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# RULES

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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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**SOLONIUK ESTATE V HUYGHE, 2020 ABQB 616 (MASTER BIRKETT)**
**Rules 1.1 (What These Rules Do), 1.2 (Purpose and Intention of These Rules) 2.22 (Self Represented Litigants), 2.23 (Assistance Before the Court), 3.13 (Questioning on Affidavit and Questioning Witnesses), 5.1 (Purpose of This Part), 5.5 (Disclosing and Identifying Relevant and Material Records), 5.17 (Questions to Discover Relevant and Material Records and Relevant and Material Information), 6.7 (Questioning on Affidavit in Support, Response and Reply to Application), 9.14 (Further or Other Order after Judgment or Order Entered) and 10.49 (Penalty for Contravening Rules)**

This dispute involved the transfer of lands previously owned jointly by Rose Maxine Soloniuk ("Mrs. Soloniuk") and her husband Metro Soloniuk ("Mr. Soloniuk") to the Defendant, Huyghe, the common law spouse of Mr. and Mrs. Soloniuk's daughter. Following Mr. Soloniuk's death, the land remained in both Mr. and Mrs. Soloniuk's names. The land was then transferred to the Defendant, who claimed to have purchased it. Conversely, Mrs. Soloniuk swore an Affidavit prior to her own death stating that she understood the land was being transferred to her. Mrs. Soloniuk's daughters, as personal representatives, filed a Statement of Claim to have the land restored to Mrs. Soloniuk's Estate.

Master Birkett provided Huyghe, who was self-represented, with information on the Rules following some difficulties with previous procedural Applications surrounding Questioning and document production. In doing so, The Court was careful to state that this was not legal advice, but merely information.

On March 4, 2020, Master Birkett ordered that Huyghe attend for Questioning, and that he was entitled to have one adult person with him. Subsequently, the Defendant filed what appeared to be an Application for a further Order pursuant to Rule 9.14 in connection with the March 4, 2020 Order. The Court stated that Huyghe must file the appropriate Application and Affidavit evidence and serve those documents on counsel for the Plaintiffs, with at least five days notice to pursue the Rule 9.14 Application.

Master Birkett noted that while self represented litigants are permitted by Rule 2.22, they are still expected to familiarize themselves with the Rules and Court procedures. Similarly, pursuant to Rule 1.1(2), Huyghe was expected to jointly manage the litigation with Plaintiffs' counsel. Further, Rule 1.2 requires the parties to jointly and individually identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense. Additionally, Rule 2.23 permitted Huyghe to request permission to have another adult present for assistance during Court processes, as was the case with the October 4, 2020 Questioning Order.

Master Birkett cited Rule 5.1 and explained that Part 5 of the Rules governs the disclosure of information, and that the Rules regarding document production and Questioning regimes are set out in Rules 5.5 and 5.17, respectively. Additionally, the Court noted that both Rules 3.13 and 6.7 permit Questioning on an Affidavit. After providing this extensive overview of the Rules for Huyghe's benefit, Master Birkett reminded the parties that pursuant to Rule 10.49, they may be penalized for contravening the Rules.

**KISSEL V ROCKY VIEW (COUNTY), 2020 ABQB 570 (EAMON J)**
**Rules 1.2 (Purpose and Intention of these Rules), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)**

Following a mixed result in a Judicial Review Application, the Applicants sought Costs pursuant to Column 4 of Schedule C. Justice Eamon considered Rule 10.29, the general Rule on Costs, and specifically that a party only needs to be substantially successful in the proceeding, and not totally successful, in order to be awarded Costs. His Lordship cited *Clarke v Syncrude Canada Ltd.*, 2014 ABQB 430 for the principle that mixed success, which dilutes substantial success, should result in each party bearing their own Costs.

Justice Eamon then went on to consider Rules 10.31 and 10.33, noting that the Court retained wide discretion on Costs and could consider any matter related to the question

of reasonable and proper Costs that may be appropriate. His Lordship also noted that Costs on Judicial Review Applications are awarded pursuant to Column 1 of Schedule C, unless "the matters at issue are particularly complex or involve matters of general importance to the public, the parties or both".

Justice Eamon ultimately found that the success was mixed but that the Applicants substantially succeeded in their Application, that the issues were not particularly difficult, and the Action was moderately complex, that the matter was important to both the parties and the constituents of Rocky View County, and that there was an additional discrete issue raised against an employee of Rocky View County, which had failed. As a result, Justice Eamon awarded Costs to the Applicants for the substantial issues and awarded Costs to Rocky View County on the discrete issue. Justice Eamon found that Column 1 would not be fair or reasonable due to the lack of precedent and the importance of the issue, and therefore based the Costs Award for the Applicants on Column 3 of Schedule C, less 10% for the loss on the discrete issue and less 35% for the unsubstantiated allegations of bad faith (in accordance with Rule 1.2, which requires a party to proceed efficiently).

**RT V ALBERTA, 2020 ABQB 655 (GRAESSER J)**
**Rules 1.2 (Purpose and Intention of These Rules), 2.24 (Lawyer of Record) and 2.25 (Duties of Lawyer of Record)**

The Applicants (the Defendants in the Action) applied to have a lawyer and his professional corporation (collectively, "Mr. Lee") representing the Respondents (the Plaintiffs in the Action) removed as the lawyer of record. The Respondents had previously filed an Application for advance Costs, and Mr. Lee had personally sworn an Affidavit in support of the Application for advance Costs. The Applicants raised concerns about Mr. Lee continuing to act as counsel for the Respondents after having made himself a witness by filing an Affidavit in support of the Application for advance Costs.

Justice Graesser determined that the test for removal of a lawyer as counsel of record is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor. However, the Court noted that the case law is unclear on what being "counsel of record" means.

Justice Graesser noted that the Rules use the term "lawyer of record" in Division 4, starting with Rule 2.24. His Lordship stated that the role of a lawyer of record includes being the address for service for a party the lawyer has filed pleadings on behalf of and appearing in Court for the party. The Court also noted that Rule 2.25 states that the lawyer of record's duties are to conduct the Action in a manner that furthers the purpose and intention of Rule 1.2 and to provide the address of the party for whom the lawyer acts if directed by the Court upon Application.

After reviewing cases discussing removing a lawyer as counsel of record, the Court determined that Mr. Lee could not be counsel on any Court proceedings in the Action until after the advance Costs Application was completed. The Court determined that removing Mr. Lee from the file entirely was not justified. Justice Graesser ordered that Mr. Lee be removed as counsel of record in the Action until the Application for advance Costs was concluded. His Lordship also stayed other steps in the Action until further Order of the Court.

**MURRAY V FORD MOTOR COMPANY OF CANADA, 2020 ABQB 729 (MANDZIUK J)**
**Rules 1.2 (Purpose and Intention of These Rules), 7.3 (Summary Judgment) and 9.4 (Signing Judgments and Orders)**

The Plaintiff appealed a Master's Decision which had dismissed his Application for Summary Judgment, and granted the Defendant's Application for Summary Dismissal. The dispute arose when the Plaintiff purchased a vehicle from a Ford dealership, which he claimed was defective. The Plaintiff sought damages for a full refund of the vehicle's price, damages for loss of income as he had quit his job because he did not feel safe driving the vehicle, and damages for the mental distress and aggravation the defective vehicle caused him.

Mandziuk J. noted that the Summary Judgment process is set out in Rule 7.3, and that it is guided by the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7, and the principles enumerated in Rule 1.2 which require the resolution of disputes in the most cost-effective, efficient, fair, just, and effective way possible. The operative question on Summary Judgment is whether the Court is sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a Trial.

Justice Mandziuk concluded that based on the evidence, there was no genuine issue requiring a Trial, and thus the matter could be disposed of on Summary Dismissal. The Court found that the Plaintiff had brought his Action against the wrong Defendant, as it was a specific dealership that sold the Plaintiff the vehicle and not the named Defendant, the Ford Motor Company of Canada. While the Plaintiff sought a full refund of the vehicle's price, the Defendant had at the very most, an obligation to provide replacement parts and labour under the warranty, which they had done. Expert evidence tendered by both parties led the Court to conclude that the Defendant had not breached its duty under the vehicle warranty.

The Court disregarded the Plaintiff's evidence of an American class action lawsuit alleging that Ford Motor Company had knowingly sold defective vehicles as it did not relate to the vehicle the Plaintiff had purchased. Moreover, the subject matter of that case was irrelevant as the issue at bar was whether the Defendant had breached the warranty and not whether it knowingly sold defective vehicles.

The Court found that the Plaintiff's claim for loss of income could not be sustained as the vehicle warranty specifically ousted that type of damages. Likewise, the damages for intentional infliction of mental suffering were untenable, as there was no evidence that the Defendant caused such suffering. The evidence was clear that a Trial would not add to the Court's ability to determine this matter fairly and justly. Accordingly, His Lordship dismissed the Appeal, invoking Rule 9.4(2)(c) to dispense with the Plaintiff's approval of the form of Order.

**STACKARD V 1256009 ALBERTA LTD, 2020 ABCA 460 (ROWBOTHAM, O'FERRALL AND STREKAF JJA)**
**Rules 1.2 (Purpose and Intention of These Rules) and 4.14 (Authority of a Case Management Judge)**

The Court of Appeal heard an Application for permission to appeal an Order of the Case Management Justice which held that an Application that the Respondents were in Contempt of Court (the "Contempt Application") could be heard at the Trial of the matter. The Court of Appeal stated that both the Application for permission to appeal and the Appeal would be heard at the same time.

The underlying litigation involved a dispute between two estates which had been under Case Management since 2016. The Appellant represented the estate of the parties' mother, while the Respondents were, among others, the estate of the parties' brother who had predeceased their mother. The dispute began when the mother transferred a vendor take-back mortgage to the Respondent corporation, which was owned by the deceased Respondent brother. Thus, litigation over ownership of this mortgage ensued amongst the siblings upon the Respondent brother's death.

The Contempt Application arose out of the Respondents' breach of a Consent Order which precluded them from using any proceeds from the mortgage until its ownership was fully determined. To further complicate the matter, the Respondents to the Contempt Application had also cross-applied for Security for Costs.

The Court of Appeal noted that the essence of the Appeal was whether the Case Management Judge had the discretion to direct that the Contempt Application matter could be heard at Trial. The Court considered Rule 1.2 in light of the fact that the matter had been under case management for 4 1/2 years, and found that directing that the Contempt Application matter be heard at Trial, as Rule 4.14(1)(d) allows, was a valid discretionary measure by the Case Management Judge to prevent the parties from further delaying the Action. In the same vein, the Court found that the Case Management Judge's direction would better lead to the fair and efficient resolution of litigation in accordance

with the foundational Rules. Moreover, the Court noted that Rule 4.14(1)(f) permits a Case Management Judge to make any procedural Order they consider necessary; providing further basis for the Case Management Judge's Order. As such, the Appeal was dismissed.

**STUVE V STUVE, 2020 ABCA 467 (WAKELING, GRECKOL AND HUGHES JJA)**
**Rules 1.2 (Purpose and Intention of These Rules) and 4.16 (Dispute Resolution Processes)**

The Appellant appealed a Chambers Judge's Decision to refuse to direct the parties to arbitration. The Appellant and the Respondent were previously married and were engaged in a matrimonial property dispute. The parties agreed to participate in a binding Judicial Dispute Resolution, which was cancelled due to the COVID-19 pandemic and the resulting Court closure. The Appellant relied on Rule 4.16 to apply for an Order directing private arbitration. The Chambers Judge refused to direct the parties to arbitration.

On Appeal, the Appellant relied on Rule 1.2 to argue that the Rules are intended to be used in part to facilitate the quickest means of resolving a claim at the least expense. The Appellant also relied on Rule 4.16(4), which provides that the Court may, on Application or its own motion, "by order direct that the parties participate in a dispute resolution process". The Appellant argued that these Rules, Court pronouncements, and the lack of right to Trial in non criminal matters, dictated that the Court can order parties to arbitration.

The Court disagreed. The Court determined that Rule 4.16 does not authorize a Judge to order arbitration without the consent of both parties. Instead, Rules 4.16(3) and (4) empower a Case Management Judge or Case Conference Judge to direct the parties to a non-binding dispute resolution process and expedite resolution though the parties may not be ready for Trial. The Court also noted that the Rule 4.16 process applies because the parties did not conclude their Judicial Dispute Resolution agreement. As a result, the Court dismissed the Appeal and ordered that each party bear its own Costs.

**ST ISIDORE CO-OP LIMITED V AG GROWTH INTERNATIONAL INC, 2020 ABCA 447 (SLATTER, SCHUTZ AND HUGHES JJA)**
**Rules 1.3 (General Authority of the Court to Provide Remedies) and 13.6 (Pleadings: General Requirements)**

This was an Appeal of a Trial Judge's finding that the Appellant had not been prejudiced by allowing the Respondent to amend their Statement of Claim to include prejudgment interest and by granting prejudgment interest based on a calculation for which there was no evidence.

The Court of Appeal noted that the Trial Judge had found that granting prejudgment interest would not cause the Appellant to suffer serious prejudice and that there was sufficient evidence before the Court to calculate prejudgment interest. The Trial Judge simply awarded prejudgment interest on 75% of the amount that the Respondent paid to settle the claims of Mr. Borger's family.

On Appeal, the Appellants identified a tension between Rule 1.3(2) and Rule 13.6(2)(c)(iii): per Rule 1.3(2) the Court can give a remedy "whether or not it is claimed or sought", however, per Rule 13.6(2)(c)(iii) a pleading must contain a statement of any interest claimed including the basis for the interest and the method of calculating it. The Court of Appeal found that Rule 1.3(2) confirmed that the Rules did not limit the jurisdiction of the Court and that Rule 13.6(2)(c)(iii) specified the way that litigants were to invoke the jurisdiction of the Court. Thus, the Court would not award interest that was not pleaded due to a lack of jurisdiction, but simply because it was not pleaded.

The Court of Appeal found that the Appellant was not prejudiced by having to answer a pleading that was not previously argued; any prejudice would have to bear on the Appellant's ability to answer the new pleading. In the instant case there was no prejudice: the entitlement to interest was created by statute, and the Appellant admitted the reasonableness of the payment the Respondent had made to Mr. Borger's estate. The Appellant had not been deprived of the opportunity to respond to and defend against the amended pleading. The Appeal was dismissed except for an adjustment to the rate of pre-judgment interest.

**SEDGWICK V EDMONTON REAL ESTATE BOARD CO-OPERATE LISTING BUREAU LTD (REALTORS ASSOCIATION OF EDMONTON), 2020 ABQB 578 (SHELLEY J)**
**Rule 2.10 (Intervenor Status)**

The Canadian Real Estate Association ("CREA") applied for intervenor status in the Judicial Review of a decision by the Realtor's Association of Edmonton ("RAE") to deny membership.

Shelley J. cited *Wilcox v Her Majesty the Queen in Right of Alberta*, 2019 ABCA 385 for the test that a potential intervenor must meet under Rule 2.10. Justice Shelley stated that the Court must be satisfied that the proposed Intervenor "will be directly and significantly affected by the outcome or has special expertise or perspective in relation to the subject matter that will assist the Court in determining the outcome." Her Ladyship noted that it is not enough that a potential intervenor's interest be affected; rather, the potential intervenor must bring a fresh perspective to the proceedings.

Justice Shelley held that the interests of CREA and RAE in the Judicial Review were the same, that CREA brought no new perspective to the proceedings, and that CREA's presence as an intervenor was not necessary for the Court to properly decide the Judicial Review. Shelley J. therefore dismissed the Application.

**REBEL NEWS NETWORK LTD V ALBERTA (ELECTION COMMISSIONER) 2020 ABQB 687 (LEMA J)**
**Rule 2.10 (Intervenor Status)**

Rebel News Network Ltd. ("Rebel News") had filed a challenge pursuant to the *Canadian Charter of Rights and Freedoms* alleging a violation of the freedom of expression by certain provisions in the *Election Finances and Contributions Disclosure Act*, RSA 2000, c E-2 regarding third party disclosures for political or election advertising.

The Justice Centre for Constitutional Freedoms ("JCCF") applied to be an intervener, pursuant to Rule 2.10. Justice Lema cited the factors set out in *Pedersen v Alberta*, 2008 ABCA 192 for guidance on whether to grant intervener status and the factors to consider: (i) will the intervener be directly affected by the Appeal; (ii) is the presence of the intervener necessary for the Court to properly decide the matter; (iii) might the intervener's interest in the proceedings not be fully protected by the parties; (iv) will the intervener's submission be useful and different or bring particular expertise to the subject matter of the Appeal; (v) will the intervention unduly delay the proceedings; (vi) will there possibly be prejudice to the parties if intervention is granted; (vii) will intervention widen the *lis* between the parties; and (viii) will the intervention transform the Court into a political arena.

After a review of other applicable case law, Justice Lema found that JCCF had not met the burden of showing that its perspective would be useful or different or would manifest in submissions different from Rebel News. On that basis, Justice Lema dismissed JCCF's Application to intervene.

**PURPLERUNG FOUNDATION V PEACE RIVER (TOWN OF) SUBDIVISION AND DEVELOPMENT APPEAL BOARD, 2020 ABCA 341 (SCHUTZ JA)**
**Rule 2.23 (Assistance Before the Court)**

The Applicants were a foundation and two of its directors. The Applicants sought permission to appeal a decision of the Subdivision and Development Appeal Board of the Town of Peace River (the "Board"). The Board's decision upheld a stop order issued by the Development Officer of the Town of Peace River relating to land leased by the Applicant.

As a preliminary issue, the Town of Peace River initially argued that the Applicant foundation could not be represented by its directors because the foundation must be represented by a lawyer. Schutz J.A. acknowledged that recent cases suggest that the Court's traditional discretion to allow a non-lawyer agent to represent a foundation like the Applicant had been extinguished.

However, The Court noted that Rule 2.23(4) was added when the Rules were amended in March 2020. Rule 2.23(4) states that Rule 2.23 does not affect the discretion of the Court to grant a right of audience to any agent to

speak on behalf of an individual or a corporation. As a result, the Town of Peace River conceded that there was extra judicial discretion to allow the directors to speak on behalf of the foundation.

**FLOCK V MCKEN, 2020 ABQB 744 (HO J)**
**Rules 3.14 (Originating Application Evidence (Other than Judicial Review)) and 5.2 (When Something is Relevant and Material)**

The Applicant applied to strike inadmissible portions of Affidavits filed by the Respondent in the main litigation pertaining to the severance of joint tenancy of a matrimonial home (the "Main Litigation"). In rendering its Decision, the Court considered Rule 5.2(1) which states that a question, record or information is relevant and material only if it could be reasonably be expected: (1) to significantly help determine one or more of the issues raised in the pleadings; or (2) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Most of the Applicant's objections to the impugned sections of the Respondent's Affidavits were that they contained references to arbitration proceedings completed in 2003 and the resulting award, which was set aside (the "2003 Arbitration"). The Applicant also referenced a previous 2019 Court of Appeal hearing on the matter (the "2019 Decision") that ruled that not all content pertaining to the 2003 Arbitration should be excluded.

Justice Ho emphasized that she did not read the 2019 Decision as deciding that the 2003 Arbitration may not be referred to at all in the Main Litigation. As such, the Court admitted portions of the Respondent's Affidavits that pertained to the 2003 Arbitration and past conduct of the parties. By contrast, Justice Ho excluded portions of the Affidavits pertaining to the 2003 Arbitration and counsels' submissions or the arbitrator's findings.

With respect to the Respondent's request for leave pursuant to Rule 3.14(1)(f) to use evidence filed by the Applicant in other litigation proceedings for the purposes of the Main Litigation, the Court declined to grant leave because the Respondents did not file a formal cross-Application, but relied on relief requested in their Brief in the Main Litigation.

**LETHBRIDGE AND DISTRICT PRO-LIFE ASSOCIATION V LETHBRIDGE (CITY), 2020 ABQB 654 (GATES J)**
**Rules 3.15 (Originating Application for Judicial Review), 3.21 (Limit on Questioning) and 3.22 (Evidence on Judicial Review)**

The Applicant sought to quash the Respondent, the City of Lethbridge's, decision refusing to post pro-life advertising on the side of Lethbridge buses. The Applicant alleged that the Respondent's decision infringed section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*), and was not saved by section 1 of the *Charter*.

The Applicant filed its Originating Application for Judicial Review on January 14, 2019 and subsequently filed an Affidavit in support of the Application. The Respondent objected to this Affidavit on the grounds that the Applicant had not sought leave from the Court to file it pursuant to Rule 3.22 and that it raised issues which were time barred by the 6-month limitation period set out in Rule 3.15(2).

The Court noted that pursuant to Rule 3.22, on Application for Judicial Review, the Court may consider: (a) transcripts of the proceedings subject to the Judicial Review; (b) if Questioning was permitted under Rule 3.21, transcripts of that Questioning; (c) anything permitted by any other Rule or enactment; and (d) anything else permitted by the Court. The Court stated that as a general rule, Affidavits are not permitted on Judicial Review, especially where they relate to the merits of the tribunal's decision. The rationale of this general rule is to prevent Applicants from turning a Judicial Review into a trial *de novo* on the merits of the issue.

His Lordship reviewed the exceptions to this general rule arising from the case of *Alberta College of Pharmacists v Sobeys West Inc.*, 2017 ABCA 306, where the Court stated that Affidavit evidence may be permitted where: (i) the evidence is tendered to establish a breach of natural justice which is not apparent on the face of the record; (ii) it

provides some background information, mainly to establish standing, and (iii) there is no transcript of the tribunal's decision.

The Court found that the impugned Affidavit provided a detailed history setting out the grounds for Judicial Review, and also set out information relevant to a breach of natural justice, given the Applicant's allegation of bias in the tribunal's decision. Accordingly, Justice Gates permitted the Applicant to file the Affidavit although the Affidavit would not be considered for any purpose falling outside the exceptions outlined above.

Justice Gates found that the tribunal's decision exhibited a reasonable apprehension of bias, in that its reasons stated there would likely be issues with the pro-life content of the advertisements but did not identify those reasons. Additionally, the tribunal's written reasons did not undertake any analysis of the Applicant's *Charter* rights, and whether they had been minimally impaired. Lastly, the decision stated that there would be a reasonable apprehension of harm from the nature of the advertisements, but based this assertion only on emails from a few community members who had expressed concern over similar advertisements in the past. Accordingly, the decision was quashed and remitted for consideration.

**BERGMAN V INNISFREE (VILLAGE), 2020 ABQB 661 (FETH J)**
**Rules 3.18 (Notice to Obtain Record of Proceedings), 3.19 (Sending in Certified Record of Proceedings), 3.22 (Evidence on Judicial Review), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)**

The Applicant, Mr. Bergman, made an Application for Judicial Review of a municipal tax bylaw enacted by the Respondent, the Village of Innisfree. The Respondent filed a Certified Record of Proceedings as required by Rules 3.18 and 3.19. The Applicant filed two Affidavits seeking to supplement the Certified Record of the Respondent, pursuant to Rule 3.18(3) which allows the Court to add to, dispense with, or vary contents of the Record.

The Court considered Rule 3.22 in determining whether the Applicant's supplemental materials should be added to the Certified Record. Rule 3.22 prescribes what evidence may be considered by the Court during a Judicial Review Application. The Court also considered the Applicant's Affidavits in light of Rule 13.18, which allows Affidavits to be sworn on the basis of personal information and belief but does not allow hearsay. The Court found that relevant hearsay evidence could be permitted by the Court under Rule 3.22(d) using the principled exception to hearsay rule, if the evidence is necessary and reliable.

Finally, Justice Feth noted that the use of Affidavits in a Judicial Review Application is exceptional, citing both *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 and *University of Alberta v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 699. His Lordship also noted that a Judicial Review Application is to review the administrative decision maker's actions, not determine the issue afresh, and the Applicant is not entitled to a hearing *de novo* on the original issue before the administrative decision maker. Justice Feth reviewed the relevant case law on when supplementary evidence could be permitted, ultimately finding that the Affidavit evidence would not be admitted as the evidence was not before the Respondent in making its decision, not relevant to the grounds for Judicial Review, and offended the hearsay rule.

The Respondent filed a cross-Application to stay the proceedings as an abuse of process, pursuant to Rule 3.68. The Court set out the test for abuse of process, which would be established where (i) the proceedings are oppressive or vexatious, and (ii) the proceedings violate fundamental principles of justice for fair play and decency; noting that specific requirements do not need to be established. Justice Feth also noted that the abuse of process doctrine could apply to re-litigation, even in cases where estoppel or *res judicata* are not met, but that the remedy of a stay would only be appropriate in the "clearest of cases". In Justice Feth's review of the Application and surrounding facts, His Lordship concluded that the Application was not an abuse of process, and on that basis did not order a stay.

The Respondent also applied for Summary Judgment pursuant to Rule 7.3(1)(b). Justice Feth, in applying the test from *Hryniak v Mauldin*, 2014 SCC 7, found that Summary Judgment was not appropriate as it was not a proportionate, expeditious or less expensive means to achieve a just result. Rather, the Court dismissed the Judicial Review Application on its merits.

**LUND V QUINN MAINTENANCE INC, 2020 ABQB 722 (EAMON J)**
**Rules 3.36 (Judgment in Default of Defence and Noting in Default) and 3.37 (Application for Judgment Against Defendant Noted in Default)**

The Plaintiff sought Default Judgment for damages by way of Application without notice to the Defendant as they failed to defend in a claim for wrongful dismissal. Justice Eamon noted that the Plaintiff had properly noted the Defendant in default under Rule 3.36. The Plaintiff then applied pursuant to Rule 3.37 for Default Judgment. After reviewing the details of the Plaintiff's employment, Justice Eamon awarded $121,777.96 in salary, $2,214.00 in lost benefits, prejudgment and post-judgment interest and Schedule C Costs.

**WANG V ALBERTA, 2020 ABQB 754 (ROOKE ACJ)**
**Rules 3.67 (Close of Pleadings), 3.68 (Court Options to Deal With Significant Deficiencies), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 3.76 (Action to be Taken When Defendant or Respondent Added), 9.4 (Signing of Judgments and Orders) and 10.33 (Court Considerations in Making Costs Awards)**

The Applicant's lawsuit had been struck out pursuant to Rule 3.68 via Civil Practice Note No. 7 as an abuse of the Court's processes. The Court, on its own motion, had initiated a review of whether the Respondents should be subject to Court access restrictions. During that motion, various parties were provided an opportunity to make submissions as to whether Court access restrictions should apply.

Rooke A.C.J. noted that the Court of Appeal in *Jonsson v Lymer*, 2020 ABCA 167 had concluded that the Alberta Court of Queen's Bench possesses only a residual authority to conduct Court access restriction processes. Therefore, the Court access review process was terminated, and the parties sought direction on the form of Order arising from the subsequent proceedings.

The Applicants claimed that Alberta Health Services ("AHS") and another individual should be named as Third Party Respondents in the Order's style of cause. The other participants rejected this position.

The Court found that AHS and the other individual were not Third Party Respondents, and that no Application had ever been made pursuant to any of the governing Rules (3.67, 3.74 or 3.76) to add those parties to the Action. The original Plaintiffs were properly named Respondents to the motion of the Court. His Lordship noted that the back-and-forth nature of civil litigation means that the same party may "wear different hats" at different points in the litigation.

Finally, the Court noted that the disputed form of Order was exactly the same in substance as that which had been granted in the most recent hearing on the issue. His Lordship found that the Applicant's conduct was a prime example of unnecessarily lengthening the Action as referred to in Rule 10.33(2). Accordingly, the Court ordered the Applicant to pay Costs, and dispensed with approval of the form and content of the Order pursuant to Rule 9.4(2)(c).

**FEENEY V ALBERTA, 2020 ABQB 572 (ROOKE ACJ)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)**

This was an Application reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No. 7, Associate Chief Justice Rooke ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. Associate Chief Justice Rooke also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

**UBAH V CANADIAN NATURAL RESOURCES LIMITED, 2020 ABQB 576 (ROOKE ACJ)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies), 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 Defendants brought an Application for an Order for Costs pursuant to a Decision by the Court that found the Plaintiff's Statement of Claim to be an Apparently Vexatious Application or Proceeding per the document-based Civil Practice Note No. 7, Rule 3.68 procedure. An Order pursuant to that Decision had already been issued, but the Court inadvertently omitted to include the quantum of Costs that should be paid to the Defendants.

Associate Chief Justice Rooke cited Rule 10.29(1) in highlighting that successful parties, here the Defendants, are presumptively entitled to Costs. The Court noted that if the responding party to this Application had been a self-represented litigant who acknowledged that a Court Order had omitted a step ordered by the Court, and not contested the matter, the Court would have not hesitated to exercise its discretion per Rule 10.31 not apply the Rule 10.29(1) presumption, and not impose Costs in favour of the successful party.

The Court found however, that the self-represented Plaintiff in this scenario repeatedly attempted to re-open the litigation against the Defendants and had a litigation approach that was "Orwellian". In ordering Costs against the Plaintiff, Associate Chief Justice Rooke noted that Rule 10.33(2) allows the Court to order Costs where there has been problematic and abusive conduct. The Court awarded Costs of $5,000 to one Defendant, and $5,000 to the other two Defendants together.

**BOLAND V SCOTT LAW, 2020 ABQB 590 (NIELSEN ACJ)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)**

This was an Application reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No. 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

Associate Chief Justice Nielsen also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

**MILLER V EDMONTON (CITY), 2020 ABQB 591 (NIELSEN ACJ)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)**

This was a Statement of Claim reviewed by Associate Chief Justice Nielsen as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No. 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

Associate Chief Justice Nielsen also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

**SKRYPICHAYKO V LAW SOCIETY OF ALBERTA, 2020 ABQB 604 (ROOKE ACJ)**
**Rule 3.68 (Court Options to Deal with Significant Deficiencies)**

The Plaintiff filed two Actions for malfeasance in public office, negligent investigation, abuse of process, breach of statutory duty, malicious prosecution, assault, libel and maintaining a hostile regulatory environment; all claims which related to the Law Society's investigation and decision to disbar the Plaintiff in 2016.

The Defendants had previously made an Application that the two Actions were Apparently Vexatious Application or Proceedings ("AVAPs"). Rooke A.C.J. and had previously ordered, pursuant to Civil Practice Note No. 7, that the Applicant had until August 26, 2020 to provide the Court with written submissions to "show cause" as to why the

AVAPs should not be struck pursuant to Rule 3.68. Rooke A.C.J. reviewed the written submissions provided by the Applicant to the Court and determined that both of the AVAPs should be struck pursuant Rule 3.68.

**SMITH V SAINT JHN, 2020 ABQB 607 (NIELSEN ACJ)**
**Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 9.4 (Signing Judgments and Orders)**

This was an Application reviewed by Associate Chief Justice Nielsen as an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No. 7, Associate Chief Justice Nielsen ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

Associate Chief Justice Nielsen also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

**CHISAN V AKERS, 2020 ABQB 659 (ROOKE ACJ)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)**

This was an Application reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No. 7, Associate Chief Justice Rooke ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

**BOLAND V SCOTT LAW, 2020 ABQB 697 (NIELSEN ACJ)**
**Rule 3.68 (Court Options to Deal with Significant Deficiencies)**

The Plaintiff had previously filed claims against two law firms and the Law Society of Alberta which Associate Chief Justice Nielsen had ruled to be Apparently Vexatious Application or Proceedings ("AVAPs"). Associate Chief Justice Nielsen had also ordered, pursuant to Civil Practice Note No. 7, that the Applicant had to provide the Court with written submissions to "show cause" as to why the AVAPs should not be struck pursuant to Rule 3.68. Associate Chief Justice Nielsen reviewed the written submissions provided by the Applicant to the Court and determined that the AVAP should be struck pursuant Rule 3.68.

Associate Chief Justice Nielsen made no findings as to whether the Plaintiff was or was not a vexatious litigant, directing the Defendants to file an Application pursuant to the *Judicature Act*, RSA c J-2, ss. 23-23.1 should they feel the need for such a direction.

**LITTLEJOHN V HER MAJESTY THE QUEEN, 2020 ABQB 715 (JEFFREY J)**
**Rule 3.68 (Court Options to Deal with Significant Deficiencies)**

Mr. Littlejohn had been incarcerated with the Drumheller Institution of Correctional Service Canada after being convicted and sentenced for arson. Mr. Littlejohn filed an Originating Application for *habeas corpus*, alleging that he was wrongfully convicted. Justice Jeffrey noted that, "*habeas corpus* is not available as a mechanism to re-open and re-evaluate a criminal conviction" and "the only remedy that may be obtained via habeas corpus is release from an illegal detention." As such, Justice Jeffrey found that the Originating Application was a collateral attack on the criminal proceeding.

Given His Lordship's findings on *habeas corpus*, Justice Jeffrey decided to initiate a Civil Practice Note No. 7 "show cause" process for determination as to whether the Court should strike the Originating Application pursuant to Rule 3.68. Justice Jeffrey ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the Apparently Vexatious Application or Proceeding should not be struck pursuant to Rule 3.68.

**HICKS V GAZLEY, 2020 ABQB 740 (MANDERSCHEID J) Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 4.31 (Application to Deal with Delay)**

The Plaintiff brought an Application for an Order severing divorce from corollary relief; an Order permitting the divorce to proceed via desk Application; a declaration that the Plaintiff had completed their Undertakings; dismissal of the Defendant's claim for spousal support due to delay pursuant to Rule 4.31; and Costs.

This was essentially the Plaintiff's fourth Application to sever divorce from the corollary relief, and his third severance Application in less than 5 months. The Plaintiff acknowledged that his previous Applications were unsuccessful. The Defendant's position was that the Application should be dismissed as the attempts to re-litigate the same matter were an abuse of process, a waste of resources, and bordered on vexatious. Justice Manderscheid noted that the issue estoppel branch of *res judicata* applied, and that per Rule 3.68(2), when attempts to re-litigate decided issues go beyond *res judicata* and into vexatious litigation they constitute an abuse of process.

Justice Manderscheid noted that it is only be appropriate to re-litigate issues where the first proceeding was tainted by fraud or dishonesty, when fresh evidence that was previously unavailable impeached the original results, or when fairness dictated that the original result should not be binding in the new context. His Lordship determined that the previous hearings were not tainted by fraud or dishonestly and that the Plaintiff had not submitted new evidence that had was previously unavailable. Undertakings within the Action had not been fulfilled and severing divorce from corollary relief would eliminate the Plaintiff's incentive to advance spousal support and matrimonial property claims; as such, Justice Manderscheid dismissed the Application to sever the divorce from the corollary relief and further dismissed the Application to permit the divorce to proceed by way of desk Application.

His Lordship's office did not receive confirmation from the Defendant that the Plaintiff's outstanding Undertakings were complete. Justice Manderscheid declined to make the declaration the Plaintiff sought.

Pursuant to Rule 4.31, if the Court found that there had been an inordinate and inexcusable delay in the Action, the delay would be presumed to result in significant prejudice to the party bringing the Application and could be dismissed. His Lordship found that any delay on the Defendant's part was neither inexcusable, inordinate, or exceptional. The Defendant had been unable to advance her claim as the Plaintiff has not provided complete responses to his Undertakings. Justice Manderscheid declined to dismiss the Defendant's claim for delay.

The Defendant argued that due to the ongoing re-ligation of the same issue by the Plaintiff, enhanced Costs of $5,000 were justified as the Plaintiff had wasted judicial resources by repeatedly initiating proceedings that were an abuse of process. His Lordship noted that where there had been litigation misconduct, enhanced Costs could be awarded. Justice Manderscheid was satisfied that the Plaintiff had engaged in litigation misconduct and wasted judicial resources due to his re-litigation of the same issue, and due to his unsubstantiated allegations against the Defendant's counsel.

**CHISAN V AKERS, 2020 ABQB 746 (ROOKE ACJ) Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.4 (Signing Judgments and Orders), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)**

The Plaintiff had previously filed a Statement of Claim which Associate Chief Justice Rooke had ruled to be an Apparently Vexatious Application or Proceeding ("AVAP"), and had ordered, pursuant to Civil Practice Note No. 7, that the Plaintiff had 14 days to provide the Court with written submissions to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68. No materials or correspondence were received from the Plaintiff. His Lordship therefore immediately proceeded to evaluate the Plaintiff's litigation and determined that there was "no question" that the Plaintiff's Statement of Claim was filed in

breach of the Court access restrictions imposed in a previous proceeding. Associate Chief Justice Rooke further determined that the AVAP should be struck pursuant Rule 3.68.

With respect to Costs, His Lordship noted that pursuant to Rule 10.31, the Court has broad discretion to determine an appropriate Costs Award, and to take into account litigant conduct that caused unnecessary litigation or delay (Rule 10.33(2)(a-b)), where a litigant engaged in improper litigation (Rule 10.33(2)(d)), breached a Court Order (Rule 10.33(2)(f)), or otherwise engaged in "misconduct" (Rule 10.33(2)(g)). The Court found that the Plaintiff had done all of these things and that the Plaintiff's "abusive litigation" warranted elevated Costs.

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

**STRATKOTTER V CANADA, 2020 ABQB 768 (ROOKE ACJ)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 9.4 (Signing Judgments and Orders)**

This was an Application reviewed by Associate Chief Justice Rooke as being an Apparently Vexatious Application or Proceeding ("AVAP"). Pursuant to Civil Practice Note No. 7, Associate Chief Justice Rooke ordered that the Applicant had 14 days to provide written submissions to the Court to "show cause" as to why the AVAP should not be struck pursuant to Rule 3.68.

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

**AGRIUM INC V COLT ENGINEERING CORPORATION, 2020 ABQB 807 (DILTS J)**
**Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 6.14 (Appeal from Master's Judgment or Order)**

This was an Appeal from a Master's Decision pursuant to Rule 6.14. The Appeal concerned a construction dispute between the Plaintiff and two Defendant companies that were contracted to assist in the upgrade of one of the Plaintiff's facilities. The contracts between the Plaintiff and Defendants included mandatory arbitration clauses.

The main question on Appeal was whether the Master had erred in refusing to strike out the Statement of Claim pursuant to Rule 3.68 in light of the Plaintiff's failure first to pursue resolution by arbitration. The Defendants raised s. 7(1) of the *Arbitration Act*, RSA 2000, c. A-43 (the *"Arbitration Act"*) which requires that an Action be stayed by the Court pending submission to arbitration. As the limitation period for commencing arbitration had passed, the Defendants argued that Plaintiff's claim was barred and must be struck. A secondary question was raised as to whether s. 7(6) of the *Arbitration Act* operated to preclude application of Rule 6.14 and bar an Appeal from the Master's Decision.

Addressing the secondary question first, the Court held that the *Arbitration Act* did not operate to preclude application of Rule 6.14. In particular, the Court held that while s. 7(6) of the *Arbitration Act* bars an Appeal from "the [C]ourt", a proper reading of that section indicates that "the [C] ourt" comprises both Masters and Justices. However, Rule 6.14 allows an Appeal of a Master's Decision as of right, and Justice Dilts held that the wording of s. 7(6) of the Arbitration Act did not serve to make a Decision of a Master "unappealable". Accordingly, while the *Arbitration Act* may operate to preclude Appeal of the decision of a Court of Queen's Bench Justice, no such bar exists in respect of Appeal from a Master.

In addition, the Court held that the *Arbitration Act* would be ineffective to bar Appeal from the Master's Decision to the extent that the Decision rested upon exercise of the Court's residual discretion. Since it was somewhat unclear from the Decision on what basis the Master reached his conclusion, the Court indicated the possibility that any preclusion of Appeal may be unavailable on this basis.

In considering the main question on Appeal, the Court concluded that the Plaintiff had failed to establish that the Defendants had attorned to the Court's jurisdiction, as argued. Contrary to the Master's conclusion, the Court held

that the Defendants' conduct could not reasonably be seen as attorning to the jurisdiction of the Court, but rather was consistent with a prudent strategy of defence in keeping with the requirements and timelines set out in the Rules. The Court further held that considerations as to fairness, as articulated by the Master, were not sufficient to deny the Defendants of their defence under s. 7(1) of the *Arbitration Act*.

Accordingly, the Plaintiff's Statement of Claim was struck as against the Defendants, pursuant to Rule 3.68.

**ALTEX ENERGY V MEYER, 2020 ABCA 368 (ROWBOTHAM, MCDONALD AND O'FERRALL JJA) Rules 3.72 (Consolidation or Separation of Claims and Actions) and 14.88 (Cost Awards)**

The Court heard Altex Energy's ("Altex") Appeal of a Case Management Judge's Decision to consolidate the Actions involving the two Respondents pursuant to Rule 3.72. The Respondents, Meyer and Greg Molaro ("Molaro"), were former employees of Altex who brought claims against Altex for wrongful or constructive dismissal, including allegations of abuse and oppression. In response, Altex filed substantially similar Statements of Defence and Counterclaims, alleging that the Respondents had conspired to act contrary to Altex's interests, therein breaching nearly identical provisions of their respective employment agreements.

Rule 3.72 states that two Actions may be consolidated for any reason the Court considers appropriate, including that the Actions (a) have a common question of law or fact, or (b) arise out of the same transaction or occurrence or series of transactions or occurrences. On Appeal, Altex argued that further evidence beyond the pleadings was required to satisfy Rule 3.72.

In dismissing Altex's Appeal, the Court of Appeal noted that the Case Management Judge consolidated the Actions due to the high degree of similarity of the pleadings and legal arguments which would be advanced at Trial. The Case Management Judge found that the allegation that the Respondents conspired weighed most strongly in favour of consolidation. The Court found that the Case Management Judge had complied with *Alliance Pipeline Limited v Universal Ensco Inc*, 2007 ABCA 285, which provides that the reliance on pleadings for consolidation is permissible where the pleadings "clearly contain the same factual allegations" and where "the extent of the commonality" is "clear on the face of the pleadings".

Additionally, the Court of Appeal noted that the Case Management Judge had found that Altex's allegation that the Respondents conspired to resign at the same time in order to cause maximum disruption to Altex's business gave rise to a possibility of inconsistent verdicts if tried separately. Moreover, the Case Management Judge found that a single Trial would use less resources given the significant factual overlap.

Finally, the Court stated that if the Respondents were to seek Costs pursuant to any Rule other than the default Rule 14.88, which awards Costs to the successful party on Appeal, they would have 20 days to file written submissions.

**KEEDER V ALGENDY, 2020 ABCA 420 (ANTONIO JA) Rules 4.20 (Confidentiality and Use of Information), 9.2 (Preparation of Judgments and Orders), 9.4 (Signing Judgments and Orders) and 14.5 (Appeals Only with Permission)**

This dispute arose between two parents with respect to Consent Orders. Both Consent Orders arose from a Judicial Dispute Resolution where Justice Phillips had the authority to make binding recommendations.

Justice Antonio noted that Rule 14.5(1)(d) states that no Appeal from a Decision made on the consent of the parties will be allowed unless permission to Appeal has been obtained. Mr. AlGendy filed a Notice of Appeal on August 21, 2020. In contravention of Rule 14.5(1)(d), Mr. AlGendy did not apply for permission before appealing the Consent Orders. Ms. Keeder filed a cross-Application to have Mr. AlGendy's Notice of Appeal struck for failing to comply with the Rules. In response, Mr. AlGendy applied for permission to Appeal.

Justice Antonio adopted the test from *Milner Power Inc v Alberta Utilities Commission*, 2019 ABCA 127, which stipulates that the Applicant must satisfy the Chambers Justice that the Appeal merits consideration by a panel of the Court of Appeal. Factors to consider include whether the Appeal raises a legal question of general importance, whether the Appeal has a reasonable chance of success, and whether it would cause undue prejudice. Mr. AlGendy argued that the Consent Orders should not have been filed without his signature, but Justice Antonio dismissed that argument on the basis of Rule 9.2(2)(c) and Rule 9.4(2)(c) which respectively allow an Order to be signed and entered when a party does not otherwise approve or object within 10 days of receipt, and allows the Court to direct that a party's approval is not required.

In relying on Rule 4.20, regarding the confidentiality of the Judicial Dispute Resolution process and the inapplicability of the rules of evidence in such a procedure, Justice Antonio dismissed Mr. AlGendy's Application for permission to Appeal. The cross-Application by Ms. Keeder was then moot.

**PELLETIER (RE), 2020 ABCA 450 (VELDHUIS JA)**
**Rules 4.22 (Considerations for Security for Costs Order) and 14.67 (Security for Costs)**

The Respondents appealed an Order that recognized Court Orders from the Cayman Islands declaring one of the Respondents bankrupt and freezing the assets of the other Respondent. The Applicants, as agents of the trustee in bankruptcy, applied for Security for Costs of the Appeal and to set aside a Stay Application for permission to intervene. In granting Security for Costs, Her Ladyship cited Rule 14.67(1) as allowing a single Appeal Judge to order a party to provide Security for payment of a Costs Award.

Her Ladyship also cited Rule 4.22, which allows a Court to order a party to provide Security for payment of a Costs Award if the Court considers it just and reasonable to do so, taking into account: (1) whether it is likely the Applicant will be able to enforce an Order or Judgment against assets in Alberta; (2) the ability of the Respondents to pay the Costs Award; (3) the merits of the Appeal; (4) whether an Order to give Security for Costs would unduly prejudice the Respondents' ability to continue the Appeal; and (5) any other matter the Court considers appropriate.

In finding it just and reasonable to award Security for Costs in the circumstances, Justice Veldhuis cited several considerations, including the merits of the Appeal, the existence of prejudice to the Applicants, the Respondents' history of funding legal counsel to unsuccessfully oppose Applications and Appeal Decisions despite being bankrupt, and how Costs of litigation are treated in insolvencies.

Justice Veldhuis directed the Respondents to post Security for Costs in the amount of $28,000 failing which the Respondents' Appeal would be struck without further Order.

**WILLOW V BOSECKE, 2020 ABQB 579 (NEILSON 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)**

Over the course of a professional negligence Action, the Plaintiff refused to accept either of two Formal Offers, and proceeded through to Summary Trial which culminated in the Court's dismissal of the Plaintiff's claim. In reference to the Formal Offers and the Cost consequences prescribed in Rule 4.29, the Defendants sought double Costs.

The Court acknowledged its overriding discretion in awarding Costs, as guided by Rules 10.29, 10.31, and 10.33. Justice Neilson set out to determine whether the Formal Offers were genuine and not merely an attempt to invoke the double Costs rule. The first Formal Offer, which was a discontinuance on a without Costs basis, had been served prior to the Plaintiff's discovery of the merits of the case, and was not held to have offered a genuine element of compromise. The second Formal Offer, which was a $50,000 settlement, was held to have constituted a genuine offer of compromise. Pursuant to Rule 4.29, the Defendants were awarded double Costs for all steps taken subsequent to the date of service of the second Formal Offer.

**SONG V ALBERTA, 2020 ABQB 583 (LEONARD J)**
**Rules 4.31 (Application to Deal with Delay) and 6.14 (Appeal from Master's Judgment or Order)**

In front of a Master, the Plaintiff had successfully defeated an Application for long delay brought pursuant to Rule 4.31. The Defendant subsequently appealed the dismissal by the Master. The parties did not dispute that the delay was inordinate, but the issues on Appeal were (1) whether the inordinate delay was excusable; and (2) whether the Defendant had suffered prejudice that impaired its ability to defend the claim.

The crux of the underlying claim was that Alberta owed the Plaintiff a duty of care by virtue of him being an inmate at the Remand Centre in Edmonton. It was alleged that Alberta failed to prevent a debilitating attack on the Plaintiff, therein breaching its duty of care.

Justice Leonard confirmed that Rule 6.14(3) provides that an Appeal from a Master is on the record and may also be based on new evidence that is relevant and material, including a fresh assessment of the facts.

The Court added that the six-part framework presented in *Humphreys v Trebilcock*, 2017 ABCA 116 (*"Humphreys"*) should be the starting point for the analysis of a Rule 4.31 Application, but that there is still judicial discretion. The Court emphasized that the conduct of both parties must be considered when determining whether a delay is excusable.

In applying the *Humphreys* framework, which focuses on whether an inordinate delay is excusable, the Court found that 38 months of unexplained inactivity was primarily attributable to the Plaintiff. In addition, the Court highlighted that it took four years to finalize the pleadings. The Defendant argued that it could not file a Statement of Defence until it received a response to its Demand for Particulars, and the Court found that delay was also attributable to the Plaintiff. The Court agreed with the Master's conclusion that the fifteen months it took to obtain the Edmonton Police Service investigative file was primarily attributable to the Plaintiff. The Court also found that the 2.5 years that it took the Plaintiff to fully provide his answers to Undertakings was attributable to the Plaintiff.

In sum, the Court concluded that the inordinate delay was inexcusable, and that prejudice to the Defendant was therefore presumed pursuant to Rule 4.31(2). Accordingly, the Court found that the Plaintiff failed to rebut the presumption and that in the circumstances, the Defendant suffered actual prejudice as a result of the delay. His Lordship underscored that after a 15-year delay, the memories of witnesses have most certainly faded.

Finally, the Court found that there were no compelling reasons not to dismiss the Action for delay, and dismissed the Action against the Defendant.

**LDS V SCA, 2020 ABQB 586 (BELZIL J)**
**Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)**

The Defendant applied to dismiss the Action pursuant to either Rule 4.31 or 4.33. The Statement of Claim alleged that the Defendant had hacked the Plaintiff's email account and, without her consent, sent intimate pictures of the Plaintiff to her partner and posted the pictures to pornographic websites.

Justice Belzil noted that an Anton Pillar Order ("APO") had been granted in May 2016 and that an Independent Supervising Solicitor ("ISS") was appointed through the APO to conduct a forensic investigation of the Defendant's electronic devices which may have been used in the alleged acts. Through the ISS's production of 3 investigative reports, Justice Belzil found that the ISS reports significantly advanced the Action as required by Rule 4.33, since the forensic analysis was required to determine the veracity of the Plaintiff's claims.

The Court also dismissed the Application pursuant to Rule 4.31 because the sheer volume of the electronic records found in the APO caused the search to be time consuming. Additionally, the investigation was delayed when the ISS identified search terms which may have yielded privileged search results and thus, required modification.

Furthermore, His Lordship noted that the Defendant's own conduct in misleading the ISS about his ownership of an iPad and laptop, which were relevant to the investigation, had the effect of delaying the Action. As such, Justice Belzil stated that it would not be "just or equitable" to dismiss the Action before the ISS was able to prepare the final investigative report.

Finally, Justice Belzil noted that Rule 4.31(b) permits the Court to make procedural Orders related to the proceeding. As His Lordship had been appointed as Case Management Justice in the Action, he ordered the parties to arrange a Case Management appearance within 7 days to schedule the Plaintiff's Application dealing with a Notice to Admit and to consider whether any further procedural Orders are required.

**TS V CHARKHANDEH, 2020 ABQB 796 (MASTER SCHLOSSER)**
**Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)**

The Applicant applied to dismiss an Action for long delay pursuant to Rules 4.31 and 4.33.

Rule 4.33 provides that the Court must dismiss an Action against an Applicant if three or more years pass without a significant advance in the Action. Master Schlosser determined that the Action was advanced by the Defendants' Affidavit of Records served on June 17, 2016. The next potentially significant step in the litigation was an Application for a procedural Order and a litigation plan, which was scheduled for June 13, 2019. However, this Application was adjourned at the request of the Applicant.

The Applicant argued that a procedural Order was not a significant step and that scheduling an event does not constitute an advance unless the event actually takes place. Master Schlosser held that the Court must consider the position the parties would have been in on June 13, 2019, if the procedural Application went ahead. The Court noted that a procedural Order becomes necessary when a lawsuit is not advancing as it should. Master Schlosser held that the procedural Application likely would have been successful and would have constituted a significant advance if it proceeded as scheduled. Thus, the Court dismissed the 4.33 Application.

Master Schlosser also dismissed the Rule 4.31 Application. Rule 4.31(1)(a) allows the Court to dismiss an Action if the Court determines that delay has resulted in significant prejudice to a party. The Court noted that the first major delay occurred when one of the Defendants was unavailable for Questioning because he was outside of Canada. The Court determined that the second major delay appeared attributable to the Plaintiff but was excusable. The Court held that because there was not both inordinate delay and inexcusable delay, prejudice was not presumed. The Court rejected the Applicants' prejudice claims and dismissed the Application.

**OMNIARCH CAPITAL CORPORATION V BISHOP, 2020 ABCA 472 (STREKAF, ANTONIO AND FEEHAN JJA)**
**Rules 4.31 (Applications to Deal with Delay) and 4.34 (Stay of Proceedings on Transfer or Transmission of Interest)**

The Plaintiffs in the underlying Action (the Respondents in the Appeal) raised funds for investments in residential mortgage backed securities in America. They eventually obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "CCAA"). The Monitor that was assigned found significant irregularities, and the Respondents then began the underlying Action to try and recover nearly $50 million in damages connected to the irregularities on April 5, 2017. The Appellant, which was also a Defendant in the underlying Action, was served with a Statement of Claim on May 10, 2017 and advised that it did not need to file a Statement of Defence and that no steps would be taken against it without reasonable notice.

Fourteen Defendants were noted in default and the Respondents settled with four Defendants. The Court of Queen's Bench granted an Order that required changes to OmniArch Capital Corporation. Durum Opportunities LP ("Durum") purchased the assets of OmniArch Capital including the right to pursue the Action, and pursuant to

Rule 4.34, the Action was stayed. In 2019 Durum obtained new counsel, advised the Appellant of the assignment of the right to pursue the Action, and provided it with a copy of the asset purchase agreement. This was the first time the Appellant learned of the settlement agreement, Notings in Default, and assignment of the right to pursue the Action. The Respondent then filed an Application pursuant to Rule 4.34 to continue the Action and the Appellant cross-applied to dismiss the action pursuant to Rules 4.34(4) and 4.31. The Chambers Judge granted an Order which, amongst other things, (1) granted the Application by Durum to continue the Action pursuant to Rule 4.34, (2) dismissed the Application by the Appellant to dismiss the Action pursuant to Rules 4.34(4) and 4.31, and (3) ordered that any Application by the Appellant regarding certain settling Defendants be brought within 60 days. These three portions of the Order were appealed.

Pursuant to Rule 4.34(4), if an Order to continue an Action is not made within a reasonable time after it was stayed, an Application could be dismissed for delay under Rule 4.31. The Appellant's factum did not address the Chamber Judge's finding regarding Rule 4.34(4). In fact, counsel agreed that Rule 4.34(4) served as a gateway to Rule 4.31. The Court noted that the objective in applying Rule 4.31 was to determine whether a delay was inordinate, inexcusable or otherwise caused significant prejudice to the Defendant: more specifically, whether the delay itself had caused significant prejudice. If the delay was inordinate or inexcusable, significant prejudice was presumed. The Appellant was aware of the *CCAA* proceeding and the appointment of a Monitor, and therefore the Appellant's concerns were that it had not been advised of other steps so that it could determine whether to oppose or intervene in those steps. The Court of Appeal determined that the Appellant did not suffer any prejudice from the delay but from the lack of opportunity to participate in other steps, noted that it would be unjust to dismiss the Action for delay when other remedies where available to the Appellant, and dismissed the Appeal.

**SECOND REAL PROPERTIES LIMITED AS REPRESENTED BY AVISON YOUNG TAX SERVICES V CALGARY (CITY), 2020 ABQB 629 (MASTER FARRINGTON)**
**Rule 4.33 (Dismissal for Long Delay)**

The Applicant applied to dismiss an Originating Application for delay pursuant to Rule 4.33, which requires a Court to dismiss an Action if there has been no significant advance for three years or more.

The Respondent had filed the Originating Application for leave to appeal two municipal taxation decisions on September 9, 2016. The Respondent requested dates that the Applicant's counsel was available for the hearing of the Originating Application on November 16, 2017. The Applicant's counsel stated that their schedule was booked for a year. No further steps were taken until the Respondent requested available dates from the Applicant's counsel again on September 25, 2019.

The Court granted the Application and dismissed the Action pursuant to Rule 4.33. Master Farrington determined that requesting available hearing dates was not a significant advance. The Court noted that some cases have denied a party success on a Rule 4.33 Application based upon the applying party's conduct. However, Master Farrington held that the Applicant's conduct did not rise to a level capable of denying the Application. The Court also declined to impose a suspension period under Rule 4.33(9) retroactively.

**ASENIWUCHE WINEWAK NATION OF CANADA V ACKROYD LLP, 2020 ABQB 666 (MASTER SCHLOSSER)**
**Rules 4.33 (Dismissal for Long Delay) and 7.3 (Summary Judgment)**

The Applicant applied for Summary Dismissal of a professional negligence Action pursuant to Rule 7.3. The Applicants were solicitors for the Respondent First Nation in an Action that was dismissed for long delay under Rule 4.33.

In the underlying Action, the Respondent First Nation commenced an Action against the Attorney General of Canada ("Canada") and Her Majesty the Queen in Right

of the Province of Alberta ("Alberta"). Canada and Alberta applied to strike the underlying Action for long delay per Rule 4.33. The Court of first instance denied the Application. The Alberta Court of Appeal overturned this Decision, and the underlying Action was struck.

In this case, the issue was when the limitations clock started to run for the Respondent to commence an Action in professional negligence against its former lawyers in the underlying Action. Section 3 of the *Limitations Act*, RSA 2000, c L-12 requires knowledge of an injury attributable to the conduct of the Defendant and that proceedings are warranted. The Applicants argued that the limitations clock started to run with the Applications to dismiss the underlying Action at the Court of first instance.

Master Schlosser rejected the Applicant's limitations argument and dismissed the Applicant's Application. The Court noted that the Decision by the Court of first instance was binding and conclusive unless set aside on Appeal. As such, Master Schlosser stated that it is difficult to see how a proceeding could be warranted in the face of the Decision of first instance or how there could be an injury consisting of the loss of the underlying Action.

Further, Master Schlosser noted that the Court of Appeal's Decision contained a strong dissent. The Court held that in cases where the facts need to be evaluated in accordance with a legal test, a potential litigant cannot be expected to correctly anticipate the final result. In this case, the dissenting Justice of the Court of Appeal who heard the motions to strike for long delay did not agree with the final result. Master Schlosser concluded that the law cannot require such a high standard on litigants. Thus, the limitations clock did not start to run with the Applications to dismiss the underlying Action, and the Applicant's Summary Dismissal Application was dismissed.

**PATIL V CENOVUS ENERGY INC, 2020 ABCA 385 (O'FERRALL, KHULLAR AND FEEHAN JJA)**
**Rule 4.33 (Dismissal for Long Delay)**

This was an Appeal of a Chambers Justice's decision to dismiss the Action for long delay pursuant to Rule 4.33. The litigation was commenced in July 2012; it proceeded with several litigation steps having been taken until May 2014. On April 6, 2015 the Respondent made a request for further documents. On May 17, 2016 the Appellant provided a letter enclosing responses to some of the requests and rejecting others, and in that same letter the Appellant indicated he would abandon some of his claims. On May 26, 2017 the parties consented to an Order for a Case Management Conference. 14 days before the Case Management Conference was to be heard, the Respondents filed an Application to dismiss the claim for long delay pursuant Rule 4.33. The question before the Court was whether the events of May 17, 2016 or May 26, 2017 had significantly advanced the Action.

The Court examined various legal principles in interpreting Rule 4.33, namely that: Plaintiffs bear the responsibility of prosecuting their claims in a timely manner; Defendants are obliged not to obstruct, delay or stall an Action; a context specific functional approach is appropriate to determine if a step constituted a significant advance in an Action; only one significant advance in an Action is needed in a three year period; and that whether or not an agreement constituted an advance in an Action is context specific.

The Court noted that Rule 4.33 was designed to prune Actions that had truly died and that Rule 4.33 was not meant to regulate the efficient prosecution of Actions. The Chambers Judge found that the Appellant's abandonment of certain claims alone did not advance the Action as those claims were doomed to fail. The Respondent did request document production because it thought that it was important, and the Appellant did provide some documents in response and objected to other requests. Conduct money and further document production became a key roadblock, and the Appellant had tried to address this roadblock by obtaining a Case Management Order. The Court of Appeal found that the abandonment of claims, document production and objections, and Case Management Order, separately and cumulatively, constituted a significant advance in the Action.

The Appeal was allowed and the Action was restored.

**COVEY V DEVON CANADA CORPORATION, 2020 ABCA 445 (O'FERRALL, KHULLAR AND FEEHAN JJA)**
**Rules 4.33 (Dismissal for Long Delay), 11.21 (Service by Electronic Method) and 13.4 (Counting Months and Years)**

The Appellant appealed the Chambers Judge's Decision to dismiss the Action for long delay. The Appellant was an individual Plaintiff who, in 2015, had commenced an Action against his former employer. After the filing of the Statement of Claim and Statement of Defence, the Respondent employer successfully applied to strike portions of the Statement of Claim. Subsequently, the Appellant failed to take any steps until 3 years less a day later when he purported to serve an Affidavit of Records (the "AOR") on the Respondent by email after business hours.

The Respondent applied to dismiss the Action pursuant to Rule 4.33. Rule 4.33 permits a party to apply for dismissal of an Action where, absent certain extenuating circumstances, "3 or more years have passed without a significant advance in an [A]ction". The Respondent argued that the AOR was insufficient to satisfy the requirements imposed by Rule 4.33 because it had been served too late, was incomplete, and was inaccessible to the Respondents since it contained privileged materials. The Respondent's argument was bolstered by the fact that the Appellant had later provided significant additional documentation in a supplementary Affidavit of Records.

In evaluating the Appellant's argument, the Court applied the "functional approach", as set out in *Weaver v Cherniawski*, 2016 ABCA 123. The Court observed that this approach "requires the Chambers Judge to determine whether the step said to be a 'significant advance in an action' actually moves the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and timing of the step are also relevant. The focus is on the substance of the step taken and its effect on the litigation, rather than on its form." Applying this test in light of the Respondent's assertions, the Court upheld the Chambers Judge's Decision to dismiss the Action for delay pursuant to Rule 4.33, and dismissed the Appeal.

Despite this, the Court went on to address two of the Respondent's alternative arguments. The Respondent's alternative arguments concerned the proper method of calculating three years pursuant to Rule 4.33 and the consequences, if any, of the Appellant's failure to serve the AOR within regular business hours. Addressing the first alternative argument, the Court held that Rule 4.33's reference to "3 or more years" means that a party must have taken some step to significantly advance the Action by the "end of the day" on the day "that is the same number date", three years from the date of the last significant advance. In coming to its Decision, the Court applied Rule 13.4(3) (Counting months and years), and also the Foundational Rules, insofar as they require that the Rules be accessible to all litigants and encourage fair and just resolutions.

Regarding the Appellant's alleged failure to serve the AOR within regular business hours, the Court of Appeal held that it was irrelevant that the AOR was emailed after close of business when calculating time for Rule 4.33. The Court noted that Rule 11.21(1)(b) states that electronic service is not deemed effective until receipt of confirmation that service has been received. Since there was no evidence presented to determine when confirmation was provided, it could not be said when service was effected. In general, service will be effected where a document is sent and confirmation is received, regardless of whether that confirmation is received during regular business hours.

**PARKS V MCAVOY, 2020 ABQB 675 (HOLLINS J)**
**Rules 5.2 (When Something is Relevant and Material) and 6.8 (Questioning Witness Before Hearing)**

The Plaintiff contracted Woodparke Homes Ltd. ("Woodparke") to build a custom home. While the Plaintiff's home was completed in 2014, the Plaintiff alleged that significant defects rendered the house uninhabitable. The Plaintiff applied to compel Woodparke and its principal, Mr. McAvoy, to produce various financial documents. The Defendants cross-applied to compel the Plaintiff to produce documents provided to the Plaintiff by third

parties to whom the Plaintiff had issued Appointments for Examination under Rule 6.8, and documents relating to a third party with which the Plaintiff had settled.

Hollins J. set out the legal test for a document to be producible under Rule 5.2(1). A record will be relevant and material, and thus producible, if it can reasonably be expected to significantly help determine issues raised in the pleadings or ascertain evidence to do so. The Court stated that relevance is primarily determined by the pleadings while materiality is a measure of the likelihood that a record will help to resolve the case or lead directly to other evidence that will do so.

Justice Hollins then considered the records that the Plaintiff requested. The Plaintiff alleged that Mr. McAvoy misapplied or misappropriated money between the Plaintiff's home and Mr. McAvoy's home, which Mr. McAvoy was constructing at the same time. Thus, the Court determined that records relating to the construction of the Plaintiff's home and certain records relating to Mr. McAvoy's home were producible. However, Justice Hollins held that general financial information of Woodparke need not be disclosed.

The Plaintiff had also requested broad information relating to Woodparke's employees. Justice Hollins determined that this information should be produced for employees who were paid based on the number of hours they worked on the Plaintiff's home between 2010 and 2014. The Court held that the relevance of employee information for salaried employees would have to be proved in Questioning. The Court also reduced the timeframe for the Plaintiff's request for records to the period between 2010 and 2014.

The Court denied the Defendants' Rule 6.8 request to compel the Plaintiff to produce documents relating to third parties. Justice Hollins stated that it was unclear what non-party documents the Defendants were seeking. In addition, the Court stated that it was unclear how documents relating to the Plaintiff settling with third parties would assist Woodparke in preparing for Trial.

**BROWN V HRT MOTORS, 2020 ABQB 620 (DEVLIN J)**
**Rule 5.16 (Undisclosed Records Not to be Used Without Permission)**

The Plaintiff was dismissed without cause from the Defendant, High River Toyota. A Summary Trial was held to determine the amount the Plaintiff was entitled to as damages in lieu of notice of termination of his employment. The Court heard from two witnesses, the Plaintiff and Saleem Budhwani ("Mr. Budhwani"), who appeared as a corporate representative for High River Toyota.

Mr. Budhwani swore an Affidavit on November 6, 2019, barely two weeks prior to the Summary Trial. The Plaintiff objected to the admissibility of the Affidavit and its appending documents as the information had not been disclosed to him before early November 2019. The Plaintiff argued that the Defendant's late production Affidavit and records engaged Rule 5.16. Rule 5.16 provides that a party who does not disclose a relevant and material record in an Affidavit of Records may not thereafter use the record in evidence in the Action unless the parties agree otherwise or the Court otherwise orders.

Here the Court ruled that the physical records should be excluded on the basis of noncompliance with Rule 5.16. Nonetheless, the Court permitted Mr. Budhwani to give oral evidence as to what the effect of the records were. Ultimately the Court found that Mr. Budhwani's oral evidence alone was insufficient to discharge the Defendant's burden of proof on balance of probabilities as to what the Plaintiff's actual loss would have been. The Court found that the Defendant did not prove what the value of the Plaintiff's lost opportunity to earn commissions over the past year actually was. The Court underscored that the Defendant did not comply with the Rules in respect of the financial information it sought to rely upon to reduce the Plaintiff's damages.

**CICALESE V SSMPG INTEGRATING SERVICES INC, 2020 ABQB 605 (MASTER ROBERTSON)**
**Rules 5.29 (Acknowledgment of Corporate Witness's Evidence), 5.31 (Use of Transcript and Answers to Written Questions), 6.6 (Response and Reply to Application), 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)**

This Application involved consideration of the meaning of putting one's "best foot forward" in an Application for Summary Judgment, and the extent of the Applicant's burden of proof when the burden at Trial on a particular point would be on the Respondent.

The Plaintiffs applied for Summary Judgment on claims pertaining to the repayment of loans. The Defendant opposed Summary Judgment, arguing that the loans had been repaid. In the alternative, the Defendant sought Summary Dismissal of the claim, even though it did not file an Application to that effect nor did it provide Affidavit evidence. The Court noted that in order to be successful, it would have to rely on the Plaintiffs' evidence or other evidence showing that the grounds for Summary Dismissal were met, pursuant to Rule 7.3(2).

The Plaintiffs attempted to rely on evidence given by one of the directors of the Defendant (Mr. Kinder) in pre-trial Questioning, but that testimony had not yet been put to the corporate representative of the Defendant for him to acknowledge on behalf of the Defendant pursuant to Rule 5.29. The Court rejected use of Mr. Kinder's evidence, dismissed the Defendant's request for Summary Dismissal, and granted Judgment for the cheque amounts.

The Defendant provided an Affidavit from Mr. Mooney, another director of the Defendant, which provided evidence that the agreement between the Plaintiff and Defendant was made under duress. However, Mr. Mooney was not in the room when the agreement was made.

The Court canvassed the issue of hearsay evidence provided by a Respondent to a Summary Judgment Application, and confirmed that Rule 13.18 clearly allows hearsay from the Respondent to an Application where the Respondent is not seeking final relief if the source of the information provided and the affiant states their belief in the information. However, the Applicant for final relief (for example, and Applicant for Summary Judgment or Summary Dismissal) must provide evidence of personal knowledge and/or rely on other evidence to the effect that there is no defence to a claim or part of it, pursuant to Rule 7.3.

In this case, the conditions were met to allow the Respondent/Defendant to rely on hearsay evidence in opposing the Application. However, the hearsay evidence could only be used to show that at some unspecified time Mr. Kinder said that he had signed the agreement under duress, not that he was actually under duress. The Court underscored that it is a basic rule of the law of evidence that evidence that a statement was made is not the same as evidence of the truth of the contents of the statement.

The Plaintiffs attached to their Brief some excerpts from an examination of Mr. Kinder under Part 5 of the Rules. The Plaintiffs argued that Rule 5.31 allows for the use of that transcript in support of an Application as against a party adverse in interest. The Court determined that until evidence has been put to the corporate witness to acknowledge the evidence as information of the corporation pursuant to Rule 5.29, it is not the evidence of the "other party", and that it was only Mr. Kinder's evidence, not the Defendant's. Master Robertson emphasized that there is a good reason for this Rule: if the Defendant is required to acknowledge it (thereby making it the Defendant's evidence), the Defendant may also qualify the acknowledgment with further evidence that is contrary, pursuant to Rule 5.29(3). The Court therefore disallowed the use of the transcript evidence of Mr. Kinder which was not yet put to the corporate representative of the Defendant.

The Defendant did not file any Affidavit in response to the Application until days before the Plaintiffs' Brief was due. The Court noted that Rule 6.6(1) requires that the Respondent to an Application file any Affidavit or other evidence in reply a "reasonable time" before the Application is to be considered. The Court added that pursuant to Rule 6.6(3) the late presentation of evidence should not be tolerated.

In the result, the Court granted Summary Judgment in favour of the Plaintiffs for the full amount of the debt. Further, the Court granted interest up to the date of the release of the Court's Decision. The Court dismissed the Defendant's request for Summary Dismissal.

**BARBE V EVANS, 2020 ABQB 599 (KENDELL J)**
**Rules 5.39 (Use of Expert's Report at Trial without Expert), 8.15 (Notice of Persons not Intended to be called as Witnesses) and 8.16 (Number of Experts)**

The Plaintiff sued his former physician and hospital in negligence, and his former physician for breach of informed consent.

The Plaintiff asked that the Court draw an adverse inference against the Defendant hospital for choosing not to call any evidence as well as for failing to serve a Notice under Rule 8.15. Justice Kendell noted that while Rule 8.15 authorizes the drawing of an adverse inference, it does not require it. Kendell J. found that the drawing of an adverse inference was not appropriate in this case. Her Ladyship stated that it was unclear what adverse inference could possibly be drawn, given that all other evidence led to the conclusion that the Defendant hospital had not breached the standard of care.

The Plaintiff retained two physician experts who had prepared expert reports: Dr. Woods and Dr. Elhilali. Dr. Elhilali passed away after authoring his expert report but prior to the Hearing. The Defendant served a rebuttal expert report prepared by Dr. Zorn, one month after Dr. Elhilali's passing. The Defendant argued that any mention of Dr. Elhilali's expert report referred to in other expert reports should be redacted. The Defendant argued that any such references would amount to the introduction of Dr. Elhilali's evidence through the other reports, contrary to Rules 8.16 and 5.39.

Kendell J. cited *Smith v Obuck*, 2018 ABQB 849 for the proposition that Rule 8.16 must be guided by its objectives of preventing the unnecessary abuse, expense, and delay that may be caused by the excessive use of experts. These objectives must be balanced against a Plaintiff's right to fully present their case.

Ultimately, Justice Kendell redacted certain portions of Dr. Woods' expert report which referred to Dr. Elhilali's report. Kendell J. did so because of the prejudice that these references may cause to the Defendant physician. With respect to the remaining references to Dr. Elhilali's report, Kendell J. held that they provided useful context and helped the Court understand the evidence and should therefore not be redacted.

**PETROBAKKEN ENERGY V NORTHRIDGE ENERGY, 2020 ABCA 470 (SLATTER, MCDONALD AND ANTONIO JJA)**
**Rule 6.3 (Applications Generally)**

PetroBakken Energy's insurers (of pollution liability insurance for PetroBakken) commenced an Action related to a pipeline spill against Northridge Energy Development Group Inc. and Bandit Pipeline Ltd. A number of Third Party Claims were subsequently filed. PetroBakken Energy then obtained protection pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the *"CCAA"*), and sold all of its assets, including this litigation, to Ridgeback Resources Inc.

One of the third parties filed an Application for Summary Dismissal on the basis that the PetroBakken entities no longer existed following the *CCAA* protection. The Case Management Judge (the "CMJ") granted the Application on that basis, and PetroBakken appealed.

The Court of Appeal considered whether the CMJ had erred in granting Summary Dismissal. The Appellant cited Rule 6.3(2) which prescribes the requirements for an Application, including subrule (b) which requires the Application to include the grounds for filing the Application and subrule (e) which requires any irregularity complained of to be specified. Upon review, the Court of Appeal found that the Application as argued before the CMJ was very different than the one described in the Application, and on that basis, the Court of Appeal granted the Appeal and vacated the Summary Dismissal Order.

**BROSSEAU ESTATE V DUBARRY ESTATE, 2020 ABQB 601 (MASTER SCHLOSSER)**
**Rule 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)**

In an Action containing numerous claims among parties affected by a fatal aircraft crash, two Defendants and their insurer brought cross-Applications seeking summary disposition of a coverage dispute. A Plaintiff swore an Affidavit in respect of these cross-Applications, and was cross-examined on that Affidavit by counsel for the insurer specifically involved in those cross-Applications, and also by counsel for other insurers not specifically involved in those cross-Applications (but nonetheless parties to the Action). A dispute arose as to whether the transcript for this latter cross-examination should be included in the record of evidence for the cross-Applications.

The Court reviewed Rule 6.7 and observed that any "person" (i.e. not restricted to a party) may cross-examine any person making an Affidavit if those two persons are adverse in interest with respect to the subject Application. Master Schlosser found that the separately represented insurers were not adverse in interest with respect to the cross-Applications in question, and therefore, the impugned portion of the transcript of cross-examination was to be excluded from the record.

**FEENEY V SIMON, 2020 ABQB 641 (ROOKE ACJ)**
**Rules 6.9 (How the Court Considers Applications), 9.4 (Signing Judgments and Orders), 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 Plaintiff and Defendants both filed several Applications in three related lawsuits emerging from allegations of police and prosecutorial wrongdoing.

The Plaintiff had applied to find Alberta and two Crown Prosecutors in Contempt of Court (the "Contempt Application"). Justice Anderson had previously ordered the Contempt Application to be adjourned *sine die*, to be heard at a Special Application. Subsequently, Justice Poelman ordered that the Contempt Application would be heard as a Special Application in October of 2020. Associate Chief Justice Rooke then held that, as Case Management Judge, the Contempt Application would take place before him.

Associate Chief Justice Rooke held that in the interest of ensuring that the Plaintiff had the full opportunity to make submissions, and considering COVID-19, the Application would be conducted on a document-only basis pursuant to Rule 6.9(1)(c). His Lordship then provided a timeline for Affidavit evidence. Finally, His Lordship required the Respondents to prepare and serve the Case Management Order regarding the timelines and held that, pursuant to Rule 9.4(2)(c), the Applicant's approval of the Order was dispensed with.

The Defendant, Alberta, had filed an Application that sought a Court Order to remove documentary material (the "Confidential Materials") from the Court files of the first two Actions. In determining that the Confidential Materials the Plaintiff had filed in the first two Actions should be removed from the record, Associate Chief Justice Rooke noted that Alberta was presumptively due Costs because of its success on its Application, pursuant to Rule 10.29(1). Further, His Lordship highlighted that the Court has broad authority per Rule 10.31 to determine whether Costs should be awarded, and their quantum. Lastly, in noting the Plaintiff's expanding litigation misconduct and in awarding Alberta an elevated lump sum Cost Award, the Court confirmed that, pursuant to Rule 10.33(2)(g), the misconduct of a party is a relevant factor in determining the quantum of Costs awarded.

**FEENEY V SIMON, 2020 ABQB 759 (ROOKE ACJ)**
**Rules 6.9 (How the Court Considers Applications), 9.4 (Signing Judgments and Orders) and 10.52 (Declaration of Civil Contempt)**

The Applicant applied to hold several parties in Contempt of Court. This Application related to three lawsuits that the Applicant initiated alleging police and prosecutorial wrongdoing.

Rooke A.C.J., as Case Management Justice, previously determined that the Application would be conducted on a document only basis pursuant to Rule 6.9(1)(c). However, the Applicant failed to file materials before the deadline. Rooke A.C.J., as Case Management Justice, determined that the Application could be dealt with without submissions from the Respondent.

Rooke A.C.J. dismissed the Application. The Court determined that there was no basis for how the Applicant's allegations may constitute a claim for Contempt of Court. The Court noted that the Applicant did not allege that the Respondents engaged in conduct identified in Rule 10.52(3), which sets out the basis for Contempt of Court. The Applicant did not allege that the Respondents failed to comply with a Court Order, were non-compliant witnesses, failed to perform or observe an undertaking, breached an enactment, or engaged in contemptuous behaviour while before the Court.

As a result, Associate Chief Justice Rooke ordered the Applicant to pay the Respondents $2,500 in Costs. The Court also ruled that the Applicant's approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

**PARIKH V CANADIAN IMPERIAL BANK OF COMMERCE (CIBC), 2020 ABCA 367 (GRECKOL JA)**
**Rules 6.14 (Appeal from Master's Judgment or Order) and 14.4 (Right to Appeal)**

The Applicant applied for permission to appeal a Consent Order signed by a Master. Rules 6.14 and 14.4(4) provide that a Decision from a Master in Chambers cannot be appealed directly to the Court of Appeal. Instead the proper forum for an Appeal of a Master's Order is a Justice of the Court of Queen's Bench.

Here, the Applicant was a self-represented litigant. The Court acknowledged that the Applicant's lack of familiarity with the Rules may have contributed to his mistaken belief that his Appeal should be heard in the first instance by the Court of Appeal. The Court stated that it understood the difficulties facing the Applicant, but that all litigants must comply with the Rules. The Court underscored that section 12 of the *Judicature Act*, RSA 2000, c J-2 also states that the proper forum for an Appeal from a Master's Order is a Justice of Queen's Bench. In the result, Justice Greckol dismissed the Application.

**O'MHAOINIGH V UNITED SAFETY INTERNATIONAL LTD, 2020 ABQB 672 (MASTER PROWSE)**
**Rule 6.21 (Preserving Evidence for Future Use)**

The Defendant applied for an Order preserving the evidence of three witnesses pursuant to Rule 6.21.

Master Prowse cited *Schwartz Estate v Kwinter*, 2008 ABQB 288 in support of the test for preserving evidence. Master Prowse stated that the issues to be considered under Rule 6.21 are whether the Order preserving evidence is necessary, whether the evidence of the witnesses is material, and the impact on the fairness of the process.

The three witnesses in question did not hold Canadian citizenships, did not normally reside in Canada, and did not travel to Canada regularly. The proceedings were at an early stage and a Trial was not anticipated for several years.

Master Prowse held that the witnesses' testimony was material. Master Prowse observed that the third witness was still an employee of the Defendant, whereas the other two witnesses were former employees. The "necessity" aspect of the above test was therefore not met with respect to the third witness. Master Prowse ultimately ordered the preservation of the evidence of two out of the three witnesses, recognizing that the Plaintiffs would suffer no disadvantage by cross-examining the two witnesses at that point in time.

**P & C LAWFIRM MANAGEMENT INC V SABOURIN, 2020 ABCA 449 (WAKELING, CRIGHTON AND FEEHAN JJA)**
**Rules 6.44 (Persons who are Referees), 6.45 (References to Referee), 6.46 (Referee's Report) and 7.3 (Summary Judgment)**

A Master had granted Summary Judgment for the legal fees following a dispute of an account. Ms. Sabourin had successfully appealed to the Chambers Judge, and P & C Lawfirm Management then appealed to the Court of Appeal.

At issue in the Appeal was whether this matter was appropriate for Summary Judgment pursuant to Rule 7.3. The Court referred to the governing principles as set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49. The Court of Appeal found that although the Chambers Judge referenced this same case, that it was not applied correctly and, as such, improperly allowed the Appeal. Namely, the Court of Appeal found that it was possible to fairly resolve the dispute on the record. The Chambers Judge erroneously found that the assertions of Ms. Sabourin raised some issues of fairness, but the Court of Appeal noted that the bare assertions of Ms. Sabourin were contrary and wholly unsupported by the other evidence.

The Appeal was allowed in part, and Summary Judgment for three of the four accounts was awarded to the law firm. The Court of Appeal referred the matter to Masters Chambers to conduct an inquiry and determine the quantum of the award, pursuant to Rules 6.44(a), 6.45, and 6.46.

**HANNAM V MEDICINE HAT SCHOOL DISTRICT NO 76, 2020 ABCA 343 (O' FERRALL, WAKELING AND FEEHAN JJA)**
**Rules 7.1 (Application to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)**

The Defendants appealed the Chambers Judge's dismissal of their Application for Summary Dismissal. The Court of Appeal took the opportunity to discuss the historical development of Summary Judgment law in Canada and other common law jurisdictions before allowing the Appeal and summarily dismissing the Plaintiff's personal injury claim.

The Court of Appeal noted that the Chambers Judge did not have the benefit of Alberta's current Summary Judgment authority: *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.*, 2019 ABCA 49 (*"Weir-Jones"*) at the time of the Decision. As a result, the Chambers Judge erred in considering whether it was obvious that there was an issue requiring Trial.

In response, the Court of Appeal clarified the Rule 7.3 test for Summary Judgment as set out in *Weir-Jones*. This test for Summary Judgment asks whether the moving party has established the facts in issue on a balance of probabilities, and thus there is no genuine issue requiring a Trial. Significantly, this conclusion need not be obvious. The Court may make contested findings on material facts in an Application for Summary Judgment despite the judiciary's historical hesitance to do so. Similarly, the Court of Appeal stressed Justice Slatter's comment in *Weir-Jones* that adjudicators can even hear oral testimony during an Application for Summary Judgment.

Moreover, the Court of Appeal explained that while the text of Rule 7.3 does not ask whether there is a genuine issue requiring a Trial, the natural conclusion if there is no defence or merit to a claim is that there is no genuine issue requiring a Trial. As such, the "genuine issue" inquiry leads to the same conclusion as asking whether a claim has merit, or a valid defence.

Finally, while discussing alternatives to a Trial, the Court of Appeal noted Rule 7.1, which allows one specific issue or question in a dispute to be heard independently from the larger claim in order to streamline the broader litigation. The Court of Appeal emphasized that this function is used less frequently than it should be when considering the current movement towards resolving litigation through less cumbersome and costly processes than the traditional Trial.

**DHILLON V HUNDAL, 2020 ABQB 522 (NEILSON J)**
**Rule 7.3 (Summary Judgment)**

The Respondents signed an offer to purchase a share in a franchise (the "Offer to Purchase") and made several installment payments towards the franchise interest. The Respondents consulted the Applicant lawyer. The Applicant informed the Respondents that the Offer to Purchase had been done improperly and that the Respondents' money was at risk.

The Applicant attempted to rectify the problems with the Offer to Purchase on the Respondents' behalf but was unsuccessful. The franchisor rejected the Respondents' application to purchase the franchise. The Respondents

sued the Applicant in negligence for allegedly providing a warranty to the franchise transaction.

The Applicant applied for Summary Dismissal of the claim against him per Rule 7.3. Neilson J. noted that Rule 7.3 allows a party to apply for Summary Judgment where there is no merit to a claim part of it. The Court reviewed the approach of the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7.

The Respondents' claim was based in negligence and required proof of a duty of care, breach of the standard of care, compensable damages, and causation. As the Respondents' lawyer, the Applicant owed the Respondents a duty of care. However, the Court determined that the Applicant did not breach the standard of care. Justice Neilson found that several of the Respondents' claims, like providing advice regarding the lack of security for money already paid, were outside the scope of the Applicant's retainer.

Further, the Court determined that the Respondents failed to establish that the damages alleged were caused by the Applicant's advice or lack thereof. The losses alleged by the Respondents concerned the installment payments the Respondents paid before consulting the Applicant. Neilson J. therefore granted the Application for Summary Dismissal of the claim.

**CANADA TRUST COMPANY (MCDIARMAID ESTATE) V ALBERTA (INFRASTRUCTURE), 2020 ABQB 580 (LOPARCO J)**
**Rule 7.3 (Summary Judgment)**

The Plaintiff claimed for an alleged breach of duty by the Government of Alberta (the "Government") during the negotiation and purchase of the McDiarmaid lands. The Government then made an Application for Summary Dismissal on the basis that the claim was statute barred by the *Limitations Act*, RSA 2000, c L-12 (the *"Limitations Act"*).

Rule 7.3 governs Applications for Summary Dismissal and Summary Judgment. Subrule (1) allows Summary Judgment when there is no defence to the claim, no merit to the claim, or the only real issue is the amount to be awarded. Subrule (2) requires that an Affidavit be provided in support of the Application. Although the Government did not file an Affidavit, Madam Justice Loparco considered whether Summary Judgment was appropriate. As stated by Justice Loparco, and pursuant to *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49: "[T]he moving party must meet the burden of showing the claim has "no merit" based on facts proven on a balance of probabilities. If the moving party meets this burden, then the resisting party must put its best foot forward to demonstrate that a triable issue remains."

Madam Justice Loparco then applied the test set out in *Hryniak v Mauldin*, 2014 SCC 7 and found that the record was sufficient to make a fair and just determination. As a result, Justice Loparco discussed the facts surrounding the claim and the relevant law on limitations and determined that two of the claims were statute barred by the *Limitations Act*, but the remainder of the claims were not statute barred and rather were genuine issues requiring a Trial.

**956126 ALBERTA LTD V JMS ALBERTA CO LTD, 2020 ABQB 718 (FETH J)**
**Rules 7.9 (Decision After Summary Trial) and 13.6 (Pleadings: General Requirements)**

The dispute between the parties arose from a purchase and sale agreement for an Esso store in St. Paul, Alberta. Justice Feth heard the Summary Trial. Pursuant to Rule 7.9, after a Summary Trial concludes, the Judge must decide whether to dismiss the Application for Judgment or grant the Application and give Judgment. Justice Feth granted the Application, finding that there was enough evidentiary record to decide the issues of fact and law. His Lordship also concluded that it would not be unjust to decide the issues by Summary Trial, in accordance with Rule 7.9(2)(c).

A question which arose during the Summary Trial was whether the vendor, 956126 Alberta Ltd., had engaged in deceit or fraudulent misrepresentation. The purchaser argued that the vendor had committed the tort of deceit and as a result asked the Court to rescind the purchase

and sale agreement. Fraudulent misrepresentation was not pleaded in the Statement of Claim. Justice Feth considered the pleadings in light of Rule 13.6(2), which requires a pleading to state facts on which the parties rely, but noted there was no requirement to plead specific words. Although fraudulent misrepresentation was not specifically pleaded in the Statement of Claim, the material facts for the claim were found. Although the claim was properly before His Lordship, he found that there was no fraudulent misrepresentation.

**BISSKY V MACDONALD, 2020 ABQB 651 (ROOKE ACJ) Rules 9.4 (Signing Judgments and Orders), 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)**

The Applicant was previously found to be a vexatious litigant, and was prohibited from initiating any Actions or Applications without prior leave from the Court. Subsequently, the Applicant filed a Notice to Attend Family Court naming her former spouse as the Respondent. The Court noted that by filing this Notice without seeking prior leave the Applicant was *prima facie* in Contempt of Court. His Lordship then considered the Applicant's leave to file Application.

His Lordship applied the criteria for a leave to file the Application, dismissed the Application and rejected the filing on 3 separate grounds: (1) the materials did not satisfy the criteria set out in the Court access restriction Order for a valid Application; (2) the submissions exhibited indicia of abusive litigation, in conducting a collateral attack on issues settled 2017; and (3) the Applicant had provided false information, in this instance seeking sole custody of the child when she already had full custody.

The Court noted that, pursuant to Rule 14.5(4), there is no Appeal from an Order prohibiting a vexatious litigant from initiating or continuing proceedings. His Lordship stated that Costs are not ordinarily awarded in leave to file Applications, as the presumption in Rule 10.29 does not apply as there is no successful or unsuccessful party. The Court considered that the Applicant was in Contempt of Court by filing the Application without leave, and that the filed Application was therefore an abuse of process. Accordingly, His Lordship exercised the discretion conferred by Rules 10.31 and 10.33 to order that the Applicant pay $2,500 in Costs.

Finally, the Court found that paragraph 8 of the previously granted Court access restriction Order was unlawful pursuant to *Jonsson v Lymer*, 2020 ABCA 167, and that the wording therein should be modified to provide that the Applicant may not bring an Application without first posting Security for Costs for all unpaid Costs Orders against her. His Lordship directed counsel for the Respondent to draft this Order, and dispensed with the Applicant's approval of the form and content thereof pursuant to Rule 9.4(2)(c).

**WANG V ALBERTA, 2020 ABQB 800 (ROOKE ACJ) Rules 9.4 (Signing Judgments and Orders), 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 Applicants applied for a Costs Order against the Respondents. This Application arose from previous proceedings when the Court access restriction process, which had been engaged with respect to the Applicants, was terminated. Rooke A.C.J. had previously ordered the parties to provide written submissions to the Court on whether the Applicants should be subject to the Court's access restriction gatekeeping.

After the parties were asked to provide their written submissions, the Alberta Court of Appeal released its Decision in *Jonsson v Lymer*, 2020 ABCA 167, which held that the Alberta Court of Queen's Bench only possesses a residual authority to, on its own motion, impose Court access restrictions. As such, Rooke A.C.J. ordered the termination of that previously engaged process. The Applicants sought Costs with respect to that Order pursuant to Rule 10.29(1).

The Court dismissed the Application. His Lordship explained that the Court ended the Court access restriction process due to an intervening Decision of the Court of

Appeal. As such, there were no "winners" or "losers" as contemplated by Rule 10.29(1).

Associate Chief Justice Rooke also ruled, in the alternative, that Costs should not be ordered because the parties against whom Costs were being sought were third parties who participated in the Court access restriction process at the Court's invitation. His Lordship found that this was not a situation which warranted the exercise of the broad authority on Costs provided by Rules 10.31 and 10.33.

Finally, Associate Chief Justice Rooke ordered an elevated punitive and deterrent Costs Award against the Applicants for their conduct in these proceedings and for their continuing and persistent abuse of Court processes. His Lordship also ruled that the Applicants' approval of the Order granted was dispensed with pursuant to Rule 9.4(2)(c).

**AUBIN V PETRONE, 2020 ABQB 708 (KHULLAR J)**
**Rule 9.13 (Re-opening Case)**

The Applicant made an Application to vary a previous Decision of the Court pursuant to Rule 9.13. The previous Decision made in March of 2020 had resulted in charges being placed on shares and real property owned by the Applicant's former husband in order to secure payment of a matrimonial property Judgment (the "March 2020 Decision").

The basis for the Application was a concern regarding the existence of "gaps" in the March 2020 Decision, which, by virtue of the individual Respondent's conduct, could render the matrimonial property Judgment meaningless.

Justice Khullar set out the following factors which the Court should consider in exercising its discretion to modify a Judgment pursuant to Rule 9.13: the desirability of avoiding unnecessary Appeals; the desirability of a fully developed record for the purposes of a potential Appeal; the need for certainty in legal proceedings; that errors to be corrected should be objectively demonstrable; Rule 9.13 is not a vehicle for reconsideration of a Judgment; and that Rule 9.13 demands a high threshold to avoid Applications which are, in effect, a "second kick at the can".

Justice Khullar was satisfied that the threshold to consider a variation had been met. Her Ladyship emphasized that this did not mean that each modification sought was granted, but rather that the Court had jurisdiction to consider the Applicant's arguments. Her Ladyship then considered each proposed variation individually.

With respect to the injunction proposed by the Applicant, Justice Khullar held that this relief constituted a new issue and new remedy, which went beyond the scope of an Application under Rule 9.13. With respect to clarification sought by the Applicant regarding the nature of a previous Order imposing charges on the Respondent's property, Justice Khullar held that no further clarification was necessary. In regard to proposed variations to the previously imposed payment plan, Justice Khullar accepted the variation that constituted a "slight modification" but rejected the proposed variation which would make Trial Costs, Appeal Costs, and interest thereon payable at the time of the first payment. Her Ladyship held that this would be a "fundamental change to the order, for which there [was] no compelling basis."

Justice Khullar rejected the proposed variation to the events that would trigger the Applicant's ability to enforce the charges. Her Ladyship found that there was no authority under the *Matrimonial Property Act*, RSA 2000, c M-8 to grant the proposed variation, and furthermore, that the current triggering events had been upheld by the Alberta Court of Appeal. There was therefore no authority to grant this proposed variation under Rule 9.13.

Lastly, Justice Khullar agreed to vary the March 2020 Decision by extending the restriction preventing the individual Respondent from declaring bankruptcy. Her Ladyship did so because it was found that this restriction was still required in order to protect the Applicant from unfair financial risk.

**WHG INVESTMENTS LTD V UNTERSCHULTZ, 2020 ABQB 753 (MAH J)**
**Rule 9.13 (Re-opening Case)**

The Applicant applied to the Court under Rule 9.13 to reconsider certain findings of fact in Justice Mah's previous decision (the "Decision").

The Applicant argued that His Lordship incorrectly characterized a loan agreement (the "Loan Agreement") between a holding company ("AGPHL") and two other individuals as a mortgage. The Applicant also claimed that allowing the Loan Agreement to determine how the sale proceeds from a commercial property ought to be distributed violated the Torrens system of land registration because the Applicant had filed a Certificate of *Lis Pendens* against the property before the distribution took place.

The Court noted that Rule 9.13 has been interpreted to mean that the Court should correct itself where it makes a blatant error of law and avoid forcing the parties to unnecessary Appeal. The Court also noted that Rule 9.13 should only be applied where the putative error is plain and manifest, not to relitigate matters already decided.

After reviewing the Decision, the Court dismissed the Application. His Lordship did not find any part of the Decision that characterized the Loan Agreement as a mortgage. The Loan Agreement was an advance on an existing mortgage in favour of AGPHL that reduced its share of the remaining sale proceeds. Further, the priorities applicable under the Torrens system remained the same because the Loan Agreement secured nothing against the property. The security for the new advances was the original mortgage, already in place.

**VMH V JH, 2020 ABCA 474 (SCHUTZ JA)**
**Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 14.2 (Application of General Rules)**

The Applicant applied to vary an Order for advance Costs. Previously, Khullar J.A. had made an advance Costs Order requiring the Respondent to pay $20,000 to a lawyer retained by the Applicant, and to be used toward legal fees and disbursements. The Applicant applied to increase the $20,000 amount and appended an email from a lawyer saying that, "your costs on this appeal may exceed [$20,000] and you will need to provide us with a credit card to secure a further retainer if we need it".

The Court cited Rules 9.15(4) and 14.2(1) in noting that a Court may set aside, vary or discharge an interlocutory order for three reasons: (a) because information arose or was discovered after the Order was made; (b) with the agreement of every party; or (c) on other grounds that the Court considers just.

Here, Schutz J.A. declined to vary the original $20,000 advance Costs Order, noting that the lawyer's email indicated only that $20,000 may not be enough to cover the Costs of the Appeal, without any detail as to why that may be so. The Court determined that, at this juncture, the evidence adduced was not sufficient to justify varying Khullar J.A.'s Order.

**SHEWCHUK V HAGE, 2020 ABQB 684 (MACLEOD J)**
**Rule 9.32 (Offer for Sale of Secured Property)**

The Applicant brought an Application to determine the effect of an earlier "Rice Order" in connection with the Respondents' foreclosure on the Applicant's property. A Rice Order is a remedy whereby the creditor in foreclosure proceedings is allowed to purchase the property, and the purchase price is credited towards the amount owing by the debtor.

In this case, the Respondents took the position that they were entitled to enforce any or all of their security, and that the Applicant was only to be credited with the money actually received as a result of enforcement. The Applicant took the position that the full purchase price was to be applied to their debt.

Justice Macleod cited *Chief Construction Company Ltd. v Royal Bank of Canada*, 2017 ABQB 589 for a review of the law surrounding judicial sales pursuant to Rule 9.32. Macleod J. adopted the following propositions: (1)

the Court, and not the mortgagee, is authorized to sell property under Rule 9.32; (2) under Rule 9.32, the Court determines the appropriate time, place, manner, and price for the sale; (3) the purchaser's rights under the sale are limited to the terms of the Court Order; and (4) there is no contract for sale between the debtor and purchaser; rather, the sale is conducted by and approved by the Court, and the rights of the purchaser are contained solely in the terms of the Court Order.

As such, the earlier Order was binding, and the Respondents were obligated to apply the full purchase price towards the debt. Justice Macleod commented that as the Respondents applied for the earlier Order, and they must accept its effect.

**BETSER-ZILEVITCH V PROWSE CHOWNE LLP, 2020 ABQB 732 (FAGNAN J)**
**Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.7 (Contingency Fee Agreement Requirements), 10.8 (Lawyer's Non-Compliance with Contingency Fee Agreement) and 10.26 (Appeal to Judge)**

The Appellant appealed a Review Officer's decision under Rule 10.26. The Respondent law firm had entered into a contingency fee agreement (the "CFA") with the Appellant. The Respondent commenced an Action and eventually reached a settlement agreement in principle on the Appellant's behalf. Afterward, the Respondent sent its final invoice to the Appellant (the "Final Invoice") and the Appellant filed an Appointment for Review.

The Review Officer found that the CFA was defective and did not contain the particulars required under Rule 10.7 including the client's address, additional costs, a termination clause, and a witness to the client's signature. As such, the Review Officer evaluated the Respondent's fees as if there was no contingency fee agreement pursuant to Rule 10.8. The Review Officer found the fees were reasonable and allowed the Final Invoice in full.

On Appeal, the Appellant argued that the CFA disentitled the Respondent to any fees because it had been terminated or, alternatively, that the Respondent was only entitled to fees and disbursements until the CFA was terminated. The Appellant also argued that the Review Officer had erred in finding that the Appellant could not rely on the CFA and that the Review Officer did not have jurisdiction to interpret the CFA.

Fagnan J. first considered the standard of review to be applied on Appeal of a Review Officer's decision under Rule 10.26. Her Ladyship determined that the standard of review was deferential given the Review Officer's specialized knowledge and experience in assessing the reasonableness of a lawyer's accounts.

Justice Fagnan dismissed the Appeal. The Court determined that the Review Officer had the authority and expertise to make findings of fact about whether the CFA was valid under Rule 10.7. Justice Fagnan noted that Rule 10.8 provides that where a contingency fee agreement is defective, the lawyer is, on successful accomplishment or disposition of the subject matter of the agreement, entitled only to the lawyer's charges determined per Rule 10.2 as if no contingency fee agreement had been entered into. The Court also determined that the Review Officer did not err in law, principle, or fact in addressing the Appellant's reasonable expectations based on his analysis under Rule 10.2.

**TALLCREE FIRST NATION V RATH & COMPANY, 2020 ABQB 592 (LEE J)**
**Rules 10.13 (Appointment for Review), 10.19 (Review Officer's Decision) and 10.27 (Decision of Judge)**

The Appellant First Nation had entered into a contingency fee agreement (the "CFA") with the Respondent law firm. The Respondent secured a settlement for the Appellant in the Action covered by the CFA. The Appellant later requested a review of the CFA per Rule 10.13, which allows a lawyer or client to request a review of a retainer agreement. The Reviewing Officer (the "RO") determined that the 20% contingency fee resulted in an extremely high fee but that it was not "clearly unreasonable". As a result, the RO allowed the fee.

The Appellant appealed the RO's decision to the Alberta Court of Queen's Bench. Justice Lee determined that the standard of review was correctness for errors in law, and

palpable and overriding error for errors of mixed fact and law. His Lordship noted that Rule 10.19 specifies that the reasonableness of a CFA is determined at the time the retainer is entered into. After reviewing the authorities, the Court determined that the onus of proving that the CFA is fair and not unreasonable was on the Respondent.

Pursuant to Rule 10.19, Justice Lee reviewed the Appellant's circumstances. The Appellant First Nation was in dire economic circumstances due to the collapse of the Alberta oil and gas industry. The Appellant was aware of the Respondent's fee but was not aware of how long it would take to settle; a settlement was reached in just 18 months. The Respondent's estimated time records amounted to about $391,900 in fees but the fees collected under the CFA were about $11.5 million.

Justice Lee determined that the RO decision was reversible on a correctness standard and a palpable and overriding error standard. The RO erred in law when evaluating whether the CFA was "clearly unreasonable" because the standard to be applied is that of reasonableness. The RO made a palpable and overriding error in finding that 20% was essentially a minimum; this decision ignored factors such as how long the Respondent spent on the file and how quickly and easily a settlement was reached.

As a result, Justice Lee revoked the RO's decision and substituted a new decision pursuant to Rule 10.27. His Lordship determined that the CFA was unreasonable and allowed the parties to make written submissions as to the appropriate final amount of the Respondent's fees.

**TALLCREE FIRST NATION V RATH & COMPANY, 2020 ABCA 433 (KHULLAR JA)**
**Rules 10.13 (Appointment for Review) and 14.5 (Appeals only with Permission)**

The Respondent First Nation had previously applied pursuant to Rule 10.13 for a review of a contingency fee agreement (the "CFA") entered into with the Applicant law firm. The Review Officer determined that the CFA was "not… clearly unreasonable". This Decision was overturned on Appeal to the Alberta Court of Queen's Bench.

Justice Khullar noted that Rule 14.5(1)(e) provides that no Appeal is allowed to the Alberta Court of Appeal from a Decision as to Costs only, unless permission is obtained. The Applicant applied for a Declaration that the Court of Queen's Bench Decision revoking the Review Officer's Decision was not "as to Costs only". In the alternative, the Applicant sought permission to Appeal.

Justice Khullar held that a dispute about the recovery of legal fees between a lawyer and their client does not fall under the purview of Rule 14.5(1)(e). Rather, this Rule is aimed at the payment of Costs between parties to litigation. Khullar J.A. further held that resolving the dispute required a review of the CFA, which could not amount to "a Decision as to Costs alone".

Having found that permission to Appeal was unnecessary, Khullar J.A. nonetheless directed that the Appeal be held in abeyance until the final Order from Court of Queen's Bench was issued. Justice Khullar did so in order to avoid litigation by installment because, at that point in time, the Decision under Appeal was interlocutory in nature.

**PRICEWATERHOUSECOOPERS INC V PERPETUAL ENERGY INC, 2020 ABQB 513 (NIXON 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)**

A former director of a public corporation successfully defended an Action brought against her by the Trustee of that corporation's estate in bankruptcy. The former director sought the Costs of the Action to which she was presumptively entitled by virtue of Rule 10.29. The Court observed its broad discretion in awarding Costs, as authorized in Rule 10.31, and the factors relevant to the exercise of that discretion, as set out in Rule 10.33. Following a detailed review of the available evidence, Justice Nixon found that the Trustee had engaged in misconduct sufficient to warrant an award of Costs on a solicitor-client basis, payable directly by the Trustee as the true promoter of the litigation.

**AURORA HOLDINGS INC V WINNERS CHAPEL INTERNATIONAL CALGARY FELLOWSHIP, 2020 ABQB 581 (HO J)**
**Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)**

This was a Costs Decision related to an Application that was withdrawn before being heard by the Court, but not before the Plaintiffs incurred the Costs to prepare for the Application. The Plaintiffs sought solicitor and client Costs for the late withdrawal of the Application. The Defendant did not agree that Costs were payable, denied misconduct, and argued in the alternative that if Costs were to be awarded, $1,075.00 should be awarded as "thrown away" Costs under Schedule C.

Ho J. noted that pursuant to Rule 10.29(1), a successful party is generally entitled to receive Costs. Rule 10.31 outlines different forms of Costs Awards. The factors relevant to a Costs Award are contained in Rule 10.33.

The Plaintiffs pointed to a number of factors that warranted solicitor and client Costs, including an improper Affidavit, inappropriate objections during cross-examination on the Affidavit, submitting a draft Consent Order to Justice Ho without informing the Plaintiffs, failing to file a Brief, and the late withdrawal of the Application. Justice Ho did not consider the Defendant's conduct to be so reprehensible, scandalous or outrageous as to justify solicitor and client Costs. After considering the factors outlined in Rule 10.33, Her Ladyship used her discretion under Rule 10.31 to award a sum of $2,000.00 to compensate the Plaintiffs for thrown away Costs.

**MDS V DSM, 2020 ABQB 749 (LEMA 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)**

Justice Lema heard the Applicant's claim for Costs following his successful Application for primary parenting and the return of a child to his custody. The Applicant argued that as the successful party, he was presumptively entitled to Costs, and that the Respondent's conduct in unilaterally moving to Newfoundland with the child in contravention of a Court Order further supported a Costs Award. The Respondent's position was that, due to her impecuniosity, Costs were not appropriate, or alternatively, that they should be deferred until after the impending Trial.

Justice Lema stated that Rule 10.33 sets out the considerations in making a Costs Award, and Rules 10.29 and 10.31 confer discretion upon a Justice in ordering Costs. Furthermore, His Lordship found that since Rule 10.33(1) directs the Court to assess the results of a proceeding when ordering Costs, a Costs Order should follow the event to which it pertains, and that it would be inappropriate to defer Costs until after Trial. Additionally, His Lordship noted that while there are some authorities that support granting enhanced Costs in custody and mobility cases such as this, Column 1 Schedule C Costs are the norm where there is no monetary component involved.

**TECHNICOIL CORPORATION V ALDERSON, 2020 ABCA 357 (KHULLAR, HUGHES AND ANTONIO JJA)**
**Rules 10.30 (When Costs Award May be Made) and 14.88 (Cost Awards)**

In a previous ruling in the Action, the Court of Appeal upheld a Decision not to strike a claim for delay pursuant to either Rule 4.33 or 4.31. This Decision addressed the Cost Award that the Plaintiff was entitled to following the Appeal.

The Court of Appeal first considered Rule 14.88, which is the default Costs rule, and which provides that the successful party in an Appeal is entitled to Costs from the unsuccessful party. Although the Defendants argued that there should be no Costs Award due to the inordinate delay, the Court of Appeal refused to deviate from the default rule. The Court of Appeal also cited Rule 10.30(1), which allows Costs to be spoken to at any time, and awarded Costs for both the Appeal heard at the Court of Appeal and the Appellants' delay Applications in the Court of Queen's Bench pursuant to Schedule C.

**DAYTONA POWER CORP V HYDRO COMPANY, INC, 2020 ABQB 723 (HUNT MCDONALD J)**
**Rule 11.25 (Real and Substantial Connection)**

This was an Appeal from an Order of a Master which held that Alberta had jurisdiction *simpliciter* over the dispute. The litigation involved a contractual dispute between Alberta investors regarding a project located in California. Justice Hunt McDonald noted that the first issue to be determined was whether the Alberta Court had jurisdiction *simpliciter* over the dispute.

Her Ladyship cited Rule 11.25, which allows for service of documents outside of Canada only if a real and substantial connection exists between Alberta and the facts on which a claim is based. Her Ladyship noted that Rule 11.25(3)(c) provides that where the claim is governed by the law of Alberta, a real and substantial connection is presumed to exist.

While the Applicants argued that they did not have to submit to the jurisdiction of the Alberta Court as there was no choice of forum clause in the agreement and both commercial parties were sophisticated, both contracts provided that they are to be "governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein".

In dismissing the Appeal, Hunt McDonald J. applied Rule 11.25(3)(c) and determined that a real and substantial connection was presumed, as the governing law of the agreement was the law of Alberta.

**AIELLO V AIELLO 2020 ABQB 549 (SIDNELL J)**
**Rule 12.36 (Advance Payment of Costs)**

This was an Application by the Applicant for interim spousal support and advance litigation Costs in the amount of $200,000.

Sidnell J. referred to the three-part test set out in *British Columbia Minister of Forests v Okanagan Indian Band*, 2003 SCC 71 that must be satisfied to make an order pursuant to Rule 12.36. This test requires that the Applicant demonstrate: (i) impecuniosity; (ii) a prima facie meritorious case; and (iii) special circumstances bringing the case within the narrow class of cases where the extraordinary exercise of powers is appropriate. Justice Sidnell also cited *Blaney v Murphy*, 2020 ABQB 196 for the proposition that this three-part test properly applies to family law cases.

In applying the case law to the facts, Her Ladyship found that the Applicant had substantial assets and did not require advance litigation Costs to "level the playing field". The "impecuniosity" aspect of the test was not met. Justice Sidnell therefore did not consider the remaining elements of the tripartite test and dismissed the Application.

**CWB MAXIUM FINANCIAL INC V 2026998 ALBERTA LTD, 2020 ABQB 733 (MAH J)**
**Rule 13.21 (Requirements for Exhibits to Affidavit)**

In the context of an upcoming Summary Trial, the Defendants sought production of the entirety of a document, an extract of which was made an exhibit to a witness' Affidavit. The Defendants' position was that attaching an extract rather than the whole document was contrary to Rule 13.21(3).

Justice Mah disagreed. His Lordship concisely remarked that Rule 13.21 does not require that the entirety of any document referred to must be appended as an exhibit. Justice Mah further noted that, in many cases, this would be impractical.

**MANSON (ESTATE) V OBSIDIAN ENERGY LTD, 2020 ABQB 632 (HOPKINS J)**
**Rule 14.5 (Appeals Only with Permission)**

The Applicant applied to have Court access restrictions imposed upon the Respondent pursuant to the *Judicature Act*, RSA 2000, c J-2 (the *"Judicature Act"*).

In considering whether the Respondent should be subject to Court access restrictions in all three Alberta Courts, Hopkins J. discussed the operation of Rule 14.5(1)(j). Justice Hopkins observed that there was no purpose in

imposing Court access restrictions upon the Respondent with respect to the Alberta Court of Appeal because Rule 14.5(1)(j) already restricted the Respondent's access to the Alberta Court of Appeal by requiring the Respondent to obtain permission to appeal.

Justice Hopkins therefore declared the Respondent a vexatious litigant pursuant to the *Judicature Act*. His Lordship imposed numerous Court access restrictions on the Respondent but declined to impose Court access restrictions with respect to the Court of Appeal. Justice Hopkins instead held that "access to the Alberta Court of Appeal is better addressed by the Alberta Court of Appeal, rather than this Court."

**RANA V RANA, 2020 ABCA 353 (FEEHAN JA)**
**Rule 14.5 (Appeals Only with Permission)**

The Appellant applied for leave to appeal the August 14, 2020 dismissal of his Application to restore his Fast Track Appeal pursuant to Rule 14.5(1)(a) and (2). Feehan J.A. noted that the criteria for granting leave to Appeal are (a) there is a question of general importance; (b) there is a possible error of law; (c) there is an unreasonable exercise of discretion; or (d) there is an apparent misapprehension of an important fact. Justice Feehan noted that the underlying Fast Track Appeal was dismissed as the Appellant has not sought or been granted leave for that Appeal. The Appellant also did not file any material that was not present during the initial Application and that there was nothing new in the materials that would require reconsideration. His Lordship determined that the Appellant did not meet the criteria and dismissed the Application for permission to Appeal.

**PIIKANI NATION V MCMULLEN 2020 ABCA 366 (WATSON, WAKELING AND ANTONIO JJA)**
**Rule 14.5 (Appeals Only with Permission)**

In this case, eight Appeals and multiple Applications relating to case management Orders from litigation involving Dale McMullen and the Piikani Nation, among many others, were heard together. The litigation had commenced over ten years ago and was brought into case management in 2012 due to the proliferation of relating Actions and Applications. In 2013 it was ordered that leave of the Court must be obtained before filing any Applications. The Appeals and Applications in this case all arose from various case management Decisions setting out timelines, the sequence in which Applications would be heard, denying Mr. McMullen leave to bring Applications, and granting other parties leave to bring Applications.

Some the Appeals brought by Mr. McMullen sought to obtain substantive relief when a substantive Decision had not been made below. The Court noted that Appeals may only be taken from Decisions that have been made. Mr. McMullen also sought to have the merits of various issues determined on Appeal before they were determined at a Trial, and the Court of Appeal held that these were collateral attacks. The Court of Appeal dismissed the Appeals and Applications that they considered to be premature and collateral attacks.

The Court explained that the Rules discourage Appeals of pre-Trial Orders. Per Rule 14.5, there was is right of appeal to the Court of Appeal for any pre-Trial decision regarding adjournments, time periods or time limits, or for decisions on Security for Costs. On this basis, the Appeals of timeline and scheduling Orders were dismissed.

The Court then went on to examine the Appeals of the Case Management Judge's Decision to deny leave to allow Applications in six instances. Each Appeal was dismissed because the underlying Application had no hope of success, was advanced on grounds that were bare allegations, or were out of time.

The only Application that was granted for was for an Order for the sealing of the Appeal Record, Joint Factum and Joint Extracts of Key Evidence that Mr. McMullen filed in violation of a restricted Court access Order.

**WALLACE V EASTSIDE CITY CHURCH, 2020 ABCA 390 (STREKAF JA)**
**Rule 14.5 (Appeals Only with Permission)**

In the underlying Action, the Trial Judge had dismissed the claims of the Applicant because they were time barred and the claims were not established by the evidence. The Applicant then filed an Appeal on May 23, 2019 and was told by the Case Management Officer that the Appeal Record was due by September 23, 2019. The Appeal Record was not filed, and the Appeal was therefore struck on September 24, 2019. On March 3, 2020, the Applicant filed an Application to restore the Appeal. Justice Strekaf dismissed the Application: this was an Application to seek leave to Appeal that Decision of Justice Strekaf.

Rule 14.5(1) provides that permission is required to Appeal the decision of a single Judge of the Court of Appeal, and Rule 14.5(2) provides that permission needs to be sought from the Judge who made the Decision. Permission to restore an Appeal is discretionary. The Applicant reargued the merits of her Appeal and the relevant factors for restoring her Appeal. Justice Strekaf applied the relevant legal test for permission to Appeal and found that the Applicant had not raised a question of general importance; did not identify a possible error of law; did not demonstrate that there was an unreasonable exercise of discretion; and did not argue that there was a misapprehension of the facts. Accordingly, Her Ladyship dismissed the Application.

**KAINAIWA/BLOOD TRIBE V ALBERTA (MINISTER OF ENERGY), 2020 ABCA 387 (ANTONIO JA)**
**Rule 14.36 (Case Management Officers)**

This was an Application to rescind the direction of the Court of Appeal's Case Management Officer adjourning an underlying Appeal. The Respondent on the Application, and the Appellant on the Appeal (the "Blood Tribe") had sought to obtain mineral rights over lands that had recently been incorporated into their territory. The Applicant on the Application, and the Respondent on Appeal ("Alberta") had in response informed the Blood Tribe that it would not transfer the rights, and the Blood Tribe then commenced a Judicial Review of that decision. The reviewing Justice found the decision of Alberta to be unreasonable, but also held that the remedy sought by the Blood Tribe was unavailable. The Blood Tribe then appealed the Decision of the reviewing Justice.

Subsequently, Alberta released a reconsideration decision once again denying the transfer of the rights. The Appeal was set to be heard two days after the reconsideration decision, and the parties adjourned the Appeal *sine die* in order to consider whether the best procedural path forward was continuing with the Appeal or commencing a Judicial Review of the reconsideration decision. The Blood Tribe filed an Application for Judicial Review of the reconsideration decision. Shortly thereafter, Alberta asked the Court of Appeal's Case Management Officer to set the original Appeal down for a hearing, and the Blood Tribe opposed this and took the position that the Appeal should remain adjourned *sine die* pending the outcome, and possible Appeal, of the second Judicial Review. The Case Management Officer directed that the Appeal remain adjourned *sine die* which led to Alberta making its Application to rescind the direction of the Court of Appeal's Case Management Officer.

Antonio J.A. noted that Rule 14.36(3) provides that anyone affected by a direction of a Case Management Officer may apply to a single Appeal Judge to have that direction rescinded, confirmed, amended or enforced. Antonio J.A. further noted that Case Management Officers are not members of the judiciary, and Rule 14.36(3) does not use the words "appeal" or "review", and therefore concluded that Applications under the Rule should not be conceived of as "appeals." Antonio J.A. determined that a Justice hearing an Application under Rule 14.36(3) could deliberate the issue considered by the Case Management Officer directly, and could make their own decision. Her Ladyship was satisfied that the Appeal should remain adjourned *sine die*, and dismissed the Application.

**ROSWELL GROUP INC V 1353141 ALBERTA LTD, 2020 ABCA 428 (MCDONALD, SCHUTZ AND STREKAF JJA)**
**Rules 14.45 (Applications to Admit New Evidence), 14.49 (Failure to Respond), 14.70 (No New Evidence Without Order) and 14.73 (Procedural Powers)**

The Defendants at Trial appealed the Trial Judge's Decision regarding the formation and alleged breach of a purchase and sale agreement. The Respondents on Appeal sought to admit correspondence exchanged among counsel for both parties and the Trial Judge regarding calculations of damages flowing from the Judgment. Accordingly, the Respondents brought two related Applications: first, an Application pursuant to Rule 14.73 to permit the late filing of an Application to admit new evidence; and second, an Application pursuant to Rules 14.45 and 14.70 to admit such evidence.

The Court of Appeal allowed both of the Respondents' Applications. In allowing the Application to permit late filing, the Court noted the Respondents' argument that the Appellants would not be prejudiced by the late filing as they had received notice of the new evidence several months earlier. In allowing the related Application to admit new evidence, the Court applied the test set out in *Santoro v Bank of Montreal*, 2019 ABCA 322: 1) the evidence should not generally be admitted if, by due diligence, it could have been adduced at Trial; 2) the evidence must bear upon a decisive or potentially decisive issue in the Trial; 3) the evidence must be credible in the sense that it is reasonably capable of belief; and 3) the evidence, if believed, could reasonably, when taken with other evidence adduced at Trial, be expected to have affected the result.

Applying this test to the facts of the case, the Court found that: 1) the evidence could not have been admitted at Trial, as it originated after the conclusion thereof; 2) the evidence bore upon a decisive issue in the Trial, being damages; 3) the evidence, which was comprised of correspondence among both counsel and the Trial Judge, was credible; and 4) the evidence, which concerned the calculation of damages, could be expected to have affected the result. Accordingly, the evidence was admitted.

As a preliminary issue, the Court also applied Rule 14.49 which states that a Respondent who fails to respond to an Application may not present oral argument at the hearing of the Application unless the Court otherwise permits. The Appellants failed to respond to the Respondents' Applications in writing and, as a result, counsel was not permitted to advance oral argument in respect of the Applications.

**CROSWELL V KONCUR, 2020 ABCA 349 (PENTELECHUK JA)**
**Rule 14.65 (Restoring Appeals)**

This was an Application for permission to restore an Appeal pursuant to Rule 14.65. In previous proceedings, it was held that the Applicant had failed to file his Appeal Record by the deadline contrary to Rule 14.16(3), and the Applicant's Appeal was therefore struck pursuant to Rule 14.64(a).

Pentelechuk J.A. stated that the discretionary test for restoring an Appeal pursuant to Rule 14.65 requires consideration of the following factors: (a) arguable merit to the Appeal; (b) an explanation for the defect or delay; (c) reasonable promptness in moving to cure the defect; (d) intention in time to proceed with the Appeal; and (e) lack of prejudice to the Respondents. Justice Pentelechuk noted that the Applicant bears the onus of showing that the Appeal would be in the interests of justice.

The Applicant's reasons for missing the deadlines included: limited literacy, poor health, lack of funds, and difficulty securing Legal Aid. Pentelechuk J.A. noted that the Applicant had not filed an Affidavit setting out these reasons, nor taken any steps to file the Appeal Record. After surveying the Applicant's reasons for non-compliance with the deadlines, Pentelechuk J.A. held that the Applicant had not satisfied the above test and dismissed the Application.

**DORIN V EPCOR DISTRIBUTION AND TRANSMISSION INC, 2020 ABCA 391 (CRIGHTON JA)**
**Rule 14.75 (Disposing of Appeals)**

The Appellant, Mark Dorin, was granted permission to appeal a matter arising from the interpretation of section 4(2) of the *Edmonton Restricted Development Area Regulations*, A/R 287/1974 (the "Regulations"), that provide that no government agency shall, without written consent of the Minister of Infrastructure (the "Minister"), approve any activity that causes surface disturbance of any land in the area. In this case, the Alberta Utilities Commission (the "Commission") had concluded that it had jurisdiction to conditionally approve EPCOR's application so long as EPCOR provided to it written consent from the Minister. The Appellant argued that a proper interpretation of the Regulations meant that until ministerial consent is obtained, the Commission cannot exercise any statutory power.

The Court of Appeal declined to interpret section 4(2) of the Regulations, stating that the issue between the parties was now moot and that if the Court was to interpret that legislation, the Minister should have received notice.

Ultimately the Court of Appeal concluded that even if an error of law occurred in the Commission's order that approved EPCOR's activity in question, the Court of Appeal was satisfied, pursuant to Rule 14.75(2), that no substantial wrong or miscarriage of justice had occurred, and no significant prejudice had been experienced by any party, and that therefore the Court of Appeal could dismiss the Appeal.

In dissent, O'Ferrall J.A. chose to interpret section 4(2) of the Regulations and to conduct an analysis, but in the result, O'Ferrall J.A. also applied Rule 14.75(2) and determined that the Court of Appeal could indeed dismiss the Appeal as no significant prejudice had been experienced by any party and no substantial wrong or miscarriage of justice had resulted.