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

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JONSSON V LYMER, 2020 ABCA 167 (SLATTER, BIELBY AND VELDHUIS JJA)
Rules 1.1 (What These Rules Do), 1.4 (Procedural Orders), 1.6 (Changes to These Rules), 4.5 (Complex Case Obligations), 4.14 (Authority of Case Management Judge) and 6.4 (Applications Without Notice)

In a prior Decision, an Order declaring the Appellant a vexatious litigant and imposing sanctions for contempt was issued against the Appellant. Although the vexatious litigant Application was brought under the *Judicature Act*, RSA 2000, c J-2 (the *"Judicature Act"*), the Case Management Judge instead considered the Application under the Court's inherent jurisdiction to control its proceedings. The Appeal addressed the scope and breadth of the Court's jurisdiction to restrain vexatious litigants and the related principles of access to justice.

The Court of Appeal considered the Rules and the Court of Queen's Bench inherent common law jurisdiction in concluding that although the Court does have the inherent jurisdiction to make vexatious litigant Orders, that process should be the exception. The preferred route is for the litigants to bring an Application under the *Judicature Act* with notice to both the Respondent and the Attorney General. The Court noted that pursuant to Rules 6.4(b), notice would not be required if the Applicant would suffer undue prejudice by giving notice, but that was not the case in this matter.

The Court of Appeal noted that Rule 1.1(2) states that all persons who come to the Court (whether self-represented or represented by counsel) are subject to the Rules, and held that there is no excuse for abuse of Court procedures. In considering the whether the Court has the appropriate authority to issue vexatious litigant Orders, the Court cited Rules 1.4, 1.6 and 4.14, which allow the Court to direct and impose procedural Orders. Although these Rules exist, the Court of Appeal held that the primary jurisdiction for vexatious litigant Orders arises from the *Judicature Act*, Part 2.1, and such Orders should first be assessed pursuant to that statute.

The Court of Appeal held that the vexatious litigant Order was not the appropriate response to the Appellant's behaviour and the Case Management Judge should have instead granted a "carefully crafted case management order, and possibly a litigation plan" pursuant to Rule 4.5.

DE VOS V ALBERTA (TRANSPORTATION), 2020 ABQB 234 (MASTER BIRKETT)
Rules 1.2 (Purpose and Intention of These Rules) and 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff alleged negligence against the Registrar of Motor Vehicle Services (the "Registrar") and others after he experienced difficulties renewing his motor vehicle license after his 75th birthday. The Registrar and two individual Defendants applied for the Action to be struck as against them pursuant to Rule 3.68 on the basis that the Plaintiff's Amended Statement of Claim did not disclose a reasonable claim against them.

Master Birkett explained that all or part of a claim may be struck pursuant to Rule 3.68(2)(b) where the pleading discloses no reasonable claim, meaning that there is "no reasonable prospect the claim will succeed" even where the Court has accepted the allegations of fact in the pleading as true. Master Birkett noted that the Court should err on the side of "generosity" to permit novel but arguable claims to proceed, but must still apply Rule 3.68 as intended to strike claims that do not disclose a reasonable cause of action. Master Birkett explained that this is consistent with Rule 1.2(2)(a) and (b) which states that the purpose of the Rules is to identify the real issues between the parties, and to facilitate the quickest and most economical means of resolution.

Master Birkett considered whether the Amended Statement of Claim, interpreted liberally, disclosed any claims against the Applicants, and determined that it did not. The Action was struck as against the Applicants.

LEMAY V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 250 (FAGNAN 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 Applicant landowners had unsuccessfully appealed a decision of the Surface Rights Board to the Court of Queen's Bench, following which the Respondent operator sought Costs of the Appeal. Upon acknowledging a successful party's entitlement to Costs pursuant to Rule 10.29, subject to the Court's general discretion under Rule 10.31 which requires the Court to consider the factors listed in Rule 10.33, the Court generally found in favour of awarding the Respondent Costs pursuant to Schedule C. While the Court disallowed second counsel fees, the Costs awarded were enhanced 25% to account for inflationary erosion of the Schedule C tariffs.

A considerable portion of the Respondent's claim for Costs was comprised of disbursements. Guided by the principle of proportionality codified in Rule 1.2, Justice Fagnan disallowed much of the disbursement claim, citing concern for the Respondent's expenditure of resources which included second counsel participation, long-distance travel, and expensive but ultimately unnecessary fresh expert evidence, the outlay for which significantly exceeded the small amount at stake on Appeal.

ALBERTA HEALTH SERVICES V ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2020 ABQB 263 (PRICE J)
Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The matter involved a dispute over the meaning and interpretation of the provisions of a Restricted Court Access Order that was granted by Justice Campbell in 2015 ("RCA Order"). The Applicant, an individual in the proceedings known as "B.G.," applied for clarification of the RCA Order, and Alberta Health Services ("AHS"), applied to vary the RCA Order with both Applications heard contiguously.

B.G. argued that under the RCA Order, legal counsel for both AHS and the Information and Privacy Commissioner of Alberta ("OIPC") were required to destroy their respective solicitor files with respect to the within proceedings. B.G. argued that counsel was not exempt from the obligation to destroy Confidential Information (as defined in the RCA Order) in its possession and were in breach of the terms of the RCA Order for failing to do so.

Price J. found that the plain language interpretation of the RCA Order did not require counsel to destroy their

solicitors' files or to redact B.G.'s full name from them. Justice Price noted the practical consideration of the requirement of lawyers to conduct conflict searches before taking on any new clients or opening a new file. Given counsels' continued obligation to examine whether a conflict of interest exists, if B.G.'s name was redacted from counsels' files, an accurate conflict search would be impossible.

Justice Price noted that the purpose and intent of the Rules, including foundation Rule 1.2, is to provide a means by which claims can be fairly and justly resolved in or by a Court process in a timely and cost-effective way. Her Ladyship referenced Rule 9.15 and the Court's jurisdiction to set aside, vary, or discharge an interlocutory Order: (a) because information arose or was discovered after the Order was made; (b) with the agreement of the parties; or (c) on other grounds that the Court considers just.

Price J. found that pursuant to Rule 9.15(c), it would be just for the Court to vary the RCA Order to allow the AHS and its legal counsel to comply with their respective legal obligations and to ensure B.G.'s access to proper health care was not compromised. Accordingly, B.G.'s Application was dismissed and Her Ladyship allowed AHS's Application to vary the RCA Order to limit the scope of the definition of "Confidential Information" to allow for these additional considerations.

AF V ALBERTA, 2020 ABQB 268 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules), 4.33 (Dismissal for Long Delay) and 13.5 (Variation of Time Periods)

The Defendants applied to have a sexual assault Action struck for long delay pursuant to Rule 4.33. One of the Plaintiffs sought an adjournment of the Application on the basis that part of the reason for the delay was that she was so emotionally damaged that she was disabled from being able to proceed with the lawsuit. The adjournment was meant to provide her time to pursue expert evidence to prove that allegation and to properly oppose the Application to strike.

The Court confirmed that Rule 1.2 does not place an onus on the Defendant to take active steps to move an Action along and went on to consider whether disability or inability to instruct counsel is a valid basis on which to oppose an Application to strike under Rule 4.33.

The Court found that to date, disability had not been accepted as a basis for denying an Application to dismiss under Rule 4.33 where all of the necessary elements to strike were established. However, the Court also emphasized that the cases where disability had been advanced as a defence to the Application, the alleged disability had not been proven to the required standard on the Application. This suggested that disability may be a relevant consideration if proven. In fact, the Court found no Court of Appeal authority which stated that disability is not an answer, or a potential answer, to a Rule 4.33 Application.

While the Court confirmed that Rule 4.33(10) prohibits a Court from using its discretion provided in Rule 13.5 to extend the Rule 4.33 time deadlines, the Court considered the fact that under section 5 of the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*), disability extends a limitation period during a period of disability, or does away with the limitation period for someone who is permanently disabled.

Justice Graesser held that this provided a basis to have Rule 4.33 yield to the same principle. Ultimately, His Lordship found that a disabled litigant may raise disability as an answer to delay under Rule 4.33 where the litigant provides evidence establishing disability of the sort required to extend limitation periods under the *Limitations Act*. The standard of proof of disability would be on a balance of probabilities.

However, the Court did not go so far as to offer any comments on the nature or extent of disability that may justify delay. The test under the *Limitations Act* is being "unable to make reasonable judgements in respect of matters relating to a claim" (section 1(h)(ii)). The Court stated that this "would seem to be the appropriate test to apply" but left that it open for future development through the case law.

The Court granted the adjournment of the Application to strike to allow the Plaintiff to gather the necessary evidence to attempt to establish her disability to the extent necessary to defeat the Rule 4.33 Application.

BRITON V FORD MOTOR COMPANY OF CANADA LTD, 2020 ABQB 344 (EAMON J)
Rules 1.2 (Purpose and Intention of these Rules) and 1.4 (Procedural Orders)

The parties could not agree if the Plaintiff's Application to certify the Action as a Class Action, and the Defendants' Application to stay the Action, should be heard together or separately. The Plaintiff argued that the Applications should be heard together. The Defendants argued that Rule 1.4 provides the Court with discretion to hear Applications "in the order necessary to advance the purpose and intention of the [R]ules" and that pursuant to Rule 1.2, one of those purposes was to provide a means to justly and fairly resolve the claim in a timely and cost-effective way.

Eamon J. noted that he need not hear the Certification Application first, and that the decision of whether to hear Applications together or separately should be based on the principles of efficiency, judicial economy, and fairness. His Lordship noted that the stay Application "overlaps the certification application", meaning that bifurcating the Applications would result in potential delay through multiple Appeals and "litigation by instalment". Conversely, the Certification Application would be costly to the parties, and there was an ongoing Saskatchewan Action which was supposed to be discontinued before the Alberta Action had proceeded (which had not occurred yet). His Lordship concluded that the most fair and efficient decision was to permit the Defendants to make their stay argument before hearing the Plaintiff's Certification Application.

SANDHU V SIRI GURU NANAK SIKH GURDWARA OF ALBERTA, 2020 ABQB 359 (LEMA J)
Rules 1.2 (Purpose and Intention of these Rules), 1.4 (Procedural Orders), 1.7 (Interpreting these Rules), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 6.10 (Electronic Hearing), 6.16 (Contents of Notice of Appointment), 6.17 (Payment of Allowance), 6.18 (Lawyer's Responsibilities), 6.19 (Interpreter) and 6.20 (Form of Questioning and Transcript)

The Applicant sought reinstatement as president of the Respondent organization. The Applicant's term in office was otherwise set to expire approximately one year subsequent to the date of filing the Application, thus the Applicant endeavoured to advance the litigation in a timely manner, notwithstanding extant social isolation directives arising from the COVID-19 public health crisis. The Respondent was not so inclined. In particular, the Respondent had refused to consent to Questioning on Affidavits by video-conference while social isolation directives remained in place, preferring to defer cross-examinations until in-person attendance was possible.

The Court set out to determine the scope of authority provided by the Rules to compel parties to submit to Questioning on Affidavits by electronic means. Rule 6.7 was identified as the primary enabling provision by which Questioning on Affidavits are regulated. In addition, Rules 6.16, 6.17, 6.18, 6.19 and 6.20 addressed, respectively, "the contents of the appointment notice, payment of an appearance allowance, the responsibilities of a lawyer for a person served with an appointment, interpreters, and 'form of questioning and transcript.'" Importantly, the Court acknowledged that these Rules are not written with reference to the means of Questioning on Affidavits, such as by in-person attendance or electronic feed.

The Court also considered Rule 6.10, which provides authority to compel parties to submit to electronic process, though only in circumstances where the Court presides. As the matter at hand involved steps "upstream" from Court involvement, Rule 6.10 could not be applied directly. However, the Court noted that Rule 1.7 confers authority to apply rules by analogy. The Court also noted the general

authority in Rule 1.4 to make procedural Orders to implement and advance the purpose and intention of the Rules, including the timely progression of the litigation, an intention referenced multiple times in Rule 1.2.

Justice Lema found that the Court has authority to compel remote Questioning on Affidavits. On the facts of the case at bar, His Lordship exercised that authority, setting timely deadlines for litigation steps and ordering that Questioning on Affidavits proceed remotely in the event social isolation directives preclude in-person Questioning at the material times.

MCKAY V PROWSE, 2020 ABCA 131 (VELDHUIS, STREKAF AND HUGHES JJA)
Rules 1.2 (Purpose and Intention of These Rules) and 4.33 (Dismissal for Long Delay)

This was an Appeal from a Decision dismiss a claim pursuant to Rule 4.33. In the underlying Action it was determined that the last steps that had constituted a significant advance in the Action took place on July 12, 2013. The Respondents applied in November 2016 to have the Action dismissed. A Master struck the Action in November 2017, and in November 2018 a Chambers Judge upheld the Master's Decision.

The Appellant alleged that the Chambers Judge had erred in determining that three or more years had passed since a significant advance in the Action and in determining that Rule 4.33 should apply regardless of the fact that some of the delays were a result of the Respondents' conduct. They submitted that (1) settlement negotiations, (2) the production of documents, and (3) proceeding to an Application to vary an Order to permit the production of unredacted documents from an American proceeding, constituted a significant advance in the Action.

The Court of Appeal determined that the Chambers Judge's conclusion regarding the settlement negotiations was entitled to deference, that the Judge did not err in finding that the production of documents did not constitute a significant advance, and that the Appellant had failed to demonstrate that the Application to vary an Order advanced the Action.

With respect to the Appellant's assertion that some delays in the Action were a result of the Respondents' conduct, the Court noted that the Appellant reached out to the Respondents in order to resolve the claim through alternative dispute resolution, and there was no evidence that the Respondents had responded to those requests. Rule 1.2 provides that the Rules were intended to facilitate expeditious and cost-effective ways to resolve claims, encouraged parties to resolve claims themselves, and oblige the parties to communicate in a timely manner. However, the Court reviewed the applicable case law and found that Rule 1.2 did not override the mandatory language of Rule 4.33 and that it was the responsibility of the Plaintiff to pursue the lawsuit.

The Court of Appeal determined that the Chambers Judge did not err and dismissed the Appeal.

PIIKANI NATION V MCMULLEN, 2020 ABCA 183 (VELDHUIS JA)
Rules 1.2 (Purpose and Intention) and 3.68 (Significant Deficiencies)

The Defendant applied to the Court of Appeal for a stay pending the Appeal of six Decisions of the Case Management Justice.

Her Ladyship noted that the Case Management Judge, in granting a number of Applications brought by the Plaintiffs and other parties, had applied the low standard informed by Rule 3.68(2) by assessing whether the Applications disclosed a reasonable chance of success, were frivolous, irrelevant or improper, or constituted an abuse of process.

Justice Veldhuis applied the test for granting a stay pending Appeal set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, and held that it would be just and equitable to grant stays with regards to two of the Decisions of the Case Management Justice, pending Appeal. Justice Veldhuis then held that until the merits of all Appeals were adjudicated, stays of the Applications were in the best interests of justice, and in facilitating the most expedient means of resolving the dispute as considered by Rule 1.2.

EWASHKO V HUGO, 2020 ABCA 228 (BIELBY, WAKELING AND SCHUTZ JJA)
Rules 1.2 (Purpose and Intention of These Rules), 5.41 (Medical Examinations) and 8.16 (Number of Experts)

The Plaintiff had sued (on her own behalf and as her child's litigation representative) the physicians and the hospital at which she gave birth to her child.

The physicians retained an expert to complete a future care costs report, and later, counsel for the hospital requested access to the child in order to have a similar expert report completed. Counsel for the Plaintiffs refused on the grounds that the physicians and hospital were not adverse in interest and thus should be required to rely on the expert report prepared for the physicians' counsel.

The hospital made a successful Application pursuant to Rule 5.41(4) requiring the child to be observed in the preparation of its own expert report regarding future care costs. The Plaintiffs appealed that Order. The Plaintiffs argued that the hospital should not have been permitted to obtain its own expert report because any such report might not be usable in evidence at Trial in any event, pursuant to Rule 8.16(1) which prohibits more than one expert from giving opinion evidence on any one subject on behalf of a party.

The Court disagreed, finding instead that Rule 8.16 limits each Defendant from calling more than one future care costs occupational therapist expert without permission. However, the fact that one party calls an expert witness in a given area does not impose a leave requirement on any other party.

The Court further noted that there are more uses made of expert reports than as evidence at Trial, including in settlement negotiations which, the Court stated, was an important element of Rule 1.2.

PARAGON CAPITAL CORPORATION LTD V STARKE DOMINION LTD, 2020 ABCA 216 (BIELBY, ANTONIO AND FEEHAN JJA)
Rules 1.4 (Procedural Orders), 4.22 (Considerations for Security for Costs Order), 9.18 (Judgments and Orders Subject to Conditions) and 10.4 (Charging Order for Payment of Lawyer's Charges)

The Court considered whether the Chambers Judge erred in granting a charging Order to secure payment of legal fees owed to a law firm, when the firm did not provide evidence that it had met the requirements of Rule 10.4(2)(a), and in particular the requirement that it demonstrate that its fees would not be, or were unlikely to be paid unless the charging Order was granted. The Chambers Judge had purported to rely on equitable jurisdiction to grant a conditional charging Order pending receipt of proof that Rule 10.4(2)(a) had been met.

The Majority considered the wording of Rule 10.4(2), which states that a charging Order "may only be made if" certain requirements are met - implying that the conditions of the Rule must be satisfied in advance and not imposed as a condition of making an interim Order final. It then compared Rule 10.4(2) to Rule 1.4(2)(e) which permits the Court to impose terms, conditions, and time limits on Orders, and Rule 9.18(1) which provides that Orders may be conditional.

The Majority noted that there appears to be a conflict between Rules 10.4(2), and Rules 1.4(1) and 9.18(1) because the latter permit conditional Orders. The Majority then reviewed the history of Rule 10.4(2), and applied the principles of statutory interpretation to resolve the ambiguity. The Majority found that the legislative purpose behind Rule 10.4(2) includes the desirability of having lawyers agree to represent those who cannot afford to pay in advance or through a retainer. In order for that purpose to be achieved, "the rule must work in such a manner as to allow an unpaid lawyer a reasonable opportunity to obtain security". The Majority concluded that requiring "an applicant to have all its ducks in a row in relation to alternative collection attempts prior to bringing an application for a charge order" would, practically speaking,

defeat the purpose of the Order. As such, the Majority held that the Chambers Judge had discretion to grant the conditional Order.

Next, the Majority considered the Appellant's argument that even if the Chambers Judge had jurisdiction to grant the conditional Order, it should not have been done because Rule 10.4(5) says: "An order must not be made under this rule if in all the circumstances that the Court considers that to make the order would be unfair". The Majority rejected this argument after reviewing the principles of statutory interpretation.

In dissent, Antonio J.A. emphasized that Rule 10.4(2) explicitly states that a charging Order may only be made if two prerequisites are met. Antonio J.A. determined that the mandatory wording of Rule 10.4(2) could not be altered by other Rules, and that while Rule 9.18 "contemplates the existence of conditional [O]rders", it does not "authorize the conversion of prerequisites into conditions that can be satisfied after the fact". In doing so, Antonio J.A. noted that the threshold to be met for Rule 10.4(2) to apply is akin to that for a Security for Costs Order made pursuant to Rule 4.22(a). Her Ladyship therefore would have held that "no principle of statutory interpretation, no other rule of court, and no "equitable jurisdiction" empowers the court to grant a charging order contrary to the intent and wording of the rule."

CLARK V UNTERSCHULTZ, 2020 ABQB 338 (ROSS J)
Rules 1.5 (Rule Contravention, Non-compliance and Irregularities) and 3.15 (Originating Application for Judicial Review)

The Applicant in this matter sought to file extrinsic Affidavit evidence in support of his Application to set aside an Arbitral Award. The Respondent challenged the timeliness of the Affidavit, pursuant to Rule 3.15.

Rule 3.15(5) requires an Applicant to file and serve an Affidavit used to support an Originating Application for Judicial Review no less than one month before the date scheduled for hearing the Application. In this case, the initial hearing date set out in the Application was March 13, 2019. However, the date scheduled for argument was January 10, 2020. The issue was whether the Applicant was required to file and serve his Affidavit one month before the initial hearing date or the date scheduled for argument.

Justice Ross determined that in the circumstances, Rule 3.15(5) should be interpreted as applying to the substantive hearing, not the original formal appearance. Justice Ross added that if the Court was wrong on this point, and Rule 3.15(5) was intended to apply to the original appearance date, rather than the actual hearing, then the non-compliance may be cured by Rule 1.5 if this is in the "overall interests of justice" and does not cause irreparable harm.

GRAEFF ESTATE V HUEY, 2020 ABQB 262 (HOLLINS J)
Rules 2.11 (Litigation Representative Required), 2.15 (Court Appointment in Absence of Self-Appointment) and 2.16 (Court-Appointed Litigation Representatives in Limited Cases)

The Applicant, the Calgary Health Trust ("CHT"), was initially a beneficiary named in the will of a deceased person's estate (the "Estate"). CHT brought an emergency Application against the Respondents seeking an Attachment Order, as there appeared to be evidence that the Respondents were selling off the property that had previously been deemed by the Surrogate Court to be security for claims of CHT.

CHT sued the Respondents (who were a past personal representative of the Estate, and the past personal representative's wife) in Surrogate Court after it was discovered money had been improperly paid out of the Estate.

The Respondents alleged that CHT had no standing to bring an Application for an Attachment Order because the *Estate Administration Act*, SA 2014, c E-12.5 precludes anyone except the named personal representative from doing so. However, prior to the Application for an Attachment Order being heard, CHT had obtained an *ex parte* Court Order in the Surrogate Action appointing CHT as the litigation representative of the Estate.

The Respondents claimed that the Order appointing CHT as the personal representative of the Estate should not have been issued under Rule 2.16, which they argued applied only to situations where the Court must appoint a litigation representative for an estate which has no personal representative. The Court disagreed and found that while Rules 2.11 and 2.15 address the situation described by the Respondents, Rule 2.16(c), under which the Order appointing CHT as the personal representative of the Estate was made, addresses a situation where it is expedient to make such an appointment concerning an Action involving the administration of an estate. The Court hearing the Application assumed that this requirement had been met to the satisfaction of the Surrogate Court Justice and confirmed that CHT had standing to bring the Application. It ultimately granted a form of Attachment Order sought by CHT against the Respondents.

VUONG VAN TAI HOLDING V ALBERTA (MINISTER OF JUSTICE AND SOLICITOR GENERAL), 2020 ABCA 169 (SLATTER, BIELBY AND VELDHUIS JJA)
Rule 2.23 (Assistance Before the Court)

This was an Appeal of an Order arising from an Apparently Vexatious Application or Proceeding ("AVAP").

On October 8, 2015, the corporate Appellant, a residential landlord owned by the individual Appellant, commenced a proceeding against a tenant. They were granted an Order against the tenant and demanded that the tenant pay rent or give up possession. The Order stated that the Rules prevent non-lawyers from appearing in Court for corporations and that the individual Appellant should not appear for the corporate Appellant in residential matters "without the written permission of the Honourable Associate Chief Justice." This Order caused a Clerk of the Court to place the Appellants' names on a list of litigants who were subject to restrictions.

In February of 2019, the individual Appellant filed an Originating Application on behalf of the corporate Appellant. The Chambers Judge, without notice to the Appellants or without giving them the opportunity to respond, determined that the Originating Application was in contempt of the previous Order, struck the Originating Application and imposed a vexatious litigant Order.

The Court of Appeal found that vexatious litigant Orders should rarely be granted *ex parte*, the notice of intention to issue the Order was not given to the Attorney General, and that the Order was "a disproportionate reaction to what happened." This was a singular breach of a previous Order and there was nothing improper about the underlying litigation. Further, Rule 2.23(4) gave the Court the discretion to "allow a right of audience to a non-lawyer", and as a result, the portion of the October 8, 2015 Order stating that the individual could not appear in Court on behalf of the corporation was rescinded. The Court allowed the Appeal and set aside the vexatious litigant Order.

RIFCO INC (RE), 2020 ABQB 366 (GROSSE J)
Rules 3.2 (How to Start an Action), 3.12 (Application of Statement of Claim Rules to Originating Applications) and 3.14 (Originating Application Evidence (Other than Judicial Review))

The parties to this dispute had entered into an agreement under which one party agreed to purchase the outstanding shares of Rifco Inc. ("Rifco"), a public company ("the Arrangement Agreement"). The purchaser later purported to terminate the Arrangement Agreement under the terms of the Arrangement Agreement.

Rifco filed an Originating Application under Rule 3.2 and sought, among other things, declaratory relief stating that the purchaser's purported termination of the Arrangement Agreement was unlawful and of no force and effect.

The Court noted that proceeding by Originating Application did not mean that the Court had to resolve all issues based on the evidence initially filed or without any Trial-like processes. Rules 3.12 and 3.14 provide the Court with tools to order that some or all of the processes set out for in Actions commenced by Statements of Claim to apply to Actions commenced by an Originating Application.

The Court found that it could not decide the validity of the termination issue on the current record but recognized

the flexibility provided by Rules 3.12 and 3.14. Despite this, the Court determined it could not use those Rules to establish a process for hearing the issues raised in an expedited fashion due in part to the COVID-19 restrictions, and because the purchaser had not had the opportunity to plead its defences in respect to some of the relief requested by Rifco.

The Court declined to make any procedural directions but suggested the parties proceed to a case conference.

L EGOROFF TRANSPORT LTD V GREEN LEAF FUEL DISTRIBUTORS INC, 2020 ABQB 360 (MASTER BIRKETT)
Rules 3.58 (Status of Counterclaim), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The underlying Action arose out of the collision between a fuel tanker truck hauling gasoline and a logging truck hauling full-size logs (the "Collision") on a snow-covered highway in November of 2014 (the "Underlying Action"). More than two years later, in late November of 2016, the Plaintiff filed a Statement of Claim to commence the Underlying Action. The Defendants filed a Counterclaim in August of 2017 (the "Counterclaim"). The parties each brought Applications to strike or summarily dismiss the other party's claim, pursuant to Rules 3.68 and 7.3, as having been filed outside the applicable limitation period (the "Applications").

After an extensive review of the facts and first principles, it was clear to Master Birkett that with the exception of the Plaintiff's claim for remediation costs arising after the Collision (the "Exception"), the Underlying Action and Counterclaim (including amendments) were all brought outside of the 2-year limitation period proscribed by the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*). Master Birkett emphasized that pursuant to Rule 3.58, a Counterclaim is an independent Action subject to the same limitation periods as the Underlying Action. Master Birkett invoked Rules 3.58, 3.62, 3.68 and 7.3 in light of sections 3 and 6 of the *Limitations Act* and concluded that the parties did not seek a remedial order within two years after the date on which they knew or ought to have known that these injuries had occurred, and accordingly there was no merit to their claims. With the one Exception, the Application to strike and for Summary Dismissal of the Underlying Action and Counterclaim were all granted.

FARM CREDIT CANADA V PACIFIC ROCKYVIEW ENTERPRISES INC, 2020 ABQB 357 (MANDZIUK J)
Rules 3.62 (Amending Pleadings), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 5.17 (People Who May be Questioned) and 7.3 (Summary Judgment)

The Appellant, Farm Credit Canada ("FCC"), appealed a Master's Decision dismissing FCC's Application for Summary Judgment against the Respondents, Ken Ping Chan and Raymond M.W. Wan (collectively, the "Respondents"), and granting the Respondents their Application to amend their joint Statement of Defence and Costs (collectively, the "Underlying Applications"). The Underlying Applications related to guarantees given by each of the Respondents in support of a loan made by FCC (the "Loan") to a corporation called Pacific Rockyview Enterprises Inc. ("Pacific Rockyview"). The Loan was in default and FCC sued the Respondents on their respective guarantees.

Mandziuk J. addressed two issues: (1) whether or not the Respondents could amend their Statement of Defence under Rules 3.62, 3.65, and 3.68; and (2) if FCC was entitled to Summary Judgment against the Respondents under Rule 7.3. Justice Mandziuk noted that where an Application for Summary Judgment is heard concurrently with a cross?Application for permission to amend pleadings, the Court must determine the amendment Application first before determining the Application for Summary Judgment.

Procedurally, Justice Mandziuk noted that the Respondents had not questioned FCC's officer, had not examined any FCC witness on Affidavits, and had not questioned any other FCC employee, which is permitted under Rule 5.17. Justice Mandziuk found no evidence to support the

Respondents' proposed amendments, found that there were only bald assertions, and accordingly denied the proposed amendments on the basis that the defences raised therein were hopeless.

Justice Mandziuk emphasized that a Court's considerations in determining whether proposed amendments to a Statement of Defence are hopeless under Rule 3.68 overlap considerably with the considerations in determining an Application for Summary Judgment under Rule 7.3. His Lordship noted that if certain amendments to a Statement of Defence are held to be hopeless, it would be very unusual, maybe impossible, for such amendments to survive an Application for Summary Judgment. Having found that the amendments were hopeless, Mandziuk J. concluded that the matter could be justly and fairly resolved on a summary basis and that there were no genuine issues requiring a Trial. Accordingly, His Lordship granted Summary Judgment against the Respondents in the amount owing under the guarantees.

BRODA V ALBERTA, 2020 ABQB 221 (MASTER SUMMERS)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendants each brought Applications to strike an Action which had been filed by the Plaintiff in response to his disbarment from the Law Society of Alberta in 2010. After reviewing the Plaintiff's extensive pleadings against the Provincial Crown and the Law Society of Alberta, Master Summers considered the applicability of Rule 3.68.

Master Summers concluded that the Action was effectively re-litigation of the conduct hearings held by the Law Society, constituting an abuse of process pursuant to Rule 3.68(2)(d). Additionally, Master Summers ruled that the Amended Statement of Claim disclosed no reasonable cause of action on the basis of procedural fairness, jurisdiction, necessity, breach of statutory duty, malicious prosecution, negligence or abuse of process, and thus ordered that the claim be struck as per Rule 3.68(2)(b).

Finally, Master Summers held that the Action had been brought outside of the limitation period, and could therefore be struck pursuant to Rule 3.68(2)(b) for that reason.

DH V WOODSON, 2020 ABQB 367 (PRICE J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 5.34 (Service of Expert's Report), 5.35 (Sequence of Exchange of Experts' Reports), 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

Upon the death of a subscriber to a policy of life insurance, a dispute arose in which a recent change in beneficiary designation, which favoured the Applicant, was impugned by the Respondents. The Applicant sought to uphold the change in beneficiary designation through dismissal of the Respondents' claims and release of the life insurance proceeds.

Central to the parties' disagreement was the insured's mental capacity at the time of the change in beneficiary designation. In support of the insured's capacity, the Applicant had attached a medical report to her Affidavit. The Respondents sought to strike this evidence pursuant to Rule 3.68 as frivolous, irrelevant, or improper information. The Court agreed that the medical opinion was hearsay, in violation of the Rule 13.18 requirement that evidence advanced in pursuit of final relief be grounded in personal knowledge, and struck the report.

In anticipation of the evidentiary challenge to the medical report, the authoring physician swore an Affidavit, exhibiting the report to cure the hearsay defect, which the Applicant then sought to rely upon. The Respondents challenged this Affidavit on the grounds that it had neither been served as an expert report in accordance with Rules 5.34 and 5.35, and that the Respondents had the opportunity to challenge the physician's evidence through cross-examination or rebuttal. These concerns were shared by the Court, with Justice Price assigning little weight to the physician's Affidavit.

With respect to the merits of summary disposition, and in reference to Rule 7.2, the Applicant argued that

dismissal should follow from admissions of fact made by the Respondents. Justice Price reviewed the pleadings, Affidavit evidence, and cross-examination transcripts, finding that admissions had not been made to support an Order for Summary Dismissal. Turning finally to Summary Dismissal pursuant to Rule 7.3, the Court reviewed whether the Applicant had met her onus of establishing that there was no merit to each of the Respondents' claims. In result, Justice Price found a genuine issue requiring Trial with respect to all claims, denying the Application for Summary Dismissal, and accordingly denying the Application for release of life insurance proceeds.

MANSON (ESTATE) V OBSIDIAN ENERGY INC, 2020 ABQB 370 (HOPKINS J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

In April of 2018, the Plaintiff, Scott Manson ("Mr. Manson"), acting for himself and as the self-appointed representative for the Estate of his mother, Melba Manson (the "Estate"), commenced an Action against the Defendants (the "Claim"). The Defendants applied to strike the Claim pursuant to Rule 3.68.

Hopkins J. found that the allegations in the Claim could not be readily summarized, nor were the details particularly relevant to His Lordship's decision. Justice Hopkins emphasized that pursuant to Rule 3.68, a pleading may be struck out in whole or in part if, among other things: (1) the Court has no jurisdiction; (2) the pleading discloses no reasonable claim or defence; and/or (3) the pleading is "frivolous, irrelevant or improper" or "an abuse of process."

Justice Hopkins found that the allegations in the Claim were simply too vague, ill-defined, and generally amounted to little more than bald allegations. His Lordship noted that the Defendants were not in a position to make any meaningful response to the allegations in the Claim. Accordingly, His Lordship concluded that the Claim was futile, an abusive proceeding, and, in accordance with Rule 3.68, struck the Claim entirely.

BDM V MMM, 2020 ABQB 288 (MANDZIUK J)
Rules 4.16 (Dispute Resolution Processes), 6.9 (How the Court Considers Applications), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The parties to a longstanding and contentious family law dispute each filed Applications seeking numerous interim remedies. In the wake of the COVID-19 public health crisis, the parties' scheduled case management meeting was adjourned, in place of which the parties consented to the Court's use of a documents-only process pursuant to Rule 6.9.

Justice Mandziuk considered and resolved the issues raised in the parties' cross-Applications. In particular, the Court addressed one party's request for a declaration of contempt pursuant to Rule 10.52, ultimately finding against such declaration and declining to consider the penalties prescribed in Rule 10.53.

It was noted that while the parties' required participation in alternative dispute resolution had been waived to expedite the Trial process pursuant to Rule 4.16(2), Court access restrictions thereafter impeded Trial scheduling. Nonetheless, Justice Mandziuk sought to encourage resolution, setting a requirement for leave in advance of filing further Applications, and directing the parties to attend mediation with a registered family mediator pursuant to Rule 4.16.

CNOOC PETROLEUM NORTH AMERICA ULC V 801 SEVENTH INC, 2020 ABQB 224 (DILTS J)
Rule 4.22 (Consideration for Security for Costs Order)

CNOOC Petroleum North America ULC (the "Applicant"), as Plaintiff/Defendant by Counterclaim, sought over $2 million in Security for Costs against 801 Seventh Inc. (the "Respondent") for future steps in the underlying litigation, which included Questioning and Trial.

Justice Dilts reviewed the applicable jurisprudence and emphasized that Security for Costs is discretionary and involves balancing of the right of one party's economic security with another party's right to legal process. As both

parties were corporate entities, Her Ladyship noted that there were two possible pathways to Security for Costs: either under Rule 4.22, or under section 254 of the Alberta *Business Corporation Act*, RSA 2000, c B-9. Dilts J. found that pursuant to either path, the Applicant bears the initial burden to establish, on a balance of probabilities, that it is just and equitable to order Security for Costs or that the Respondent will be unable to pay its Costs. If the Applicant satisfies this initial threshold question, only then does the burden shift to the Respondent.

Justice Dilts reviewed the facts underpinning the Action and was satisfied that the Respondent remained in good standing with its lenders and had recourse to lands and buildings to satisfy a Costs Award. Her Ladyship also noted that certain lands and buildings at issue not only had inherent value but that they may have revenue generating capability in the future. Accordingly, Her Ladyship concluded that the Applicant had failed to meet its initial onus of proving, on a balance of probabilities, that it was just and equitable to order Security for Costs or that the Respondent would be unable to pay its Costs. Accordingly, the Application for Security for Costs was dismissed.

FISH CREEK FINISH CARPENTRY LTD V LINDNER, 2020 ABCA 129 (VELDHUIS JA)
Rules 4.22 (Considerations for Security for Costs Order), 14.48 (Stay Pending Appeal) and 14.67 (Security for Costs)

The Master and Chambers Justice had both found that the Defendant, Andrew Lindner, had fraudulently transferred and conveyed his cause of action in an unrelated real estate litigation to his wife, Magdalena Lindner ("Magdelena"), with the intent to defeat his creditors. Magdalena then made an Application to stay the enforcement of the lower Court's Order pending the Appeal, pursuant to Rule 14.48.

Veldhuis J.A. noted that the test for whether the Court of Appeal will grant a stay pending Appeal pursuant to Rule 14.48 is whether: (i) there is a serious question arguable on Appeal; (ii) the Applicant would suffer irreparable harm absent the stay; and (iii) the balance of convenience favours granting the stay. The Court noted that whether there is a serious question arguable on Appeal is a low threshold, used to simply determine whether the Appeal is frivolous or vexatious. Justice Veldhuis found that the Courts below had specifically considered and rejected the same arguments that were raised on the Appeal, and therefore there was no serious question arguable on Appeal. Justice Veldhuis also found against Magdelena as to whether she would suffer irreparable harm or whether the balance of convenience favoured granting the stay. The Application to stay the enforcement of the lower Court's Order pursuant to Rule 14.48 was dismissed.

Fish Creek Finish Carpentry Ltd. ("Fish Creek") made a cross-Application for Magdalena to post Security for Costs for the Appeal pursuant to Rule 14.67(1). Justice Veldhuis considered the factors listed in Rule 4.22 in order to determine if Security for Costs should be granted, and found that Fish Creek had failed to provide any evidence in support of its argument. The Application for Security for Costs was dismissed.

HICKS V GAZLEY, 2020 ABCA 239 (BIELBY JA)
Rule 4.22 (Considerations for Security for Costs Order)

In the course of a divorce and matrimonial property Action, a post-nuptial matrimonial property agreement had been held to comply with the formalities required by statute. The Respondent appealed this interlocutory finding, and the Applicant sought Security for Costs pursuant to Rule 4.22. Madam Justice Bielby reviewed each of the considerations prescribed by that Rule, and found none to favour an Order for Security for Costs. Specifically, there was no proven unlikelihood of enforcement; limited evidence as to the Respondent's impecuniosity; an arguable case on Appeal; as well as both the potential for undue prejudice to the Respondent's ability to continue the Appeal, and a concern that the Applicant had in fact sought Security for Costs to suppress the Respondent's ability to pursue the Appeal. As such, the Application was dismissed.

DL V KS, 2020 ABQB 271 (GROSSE J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was an Endorsement regarding calculations following a Decision arising out of a number of Applications relating to child support and parenting issues. Justice Grosse also made determinations regarding Costs in the Endorsement.

Both parties sought enhanced Costs. Her Ladyship noted that pursuant to Rule 10.31, Costs are awarded at the discretion of the Court. According to Rule 10.29, a successful party is generally entitled to Costs from an unsuccessful party. In making a Costs Award, Rule 10.33 sets out a number of factors that the Court may consider. Additionally, Rule 4.29 addresses Costs after a Formal Offer to settle has been made.

Justice Grosse noted that there had been mixed success on one of the Special Applications, and the Respondent had been unsuccessful on the cross-Application. Her Ladyship explored the relevant timeline of events and noted that the Respondent had made a Formal Offer to settle which came close to the actual result, however, the Applicant was ultimately awarded more than was offered. Justice Grosse noted that the doubling provisions of Rule 4.29 were not triggered, but still considered the fact that the Respondent had attempted to resolve litigation through making a Formal Offer. Further, Her Ladyship did not accept the Applicant's argument that the Respondent's misconduct in the litigation warranted elevated Costs.

After reviewing each party's conduct and success on various points, Justice Grosse held that a Costs award of $867.22 was payable by the Respondent to the Applicant.

ABT ESTATE V RYAN, 2020 ABCA 133 (WATSON, SLATTER AND FEEHAN JJA)
Rules 4.29 (Cost Consequences of Formal Offer to Settle), 5.3 (Modification or Wavier of this Part), 8.4 (Trial Date: Scheduled by Court Clerk), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 14.5 (Appeals Only with Permission)

Two complex underlying Actions, heard together, dealt mostly with a lawsuit against various parties involved in the Cold Lake Industrial Park Limited Partnership ("CLIP") for a return of funds invested by the Plaintiffs in CLIP and a subsequent lawsuit commenced by CLIP and numerous Defendants in response (the "Underlying Actions"). The Trial Judge was critical of a number of the Defendants in the Underlying Actions finding, *inter alia*, that many were not credible witnesses, had sworn false Affidavits of Records, had failed to answer Undertakings, and had given deceptive or misleading evidence during the Trial (the "Defendants' Conduct"). The Trial Judge ordered an award of Costs of double Column 5 and double Column 4 payable by the Defendants found to be liable, and no Costs would be awarded to those Defendants that were not found liable.

The Appellants/Defendants appealed the Costs awarded by the Trial Judge in two factions: (1) some of the liable Defendants appealed the findings that Costs were payable; and (2) some non-liable Defendants appealed the decision not to award Costs to them. Matthys Muller ("Mr. Muller"), a non-liable Defendant, also separately appealed the denial of Costs to him, in part, for failing to acknowledge a Formal Offer he had made prior to Trial (collectively, the "Appeals").

The Court found that many of the non-liable Defendants had not obtained permission to Appeal the issue of Costs in accordance with Rule 14.5(1)(e). Having failed to comply with Rule 14.5, these non-liable Defendants did not have standing to appeal the Trial Judge's Decision. The Court also reviewed Rules 5.3 and 8.4, as these Rules relate to unanswered Undertakings. The Court noted that pursuant to Rule 8.4(3)(e), unless enforcement of the Undertaking has been pursued, the witness is entitled to assume that

an answer is no longer required. The Court emphasized that any unanswered Undertakings do not support an adverse inference that the answer would have been unfavorable to the witness, because there are many reasons why Undertakings are not answered, including the waiver found in Rule 5.3, implied by non-enforcement.

The Trial Judge found a genuine *Calderbank* and Formal Offer from the Plaintiffs (the "Offers") which had been exceeded at Trial and for which Costs had been awarded accordingly. The Court of Appeal agreed with the Trial Judge's Decision with respect to the doubling of Costs under Rule 4.29(1) in this regard. The Court reviewed Rules 10.29 and 10.31 and the general rule that a successful party in an Action is entitled to a Costs Award subject to the Court's discretion. In applying the factors set-out in Rule 10.33, the Court found that Defendants' Conduct and the Offers had warranted the Costs awarded by the Trial Judge and dismissed the Appeals in this regard.

In addressing the Appeal by Mr. Muller, the Court found that Mr. Muller had made a genuine *Calderbank* and Formal Offer to extract himself from the suit at a stage when it was apparent that there was no reasonable prospect of liability being found against him. While Mr. Muller had engaged in some of the Defendants' conduct at Trial, the Court found that those actions did not rise to the threshold of reprehensible, scandalous or outrageous conduct. The Court found that a contrary conclusion by the Trial Judge was an error in principle, or a palpable and overriding error, such that Mr. Muller was entitled to his Costs on single column 5, subject to double Costs for bettering his Formal Offer of settlement.

The Court also reviewed the jurisprudence on the applicability of Sanderson and Bullock Orders noting that a Sanderson Order allows a successful Defendant to recover Costs directly from an unsuccessful co-Defendant and a Bullock Order allows a Plaintiff to add to the Costs recoverable from an unsuccessful Defendant, the amount of Costs which he is obliged to pay to a successful Defendant. Due to the Defendants' Conduct, the Court granted a Bullock Order in favour of the Plaintiffs against two of the Defendants, including CLIP, to allow for a right of recovery as against those two parties for the Costs payable by the Plaintiffs to Mr. Muller.

H2S SOLUTIONS LTD V TOURMALINE OIL CORP, 2020 ABCA 201 (SCHUTZ, HUGHES AND FEEHAN JJA)
Rules 4.29 (Consequences of Formal Offers to Settle) and 14.59 (Formal Offers to Settle)

Following the Court's Summary Dismissal of the Appellant's claim for interest on overdue accounts, the Respondents sought double Costs pursuant to Rules 4.29 and 14.59, as the Respondent had made a Formal Offer under Rule 14.59, offering to forego Costs of the Appeal in exchange for a discontinuance of the Action.

The Court declined to grant double Costs due in part to the chronology of events. The Court concluded that the Respondent did not sustain any Costs during the two-month period in which the Formal Offer remained open per Rule 14.59. Both the factum and response materials were filed months after the Formal Offer expired, and no interlocutory proceedings took place in the interim. As such, the Court ruled that the lack of Costs incurred during the time that the Formal Offer was open was fatal to the Application for double Costs, since Rule 4.29 (as incorporated into Rule 14.59) relates to Costs incurred after service and before expiry of the Formal Offer.

Additionally, the Court found that the Respondent's Formal Offer did not incorporate an identifiable and sufficient compromise, as the Respondent had not incurred any Costs to double in the time period when the Formal Offer was open for acceptance. To that end, the Formal Offer was devoid of any substantive meaning and therefore insufficient to trigger a double Costs Award.

FODE V PARAGON GAMING EC COMPANY, 2020 ABQB 266 (MASTER SCHLOSSER)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The sole remaining Defendant applied to strike the Action against her for delay pursuant to either Rule 4.33 or Rule 4.31. The Plaintiff's Statement of Claim was filed in 2009,

and liability for battery was admitted by the remaining Defendant in 2014; the only remaining issue was proof of damages.

Master Schlosser reviewed the steps taken in the Action, and determined that the answers to Undertakings provided in October 2017, as well as the settlement with a group of Defendants in 2018 (which resulted in them being removed from the lawsuit, removing parties and the number of issues) constituted a significant advance in the Action. As such, the Master held that the Action should not be struck pursuant to Rule 4.33, and the Application brought pursuant to Rule 4.33 was dismissed.

With respect to Rule 4.31, Master Schlosser noted that since liability was admitted in 2014, the real question was: "What would a reasonable time be for a [P]laintiff to quantify her damages and bring this lawsuit to a conclusion?" The Master then proceeded to review the progress of the Action as a whole and held that there had been inordinate delay. Master Schlosser next considered whether the delay was excusable, and noted that generally speaking, an acceptable excuse for delay is that it was caused by something outside of the Plaintiff's control. Here, the primary source of delay was the Plaintiff moving to New Zealand. The delay was compounded by positions taken by various Defendants. Overall, Master Schlosser held that the delay was inexcusable.

Finally, Master Schlosser considered whether the delay had resulted in significant prejudice. The Master noted that prejudice should be presumed where delay is found to be inordinate and inexcusable by operation of Rule 4.31(2). However, Master Schlosser held that the presumption had been rebutted. There was no actual proof of prejudice, and given that the remaining Defendant had admitted to the allegations, there were no unproven allegations hanging over her head. Further, the Master found no actual prejudice arising from the fact that the Plaintiff had settled with the other Defendants and may not be able to call their employees as witnesses given that liability was already established. As such, the Application brought pursuant to Rule 4.31 was dismissed. Master Schlosser further ordered that each party should bear its own Costs.

THORESON V ALBERTA (INFRASTRUCTURE), 2020 ABCA 146 (SLATTER, BIELBY AND ANTONIO JJA)
Rule 4.31 (Application to Deal with Delay)

In 2004 the Appellants' land was expropriated for construction of Calgary's Stoney Trail "ring road". The Appellants had been operating a custom sewing business on the expropriated land, and in 2005 the Appellants filed a Statement of Claim for business losses related to the expropriation. By the end of 2018, the Trial for the business losses had not occurred and Alberta applied to strike the Statement of Claim pursuant to Rule 4.31, and the Case Management Justice granted that Application.

On appeal, the Appellants argued that the Rules did not apply to proceedings under the *Expropriation Act*, RSA 2000, c E-13, namely due to the existence of the *Expropriation Act Rules of Procedure and Practice*, Alta Reg 187/2001. The Court of Appeal dismissed this argument as flawed and specifically noted how the Rules had been applied in other expropriation cases.

Finding that the Rules applied to the expropriation Action, the Court of Appeal then considered whether the Case Management Justice had erred in the consideration of Rule 4.31. The Court of Appeal advised that the test set out in *Humphreys v Trebilcock*, 2017 ABCA 116 is one of many potential approaches to determine the application of Rule 4.31, and specifically noted that the Case Management Justice was not obliged to determine a specific answer to the degree of advance expected by a reasonable litigant. Rather, the Case Management Justice simply had to first decide whether there had been delay. The Case Management Justice found there had been delay, that the Appellants could not rebut the presumption that the Defendants had suffered prejudice, and that there was no compelling reason to allow the Action to continue. The Court of Appeal found that the Case Management Justice had not erred in the application of Rule 4.31 and dismissed the Appeal.

4075447 CANADA INC V WM FARES & ASSOCIATES INC, 2020 ABCA 150 (BIELBY, ANTONIO AND FEEHAN JJA) Rule 4.31 (Application to Deal with Delay)

This was an Appeal of a Decision of a Chambers Justice to dismiss an Action for inordinate and inexcusable delay pursuant to Rule 4.31. The Chambers Justice had dismissed an Appeal from a Master's Order.

The Appellant argued that the Chambers Justice had erred in (1) not considering the Rules during the period that required alternative dispute resolution and during which the parties discussed and tried to schedule mediation, (2) dismissing the Action "when the [A]ppellant was ready, willing and able to proceed to trial", (3) failing to consider the delay by the Respondents, and, (4) failing to find that the Master erred in deciding that the presumption of prejudice was not rebutted and that there was prejudice.

The Court of Appeal determined that the use of the word "may" in Rule 4.31 meant that the there was a degree of judicial discretion in the Rule. The Appellant did not allege that the lower Court had made an error in law when applying the Rule but that the lower Court had erred by not comparing certain facts in the case to other precedents or that it did so erroneously. The Court of Appeal explained that there was no merit to this argument of the Appellant, as Rule 4.31 asks the Court to look at the Action as a whole, that delay cases are largely decided on their facts, and that it was rarely possible to compare the outcome of one delay case with another.

The Appellant relied on the mandatory alternative dispute resolution rule that was in effect during much of the litigation as an excuse for delay, however, the Court of Appeal explained that it was still open to the lower Courts to find that steps taken for litigation did not need to stop during the years in which the mediation process was discussed, and notably, none of the parties ever participated in mediation, they only discussed it.

The Appellant also argued that it had shown evidence that it was ready for Trial and that there was a ceiling of roughly 10 years for a matter to be Trial ready. The Court noted that there was evidence that undermined the Appellant's assertion that it was ready for Trial. Further, the Court explained that there is no "10 year ceiling" and that many cases are dismissed for delay that have been ongoing for less than 10 years.

The Appellants also argued that that the Respondents contributed to the delay by not conducting their Questioning and that the lower Courts failed to give that fact proper weight. There was, however, a litigation plan in which the Respondents' Questioning would follow the Appellant's Questioning, but that Appellants never completed their Questioning.

The Court of Appeal determined that the lower Court did not err in presuming and finding actual prejudice caused by the delay. A major factor was that the Appellants did not lead any evidence to rebut that presumption. The Court of Appeal determined that even if the Appellant's arguments were true, it would not result in a "palpable and overring error", and that absent such an error they could not upset findings of fact or factual inferences. The Appeal was dismissed.

ALDERSON V WAWANESA LIFE INSURANCE COMPANY, 2020 ABCA 243 (KHULLAR, HUGHES AND ANTONIO JJA) Rules 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay), 5.29 (Acknowledgement of Corporate Witness's Evidence) and 5.30 (Undertakings)

This was an Appeal of a Decision of a Chambers Judge which had declined to dismiss the Respondent's claim for delay pursuant to Rules 4.33 or 4.31. The Appellants argued that the Chambers Judge erred in her analysis of Rule 4.33(2) by failing to conduct a discrete analysis of each response to each Undertaking, and also by treating responses to Undertakings by the Defendant and the Plaintiff differently. The Appellants also argued that the Chambers Judge erred in her analysis of Rule 4.31 by finding that the presumption of prejudice had been rebutted, and also by finding a compelling reason not to strike the claim.

The Court began with an analysis of Rule 4.33. The Court surveyed case law to find that a response to an Undertaking

materially advances an Action, as Undertakings are an extension of the discovery process. Further, Rule 5.30 requires that a response to an Undertaking be provided in a reasonable time, thus making it clear that Undertakings are an extension of the discovery process. Moreover, Rule 5.29 permits the evidence of a corporate representative to be read in only if it is acknowledged as the evidence of the corporation. The Chambers Judge declined to conduct a review of all 61 Undertakings in issue, noting that the response to the first Undertaking was alone sufficient to significantly advance the Action. The Court agreed with the Chambers Judge's analysis and dismissed the first ground of Appeal.

The Court then turned to Rule 4.31, applying the six step analysis set out in *Humphreys v Trebilcock*, 2017 ABCA 116. In disputing that the presumption of prejudice caused by delay had been rebutted, the Appellants argued that the Chambers Judge placed undue weight on certain evidence. The Court found that this did not amount to a palpable or overriding error, and dismissed the second ground of Appeal.

CONDOMINIUM CORPORATION NO 022 5899 V 499430 ALBERTA LTD, 2020 ABQB 233 (LEMA J)
Rules 4.33 (Dismissal for Long Delay) and 10.33 (Court Considerations in Making Costs Award)

Justice Lema issued a Costs Award against the corporate developer of a commercial condominium and several related parties. While all parties agreed that awarding Costs pursuant to Schedule C was the appropriate starting point, the issue concerned what, if any, adjustments to Schedule C were suitable.

The condominium corporation arguing for enhanced Costs was originally controlled by the unsuccessful parties (including the corporate developer), and had sued the unit holders for various unpaid contributions. However, eventually the unit holders came to control the condominium corporation, which led to an agreement to end the Actions by consent Order. The corporate developer and related parties opposed the consent Application to end the Actions.

The condominium corporation claimed that the unsuccessful parties had, among other things, contested the consent Application to end the Actions without standing to do so, and after it was evident that the period of long delay had expired pursuant to Rule 4.33. However, the Court did not consider this argument as the parties had not addressed it in their Costs submissions.

The condominium corporation also argued that the unsuccessful parties offended Rule 10.33(b) which allows the Court to impose, deny or vary Costs Awards. Specifically, the condominium corporation argued that, among other things, the conduct of the unsuccessful parties was unnecessary, or unnecessarily lengthened and delayed the Action. Therefore, it argued that full indemnity Costs were appropriate.

The Court found that the unsuccessful parties had not, for the most part, acted in a way that caused "unnecessary litigation" and refused to order full indemnity Costs to the condominium corporation. It did, however, order an enhanced Costs adjustment.

CIBC MORTGAGES INC V TUBRETT, 2020 ABQB 232 (MASTER SCHLOSSER)
Rules 4.34 (Stay of Proceedings on Transfer or Transmission of Interest) and 9.33 (Sale to Plaintiff)

The Plaintiff in a foreclosure Action brought an Application for repossession of mortgaged property, and Judgment for the unsecured balance owing under the mortgage, pursuant to Rule 9.33. Noting that the Application was in the way of final relief, the Court applied the evidentiary standards of summary disposition.

Master Schlosser identified several factual uncertainties which could not be resolved summarily. Significantly, the lone appraisal report was unreliable on its face and the calculation of arrears was the subject of conflicting evidence, so the Court could not ascertain the shortfall in fair value relative to the amount outstanding on the mortgage. Moreover, an ambiguous reference to bankruptcy proceeds left the Court with doubt as to the potential operation of a stay, pursuant to Rule 4.34, barring the

unsecured claim for a deficiency Judgment. The Application was dismissed, with a direction that the matter be resolved either through further evidence, or Trial.

SALMON V MAMA PANDA LTD, 2020 ABQB 323 (NATION J)
Rule 5.2 (When Something is Relevant and Material)

This was an Application by a Defendant, Mama Panda Ltd. ("Mama Panda") to compel a Third Party Defendant, Dr. Page ("Dr. Page") to answer questions and Undertakings that were refused or objected to at a cross-examination on an Affidavit.

The Plaintiff had suffered injuries in a premise that was occupied by Mama Panda. Dr. Page had changed the original cast placed on the Plaintiff by another one of the Defendants, who was a different doctor. Mama Panda filed a Statement of Defence and a Third Party Notice against Dr. Page, who brought an Application to have the Third Party Notice dismissed. Dr. Page argued that the Third Party Notice was outside of the limitations period. In bringing the Application to compel answers to questions and Undertakings, Mama Panda argued that it was important to establish what Dr. Page knew and when he knew it. Dr. Page argued that the questions and Undertakings objected to were not relevant and material to the Application to dismiss the Third Party Notice.

Justice Nation noted that pursuant to Rule 5.2 a question is relevant and material only if the answer could reasonably be expected to "significantly help determine one or more of the issues raised in the pleadings" or "ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings". Justice Nation found that Mama Panda was entitled to explore the issues on which it had questioned or requested Undertakings from Dr. Page. Accordingly, Her Ladyship allowed Mama Panda's Application to compel Dr. Page to answer the questions and Undertakings that were objected to.

SER V JS, 2020 ABQB 267 (JONES J)
Rule 5.13 (Obtaining Records from Others)

In an Application to recover child support arrears, the Applicant alleged that the Respondent had concealed income earned through corporate entities. In raising concern for the true scope of the Respondent's shareholdings, the Applicant argued that the Respondent had failed to provide sufficient financial disclosure which would permit verification of the extent of the Respondent's corporate interests. The Court found that the Respondent had satisfied the disclosure obligations set out in the Alberta Child Support Guidelines, and that further disclosure from third party corporate entities would have to be pursued through an Application on notice to those parties, pursuant to Rule 5.13.

ANOKHINA V BANOVIC, 2020 ABQB 270 (LEMA J)
Rule 6.3 (Applications Generally)

The Defendant sought a determination regarding Costs following his success in defeating the Plaintiff's Application to consolidate two Actions: an unjust enrichment Action between the Plaintiff and the Defendant's son, and the Plaintiff's divorce proceedings with the Defendant. The Plaintiff had served notice of the Application to consolidate the Actions on only the son, and not on the Defendant. The Plaintiff opposed any Costs Award sought by the Defendant on the grounds that she had never served the Defendant with the Application to consolidate. Justice Lema rejected that argument, as the Defendant should have received notice of the Application to consolidate pursuant to Rule 6.3, which instructs that notice shall be given to all parties affected. As a result, Costs were awarded to the Defendant.

HOOPP REALTY INC V EMERY JAMIESON LLP, 2020 ABCA 159 (VELDHUIS, HUGHES AND ANTONIO JJA)
Rule 6.14 (Appeal from Master's Judgment or Order)

Two Appeals in related Actions were brought pertaining to HOOPP Realty Inc. ("HOOPP") and concerning two Summary Dismissal Applications (the "Applications") in lawyers' negligence claims (the "Actions"). Hoopp had commenced the Actions against two of its former counsel

("Dentons" and "Emery Jamieson") for their respective handling of a lawsuit against a contractor and a failure to recognize a mandatory arbitration provision.

The Master, at first instance, had granted Emery Jamieson's Application, dismissing the Action as against Emery Jamieson as having been statute barred. The Master had dismissed Dentons' Application, finding that the claim against Dentons was multi-faceted and expert evidence would be required. HOOPP appealed the Master's Decision on the limitation period (the "HOOPP Appeal") and Dentons appealed the Master's Decision on the merits (the "Dentons Appeal"). The Chambers Judge upheld the Master's Decision, finding that both Decisions were correct in both fact and law.

At the Court of Appeal (the "Second Appeal"), the Court reviewed the complex factual history between the parties. HOOPP argued, on the Second Appeal, that the Chambers Judge had failed to treat the Appeal before him as a *de novo* hearing and that it was an error for the Chambers Judge to adopt portions of the Master's reasons. The Court reviewed Rule 6.14 pertaining to the record before a Chambers Judge on an Appeal of a Master's Decision and noted it is not an error for a Chambers Judge to summarily describe their analysis and conclusions with reference to the Master's Decision if the Chambers Judge finds that it was correct in fact and law.

Having failed to identify any error in the Chambers Judge's reasons or conclusions that warranted appellate intervention, the Court dismissed the HOOPP Appeal.

Turning to Dentons Appeal, the Court found that the Master was alive to the multi-faceted nature of the claim against Dentons and the interrelationship between the claims against both law firm parties. With all the unknowns and possibilities, the Court found that the Master could not fairly resolve the dispute on a summary basis. The Court noted that the Chambers Judge was also similarly satisfied that the record raised triable issues and prevented Summary Dismissal. The Court concluded that Dentons failed to identify any reviewable error and accordingly, the Court dismissed the Dentons Appeal.

GILL V 1176520 ALBERTA LTD, 2020 ABQB 274 (FETH J)
Rules 6.45 (Reference to a Referee) and 13.6 (Pleadings: General Requirements)

While presiding over the Plaintiffs' Action to enforce an agreement for the sale of shares in a small business, Justice Feth upheld the impugned sale and granted punitive damages against the Defendant at an elevated quantum.

After assessing the parties' respective narratives, His Lordship concluded that despite the alleged language barrier issues at play during the formation of the contract, the parties had executed a valid agreement for the sale of shares in exchange for funding, which the Defendant deliberately breached. As such, the Court concluded that the Plaintiffs were entitled to 25% of the shares in the corporation in question, as required by the contract. Justice Feth granted the Plaintiffs punitive damages in a greater amount than was sought in their Amended Statement of Claim. In justifying this award, His Lordship reasoned that while Rule 13.6(2)(c) requires a claimant to explicitly set out the types of damages pursued, when a specific sum of punitive damages is stipulated in the pleadings, a Trial Judge has discretion to expressly or implicitly amend the pleadings to fix the appropriate quantum.

Additionally, Justice Feth ruled that the Plaintiffs were entitled to their share of the profits which they would have received during the timeframe in which they were wrongfully deprived of their stake in the business. To implement this measure, the Court ordered an accounting of the business to determine the appropriate award. Justice Feth also noted that should the parties encounter any disputes in appointing an evaluator, or determining the correct quantum of profits to be distributed, the Court would retain jurisdiction to assign a referee to resolve such issues pursuant to Rule 6.45.

GOUTHRO V KUBICKI, 2020 ABQB 205 (MASTER SUMMERS)
Rule 7.3 (Summary Judgment)

Two Defendants applied for Summary Dismissal of the Plaintiff's claim against them, and Summary Dismissal of another Defendant's Third Party Claim against them, pursuant to Rule 7.3. The claims against the two Defendants alleged that they had negligently carried out construction work at a residential property.

Master Summers reviewed the test for Summary Dismissal described by the Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 and noted that Summary Dismissal is appropriate where the Court is able to make necessary findings of fact on the record before it. The Master then considered the claims against the two Defendants and the evidence filed by the parties. Master Summers held that it was possible that the two Defendants owed a duty of care to the Plaintiff, and found that the Plaintiff's expert evidence demonstrated that the two Defendants' work contributed to problems at the residence. As such, there were genuine issues as to whether the two Defendants had been negligent which could not be determined on a summary basis, and Master Summers dismissed the Defendants' Application for Summary Dismissal.

KOSTIC V THOM, 2020 ABQB 324 (ROOKE ACJ)
Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of the Plaintiff's claim pursuant to Rule 7.3(1). In citing *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.*, 2019 ABCA 49, the Court confirmed the key factors that should be considered in determining summary dispositions. Rooke A.C.J. noted that first, the Court must consider whether it is possible to fairly resolve the dispute on a summary basis, or whether uncertainties in the facts, record or law reveal a genuine issue requiring a Trial. Second, the Court must assess whether the moving party has met its burden to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a Trial. Third, the Court must consider whether the resisting party put its best foot forward and demonstrated that there is a genuine issue requiring a Trial. Lastly, the presiding Judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

Rooke A.C.J. first noted that there were no material facts in dispute. There was also no dispute between the parties about the validity or accuracy of the documents in evidence, nor were there any substantial issues of credibility to be resolved. Further, the Court was satisfied that the Defendants had met their burden to show that there was no merit to the claim against them. Rooke A.C.J. found that none of the evidence put forward by the Plaintiff demonstrated that there was a genuine issue requiring Trial. Finally, Rooke A.C.J. determined that he had "sufficient confidence in the state of the record," and exercised the Court's judicial discretion to summarily resolve the dispute. The Defendants' Application for Summary Dismissal was granted.

FITZPATRICK V THE COLLEGE OF PHYSICAL THERAPISTS OF ALBERTA, 2020 ABCA 164 (PENTELECHUK, ANTONIO AND FEEHAN JJA)
Rule 7.3 (Summary Judgment)

The Court of Appeal dismissed an Appeal of a Chambers Judge's Decision granting the Defendant Summary Dismissal of the Action.

The Court considered Rule 7.3(1) which allows for Summary Dismissal where there is no merit to a claim or part of it, or the real issue in dispute is the amount to be awarded.

The Court confirmed that the Respondent had statutory immunity that was not displaced by evidence of bad faith, and upheld the Chambers Judge's finding that the limitation period under the Limitations Act, RSA 2000, c L-12 had expired by the time the Appellant had brought his claim. Given these findings, the Court found there was no merit to the claim and no genuine issue requiring a Trial. The Court upheld the Decision of the Chambers Judge and dismissed the Appeal.

LI V MORGAN, 2020 ABCA 186 (SLATTER JA)
Rules 9.4 (Signing Judgments and Orders), 13.5 (Variation of Time Periods), 14.16 (Filing the Appeal Record - Standard Appeals), 14.23 (Filing Factums - Standard Appeals), 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

Heng Li (the "Appellant") applied to restore an Appeal that was struck (the "Underlying Appeal") when the Appellant failed to file his Appeal Factum before the deadline pursuant to Rule 14.23(1) (the "Application"). Slatter J.A. noted that the Underlying Appeal would also have been deemed abandoned in the ordinary course on April 16, 2020, when the Appellant had also failed to have the Underling Appeal restored within six months of it being struck pursuant to Rules 14.47 and 14.65(3)).

Justice Slatter reviewed these Rules and the applicable jurisprudence and noted the following considerations to restore an Appeal after the six-month deemed abandonment: (a) the explanation for the delay; (b) the explanation for the delay in applying to restore the Appeal; (c) a continuing intention to proceed with the Appeal; (d) a lack of prejudice to the Respondent; and (e) the arguable merit of the Appeal.

His Lordship found that the Appellant had no explanation for the delay in moving to restore the Underlying Appeal, other than the Appellant's erroneous view that he could wait until the eve of the six-month deadline. Justice Slatter emphasized, among other things, that the Rules also have an administrative component, because after the six months has passed, the Registry can regard an Appeal as "finished", and the file can be closed and archived.

In weighing these considerations, Slatter J.A. found that while the Court has the discretion under Rules 13.5(2) and 14.2(3) to extend most deadlines, including the six-month deadline in Rules 14.47 and 14.65(3), the Appellant had not established that the Underlying Appeal should be restored. Accordingly, Slatter J.A. concluded by dismissing the Application and awarding the Respondent Costs fixed at $1,250 plus GST. His Lordship added that approval of the Appellant as to the form of Order was not required under Rule 9.4(2)(c) and (d).

Justice Slatter also noted that the Appellant had applied in the Underlying Appeal to add the Respondent's counsel, an insurance adjuster, and the Respondent's insurance company as parties to the Underlying Appeal (the "Additional Parties"). His Lordship found that the Additional Parties would not have been proper parties at Trial and would therefore not be proper parties on Appeal. His Lordship found that had it been necessary to deal with this portion of the Underlying Appeal, it too would have been dismissed.

LOGAN ESTATE (RE), 2020 ABQB 308 (MAH J)
Rules 9.5 (Entry of Judgments and Orders) and 9.6 (Effective Date of Judgments and Orders)

This was an Endorsement by Justice Mah in an estate matter that dealt with whether he should issue a fiat under Rule 9.5(2) to permit the formal entry of an Order even though more than three months had passed since it was pronounced. The Decision had been made on November 12, 2019.

In a previous Endorsement, Justice Mah had dispensed with the requirement to file an Order in relation to a Costs Decision so that a Bill of Costs could be filed immediately. Counsel for the personal representative sought a fiat for late entry and sought to settle the Order. The Applicant argued that the Order should not be entered and disagreed with the November 12, 2019 Decision but did not provide any other reason for opposing the fiat and did not contest the contents of the Order.

Justice Mah noted that pursuant to Rule 9.6 an Order takes effect from the day it is pronounced whether or not it has been entered. The proper remedy for a party who disagrees with the Court is to Appeal the Decision instead of resisting the entry of an Order. Accordingly, Justice Mah endorsed the Order and granted the fiat necessary to allow the late filing of the Order.

BISSKY V MACDONALD, 2020 ABCA 242 (ROWBOTHAM JA)
Rule 9.12 (Correcting Mistakes or Errors)

The Plaintiff had previously been declared a vexatious litigant and was subject to an Order requiring her to obtain permission of a single Justice of the Court of Appeal in order to bring an Application.

The Plaintiff requested permission to apply, pursuant to Rule 9.12, to correct a mistake in one of Justice Rowbotham's earlier Decisions in which Her Ladyship had denied the Plaintiff's request for permission to apply to restore her Appeal. Her Ladyship had previously ordered the Plaintiff to post Security for Costs within a certain period and she had not done so. This, in addition to the fact that the Application to restore the Appeal did not meet the test for restoration of an Appeal, was the foundation for Justice Rowbotham's Decision.

Eventually, the Plaintiff paid her Security for Costs and then initiated this Application. The Court denied the Application. Justice Rowbotham confirmed that the mistake or error contemplated by Rule 9.12 must be based upon facts as they existed at the time of the Decision, and not on circumstances which have changed since that time. It followed that the Plaintiff attempting to post or posting Security for Costs two months after Her Ladyship rendered the Decision not to restore the Plaintiff's Appeal was not a mistake or error contemplated by Rule 9.12.

FRIESEN V FRIESEN, 2020 ABQB 305 (LOPARCO J)
Rules 9.14 (Further or Other Order after Judgment or Order Entered), 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 Decision regarding Costs relating to a previous Judgment that was issued following a Trial regarding divorce, support and matrimonial property issues. The Plaintiff claimed substantial success and sough Costs based on Column 1 or Column 4 of Schedule C depending on how the Court calculated success. The Plaintiff also submitted that the Defendant was only entitled to pre-Judgment interest on the Defendant's portion of the value of the home as of the separation date. The Defendant claimed that she was more successful than the Plaintiff and sought Costs based on Column 4 of Schedule C. She also submitted that she was entitled to pre-Judgment interest on the value of her share of the home from the date of Action to the date of the Judgment. The Defendant also sought post-Judgment interest as the Plaintiff had not paid the amounts he was ordered to pay within the 60 day requirement.

Justice Loparco explained that Rule 10.29 provides that a successful party is entitled to a Costs Award and that Rule 10.33 provides a list of factors that the Court may consider when making such an Award. Justice Loparco noted that the relevant case law also provides that success in family law matters does not mean total success; rather, it generally means substantial success. Her Ladyship found that the Defendant, although not successful only every issue, was substantially successful at Trial. Justice Loparco awarded the Defendant Costs according to Column 4 of Schedule C subject to deductions for the hiring of experts.

Her Ladyship noted that the issue of pre-Judgment interest was a live issue at Trial, and that though she awarded the Defendant interest, she left it up to the parties to decide how to calculate the interest. The issue was referred back to Justice Loparco who explained that pursuant to Rule 9.14 the Court may, on Application after a Judgment or Order has been made, make a further Order if it is needed so as to provide a remedy to a party who is entitled to such a remedy from the original Order, and doing so does not require that the original Judgment or Order be varied. Her Ladyship then calculated the amount of interest that the Defendant was due for her share of the value of the home. Additionally, Justice Loparco ordered that the Plaintiff pay post-Judgment interest to the Defendant based on the amounts that remained outstanding.

PLC V CG, 2020 ABQB 211 (LEMA J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations for Making Costs Award)

Having heard six Applications between the parties related to spousal support and parenting arrangements, the Court was then asked to settle Costs to be apportioned between

the parties. The father was clearly the successful party in five of the six Applications, and therefore was presumptively entitled to Costs pursuant to Rules 10.29(1) and 10.33(1)(a). Three of these Applications had been complicated by the mother's falsification of drug tests, and as a consequence, the Court ordered the father's Costs enhanced 1.5 times pursuant to Rule 10.33(2)(g).

In the course of rendering its Decision, the Court learned that the father had neglected to make Court-ordered spousal support payments to the mother, intending to offset that amount against an award of Costs. Based on the father's unilateral decision to withhold payment in contravention of Court Order, the father's Costs award was reduced by $2,000.00.

HEMRAJ V CARON & PARTNERS LLP, 2020 ABQB 246 (ACKERL 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)

In 2001, Zulfikar Hemraj (the "Plaintiff"), was involved in a three-vehicle motor vehicle accident. The Plaintiff brought a claim against the drivers of the other two vehicles (the "MVA Action"). The Plaintiff was unsuccessful at Trial and commenced a negligence suit against his two former counsel and their respective law firms (the "Defendant Lawyers"), claiming that their negligence had caused his loss at Trial (the "Negligence Action").

At the Trial of the Negligence Action, Ackerl J. found that the Defendant Lawyers had breached their duty of care to the Plaintiff by failing to draft the Statement of Claim in the MVA Action to properly reflect the ordering in which the vehicles had struck the Plaintiff. Notwithstanding this breach, Justice Ackerl found that the Plaintiff had not established causation between the Defendant Lawyers' breach of the duty of care and the Plaintiff's loss at Trial. Accordingly, His Lordship concluded that the Plaintiff was entitled to nominal damages for the breach of the duty of care in the amount of $1,000.

Justice Ackerl reviewed the presumption that a successful party will be entitled to a Costs Award against an unsuccessful party pursuant to Rule 10.29. His Lordship referenced the discretion of the Court to award Costs under Rule 10.30 and the factors to consider under Rule 10.33.

Weighing these factors, Justice Ackerl considered the degree of success and the loss of both the Plaintiff and the Defendants, finding that the Plaintiff had been almost wholly unsuccessful while the Defendants were found to have breached their professional duties. In balancing these factors, His Lordship ordered that the Plaintiff pay 25% of the Defendants' Costs.

SR V TR, 2020 ABQB 251 (JONES J)
Rules 10.29 (General Rules for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In a family law dispute that began in 2007, the mother sought retroactive child support and solicitor-client Costs (including Costs arising from over 25 Court appearances and multiple Actions in both the Court of Queen's Bench and Provincial Court). Jones J. granted the mother's Application for retroactive child support, and then turned to the issue of Costs.

Jones J. explained that the general rule governing Costs Awards, described in Rule 10.29(1), is that the successful party is generally entitled to Costs payable forthwith, and that the Rule applies equally in family law proceedings. However, His Lordship noted that Courts exercise substantial discretion in assessing Costs. Pursuant to Rule 10.31, the Court may consider any matter "related to the question of reasonable and proper costs that the Court considers appropriate". Further, Rule 10.33(2) lists a number of factors that the Court may consider "in deciding whether to impose, deny or vary an amount in a costs award".

The majority of the Costs sought by the mother related to interlocutory custody and access Applications that were heard by other Judges and had never been finally determined at Trial. His Lordship found that it was not possible to "engage in a re-trial in order to determine what

the outcome might have been and to what extent she would have been successful", and commented that the mother should not have waited until custody was no longer an issue to advance a claim for Costs in respect of all of the Actions. Further, while the mother argued that the father had engaged in misconduct "throughout all of the proceedings", Jones J. found that neither party's conduct supported an award for Costs in the circumstances. As such, Jones J. declined to award Costs and disbursements respecting the earlier interlocutory Applications. His Lordship also declined to award Costs for the proceedings in Provincial Court, and noted that there appeared to be no authority for the premise that the Court of Queen's Bench had jurisdiction to award Costs in respect of Provincial Court proceedings.

Finally, Jones J. considered whether solicitor-client Costs should be awarded in respect of the mother's successful Application for retroactive child support or any previous Applications involving the parties. His Lordship explained that solicitor-client Costs may be appropriate where a party has engaged in "reprehensible, scandalous or outrageous conduct". Here, while the matter was fiercely contested, Jones J. found that the father had not engaged in litigation misconduct and as such there was no reason to depart from the general rule for Costs under Rule 10.29(1). However, His Lordship directed the parties to provide written submissions regarding Costs of bringing the matter of retroactive child support and Costs to Trial.

LLOYD GARDENS INC V CHOHAN, 2020 ABQB 343 (HUGHES J)
Rules 10.29 (General Rule for Litigation Costs), 10.31 (Court Ordered Costs Award) and 10.33 (Considerations in Cost Awards)

Following a Trial scrutinizing a verbal agreement for the purchase of property, Madam Justice Hughes heard the parties' submissions on Costs. The Plaintiffs argued that because they were successful at Trial, they were entitled to full indemnity Costs, or alternatively, either a multiple of Schedule C Costs, or Schedule C Costs enhanced by 35% inflation.

The Defendants posited that the parties should bear their own Costs, since both experienced similar levels of success on their Statements of Claim and Counterclaims. On this line of argument, the Defendants submitted that the Plaintiffs' $2 million-dollar damages claim was dismissed, although their underlying request to dismiss a wrongfully filed caveat was allowed, while the Defendants' $1.7 million-dollar Counterclaim was dismissed, yet their claim for unjust enrichment was allowed. Alternatively, the Defendants argued that enhanced Costs were inappropriate, as the Plaintiffs' misconduct in directing a witness to lie under oath during Trial should preclude any Costs Award.

Madam Justice Hughes ultimately held that the Plaintiffs were entitled to Costs, as they were the successful party pursuant to Rule 10.29. This conclusion was justified in that the most germane issue at Trial was whether the impugned verbal agreement was properly characterized as a partnership, as the Defendants argued, or whether it was a mere verbal agreement, which the Defendants had breached by failing to make their share of financial contribution. Having ruled against the Defendants on this issue, Her Ladyship attributed success to the Plaintiffs.

Madam Justice Hughes then assessed various factors found in Rule 10.33 including the complexity of the case, efforts made by both parties at streamlining the litigation, settlement offers made by the Plaintiffs, and the fact that the Defendants did not plead fraud or conspiracy in their Statement of Claim, and found these factors to militate in favour of enhanced Costs.

However, Her Ladyship then considered the Plaintiffs' misconduct in attempting to deceive the Court at Trial, and found that pursuant to Rule 10.33(2)(g), such behaviour did warrant a varying of the Costs Award. Based on the discretion conferred by Rule 10.31(1)(b) to vary any Costs Award, the Court found that a lump sum Costs Award was suitable in light of the aforementioned deceit.

BOWNESS REAL ESTATE CORP V AXA INSURANCE COMPANY, 2020 ABQB 379 (HO J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Awarded) and 10.33 (Court Considerations in Making Costs Award)

Previously, Madam Justice Ho had issued a Decision in favour of the Plaintiff, namely that the Plaintiff was entitled to insurance coverage which had previously been denied. The award in the Decision was a small fraction of the entire amount claimed by the Plaintiff. Subsequently, the parties could not come to an agreement on Costs, and came back before Justice Ho.

Madam Justice Ho reviewed the relevant Rules prior to making her Decision on Costs. Rule 10.29 states that the successful party is entitled to a Costs Award against the unsuccessful party. Rule 10.31 states that the Court may order one party to pay the reasonable and proper Costs incurred or an amount that the Court considers appropriate, including full indemnity Costs or lump sum Costs. Rule 10.33 sets out the factors which the Court should consider when making a Costs Award.

Both the Plaintiff and the Defendant argued that they were entitled to Costs. Madame Justice Ho rejected the Defendant's argument that it was entitled to solicitor-client Costs based on allegations of bad faith made against it by the Plaintiff.

Justice Ho noted that Rule 10.33 allows the Court to consider unnecessary conduct which lengthens or delays proceedings, and Justice Ho made a downwards adjustment against the Plaintiff's assessed Costs. The Plaintiff's bad faith allegations against the Defendant made the Trial more complicated and longer than necessary. Ultimately, Madame Justice Ho awarded the Plaintiff $100,000 in Costs, which was less than what the Plaintiff sought in its Bill of Costs.

AURORA HOLDINGS INC V WINNERS CHAPEL INTERNATIONAL CALGARY FELLOWSHIP, 2020 ABQB 339 (HO J)
Rule 10.33 (Considerations in Costs Awards)

Following a Judgment in the Plaintiff's favour, Madam Justice Ho heard submissions from the Defendant and Third Party with respect to Costs and interest. While the Defendant sought 50% of its fees and disbursements from the Third Party for the entire lawsuit, the Third Party argued that it should pay taxable Costs pursuant to Schedule C, plus reasonable disbursements for steps taken by the Defendant in relation to the Third Party Claim.

Madam Justice Ho reasoned that granting 50% of fees and disbursements would be tantamount to enhanced Costs on a partial indemnity basis. However, such Costs are only available where a party's conduct is "reprehensible, scandalous or outrageous conduct", which was not true for the case at bar, and thus the Defendant's position was rejected.

Lastly, Her Ladyship considered the factors in Rule 10.33 including the low complexity of the matter, the conduct of the Third Party which did not impede progress of the proceedings, and the equal apportionment of liability between the Defendant and Third Party, ultimately concluding that Costs pursuant to Schedule C were appropriate.

CNR INVESTMENTS INC V WALLS, 2020 ABQB 291 (EAMON J)
Rules 10.36 (Assessment of Bill of Costs), 10.38 (Assessment Officer's Authority) and 10.41 (Assessment Officer's Decision)

This was an Appeal by the Plaintiff from a Decision of an Assessment Officer to disallow certain Cost claims in a foreclosure Action.

The Court found that pursuant to Rules 10.36 and 10.41(3), the Assessment Officer could exercise discretion in the matter and could decide whether an item in a Bill of Costs was reasonably and properly incurred, and could

disallow an item that was improper, unnecessary, excessive or a mistake. Furthermore, pursuant to Rule 10.38, the Assessment Officer's authority extended to the manner in which he or she conducted the proceedings including requiring further information from the parties.

Ultimately, the Court ordered the Assessment Officer to reassess the claim for the service Costs of the two Applications as the Court found that the Assessment Officer had failed to discuss postage Costs or allow any amount for them.

FLY R + F CONSULTING LTD V 1824455 ALBERTA LTD, 2020 ABCA 204 (MCDONALD, VELDHUIS AND ANTONIO JJA)
Rule 10.50 (Costs Imposed on Lawyer)

The Appellants appealed a Chambers Judge's Decision which had found a conflict of interest arising from the representation of three shareholders and their company by one law firm, directed that the law firm cease representing the company, and awarded solicitor-client Costs against the Appellants. The Respondents cross-appealed on the basis that the Chambers Judge erred in not ordering the Appellant's counsel to cease acting for the individual shareholders, in addition to the company.

The Court of Appeal noted that the question of whether there is a conflict of law involves findings of mixed fact and law, and therefore the standard of review is palpable and overriding error. After reviewing the facts and Decision below, the Court held that the Chambers Judge did not err in finding a conflict.

With respect to solicitor-client Costs, the Court noted that Appellate Courts should only intervene respecting Costs where the Chambers Judge "misdirected himself or herself on the applicable law or made a palpable error in his or her assessment of the facts", or exercised discretion "in an abusive, unreasonable or non-judicial manner". In this case, the Respondents' counsel had initially raised the issue of conflicts in a letter to the Appellants' counsel, but received no substantive response, requiring the Application now under Appeal. The Appellant had then responded by letter, characterizing the Application respecting the conflict as frivolous, vexatious, and abusive, and stating that he would seek solicitor-client Costs against the Respondents and their counsel pursuant to Rule 10.50, which permits Costs to be awarded against counsel where there has been serious misconduct. The Appellants' counsel later "sent more personal threats" alleging serious misconduct after receipt of the Respondents' brief. The Court of Appeal held that based on these actions, there was no basis to interfere with the Chambers Judge's Costs award.

The Court of Appeal allowed the cross-Appeal and ordered that the Appellants' counsel be removed as solicitor for both the company and the individual shareholders.

LAW SOCIETY OF ALBERTA V BEAVER, 2020 ABQB 321 (ROOKE ACJ)
Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Law Society of Alberta ("LSA") applied for an Order declaring the Respondent in contempt of Court for breaching a permanent Injunction that was previously granted which, among other things, prohibited the Respondent from being involved in any manner or capacity with the provision of legal services. The Court found that the LSA had proved beyond a reasonable doubt that the Respondent had breached the permanent injunction Order without excuse, and was therefore in contempt of Court pursuant to Rule 10.52(3). The Court gave the LSA 20 days to provide a supplementary brief regarding punishment for contempt of Court pursuant to Rule 10.53, and gave the Respondent 20 days to respond to the LSA's brief.

RMK V NK, 2020 ABQB 328 (GOSS J)
Rule 10.54 (Mental Disorder)

This was an Action by the Plaintiff, RMK, for specific performance of a divorce settlement agreement that had been executed on March 30, 2017 (the "Agreement") which had been repudiated by the Defendant, NK. At issue was whether the Agreement was unenforceable due to the Defendant's lack of mental capacity during the Agreement's

formation/ The Defendant alleged that the Plaintiff and her counsel were aware of the Defendant's lack of mental capacity, and seized upon in crafting an unfair agreement.

In January 17, 2017, prior to the Application at issue, the Plaintiff applied for an Order requiring the Defendant to deposit money into the Plaintiff's account on a weekly basis until such time as the Defendant complied with a previous Order to provide an accounting of matrimonial assets that the Defendant had hidden. In the alternative, the Plaintiff sought an Order pursuant to Rule 10.54 to have the Defendant taken into custody and assessed for mental incapacity. The Plaintiff later testified that she had made the Rule 10.54 Application, not out of concern for the Defendant's mental health, but in an attempt to have a guardian appointed to assist with his inability to follow Court Orders, and to manage his financial affairs.

Justice Goss was therefore required to assess whether the Plaintiff's Rule 10.54 Application could be taken as evidence of the Plaintiff's knowledge that the Defendant did not have capacity at the time the Agreement was formed. In finding that the Agreement was enforceable, Madam Justice Goss ruled that the evidence did not support a finding that the Plaintiff and her counsel knew that the Defendant did not possess capacity to contract. Evidence of the Defendant's financial recklessness, deceitful diversion of funds, and refusal to comply with Court Orders was insufficient to overcome the presumption of capacity to contract.

CNOOC PETROLEUM NORTH AMERICA ULC V 801 SEVENTH INC, 2020 ABCA 212 (O'FERRALL JA)
Rules 11.25 (Real and Substantial Connection), 11.27 (Validating Service) and 11.31 (Setting Aside Service)

The Applicant, China National Overseas Oil Company Limited (the "Applicant"), a state-owned corporation whose registered office is in Hong Kong, applied for a stay pending Appeal (the "Stay Application") of an Order validating service of a Counterclaim (the "Appeal") which purported to be served pursuant to an Order for service *ex juris* (the "Service Order").

The Respondent, 801 Seventh Inc., as landlord (the "Respondent"), and a wholly-owned subsidiary of the Applicant, as tenant (the "Tenant"), had entered into a lease in December of 2013 (the "Lease"). Contiguously, the Applicant and the Respondent had entered into a separate indemnity agreement whereby the Applicant would indemnify the Respondent from any losses arising out of a failure by the Tenant to pay rent. In 2018-2019, the Tenant vacated the leased premises and quit paying rent. The Respondent's Counterclaim, which was served on the Applicant in accordance with the Service Order, sought damages from both the Applicant and Tenant for the Tenant's failure to pay rent (the "Underlying Action").

The Chambers Justice, having considered the Respondent's *ex parte* Application to validate service brought pursuant to Rule 11.27, and the various Affidavits filed demonstrating the efforts to serve the Applicant, had granted the Service Order. The Chambers Justice had also granted the Respondent permission to serve further litigation documents in the Underlying Action on the Applicant by faxing them or by serving the Tenant.

In addressing the Stay Application of the Service Order, O'Ferrall J.A. noted that the Applicant must satisfy the Court that: (1) there is a serious issue to be determined on Appeal; (2) the Applicant will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting the stay. Justice O'Ferrall found that Rule 11.25 provides that a claim may be served outside Canada if a real and substantial connection exists between Alberta and the facts. His Lordship emphasized that a real and substantial connection is presumed to exist when, *inter alia*, the claim relates to land in Alberta or the claim relates to a contract made, performed, or breached in Alberta. O'Ferrall J.A. also reviewed Rule 11.31(1) which provides that a Defendant may apply to the Court to set aside service of a commencement document and that an Application under this Rule is not an acknowledgment by the Defendant that the Court has jurisdiction.

In balancing these considerations, Justice O'Ferrall determined that: (1) His Lordship was not persuaded

that there was a serious issue to be determined; (2) an appropriately worded Undertaking or Court-ordered protection could prevent any irreparable harm befalling the Applicant; and (3) the balance of convenience did not favour any Order which would discourage the taking of steps pending the determination of the Appeal. Accordingly, O'Ferrall J.A. dismissed the Stay Application but ordered that the Respondent was not permitted to prejudice the Applicant for any of its participation in the Underlying Action pending the hearing of the Appeal.

WASS V WASS, 2020 ABCA 180 (WAKELING JA)
Rules 13.4 (Counting Months and Years), 14.17 (Filing the Appeal Record – Fast Track Appeals), 14.47 (Application to Restore Appeal) and 14.65 (Restoring Appeals)

The Applicant sought an Order restoring her Appeal under Rule 14.65(1). On January 3, 2020 the Registrar struck the Applicant's Appeal because she had failed to file the Appeal Record within one month of filing her Notice of Appeal as required for fast-track Appeals under Rule 14.17(b).

Rule 13.4(1) sets out the process for calculating time. The Court clarified that, when counting from a date in months, the time is calculated from the date on which the activity occurs in the month to the same-numbered date in a subsequent month.

Rule 14.47 requires that an Application to restore a struck fast-track Appeal must be filed, served, and made returnable within three months after having been struck. Here, the day required by Rule 14.47 was April 3, 2020. The Applicant filed her Application on April 6, 2020, with a return date of April 23, 2020. The Court determined that the Applicant had failed to meet the required timeline and deemed the Appeal abandoned, pursuant to Rule 14.65(3).

The factors governing the restoration of an Appeal that has been deemed abandoned pursuant to Rule 14.65(3) are whether: (1) the Applicant demonstrated an unwavering intention to prosecute her Appeal; (2) the Applicant provided a sufficient explanation for the defect or delay; (3) the Applicant moved with reasonable promptness to cure the defect; (4) the Appeal has arguable merit; and (5) the restoration of the Appeal will prejudice the Respondent to an unacceptable degree. The Court found that the Applicant had failed to meet any of the five criteria and that it was not in the interests of justice to restore the Appeal.

VESTBY V GALLOWAY, 2020 ABQB 361 (FETH J)
Rule 13.6 (Pleadings: General Requirements)

The Trial of the Plaintiff's Action for divorce and the division of matrimonial property was heard alongside the Trial of the Plaintiff's Action against his in-laws to enforce, through the doctrine of proprietary estoppel, a promise to transfer property. The Plaintiff's in-laws argued that proprietary estoppel was not adequately pleaded, in reference to the requirement of Rule 13.6 that a pleading state the "facts on which a party relies, but not the evidence by which the facts are to be proved". Justice Feth determined that the material facts supporting each element of proprietary estoppel were identified in the Statement of Claim, and accordingly held that proprietary estoppel was sufficiently pleaded.

RD V LT, 2020 ABCA 179 (SCHUTZ JA)
Rules 14.5 (Appeals Only with Permission) and 14.8 (Filing a Notice of Appeal)

The Applicants sought various relief including an extension of time to Appeal a scheduling Order. Schutz J.A. noted that pursuant to Rule 14.8(2), a Notice of Appeal must be filed within one month of the date of pronouncement of a Decision. Her Ladyship also noted that permission must be obtained to Appeal a scheduling Order pursuant to Rule 14.5.

At the outset, Schutz J.A. commented that the Applicant did not meet the test for permission to Appeal. However, since the Respondents did not raise that objection, Schutz J.A. went on to consider the merits of the Application for a time extension. In doing so, Her Ladyship rejected the Applicant's argument that under Rule 14.8, the time to Appeal runs from the date of filling of the Order rather than the date of its pronouncement, based on the plain language of the Rule. Schutz J.A. also rejected the Applicant's argument that the Order was not a scheduling Order. Her Ladyship concluded that an Appeal of the scheduling Order

would have no chance of success, which was "dispositive of this Application". As such, the Application was dismissed.

JMS V JDS, 2020 ABQB 272 (GRAESSER J)
Rule 14.16 (Dispute Resolution Processes)

The Plaintiff sought a reduction in his child support and spousal support obligations citing a significant loss in income and the Defendant's return to work as changes in circumstances.

The Court directed the parties, pursuant to newly amended Rule 14.16(4)-(6), to undergo dispute resolution. The new Rule, amended in light of COVID-19, allows the Court to direct parties to participate in a dispute resolution process and to give directions respecting any aspect of the dispute resolution. Here, the Court directed the parties to select the mediator by agreement. The Court also recommended that the mediation be conducted via video conferencing in order for the process not to be delayed due to COVID-19.

Graesser J. confirmed that His Lordship would resolve any matter the parties could not agree upon concerning the dispute resolution. Finally, Graesser J. stated that he was prepared to continue the case conference to assist the parties with the litigation planning if they were unable to resolve issues through mediation.

RUBY V MILLS, 2020 ABCA 223 (PENTELECHUK JA)
Rules 14.16 (Filing the Appeal Record – Standard Appeals), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Applicants sought to restore their Appeal after their Appeal had been struck pursuant to Rules 14.16(3) and 14.64(a) for failure to file an Appeal record.

The Court noted that, their Appeal having been struck, the Applicants faced a further deadline to restore their Appeal. Rules 14.47 and 14.65(3) state that an Application to restore a standard Appeal that has been struck, dismissed or deemed abandoned must be filed, returnable and granted within six months of the Appeal having been struck, dismissed or deemed abandoned.

In this case, the six-month deadline would have expired on May 25, 2020 and the Appeal would have been deemed abandoned on May 26, 2020. However, under Ministerial Order MO 27/2020 made by the Minister of Justice and Solicitor General in response to the COVID-19 pandemic, limitation periods were temporarily suspended from March 17, 2020 to June 1, 2020. Therefore, the Applicants had brought their Application within six months.

The Court considered the test for restoring an Appeal and found there was no arguable merit to the Appeal and declined to restore the Appeal.

BISSKY V MACDONALD, 2020 ABCA 138 (ROWBOTHAM JA)
Rules 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

Having been declared a vexatious litigant, the Applicant was subject to an Order restricting access to the Alberta Courts. In part, the Order imposed a leave requirement for the Applicant's access to further Court process, and also specifically prohibited the Applicant from advancing litigation against the Respondent absent sworn proof of payment of "any Alberta Court costs awards" outstanding in favour of the Respondent.

Initially, the Applicant sought permission to Appeal a family law matter involving the Respondent. Justice Rowbotham conditionally granted that permission subject to posting Security for Costs. Upon the Applicant failing to post Security for Costs, the Appeal was struck, and then subsequently deemed abandoned in accordance with Rule 14.65.

The Applicant then sought leave to bring an Application to restore the Appeal. Justice Rowbotham considered the Order of Security for Costs to be an "Alberta Court costs award" as contemplated in the Order restricting the Applicant's Court access, and noting that such award remained unpaid, dismissed the Application. Justice Rowbotham reasoned in the alternative that an Application for restoration of the Appeal, pursuant to Rule 14.47, would not succeed.

STEAM WHISTLE BREWING INC V ALBERTA GAMING AND LIQUOR COMMISSION, 2020 ABCA 210 (MARTIN, GRECKOL AND STREKAF JJA)
Rule 14.88 (Cost Awards)

The Appellant sought a ruling on Costs against one Respondent after its Appeal was allowed in part. It also appealed the Costs Order resulting from the Trial of the underlying Decision.

The Court noted at the outset that Costs are presumptively awarded to the successful party to the Appeal, or the party that has achieved "substantial" success if success is mixed, pursuant to Rule 14.88. Both parties argued that they were each considerably or substantially successful on Appeal. The Court considered the parties' positions and the result, and ordered that each party bear its own Costs of the Appeal.

With respect to the Appellant's appeal of the Costs Order resulting from Trial, the Court of Appeal noted that it has jurisdiction to determine the Costs at Trial as a result of an Appeal, but due to the discretionary nature of Costs Awards, they are "generally extended considerable deference on appeal". Further, where the outcome of an Appeal "substantially varies the result at trial, this Court may decide the issue of trial costs afresh".

At Trial, the Appellant had conceded that the Respondent was entitled to Costs pursuant to Column 5 of Schedule C, whereas the Respondent had argued it was entitled to solicitor-client Costs, or alternatively that a multiplier be applied to Column 5 of Schedule C. The Trial Judge held that enhanced Costs were appropriate given the complexity of the Action and improper litigation conduct on the part of the Appellant. On Appeal, the Court noted that the complexity of the issues had not changed but explained that the Trial Judge's "conclusion as to litigation misconduct" deserved consideration. The Court of Appeal therefore held that the Respondent should receive Trial Costs in accordance with Column 5 of Schedule C.