactory Affidavit of Records.

The Court proceeded to consider relief in favour of the Appellant despite his non-compliance, pursuant to Rule 5.16. The Court set out the four-part test applicable to Rule 5.16 as follows: (1) the other Party would suffer prejudice if the use of the record was permitted; (2) there was a reasonable explanation for the non-disclosing Party's failure to disclose the record; (3) excluding the record would prevent the determination of the issue on the merits; and (4) in the circumstances of the case, the ends of justice require that the record be admitted. The Court did note that the reasonability aspect should be viewed as the first line of the inquiry, which would suggest that if the Court finds that there is no reasonable explanation for non-disclosure, it need not consider the remaining requirements for the four-part test.

The Court found that the Appellant had no reasonable explanation for non-compliance, specifically finding that: (1) the omission from the Amended Affidavit of Records was not an innocent oversight; (2) the lack of fulsome disclosure of the Audio Recording was not justified because he considered it to be privileged; and (3) being a self-represented litigant was not a reasonable excuse for non-compliance with the Rules. In this particular case, the Court noted that the Appellant had a law degree and experience as a litigator.

The Court found that the Respondent would suffer prejudice if the Audio Recording was admitted into evidence, noting that Rule 5.8(2) imposes an obligation on the disclosing Party to provide sufficient information to allow the

Court to determine that each record in respect of which there is an objection to produce is disclosed in the Affidavit of Records. Further, there must be a sufficient description to allow the receiving Party to decide whether to make an Application under Rule 5.11 to substantiate the claim of privilege.

The Court found that although excluding the Audio Recording from further proceedings could make it more difficult for the Appellant to prove his case it would not be a bar for determination on the merits, taking into consideration that both Parties would still be able to give *viva voce* evidence.

The Court additionally found that it would not be unjust to exclude the Audio Recording, noting the object and purpose of the disclosure provisions found in Part 5 of the Rules, the implications for non-disclosure on the Respondent's litigation strategy, and the fact the Appellant had allegedly learned about the deficiencies once he had engaged counsel.

The Court found that the Appellant's disclosure of the Respondent's Questioning transcript to the Calgary Police and the RCMP constituted a breach of the implied undertaking rule set out in Rule 5.33. The Court found that Rule 5.33 was breached and that the breach was not extinguished when the Appellant exhibited the transcript to an Affidavit filed in support of his Summary Judgment Application.

The Court accordingly dismissed the Appeal.

LC V ALBERTA (CHILD WELFARE), 2023 ABKB 99

(GRAESSER J)

Rules 5.17 (People Who May Be Questioned) and 5.19 (Limit or Cancellation of Questioning)

This was a Decision delivered in Case Management in response to the Application of three proposed examinees to cancel or postpone their Questioning.

The underlying Action was a complex and slow-moving Class Action against the Alberta Government for injuries resulting from the Government's failure to make timely arrangements for children in its care. The Applicants argued that they should not be obliged to attend for Questioning, as demanded by the Plaintiffs, on the basis that the Plaintiffs had not demonstrated that the Applicants' possessed additional or superior information to the Government Officer, and that their Questioning was premature pending further steps in the litigation. The Applicants submitted that the proper approach was to await a complete Affidavit of Records from the Government, question the Government Officer and obtain necessary Undertakings, and then proceed to question the Applicants, if necessary. In response, the Plaintiffs argued that they were entitled to question the Applicants, pursuant Rule 5.17, at any time and in any order they deemed strategically appropriate. The Court agreed with the Plaintiffs.

Since the Applicants were not Parties to the Action, the Court held that the Application to cancel or postpone Questioning could only be argued on the basis of Rule 5.19(b), which permits limitations on Questioning where the proposed Questioning is unnecessary, improper or vexatious. The Court held that it was not necessary in the circumstances for the Applicants to adduce Affidavit evidence in support of their position but observed that some basis must be argued to support the conclusion that

the proposed Questioning was unnecessary, improper or vexatious. The Court rejected the Applicants' position that the Plaintiffs bore the burden of demonstrating that the proposed Questioning was proper.

Noting that the Applicants had not argued that their Questioning was unnecessary, improper or vexatious, the Court rejected the Application. In response to the Applicants' submission that their Questioning was premature in light of outstanding steps, the Court observed that it was preferable to permit various steps to proceed in tandem to avoid unnecessary delay, provided the Plaintiffs accepted the risk associated with proceeding to Questioning without completing such steps. In response to the Applicants' submission that their Questioning should follow the Questioning and responses to Undertakings of the Government Officer, the Court held that the Plaintiffs were entitled to question witnesses in whatever order they chose, again provided they accepted the risks of such ordering. Absent limitations imposed at the request of a Party, pursuant to Rule 5.19(a), it was not necessary to limit the number or identity of proposed examinees in a general way, as proposed by the Applicants.

FORD V JIVRAJ, 2023 ABKB 92

(GRAESSER J)

Rules 5.33 (Confidentiality and Use of Information), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 10.52 (Declaration of Civil Contempt)

The underlying Action arose from a failed relationship between the Parties: the Plaintiff's failed political aspirations and the Defendant's claimed loss of a political future.

The Plaintiff commenced a Statement of Claim for a Restraining Order and sought interim relief in the same nature against the Defendant. The Defendant filed a Statement of Defence and also filed a Counterclaim for his own Restraining Order. Justice Graesser had to determine whether an existing interim Restraining Order against the Defendant (the "Interim Restraining Order") should continue indefinitely and whether the Defendant was in Contempt of Court for breaching the Interim Restraining Order.

By way of background, the Parties were engaged in a collateral fight, a defamation lawsuit. Counsel for the Plaintiff maintained that the Defendant had perjured himself and had obtained leave to question the Defendant on certain records disclosed by the Defendant in the defamation Action. The Court noted that generally, Parties to an Action are subject to the implied undertaking of confidentiality. They must treat all records received during litigation as confidential and can use them only to carry on the Action in which the records were disclosed. However, Parties may be relieved of the implied undertaking rule if the Court so orders under Rule 5.33(1). Justice Grasser granted the Plaintiff leave to cross-examine the Defendant on certain records disclosed in the defamation Action on the basis that the Defendant was aware of these records and ought to have produced them in the current Action. The evidence from the cross-examination was before the Court.

Turning the Court's attention to the two main issues, Graesser J. noted that even though the Plaintiff had previously obtained the Interim Restraining Order, she still had to prove the elements of her claim to obtain a civil Restrain-

ing Order (also known as a civil Injunction) against the Defendant. She could not rely on Rule 9.15 to vary the Interim Restraining Order and obtain final relief. Rule 9.15 simply holds that interim Orders obtained without notice can be varied by the Court. The Plaintiff's claim was for a permanent Injunction and the Interim Restraining Order was interim in nature. Accordingly, the Plaintiff had to meet her claim. The fact that the Plaintiff had previously obtained an Interim Restraining Order in her favour did not reverse the onus or require the Defendant to prove that it should never have been granted.

The test for granting a civil Restraining Order has five elements: (1) whether there is an enforceable right and/or a threat of violation of that right exists; (2) whether the Applicant will suffer irreparable harm; (3) the hardship caused to the Respondent if a permanent Injunction is granted, compared to the hardship to the Applicant if the Applicant had to resort to an award of damages only; (4) the Parties' conduct; and (5) whether the Injunction will be effective. The Applicant must prove all elements.

The Court held that harassment was a logical extension to the existing tort of intentional infliction of mental suffering, and that the Plaintiff had an enforceable right or threat to it. The Plaintiff testified extensively as to the mental suffering she experienced following a certain article published in the news. The Court found that the Plaintiff had already suffered demonstrable harm by being forced to resign and go on disability benefits due to the Defendant's campaign against her. With respect to the Parties' hardship, the Defendant claimed that if a permanent Injunction would be granted, he could not protect himself against the Plaintiff, and that he had been publicly muted. The Plaintiff asserted that a financial award would not stop the Defendant from attacking her, and that it was unlikely that the Defendant would be able to pay any significant damages. After weighing the evidence and various testimony, the Court, on a balance of probabilities, granted a permanent Restraining Order against the Defendant.

Regarding the Plaintiff's Contempt Application, the Court turned to Rule 10.52, which governs declarations of civil Contempt. Under Rule 10.52(3), the Plaintiff had the burden of proving beyond a reasonable doubt all the essential elements of Contempt. Mainly, the Plaintiff had to establish that the Interim Restraining Order was properly served on the Defendant and that the Defendant willfully breached its terms. Once these elements were proven, and the Defendant failed to tender a reasonable excuse as to the noncompliance, the Court was free to make a civil Contempt declaration.

Justice Graesser was satisfied beyond a reasonable doubt that the Defendant was aware of the Interim Restraining Order and deliberately set to circumvent it. The Defendant did not provide a reasonable excuse for doing so. As a result, he was found guilty of civil Contempt of the Interim Restraining Order.

BRADLEY V BRADLEY, 2023 ABKB 128

(GROSSE J)

Rule 5.34 (Service of Expert's Report)

The Applicant sought to vary child support. He submitted an expert report in support of his position. The Respondent objected to the report as not having the necessary form or content to be an expert report. In particular, the report did not provide a CV or list of qualifications, as is required by Rule 5.34 and Form 25.

Justice Grosse agreed that a CV or summary of qualifications is an important part of expert evidence. However, she stated that the Court process in Alberta focuses on substance over form and will allow for errors to be cured where there is no material prejudice to the opposing Party.

She also highlighted the delay in raising the objection. The initial expert report was filed on August 3, for a hearing scheduled for September 9. No objection was raised until August 24 and, at that time, it was a general objection. Specifics of the objection followed, by request, the next day. The issue was rectified the following day.

The Applicant argued that there was insufficient time to cross-examine or assess qualifications. However, he had not requested cross-examination prior to the hearing.

Justice Grosse therefore dismissed the request to reject the expert report due to lack of CV.

KUZUCHAR V KUZUCHAR, 2023 ABKB 135

(MARION J)

Rules 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Experts' Reports) and 12.50 (Divorce Without Appearance by Parties or Counsel)

This Decision arose from a 2-day trial of a divorce Action. The Parties had mixed success on the three issues presented at Trial, namely, the finalization of: (1) the distribution of the matrimonial property, (2) section 7 expenses of the *Federal Child Support Guidelines*, SOR/97-175, and (3) the recalculation of child support.

In determining the issues, Marion J. reviewed the procedural background of the Action. He noted that the Plaintiff had applied for divorce under Rule 12.50 twice. The first time in 2020, when her Application was rejected for not incorporating a parenting plan in the proposed form of Divorce Judgment and Corollary Relief Order, and for not obtaining her husband's consent. The second time in 2021, when she obtained leave of the Court to apply for divorce under Rule 12.50 without the need of her husband's consent.

Rule 12.50 lets Parties apply for Judgment of Divorce and pursue the corollary relief claimed in their Statement of Claim or Counterclaim. More importantly, with the Court's permission, Rule 12.50 enables one Party to apply for a Divorce Judgment and corollary relief without the consent of the other Party.

However, Marion J. found that the parenting agreement attached to the Plaintiff's 2021 Application differed from the one adduced as evidence at Trial. The 2021 parenting plan was never signed or agreed to by the Defendant, while the one presented at Trial indicated that the Defendant had consented to it. Justice Marion found that the Plaintiff was authorized to seek a Divorce Judgment without the Defendant's consent, but that ability did not extend to corollary relief and the parenting agreement. Therefore, Marion J. held that if the Defendant did not agree with the parenting agreement proposed by the Plaintiff included in the Divorce Judgment, he could apply to vary it, otherwise he was deemed to have accepted it.

Further, Marion J. had to determine whether certain shares of the Defendant in his corporation should be divided between the Parties. Justice Marion found that the Defendant did not provide appropriate disclose of the corporation's assets. The Defendant attached to his written argument an opinion letter from his accountant which was not presented as evidence at Trial nor was it in compliance with Rules 5.34 and 5.35. Since the opinion letter was not an expert's report presented in Form 25 as required by Rule 5.34, nor served in the sequence provided for by Rule 5.35, the Court ignored the opinion letter. Nonetheless, Marion J. held that it was not just equitable to divide the shares, and, in any event, found that they had no value.

DOW CHEMICAL CANADA ULC V NOVA CHEMICALS CORPORATION, 2023 ABKB 156

(ROMAINE J)

Rules 5.34 (Service of Expert's Report) and 5.35 (Sequence of Exchange of Experts' Reports)

The Court considered several issues arising from a damages hearing, the resolution of which may give rise to the necessity of further evidence or help guide the progression of the hearing.

One of the issues the Court considered was whether evidence given by the Plaintiffs' expert witness on cross-examination justified a new report from the Defendant's expert witness. The Court held that cross-examination cannot be used as a foundation for supposedly "responsive expert evidence" on subjects not covered by a responding expert in their report. As such, Romaine J. rejected the Defendant's submission that its cross-examination of the Plaintiff's expert on an issue opened the door to new evidence from the defence expert on that issue.

Romaine J. noted that Rules 5.34 and 5.35 require the disclosure of expert reports so that an expert may not testify with respect to an issue, except with leave, unless the substance of their testimony is set out in a report served under the Rules. The purpose of disclosure is to avoid Trial by ambush.

Romaine J. cited *Drapaka v Patel*, 2013 ABQB 247 and *Wade v Baxter*, 2001 ABQB 812 for the principle that even if the expert has served a report in compliance with the Rules, the Trial Judge has discretion to ensure a Party is not unfairly taken by surprise by expert evidence on a point

that would not have been anticipated from a reading of the report.

Romaine J. held that while there are circumstances in which it may be appropriate for a defence expert to respond to the evidence of a Plaintiff's expert where the defence expert had not included that information in their report, it would not be appropriate to do so in this case.

In this case, most of the defence expert's new evidence could not have been anticipated from a reasonable reading of his report. The defence expert testified that some of his evidence was additional analysis related to the testimony of the Plaintiff's expert. However, the issue arose after the Plaintiff's expert had issued his report, and therefore he did not specifically refer to the issue in his report. Romaine J. commented that while the right to cross-examine goes beyond the contents of an expert's report, that does not necessarily allow the Defendant to later examine their own experts in chief on that issue.

Romaine J. further held that the Plaintiff would have been taken by surprise by the contents of the defence expert's new evidence. While the Plaintiff was aware of the Defendant's position on the issue and had the opportunity to review the defence expert's second opinion to the extent that he addressed the issue, the Plaintiff could not have been aware of the new report, with its extensive new opinions.

SIGNALTA RESOURCES LIMITED V CANADIAN NATURAL RESOURCES LIMITED, 2023 ABKB 108

(SIDNELL J)

Rules 5.36 (Objection to Expert's Report), 5.38 (Continuing Obligation on Expert) and 8.16 (Number of Experts)

In the context of Trial, Justice Sidnell considered the admissibility of expert evidence. Initially, Justice Sidnell noted the obligations of counsel when tendering expert evidence. Specifically, Justice Sidnell recognized that, under Rule 5.38, it is the responsibility of counsel to ensure that the expert understands that if the expert changes their opinion after issuing their report, the expert has an obligation to disclose that change of opinion.

Further, when considering the admissibility of expert evidence, Justice Sidnell identified the analytical steps the Court must consider in order to ensure that the expert opinion enhances the fact-finding process. Justice Sidnell recognized that expert evidence is presumptively inadmissible; however, if relevant factors are satisfied, the expert evidence may be admitted. While considering a factor referred to as the exclusionary rule which requires that the expert evidence not be subject any exclusionary rule, Justice Sidnell noted that an exclusionary rule could also refer to a procedural rule. Specifically, Justice Sidnell recognized that the Defendant objected to certain expert evidence as being duplicative, and therefore was prohibited by Rule 8.16.

When considering whether Rule 8.16 prohibited the expert evidence in question, Justice Sidnell noted the timing of the Defendant's objection to the inclusion of the expert evidence. Specifically, Justice Sidnell recognized that the Defendant did not object to the inclusion of the expert evidence until Justice Sidnell requested submissions on the law relating to expert evidence, which occurred after the completion

of the expert's testimony, the submission of closing Briefs, and oral arguments. Justice Sidnell stated that pursuant to Rule 5.36, the challenge of the expert evidence should have been raised within a reasonable time-frame.

Ultimately, considering the lateness of the objection, Justice Sidnell declined to consider the Defendant's challenge of the expert evidence on the basis that the duplication of expert evidence violated Rule 8.16.

BRUNEAU V QUINN, 2023 ABKB 177

(RENKE J)

Rule 6.4 (Applications without Notice)

The Applicants applied for a without notice interim Injunction pursuant to Rule 6.4. The Application concerned individuals falsely holding themselves out as being involved in the government of the Papaschase First Nation.

Justice Renke considered whether this matter could be heard *ex parte* pursuant to Rule 6.4. The Applicants argued that notice would precipitate the damage the Application was intended to prevent. They argued that the activities of the Respondents were becoming more aggressive, negatively impacting the community, and that notice would escalate their behaviour.

Justice Renke concluded that proceeding without notice was appropriate. In particular, he noted that the Applicants had provided very comprehensive materials in support of their Application.

CASTLE BUILDING CENTRES GROUP LTD V ALBERTA DRYWALL & STUCCO SUPPLY INC, 2023 ABKB 32

(RICHARDSON J)

Rules 6.14 (Appeal from Applications Judge's Judgment or Order) and 7.3 (Summary Judgment)

The Respondent obtained Summary Judgment against the Appellants (the "Decision"). The Appellants appealed the Decision of the Applications Judge under Rule 6.14 and requested that new evidence be considered on the Appeal. The Application to allow new evidence and the Appeal were both granted.

Richardson J. held that there was not sufficient and reliable evidence to grant Summary Judgment for the entire amount sought by the Respondent. Although there was no dispute that the Appellants were indebted to the Respondent, there was a litigable dispute on the amount of that indebtedness. Having taken note of the ambiguity and outright errors in the Respondent's evidence that was before the Applications Judge, Richardson J. held that the Summary Judgment should not have been granted.

Richardson J. further held that the Applications Judge erred in granting Summary Judgment while also declining to dismiss the Appellants'

Counterclaim. Having noted that Summary Judgment is designed to avoid increased complexity in litigation, Richardson J. pointed out that the result of the parallel findings of granting Summary Judgment and declining to dismiss the Counterclaim would result in added complexity and would unfairly impact the Appellants' ability to advance their Counterclaim.

On the other hand, Richardson J. disagreed with the Appellants' argument that the record did not provide a transparent account of how the Applications Judge made the Decision. Richardson J. commented that there was no need for the Applications Judge to issue a written Decision in order for their reasons to be understood and transparent. Richardson J. found that requiring written reasons would cause delay and inefficiency and be contrary to the stated policy behind Summary Judgment, which includes efficient resolution of disputes.

Most new evidence that the Appellants sought to introduce was available in advance of the Summary Judgment Application. The Appellants made a strategic choice not to offer it in resisting the Application. However, Richardson J. granted the Application to allow new evidence as the new evidence was found to be necessary and its consideration was in the interests of justice given the ambiguity in the Respondent's evidence and submissions in support of Summary Judgment.

RAINARD V TAN, 2023 ABKB 50

(NIXON J)

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

The Defendant appealed from the Decision of an Applications Judge. The Applications Judge had granted the Plaintiff's Application for Summary Judgment to enforce a 2018 Swiss Judgment against the Defendant.

The Defendant appealed on two grounds: (1) that the Applications Judge erred in her conclusion regarding the application of Ministerial Order M.O. 27/2020, which suspended limitation periods in certain circumstances; and (2) that evidence not before the Applications Judge established that there was a genuine issue requiring Trial.

Justice Nixon stated that the standard of review on an Appeal from an Applications Judge is correctness.

As referenced above, the Defendant filed new evidence: an Affidavit from a Swiss lawyer providing information about the Swiss legal process. The Court permitted the new evidence pursuant to Rule 6.14(3), which allows a Judge hearing an Appeal of an Applications Judge's Judgment or Order to do so when the new evidence is relevant and material.

Justice Nixon found no error in the Applications Judge's conclusions notwithstanding the new evidence. The Appeal was therefore dismissed.

HOLMES V HOLMES, 2023 ABKB 1

(FETH J)

Rules 6.25 (Preserving or Protecting Property or its Value), 12.7 (Starting Proceeding Under Divorce Act (Canada)), 12.8 (Starting Proceeding Under Family Property Act) and 12.9 (Starting Combined Proceeding under Divorce Act (Canada) and Family Property Act)

Prior to divorcing, the Parties jointly owned their matrimonial home and assets. The Respondent incurred credit card debt that had been registered as a writ against title to the matrimonial home. The Applicant was concerned that the Respondent would continue to incur debt and that his creditors would place further chargers on title to the matrimonial home. Accordingly, the Applicant sought interim relief under section 9 of the *Matrimonial Property Act,* RSA 2000, c M-8 (the "*MPA*").

The Applicant sought the transfer of the matrimonial home title to her along with a preservation Order directing her not to sell the property. Justice Feth dismissed the Application citing three major concerns: (a) no matrimonial property Action had been filed by the Applicant, (b) the Applicant did not have permission from Family Docket Court to apply for interim distribution of property, and (c) the Respondent may not have received proper notice of the relief sought by the Applicant.

The Court noted that Rule 12.8 prescribes that a proceeding under the *Family Law Act*, SA 2003, c. F-4.5 (the "*FLA*") for division of family property must be started by Statement of Claim. This requirement is further codified in the case law and section 4 of the *MPA*. Rule 12.7 prescribes that a divorce proceeding under the *Divorce Act*, RSC, 1985 c.3 (the "*Divorce Act*") must be started by Statement of Claim. The Applicant, however, filed only a Statement of Claim for divorce under the Divorce Act, which offers relief for spousal support, child support, and custody and access to children. Justice Feth found that the Statement of Claim did not address the division of family property under the *FLA.*

Nonetheless, the *MPA* and Rule 12.9 gave Feth J. the jurisdiction to deal with the division of matrimonial property. Rule 12.9 states that a proceeding that is both a proceeding under the *FLA* and *Divorce Act* may be started by filing a claim for divorce and division of family property as long as the claims are set out separately into one Statement of Claim. Further, Rule 6.25 preserves and protects property generally, and Rule 6.25(1)(c) allows the Court to order the sale of a property and payment of the proceeds into Court.

However, the Applicant did not seek relief under Rule 6.25 nor did she apply before Feth J. to amend her Statement of Claim to add an Action for the division of matrimonial property. Absent a Statement of Claim for division of matrimonial property, the Court was precluded from transferring title to the matrimonial home under section 9 of the *MPA*.

CANADIAN TAXPAYERS FEDERATION V ALBERTA (ELECTION COMMISSIONER), 2023 ABKB 161

(NIELSEN ACJ)

Rule 6.32 (Notice to Media)

The Applicants applied for a Restricted Court Access Order seeking, among other things, to ban the publication of one of the Applicants' identity, John Doe. Associate Chief Justice Nielsen dismissed the Application directing that John Doe must participate in the proceeding by his real name.

When a Restricted Court Access Application is filed, Rule 6.32 requires that a copy of it must be served on the Court Clerk, who, in accordance with direction from the Chief Justice, must give notice of the Application to the media or other persons identified by the Court. Notice was given in accordance with Rule 6.32. CTV and CBC/Radio-Canada opposed the Application.

Associate Chief Justice Nielsen outlined the test for a discretionary Restricted Court Access Order as stated by the Supreme Court of Canada in Sherman Estate v Donovan, 2021 SCC 25. An Applicant wanting to limit the open Court presumption must establish that: (1) the Court openness poses a serious risk to an important public interest; (2) the Order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the Order outweigh its negative effects. Failure to establish an important public interest ends the analysis.

The Applicants argued that Court openness would injure three important public interests: privacy, confidentiality, and the right to a fair Trial. The Court disagreed.

Nielsen A.C.J. found that privacy is at serious risk only where the information on the Court record is sufficiently sensitive to warrant protection of the larger societal interests, such as protecting sensitive information relating to stigmatized medical conditions and sexual assault. The information at issue that John Doe was a donor to the Canadian Taxpayers Federation, was not highly sensitive information that struck "at the core identify of John Doe".

Nielsen A.C.J. found that the Applicants did not establish an important public interest with respect to confidentiality, holding that "[a]n expectation that confidentiality is guaranteed in spite of the common law requiring public participation in court proceedings is not a reasonable one".

Lastly, Nielsen A.C.J. found that the Applicants cannot litigate anonymously. The public interest is engaged when the Plaintiff has "no choice but to engage the judicial process in order to obtain their remedy and the open court principle defeats the remedy prior to adjudication of the claim". This was not the case here as John Doe's participation in the proceedings would not have rendered any of the remedies in the Application meaningless.

GAULT V COWDEN, 2023 ABKB 178

(WHITLING J)

Rule 6.49 (Application for Replevin)

This was an Application for replevin. The Applicant was seeking to replevy a goldendoodle named Luna. The Applicant submitted that Luna was repossessed by the Respondent in a bad faith exercise of contractual discretion. The Guardian Dog Contract (the "Contract") between the Parties confirmed that the Respondent retained title to Luna, and that she had the discretion to repossess Luna if she felt at any time that such repossession was necessary to ensure Luna's well-being.

The Court reviewed the basic requirements for a Replevin Order found in Rule 6.49, noting that an Application must include an undertaking and an Affidavit containing facts of the wrongful taking of property, a clear and specific description of the personal property, its value and the Applicant's ownership or entitlement to lawful possession of the personal property. The Court then reviewed the traditional test contained in *Ryder Truck Rental Ltd. v Walker*, [1960] OWN 114 (HC), the "substantial grounds" test. The "substantial grounds" test requires a high degree of assurance that the Plaintiff will be successful at Trial, and cases in which there is clear documentation supporting the Plaintiff are more likely to meet the test.

The Judge held that the Applicant had failed to prove with a "high degree of assurance" that they would have been successful in the merits hearing of the dispute. The Contract provided the Respondent with broad discretion to repossess Luna for the dog's well-being. While the Applicant's evidence suggests that the Respondent's decision was arbitrary or capricious, it required a credibility assessment that could not be conducted in the Application at bar.

In conclusion, it was held that the Respondent was at least as likely to succeed on the merits of the dispute as the Applicant. The Court noted that this was not a case where the Applicant had brought forward "substantial grounds" to believe that she was entitled to immediate possession of Luna. Therefore, the Applicant's Application to replevy Luna was denied.

GORDON ESTATE (RE), 2023 ABKB 132

(ARMSTRONG J)

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

The Respondent contested the validity of the deceased's will (the "Deceased's Will") on the basis the deceased lacked testamentary capacity at the time his will was prepared and executed which was purportedly a result of undue influence (the "Validity Application"). The Applicant applied for Summary Dismissal pursuant to Rules 7.2 and 7.3, to dismiss the Validity Application.

The Court reviewed the applicable considerations for Summary Judgment as set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49.

The Court determined that the record it had before it was comprehensive, noting that: four Affidavits had been proffered (the "Affidavits") including one from the lawyer who assisted in the preparation and execution of the Deceased's Will (the "Lawyer"), the Affidavits had been questioned on; and the Lawyer's entire file relating to the Deceased's Will had been produced as had the deceased's medical records for the relevant period.

The Court additionally found that the Respondent's proposed expert evidence did not justify a full Trial. Accordingly, the Court determined that the available record in the Summary Dismissal Application was sufficient to determine the matter summarily.

2102908 ALBERTA LTD V INTACT INSURANCE COMPANY, 2023 ABCA 34

(WAKELING, STREKAF AND ANTONIO JJA)

Rule 7.2 (Application for Judgment)

The Parties - an insurer and a commercial insured - submitted the insurance policy and an Agreed Statement of Facts for a determination of coverage, pursuant to Rule 7.2. By agreement, the Application proceeded as a desktop Application. The Chambers Judge concluded that the circumstances described in the Agreed Statement of Facts were not excluded by the insurance policy. The insurer appealed.

Reviewing on a correctness standard, the Court of Appeal disagreed with the Chambers Judge and found that the circumstances described in the Agreed Statement of Facts were excluded by the policy, disentitling the insured from indemnity under the policy. Accordingly, the Appeal was allowed.

IMPERIAL OIL LTD V ALBERTA (MINISTER OF TRANSPORT), 2023 ABKB 115

(ROSS J)

Rule 7.3 (Summary Judgment)

This was an Application for Summary Judgment brought by the Plaintiff, Imperial Oil Ltd. ("Imperial"), against Alberta (Minister of Transport) (the "Crown") and the Town of Drayton Valley (the "Town"), as well as a cross-Application brought by the Crown for Summary Dismissal of Imperial's claim against the Crown.

The subject matter of the Application was a road constructed by the Town, using Crown funding, on land owned by Imperial. Imperial sought various relief against the Crown and the Town by way of Summary Judgment, including an Injunction directing that the land on which the road was constructed be purchase or

expropriated. The Crown cross-applied for Summary Dismissal on the basis that it had not constructed the road and was therefore not responsible. The Town argued that neither Summary Judgment nor Summary Dismissal were appropriate in light of uncertainty as to whether it or the Crown was responsible for the road.

The Court reviewed the law of Summary Judgment, including as set out in Rule 7.3. In particular, the Court noted the applicable standard of no genuine issue requiring Trial, as well as the Parties' requirement to put their best foot forward through the introduction of relevant evidence. The Court further noted that where a Party asserts that there is a genuine issue requiring Trial, that Party must establish, based on the evidence, that there is a realistic prospect that a Trial will create a better record. Speculation, absent other evidence, as to what might be revealed through the Trial process is insufficient.

Reviewing the evidence before it, the Court concluded that it could make the necessary findings of fact and to apply the law to the facts in order to achieve a proportionate, more expeditious, less expensive and just result. Based on concessions by the Crown and the Town, the Court concluded that the road's construction amounted to a continuing trespass in respect of which no defence was available. The Court granted Imperial's Summary Judgment Application, including the requested Injunction, without prejudice to the Town's claim against the Crown for indemnity and contribution.

ASENIWUCHE WINEWAK NATION OF CANADA V ACKROYD LLP, 2023 ABCA 60

(SLATTER, WAKELING AND PENTELECHUK JJA)

Rule 7.3 (Summary Judgment)

This was an Appeal from an Application to summarily dismiss an Action brought against solicitors for negligence.

The Respondents were the Appellant's solicitors in an Aboriginal land claim Action against Alberta and Canada. The land claim Action failed to progress and both Canada and Alberta applied to strike, pursuant to Rule 4.33. The Application was unsuccessful at the Court of King's Bench, but succeeded at the Court of Appeal. After the Court of Appeal's Decision, the Appellant sued its solicitors for negligence. The Respondent solicitors applied pursuant to Rule 7.3 to summarily dismiss the Action on the basis that it was barred by the *Limitations Act*, RSA 2000, c. L-12 (the "*Limitations Act*").

At the Court of King's Bench, the Court concluded that the Appellant's failure to initiate a claim within two years from the date of the first 4.33 Application placed the solicitor's negligence claim outside the time required by the *Limitations Act*. Accordingly, the Appellant's claim was dismissed.

The Court of Appeal disagreed with the Court of King's Bench's application of the test, finding that the Appellant had only been aware of circumstances warranting an Action after the Court of Appeal had struck the land claim Action. Since the solicitor's negligence claim was initiated within two years of the Court of Appeal Decision, the claim was not barred by the *Limitations Act*. In the result, the summary dismissal was overturned, and the Appeal was

LUSCOMBE V RE/MAX REAL ESTATE (EDMONTON) LTD, 2023 ABKB 63

(APPLICATIONS JUDGE SUMMERS)

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

allowed. The Applicants applied to set aside Judgment against them under Rule 9.15, which allows the Court to set aside a Judgment or Order on Application.

At the outset, the Court noted that Judgment was granted against the Applicants with notice. The Applicants were not noted in default and their Statement of Defence was not struck. As such, the Court determined that Rule 9.15(3) did not apply as that Rule only applies to Judgments granted against an Applicant noted in default or whose defence has been struck.

The Court considered the Application under Rule 9.15(1)(b), which allows the Court to set aside a Judgment or Order following a hearing where the Applicants did not appear because of accident or mistake. The Court noted that the Applicants provided evidence that they were elderly and had health issues. The Applicants also believed that they had no liability and relied on one of the other Defendants who retained counsel to defend them.

The Court declined to set aside the Judgment against the Applicants. The Court reviewed cases suggesting that Rule 9.15(1)(b) allows for an Application to set aside or vary Orders or Judgments granted following inadvertent failure to appear at a Trial or a Chambers Application. The Court noted that the Applicants paid little attention to the lawsuit and made a conscious decision to rely on one of the other Defendants to defend them. The Court determined that the Applicants made a conscious decision not to attend the hearing at which Judgment was granted rather than failing to attend due to accident or mistake.

CANADIAN IMPERIAL BANK OF COMMERCE V HAYDEN, 2023 ABKB 152

(NIELSEN ACJ)

Rules 9.35 (Checking Calculations: Assessment of Costs and Corrections) and 14.5 (Appeals Only with Permission)

The Applicant sent the Court an email requesting permission to file an Application requesting that Costs in a foreclosure action be assessed (the "Proposed Application"), as the Applicant was subject to Court access restrictions.

The Court denied the Applicant permission to file the Proposed Application. The Court noted that a person subject to Court access control is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise. Nielsen A.C.J. determined that the Applicant failed to establish a reasonable basis for the Proposed Application and that it continued the Applicant's pattern of persistent, repeated, and abusive litigation activities. The Court also noted that the Proposed Application was unnecessary, as Rule 9.35 requires an automatic review of Costs by an Assessment Officer prior to completion of a foreclosure Action.

The Court urged the Applicant to seek professional legal assistance. The Court also noted that under Rule 14.5, there is no Appeal to the Court of Appeal of Alberta of a decision to deny leave, but that the Applicant could Appeal to the Supreme Court of Canada.

HO V LAU, 2023 ABKB 15

(LEMA J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account) and 10.31 (Court-ordered Costs Award)

The successful Applicant sought full-indemnity Costs of the proceedings from the unsuccessful Respondent. The Respondent, in contrast, called for party-and-party Costs under Schedule C. The Court rejected both positions, instead awarding Costs under Schedule C, but with a multiplier of 2, and a "complex chambers application" adjustment. One of the issues that the Court considered was the relevance of the Applicant's failure to provide a Bill of Costs or other evidence of actual Costs. The Applicant had not provided a Bill of Costs or any other evidence of solicitor-client fees.

Lema J. held that the Applicant had a practical obligation to put its best foot forward by providing its accounts or other evidence of its legal costs, which the Applicant failed to do. The Court adopted the reasoning in *McAllister v Calgary (City)*, 2021 ABCA 25, wherein the Court held that where a Judge awards Costs as a percentage of assessed Costs, the assessment may require a consideration of the factors in Rules 10.2(1) and 10.31(1)(a). Where a Party seeks solicitor-client Costs, the Party has a practical onus to provide statements of account or other evidence of its legal costs to enable scrutiny of those Costs.

BARKWELL V MCDONALD, 2023 ABCA 87

(SLATTER, CRIGHTON AND PENTELECHUK JJA)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.21 (Repayment of Charges), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Appellant appealed the Trial Judge's Decision which divided matrimonial property. The Court of Appeal allowed the Appeal and changed the outcome of the issues at hand. The Parties had argued the issue of Costs in their original Factums and the Trial Judge awarded the Respondent $397,653.22 in Costs, being 50% of his actual legal fees incurred to date plus disbursements. However, since the Appeal was allowed, the Court of Appeal recognized that new submissions needed to be made and provided general guidance on Costs in this Decision.

The Court of Appeal considered Rule 10.21, 10.33 and Costs under *McAllister v Calgary (City)*, 2021 ABCA 25 ("*McAllister*"), particularly in relation to the discretion of Trial Judges in setting "reasonable and proper costs" under the Rules.

The Court of Appeal noted that while the use of Schedule C is not mandatory, it is often used as a benchmark in assessing Costs and provides Parties with greater certainty and avoids lengthy inquiries into the appropriate level of Costs. The overriding principle is proportionality, with the aim of balancing indemnity for the winning Party without unreasonably discouraging access to the Court or unduly penalizing the losing Party. The Costs Award should partially, but not fully indemnify the winning Party, and a rough rule of thumb is that the Costs Award should reflect 40 to 50% of the solicitor and client Costs.

The Court of Appeal highlighted that, if the Trial Judge decides to make a Costs Award based on a percentage of solicitor and client Costs, the analysis must go further. The question is not just whether the solicitor and client Costs are reasonable as between solicitor and client, but whether the quantum represents an amount that the losing Party in the litigation should reasonably be expected to pay to the winning Party. This involves a detailed analysis of all the factors that go into assessing solicitor's fees, as set out in Rule 10.2 and Rule 10.31(1). The winning Party should provide the Court, as a benchmark, an assessment of the fees that would be ordered under Schedule C whenever seeking a lump sum Costs Award. The Court of Appeal noted that the Trial Judge simply granted a Costs award of 50% of the face value of the legal fees claimed by the Respondent, without any further analysis and without a draft Bill of Costs based on Schedule C, which is not an approach directed by *McAllister*. The Court of Appeal ultimately asked the Parties to make supplemental submissions on Costs.

FERGUSON V TEJPAR, 2023 ABKB 82

(DARIO J)

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

The Applicant sought Costs following a Decision related to title to property. The Parties had enjoyed mixed success.

Justice Dario stated the general rule under Rule 10.29(1) IS that the successful Party to an Application or Action is entitled to Costs. The Court noted that this general rule is subject to exceptions as well as the Court's overarching discretion regarding Costs Awards. Justice Dario cited Rule 10.33 for the factors that the Court may consider when determining Costs, including: the degree of success, the amount claimed and recovered, the importance of the issues, the complexity of the Action, and any conduct that shortened proceedings.

The Applicant sought Costs equivalent to a 45% indemnity of his purported legal fees, for a total of $80,763.38. The Respondents argued that no Costs should be awarded because of the nature of the litigation, the lack of authoritative jurisprudence on the subject-matter of the dispute, and because the litigation proceeded expeditiously.

The Court considered these arguments and further noted that the matter was of some

general public importance. Based primarily on the public-interest characteristics of the dispute, the Court limited the Costs Award in favour of the Applicant to two times the amount set out in Column 1 of Schedule C, for a total Costs Award of $15,390.

JC V KC, 2023 ABKB 96

(MARION J)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.34 (Court-Ordered Assessment of Costs) and 12.61 (Appeal from Provincial Court Order to Court of King's Bench)

The Appellants had appealed an Order of the Provincial Court pursuant to Rule 12.61. The Appeal was dismissed, and the Parties now sought direction regarding Costs.

The Respondent was self-represented but had retained legal counsel for assistance with written materials. The Respondent's child was also subject to the Order under Appeal, and was represented by counsel.

The Court referred to Rule 10.29(1), which sets out the general rule that a successful Party is entitled to Costs. The Court also set out Rule 10.33, which lists factors that may guide the Court's discretion in making a Costs Award. Justice Marion observed that Rule 10.31 provides the Court with significant discretion in the implementation of a Costs Award.

The Court held that the Respondent was entitled to Costs and that the cases dealing with Costs Awards for self-represented litigants did not apply to these circumstances. The Court declined to award Costs in favour of the Respondent's child, and instead dealt with the Respondent's share of those legal fees as part of the Respondent's Costs Award.

The Court turned to a consideration of the factors listed under Rule 10.33. Primarily based on the manner in which the Applicant's conduct negatively affected the proceedings, the Court ordered that: (1) the Respondent was entitled to 40% of her actual legal costs and 100% of her disbursements; and (2) the Respondent was entitled to 100% of her share of legal fees paid to the child's counsel. The Court ordered that if the Parties were unable to agree on the quantum of these amounts, then such quantum would be assessed by an Assessment Officer pursuant to Rule 10.34.

ALL GOOD COLLECTIVE CORP V 314 PURE CANNABIS LTD, 2023 ABKB 127

(MAH J)

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

This was a Costs Decision arising from an Application for an interim Injunction to sequester some funds pending adjudication of a breach of contract Action. The Court considered Rules 10.29 and 10.31 regarding the ability of the Court to use its discretion to award Costs to the successful Party, considering factors under Rule 10.33, which include, among a list of factors, result, complexity, and whether an Application was unnecessary or improper.

The Defendant sought 50% of actual indemnity Costs as the successful Party as per the scale set out by the Court of Appeal in *McAllister v Calgary (City)*, 2021 ABCA 25 ("*McAllister*") and *GG & HH Inc. v 2306084 Alberta Ltd.*, 2022 ABKB 834 ("*GG & HH*"). The Plaintiff submitted that Costs for this Application should be in the cause, as the Defendant did not refute bad faith allegations, and since such allegations remain live it should be the final decision-maker (Trial Judge or Applications Judge at Summary Judgment) who determines all the Costs. Alternatively, the Plaintiff argued that the Costs should be on Column 3 of Schedule C, given that the amount at stake was $300,000 and the matter was not so complex so as to attract McAllister-scale Costs.

The Court concluded that the *McAllister* approach as applied in *GG & HH* applied and directed the Plaintiff to pay 40% of the Defendant's Costs of the Application. Justice Mah noted that the Plaintiff's Application was unnecessary as it was really in no different a position than that of any Plaintiff who sues a Defendant for a money Judgment. Justice Mah also clarified that the bad faith allegations remain live issues to be adjudicated, however the Plaintiff cannot rely on the Defendants conduct as a reason for denial of Costs, when that conduct has not yet been proven.

ESTATE OF GOW, 2023 ABKB 73

(HARRIS J)

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

This was a Costs Decision arising from the Court's previous dismissal of the Applicants' Application to set aside a grant of probate and for a direction of Trial to determine the issues of testamentary capacity of undue influence over the deceased by the Respondents.

The Court noted its wide discretion pursuant to Rules 10.31 and 10.33, as well as the Surrogate Rules, with respect to any Costs Award. The Court observed that Rule 10.31(1) extends the Court's discretion to "any amount that the Court considers to be appropriate in the circumstances, including... [under Rule 10.31(1)(b)(i)] an indemnity to a party for that party's lawyer's charges".

Referring to *Schwartz Estate v Kwinter*, 2013

ABQB 147, the Court noted that, with respect to estate matters, the Surrogate Rules modify the Rules of Court, supplementing the ordinary Costs principle by penalizing any person who required formal proof of the will if it became clear that the "Application was frivolous or vexatious" or if "the person had no substantial basis for requiring the scrutiny of the Court". The Court found that the Applicants' conduct did not approach the level of animosity, arbitrariness or obstructionism required to attract enhanced Costs. However, relying on *Stewart v McLean*, 2003 ABQB 205, 49 ETR (2d) 294, the Court noted an Application may attract an Order for enhanced Costs when there are clear allegations that put the issue of a Party's honesty before the Court. The Court held that the allegations of undue influence fell within this category. Because the allegations of undue influence were not successful, the Court concluded that it would be appropriate to award some measure of enhanced Costs.

For the reasons above, the Court found the Respondents were entitled to enhanced Costs for the failure to establish a triable issue relating to undue influence, calculated at 2.5 times for half of their fees, in addition to disbursements as set out in their Bill of Costs, and GST.

TING V TING, 2023 ABKB 77

(HARRIS J)

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

Justice Harris considered a Costs Application after the Parties were unable to come to an agreement on Costs at the conclusion of a Trial. Justice Harris noted that the Court is awarded considerable discretion under Rules 10.31 and 10.33 when considering Costs.

After canvassing the jurisprudence, Justice Harris noted that Column 1 of Schedule C is no longer the presumed default for Costs in family law contexts. Ultimately, taking into consideration the complexity of the Trial and interlocutory Applications, Justice Harris awarded the Plaintiff party/party fees based upon Column 3 of Schedule C, plus disbursements and GST; excepting thereout certain disputed fees which were identified by Justice Harris.

SELENIUM CREATIVE LTD V EDMONTON (CITY), 2023 ABKB 94

(MANDZIUK J)

Rule 10.31 (Court-ordered Costs Award)

This was a Costs Decision arising from an Application for extension of time under section 64(3) of the *Expropriation Act*, RSA 2000, c E-13 (the "Act") between Selenium Architectural Millwork ("Selenium") and the City of Edmonton ("City").

The Court considered Rule 10.31 regarding the ability of the Court to award party and party Costs on a higher scale. Selenium, being the unsuccessful Party, sought full indemnity Costs under the Act. The City sought Costs on Column 3 of Schedule C. The Court noted that Selenium was unsuccessful in its Application, which was not captured by the Costs or indemnity provisions of the Act. The Court held that the City was successful and was entitled to Costs. Selenium's Application related solely to extension of time under the Act and did not seek any monetary amount. The City argued that the Application was urgent, complex and important, thereby entitling them to Column 3 of Schedule C.

Justice Mandziuk recognized that the issues were certainly important to the Parties and were cloaked in urgency, but they were of modest complexity. Keeping the principles in mind, Justice Mandziuk exercised discretion and ordered that Selenium pay Costs to the City on Column 1 of Schedule C, including disbursements.

WANG AND LI V ALBERTA HEALTH SERVICES, 2023 ABKB 189

(FUNK 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 for an Order allowing the Applicants to object to a distribution of funds paid into Court, granting a Stay of enforcement of a previous Costs Award, and directing that a half day Special Chambers hearing be set for a Bill of Costs Appeal that had been scheduled, and then canceled, in 2019. The underlying Application was dismissed with prior reasons at 2023 ABKB 83.

The Court noted that, as the successful Party, the Respondent was presumptively entitled to Costs, which the Respondents sought pursuant to Column 3 of Schedule C in light of the quantum of the previous Costs Award. Applying the factors listed in Rules 10.31 and 10.33, the Court noted that the Respondents had been wholly successful in having the Application dismissed, that the underlying dispute involved the previous Costs Award, which was valued in excess of $300,000, and that the matter was contested. On the basis of those factors, the Court granted the Respondent its requested Costs.

TING V TING, 2023 ABCA 9

(KHULLAR, MARTIN AND SCHUTZ JJA)

Rules 10.31 (Court-ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 14.88 (Cost Awards)

The Respondent, having been successful on Appeal, sought an enhanced Costs Award. The Respondent argued that she was entitled to an enhanced Costs Award primarily due to her service of *Calderbank* settlement offers which were not accepted by the Appellant.

The Court observed that, pursuant to Rules 10.31 and 14.88(2), Costs Awards are subject to broad discretion, the exercise of which is guided by the considerations listed under Rule 10.33(1). The Court held that *Calderbank* letters do not result in the automatic or presumed doubling of Costs Awards.

In the circumstances of this case, the Court awarded Costs under Column 1 of Schedule C. The Court declined to award enhanced Costs primarily because the *Calderbank* offer did not represent a genuine compromise by the Respondent, and because it was served and expired prior to the Appellant's Notice of Appeal being filed. Neither Party had incurred any claimable Costs prior to the offer's expiry.

CLEARBAKK ENERGY SERVICES INC V SUNSHINE OILSANDS LTD, 2023 ABCA 96

(KHULLAR, VELDHUIS AND ANTONIO JJA)

Rules 10.33 (Court Considerations in Making Costs Award) and 14.88 (Cost Awards)

The Court had allowed the Appellants' Appeal to restore an Applications Judge's Decision which granted the Appellant Summary Judgment against the Respondent. Among other things, the Respondent to the Appeal applied to argue Costs.

The Court noted that Rule 14.88 entitles successful Parties to an Appeal to Costs and that special reasons are generally required to deny a successful Party Costs. The Court acknowledged that Rule 10.33 allows Courts awarding Costs to consider a Party's unnecessary conduct or conduct that unnecessarily lengthened or delayed the Action. The Court found that although the litigation was imperfect, it did not rise to the level of rebutting the Rule 14.88 presumption. The Court accordingly found that the Appellant was entitled to entitled to the Schedule C, Column 2 Costs for the Appeal.

EARTH DRILLING CO LTD V KEYSTONE DRILLING CORP, 2023 ABKB 17

(LEMA J)

Rule 10.35 (Preparation of Bill of Costs)

This was an Application by the Defendant seeking solicitor-client Costs, following a successful Injunction against the Plaintiffs. The Plaintiffs argued that only Schedule C Costs should be awarded with a possible multiplier of 1.5. In the main Judgment, the Defendant asserted the legal Costs to have exceeded $100,000 but failed to provide a Bill of Costs, statement of account or any other evidence for the claimed Costs. Justice Lema considered Rule 10.35, noting the importance of providing a Bill of Costs. The Court noted that failure to provide a Bill of Costs or any evidence is not only prejudicial to the Plaintiff, but also does not assist the Court in verifying the Costs being claimed as fair and reasonable.

Justice Lema declined to use the Defendant's asserted legal costs as a baseline to award any Costs. In determining the Costs Award, Justice Lema used the Plaintiff's Bill of Costs as a baseline, adjusting it according to the circumstances at hand and thereby awarding $52,000 in Costs to the Defendant.

HAYDEN V CANADIAN IMPERIAL BANK OF COMMERCE, 2023 ABKB 100

(NIELSEN ACJ)

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

The Applicant sent the Court an email requesting permission to file an Appeal of a Provincial Court Decision (the "PC Decision") as the Applicant was subject to Court access restrictions.

The Court denied the Applicant permission to file the proposed materials. The Court noted that a person subject to Court access control is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise. Nielsen A.C.J. determined that the Applicant failed to establish a reasonable basis for her proposed Appeal of the PC Decision and that her proposed Appeal continued the Applicant's pattern of persistent, repeated, and abusive litigation activities.

The Court previously imposed penalties on the Applicant under Rule 10.49. However, as this did not deter the Applicant, the Court declined to impose further such penalties though the Court noted that her Application should warrant a further penalty under Rule 10.49. The Court also noted that, under Rule 14.5, there is no Appeal to the Court of Appeal of Alberta of a decision to deny leave, but that the Applicant could Appeal to the Supreme Court of Canada.

CHRISTOFI V KAHANE LAW OFFICE, 2023 ABKB 122

(NIELSEN ACJ)

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

The Applicant sent the Court three emails requesting permission to file a Notice of Appeal of an Order and an Application as he was subject to Court access restrictions.

The Court denied the Applicant permission to file the proposed materials. The Court noted that a person subject to Court access restrictions is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise. Nielsen A.C.J. determined that the Applicant failed to provide the materials he wished to file, provided no information or evidence, failed to provide necessary materials including a transcript of the Decision he intended to Appeal, and that the Application the Applicant intended to file was a collateral attack on previous Decisions.

The Court noted that, under Rule 14.5, there is no Appeal to the Court of Appeal of Alberta of a Decision to deny leave, but that the Applicant could Appeal to the Supreme Court of Canada. The Court also cautioned the Applicant that abuse of the Court's leave processes may have negative consequences, including penalties pursuant to Rule 10.49.

AKPAN (RE), 2023 ABCA 105

(MARTIN JA)

Rule 10.49 (Penalty for Contravening Rules)

The Applicant had notarized a notice that was referred to by Rooke A.C.J. (as he then was) as "obnoxious" and of "no legal effect", and concluded that by notarizing the notice, the Applicant failed in her duties as a notary and in her professional duties as a lawyer.

The Applicant provided the Court with written submissions as to why she should not be held liable for a $10,000 fine to be paid to the Court under Rule 10.49. Nonetheless, the Court imposed the penalty. The Rule allows the Court to impose penalties if it finds that a lawyer contravened the Rules or interfered with the proper or efficient administration of Justice.

The Applicant sought permission to Appeal the penalty. Justice Martin held that there was no other forum to which the Applicant could Appeal and, therefore, permission was not required. The Applicant could Appeal as of right.

STOKES V HECK, 2023 ABKB 58

(FEASBY J)

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

The Parties were engaged in protracted litigation arising from the dissolution of their marriage. Dr. Stokes applied to hold Mr. Heck in Contempt of Court pursuant to Rule 10.52, for refusing to comply with an Order of the Court (the "Order"). The Order required Mr. Heck to remove a Certificate of Pending Litigation from a recreational property so it could be sold.

Mr. Heck refused to comply with the Order. Justice Feasby stated that there was no doubt he was in Contempt of Court, and so he then moved on to consider the appropriate sanction. Justice Feasby noted that Mr. Heck had a history of disobeying Court Orders, and that financial sanctions had little impact on his actions. Justice Feasby had already found Mr. Heck in Contempt of the Order and fined him $2,500 per day until he purged his Contempt. Despite this, the Contempt persisted. He also warned Mr. Heck, at that time, that if he failed to comply with the Order, Dr. Stokes would be entitled to seek further sanctions, including incarceration.

Pursuant to Rule 10.53, Justice Feasby held that he was entitled to vary the sanctions imposed on Mr. Heck for Contempt of Court, and that it was open to him to Order his incarceration as a sanction of last resort. Given Mr. Heck's "track record" of disobeying Court Orders, Justice Feasby ordered that Mr. Heck be taken into custody until he complied with the Order.

ANDRES V ANDRES, 2023 ABCA 42

(FEEHAN JA)

Rules 12.59 (Appeal from Divorce Judgment), 14.4 (Right to Appeal) and 14.8 (Filing a Notice of Appeal)

This was an Application to extend time to Appeal parts of an Order dismissing the Applicant's request for retroactive variation of child support and ruling on the time that one of the Parties' children ceased to be a child of the marriage for the purposes of support calculation.

The Order sought to be appealed was granted 14 and one-half months prior to the Applicant's Notice of Appeal. Since Rules 12.59, 14.4 and 14.8 and applicable provisions of the Divorce Act, RSC, 1985, c 3 (2nd Supp.) required an Appeal to be brought within 30 days of the Order being made, absent extension by the Court, the Applicant required an express extension from the Court to proceed.

Citing the test from *Cairns v Cairns*, [1931] 4 DLR 819 ("*Cairns*"), the Applicant argued that an extension was appropriate in the circumstances because he had filed his Notice of Appeal promptly upon becoming aware that the Order sought to be appealed was final and not interim, the delay had not caused serious prejudice to the Respondent, and the Appeal

had a reasonable chance of success. The Court agreed with the Applicant in regard to the applicable test as a guiding framework, noting further its overriding discretion to extend the time for Appeal where justice so requires, even where not all of the applicable criteria were satisfied. However, the Court disagreed that an extension was appropriate in the circumstances.

Applying the framework from *Cairns*, the Court held that the Applicant's mistaken impression that the Order sought to be appealed was interim and not final was insufficient to push back the time to Appeal and did not have the effect of placing the Applicant's bona fide intention to Appeal within the applicable Appeal period, as argued by the Applicant. Further, noting the Respondent's evidence that she had suffered from prolonged illness and stress as a result of the Applicant's continued attempts to reduce his child support obligations, the Court rejected the Applicant's argument that no prejudice had resulted. That the Applicant had taken some benefit from the Order by taking advantage of the Child Support Recalculation Program was also noted. Though the Court agreed that the Applicant's proposed Appeal satisfied the low threshold for establishing a reasonable chance of success, since it had some arguable merit and was not frivolous or vexatious, the Court held that that criterion alone was not sufficient to permit the extension.

On balance, the Court concluded that the Applicant's lengthy delay could not be remedied on the basis of special grounds. Accordingly, the Application was dismissed.

LESENKO V WILD ROSE READY MIX LTD, 2023 ABKB 148

(APPLICATIONS JUDGE SCHLOSSER)

Rule 13.5 (Variation of Time Periods)

A contractor filed liens against an owner for unpaid work and materials. The Parties entered into a Consent Order to have the sum of the liens paid into Court as security, using a template Order under the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 (the "PPCLA"). The liens were discharged from title.

The Consent Order provided that the contractor had 180 days following the date of the registration of the liens to commence a Court Action regarding the liens. The contractor filed a claim outside the 180 day period, and sought an extension to the time specified in the Consent Order pursuant to Rule 13.5.

Applications Judge Schlosser acknowledged that he had a general power to vary the time specified in an Order, within limits. However, because the Consent Order was made pursuant to the PPCLA, and because the PPCLA has strict and explicit time limits, Applications Judge Schlosser determined he had no power to extend the time in the Consent Order. He stated that the Court only has authority to extend time periods fixed by statute where the statute grants the Court that power. The PPCLA did not grant him that authority. He further found that a Consent Order under the PPCLA could not allow the Parties to contract out of the PPCLA's terms. He therefore denied the Application.

UBAH V UBAH, 2023 ABCA 15

(HO JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought permission to appeal two Orders of Associate Chief Justice Rooke (as he then was) related to the Applicant's status as a vexatious litigant. Rule 14.5(1)(j) establishes that a litigant who has been declared vexatious cannot appeal to the Court of Appeal without permission from the Appeal Court.

To grant a vexatious litigant permission to Appeal, the Court of Appeal must find that: (a) there is an important question of law or precedent, (b) there is a reasonable chance of success on Appeal, and (c) the delay will not unduly hinder the progress of the Action or cause undue injustice. The Applicant faces a very high burden in establishing a serious issue of general importance with a reasonable chance of success on Appeal. Further, a declaration that a Party is a vexatious litigant is discretionary in nature and, as such, its Appeal is subject to a deferential standard of appellate review.

Appeal Justice Ho dismissed the Applicant's Rule 14.5 Application. The Applicant failed to establish an important question of law or precedent, or that he had a reasonable chance of success on Appeal. Although the Applicant cited general principles of natural justice and procedural fairness, Rooke A.C.J.'s application of these principles to the circumstances of the case, and his findings of fact, would have been afforded deference by the Court of Appeal.

CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 47

(ROWBOTHAM JA)

Rules 14.5 (Appeals Only With Permission), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Applicants applied for permission to Appeal the Decision of a single Appeal Justice who had dismissed an Application to restore the Applicants' Appeal (the "Dismissed Restoration Application"). The underlying Appeal had been struck in accordance with Rule 14.64 because the Applicants had failed to meet the applicable deadlines to file their Appeal Record and transcripts. The Appeal was later deemed abandoned per Rule 14.65(3). The Dismissed Restoration Application was dismissed on the basis the test to restore an Appeal had not been met.

The Court set out that permission to Appeal will only be granted in accordance with Rule 14.5(2) where the Applicant can demonstrate that there is: (1) a question of general importance, (2) a possible error of law, (3) an unreasonable exercise of discretion, or (4) a misapprehension of important facts. The Court noted that, under the first prong, the factors that are to be considered in assessing whether a question justifies another level of review include: the perceived strength of the argument, the importance of the issue to the Parties and legal system as a whole, a reasonable chance of

success, and that the Appeal is not frivolous.

The Court rejected the Applicants' submissions, finding that prejudice to the Applicants was not a consideration and that each case was to be considered according to its own factual matrix.

More specifically, the Court found that there was no issue of general importance; the Dismissed Restoration Application was an exercise of discretion in which none of the applicable factors were met. The Court additionally noted that the length of delay and the explanation for the delay outweighed any new evidence, and that evidence had only been proffered by one of the Applicants.

The Court declined to grant permission to Appeal and specified that granting permission to Appeal to three Justices is an "extraordinary exercise" of the Court's authority.

BANOVICH V BANOVICH, 2023 ABCA 54

(FEEHAN JA)

Rule 14.5 (Appeals Only with Permission)

This was an Application by the Defendants, brought pursuant to Rule 14.5(1)(e), seeking permission to Appeal a Decision on Costs given at the conclusion of a Trial. The Application was dependent on whether the Defendants had a good and arguable case with sufficient merit to warrant scrutiny on Appeal and of importance to the law in general.

The Court stated that Costs Decisions are highly discretionary and will not be interfered with lightly; they should not be set aside on Appeal unless the Court below made an error in principle or the Costs Award was plainly wrong. Permission to Appeal Costs Orders should be granted sparingly, and the Party seeking permission to Appeal must meet a high threshold.

The Court noted that the Trial Judge had followed a flawed process when he delivered the first Costs Decision, knowing the counsel specifically requested the ability to speak to Costs without allowing them to do so, and improperly considered the alleged impecuniosity of the Plaintiff in making the initial Costs Awards. However, he corrected his error and allowed for full submissions on Costs before issuing the second ruling. The Trial Judge indicated in the first and second Costs Award that the Costs would be modest given the dismissal of both the Statement of Claim and the Counterclaim. The Trial Judge stated that he had considered Schedule C of the Rules, the case authorities provided, the various offers from both Parties, and the proposed Bill of Costs.

The Court held that the Defendants did not have a good and arguable case having sufficient merit to warrant scrutiny given the clear indication by the Trial Judge that Costs should be only nominal. Further, while the issues may be important to the Parties, they were not important for the law in general. Ultimately, the Court dismissed the Defendants' Application for permission to Appeal.

REAL ESTATE COUNCIL OF ALBERTA V MOSER, 2023 ABCA 57

(WATSON JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant applied for, among other things, permission to Appeal a Decision made by a Chambers Judge in 2021 (the "2021 Decision") to the extent it was a "decision as to costs only" pursuant to Rule 14.5(1)(e).

The 2021 Decision awarded "some costs" which the Court found was "a decision as to costs only". The Court determined that this was sufficient to trigger the permission to Appeal requirement in Rule 14.5(1)(e).

The Court noted the following difficulties in assessing the Application: (1) there was no formal Order as stated; (2) there was no Costs amount or a basis for a specific Costs Award to consider whether permission to Appeal should be granted, specifying that the amount of Costs in dispute is a factor to be considered; (3) the Application was premature; and (4) the utility of any remedy granted was unclear.

The Court ultimately found that the proposed Appeal advanced by way of the Application did not raise an arguable point of general importance which would justify a full panel of the Court of Appeal to review the matter. The Court additionally noted that if the Costs at issue turned out to be under $25,000, it would not have granted permission to Appeal in any event. The Court noted that a crystallized Appeal with a proper foundation may still present itself, and as such the Court dismissed the Application without prejudice to the Application being revived.

DUNN V CONDOMINIUM CORPORATION NO 042 0105, 2023 ABCA 69

(WATSON JA)

Rule 14.5 (Appeals Only with Permission)

Justice Watson considered an Appeal in which the underlying claim amount was under $25,000.00 and therefore engaged Rule 14.5(1). Pursuant to Rule 14.5(1)(g), the Parties required permission to Appeal. Justice Watson considered the common law test for permission to Appeal; namely, whether the Appeal had a reasonable prospect of success and whether there is an issue of law or jurisdiction that has public importance. Justice Watson found both branches of the test were met and ultimately granted permission to Appeal under Rule. 14.5(1).

GOLDSTICK ESTATES (RE), 2023 ABCA 111

(FEEHAN JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant applied for permission to Appeal an Order that he post Security for Costs for every Application related to the estates of his parents (the "Estates"), pursuant to Rule 14.5(1)(h). The Applicant also applied for a Stay of an Order that he pay Costs of his Application for removal and replacement of the personal representative of the Estates (the "Personal Representative"). The Applications for permission to Appeal and for a Stay were both dismissed.

Feehan J.A. cited Z*ulu Publications Inc. v WestJet Airlines Ltd.*, 2021 ABCA 353 and *Thompson v Procrane Inc.* (Sterling Crane), 2016 ABCA 71 for the principle that generally, permission to Appeal will be granted only if the Appeal raises a serious question of general importance, and if there is a reasonable chance of success, having regard to the prejudice to each Party and whether the delay caused by an Appeal would unduly hinder the Action.

Citing *Vysek v Nova Gas International Ltd.*, 2002 ABCA 112, Feehan J.A. commented that for an issue to raise a serious question of general importance, it must be a broad question which transcends the interests of the immediate Parties. Feehan J.A. held that this requirement was not met as the questions raised were of private importance to the Applicant alone.

Feehan J.A. further held that, given the Applicant's often unsuccessful Applications in this Action over the past eight years, the Order that any further Application must be accompanied with Security for Costs was supportable and appropriate. Thus, there was no reasonable chance that on Appeal the Court would vary that requirement.

In addition, the Applicant failed to pay the $150,000 owing in Costs or further accruing Costs. The Applicant resided in Sweden for the entirety of this litigation and only complied with Court Orders after long delays. Based on that, Feehan J.A. held that there would be significant prejudice to the Estates by allowing the Applicant to bring further Applications without posting Security for Costs.

With respect to the Application for a Stay, Feehan J.A. noted that the Applicant was required to pay Costs of his Application by means of a transfer of funds held in the Court to counsel for the Personal Representative. At the time this Decision was made, the funds were held in trust pending resolution of the Estates. Having found that a decision as to whether that payment should have been stayed would have no practical effect on the rights of the Parties, Feehan J.A. dismissed the Application for Stay.

WEIDENFELD V ALBERTA (MINISTER FOR SENIORS AND HOUSING), 2023 ABCA 14

(HO JA)

Rules 14.15 (Ordering the Appeal Record), 14.37 (Single Appeal Judges) and 14.48 (Stay Pending Appeal)

The Applicant applied for a Stay Pending Appeal of two Orders granted in October and November of 2022 (the "Stay Application"). An Appeal had commenced with respect to the Order granted in October (the "October Order") but not the Order granted in November (the "November Order"). The Court dismissed the Stay Application in its entirety. More specifically, with respect to the November Order, the Court understood that Rule 14.48 did not grant the Court jurisdiction to Stay its effect absent an Appeal of the November Order.

The Applicant sought an Order directing that the October and November Decisions and corresponding Orders be removed from on-line databases (the "Publication Relief"). The Court stated that it was doubtful that the Publication Relief was within the jurisdiction of a single Justice of the Court of Appeal pursuant to Rule 14.37.

The Court additionally determined that it was not prepared to issue an Order dispensing with the Rule 14.15 requirement mandating that the Applicant include a transcript in the Appeal Record. More specifically, the Court acknowledged that the Applicant may have to take steps to manage his finances but that ordering transcripts is an ordinary cost associated with litigation and the Applicant had a reasonable amount of time to address the issue.

R V USMANN, 2023 ABCA 3

(WATSON, CRIGHTON AND FEEHAN JJA)

Rule 14.32 (Oral Argument)

The Appellant appealed a conviction. He did not appear on the date scheduled for the Appeal and he failed to instruct his counsel relative to the Appeal. He further failed to appear for sentencing, and an arrest warrant was issued that remained outstanding. The Appellant did file a Factum and the Appeal was perfected. Accordingly, the Panel of the Court of Appeal decided it would hear the Appeal in the Appellant's absence as is permitted under Rule 14.32(3).

MATTSON V ROCKY VIEW (COUNTY), 2023 ABCA 89

(SLATTER JA)

Rules 14.40 (Applications to Single Appeal Judges) and 14.44 (Application for Permission to Appeal)

The Applicant sought permission to Appeal a decision of the Subdivision and Development Appeal Board (the "SDAB Decision"). The SDAB Decision granted the Applicant's neighbour a development permit for the construction of an accessory dwelling unit. By the time this Application was heard, the Applicant and Respondents had consented to adjourn the Application for several months. In this Decision, the Court commented on an anomaly arising from the language of the *Municipal Government Act,* RSA 2000, c M-26 (the "*Act*").

The Court expressed concern that the individual to whom the development permit was granted was not named as a Respondent to the Applicant's Application for permission to Appeal. The Court noted, however, that the *Act* does not strictly require that such a Party be named. Justice Slatter commented that this was an unfortunate anomaly in the drafting of the *Act*, given the fundamental principle that the Court will not adjudicate on legal rights unless all affected Parties are given appropriate notice of the proceedings. The Court encouraged Parties faced with similar circumstances to name the permit holder or landowner as a Respondent to avoid appearances where no remedy can be granted by the Court because of the absence of an affected Party.

Beyond that anomaly, the Court observed that the Applicant had not filed and served his Affidavit and Memorandum of Argument simultaneously with his Application, as is required for any Application to a single Appeal Judge under Rule 14.40. Justice Slatter noted that on occasion an Application is filed and accepted by the Registry without the accompanying materials for the purposes of preserving the deadline to apply. However, Slatter J.A. also noted that the Applicant had not sought to preserve a time limitation for permission to Appeal as available under Rule 14.44(3).

In the result, the Court granted the adjournment which had been consented to on the basis that it was required in any event such that the permit holder may be given notice; the Court also ordered that the Application be amended accordingly. Finally, the Court ordered that the Applicant's Memorandum of Argument and any accompanying material be filed and served within a week.

CAN V ALBERTA SECURITIES COMMISSION, 2023 ABCA 21

(ROWBOTHAM JA)

Rule 14.47 (Application to Restore an Appeal)

This was an Application pursuant to Rule 14.47 for the restoration of an Appeal.

The Appeal was struck as a result of the Applicants' failure to file their Appeal Record and transcripts by the deadline. The Applicants adduced Affidavit evidence from their counsel explaining that the 14-month lapse between the filing deadline and the Application to

restore was due to an oversight by him and his office.

The Court noted five non-determinative factors for assessing whether an Appeal should be restored: (1) whether the Applicant intended in time to proceed with the Appeal; (2) what explanation is offered by the Applicant for the defect or delay which caused the Appeal to be struck or deemed abandoned; (3) whether the Applicant moved with reasonable promptness to cure the defect and have the Appeal restored; (4) whether the Appeal has arguable merit; and (5) whether the Respondents have suffered any prejudice, which includes consideration of the length of delay.

Applying these factors to the record before it, the Court noted that there was no evidence the Applicants intended to proceed with the Appeal during the relevant time, and that the 14 months between the Appeal being struck and the restoration Application permitted an inference that they did not. Further, though there is no rigid rule that an error by counsel is an insufficient explanation for delay, in this case, counsel's failure to notice that the deadline had lapsed for over a year, despite advice from both the Court and opposing counsel to that effect, precluded a finding of any reasonable explanation. As to promptness and prejudice, the Court found that the Application had not been promptly pursued and that the Applicants' failure to append the missing materials to their Application to restore indicated the Appeal would not be promptly pursued, resulting in presumed prejudice to the Respondent. The Appeal's merits could not be assessed on the available record, though the Court commented that the prospect of success appeared low.

Accordingly, the Application was dismissed.

WOLK V WOLK, 2023 ABCA 66

(CRIGHTON JA)

Rules 14.47 (Application to Restore an Appeal), 14.65 (Restoring Appeals) and 14.88 (Cost Awards)

This was an Application brought pursuant to Rule 14.47 to restore an Appeal of an Order approving the sale of the Applicant's and Respondent's former matrimonial home, among other related relief.

Upon the Order being granted, the Applicant appealed the Order and sought a Stay of the Order pending Appeal. The Stay Application was denied, and the home was sold. The Appeal was later struck and deemed abandoned as a result of the Applicant's failure to file an Appeal Record or Factum within the required time.

Considering the Application, the Court recited the considerations to be applied in determining an Application to restore an Appeal, namely (a) arguable merit to the Appeal; (b) explanation for the defect or delay which caused the Appeal to be taken off the list; (c) reasonable promptness in moving to cure the defect and have the Appeal restored to the list; (d) intention in time to proceed with the Appeal; and (e) lack of prejudice to the Respondents (including length of delay). The Court observed that, above all, the Court must consider whether it is in the interests of justice to restore the Appeal and allow the matter to proceed.

Applying the recited considerations to the facts, the Court held that the Appeal lacked arguable merit, since the Appeal's main objective - reversal of the Order directing sale of the former matrimonial home - had been rendered moot

by the home's previous sale and, in any event, none of the Applicant's proposed arguments supported a reversal of the Order. Further, the Court noted that the Applicant had failed to demonstrate an unwavering intention to pursue the Appeal, having allowed the Appeal to be struck and later deemed abandoned, pursuant to Rule 14.65(3), despite having been expressly informed of the consequences. The Court observed that the Application had not included the documents he previously failed to file, calling into question the Applicant's readiness to file the necessary materials upon the Appeal being restored. The remaining considerations were not explicitly addressed.

In the circumstances, the Court held that it would be contrary to the interests of justice to restore the Appeal. The Application was dismissed. The Court also held that the Respondent was by default entitled to Costs pursuant to Rule 14.88.

STOKES V HECK, 2023 ABCA 39

(VELDHUIS JA)

Rule 14.48 (Stay Pending Appeal)

The Applicant previously appealed an Order to enforce an Arbitration award (the "Appealed Order") in relation to a family law dispute. The Applicant applied for a Stay of enforcement of the Appealed Order pending Appeal pursuant to Rule 14.48.

The Court noted that Rule 14.48 provides that an Application to Stay proceedings or enforcement of a Decision pending Appeal may be made to a single Appellate Judge. The Court also noted that the Applicant must show that: (1) There is a serious question to be considered on Appeal; (2) It will suffer irreparable harm if the Stay is not granted, and (3) The balance of convenience favours granting the Stay.

The Court determined that the Applicant failed to satisfy the test for a Stay. The Court found that the Applicant met the low threshold to establish a serious issued to be tried but failed to establish irreparable harm. The Court found that the Applicant failed to show that he would suffer harm that could not be quantified in monetary terms despite the Applicant's argument that a property that would be sold under the Arbitration award had sentimental value. The Court also determine that the balance of convenience did not favour granting a Stay.

EMELOGU V EKWULU, 2023 ABCA 17

(ANTONIO JA)

Rules 14.64 (Failure to Meet Deadline) and 14.65 (Restoring Appeals)

The Applicant failed to file his Appeal Record and transcript by the relevant deadline, and the Appeal was struck pursuant to Rule 14.64. The Applicant made an Application to restore the Appeal. The Application was adjourned to provide time for the Applicant to obtain a transcript of the Trial Judge's reasons, but the Applicant twice failed to file the transcripts for formatting flaws. As the Appeal was not restored within six months, it was deemed abandoned pursuant to Rule 14.65. The Applicant then retained counsel an applied to restore the abandoned Appeal.

The Court denied the Application. The test for restoring an abandoned Appeal is the same as for restoring a struck Appeal. The Court will consider five factors: (a) whether the Appeal has arguable merit; (b) whether the Applicant intended in time to proceed with the Appeal; (c) what explanation is offered by the Applicant for the defect or delay which caused the Appeal to be struck or deemed abandoned; (d) whether the Applicant moved with reasonable promptness to cure the defect and have the Appeal restored; and (e) whether the Respondents have suffered any prejudice, which includes consideration of the length of delay. The onus is on the Applicant to provide evidence on the five factors.

Antonio J.A. stated that discretion to restore an Appeal should be used sparingly, and with a view to the interest of justice. To establish arguable merit, the Applicant need only show that the Appeal is not frivolous or hopeless. The Court found that the Applicant failed to provide transcripts or other materials to support certain alleged errors, and that the delay would prejudice the Respondent. Given the lack of demonstrated merit to the Appeal, the weak justifications for the delay, and the prejudice to the Respondent, the Court declined to restore the abandoned Appeal.

STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2023 ABCA 98

(WAKELING JA)

Rule 14.88 (Cost Awards)

The Applicant, Ms. Stubicar, sought and was granted an adjournment on a permission to appeal Application, seeking leave to Appeal a Decision made under the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*"). The opposing Party, JEMM Sunnyside Ltd. ("JEMM"), sought solicitor-client or enhanced thrown-away Costs of the adjournment.

Applications for permission to Appeal under the *MGA* are considered urgent and are to be heard expeditiously. Ms. Stubicar's counsel sought a hearing date 65 days after the initial Decision was made. She refused to consent to earlier dates, and when an Order was made setting a time period for the hearing, failed to provide availability in the prescribed window.

Counsel to Ms. Stubicar then sought an Order overturning the scheduling Order, arguing that the date set (in the absence of her input) was unfairly prejudicial. In the interest of ensuring Ms. Stubicar was not prejudiced by her Counsel's lack of professionalism, Justice Kirker adjourned the matter by two weeks to ensure Ms. Stubicar's counsel could file a Memorandum of Argument.

At the hearing set by Justice Kirker, Ms. Stubicar's counsel was not prepared to argue her permission to appeal Application. She had not filed a Memorandum of Argument. Instead, she sought an adjournment. The adjournment was granted by Justice Wakeling in recognition of the prejudice to Ms. Stubicar if the Application was heard without a Memorandum of Argument.

The permission to appeal Application was heard and denied three weeks later. JEMM sought Costs for its preparation for the scheduled hearing which resulted in the final adjournment, and other scheduling issues. It argued that it could not use the Memorandum of Argument initially drafted and filed prior to the adjournment, because it was drafted without the benefit of Ms. Stubicar's Memorandum of Argument.

Justice Wakeling considered Rule 14.88, which provides that the successful Party to an Application is entitled to Costs against the unsuccessful Party, unless otherwise ordered.

Justice Wakeling found that Ms. Stubicar's counsel engaged in litigation misconduct by continuously resisting directions from the Court and by seeking an adjournment without a valid reason. He therefore granted a significant portion of the Costs sought on an estimated full indemnity basis for the work done by counsel to JEMM for the adjourned hearing.