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COUCH V OLATIREGUN, 2023 ABKB 402

(SULLIVAN 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), 10.33 (Court Considerations in Making Costs Award) and 10.42 (Actions Within the Provincial Court Jurisdiction)

This was a Costs Decision arising from an Action in which the Plaintiff alleged he suffered severe injuries from a low-velocity motor vehicle accident. The Court found the injuries to be minor. The Plaintiff in the underlying Action sought general damages of $125,000 and special damages of $100,000 but was only awarded $4,722 for his injuries.

The Plaintiff's counsel made a Costs submission without notice to the self-represented Defendant and sought Costs in the amount of $12,378, a value close to three times the damages Award and representing 75% of the maximum Costs available under Column 1 of Schedule C. The Plaintiff's counsel submitted that the Plaintiff minimized Costs in the following ways: (1) he only sought Costs for a single counsel when the Plaintiff was represented by two counsel at Trial; and (2) he entered relevant medical records as evidence without witness testimony and bypassed the Judicial Dispute Resolution Process (JDR). The Plaintiff's counsel also argued that the Defendant unnecessarily prolonged and complicated the process by not cooperating in the Plaintiff's efforts to bypass Mediation and set Trial.

Referencing Rules 10.29 and 10.31, Sullivan J. noted the general rule that a successful party is entitled to Costs against the unsuccessful party subject to the Court's general discretion, in light of the factors listed in Rule 10.33 that go into the determination of a reasonable and appropriate Costs Award.

Sullivan J. first went through the considerations in Rule 10.33(1) and found that: (1) the Plaintiff was successful in the underlying Action; (2) the final damages Award represented just over 2% of the initial damages claim; (3) the issues involved in the underlying Action, namely assigning liability and assessing damages, were not novel and were not likely to have far-reaching implications on future motor vehicle accidents; (4) this was a relatively simple Action wherein the Trial lasted two half-days out of the five days initially allotted; (5) apportionment of liability was irrelevant; (6) while the Plaintiff's counsel shortened the Action by entering relevant medical records as evidence without witness testimony and by bypassing the JDR, the Defendant also shortened the proceedings as he did not appear at Trial; and (7) there were no known offers to settle that could have saved the Court time and resources.

Sullivan J. then turned to the considerations in Rule 10.33(2). While noting that some factors were inapplicable, Sullivan J. found the following: (1) the self-represented Defendant conducted himself reasonably and to the best of his ability without lengthening or delaying the Action unnecessarily; (2) the Defendant did not deny or refuse to admit anything that should have been admitted; (3) there were no unnecessary Applications, proceedings, or steps taken in the Action; (4) neither party engaged in misconduct; and (5) there was no evidence suggesting that a settlement offer was made.

Lastly, Sullivan J. tackled the significant discrepancy between the amount of damages claimed by the Plaintiff and the amount that he was awarded. Sullivan J. cited Rule 10.42, which restricts Costs to not more than 75% of Column 1 where an Action is brought in the Court of

King's Bench, but where the amount sued for is within the jurisdiction of the Provincial Court. Although the Costs sought by the Plaintiff's counsel did not exceed the 75% cap, Sullivan J. stated that the 75% limit is a high-water mark rather than an absolute entitlement. In addition, Sullivan J. noted that there was no reasonable basis for the Plaintiff to claim exorbitant damages and pursue an Action in the Court of King's Bench for a minor vehicle accident.

Given the above, Sullivan J. found justification for departing from the general approach to awarding Costs at a level approximating 40-50% of actual Costs, and held that an adjustment was in line with both the principles of efficiency and fairness under Rule 1.2 and the principle that Costs Awards should be proportional to the interests involved in an Action.

In the result, Sullivan J. awarded the Plaintiff $1,300 for Costs including disbursements.

BABIUK V HEAP, 2023 ABKB 410

(MANDZIUK J)

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

The Defendants, represented by the Administrator of the *Motor Vehicle Accident Claims Act*, RSA 2000, c M-22, applied to dismiss the Action pursuant to Rules 4.31 and 4.33 for long delay. The underlying Action was commenced in 2005.

After surveying the steps which had taken place in the litigation, Mandziuk J. noted that there had been very few meaningful steps taken in this Action in the last 17 ½ years, that those steps taken had primarily been driven by the Administrator, and that a number of steps remained to be taken before the matter could proceed to Trial.

Mandziuk J. also noted that Rules 4.31 and 4.33 should be read and applied in the context of Rule 1.2, the core of which is efficiency. As such, litigants are mandated to litigate in a manner that is timely, cost-effective, and transparent, with a focus on the issues and on well-timed resolution.

Mandziuk J. then turned to the Application under Rule 4.33. Rule 4.33 requires a significant advance of the Action within a three-year period. For the purposes of Rule 4.33, the three-year period is measured from the date of the last uncontroversial significant advance to the date the Rule 4.33 Application is filed. Mandziuk J. held that an Order regarding Costs, filed January 31, 2018, was arguably the last uncontroversial significant advance.

The Plaintiff argued that there were significant advances that occurred after January 31, 2018, including: (1) the Plaintiff retained new counsel; (2) the parties attempted to engage in settlement discussions; and (3) there was some discussion of alternative dispute resolution and the Plaintiff requested a Litigation Plan, which the Administrator declined to prepare. Mandziuk J. disagreed and found none of these steps constituted a significant advance in the Action. Mandziuk J. held that discussions and negotiations, while they were to be encouraged, did not advance an Action in an essential way if they were unsuccessful and did not narrow the issues relating to facts or procedure. Although

there was an offer to schedule mediation or Judicial Dispute Resolution, no dates or mediator were suggested.

In addition, Mandziuk J. observed that the Plaintiff did not know where her file was for 19 months while the file was in custodianship with the Law Society of Alberta. Mandziuk J. noted that difficulty retaining counsel was not an excusable delay, and the Law Society's custodianship was not the administrative delay contemplated by the Rule.

Mandziuk J. then turned to the Application under Rule 4.31. Citing the legal test in *Humphreys v Trebilcock*, 2017 ABCA 116, Mandziuk J. summarized the analysis to be applied under Rule 4.31 and noted that determining whether delay was inordinate and inexcusable was not a formulaic exercise, but a holistic analysis considering the "Action as a whole".

Mandziuk J. found that the Plaintiff had not advanced the Action to the necessary point, and that the delay was considerably in excess of what is reasonable in the context of a straightforward case. Among other things, Mandziuk J. highlighted the ten-year period of inactivity after another person had been identified as a party to the Action (the claim against that person was dismissed due to limitation period expiry), the prolonged delay in answering Undertakings (four years), the 12-year delay in examining one of the Defendants, and the fact that the other Defendant had never been examined at all.

The delay was found to be inexcusable as the Plaintiff failed to provide evidence to establish a compelling explanation or excuse. The inordinate and inexcusable delay gave rise to a presumption of significant prejudice, which the Plaintiff failed to rebut. Mandziuk J. also found there had been actual prejudice to the Administrator.

Finally, Mandziuk J. held that while the Plaintiff deserved sympathy, there was no compelling reason that would persuade the Court not to exercise its discretion to dismiss the Action.

Ultimately, Mandziuk J. dismissed the Plaintiff's Action pursuant to Rules 4.31 and 4.33.

HUNT V RIEHL, 2023 ABKB 440

(LOPARCO J)

Rules 1.2 (Purpose and Intention of these Rules), 3.36 (Judgment in Default of Defence and Noting in Default), 4.33 (Dismissal for Long Delay), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.5 (Service on Individuals)

The Appellant and Respondents were joint venture partners in the development of three jointly owned properties. The Respondents sought and were granted relief by Originating Application. In the Originating Application hearing, which the Appellant attended, leave was granted to file a Statement of Claim for further relief and damages. A Statement of Claim was delivered by courier, but the delivery receipt included only a horizontal line above the recipient signature line. The Appellant was also sent a copy of the Statement of Claim by email.

The Respondents obtained a Noting in Default against the Appellant, based in part an Affidavit of Service exhibiting the deficient delivery receipt. The Noting in Default was sent to the

Appellant by email. The Respondents served a Garnishee Summons against the Appellant's employer in respect of the previous Originating Application but took no steps further to the Noting in Default for over two years. In 2022, the Respondents filed an Application for Default Judgment, pursuant to Rule 3.36. The Appellant then cross-applied to set aside the Noting in Default, pursuant to Rule 9.15.

The Court held that there are two tests for setting aside a Noting in Default and Default Judgment pursuant to Rule 9.15: (1) where there is a non-trivial flaw in the process preceding the Noting in Default or Default Judgment, the Defendant, acting promptly, has a right to have the Noting in Default or Default Judgment set aside; and (2) where the process preceding the Noting in Default or Default Judgment is regular, the Noting in Default or Default Judgment may be set aside in light of the availability of an arguable defence, absence of intent to allow Judgment to go by default, availability of a reasonable excuse for failing to defend, and prompt action by the party seeking to set aside once the Noting in Default is known.

The Court found that service of the Statement of Claim was ineffective since the courier receipt was insufficient to confirm personal service on the Appellant. The personal service requirement for commencement documents, pursuant to Rule 11.5, was not satisfied. The earliest evidence of the Statement of Claim being brought to the Appellant's attention was the Respondents' email attaching the Statement of Claim. The email was sent fewer than 20 days from the date of the Noting in Default, contrary to Rule 3.36. Accordingly, there was a non-trivial flaw, engaging the first above-noted category.

The Court went on to consider whether the Appellant had acted sufficiently promptly to avail of his right to set aside the Noting in Default. The Court distinguished the facts of *Anstar Enterprises Ltd v Transamerica Life Canada*, 2009 ABCA 196 ("*Anstar*"), which similarly involved a lengthy delay by the party seeking Default Judgment. Unlike in that case, the Court found that the Respondents had obtained a Noting in Default promptly, waiting only to seek Default Judgment. Further, unlike in *Anstar*, the filing of the Application for Default Judgment was within the three-year drop-dead rule prescribed by Rule 4.33.

The Court noted that in the case before it, the Respondents had good reason to delay seeking Default Judgment until their losses had fully crystallized. Meanwhile, the Respondents gave the Appellant actual notice of the Noting in Default, which the Appellant ignored for over two years. Noting the duty on litigants to act with reasonable dispatch, as reflected in Rule 1.2, the Court held the Appellant had not acted promptly.

Last, the Court applied an overall fairness review, as prescribed in *SFM v MRM,* 2020 ABQB 302, comparing the relative prejudice to each party that would result from granting or not granting the Appeal. The Court noted the Appellant's failure to act after having been made aware of the Noting in Default and other procedural steps, despite having attended Court previously and having had the means and opportunity to obtain legal advice. The Court also noted substantial steps taken by the Respondents to deal with the circumstances described in the Statement of Claim, including reasonable mitigative efforts. The Court concluded that fairness considerations dictated that the Appeal should be refused.

In the result, the Appeal was refused and the Default Judgment, upheld.

KUDZIN V APM CONSTRUCTION SERVICES INC, 2023 ABKB 425

(MARION J)

Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.65 (Permission of Court to Amendment before or after Close of Pleadings), 5.31 (Use of Transcript and Answers to Written Questions), 6.11 (Evidence at Application Hearings), 6.8 (Questioning Witness Before Hearing), 7.3 (Summary Judgment), 13.12 (Pleadings: Denial of Facts) and 13.18 (Types of Affidavit)

Pursuant to Rule 7.3(1)(b), the Applicants sought to summarily dismiss eleven of thirteen Actions arising from an explosion. The Court noted the applicable principles for Summary Judgment as set out in the jurisprudence but ultimately determined that it was not possible to fairly resolve the claims against the Applicants on a summary basis, based on the issues it had identified in the facts, the record, and the law.

The Court considered whether some of the Respondents (the "Neighbor Respondents") could rely on various elements of their compendium of evidence which included: excerpts from the Part 5 Questioning transcripts of one of the Applicants (the "Applicants' Questioning"); excerpts from the Part 5 Questioning transcripts of several individual witnesses as parties, and employees or ex-employees of various corporate Defendants (the "Other Defendants' Questioning"); and certain records produced by parties in the Actions but not exhibited to any Affidavit filed in the Actions (the "Selected Records").

The Court also considered whether the Applicants could rely on various elements of their compendium of evidence which included: excerpts from the Part 5 Questioning of another Defendant (the "Middlemiss Defendant Questioning"); numerous records produced by another Defendant who had filed a Third Party Claim against the Applicants (the "APM Defendant Records"). The Court also considered whether the Applicants could rely on excerpts from the Part 5 Questioning of two other Defendants (the "J. Arbeau and Arends Defendant Questioning").

The Court reviewed Rule 5.31 and Rule 6.11 when considering whether the Neighbour Respondents could rely on the Applicants' Questioning, noting that Rule 6.11 provides that that written answers in Part 5 Questioning which may be used in in accordance with Rule 5.31 is evidence that a Court may consider when making a decision about an Application. The Court determined that the Applicants' Questioning was properly useable by the Neighbour Respondents because (1) one of the Applicants was both a party and corporate representative to other Applicant, (2) the Applicants were adverse in interest, and (3) the Neighbour Respondents sought to use that evidence against the Applicants.

Among other things, the Court considered whether the Neighbour Respondents could rely on Rule 6.11(c) to use the Other Defendants' Questioning in conjunction with Rule 5.31. The Court reviewed the jurisprudence and noted that Rule 6.11 restricts the evidence a Court may consider on an Application, noting that the Court "may consider only" the listed forms of evidence; does not distinguish between different types of Applications; and expressly provides that Part 5 Questioning can be used if it is evidence that "may be used" under Rule 5.31.

The Court found that absent an agreement, a party cannot admit Part 5 Questioning evi-

dence for a party adverse in interest (party B) against another party in the action (party C), whether in Trial or in an Application (including summary process) regardless of whether party C is adverse or not. The Court set out that there may be exceptions, such as if a witness is no longer available, but no exceptions had been suggested. The Court noted that Rule 6.8 allows for the Questioning of a person for the purpose of obtaining a transcript of that person's evidence for use at the hearing of an Application, and the transcript of that Questioning is filed and available to be used on the Application under Rule 6.11(1)(b). The Court further noted that Rule 6.8 may be used to question parties or individuals, including employees or former employees of parties. The Court set out that its interpretation of Rules 6.11(1)(c) and 5.31 was consistent with the obligations of parties to put their best foot forward.

The Court acknowledged that it may make sense for Rule 6.11(1)(c) to be reconsidered in the future or for parties to agree to a more flexible use of transcripts, but that unlike in Ontario, it could not characterize the attempt to use the Other Defendants' Questioning as a procedural non-compliance that was correctible under Rule 1.5. The Court set out that Rule 1.5 should not be used to amend the Rules or override mandatory or limiting provisions under Rule 6.11. Accordingly, the Court found that the Neighbour Respondents were not entitled to rely on the Other Defendants' Questioning pursuant to Rule 6.11(c) in the way that they had attempted. The Court later noted that for the same reasons, the Applicants could not rely on the J. Arbeau and Arends Defendant Questioning and the Middlemiss Defendant Questioning.

The Court found that the Other Defendants' Questioning was not admissible as a principled exception to hearsay and noted that the Respondents had not adduced an Affidavit, and had instead attempted to rely on facts in the Other Defendants' Questioning as hearsay pursuant to Rule 13.18. The Court further found that the Other Defendants' Questioning did not fit into the types of evidence the Court may review on an Application under Rule 6.11(1).

In determining whether the Selected Records could be used, the Court reviewed Rule 6.11(d) and Rule 5.15. The Court accordingly set out that Rule 5.15 created certain presumed admissions about records so that parties do not need to unnecessarily waste time proving the authenticity of records, or prove that they were sent and received as indicated. The Court found that Rule 6.11(1)(d) then provides a method by which the Court may admit, in an Application, the records that are subject to those admissions. Further, the Court specified that an "admissible record" set out in Rule 6.11(1)(d) must still be admitted into evidence. The Court set out that if the exceptions do not apply, the presumptions are not rebutted, and the records are otherwise admissible; the records, subject to Rule 5.15(2), are admissible records that may be relied on by parties and considered by the Court on an Application pursuant to Rule 6.11(1)(d). The Court specified that records admitted pursuant to Rule 6.11(1)(d) at best: can only be admitted as authentic records that are true copies of the original; are what they purport to be; which were transmitted and received as they purport or appear to have been but could not be admitted for the truth of their contents. The Court found that the Selected Records and the APM Defendant Records were accordingly admissible only for the purposes of proving that they were authentic records sent and received on or about the time they appeared to have been transmitted and were not admissible for proof of the truth of their contents.

The Court considered whether the Applicants had proven there was no merit to claims of vicarious liability on their Application made pursuant to Rule 7.3, and found that because the Applicants had put into issue their own alleged lack of vicarious liability Pursuant to Rule 13.12, the Pleadings were deemed to be denied by all Respondents and therefore

vicarious liability was squarely in issue. The Court therefore dismissed the Applicants' claim for Summary Dismissal.

The Court also noted that some claims were likely filed before there was complete discovery and that that Rule 3.65(1), subject to Rule 3.65(5), enabled the Court to give permission to amend a Pleading before or after the close of Pleadings.

MUKAGASIGWA V NKUSI, 2023 ABKB 423

(NIELSEN ACJ)

Rule 2.23 (Assistance Before the Court)

This Decision addressed the purported representation of a litigant by an individual not qualified under the *Legal Professions Act*, RSA 2000, c L-8. Among other things, the individual argued that he was permitted to, and did, appear as a "McKenzie friend", as described in the case of *McKenzie v McKenzie*, [1970] 3 All ER 1034 (UK CA) ("*McKenzie*").

The Court held that the *McKenzie* friend concept is codified in Alberta in Rule 2.23, such that the role is limited to quiet suggestions, note-taking, support, or addressing the particular needs of a party. Neither Rule 2.23 nor *McKenzie* permit representation by non-lawyers in the Court of King's Bench. For this reason and others, the individual was prohibited from further participation in the litigation, and from representing or providing legal assistance in other Court of King's Bench proceedings.

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA V CO-OPERATORS GENERAL INSURANCE COMPANY, 2023 ABKB 426

(MARION J)

Rules 3.2 (How to Start an Action), 3.14 (Originating Application Evidence), 3.72 (Consolidation or Separation of Claims and Actions) and 6.11 (Evidence at Application Hearings)

This was an Originating Application by the Applicants, Royal & Sun Alliance Insurance Company of Canada ("RSA") and APM Construction Services Inc ("APM"), seeking a declaration that the Respondent, Co-operators General Insurance Company ("Co-operators"), owed APM a duty to defend and owed RSA a duty to contribute to APM's defence (the "Duty to Defend Application"). The underlying Action involved several separate claims arising out of a gas line explosion (the "Canmore Actions"). The Respondent cross-applied (the "Cross-Application") to adjourn the Duty to Defend Application and to have it joined with the Canmore Actions pursuant to Rule 3.72. In addition, the Respondent sought consequential relief

about the use of evidence from the Canmore Actions in the Duty to Defend Application.

By way of background, an entity named DCR provided a document entitled "Confirmation of Insurance" ("COI") to APM, which appeared to have been issued by DCR's insurer, Co-operators. On the face of the COI, APM was referenced as an "Additional Insured" in respect of DCR's commercial general liability insurance policy it held from Co-operators. APM also had a commercial general liability insurance policy with RSA for the relevant period.

Marion J. first addressed the admissibility of evidence from the Canmore Actions that the Respondent sought to use in response to the Duty to Defend Application. Marion J. recognized that the Duty to Defend Application involved both an Originating Application and an Application within the Canmore Actions, and that the two processes would require different evidence. Citing Rules 3.14(1) and 6.11, Marion J. found the records produced in the Canmore Actions, which were exhibited in the Respondent's Affidavit, could be used in relation to the Rule 3.72 Application, but only for the purposes of proving the records are authentic and were sent and received as indicated. Marion J. further found that the Respondent could not use the Part 5 Questioning transcripts under Rules 3.14 or 6.11.

With respect to whether the Duty to Defend Application could be determined summarily, Marion J. noted that Rule 3.2 directs that a Statement of Claim must be used to start an Action, unless "there is no substantial factual dispute", among other factors. Further, Courts had significant discretion as to whether and how Originating Applications should proceed.

Marion J. noted that duty to defend Applications are often commenced by Originating Application as they typically do not contain factual disputes. However, where additional factors arise that make a summary determination more difficult, the Rules are not inflexible and the Court holds discretion to determine if the summary process is appropriate based on the circumstances of the case.

Marion J. determined that it was not appropriate to summarily grant the Duty to Defend Application based on the following: first, there was a factual dispute between the parties as to whether APM ever became an Additional Insured, or whether it remained an Additional Insured at the time of the explosion; second, the legal effect of the COI remained a genuine issue for Trial; third, there were no other factors that would support granting the Duty to Defend Application summarily. On the second point, Marion J. further explained that the cases involving COIs adding additional insureds were generally decided after lengthy Trials and held important precedential value in the construction insurance industry.

With respect to whether the Duty to Defend Application should be heard concurrently with the underlying Canmore Actions, Marion J. cited Rule 3.72 and some of the factors listed in Mikisew Cree First Nation v Canada, 1998 ABQB 675 that influence a Court's discretion to consolidate Actions, and found that: (1) there were common disputes that would result in a significant overlap in the evidence and witnesses in the proceedings; (2) the determination of the Canmore Actions would have a direct and significant impact on some of the issues involved in the Duty to Defend Application; (3) there was no evidence of any prejudice to RSA or APM; and (4) there was no evidence of any prejudice to the other parties to the Canmore Actions.

In the result, Marion J. found it appropriate to join the Duty to Defend Application to the Canmore Actions and have it heard concurrently.

VENINI V VENINI, 2023 ABKB 524

(MARION J)

Rule 3.2 (How to Start an Action)

George Venini ("George"), David Venini ("David"), Eugene Venini ("Eugene"), and Mary Ann Lyons ("Mary Ann") were each 25% shareholders in John G Venini Investments Limited ("JGVI"), a family business started by their father. Eugene was the sole employee of JGVI. George and David (the "Applicants") brought an Originating Application seeking an Order that Eugene was prohibited from voting at directors' meetings with respect to his employment pursuant to section 120(6) of the *Alberta Business Corporations Act*, RSA 200 c. B-9 ("*ABCA*") and an Order that Eugene's employment with JGVI be set aside pursuant to section 120(9) of the ABCA.

The Court noted that Rule 3.2 provides that a Statement of Claim must be used to start an Action unless there is no "substantial factual dispute" and, even when there is no substantial factual dispute, the Court has significant discretion as to how Originating Applications proceed. Justice Marion held that Alberta Courts have harmonized the Originating Application process with the Summary Judgment process by confirming that the test for whether a matter is appropriate for Summary Judgment also applies to Originating Applications. In considering the Originating Application, Marion J. found that the proper approach was to consider the test for summary disposition set out by the Alberta Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courtier Ltd,* 2019 ABCA49.

Justice Marion held that there was no substantial factual dispute as to whether Eugene had voted on his employment with JGVI. There was evidence that all four directors were present at the meeting and that both George and Eugene's evidence confirmed there was a vote on Eugene's employment with JGVI. It was incumbent on Eugene "to put his best foot forward if he disputes this evidence", which he did not do. The Court, accordingly disposed of the issue, finding that Eugene was prohibited from voting on his employment pursuant to section 120(6) of the *ABCA*.

With respect to whether Eugene's employment contract should be set aside, the Court held that while there was a dispute about the scope and compensation of Eugene's role, it did not give rise to a genuine issue requiring a Trial and therefore did not constitute a substantial factual dispute. This was, in part, because the decision on the issue before the Court did not require the Court to make findings as to whether Eugene's employment or compensation was reasonable, or determine the appropriate scope or time required for Eugene's employment, which was disputed between the parties. Accordingly, the disputed facts were not substantial for the purposes of the Application. The Court declined to set aside Eugene's employment contract but noted that no findings were being made on the disputed matters on the record, and that the parties could decide whether they wished to continue to litigate those issues.

CHAUDHARY V ALBERTA (ASSURED INCOME FOR THE SEVERELY HANDICAPPED ACT, APPEAL PANEL), 2023 ABCA 254

(SLATTER, STREKAF AND DE WIT JJA)

Rule 3.15 (Originating Application for Judicial Review)

The Appellant appealed the dismissal of his Application for Judicial Review which was dismissed on the basis the Appellant had filed and served the Application after the limitation period had passed.

The Court noted that an Originating Application must be filed and served within six-months after the date of the Decision as per Rule 3.15(2). The Court found that the Chambers Judge did not err in holding that the Court had no discretion to extend the time for the Appellant to commence his Judicial Review Application. More specifically, the Court set out that Rule 3.15 and its predecessor had been strictly construed and that there was no discretion to extend the limitation period because of an Applicant's knowledge or circumstances.

The Court accordingly found that because the Appellant had filed his Judicial Review Application after the six-month limitation period, a Judicial Review could not proceed and the Appeal was ultimately dismissed.

OLEYNIK V UNIVERSITY OF CALGARY, 2023 ABCA 265

(SLATTER, STREKAF AND DE WIT JJA)

Rules 3.18 (Notice to Obtain Record of Proceedings), 3.22 (Evidence on Judicial Review), 9.4 (Signing Judgments and Orders) and 14.71 (Interlocutory Decisions)

The Appellant appealed an Order that struck out an Affidavit and related Brief that he had filed in support of a Judicial Review Application challenging a decision of the Office of the Information and Privacy Commissioner.

Upon the Appellant's filing of the Judicial Review Application, the Privacy Commissioner filed a Certified Records of Proceedings in accordance with Rule 3.18. Thereafter, the University of Calgary filed a Cross-Application seeking to strike out the Appellant's Affidavit and Brief filed alongside the Judicial Review Application, on the basis of non-compliance with Rule 3.22. Rule 3.22 limits the evidence that can be relied upon in Judicial Review proceedings. The Court reiterated the Chambers Judge's observation, which is confirmed by Rule 3.22, that Judicial Review is a review of the administrative tribunal's decision based on the record before the tribunal, not a form of fresh assessment.

On Appeal, the Appellant argued that his Affidavit was permitted under Rule 3.22(b.1), which allows for Affidavit evidence to be filed in respect of Judicial Review Applications of a limited nature. The Court disagreed, and held that the Judicial Review Application could not be characterized as falling under the Rule 3.22(b.1) exception because, at its base, it simply sought to set aside the decision of the Privacy Commissioner.

As a final note, the Court commented on its general disapproval of Appeals of interlocutory rulings. The Court stated that the preferred approach is to proceed with the merits hearing, and then prosecute one Appeal from the ultimate outcome (which, per Rule 14.71, could capture relevant interlocutory rulings).

The Court therefore dismissed the Appeal, with Costs in favour of the University of Calgary, and invoked Rule 9.4(2)(c) to waive the requirement of the Appellant's approval of the form of Order.

ASTOLFI V STONE CREEK RESORTS INC, 2023 ABKB 416

(MARION J)

Rules 3.61 (Request for Particulars), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.66 (Costs), 3.68 (Court Options to Deal with Significant Deficiencies) and 6.14 (Appeal from Applications Judge's Judgment or Order)

The Defendant appealed the Decision of an Applications Judge granting the Plaintiff permission to amend his Statement of Claim in the underlying wrongful dismissal Action.

The Court dismissed the Appeal, allowing the amendments, with the exception of some that were not permitted.

Pursuant to Rule 6.14(4), the Court noted what is included in the record of proceedings on an Appeal of an Applications Judge's Judgment or Order. The Court also set out that the test for additional evidence set out in Rule 6.14 (3) was a "very lax test", noting that the test for whether additional evidence is relevant and material is whether the new evidence might reasonably be expected to significantly help determine one or more issues raised on the Appeal. The Court found that the supplemental evidence and transcripts of Questioning were properly before it as evidence that was relevant and material to the Appeal.

The Court reviewed the jurisprudence and principles surrounding the exercise of discretion in permitting an amendment to a Pleading in relation to Rule 3.65, noting that: there is a strong presumption in favour of allowing amendments to Pleadings after the close of Pleadings; the Applicant need not show any particular reason for needing the amendment; that Courts should exercise their discretion to allow the amendment unless the non-moving party demonstrates an exception or compelling reason not to; the Court must consider the impact the proposed amendment will have on the non-moving party's litigation interests and the public interest in the resolution of litigation as quickly as reasonably possible without the expenditure of more public and private resources than is reasonably necessary.

The Court noted that the compelling reasons or grounds not to permit amendments that have been recognized over time include whether the: (1) proposed amendment will significantly harm a legitimate litigation interest of the non-moving party; (2) proposed amendment advances a claim that cannot possibly succeed or is hopeless because it would have been struck if it were in the original Pleading, which specifically include considerations under Rule 3.68(2)(a)-(e); (3) proposed amendment is not supported by a required threshold level of evidence, based on the nature of the proposed amendment; (4) proposed amendment seeks

to add a new party or a new cause of action after the expiry of a limitation period and is statute-barred or subject to a "rock-solid" limitations defence, unless permitted by statute; (5) proposed amendment or the failure to plead earlier, involves bad faith; and (6) proposed amendment will contravene the public interest in promoting expeditious and economic dispute resolution.

The Court found that the amendments did not: fail to disclose a cause of action or that there was a compelling reason to refuse the amendments for failing to disclose a cause of action; the amendments were barred by either the *Limitations Act*, RSA 2000, c L-12 or the *Worker's Compensation Act*, RSA 2000, c W-15 and that the amendments were not against the public interest, noting that they did not solely cause delay.

The Court set out that the evidentiary threshold for amending Pleadings after the close of Pleadings depends on the nature or classification of the proposed amendment. Specifically, the Court noted three categories: (1) amendments which require no or minimal evidence which include those that are trivial, inconsequential, ancillary, or merely clarify wording and also those which add new causes of action based on the facts that are already pleaded; (2) most other significant amendments that require only modest evidence and have a low evidentiary threshold, including any admissible evidence but may also include hearsay and potentially even opposing party Pleadings; and (3) some amendments which have a significantly elevated evidentiary threshold that require significant evidence establishing a "good ground" or "exceptional circumstances" including those that seek to new causes of action based on fraud, high handedness, or malicious conduct but the elevated threshold does not apply where the amendments add particulars for an existing cause of action.

The Court determined that (1) certain aspects of the amendments relating to Alberta Occupational Health & Safety were not relevant and were accordingly struck, (2) certain aspects of the amendments relating to wrongdoing in litigation conduct and were partially struck; (3) there was sufficient evidence surrounding the particulars of allegations relating to how the Defendant had made misrepresentations to the various administrative tribunals, noting that any concerns about particularization could be addressed in a Request for Particulars or an Order under Rule 3.61; (4) the amendments relating to physical injury were not duplicative and unnecessary; (5) the amendments relating to what the Plaintiff would do if he obtained a punitive damage Award was irrelevant, prejudicial, and accordingly struck; and (6) that it was not satisfied that amendments relating to certain July 2018 communications were covered by settlement privilege.

The Court considered what an appropriate Costs Award would be in accordance with Rule 3.66, noting that Rule 3.66 had dual competing purposes. The Court set out that Rule 3.66(1) encourages litigants to get their Pleadings right the first time and to hold the amending party responsible for Costs resulting from the amendment, while Rule 3.66(2) was intended to ensure that Respondents in amendment Applications do not unreasonably object to amendments.

The Court noted that if the Defendant sought to serve a Request for Particulars in accordance with Rule 3.61 and was required to do so within one month of its decision.

OLKOWSKI V NANO-GREEN BIOREFINERIES INC, 2023 ABKB 441

(GRAESSER J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies), 5.33 (Confidentiality and Use of Information), 10.31 (Court-ordered Costs Award), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

This was an Application by the self-represented Applicant, Dr. Olkowski, seeking to have the Respondents, Nano-Green Biorefineries Inc. ("Nano-Green") and Blaine Kunkel, Nano-Green's Chief Executive Officer, held in Contempt of Court. Dr. Olkowski claimed that the Respondents used information obtained from him and Dr. Laarveld (a former Co-Plaintiff) through record production and Questioning in making a complaint about Dr. Olkowski to the University of Saskatchewan (the "Complaint") and presented evidence and information at the University's Hearing Board proceeding (the "Contempt Application").

In response, Nano-Green cross applied to strike a number of paragraphs in Dr. Olkowski's Amended Statement of Claim and to summarily dismiss some of the allegations (the "Strike Application").

In considering the Contempt Application, Graesser J. considered the law surrounding Rules 10.52 and 10.53 and confirmed that civil Contempt must be proven beyond a reasonable doubt. Graesser J. also cited Rule 5.33, which codifies the "implied undertaking" rule and provides that any information or record obtained in the course of litigation, including records produced through Affidavit of Records or information obtained during Questioning, cannot be used for any other purposes.

Graesser J. noted that a novel question in this case was whether a Defendant could use information from the record production and Questioning of a former Co-Plaintiff in an Application that did not involve the Co-Plaintiff. Nano-Green and Mr. Kunkel did not provide any evidence suggesting that they obtained a Court Order exempting them from the operation of Rule 5.33, nor did they mention that they obtained consent from Dr. Laarveld to use information disclosed by him. Graesser J. drew adverse inferences from the absence of any mention of a Court Order or consent from Dr. Laarveld. Graesser J. found that the Respondents would not have known about the existence of certain records and presented them to the Hearing Board but for the Questioning and record production in this Action, and concluded that he was satisfied beyond a reasonable doubt that Mr. Kunkel and Nano-Green used records and information learned in the discovery process to formulate the Complaint.

Graesser J. established that the Respondents breached Rule 5.33, but Dr. Olkowski had not provided information that he had been harmed or disadvantaged in this Action, nor were the breaches flagrant or particularly egregious. Therefore, he did not impose any sanctions or consequences on the Respondents, but awarded Costs in any event of Trial, paid forthwith as per Column 1 of Schedule C.

With respect to the Strike Application, among other things, Nano-Green and Mr. Kunkel sought to strike paragraphs in the Amended Statement of Claim (the "Impugned Paragraphs") under Rule 3.68 for lack of jurisdiction or a cause of action. Alternatively, they sought to strike the Impugned Paragraphs that overlapped with defamation claims already advanced by Dr. Olkowski in Saskatchewan (the "Saskatchewan Action"), as well as paragraphs

that related to the patent prosecution process (the "Patent Prosecution Claim"). Further, the Respondents sought Summary Dismissal of the Impugned Paragraphs relating to the defamation claims on the basis of absolute or qualified privilege.

Graesser J. noted that the relief sought by Dr. Olkowski under the Patent Prosecution Claim could only be awarded in patent litigation, which could only be dealt with in the Federal Court, and struck the Impugned Paragraphs regarding the Patent Prosecution Claim. In regard to *res judicata*, Graesser J. noted that the doctrine applies to issues or claims that have already been resolved in other litigation. Since the Applicant had appealed the Saskatchewan Action, *res judicata* may apply if that Appeal is upheld. However, the Court noted that some communications between the parties leading up to or during the litigation between them might be relevant to Costs or quantum of damages, and a communication might be made with an intent to cause economic harm to someone. Therefore, Graesser J. partly dismissed the Respondents' Strike Application, noting that any defamation issues in the Saskatchewan Action would be fully and finally dealt with in that Province, and that and the Impugned Paragraphs were relevant only as they related to matters outside of the tort of defamation.

In dismissing the Respondents' privilege claims, Graesser J. noted that qualified privilege is lost where the communication is tainted by malice or goes beyond necessity and reasonableness. The parties had conflicting evidence on this issue that could not be resolved through Affidavit evidence. While absolute privilege may apply to complaints to regulatory bodies, the availability of an absolute privilege depends on the characterization of the Interim Associate Vice-President, to whom the Complaint was addressed. Graesser J. directed that this issue be dealt with at Trial.

HUSKY OIL OPERATIONS LIMITED V TECHNIP STONE & WEBSTER PROCESS TECHNOLOGY INC, 2023 ABKB 545

(LEMA J)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Technip Stone & Webster Process Technology, Inc. and Technip USA, Inc. (the "Appellant") appealed from an Application Judge's Decision that Husky Oil Operations Limited (the "Respondent") was not bound by an arbitration clause in a contract because they were not a signatory to the contract. The Appellant argued that if the Respondent wanted to enforce a warranty provided in the contract (the "Contractual Warranty Right"), it necessarily meant that the matter would proceed to arbitration if a dispute arose. The Respondent argued that they were not bound by any associated conditions or limitations imposed by the contract, including the requirement to arbitrate disputes.

After considering the contract in issue, Lema J. held that that the Applications Judge erred. Justice Lema concluded that because the Respondent decided to enforce the Contractual Warranty Right, it was agreeing to resolve the warranty dispute via arbitration. In other words, the Respondent became a party to the arbitration mechanism when it sought to enforce the Contractual Warranty Right.

The Appellant argued that since the Respondent failed to commence arbitration proceedings in accordance with section 3(1) of the *Limitations Act*, RSA 2000, c L-12 (the "Limitations Act"), the Action must be dismissed pursuant to Rule 3.68. Justice Lema noted that section 3(1) of the *Limitations Act* sets deadlines for seeking a "remedial order" and that "at first glance", requesting arbitration would fall outside seeking a "remedial order". However, section 5(1) of the *Arbitration Act*, RSA 2000, c A-43 (the "*Arbitration Act*"), provides that "[t]he law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action". The Court found that section 5(1) of the *Arbitration Act* created a link between arbitration proceedings and the Limitations Act, and that commencing arbitration was subject to the time limits stipulated in section 3(1) of the *Limitations Act*. Accordingly, since the Respondent filed its Statement of Claim in 2017, the applicable limitation period for the Respondent to commence arbitration had necessarily expired. The Respondent's arbitrable claims were struck from it's Action against the Appellant pursuant to Rule 3.68. However, with respect to the Respondent's negligence claim against the Appellant, Lema J. held that it was not struck as it arose under the law of negligence, was not arbitrable pursuant to the contract, and was not affected by the expiration of the arbitration deadline.

PARENTEAU V SPENCER, 2023 ABCA 268

(ROWBOTHAM, HUGHES AND PENTELECHUK JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant appealed a Decision to strike the Appellant's Statement of Claim pursuant to Rule 3.68 as an "abuse of the Court". The Respondents all sought to have the Action against them struck by invoking the Apparent Vexatious Application or Proceeding ("AVAP") procedure under Court of King's Bench Civil Practice Note 7 ("CPN7").

The Court noted that it interpreted the underlying Decision as striking the Appellant's Statement of Claim solely under Rule 3.68(2)(d) for constituting an abuse of process as opposed to Rule 3.68(2)(b) where the "pleading discloses no reasonable claim". The Court found that this was consistent with recent jurisprudence which noted that the CPN7 procedure should be limited to Rules 3.68(2)(c) and 3.68(2)(d). The Court set out that although no evidence may be submitted on the issue of whether a "reasonable claim" has been plead under Rule 3.68(2)(b); under Rule 3.68(2)(d), evidence may be admitted and there is no presumption that the facts plead are true. Further, the Court noted that the admission of evidence is strongly curtailed under the "summary procedures" in CPN7 based on the rational that CPN7 should only apply where the "the frivolous, vexatious, or abusive nature of the proceeding" is "apparent on the face of the pleading".

The Court additionally noted that the Appellant's submissions in respect of the Respondents did not establish a proper claim for her negligence claim and the questions she sought to have answered had little, if anything, to do with the Respondents. The Court accordingly dismissed the Appeal as no reviewable error had been found in the Court's decision to strike the Appellant's Statement of Claim.

The Court additionally set out several observations and concerns regarding CPN7:

(1) CPN7 was implemented "to better manage litigation that, on its face, appears to be unmeritorious, has no chance of success, or is otherwise abusive and vexatious" resulting in parties being able to avoid having to file an Application to strike a Pleading under Rule 3.68 and the resulting delays in securing a chambers date, as the review is entirely in writing;

(2) Although CPN7 seeks to enforce Rule 3.68, it makes no reference to "vexatious" proceedings or Pleadings and on this basis alone, the inclusion of "vexatious" language in CPN7 is troublesome;

(3) The propriety of attaching the "vexatious" label to the overall process outlined in CPN7 is questionable as it does not follow that all Actions amounting to an abuse of process are necessarily vexatious;

(4) The phrase "Apparent Vexatious Application or Proceeding" contained in CPN7 is provocative and can have long-term implications for the party whose Application or proceeding is being challenged, as the distinction between a vexatious proceeding contemplated by CPN7 and a person being declared a vexatious litigation is often not apparent to the litigant; and

(5) The ordinary course is for Defendants to make Applications under Rule 3.68 which CPN7 does not supplant as many Actions and Appeals are not vexatious (as concerns about vexatious proceedings can be dealt with separately under the *Judicature Act*, RSA 2000, c J-2), but are completely unmeritorious and born from unfamiliarity with applicable legal principles, rules of evidence and rules of procedure.

HANDELSMAN V GHANI, 2023 ABKB 398

(EAMON J)

Rule 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Applicant applied to amend the Pleadings in this Action, including to add a party (the "Proposed Defendant") to the lawsuit and to amend the Certification Order (as the matter had already been certified as a Class Action) accordingly. Eamon J. refused the amendments pertaining to the Proposed Defendant but allowed the other amendments, which did not relate to the Proposed Defendant.

Eamon J. commented that the Court has broad discretion to amend pleadings after certification of a Class Action. Generally, amendments should be allowed no matter how careless or late, subject to the following exceptions: (a) the amendment seeks to add a new party or a new cause of action after the expiry of the limitation period unless otherwise permitted by statute; (b) the amendment is hopeless, in that an amendment if it had been in the original pleadings would have been struck; (c) the amendment would cause serious prejudice to the opposing party that is not compensable in Costs; and (d) there is an element of bad faith associated with the failure to complete the amendment in the first instance.

Eamon J. cited *Attila Dogan Construction and Installation Co. Inc v AMEC Americas Limited*, 2014 ABCA 74 for the propositions that a party seeking substantive amendments must present some evidence in support of the Application to amend, and that the Judge may engage in some limited assessment of the evidence in determining if the threshold is met.

Citing *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA*, 2013 ABCA

87 and other caselaw, Eamon J. held that where fraud, highhandedness, or malicious conduct is alleged, the evidentiary test is "stiffer" and there must be "good ground" or "exceptional circumstances" with "significant evidence in support of the amendments".

Eamon J. found that the Applicant did not satisfy the evidentiary threshold required to join the Proposed Defendant in respect of claims for knowing assistance in breach of fiduciary duty. There was no evidence to suggest that the Proposed Defendant knew of impropriety in the operations or the dishonest conduct asserted by the Applicant.

Eamon J. further found that the Proposed Defendant was not stonewalling the Applicant by not disclosing records, and that there was no evidence that the absence of records was a problem of the Proposed Defendant's making. As such, there was no evidence meeting the low evidentiary standard to support the other categories of proposed amendments against the Proposed Defendant.

Eamon J. allowed the other amendments. Having noted that none of the Defendants objected to the other amendments, which were technical in nature, Eamon J. held that these amendments arose from facts already pled against the existing Defendants and did not change the substance of the case. In addition, these amendments were supported sufficiently by the exhibits to the Applicant's Affidavit to the extent evidence was required.

SMITH V TUCHSCHERER, 2023 ABCA 238

(KHULLAR CJA)

Rule 4.22 (Considerations for Security for Costs Order)

Mr. Tuchscherer applied for an Order requiring Mr. Smith to pay Security for Costs of the impending Appeal pursuant to Rule 4.22.

Mr. Smith acknowledged that he had no assets in Alberta as his assets were in the United States, which weighed heavily in favour of requiring Security for Costs. The Court found it concerning that Mr. Smith had failed to pay two previous Costs Awards, again weighing in favour of requiring security. Further in favour of requiring security was that the underlying Appeal was not, on its face, strong. The only error articulated on the Notice of Appeal was related to a finding of fact, which was a finding that was owed deference on Appeal. Finally, in ordering Security for Costs of $7,500.00, the Court found there was no undue prejudice to Mr. Smith as there was no evidence that posting Security for Costs would prevent him from pursuing the Appeal.

LAY V LAY, 2023 ABCA 260

(HO JA)

Rules 4.22 (Considerations for Security for Costs Order), 14.37 (Single Appeal Judges), 14.67 (Security for Costs) and 14.90 (Sanctions)

The Applicants applied to strike an Appeal by the Respondents and to obtain Security for Costs. Appeal Justice Ho granted the Application for Security for Costs and directed that the strike Application be brought before a Panel of the Court rather than a single Appeal Judge.

With respect to the strike Application, the Applicants argued that an Order striking the Appeal should be granted because: (i) one of the Appellants was not a proper party to the Appeal, (ii) the second Appellant was bankrupt and unable to file an Appeal in her own name, and (iii) the first Appellant could not act on behalf of the second Appellant as he was not a lawyer within the meaning of section 106 of the *Legal Profession Act*, RSA 2000, c L-8.

Rule 14.37(2)(b) gives a single Appeal Judge jurisdiction to strike an Appeal if it does not comply with a mandatory Rule, prior Order, or direction of the Court of Appeal. However, the Applicants could not explain what mandatory Rule, prior Order, or direction was not observed by the Respondents. Instead, the Applicants tried to rely on Rule 14.90(1)(b), generally. However, Rule 14.90(1)(b) falls under a subdivision related to sanctions and states that in the event of non-compliance with a Rule, Order, or direction, a single Appeal Judge may strike an Appeal.

Appeal Justice Ho found that she did not have jurisdiction to hear the strike Application because a determination of whether a proper party to the Appeal - notwithstanding that it has been identified as a respondent in the Court below - is an issue that should be more appropriately considered by a panel of the Court.

With respect to the Security for Costs Application, a single Appeal Judge may award Security for Costs pursuant to Rule 14.67(1). The considerations for issuing a Security for Costs Order are outlined in Rule 4.22. In determining whether it is just and reasonable to order Security for Costs, the Court looks at: (a) whether it is likely that the Applicant can enforce a Judgment against the Respondent's assets in Alberta; (b) the Respondent's ability to pay the Costs Award; (c) the merits of the Action in which the Application is filed; (d) whether the Security for Costs Order would unduly prejudice the Respondent's ability to continue the Action; and (e) any other matter the Court considers appropriate. The Applicant has the onus of establishing that these factors weigh in favour of a Security for Costs Award.

Appeal Justice Ho found that on the record it was just and reasonable that the Respondents pay Security for Costs for the fees for the Appeal. The Respondents had an outstanding $350,000 in unpaid Cost Awards from litigation in the Court below. While some of the Costs Awards had been outstanding for more than five years, the Court stressed that access to justice "does not equate to access to civil processes without fear of costs consequences".

GRIMES V GOVERNORS OF THE UNIVERSITY OF LETHBRIDGE, 2023 ABKB 432

(GRAESSER J)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.9 (Right of Review), 10.31 (Court-ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following the dismissal of an Application for Judicial Review.

The Court began by surveying historical developments in the case law on Costs, including the Court of Appeal decisions of *McAllister v Calgary (City),* 2021 ABCA 25, *Barkwell v McDonald*, 2023 ABCA 87, and *Barkwell v McDonald*, 2023 ABCA 183, and the reconciliation of these decisions with Rules 10.9, 10.31, and 10.33.

Graesser J. concluded that Costs remain wholly within the discretion of the Court, but that, notwithstanding passages from the decisions surveyed, a departure from the tariff set out in Schedule C to the Rules should not typically occur absent exceptional circumstances.

Turning to the matter before the Court, Graesser J. noted that the University of Lethbridge had been entirely successful in responding to the Application for Judicial Review, and that the matter was not complex. Graesser J. also commented on the service of a settlement offer by the University: the offer was not in the form provided for under Rule 4.29, but could nevertheless influence a Costs Award. Ultimately, however, Graesser J. found that the offer did not contain a genuine compromise, and so it had no effect on the Costs Award.

In the result, Graesser J. awarded the University of Lethbridge Costs according to Column 1 of Schedule C, modified slightly to account for inflation.

AVLI BRC DEVELOPMENTS INC V BMP CONSTRUCTION MANAGEMENT LTD, 2023 ABCA 267

(SLATTER, HUGHES AND KIRKER JJA)

Rules 4.29 (Costs Consequences of Formal Offer to Settle), 14.59 (Formal Offers to Settle) and 14.88 (Costs Awards)

The Alberta Court of Appeal had previously dismissed the Appellant's Appeal and held that the Respondents, as the successful party, were presumptively entitled to Costs. Two of the Respondents later sought enhanced Costs under Rule 14.88.

The first Respondent argued that it was entitled to double Schedule C Costs under Rules 4.29 and 14.59. Rule 4.29 entitles a party to double Costs including disbursements if that party makes a Formal Offer that is not accepted and the outcome of the proceedings is less favourable to the opposing party than the Formal Offer. Rule 14.59 states that when a Formal Offer is made for an Appeal, Costs of the Appeal must be awarded in accordance with Rule 4.29.

The Court awarded the first Respondent double Schedule C Costs. The Court noted that the four primary factors in whether double

Costs are appropriate are the timing of the offer, the content of the offer, whether the offer was beyond *de minimis*, and whether special circumstances exist which militate against granting double Costs. The Court determined that all four factors weighed in favour of granting double Costs and noted that the Appellant did not argue otherwise despite being given an opportunity to respond.

The Court awarded the second Respondent Costs calculated on Column 2 of Schedule C. Although the second Respondent argued for enhanced Costs, it based its calculations on Column 1 of Schedule C, even though the Chambers Judge had awarded Costs based on Column 2. The Court found that there was no material difference between the enhanced Costs the second Respondent appeared to claim and the amount it was entitled to under Column 2 of Schedule C.

WESTJET V ELS MARKETING INC, 2023 ABKB 408

(MCCARTHY J)

Rule 4.31 (Application to Deal With Delay)

WestJet and ELS were parties to claims that had been subject to case management and protracted litigation for 12 years. WestJet sought to have ELS's Counterclaim dismissed for inordinate and inexcusable delay, pursuant to Rule 4.31.

McCarthy J. considered the tests for long delay set out in *Humphreys v Hanne,* 2017 ABCA 116 and T*ransamerica Life Canada v Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276. McCarthy J. concluded that, on the facts, there had undoubtedly been delay by ELS in pursuing its Counterclaim, stating: "Both WestJet's Statement of Claim and ELS's Statement of Defence and Counterclaim in this Action were filed more than 13 years ago. I have been case managing this Action for approximately 12 of those years. The Court of Appeal's decision to reinstate ELS' counterclaim following its partial dismissal was made the better part of nine years ago. The Consent Order permitting amendments to ELS' counterclaim was entered into more than three and a half years ago."

McCarthy J. then turned to consider whether that delay had been inordinate, including consideration of the time elapsed, the resolution of the primary claim, and the various steps taken. McCarthy J. acknowledged that, unlike many cases, this was not a case where the claim had largely been dormant. However, McCarthy J. found that little of the activity on the claim had done anything to advance the matter, and that activity was insufficient to forestall a finding of inordinate delay.

McCarthy J. then proceeded to consider whether the delay was inexcusable, noting that the burden to prove inordinate delay was excusable lies with the non-moving party. The Court held that it was incumbent on ELS to move the claim forward, and it failed to do so. As such, ELS failed to show a credible excuse for delay, and the delay was found to be inexcusable.

With a finding of inordinate and inexcusable delay, a presumption of significant prejudice

was applied. ELS had the opportunity to rebut that presumption. The Court did not accept ELS' arguments regarding prejudice, and found it had not rebutted this presumption.

McCarthy J. acknowledged that Rule 4.31 provided discretion as to whether the claim was dismissed, but found no reason not to dismiss the claim. ELS' claim was therefore dismissed.

PROTECTION OF THE HOLY VIRGIN MARY ORTHODOX CONVENT AT BLUFFTON V OUSTINOW ESTATE, 2023 ABKB 462

(ROSS J)

Rule 4.31 (Application to Deal with Delay)

On June 11, 2021, the Applicant, Oustinow Estate, filed an Application to dismiss the Respondent's Action for delay. The Statement of Claim was initially filed on February 18, 2011, wherein the Respondent sought a constructive trust or, alternatively, damages, on a property (the "Property") that Metropolitan Oustinow ("Oustinow") owned at the time of his death. The Property was left to a United States convent pursuant to Oustinow's will. The Respondent alleged that he had been promised the land by Oustinow prior to his death.

Justice Ross determined that the appropriate framework to apply was the six-part test set out in *Humphreys v Trebilcock*, 2017 ABCA 116, but noted that this was not the only way to analyze delay pursuant to the Alberta Court of Appeal's comments in *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABC 276.

The Court had no issue finding that the first part of the test, whether there had been delay, was met, as the Action had been ongoing for ten years and the Pleadings were still not resolved. However, while there had been delay, the delay was not inordinate or excusable. Justice Ross found that large portions of the delay were attributable to the Applicant, including two years and nine months to find a replacement litigation representative, one year and one month to file a Statement of Defence, and an extended period wherein the Applicant failed to provide dates for Questioning. Further, the parties later agreed to adjourn Questioning to pursue settlement discussions, which took approximately two years. Justice Ross, in deeming that the delay was not inordinate or excusable, also noted that the Plaintiff had taken litigation steps by filing an Affidavit of Records and by entering into a litigation plan in 2018, and that the matter was more complex than the Applicant suggested as it involved actions taken by the Respondent over many years in purported reliance on Oustinow's promise.

Justice Ross held that since the delay was not inordinate or excusable, the presumption of prejudice did not apply, and the onus was on the Applicant to prove significant prejudice arising from the delay, which "is the most important factor of the analysis." The Applicant alleged prejudice in four different manners: 1) reputational; 2) inability to distribute the estate; 3) loss of evidence; and 4) as a result of an adverse possession Action brought by the Respondent. The Court rejected each argument, finding that: 1) the Defendant would have taken appropriate steps to move the Action along if there was significant reputational prejudice; 2) there was no evidence that any party was impacted from the delay in finalizing the estate; 3) there was no evidence that the

Applicant had lost documents or witnesses due to the delay; and 4) there was no evidence of the Respondent's continued occupation of the lands but, even if that existed, the Court did not accept that that alleged prejudice arose from any delay in pursuing the within Action.

The Application was dismissed.

HERITAGE PROPERTY CORPORATION V TRIOVEST INC, 2023 ABKB 513

(WHITLING J)

Rules 4.31 (Application to Deal with Delay), 6.14 (Appeal from Application Judge's Judgment or Order) and 7.3 (Summary Dismissal)

The Plaintiffs brought a claim for breach of contract against the Defendants. The Plaintiffs' claim was summarily dismissed by Applications Judge Robertson (the "Order"). The Plaintiffs appealed the Order pursuant to Rule 6.14. The Defendants applied to dismiss the Plaintiff's Appeal for delay under Rule 4.31.

The Court considered Rule 4.31, noting the Defendant's arguments that the Rule empowers the court to "dismiss all or any part of a claim", and that Appeals pursuant to Rule 6.14(1) are subject to short timelines and must be pursued diligently. The Plaintiffs cited some authorities addressing delays in the context of Appeals before the Court of Appeal. The Court acknowledged that even though the authorities cited by the Plaintiffs were not directly applicable to the present situation, the general principle that litigants are expected to diligently pursue Appeals applies. It was recognized that a comparatively shorter period of delay may establish "inordinate and inexcusable delay" in the advancement of an Appeal under Rule 6.14(1), as opposed to the dismissal of an entire Action.

Nevertheless, the Court found that the delay in advancing this Appeal did not reach the threshold of being considered inordinate and inexcusable. The initial six-month delay was consented to by the Defendants under Rule 4.31(3). The subsequent delays could be attributed to various factors largely beyond the control of the Plaintiffs. These include the impact of the COVID-19 pandemic, the serious illness of the Plaintiffs' former counsel, and the Court's scheduling backlog. The Court observed that according to Rule 4.31(1)(b), the Defendants were obligated to demonstrate the existence of "significant prejudice" resulting from the delay. However, the presumption put forth by the Defendants regarding any prejudice related to the witnesses was refuted, given that the crucial matters in the Appeal hinged on the written evidence. Consequently, the Defendants' request to dismiss the Appeal on grounds of delay was rejected.

The Court proceeded to evaluate whether the Plaintiff's Appeal from the Order should be dismissed summarily. In doing so, the Court applied the test in *Weir-Jones Technical Services Inc v Purolator Courier Ltd.*, 2019 ABCA 49, and observed that the issues in this Appeal could be resolved on a summary basis, given that they primarily hinged on the language of the purchase and sale agreement and written evidence. The Court applied the relevant legal principles concerning breach of contract and determined that it was appropriate to resolve the dispute between the parties summarily and in favor of the Defendants. The Court noted that the Defendants had established the nec-

essary facts on a balance of probabilities and had discharged their burden of demonstrating that there was no merit to the Plaintiffs' claims. Although the Plaintiffs presented substantial evidence, they failed to demonstrate the existence of a genuine issue that necessitated a Trial.

VANMAELE ESTATE (RE), 2023 ABKB 456

(LOPARCO J)

Rule 4.33 (Dismissal for Long Delay)

The Applicant, a beneficiary of the estate in issue, applied to strike a motion brought by an executor and beneficiary of the estate (the "Respondent") under the *Dependants Relief Act,* RSA 2000, c D-10.5 (the "*DRA* Claim"), for long delay pursuant to Rule 4.33 (the "Application").

At a Case Management Conference ("CMC"), one of the estate executors requested that the Case Management Justice ("CMJ") determine whether the Respondent was a dependant. The matter was scheduled to be heard on December 7, 2016. At that time, the CMJ declined to determine the issue on Affidavit evidence alone and proposed a Judicial Dispute Resolution ("JDR") take place to settle the claim. The matter was adjourned sine die to schedule a JDR, which never took place because the Respondent declined to participate.

The Application was initially filed on December 19, 2019, and was heard on June 24 and July 2, 2020. At that time, Bokenfohr J. queried whether the Respondent was incapacitated during the three-year period, and ordered that he undergo a capacity assessment as a result of the decision in *AF v Alberta*, 2020 ABQB 268 ("AF"), which made it a live issue as to whether this would extend the limitation period. The Respondent refused to attend the assessment. At the subsequent CMC, Bokenfohr J. held that there was no issue with the Respondent's ability to represent himself, and the Application was re-scheduled for March 1, 2023.

The Court held that the period for determining whether an uncontroversial significant advance had taken place was December 7, 2016, the date the matter was originally set to determine whether the Respondent was dependant, until December 18, 2019, the date the Applicant filed the Application (the "Relevant Period"). Justice Loparco found there had been no significant advance in the *DRA* Claim during the Relevant Period.

That, however, did not decide the issue, and the Court moved on to consider whether there were any other reasons for the delay, namely whether there was an agreement that suspended Rule 4.33, whether the Respondent was incapacitated during the Relevant Period, and whether any steps taken in a related Action constituted a significant step in the *DRA* Claim. The Court found there was no agreement that suspended the Rule and there was no evidence that proved the Respondent's disability on a balance of probabilities as required by the decision in AF.

The Court then moved on to consider the factors in A*ngevine v Blue Range Resource Corp.*, 2007 ABQB 443, to determine whether the Application to pass accounts that was heard in 2018 by Renke J. was "inextricably linked" to the *DRA* Claim, thereby suspending the passage of time. The Court found that Renke J.'s decision resolved several issues pertinent to the *DRA* Claim, namely the determination of the

Respondent's compensation and the validity of the lease agreement between the Respondent and the deceased. Justice Loparco held that Renke J.'s decision related to assets and income, which was relevant to the Respondent's entitlement as a dependant, and it thereby increased the quality of the information such that the parties and the Court would be better situated to rationally assess the merits of the *DRA* Claim.

The Court also opined that the Respondent had experienced complex medical issues that may entitle him to a dependency claim and that any doubt as to whether there was a significant advance in the Action "ought to be resolved in his favour." Accordingly, the 2018 Application to pass accounts constituted a significant step in the *DRA* Claim that suspended the passage the time. The Application was dismissed.

STYLECRAFT DEVELOPMENTS (1984) LTD V CARSCALLEN LLP, 2023 ABKB 504

(BOURQUE J)

Rule 4.33 (Dismissal for Long Delay)

The Defendants were former counsel to the Plaintiff, who had sued for professional negligence after the Plaintiff's claim was dismissed. The Defendants applied to dismiss the Plaintiff's claim for long delay pursuant to Rule 4.33. Applications Judge Farrington granted that Application, and the Plaintiff appealed.

On Appeal, Justice Bourque considered whether the matter had been significantly advanced by the conduct of the parties, the provision of a Witness List, and/or the formation of a Litigation Plan.

The Court highlighted that Rule 4.33 deals only with timing, not merits. A decision to dismiss for delay has nothing to do with the strength of the claim. The question is whether, during the alleged period of delay, there was a step that moved the Action forward in an essential way, measured as a step which increases the likelihood that the claim will be resolved.

Justice Bourque summarized the considerations the Court must make to complete a functional "significant advancement" analysis: (a) whether formal steps were taken; (b) whether issues were narrowed; (c) whether steps were taken to complete document or information discovery; (d) whether positions were clarified; (e) the nature, value, quality, genuineness, and timing of purported development; (f) the history and nature of the litigation; and (g) the outcome of the purported advancement.

In light of these considerations, Justice Bourque found that communications between the parties suggesting mediators for an ADR, exchanging a Witness List, and entering a Litigation Plan cannot count as significantly advancing the matter. Rather, Justice Bourque stated that these steps were "extremely minimal in nature, did not include the disclosure of meaningful information, and did not move the parties towards resolution." Something more was required to be completed pursuant to the communications or Litigation Plan for it to count as a significant step.

The Appeal was therefore dismissed.

BARON REAL ESTATE INVESTMENTS LTD V TRI-ARROW INDUSTRIAL RECOVERY INC, 2023 ABKB 531

(APPLICATIONS JUDGE SUMMERS)

Rule 4.33 (Dismissal for Long Delay)

All except one Defendant applied for dismissal of the claims against them pursuant to Rule 4.33. Applications Judge Summers defined the sole issue as whether the Plaintiff's service of a Supplemental Affidavit of Records constituted a "significant advance of the Action" as required under Rule 4.33.

There was a preliminary disagreement between the parties regarding the burden of proof on an Application under Rule 4.33. The Applicants took the position that the onus always rests with the Plaintiff, who must demonstrate a significant advance in an Action. The Court disagreed, and held that absent some contrary intention being indicated in a statute or Rule, the burden of proof always lies with the Applicant to prove its Application on a balance of probabilities. In this case, that meant showing that there was no significant advance of the Action in the relevant time period.

In regard to the substance of the Application, the Applicants characterized the contents of the Supplemental Affidavit of Records as "insignificant" and not bearing on the facts in dispute between the parties. Having examined the nature, extent, and potential importance of the records disclosed in the Supplemental Affidavit of Records relative to the Pleadings, the Court disagreed, and held that its service constituted a genuine step taken by the Plaintiff to advance the Action.

Applications Judge Summers therefore dismissed the Application.

KELANA HOLDINGS LTD V 393510 ALBERTA LTD, 2023 ABKB 486

(SILVER J)

Rules 5.33 (Confidentiality and Use of Information) and 10.52 (Declaration of Civil Contempt)

The Applicant sought an Order declaring the Respondents in civil Contempt for failing to deliver property under seizure pursuant to the *Civil Enforcement Act*, RSA 2000, c C-15.

Silver J. cited *Whitford v Red Pheasant First Nation*, 2022 FC 436 for the proposition that an undertaking that is given to the Court with regards to property is an "enforceable obligation" made to the parties in the Action and to the Court. As such, undertakings have the effect of a Court Order, which, if not honoured, may be enforced including by motion to compel, motion to strike, and ultimately by proceedings for Contempt.

Silver J. commented that civil Contempt under Rule 10.52(3)(b) can flow from any provincial statute that provides for such a finding. Many provincial statutes base civil Contempt on conduct that fails to comply with notices issued under the statutory authority. The other typical form of civil Contempt found under provincial

legislation relates to non-compliance of Orders or directives similar to Rule 10.52(3)(a)(i) and (iii-iv).

Silver J. noted that there was no decision in Alberta that substantively spoke of the proof requirements of civil Contempt under provincial statutes where civil Contempt is occurring outside of Court. As such, Silver J. held that in terms of such conduct, an Applicant must prove beyond a reasonable doubt the three elements of civil Contempt as outlined in *Carey v Laikon*, 2015 SCC 17 ("*Carey*") (the "Three Elements"), namely: (1) an Order stating clearly and unequivocally what must be done; (2) actual notice of the terms of the duty to deliver; and (3) intentional failure to comply with the duty to deliver the property under seizure.

Silver J. commented that a failure to comply with the terms of an undertaking given to the Court may refer to the implied undertaking rule found under Rule 5.33, which protects and enforces the confidentiality of information and records disclosed during litigation. As such, a breach of the Rule has found to be analogous to a breach of a Court Order, and the Three Elements for civil contempt from *Carey* applies to Rule 10.52(3)(a)(vi).

Silver J. held that the Applicant did not prove beyond a reasonable doubt that the Three Elements were met. Specifically, the seizure documents failed to list the quantity and descriptions of the items under seizure. As such, they did not fully provide the Respondent with actual notice. Furthermore, some of the property was in fact delivered and removed for sale. Silver J. also had a reasonable doubt as to whether the Respondent intentionally failed to comply with the duty to deliver the property under seizure. As such, Silver J. dismissed the Application.

RAYNER V MIZIER, 2023 ABKB 521

(APPLICATIONS JUDGE SCHLOSSER)

Rules 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Applicant applied for Summary Judgment under Rule 7.3 in relation to a loan that the Applicant purportedly advanced to the Respondent.

The Respondent argued that the loan was advanced to a corporation and not to him personally. In support, the Respondent produced a promissory note indicating that a company was the borrower. The Applicant produced a different promissory note allegedly signed by both parties indicating that the loan was issued to the Respondent personally, which the Respondent denied signing. In accordance with Rule 6.11, both parties tendered expert opinion evidence on the issue of whether the signature was in fact the Respondent's.

The Court could not determine summarily who borrowed the funds because credibility was central to resolving that question. However, the Court granted Summary Judgment for unjust enrichment as the Respondent received the loan through a bank draft payable to him personally and deposited the funds into his personal account.

CHALLIS V MAVERICK OILFIELD SERVICES LTD., 2023 ABKB 514

(ARMSTRONG J)

Rules 6.14 (Appeal from Application Judge's Judgment or Order), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Respondent Plaintiff had advanced a claim against the Appellant Defendant company and sought Summary Judgment for payment of severance and payment of the deferred portion of his bonus. The Applications Judge only granted Summary Judgment for the deferred portion of the Plaintiff's bonus. The Defendant appealed.

The Respondent Plaintiff did not file a Notice of Appeal but argued that he was not required to file one, since an Appeal from an Applications Judge was a hearing *de novo*. In dismissing this argument, the Court noted that the term *de novo* was used in relation to the applicable standard of review rather than the mechanics of Appeals from Applications Judges. An Appeal of an Applications Judge's Decision is not a "new hearing of the matter, conducted as though the original hearing had not taken place", as Rule 6.14(3) makes it clear that such an Appeal is an Appeal on the record. Additional evidence must be relevant and material before it can be adduced on Appeal, and the Appellant must provide a transcript of the proceedings for the purpose of Appeal.

The Court noted that the standard of review for an Appeal under Rule 6.14 is correctness and no deference is owed. Additionally, the Court cited *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 for the test for Summary Judgment under Rules 7.2 and 7.3.

The Court concluded that this was an appropriate case for Summary Judgment. There was a factual dispute regarding the terms of the deferral agreement; however, this dispute could be resolved on the record before the Court by considering the treatment of the other bonus recipients, the correspondence between the parties, and the minimum protections provided by the *Employment Standards Code*, RSA 2000, c E-9.

The Court found no genuine issue requiring a Trial and dismissed the Appeal.

KAUP V LANDREX HUNTER RIDGE INC, 2023 ABKB 542

(HARRIS J)

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

The Plaintiffs appealed the Decision of an Applications Judge. The Applications Judge concluded that both the Statement of Claim and the Defendants' counterclaim could be determined summarily, dismissing the Plaintiffs' claim while granting the Defendants' counterclaim.

The Court noted that under Rule 6.14, an Appeal of an Applications Judge's Decision is de novo, and that the standard of review was correctness on all issues. The Court further noted that, under Rule 6.14(3), an Appeal from an Applications Judge's Decision is an Appeal on the record of proceedings before the Appli-

cations Judge. However, new evidence may be admitted if the Judge hearing the Appeal considers it relevant and material. Although the test for relevance and materiality under Rule 6.14 has been described as having a low threshold, the additional evidence sought to be considered must be admissible evidence: when the Appellant sought a final disposition of a claim, the evidence must meet the standards required at Trial.

The Court refused to admit a second Affidavit from the Appellant Plaintiffs into evidence as the Affidavit contained inadmissible evidence such as subjective beliefs, hearsay, and irrelevant information. Citing the test from Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49, the Court concluded that the claims involved in this case were appropriate for summary disposition and that there was no genuine issue requiring a Trial. Therefore, the Plaintiffs' Appeal was dismissed.

CASKEY V HILLENBRAND, 2023 ABKB 477

(APPLICATIONS JUDGE SMART)

Rule 7.2 (Application for Judgment)

In the context of litigation related to a failed house sale, a selection of the Defendants applied, pursuant to Rule 7.2, for Summary Dismissal of the claim against them. The claim against the relevant Defendants was in regard to their role, as counsel to the seller, in registering certain instruments on title.

The Defendants argued that they acted on the instructions of the seller who, in the circumstances of this case, was acting as the agent of the buyers in dealing with the Land Titles Office. Therefore, per the Defendants, any liability was the seller's alone.

The Court held that, even if the Defendants' arguments were accepted, a relationship was conceivably created between the Defendants and the purchasers, with corresponding duties and obligations. The Court further observed that if there was no such relationship, as the Defendants argued, then they had misrepresented their position to the Land Titles Office when registering the instruments at issue.

Based on these findings, the Court was unable to conclude that the Plaintiffs' claim had "no merit" as required for a successful Application for Summary Dismissal. The Court therefore dismissed the Application and granted Costs to the Plaintiffs.

CHEMTRADE LOGISTICS INC V FORT SASKATCHEWAN (CITY), 2023 ABKB 434

(ANGOTTI J)

Rule 7.3 (Summary Judgment)

Chemtrade Logistics Inc. ("Chemtrade") filed a Judicial Review Application regarding two development permits granted by the City of Fort Saskatchewan. A number of developers applied for Summary Dismissal of Chemtrade's Application on the basis that there was a statutory right of Appeal.

Justice Angotti considered Rule 7.3(1)(b), which permits the Court to dismiss an Action where it has no merit. The parties were not seeking a decision on the merits of the Application, but rather the merits of the threshold question: should the Court exercise its discretion to allow the Application to proceed if there is an adequate alternative remedy and no exceptional circumstances?

As a first step, Justice Angotti considered whether summary disposition was appropriate. Chemtrade argued that it was not appropriate on an Application for Judicial Review, as it involves a review of the merits of the Application and effectively becomes the Judicial Review itself. However, the Applicants sought Summary Dismissal based on a "fatal flaw" argument, rather than on the merits. In this case, the "fatal flaw" was the presence of an adequate alternative remedy and absence of any exceptional circumstances. Justice Angotti therefore held that the Application was appropriate to consider in the circumstances.

Justice Angotti then went on to consider whether the statutory right of Appeal justified an exercise of her discretion to grant Summary Dismissal. The Court acknowledged that, as a general rule, all statutory rights of Appeal must be exhausted before pursuing Judicial Review. However, for one of the permits, no statutory means of Appeal existed. There was therefore no adequate alternative remedy. For the other permit, there was a statutory right of Appeal. However, the function of the statute created prejudice to Chemtrade as it was unable to act on its statutory right of Appeal. This was an exceptional circumstance sufficient to allow the Application.

Justice Angotti therefore dismissed the Summary Dismissal Application.

ATB V REAL INDUSTRIES 333 CORP, 2023 ABKB 503

(HOLLINS J)

Rule 7.3 (Summary Judgment)

The Court granted the Plaintiff's Rule 7.3 Application for Summary Judgment based on unjust enrichment.

Hollins J. commented that the Summary Judgment test under Rule 7.3 must be considered in light of *Hryniak v Mauldin*, 2014 SCC 7, where the Supreme Court of Canada recommended a culture shift in civil litigation allowing for the use of summary procedures where the Court is able to reach a fair and just determination on

the merits of a matter with the material before it.

Hollins J. continued to comment that the Alberta test for Summary Judgment was settled in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 ("*Weir-Jones*"). Specifically, the Court should first determine whether it is possible to make a summary determination based on the record before it and the nature of the disputes. The record before the Court must allow it to make the necessary findings of fact and apply the law to those facts. If that can be done, the Court will then move to consider whether proceeding by Summary Judgment would be the more expeditious way to achieve a just result.

Citing *Weir-Jones*, Hollins J. further commented that a dispute on material facts, issues of credibility, or the level of complexity of the case are all things that may render a matter inappropriate for determination by Summary Judgment.

Hollins J. cautioned against summary determination of fraudulent conduct where credibility is a live issue. However, Hollins J. did not consider that issue as the Plaintiff was not pursuing its Rule 7.3 Application based on its allegations of fraud, but unjust enrichment and knowing receipt, neither of which require a finding of fraudulent intent.

Hollins J. noted that the Plaintiff brought an Action for fraud, as well as for conversion, unjust enrichment, and knowing receipt. However, Hollins J. was satisfied that the same set of facts could be used to ground a claim for equitable relief without considering whether those same facts would constitute fraud.

Further, the agreed upon facts did not engage issues of credibility and provide a sufficient record on which to adjudicate the claims of unjust enrichment and knowing receipt. As such, Hollins J. held that the dispute may be fairly resolved based on the available record.

BAINS V ADAM, 2023 ABKB 491

(YAMAUCHI J)

Rules 8.17 (Proving Facts) and 9.13 (Re-opening Case)

Yamauchi J. denied the Plaintiff's Application to enter opinion evidence through an Affidavit after the conclusion of the Trial.

Yamauchi J. cited with approval Heritage *Freehold Specialists & Co v Montreal Trust Co (1997)*, 208 AR 241, 52 Alta LR (3d) 354 for the proposition that to enter such evidence, a litigant should apply for leave under Rule 8.17 before the Trial as opposed to at the Trial, let alone after the Trial has been completed. Moreover, allowing the Plaintiff to enter opinion evidence through an Affidavit would contravene Rule 8.17, as the Defendants would have no opportunity to cross-examine the authors of the various exhibits.

Yamauchi J. cited *Aubin v Petrone*, 2020 ABQB 708 for the propositions that a Court may consider a Rule 9.13 Application if it is satisfied there is a good reason to do so; and in deciding whether to exercise this discretion, a Court should keep in mind a number of factors, including: (1) the desirability of avoiding unnecessary and costly Appeals; (2) the desirability of the Appeal Court having a fully developed factual and legal record; (3) the need for finality and certainty in legal proceedings; (4) that

errors to be corrected should be objectively demonstrable (such as an incorrect statement of law or interpretation of a contract which all parties agree is incorrect); (5) the Rule is not a vehicle for seeking reconsideration of a judgment call; and (6) the threshold for a Court to exercise its discretion should be high to avoid Applications which are in reality, a "second kick at the can".

Citing *CZ v RB*, 2019 ABCA 445, Yamauchi J. continued to comment that Rule 9.13 should be used sparingly, and that it is "not an occasion for the losing party to advance new argument which they did not think of before". Rule 9.13 is never intended as a vehicle to shore up evidential gaps. The test for whether to admit further evidence on the Application to vary a pronounced Judgment is similar to the rules for receiving new evidence on Appeal to the Court of Appeal.

Yamauchi J. held that the exhibits that the Plaintiff had available but chose not to enter as evidence at Trial were effectively new evidence. The Plaintiff failed or refused to put that evidence before the Court or call the authors of the evidence, nor did he provide "good reason" why the Court should accept such evidence post-Trial. As such, the Plaintiff's Application to enter such evidence through an Affidavit after the conclusion of the Trial was dismissed.

STUBICAR V CALGARY (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2023 ABCA 243

(WAKELING JA)

Rules 9.3 (Dispute Over Contents of a Judgment or Order), 14.2 (Application of General Rules), 14.36 (Case Management Officers) and 14.77 (Preparation and Signature of Judgments and Orders)

In a related Decision, while sitting as a single Appeal Judge, Wakeling J.A. ordered Ms. Stubicar (the "Applicant") to pay $7,500.00 in thrown-away Costs to JEMM Sunnyside Ltd. (the "Respondent") arising from an Application to adjourn a Hearing (the "Costs Order"). The Applicant and Respondent could not agree to the terms of the draft Costs Order. The Respondent wrote to Wakeling J.A. and requested that the Court settle the disputed terms pursuant to Rule 9.3. The Case Management Officer (the "CMO") replied and indicated that CMOs have jurisdiction to determine Applications made pursuant to Rule 9.3.

In written submissions to the CMO, the Applicant argued that CMOs do not have jurisdiction to determine Applications made pursuant to Rule 9.3 as they are not members of the "Court" as stipulated in Rule 9.3. Further, Rule 14.2 provides that the other parts of the Rules apply to Appeals if the Rules dealing explicitly with Appeals do not specifically deal with a matter. The CMO found that CMOs have express authority under Part 14 of the Rules and section 14 of the *Court of Appeal Act*, RSA 2000, c C-30 (the "Act"), to assist the Court in managing matters without a Judge's attendance, and that Rule 14.77(2) expressly allows the Court to authorize a CMO to settle the form of any Order. The CMO approved the draft Costs Order proposed by the Respondent.

Ms. Stubicar subsequently brought an Application pursuant to Rule 14.36(1) to set aside the CMO's decision on the Costs Order and argued that the CMO did not have authorization to determine the Costs Order dispute without explicit authorization from the Court.

Justice Wakeling held that Rule 9.3 was of limited import because Part 14 of the Rules covers the relevant subject matter. However, Rule 9.3 applied insofar as it instructs the parties to apply to resolve the dispute about the contents of the Order. Justice Wakeling noted that section 14(2) of the Act provides that a "case management officer, at the direction of the Court, may assist the Court with respect to the management of matters before the Court and the business of the Court", and that Rule 14.36(1) provides that "a case management officer, at the direction of the Court, may assist the Court with respect to the management of matters before the Court as authorized by section 14 of the Court of Appeal Act." Justice Wakeling held that when section 14(2) of the Act and Rule 14.36(1) are read together, they authorize a CMO to settle the disputed terms of an Order as this constitutes "management of matters before the Court" and "assist[ing] the Court". This conclusion was supported by the minutes of the meeting of the Alberta Court of Appeal on November 10, 2018, wherein the Court expressly approved assigning CMOs the task of resolving disputed terms of an Order. This was also reflected in an information sheet available to the public on the Court's website and was consistent with other Canadian jurisdictions assigning duties to nonjudges to perform similar roles. Justice Wakeling held that if an Appeal Judge wants to settle disputed terms of an Order, they must indicate their intention at the Hearing, in a Judgment or in a communication to the CMO. The Application to rescind the CMO's administrative direction was dismissed.

PRAIRIE WEST HOMES INC V BARAKA HOMES LTD, 2023 ABCA 256

(FEEHAN JA)

Rules 9.4 (Signing Judgments and Orders), 14.24 (Filing Factums – Fast Track Appeals), 14.47 (Application to Restore an Appeal), 14.64 (Failure to Meet Deadlines) and 14.65 (Restoring Appeals)

The Plaintiff, a builder, appealed a decision that denied the Stay of an Order releasing certain Court funds to the Defendant. However, the Plaintiff failed to prosecute the Appeal in a timely manner and the Appeal was struck and deemed abandoned. The Plaintiff applied to restore the Appeal, but Feehan J.A. dismissed the Application.

Feehan J.A. noted that the relevant Rules to restore an Appeal are Rules 14.47 and 14.65.

Under Rule 14.47, an Application to restore an Appeal must be filed and returned within 3 months after being struck or deemed abandoned (if the Appeal is a fast-track Appeal), or within 6 months (if the Appeal is standard). Rule 14.65(3) makes it clear that an Appeal is deemed to have been abandoned if no Application to restore the Appeal has been filed, served, and granted within 3 months for a fast-track Appeal or within 6 months for a standard Appeal.

On multiple occasions, the Plaintiff was advised by the Case Management Officer that its Appeal was a Fast Track Appeal and that the filing deadlines for Fast Track Appeals applied. The Plaintiff was referred to the relevant Rules pertaining to Fast Track Appeals, including Rule 14.24(1)(a), which prescribes that an Appellant must file its Factum before the earlier of 20 days after filing the Appeal Record, or no later than 2 months after the Notice of Appeal is filed, otherwise the Appeal is struck by the Registrar. Pursuant to Rule 14.64(a), an Appeal

must be struck if the Appellant fails to file the Appeal Record or its Factum.

The deadline for the Plaintiff to have the Application to restore filed, heard, and determined was June 22, 2023. That deadline was not met. Instead, on June 21, 2023, the Plaintiff advised the Case Management Officer that it was busy searching for a new office and unable to file Court documents. Accordingly, the Appeal was struck pursuant to Rule 14.65(3).

The test for restoring an Appeal is discretionary and involves the following considerations: (a) an arguable merit to the Appeal; (b) an explanation for the delay which caused the Appeal to be taken off the list; (c) reasonable promptness in moving to restore the Appeal; (d) timely intention to proceed with the Appeal; and (e) lack of prejudice to the Respondents.

Appeal Justice Feehan explained that none of the five factors is determinative and failure to meet one of them is not fatal. Ultimately, the factors are weighed to determine whether it is in the interests of justice to permit the Appeal.

There may be cases where even if all factors are met, it may not be in the interests of justice to permit the Appeal.

Relying on recent Court of Appeal authorities, Feehan J.A. stated that there needs to be "exceptional circumstances over which the appellant had no control [which] made it impossible for the appellant to prosecute the appeal", which is "a very onerous obligation that will seldom be discharged", especially when prejudice to the Respondent can be presumed.

Appeal Justice Feehan found that there was no reasonable explanation for the Plaintiff's delay which caused the Appeal to be struck or abandoned. Further, there was no merit to the Appeal, which sought to overturn a procedural decision entitled to deference. Ultimately, the Plaintiff failed to meet the requisite criteria and establish that it was in the interests of justice to restore the Appeal.

Rule 9.4(2)(c) was invoked to allow the Court Clerk to sign the Order without the parties' approval of the form of Order.

RESTA V THORNTON, 2023 ABKB 498

(FUNK J)

Rules 9.6 (Effective Date of Judgments and Orders) and 9.14 (Further or Other Order after Judgment or Order Entered)

In this Application, the Court was asked to determine whether a *nunc pro tunc* ("now for then") Order was the appropriate recourse when the Respondents were unexpectedly unable to meet a Court-ordered deadline for payment of Security for Costs and the Applicants refused to accept payment one day after the deadline.

Citing *CIBC v Green*, 2015 SCC 60, the Court noted the general principle that Courts have inherent jurisdiction to issue Orders *nunc pro tun*c, which would give an Action retroactive legal effect, as though it had been performed at an earlier date. The Court also noted that pursuant to Rule 9.6, a Court Order takes effect from the date of pronouncement or, if the Court orders otherwise, the date so ordered. Further, under Rule 9.14, a Court is permitted, after a Judgment has been entered, to make a further or other Order which provides a remedy to which a party is entitled in connection with

the Judgment so long as doing so does not require variance of the original Judgment.

The Court highlighted the fact that the Respondents could not have anticipated that their multiple emails to Counsel for the Applicants for the Applicants' banking information would go unanswered on the payment deadline. The Respondents had done what was necessary to complete the required step on time but were unable to complete the step for reasons beyond their control, which were unforeseen and unintentional. The Court also found that a *nunc pro tunc* Order would not cause prejudice to the Applicant, and would facilitate access to justice.

Further, the Court noted that in the event the *nunc pro tunc* Order was not granted, relief from forfeiture would be available to the Respondents since the result of non-compliance (i.e., not meeting the deadline for payment) was disproportionate in light of the facts of this case.

In the result, the Court granted a *nunc pro tunc* Order, allowing the transfer of funds forthwith and deeming that payment to have been made on the payment deadline.

KMECH V DOROSH, 2023 ABKB 457

(MAH J)

Rules 9.12 (Correcting Mistakes or Errors), 10.31 (Court-ordered Cost Awards), 10.35 (Preparation of Bill of Costs), 10.36 (Assessment of Bill of Costs), 10.41 (Assessment Officer's Decision) and 10.52 (Declaration of Civil Contempt)

The parties were beneficiaries under their late mother's estate. The Applicant had originally brought forth a Motion to have the Respondent removed as personal representative, due to the alleged mishandling of the estate. The Respondent also filed a caveat on the land that comprised the former family home, claiming an interest as a beneficiary under the *Intestate Succession Act* RSA 2000, c I-10. The litigation was seemingly resolved by a Consent Order issued by Justice Michalyshyn on November 27, 2020 (the "November Order"). However, the parties later disagreed on whether the November Order reflected the intent of the parties and how it should be implemented. The parties attended a Special Chambers Application to determine the issues forming the November Order, namely whether the Respondent: i) had to pay 50% of either the *gross* or *net* proceeds of the sale of certain property; ii) was entitled to an assessment under the Rules of the Applicant's full-indemnity legal fees; and iii) was in Contempt of the November Order for failing to pay all of the 50% of gross proceeds of sale and failing to pay the full-indemnity legal costs. Among other things, the Court considered whether the Applicant was required to reimburse the estate for the legal fees related to the removal of the caveat.

The Respondent argued that the November Order contained a drafting error, and Justice Mah should exercise discretion under Rule 9.12 to correct the change from gross proceeds, back to net proceeds. The Respondent relied on the defence of *non est factum*. Justice Mah, citing from the Alberta Court of Appeal's decision in *Farm Credit Canada v Chan*, 2021 ABCA 168 found

that the Respondent was careless and was thus foreclosed from using the *non est factum* defence. Justice Mah noted that *non est factum* does not exist to allow people to escape an obligation by saying they did not read a document properly or because they failed to notice something.

The Court went on to consider whether the Respondent was entitled to assess the legal fees under the Rules. The Applicant's position was that the Respondent was apprised in advance of the approximate full-indemnity Costs and signed the November Order saying they would pay. The Respondent was told varying anticipated Costs of the total amount of legal fees, none of which were the actual amount billed by opposing counsel. Justice Mah found that being advised in advance of the probable amount of the Costs did not amount to an acceptance of the final total rendered, nor did it waive the right of assessment under the Rules. Further, no specific amount was mentioned in the November Order, meaning the final amount was left open. The November Order did not say that the Costs may be assessed, nor that they could be assessed. Therefore, Justice Mah found that the Rules should apply by default, and that the November Order provided that Costs would be assessed pursuant to Rule 10.31. The Respondent was entitled to a Bill of Costs under Rule 10.35, and was also entitled to have the Bill of Costs assessed in accordance with Rules 10.36(2) and 10.41.

Finally, the Court turned its attention to the question of whether the Respondent should be held in civil Contempt for not adhering to the terms of the November Order. Justice Mah was not convinced that the Respondent's actions had met the requisite intent, namely, a wilful and deliberate flaunting of the Order beyond a reasonable doubt. The Court found it reasonable to believe the Respondent thought that the word "gross" was a drafting error, as the Respondent paid the net sale of the proceeds, and then instructed counsel to make an Application under Rule 9.12 to relieve them of the obligation to pay the remaining balance. Similarly, because the November Order did not specify the terms of the Costs, it was reasonable for the Respondent to wait for Costs to be assessed.

In obiter, the Court questioned whether the failure to carry out a settlement in the form of a Consent Order, which involves distributing the sale proceeds of an estate asset, falls within the meaning of "an Order to pay money", which is the exception set out in Rule 10.52(3)(a)(i).

The Court concluded that the Respondent had to pay the gross proceeds of the sale, was entitled to the assessment of Costs and was not to be held in civil Contempt. The Applicant did not have to reimburse the estate for the legal fees related to the removal of the caveat. Each party was responsible for bearing their own Costs for the proceedings from the November Order to the date of the Special Chambers Application.

ADEBISI V DENTONS CANADA LLP, 2023 ABKB 452

(RICHARDSON J)

Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.18 (Reference to Court), 10.23 (Costs of Review), 10.26 (Appeal to Judge) and 10.27 (Decision of Judge)

The Appellant appealed the decision of a Review Officer in relation a legal bill presented by the Respondent law firm. The Court found ultimately confirmed the decision of the Review Officer, but for a calculation error, and the Appeal was accordingly dismissed.

The Court noted that the standard of review to be applied to an Appeal of a Review Officer's decision under Rule 10.26 is deferential, given the Review Officer's specialized knowledge and experience in assessing the reasonableness of lawyer's accounts and that they were in best position to assess and weigh evidence. The Court also noted that in accordance with Rule 10.27(1), it may interfere with a Review Officer's decision if any of these errors are clearly made on the record of the hearing, noting that where interference is so justified, the Court on Appeal may reassess the account or return it for a new assessment, among other remedies.

The Court noted that Rule 10.18(1)(a) requires that the Review Officer must refer any question arising about the terms of a retainer agreement to the Court for decision and direction. The Court additionally noted that the terms of a retainer agreement could not be decided by the Review Officer, including: questions of interpretation and implied retainer agreements and oral agreements.

Among other issues, the Court considered whether the Review Officer exceeded their jurisdiction with respect to determining if the lawyer working for the Respondent had provided a legal opinion before the retainer agreement was signed which was accompanied by inflammatory language, suggesting fraud and extortion on the part of the lawyer working for the Respondent (the "Retainer Allegation") .The Court found that the Retainer Allegation was without merit, noting that the Review Officer had applied the proper balance of probabilities standard and dismissed the Retainer Allegation as being without any evidentiary foundation.

The Court found that the Review Officer did not make any credibility findings with respect to the Retainer Allegation but determined that even if the Review Officer had done so, it was within the Review Officer's purview, provided that the credibility finding related solely to whether the lawyer acted within the scope of the retainer. The Court further considered the terms of the retainer agreement itself and noted that the Retainer Allegation: lacked any evidentiary foundation; was contrary to the express terms of the retainer agreement; and contrary to the professional obligations of counsel to not provide legal opinions without first reviewing client files. The Court accordingly found that the Review Officer's findings was within their jurisdiction.

The Court determined that the Review Officer's decision to not award the Respondent Costs for the hearing before the Review Officer in accordance with Rule 10.23 was a finding that was open to the Review Officer to make and that there was nothing on the record that warranted disturbing this finding.

The Court found that there was no error of the Review Officer's consideration of the reasonableness of the fees but considered whether total fees charged by the Respondent were reasonable in accordance with Rule 10.9. The Court noted that Review Officers are experts

in their field and are best placed to assess the reasonableness of fees under Rule 10.9, which necessarily involve an assessment of the value of the legal services provided. The Court set out that that the principles which govern the reasonableness of lawyers fee include: (1) the Court must hold the lawyer and the client to promises made in a retainer agreement regarding amounts a lawyer may charge, and a client must pay for legal services in the absence of a compelling reason not to; unless there is a contrary position in the retainer agreement; (2) a client must pay for a legal service which increases the likelihood the purpose of the retainer agreement will be achieved; (3) the client is not responsible for the cost associated with unnecessary steps; a client who instructs a lawyer to take a step which increases the likelihood the objective of the retainer will be achieved but will not likely present a benefit which justifies the cost or does not increase the likelihood of success is responsible for the fees associated with this service; (4) to ensure that those obliged to pay for legal services are treated reasonably by their counsel, taking all circumstances into account; and (5) a client who contests their lawyer's charges at the outset of the hearing must particularize their complaint; and finally, it is the lawyer who bears the burden of persuading the Review Officer that the amount charged is appropriate.

In determining that Schedule C amounts were inadequate for the hearing before the Review Officer, the Court among other things noted that: (1) the Notice of Appeal was served more than one month after the Certificate of the Review Officer was issued which was contrary to the requirement the requirement that requires service of a Notice of Appeal within one month as set out in Rule 10.26; (2) the Notice of Appeal was in breach of Rule 10.26 as the record of proceedings contained significant omissions including the lack of a transcript for the underlying hearing, and did not contain a written argument.

FAZEL V SINGER (WILSON LAYCRAFT), 2023 ABCA 213

(MARTIN, HO AND GROSSE JJA)

Rule 10.26 (Appeal from a Review Officer's Decision)

This was an Appeal of an Order made in morning Chambers refusing an extension of time to file an Appeal of a Review Officer's decision.

The Appellant retained the Respondent in 2019 for a family law matter. Between September 2019 and March 2020, the Respondent invoiced the Appellant $98,828.70. Approximately $42,273.48 of the balance remained outstanding.

The parties attended before a Review Officer. The Review Officer proceeded with the review despite the Appellant's request for an Adjournment and allowed for the entirety of the Respondent's fees. The Appellant appealed to the Alberta Court of Queen's Bench, (as it was then), and a Justice subsequently ordered the matter to be redetermined.

The re-determination took place over a three-day period. On the final day, the Appellant asked the Review Officer to recuse himself, alleging inappropriate ex-parte communication with the Respondent. The Review Officer refused the request, and the Appellant left the Hearing, despite warnings that the Review Officer still planned to proceed. The Review Officer allowed for the entirety of the Respon-

dent's fees. The Appellant did not file an Appeal of a Review Officer's decision within one month, as required pursuant to Rule 10.26(4).

The Respondent filed an Application for Judgment for the remaining fees. Master Prowse (as he was then) adjourned the Respondent's Application and directed the Applicant to file an Application to extend the time to Appeal a Review Officer's decision.

When the Applicant's Application was heard, they tried to refer to new evidence that was not available to the Master. Referring to the rule in *Cairns v Cairns*, 1931 CanLII 471 (ABCA) ("*Cairns*"), the Chambers Judge dismissed the Application for an extension of time.

The Appellant was now appealing on the basis that the Chambers Judge erred in refusing to grant an extension of time to Appeal the Review Officer's Certificate and erred in dismissing the Appeal in its entirety. The Appellant also argued that the Chambers Judge failed to provide a fair hearing. The Appellant argued that the Chambers Judge erred in assessing the *Cairns* factors because they failed to consider the Appellant's new evidence.

The Court considered the test for admitting new evidence set out in *Palmer v The Queen*, 1979 CanLII 8 (SCC) ("*Palmer*"). Satisfied that the new evidence met the *Palmer* requirements, the Court admitted the Applicant's new evidence. The Court stated that now, with the admission of the new evidence, it was required to determine if the Chambers Judge erred in assessing the *Cairns* factors. Despite the new evidence the Court determined that justice did not require for an extension to the time period to Appeal a Review Officer's decision. Moreover, the Court found no reviewable error in the Review Officer's reasonableness assessment or of his confirmation of the amount of fees and disbursements owed to the Respondent.

The Court held that in light of the above reasons, and as they admitted the new evidence, it was not necessary to address the Appellant's contention that the hearing was procedurally unfair. Ultimately, the Appeal was dismissed.

0678786 BC LTD V BENNETT JONES LLP, 2023 ABKB 470

(JEFFREY J)

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

The Applicants, Bennett Jones LLP and Voorheis & Co. LLP, had previously applied to declare two Respondent companies (the "Respondent Companies") and their lawyer (the "Respondent Lawyer") in civil Contempt. The Applicants acknowledge that the Contempt had been purged by this stage in the proceedings, but still sought the Court's direction on a penalty for the Contempt, or in the alternative, their Costs on an indemnity basis.

The Court imposed a fine on the Respondent Companies and the Respondent Lawyer for the Contempt, and then considered the appropriate Costs Award to the Applicant.

The Court found that the Applicants were entitled to their Schedule C Costs at 2 times the amounts in Column 3 less any amounts they had received from the Respondent Companies as Costs during the previous phases of the Contempt Application.

The Court found that the this reflected its application of the considerations in Rule 10.29 and 10.33. The Court specifically noted that Costs on an enhanced scale were appropriate because (1) the Applicants were largely successful throughout on all phases of the Contempt process; (2) the Respondent Companies and the Respondent Lawyer improperly attempted to re-litigate previously decided issues, collaterally attacking earlier final decisions; (3) the Respondent Companies and the Respondent Lawyer failed to keep the Court process focused on the issues of Contempt, liability and then penalty; and (4) the Respondent Lawyer had facilitated their clients' civil Contempt, which was itself egregious litigation conduct.

PAWLICKI V BLACK DIAMOND GROUP LIMITED, 2023 ABKB 492

(HOLLINS J)

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

This Costs ruling arose from a Decision related to an employment matter. The Court considered the general Costs rule under Rule 10.29 that the successful Party to an Application or Action is entitled to Costs, subject to the Court's discretion. The Court also reviewed Rules 10.33(1) and 10.33(2) and highlighted factors that a Court considers in making a Costs Award, including: the degree of success of each party, the amount claimed versus the amount recovered, the complexity of the Action, the conduct of the parties within the litigation, and settlement offers exchanged by the parties prior to the Trial.

Further, the Court noted that the use of Schedule C is not mandatory and cited the Court of Appeal Decision in *McAllister v Calgary (City)*, 2021 ABCA 25, which endorsed "ordinary-course indemnification to successful parties, prima facie, in the range of 40-50% of actual Costs".

The Court found that the Plaintiff was substantially successful as he had won on the biggest issues and recovered about 80% of his last offer to settle made to the Defendant. At the same time, the Court held that the offers to settle exchanged between the parties prior to Trial and the Plaintiff's allegations of litigation conduct on the part of the Defendant, did not significantly impact its Costs Decision.

The Court did not award Costs to the successful Plaintiff pursuant to Schedule C, but awarded him a lump sum of $35,610, approximately 45% of the solicitor-client Costs, payable forthwith.

HAMANI V HAMANI, 2023 ABKB 507

(BERCOV J)

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

The matter before Bercov J. was for a determination of Costs in the context of a family matter. Each party sought an award of Costs, as they believed they were the most successful party, even though there was mixed success throughout the Action. Further, the parties claimed that the conduct of the other party was unreasonable, improper and wasted judicial resources, justifying a Costs Award above Schedule C.

The legal principles pertaining to Costs were not at dispute. Bercov J. used the following principles to reach her conclusion: (1) Rule 10.29 sets out the general rule that the successful party is presumptively entitled to Costs; (2) the general rule applies in family matters in the same manner as in civil matters; (3) success in family matters means substantial success, not absolute success; (4) substantial success is assessed by looking at overall results of what was initially claimed; (5) success can be established on a finding that a party was successful on the most important issue litigated; (6) misconduct in the litigation can warrant enhanced Costs; (7) Costs are discretionary and discretion must be exercised in a principled way; and (8) non-exhaustive factors enumerated in Rule 10.33 help guide the discretion.

Bercov J. reviewed the procedural history of the Action and determined that the Trial took considerably more time than needed, with both parties incurring significantly more fees than necessary. The Court concluded that each party played a role in the length and expense of the Action, and at times, both parties advanced unreasonable positions given the law and the facts. The Court was critical on the Parties for not conceding to issues that should have been conceded and that the Parties spent considerable resources litigating issues that should have been resolved by agreement. Lastly, after looking at the overall result of the claims brought forth by each party, Bercov J. disagreed that either party achieved substantial success.

Therefore, Bercov J. concluded that the circumstances were not appropriate to award Costs to either party.

UHRIK V BARATA, 2023 ABKB 517

(NIELSEN ACJ)

Rules 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and 14.5 (Appeals Only with Permission)

Tibor Uhrik and Lieselotte Litzius (collectively, the "Plaintiffs") were litigants subject to Court access restrictions. The Plaintiffs brought an Action against their former legal representatives (the "Defendants"), claiming, among other things, negligence. The proceedings were stayed indefinitely due to a lack of merit, and the Plaintiffs were subjected to Court access restrictions, requiring Court permission for the Stayed Action to continue. Thus, the matter before Nielsen A.C.J. was to determine whether the Plaintiffs' Application to continue the Action should be permitted.

In the Court's analysis, it applied the common law test for leave to continue or initiate litigation. The Court concluded that the Plaintiffs' request to continue the Action should be dismissed, as the Plaintiffs had not satisfied their obligation that, on a balance of probabilities, there was a reasonable basis for the Action. In doing so, the Court noted that Rule 14.5(4) did not allow for the Plaintiffs to appeal the Decision to grant or deny leave to initiate or continue litigation to the Alberta Court of Appeal. The Court did clarify that a litigant who is denied leave to initiate or continue litigation by the Court of King's Bench of Alberta may, however, seek leave from the Supreme Court of Canada.

The Court then directed its attention to the issue of Costs. The Statement of Claim for the Action was permanently stayed as an abuse of the Court; therefore, the Defendants were entirely successful and were presumptively entitled to Costs under Rule 10.29(1). Further, the Plaintiffs' 500-page Affidavit, along with a pattern of problematic litigation conduct demonstrated throughout the litigation forced the Court to award a lump sum Costs Award. The Court did so to ensure that the problematic litigation would come to a timely and conclusive endpoint, as the usual approach to awarding Costs would give the Plaintiffs yet another opportunity to inflict harm on the Defendants. Nielsen A.C.J. also concluded that the criteria pursuant to Rule 10.33 were relevant due to the baseless nature of the claim, the abusive nature of the proceedings, and because the Plaintiffs concealed from the Defendants that the Action had in fact been stayed.

Nielsen A.C.J. ordered the Plaintiffs to each pay the Defendants $2,500 in Costs, for a total Costs Award of $5,000.

MAURIER V MAURIER, 2023 ABKB 539

(RENKE J)

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

This Decision stemmed from a Special Chambers Application in the context of a family law matter addressing, among other things, the Costs associated with the Special Chambers Application. The Court applied Rule 10.29 as a general rule, which presumes that the successful party is entitled to Costs. In this case, the Defendant was successful on the main issue, while the Plaintiff was successful on some minor issues. Although the Plaintiff raised some concerns regarding a delayed filing and certain irregularities in the materials filed by the Defendant, the Court found that they were minor and did not preclude the Defendant's entitlement to Costs.

To determine an appropriate Cost Award, the Court considered the factors listed in Rule 10.31 and conducted an inquiry into setting reasonable and proper Costs. The Defendant sought enhanced Costs of $6,000, but also referred to double Costs under Column 2 of $3,370. Justice Renke referred to *McAllister v Calgary (City)*, 2021 ABCA 25 to consider partial indemnity, but noted that he did not have a draft Bill of Costs to make this inquiry. The Court considered Schedule C, noting that a Special Chambers Application is not a "high volume-interlocutory matter" like a morning Chambers Application that is heard in 20 minutes on a crowded docket. Justice Renke observed that neither principle nor case law restrict family law matters to Column 1 of Schedule C. The Court took into account the Defendant's success on a crucial issue and awarded double Costs due to the presentation of a settlement offer and the ample room and opportunity for pre-Application resolution. Justice Renke reduced the Costs Award by $500 due to the Defendant's late filing and irregularities.

KLASSEN V CANADIAN NATIONAL RAILWAY COMPANY, 2023 ABCA 233

(SLATTER, ANTONIO AND WAKELING JJA)

Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.32 (Costs in Class Proceeding)

This Costs ruling arose from the Court of Appeal having reversed a Decision of the Alberta Court of King's Bench which set aside the certification of a class proceeding on the basis that the Pleadings did not disclose a cause of action.

The Court referred to Rule 10.29(1), which sets out the general rule that a successful Party is entitled to Costs. However, when a class proceeding is involved, Costs must also be determined in light of Rule 10.32, which requires an assessment of: (a) the public interest; (b) whether the Action involved a novel point of law; (c) whether the proceeding or Action was a test case; and (d) access to justice considerations.

The Court found that the issues in this class proceeding were not issues of public importance, but rather personal claims of the Representative Plaintiffs. While the claim raised

by the Representative Plaintiff was novel, it could be resolved with certainty in light of the statutory regime.

The Court rejected the Respondent's argument that a Costs Award would have a negative impact on access to justice and went on to highlight the objectives of class proceedings including, among others, access to justice, efficiency and behaviour modification. Noting that the conduct of the Appellant was lawful and that the Pleadings did not disclose a cause of action, the Court found no concerns regarding behaviour modification or judicial economy and efficiency.

Considering the Appellant's claim of quadrupling the assessed legal fees, the Court confirmed that a successful party may not claim assessed Costs based on a percentage indemnity of actual fees charged without disclosing the amount charged and justifying that amount. The Court recognized the impact of the underlying litigation on the Appellant but noted that access to justice considerations and the purposes of class proceedings could moderate the quantum of a Costs Award.

In the result, the Court awarded the successful Appellant Costs pursuant to Column 5 of Schedule C but refused to quadruple the amount.

MYW V DTW, 2023 ABKB 467

(JONES J)

Rules 10.31 (Court-Ordered Costs Award) and 10.41 (Assessment Officer's Decision)

Following the mother's Application for, among other things, the partition and sale of the parties' matrimonial home, Jones J. issued his Costs Decision. He awarded the mother Costs under Column 1 of Schedule C of the Rules, plus reasonable disbursements.

While the Chambers Order provided for the mother's entitlement to Schedule C Costs, the parties were unable to agree on the quantum and proper column. The father argued that Costs of $675 under Column 1 were appropriate. The mother argued threefold: first, Costs should be calculated with recourse to Column 3 with a multiplier of two, for a total amount of $10,696.63; second, and in the alternative, a similar calculation should be undertaken under Column 2; and third, and in the final alternative, Column 2 Costs with no multiplier.

The mother acknowledged that Courts assess Costs under Rule 10.31, and that but for the Chambers Order limiting Costs to Schedule C, she would have argued for a Costs Award in the range of 40% to 50% of reasonable Costs incurred, as per the Court of Appeal decisions in *Barkwell v McDonald,* 2023 ABCA 87 ("*Barkwell*") and *McAllister v Calgary (City)*, 2021 ABCA 25 ("*McAllister*").

However, the mother also presented Jones J. with the recent Court of King's Bench Decision in *Grimes v Governors of the University of Lethbridge*, 2023 ABKB 432 ("*Grimes*"), where Graesser J. stated that a departure from Schedule C party-party Costs requires some exceptional circumstances. The mother disagreed with Graesser J. She argued that *Grimes* rests on an erroneous conclusion that the Costs provisions of the Rules treat Judges and Assessment Officers alike; when in reality, they differ, as Rule 10.41(1) limits awards by Assessment Officers to "reasonable and proper costs" while Rule 10.31(1)(b) lets Judges award any amount "appropriate in the circumstances".

Jones J. recognized that the mother's challenge to the reasoning in *Grimes* represents an invita-

tion to revisit *Barkwell* and *McAllister*. However, he declined the invitation. He stated that any clarification of the principles from *Barkwell* and *McAllister*, and their application in *Grimes*, rests with the Court of Appeal.

Jones J. awarded Costs in favour of the mother under Column 1. He relied on the *McAllister* decision for the proposition that "Schedule C can be particularly useful and efficient in high volume interlocutory matters such as chambers applications". There was no evidence that the father's conduct justified an award of enhanced Costs.

1933748 ALBERTA LTD V ENGEL, 2023 ABKB 528

(FRASER J)

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

The Court considered the appropriate Costs Award for an Appeal of a Provincial Court Decision (the "PC Decision"). The PC Decision awarded the Plaintiff $50,000 plus judgment interest. On Appeal, Fraser J. reduced the award to the Plaintiff to $10,335 plus GST.

The Plaintiff sought solicitor-client Costs as well as contractual interest on the Judgment amount. The Defendant argued that solicitor-client Costs were not appropriate and that Costs should instead be awarded based on Column 1 of Schedule C.

The Court determined that solicitor-client Costs were not appropriate. The Court noted that Costs Awards are discretionary under Rule 10.31, and Rule 10.33 provides non-exhaustive factors that the Court may consider when making a Costs Award. The Court determined that there was a genuine issue to be litigated and both parties acted reasonably throughout the litigation. The Court was unable to determine exactly what steps were taken but noted that the litigation was more complex than most falling under Column 1 of Schedule C. the Court awarded the Plaintiff $10,000 in Costs and contractual interest on the Judgment amount.

JL ENERGY TRANSPORTATION INC V ALLIANCE PIPELINE LIMITED PARTNERSHIP, 2023 ABKB 445

(HORNER J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision following a successful Application by the Defendants to Strike Affidavits and portions of Affidavits filed by the Plaintiff.

Guided by the factors set out under Rule 10.33, Horner J. held that: the Defendants were wholly successful; the result of the Application would streamline forthcoming proceedings;

pre-hearing discussions between counsel led to the hearing of the Application being straightforward; and that the Plaintiff's concessions shortened the hearing, but not in a meaningful way.

In light of those findings, as well as the high-value of the claim and the complexity of the issues, the Court awarded Costs according to Schedule C of the Rules at a three-time multiplier.

DYCK V DYCK, 2023 ABKB 463

(MAH J)

Rule 10.33 (Court Considerations in Making Costs Award)

This was a Costs Decision arising from the Plaintiff's successful Application to compel further and better financial disclosure in the context of family law proceedings.

Mah J. cited Rule 10.33 for the factors which must be considered by the Court in exercising its discretion over Costs Awards. The Court held that the Plaintiff was substantially successful and entitled to Costs, but that there were no factors which supported a deviation from the amounts set out in Schedule C of the Rules.

Mah J. therefore ordered Costs in favour of the Plaintiff according to Column 1 of Schedule C, in the amount of $675 payable forthwith.

NEUSTAEDTER V ALBERTA LABOUR RELATIONS BOARD, 2023 ABKB 466

(LABRENZ J)

Rule 10.42 (Actions within Court of Justice Jurisdiction)

The Applicants appealed a Decision dismissing their Application for Judicial Review in respect of certain administrative penalties. In their Costs submissions, the Applicants, referencing Rule 10.42, argued that the amount at stake was well within the jurisdiction of the Alberta Court of Justice and had the subject matter also been within the jurisdiction of that lower Court, the Rules on Costs would require the Column 1 Costs to be further reduced by 24%.

Labrenz J. held that a Judicial Review Application is not within the jurisdiction of the Alberta Court of Justice. Such Applications must be brought in the Court of King's Bench. As such, Rule 10.42 did not apply to this matter.

Labrenz J. further held that although the total Costs sought by the Respondent was relatively modest and that there were five Applicants, the arguments on the Judicial Review were substantially the same and the arguments made on the Costs' Application were identical. This justified a modest reduction in the Costs Award.

Accordingly, Labrenz J. awarded Costs to the Respondent as a lump sum of $2,000 in each Action, totalling $10,000. Having noted the consent of the Respondent, each Costs Order was stayed pending the resolution or disposal of the Appeal.

DOCKEN V ANDERSON, 2023 ABKB 474

(JONES J)

Rule 10.49 (Penalty for Contravening Rules)

The Defendant had Court access restrictions imposed on her following an Application pursuant to section 23-23.1 of the *Judicature Act,* RSA 2000, c J-2 in a distinct Action involving the Attorney General of Canada, and further stringent communications and filing restrictions were subsequently imposed on her in an Action involving the Bank of Canada (the "RBC Action").

Among other things, the Court noted that: the Defendant had phoned the Calgary Clerk of the Court identifying herself by name and demanded to know the status of certain litigation where she was involved; the Clerk informed the Defendant that she was prohibited from communicating with the Court by telephone as per the RBC Action; the Defendant advised that her lawyer (not named) would contact the Alberta Court of King's Bench unless her requests were met and the lawyer never materialized; the Clerk hung up when the Defendant repeatedly called; additional telephone calls were received from persons who purported to not be the Defendant but who demanded certain information concerning the Defendant's litigation, none of these persons were a lawyer and the Clerks did not provide the requested information; and that Alberta Court of Justice staff also received telephone demands from the Defendant (together the "Noted Conduct").

The Court found that the Noted Conduct warranted a further Rule 10.49(1) penalty following the scheme established in the RBC Action, in which the Court noted that the Defendant "should also anticipate that additional penalties will increase, stepwise" until the Defendant discontinued her misconduct. The Court noted that the most recent baseline penalty imposed for the Defendant's conduct was $30,000 and that the current baseline penalty was now $35,000. The Court accordingly determined that the Noted Conduct warranted an elevated Rule 10.49(1) penalty of $40,000 and that the penalty would be paid by the Clerk of the Court from the security for misconduct pool established in the current Action and the RBC Action.

PANDER V CHOPRA, 2023 ABCA 249

(GROSSE JA)

Rules 14.4 (Right to Appeal), 14.5 (Appeals Only With Permission) and 14.49 (Failure to Respond)

The Applicant applied for a Stay pending Appeal with respect to a Decision by the Chambers Judge which (1) dealt with the proper jurisdiction of the parties' divorce proceedings and granted leave to the Respondent to further apply for severance of certain corollary relief claims from the overall divorce Action; and (2) granted Costs in favour of the Respondent. The Applicant also sought permission to Appeal with respect to the Chambers Judge's related refusal to grant an adjournment.

As a starting point, Justice Grosse noted that the Applicant did not require permission to

Appeal the Order on jurisdiction or the Costs Award, per Rules 14.4(1) and 14.5(1)(e), but that permission to Appeal was required in respect of the Decision refusing the adjournment, per Rule 14.5(1)(b).

Justice Grosse also observed that the Respondent did not file materials in response to the Applications, based on an apparent error by counsel with respect to filing requirements. Notwithstanding this omission, the Court exercised its discretion under Rule 14.49 and permitted the Respondent to make brief oral submissions.

With respect to the Applicant's Application for permission to Appeal the refusal of the adjournment, the Court cited the test which must be satisfied, which requires that: (1) there be a serious question of general importance; (2) there be a reasonable chance of success on Appeal; and (3) the Appeal will not unduly hinder the progress of the Action or cause undue prejudice without any proportionate benefit.

Justice Grosse held that the proposed Appeal did not raise a question of general importance, and that this requirement was not relaxed because other issues are under Appeal as of right. Permission to Appeal the refusal of the adjournment request was therefore denied.

In regard to the Stay Applications, the Court noted that the Respondent did not oppose the Stay and was in fact willing to undertake not to obtain a divorce Judgment in Canada until after the Hearing of the Appeal on its merits. The Court therefore granted the Stay Applications.

MAKIS V ALBERTA HEALTH SERVICES, 2023 ABCA 214

(PENTELECHUK JA)

Rule 14.5 (Appeals Only With Permission)

The Appellant, Dr. Makis, was a practicing doctor who was terminated after professional complaints were made against him. In turn, he sued the Respondent, Alberta Health Services ("AHS"), for wrongful termination and other physicians for a number of torts related to the complaints. He also alleged a wide-ranging criminal conspiracy involving the Respondents, legal counsel, and the judiciary.

Dr. Makis unsuccessfully applied to have the Respondents declared vexatious litigants. The Respondents successfully applied to strike or summarily dismiss Dr. Makis' Actions. Dr. Makis was also found to be a vexatious litigant. As a result of that Order, Dr. Makis was required to obtain permission to Appeal the Respondents' Applications, pursuant to Rule 14.5(1)(j).

The Court considered whether there was an important question of law or precedent, with a reasonable chance of success, and which would not unduly hinder the progress of the Action or cause undue prejudice.

On the Application to have the Respondents declared vexatious litigants, Justice Pentelechuk found that the Appeal lacked a reasonable chance of success. In particular, the Court noted that the Respondents were Defendants in the Action and the proper remedy for unnecessary litigation by a Defendant is a Costs Award.

On the Applications to have Dr. Makis' Actions dismissed, Justice Pentelechuk granted Dr. Makis leave to Appeal. The Court noted that

Dr. Makis failed to attend the proceedings wherein the Applications to summarily dismiss his Actions were heard. However, Justice Pentelechuk stated that the Respondents were not entitled to Summary Judgment by default, and were it not for the vexatious litigant Order, Dr. Makis would be entitled to an Appeal as of right. Leave was therefore granted to Appeal. However, Security for Costs was Ordered against Dr. Makis as a condition of Appeal.

ESFAHANI V SAMIMI, 2023 ABCA 220

(HO JA)

Rules 14.5 (Appeals Only With Permission) and 14.37 (Single Appeal Judges)

The Applicant sought an Appeal of division of matrimonial property pursuant to section 48 of the *Arbitration Act*, RSA 2000, c A-43. The Applicant applied for both permission to Appeal and an extension of time to file a Notice of Appeal under Rules 14.5(1) and 14.37(2)(c).

Justice Ho canvassed the relevant jurisprudence regarding the Application for an extension of time and permission to Appeal. Specifically, Justice Ho noted that the Court is required to "do what justice requires to be done between the parties having regard to the circumstances of each particular case."

Ultimately, Justice Ho was not satisfied that the test for permission to Appeal was met. Noting that the common law test for permission of Appeal was not met, Justice Ho did not consider the extension of time to file a Notice of Appeal Application.

GOLDSTICK ESTATES (RE), 2023 ABCA 225

(FEEHAN JA)

Rule 14.5 (Appeals Only With Permission)

In a previous decision, while sitting as a single Appeal Justice, Feehan J.A.. denied the Applicant's appeal of a Security for Costs Order made by a Case Management Judge and denied a related Stay Application directing payment out of Court.

The Applicant sought permission to Appeal the decision by Feehan J.A. to a Court of Appeal panel and requested an extension of time to do so. Feehan J.A. dismissed both Applications.

Before appealing a Decision of a single Appeal Judge to the Court of Appeal, an Appellant is required by Rule 14.5(1)(a) to obtain permission from that Appeal Judge. Further, Rule 14.5(3) precludes Appeals under Rule 14.5(1)(a) where the single Appeal Judge granted or denied permission to Appeal. Therefore, an Appeal of the decision of Feehan J.A. with respect to the Security for Costs Order could go no further.

However, the Appeal of the Stay Application directing payment out of Court could be

argued before Feehan J.A., even though the Application was two months out of time. In determining whether to grant an extension of time to Appeal, Feehan J.A. applied the well-known test for extension of time as set out in *Cairns v Cairns*, 1931 CanLII 471 (AB CA). The test requires the Applicant to show: (a) a *bona fide* intention to Appeal while the right to Appeal existed; (b) an explanation for the failure to Appeal in time that excuses or justifies the lateness; (c) an absence of serious prejudice such that it would not be unjust, with respect to both parties, to disturb the Judgment; (d) that the Applicant did not take the benefits of the Judgment under Appeal; and (e) a reasonable chance of success on Appeal.

An Applicant appealing a Decision of a single Appeal Judge to a Court of Appeal panel must establish that: (a) there is a question of general importance; (b) a possible error of law; an unreasonable exercise of discretion; or (d) a misapprehension of important facts. At least one criterion must be established, otherwise the Appeal is not in the public's interest.

Both the Application for extension for time and permission to appeal the Stay Application turned on whether the Applicant had a reasonable chance of success on Appeal. The Applicant failed to raise a question of general importance to the community or satisfy Feehan J.A. that he had a reasonable chance of success on Appeal.

KELLEY (RE), 2023 ABCA 232

(DE WIT JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant filed an Application to restore his Appeal under Rule 14.47 on July 17, 2023. Justice de Wit dismissed that Application noting that the Appeal had no merit and was hopeless. The Applicant filed the current Application to restore his Appeal again. The Applicant claimed that the combined effect of a number of the Rules, including Rules 14.1, 14.65(1) & (3), 14.37(2)(c), and 15.16, allowed him to bring this Application.

Justice de Wit considered the Rules mentioned by the Applicant, noting that the Rules do not allow for an Appeal in the circumstances; however, Rule 14.5(1)(a) allows permission to Appeal to be granted from the Decision of a single Appeal Judge. The Court noted that the test under Rule 14.5 is established in *Ouellette et al v Law Society of Alberta*, 2021 ABCA 283 at para 14, which indicates that permission to review a single Judge's Decision should be rare and permitted "only if there is a compelling reason to require the applicant and the respondent to reargue and three Judges of the Court of Appeal to decide an issue." Justice de Wit considered *Can v Alberta Securities Commission*, 2023 ABCA 202 ("*Can*") at paras 25, 35, which establishes that an Application to reargue is only allowed in exceptional circumstances such as when the Court has been mislead, where the Court has overlooked or misapprehended evidence or where patent errors are found in the decision or calculations. Considering *Can*, Justice de Wit concluded that none of the exceptional circumstances were applicable in this case.

Justice de Wit dismissed the Appeal noting that the Applicant's submissions provided no further evidence of a meritorious Appeal or a reasonable chance of success at the Appeal.

GOODSWIMMER V CANADA (ATTORNEY GENERAL), 2023 ABCA 246

(ANTONIO JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant lawyers were counsel for the Plaintiff in the underlying Action against Alberta and Canada. Costs were awarded against the Applicant lawyers, personally, in the amount of $153,976.75 (the "Costs Award"), representing 75% of the Costs awarded in favour of Canada on two stay Applications (the "Stay Applications") and 25% in favour of Canada on a strike/summarily dismiss Application (the "Strike Application").

The Applicant lawyers applied for permission to Appeal the Costs Award. Their Application was denied.

The Stay Applications arose from an Order requiring the Plaintiff to answer Undertakings related to legal advice received prior to entering into a Treaty Land Agreement in 1990. The Plaintiff exhausted all Appeal routes and was ultimately unsuccessful in setting aside the Order. As a result, it continued to bring various Stay Applications. The Stay Applications were found to be "unfounded, frivolous, and vexatious", and the conduct of the Applicant lawyers was deemed a "marked and unacceptable departure from reasonable conduct".

The Strike Application was brought by Canada and Alberta to strike or summarily dismiss portions of the Plaintiff's claim. The Strike Application was successful, affirmed by the Court of Appeal, and refused leave to Appeal by the Supreme Court of Canada. The Costs Award reflected the Applicant lawyers' behaviour in the lower Court, which showed "a pattern of obstruction, delay, and misdirection", which included the late filing of hearsay Affidavits, re-arguing settled points, and raising new Applications and issues. This conduct was deemed by the Chambers Judge as "unreasonable, persistent, and disruptive".

Rule 14.5(1) states that a Costs Decision can be appealed to the Court of Appeal only with permission. Permission is granted if the following four criteria are met: (a) the Applicant identifies a good, arguable case with enough merit to warrant scrutiny by the Court; (b) the issues are important both to the parties and in general; (c) the Appeal has practical utility; and (d) the Court considers the effect of proceedings delay caused by the Appeal. All four must be established.

Madam Justice Antonio found that Costs Awards are accorded deference, even when granted against counsel. The Applicant lawyers failed to establish that they had a good, arguable case. They also failed to establish the second element since the proposed Appeal did not involve issues of general importance. Accordingly, permission to Appeal was denied.

GOODSWIMMER V CANADA (ATTORNEY GENERAL), 2023 ABCA 247

(ANTONIO JA)

Rule 14.5 (Appeals Only with Permission)

The Plaintiff Applicant applied for permission to Appeal the Costs awarded to the Respondents. The underlying Costs Decision awarded Costs to Alberta (the "Alberta Respondent") and only a portion of the Costs awarded to Canada (the "Canada Respondent"). The Plaintiff had been ordered to pay all of the Alberta Respondent's Costs, whereas the Plaintiff's lawyers had been ordered to pay a portion of the Canada Respondent's Costs, personally. The Court noted that Rule 14.5(1)(e) was applicable and that for permission to be granted: (1) the Applicant must identify a good, arguable case having enough merit to warrant scrutiny by the Court; (2) the issues must be important, both to the parties and in general; (3) the Appeal must have some practical utility (4) the Court should consider the effect of delay in proceedings caused by the appeal (together the "Permission to Appeal Test").

The Applicant submitted that it was unreasonable for the Chambers Judge not to apportion some of the Costs awarded to the Alberta Respondent against its former lawyers in the same away the Court had with the Canada Respondent because the Costs awarded to the Alberta Respondent related to the same proceedings involving the same "serious misconduct".

The Court denied the Application for permission to Appeal and found that the first element of the Permission to Appeal Test had not been satisfied. The Court specifically noted that: it was within the Alberta Respondent's discretion to approach the question of Costs differently than the Canada Respondent; there was no Application or Cross-Application requesting that Costs awarded to the Alberta Respondent be apportioned as between the Respondents and their lawyers, instead apportionment of the Alberta Respondent's Costs was raised with the Chambers Judge for the first time by the Applicants in their response Brief; there was no Application asking that any part of the Alberta Respondent's Costs be awarded against the lawyers; and no realistic opportunity for all affected parties to respond to the Applicant's late-rising request.

The Court found that the second element of the Permission to Appeal Test had not been satisfied, noting that the proposed Appeal involved the application of settled principles to unique facts and was therefore not also of general importance.

GOLDSTICK V MONSMA, 2023 ABCA 257

(PENTELECHUK JA)

Rule 14.5 (Appeals Only With Permission)

The Applicant applied for permission to Appeal the Court's Decision to dismiss the Applicant's Application to extend the time to Appeal the Order of a Special Chambers Judge.

Pursuant to Rule 14.5(2), the Court set out that permission to Appeal the decision of a single Judge of the Court to a Panel of the Court of Appeal may be granted if the Applicant established (a) a question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts.

The Court determined that the Applicant noted the same concerns and complaints in the Application as he had in his underlying Application. The Court further noted that a desire to reargue the same matters was not sufficient to warrant granting permission to Appeal the Decision to a full Panel and that the Applicant had not filed any new evidence or evidence at all in support of his Application, despite the lack of evidence being directly in issue in the underlying Application. The Court accordingly dismissed the Application.

DOUS V VISKAT TUBULAR TECHNOLOGIES INC, 2023 ABCA 216

(HO JA)

Rules 14.8 (Filing A Notice of Appeal) and 14.48 (Stay Pending Appeal)

The Applicant filed a Notice of Appeal of Decision dismissing an Amended Statement of Claim (the "Dismissal") as against the Respondents. The Court of Appeal Case Management Office informed the Applicant to file an Application for extension of time to Appeal as he had filed outside of the Appeal period. Subsequently, the Chambers Judge issued a Costs Award arising from the Dismissal. The Applicant filed an Amended Civil Notice of Appeal with respect to both the Dismissal and the Costs Award under Rule 14.8. The Applicant also filed an Application to Stay the Costs Award pending the outcome of the Appeal under Rule 14.48.

The Court considered the factors in *Cairns v Cairns*, 1931 CanLII 471 (AB CA), for an Application to extend time to file a Notice of Appeal.

The Applicant submitted that the action of filing the initial Notice of Appeal mere days after the expiry period and the fact that he ordered the transcripts of the Chambers Judge decision were indicative of his bona fide intention to Appeal. Justice Ho concluded that the Applicant had established a bona fide intention to Appeal and met the relatively low threshold of having "some merit" to his Appeal. The extension of time to Appeal was granted.

The Court considered the Application to stay the Costs Award under Rule 14.48 and noted that the legal test to be met for a Stay is outlined in *RJR-MacDonald Inc v Canada (AG)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 334-335. The Applicant submitted that he would suffer irreparable harm if a Stay of the Costs Award

is not granted because of his poor financial circumstances. The Respondents submitted that they were legally entitled to the benefits of the Costs Award and a Stay would deprive them of the ability to enforce the Cost Awards. Justice Ho concluded that the Applicant had not demonstrated that he would suffer irreparable harm if a Stay was not granted. Additionally, Justice Ho also noted that the Applicant had not provided meaningful documentary or third-party evidence substantiating his claims about his financial position and the implications of enforcement of the Costs Award. Therefore, the Applicant's request for a Stay of the Costs Award pending Appeal under Rule 14.48 was denied.

ALPHABOW ENERGY LTD V ALBERTA ENERGY REGULATOR, 2023 ABCA 239

(KHULLAR CJA)

Rule 14.22 (Application for Permission to Appeal)

Pursuant to Rule 14.22, the Appellant submitted an Application for permission to Appeal a Suspension Order issued by the Alberta Energy Regulator (the "Regulator") made under the *Responsible Energy Development Act*, SA 2012, c R-17.3. The Order was issued by the Regulator on June 5, 2023. On June 9, 2023, the Appellant requested of the Regulator, i) a regulatory Appeal of the Order and collateral matters; ii) an inquiry regarding the Order; and iii) a Stay of Enforcement of the Order. An interim Stay of the Order was granted by the Regulator, pending consideration of the requested inquiry. The Regulator granted the Appellant's request for Appeal of the Order but denied the request for an inquiry and Stay of Enforcement. At the time of the Application for permission to Appeal, the regulatory Appeal had not been heard nor decided.

The Court held that the Order constituted a decision by the Regulator. Thus, Chief Justice Khullar possessed the necessary authority to grant the Application if arguable errors of law were present, and the remaining elements of the test were satisfied. However, the Application was deemed premature, given the outstanding Appeal to the Regulator. The Court emphasised that as a general rule, parties should exhaust the administrative process and remedies before bringing an Appeal or Judicial Review to the Court. Though exceptions exist, Chief Justice Khullar was not satisfied the case at hand met an exception. Therefore, Chief Justice Khullar adjourned the Application *sine die*, pending the outcome of the regulatory Appeal.

However, by adjourning the matter, Chief Justice Khullar realised that the adjournment would run afoul Rule 14.44(2). Pursuant to Rule 14.44(2), an Application for permission to Appeal must be heard within six months of the date of the filing of the Application. If the six-month period lapses, the Application is deemed to be abandoned. Thus, the Court directed that Rule 14.44(2) would not apply to the adjourned Application, ensuring that the Appellant could still seek permission to Appeal both the Order and the decision of the regulatory Appeal at the conclusion of the regulatory Appeal.

VLM DOMINEY ESTATE, 2023 ABCA 261

(SLATTER, PENTELECHUK AND ANTONIO JJA)

Rules 14.27 (Filing Extracts of Key Evidence) and 14.28 (Record Before the Court)

The Court allowed the Plaintiff's Appeal from an Order denying the certification of Class Action.

At the end of its Decision, the Court commented that it was inappropriate for the Appellant to file the entire Trial Record in this Appeal. The Court cited Rule 14.27, which specifically requires that only evidence needed to resolve the Appeal is to be filed with the Court of Appeal. Such requirement can find its support in Rule 14.28(1), which provides that all the Trial Records are part of the Appeal Record even if copies are not filed with the Court of Appeal.

KELLEY (RE), 2023 ABCA 219

(DE WIT JA)

Rules 14.37 (Single Appeal Judges) and 14.47 (Application to Restore an Appeal)

The Applicant applied pursuant to Rule 14.47 to restore his Appeal. The Applicant's Appeal was previously struck pursuant to Rule 14.37(2)(c) on the basis that it was filed outside the appeal period stipulated by the *Bankruptcy and Insolvency General Rules*, CRC, c 368.

The Respondent argued that the matter was *res judicata* following the decision by which the Appeal was struck. At that time, the Applicant had not brought a Cross-Application to extend time to Appeal.

The Court disagreed that the matter was *res judicata*, but nonetheless declined to restore the Appeal.

Justice de Wit noted that the test to restore an Appeal involves an assessment of the Appeal's arguable merit, which could not be sufficiently shown here. The Court observed that the Chambers Judge's reasons for disallowing the Applicant's claim were strong and well-supported, and that the Applicant's proposed grounds of Appeal were, on their face, hopeless.

Justice de Wit held that there were no other considerations which would make it in the interests of justice to restore the Appeal and allow it to proceed, and therefore dismissed the Application.

SPARKS V HORVATH, 2023 ABCA 231

(FEEHAN JA)

Rule 14.37 (Single Appeal Judges)

The Applicant sought an extension of time to file a Notice of Appeal pursuant to Rule 14.37(2)(c) of an Order adjourning the review of a restraining Order granted against the Applicant from June 1, 2023 to August 23, 2023 (the "Adjournment Order").

The Court noted that the Applicant had not: filed an Affidavit in support of his Application; presented evidence that met the well known criteria for an extension of time set out in the jurisprudence; and the Order which the Applicant sought to Appeal was the Adjournment Order that was a procedural Order in Chambers with an imminent return date, which would address the issue in Chambers and was therefore useless and hopeless. The Court accordingly dismissed the Application.

BANK OF MONTREAL V MCLENNAN, 2023 ABCA 235

(FEEHAN JA)

Rules 14.37 (Single Appeal Judges) and 14.40 (Applications to Single Appeal Judges)

The Defendant applied to extend the time to Appeal an Order of a Chambers Judge dismissing her Appeal from an Applications Judge's Order. Appeal Justice Feehan exercised his discretion and granted the Application.

The Plaintiff had sued the Defendant for an indebtedness on a Mastercard. The Defendant alleged that she never received or used the Mastercard. When the Plaintiff served the claim, the Defendant was living with her critically ill mother, and was never personally served with the claim. The Plaintiff applied to validate service and later obtained Default Judgment.

Two years and ten months after Default Judgment was granted, and two years and nine months after the Defendant became aware of the Default Judgment, the Defendant applied to set it aside. The set aside Application was dismissed by an Applications Judge on November 22, 2022.

The Defendant unsuccessfully appealed the Applications Judge's Decision on May 4, 2023. The Defendant's time to Appeal the Chamber Judge's Decision had expired June 5, 2023.

On June 1, 2023, the Defendant mistakenly filed an Application for Permission to Appeal without any supporting documents. She re-filed the Application on June 22, 2023. On June 27, 2023, the Defendant was informed by the Case Management Officer that she did not need permission to Appeal but was required to seek an extension of time to Appeal. The Defendant was advised to apply to extend the time to Appeal by July 31, 2023. She filed on July 20, 2023.

Rule 14.37(1) allows single Appeal Judges to decide any Applications incidental to an Appeal, and Rule 14.37(2)(c) gives single Appeal Judges discretion to extend the time to Appeal.

In extending the time to Appeal, Feehan J.A. applied the well-known test from *Cairns v Cairns*, 1931 CanLII 471 (AB CA) ("*Cairns*"). The case determined that an Applicant must: (1) show a bona fide intention to Appeal and an excuse for the failure to Appeal; (2) demonstrate that the Respondent was not prejudiced by the delay; (3) show that the Applicant did not take the benefits of the Judgment being Appealed; and (4) show that the Applicant had a reasonable chance of success if the Appeal is allowed.

The Court noted that it is not necessary for an Applicant to meet all four requirements in *Cairns*, but it is more likely that an extension will be granted if all requirements are met. The Court found that the Defendant had satisfied the first step. She had a bona fide intention to file but was mistaken about the procedure to be undertaken. On the second and third steps, there was no evidence that the Plaintiff had been prejudiced by the Defendant's delay in filing the correct Application, and the Defendant did not take the benefits of the decision below.

The fourth point was contested by the Plaintiff. The Plaintiff argued that the Defendant failed to comply with Rule 14.40(2), which stipulates that an Applicant must serve a filed copy of the Application and other materials on parties to the Appeal at least 10 days before the Application is scheduled to be heard. However, the Registry alerted the Plaintiff to the Defendant's Application, and the Plaintiff filed a memorandum of argument. Further, the Plaintiff made oral submissions.

Lastly, Feehan J.A. found that the Defendant's delay was not willful, and her position was reasonably arguable. Time to Appeal was extended to the date the Defendant filed the Notice of Appeal on July 20, 2023.

DOW CHEMICAL CANADA ULC V NOVA CHEMICALS CORPORATION, 2023 ABCA 262

(WATSON JA)

Rules 14.37 (Single Appeal Judges) and 14.75 (Disposing of Appeals)

This Application arose from a previous Decision by the Court of Appeal, granting permission to Appeal two specific points. The Appeal was scheduled for November 9, 2023. In the interim, the Appellant had brought this Application to stay the within Arbitration pending the outcome of the Appeal.

Justice Watson considered Rule 14.37(1) and Rule 14.75 to inquire whether he had jurisdiction to hear this Application and grant the requested remedy. Justice Watson acknowledged that he was currently considering this inquiry due to the lack of specific guidance in the Rules regarding the authority of a single Judge in the Court of Appeal to hear an Appeal of this nature. Upon reviewing Rule 14.37, Justice Watson determined that the only apparent authority for him to proceed with this type of Application as a single Judge is if it is deemed "incidental to an appeal". The Appellant argued that this matter was indeed incidental to an Appeal, as Rule 14.75 grants the Court of Appeal Panel itself the power to issue an injunction. If the Panel is able to grant an injunction based on the authority granted by the Rules, it could be argued that the Justice, as a single Judge, also possesses the incidental authority that upholds the majesty of that authority. Additionally, the Court acknowledged

that the Rules hold statutory power, as outlined in the *Judicature Act*, RSA 2000, c J-2.

After careful consideration of the arguments presented by both parties, the Court determined that it is plausible that an interim measure taken during an Appeal could serve a protective or prophylactic purpose, thereby facilitating a more definitive resolution of the matter by the Appeal Panel at a later stage.

Justice Watson ultimately concluded that he had the requisite jurisdiction to address the issue of the Stay of the Arbitration for the present purposes. Subsequently, the Court proceeded to evaluate the merits of the Application and ultimately granted a Stay of the Arbitration, albeit on a limited basis, by suspending the tribunal's timetable until the Appeal hearing had concluded.

LAWRENCE V ALBERTA (DIRECTOR OF SAFEROADS), 2023 ABCA 271

(WATSON, WAKELING AND FEEHAN JJA)

Rules 14.46 (Application to Reconsider a Previous Decision) and 14.72 (Binding Precedents)

The Defendant applied for permission to argue on Appeal that a specific issue in *Lausen v Alberta (Director of SafeRoads)*, 2023 ABCA 176 ("*Lausen*") should be reconsidered under Rules 14.46 and 14.72. The Application was dismissed.

The proposed issue for reconsideration was whether under subsection 4(e)(v) of the *SafeRoads Alberta Regulation*, AR 224/2020 it was "necessary for recipients of an administrative penalty to be issued or advised of a notice of administrative penalty before they are said to be aware of their right to a roadside appeal".

Rule 14.46 states that an Application to reconsider a previous Decision of the Court of Appeal must be filed and served and must be returnable prior to the filing of, and prior to the deadline for filing, the Applicant's Factum. Rule 14.27 clarifies that no party may argue that a prior precedential Decision of the Court should be reconsidered unless permission has been obtained under Rule 14.46. The test for reconsideration had been recently discussed in *Peters v Atchooay*, 2021 ABCA 237. The aim is not to determine whether the previous case was "wrongly decided; … only … to determine whether [it] should be reconsidered".

Leave to reconsider a binding precedent is granted only in very limited circumstances due to policy considerations that require "certainty and stability of the trial process, finality in litigation, and judicial economy". There are six factors that are relevant to determine whether leave for reconsideration should be granted: (i) the age of the Decision, (ii) whether the Decision created settled expectations or resulted in cases being decided in a particular way, (iii) the treatment of the issue by other Appeal Courts, (iv) whether binding statute or authority has been overlooked, (v) whether the Decision has "some simple, obvious, demonstrable flaw", and (vi) whether the Decision was a Memorandum of Judgment delivered from the bench or a reserved, circulated one.

Lausen was a recent unanimous Decision of the Court. It set out a practical, reasonable procedure for the issuance of a notice of administrative penalty to a suspected impaired driver. The Defendant wanted reconsideration of whether "awareness of the right to a roadside test is impossible where the driver has not yet been issued or advised of the notice of administrative penalty". The Court found that the statement sought to be reconsidered was

not a general statement of law but a conclusion on the facts of that case. Accordingly, the Application for reconsideration was dismissed and the parties were free to argue that *Lausen* could be distinguishable on its facts.

NKUSI V PATRICIA C TIFFEN PROFESSIONAL CORPORATION, 2023 ABCA 272

(WATSON JA)

Rules 14.47 (Application to Restore an Appeal) and 14.65 (Restoring Appeals)

The Court dismissed the Appellant's Application to restore an Appeal under Rules 14.47 and 14.65 (the "Restoration Application"). The Appeal was deemed abandoned due to non-compliance with the Rules and practices of the Court.

Watson J. held that the Restoration Application gave rise to consideration of the factors set out in *Li v Morgan*, 2020 ABCA 186 ("*Li*"). Namely: (i) an explanation for the delay that caused the Appeal to be struck in the first place; (ii) an explanation for the delay in applying to restore the Appeal; (iii) continuing intention to proceed with the Appeal; (iv) lack of prejudice to the Respondent; and (v) the arguable merit of the Appeal. Watson J. further held that no one factor is determinative; all factors are weighed to determine whether an Appeal should be restored.

Watson J. cited *Mylonas v Kadman*, 2019 ABCA 39 and *Rana v Rana*, 2018 ABCA 347 for the proposition that the test for restoring an Appeal involves similar considerations of whether the Appeal has been struck or deemed abandoned. However, in the case of an Appeal deemed abandoned, the threshold for restoration is heightened.

Watson J. commented that it is not for a party to unilaterally decide what time limitations or Rules are appropriate to that party's case. Ultimately, the Court must be satisfied that restoring the Appeal is in the interests of justice and not unfairly prejudicial to any opposing parties.

It was found that, having regard to the factors in *Li* and other cases, the materials filed for the Appellant fell short of substantiating the restoration of the Appeal. Watson J. further found that the Appellant provided no explanation for the delay that caused the Appeal to be struck.

Watson J. noted that the Appellant had failed to order and file proof of ordering the Transcript of the Decision to strike the Appeal within the timelines mandated for fast tracked Appeals, or to file an Appeal Record when due. Further, the Appellant did not file an Affidavit in support of the Restoration Application, nor did he append his late Appeal Record to his filed materials, which also raised doubts about whether the Appellant had a continuing intention to prosecute the Appeal.

Watson J. further held that there was no merit to the Appeal and that lack of merit alone may be grounds to deny a restoration Application.

SHENNER V TORNQVIST, 2023 ABCA 240

(KHULLAR CJA)

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

This was an Application brought pursuant to Rule 14.65 to restore an Appeal for a second time. The Applicant failed to file his Factum by the relevant deadline, and the Appeal was struck pursuant to Rule 14.64. The Applicant made an Application to restore the Appeal, which was granted. However, the Applicant failed to file the Factum again. As the Appeal was not restored within three months of the date on which it was last struck, it was deemed abandoned pursuant to Rule 14.65(3)(b).

Considering the Application, the Court recited the considerations to be applied in determining an Application to restore an Appeal that had been deemed abandoned, namely (a) explanation for the delay that caused the Appeal to be struck; (b) reasonable promptness to cure the defect and restore the Appeal; (c) continuing intention to proceed with the Appeal; (d) prejudice to the Respondent, including the length of the delay; and (e) the arguable merit of the Appeal. The Court observed that the Applicant bears the onus of satisfying the Court that restoring the Appeal is in the interests of justice.

Applying the above considerations to the facts, the Court found that the Applicant had demonstrated his continuing intention to proceed with this Appeal. The Applicant's failure to file the Factum by the relevant deadline could be attributed to the incompetence of counsel, and the Applicant should not be prejudiced as a result. To establish arguable merit, the Applicant need only show that the Appeal is not frivolous or hopeless. While noting that the Respondent suffered actual prejudice, the Court found that it was in the interests of justice to restore the Appeal for the second time.

GILES (RE), 2023 ABCA 242

(MARTIN, ROWBOTHAM AND PENTELECHUK JJA)

Rule 14.73 (Procedural Powers)

This Costs Decision arose from an Appeal concerning interpretation of a testamentary spousal trust. The Chambers Judge found that the Respondents were entitled to information about the beneficiary's financial situation. The Appellant challenged the Chambers Judge's Decision and the subsequent Costs Award.

The Respondents took the position that the Appellant did not amend his Notice of Appeal to include an Appeal of the Costs Award and that therefore the Decision was not properly before the Court. The Court considered Rule 14.73 regarding Court's procedural powers stating that the Court has the authority to cure this irregularity if needed. The Court stated that the Respondents had the notice of the Costs Appeal which formed the Appellant's Factum, and had an opportunity to present their arguments in response. The Respondents sub-

mitted that if the Costs Appeal was permitted to proceed, then the Chambers Judge's Decision was reasonable. The Appellant submitted that there was mixed success and that the Costs Award should reflect the divided success.

The Court of Appeal referred to McAllister v Calgary (City), 2021 ABCA 25 noting that Cost Awards are discretionary, and the Chambers Judge made findings of fact given in the context of an exercise of discretion. The Court considered the Chambers Judge's finding that the Respondents succeeded on almost all grounds and that the Court's Decision is therefore entitled to deference. The Court of Appeal recognized that there was some double counting in the Costs Award and therefore reduced the Costs by $16,141.26. The overall Appeal was dismissed.