14.5	**CARBONE V DAWES,** 2024 ABCA 13
	ESFAHANI V SAMIMI, 2024 ABCA 16
	DYNAMO COATINGS LTD V ALBERTA BUILDING TRADES COUNCIL BENEVOLENT SOCIETY (A.B.T.C.B.S.), 2024 ABCA 36
	MILOT LAW V SITTLER, 2024 ABCA 39
	ROCK RIVER DEVELOPMENTS LTD V VILLAGE OF NAMPA, 2024 ABCA 42
	LS V MK, 2024 ABCA 64
	XU V MA, 2024 ABCA 81
	ARDMORE PROPERTIES INC V STURGEON SCHOOL DIVISION NO 24, 2024 ABCA 88
	BEHRISCH V BEHRISCH, 2024 ABCA 101
14.8	**REININK V ALBERTA (LABOUR RELATIONS BOARD),** 2024 ABCA 63
14.9	**AUBIN V CONDOMINIUM PLAN NO 862 2917,** 2024 ABKB 156
14.14	**DYNAMO COATINGS LTD V ALBERTA BUILDING TRADES COUNCIL BENEVOLENT SOCIETY (A.B.T.C.B.S.),** 2024 ABCA 36
	MARSHALL V LEE, 2024 ABCA 86
14.16	**BRADY V VAN DEURZEN,** 2024 ABCA 66
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14.32	**OKEKE V CHEN,** 2024 ABCA 28
14.37	**ROCK RIVER DEVELOPMENTS LTD V VILLAGE OF NAMPA,** 2024 ABCA 42
	REININK V ALBERTA (LABOUR RELATIONS BOARD), 2024 ABCA 63
	BEHRISCH V BEHRISCH, 2024 ABCA 101
14.40	**ESFAHANI V SAMIMI,** 2024 ABCA 16
14.48	**ANAND V ANAND,** 2024 ABCA 70
	BLENCH V CHENG, 2024 ABCA 73
14.55	**MARSHALL V LEE,** 2024 ABCA 86

ANDERSON V ALBERTA, 2024 ABKB 64

(JERKE J)

Rules 1.2 (Purpose and Intention of These Rules), 5.2 (When Something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records), 5.17 (People Who May Be Questioned), 5.33 (Confidentiality and Use of Information) and 13.18 (Types of Affidavit)

The case involved a protracted legal dispute, spanning over a decade. The primary issue at hand was an Application before the Case Management Judge seeking judicial declarations and Orders to recognize certain documents as privileged. The documents in question were supporting documents related to traditional land use studies ("TLUS") that the Applicant had conducted over the past twenty years. While the Applicant had not claimed privilege over the final reports of these studies, it asserted that the TLUS supporting documents were privileged.

The Respondents in this matter challenged the Applicant's claim. They argued that the TLUS supporting documents were not privileged. Moreover, they contended that even if these documents were initially privileged, the Applicant had effectively waived such privilege by already disclosing some of these supporting documents to them. Despite their opposition to the privilege claim, the Respondents expressed a willingness to consider the imposition of a confidentiality and/or sealing Order to safeguard any sensitive information contained within the documents in question.

The Court began by emphasizing the overarching purpose and intention of the Rules, as set out in Rule 1.2. Further, the Court considered the specifics of Rule 5.2 regarding the relevance and materiality of evidence, and Rule 5.33 on the confidentiality and use of information, to evaluate the significance of the TLUS supporting documents to the case's issues. The Court reviewed Rules 13.18, 5.17 and 5.6 to outline who could be questioned and the appropriate form and content of an Affidavit. The absence of a formal definition of "information" within the Rules prompted the Court to adopt a broad interpretation, recognizing information as encompassing knowledge or news, as per the Canadian Oxford Dictionary.

The Applicant argued that the consultations they engaged in were constitutionally mandated, concerning development on traditional

territory. The Applicant did not assert class privilege over the documents but claimed a case-by-case privilege, citing the inclusion of highly sensitive personal information collected under confidentiality assurances. The Applicant further maintained that during the interviews for the TLUS, assurances were given to participants about the confidentiality of their information and identity, which, in their view, should be upheld.

The Court applied the *Wigmore* criteria to determine whether a case-by-case privilege existed concerning certain documents. Noting a *prima facie* presumption that the records were not privileged, the Court emphasized that the application of the *Wigmore* criteria is case-specific and requires a principled analysis rather than a formulaic one. Following its analysis, the Court concluded that the communications comprising the TLUS supporting documents originated in confidence, except for parts of the information incorporated into TLUS final reports explicitly recognized for Court use.

Turning to the issue of waiver, the Court found that the Applicant did not take reasonable steps to prevent the disclosure of the TLUS supporting documents. Acknowledging the disclosure was inadvertent, the Court held that it was also intentional. The Court found "the bell ha[d] been rung" on the TLUS supporting documents that were provided and it would be unfair and artificial to expect the defendants to "disabuse their minds" of the information.

In conclusion, the Court found that, upon a case-by-case analysis, the TLUS supporting documents were privileged, with the exception of information already incorporated into TLUS final reports. This excluded information comprising names of participants, names of special medicines, and the pinpoint locations for activities like hunting, fishing, berry picking, medicine harvesting, and identifying family and sacred places. However, TLUS supporting documents pertaining to members who will testify as witnesses were to be disclosed.

Further, the Court found that the Applicant had relinquished privilege over TLUS supporting documents that had been previously shared with the Respondents. The Court indicated that the situation could be adequately safeguarded by implementing a confidentiality and/or sealing Order.

DOW CHEMICAL CANADA ULC V NOVA CHEMICALS CORPORATION, 2024 ABKB 98

(ROMAINE J)

Rules 1.2 (Purpose and Intention of These Rules), 4.2 (What the Responsibility Includes), 4.7 (Monitoring and Adjusting Dates), 4.9 (Orders to Facilitate Proceedings), 4.10 (Assistance by the Court), 4.11 (Ways the Court May Manage Action), 4.12 (Request for Case Management), 4.13 (Appointment of Case Management Judge) and 4.15 (Case Management Judge Presiding at Streamlined Trial and Trial)

This matter was an Endorsement from Justice Romaine with regards to certain procedural issues arising from what was known to the Court as the "second remand" hearing.

The Court was tasked with making decisions on certain directions pursuant to Rules 4.2, 4.7(2) and 4.9 in order to facilitate the ultimate hearing of the second remand issue and

finalizing the extensive litigation between the parties with respect to the joint ownership of a powerplant.

On November 2, 2023, the Court noted that in one of the Notices of Appeal filed by the Defendant during the course of the first remand, the Defendant had appeared to object to the Court "unilaterally" taking over the "case management" of the hearing, although no objection had ever been made before the Court with respect to this issue.

However, on November 24, 2023, Defendant's counsel stated that the Defendant had never agreed that the Court would "play a case management role" going forward, referring to Rule 4.15. It was the Defendant's position that Court did not have the authority to place the matter in case management.

The Court's emphasized that Rule 4.2 makes it the responsibility of the parties to manage their dispute, and to plan its resolution and requires the parties, when the complexity or the nature of an Action requires it, to apply to the Court for direction, or request case management under Rule 4.12. However, it was clear to the Court that the parties could not agree to a plan to have the remand go forward. Rule 4.7(2) indicates that, on application, the Court may adjust or set dates by which a stage or a step in the Action is expected to be complete. The Court stated that Rule 4.9 provides a Court, or a party who is not satisfied that an Action is being managed in accordance with Rule 1.2, to make (or apply for) a procedural or any other appropriate Order. The Court stated that Rules 4.10 and 4.11 provide further support for a Court making procedural or any other Orders that may aid in the resolution of the proceedings.

Further, the Court concluded that there had been a request for case management, and no Order granting case management, as required by Rule 4.12(1) and Rule 4.13. Therefore, Rule 4.15, which the Defendant suggested prevented the Court from continuing to make procedural Orders to move the matter to a hearing, had no relevance to the situation.

The Court did state that the Defendant could make such an Application, despite the fact that that it was not the preparation stage of a new Trial, but the continuation of a Trial that had been referred back to the Trial Court by the Court of Appeal.

Therefore, until and unless the Defendant made an Application for case management under Rule 4.12 and such Application is granted, the Court held that it could and would continue to make directions and hear Applications on pre-hearing issues with the goal of facilitating and scheduling the second remand hearing.

AUBIN V CONDOMINIUM PLAN NO 862 2917, 2024 ABKB 156

(MANDZIUK J)

Rules 1.2 (Purpose and Intention of These Rules), 6.14 (Appeal from Applications Judge's Judgment or Order) and 14.9 (Appeals from Several Decisions)

The Appellants appealed a Decision of an Applications Judge on its merits and the Costs Award, and both the Appellants and Respondent introduced new evidence. When new evidence is introduced on Appeal from an Applications Judge's Decision, a fresh assessment of the facts is required, and no deference is owed to the Applications Judge's findings. Rule 6.14(3) allows for the introduction of new evidence as long as the Justice hearing the

Appeal determines that the evidence is relevant and material. The test to introduce new evidence is "very lax".

Justice Mandziuk considered a procedural issue in this Decision. Rule 6.14(2) prescribes that an Appellant has 10 days after being served with a filed Order by an Applications Judge to file and serve its Notice of Appeal. The Appellants filed their Notice to Appeal of the merits Decision in time, but did not amend their Notice of Appeal, or file a new one, in response to the Costs Award, which was rendered by the Applications Judge at a later time.

While the Rules for Appeals to the Court of Appeal are not directly applicable to Appeals of an Applications Judge's Order, they are instructive. Rule 14.9 states that while a separate Notice of Appeal is required for each Decision appealed, Appeals concerning a substantive Decision and a ruling on Costs for the same hearing are an exception. Justice Mandziuk read Rule 14.9 in conjunction with Rule 1.2 (which provides for a fair, just, and cost-effective and timely Court process) to decide that he had authority to hear the Appeal of the Costs Award notwithstanding that no amended Notice of Appeal was filed for it.

WV V MV, 2024 ABKB 174

(FEASBY J)

Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Order), 3.23 (Stay of Decision) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The matter involved an Application to set aside an interim Injunction granted on an *ex parte* basis. The Applicant argued, in part, that there was no serious issue to be tried. In support of this position, she argued that the Respondent's Pleadings were deficient. In hearing these arguments, Justice Feasby granted leave to the Respondent to amend his Originating Application for Judicial Review, pursuant to Rule 3.65. In doing so, Justice Feasby noted that Courts should exercise discretion to permit a pleading to be amended unless there is a compelling reason not to. Feasby J. also cited Rule 1.3, stating that the subject matter of this case was too significant for the outcome to turn on Pleadings defects that could be remedied.

The interim Injunction that was the subject of the Application was granted pending the outcome of an Application for Judicial Review. Citing Rule 1.4 and 3.23, the Court noted that Injunctions may be granted pending a Judicial Review proceeding. However, ultimately, the Court found that on a balance of convenience, the harm arising to the Applicant outweighed the harm arising to the Defendant. The Application to set aside the interim Injunction was therefore granted.

KNEEHILL COUNTY V RISLER, 2024 ABKB 89

(MARION J)

Rules 1.4 (Procedural Orders), 3.2 (How to Start an Action), 3.12 (Application of Statement of Claim Rules to Originating Applications), 3.14 (Originating Application Evidence (Other than Judicial Review)) and 3.15 (Originating Application for Judicial Review)

This matter, commenced by an Originating Application (the "Application"), gave rise to an issue of whether this matter could be appropriately dealt with summarily.

Marion J. commented that Rule 3.2(2)(a) provides that a Statement of Claim must be used to start an Action unless, among other things, there is no substantial factual dispute. Citing *Royal & Sun Alliance Insurance Company of Canada v Co-Operators General Insurance Company,* 2023 ABKB 426, Marion J. further commented that, even where there is not a substantial factual dispute, the Courts have significant discretion under Rules 1.4(1), 3.2(6), 3.12, and 3.14(1)(g) as to whether and how Originating Application proceedings proceed.

Marion J., citing *Venini v Venini,* 2023 ABKB 524, commented that Alberta Courts have confirmed that the test for whether a matter is appropriate for Summary Judgment do apply to Originating Applications, with some modifications.

Marion J. reiterated the principles that applied to the situation in the matter at hand. Specifically, whether there was a substantial factual dispute, and the proper approach to summary dispositions set out by the Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49. Having found that there was no material factual dispute, that the Applicant's requested relief was interim, and that no participant at the hearing objected to the Court making a Decision, Marion J. held that it was appropriate for the Court to consider the Application summarily.

FORD V NEW DEMOCRATS OF CANADA ASSOCIATION, 2024 ABKB 141

(DARIO J)

Rules 1.4 (Procedural Orders), 2.1 (Actions by or Against Personal Representatives and Trustees), 2.6 (Representative Actions), 2.12 (Types of Litigation Representatives and Service of Documents), 2.16 (Court-appointed Litigation Representatives in Limited Cases), 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions), 3.68 (Court Options to Deal With Significant Deficiencies), 7.3 (Summary Judgment) and 10.33 (Court Considerations in Making Costs Award)

The Action related to a defamation claim arising from comments in an online press release and posts on X (formerly Twitter). There was a dispute as to the proper Defendant to be named, as the named Defendant was an unincorporated association, not capable of

being sued. An Application was brought by the Plaintiff seeking direction from the Court as to who to name. However, the day before that Application was heard, the parties reached an agreement wherein the Applicant would abandon the Application and the Respondent would provide a name of an individual who could be named on behalf of the Respondent. Only Costs were addressed at the hearing of the Application, and Costs were awarded to the Respondent.

The Respondent then failed to meet its obligations under the settlement agreement, and the Applicant brought a fresh Application to appeal the Costs awarded to the Respondent and revive the prior Application for direction as to the proper parties. In response, the Respondent applied to strike the Statement of Claim, pursuant to Rule 3.68, or summarily dismiss the claim, pursuant to Rule 7.3.

The named Defendant was a beneficiary of a trust. The Respondent cited Rule 2.1 to argue that the claim should have been brought in the name of the trustee. However, the trustee was also an unincorporated entity and did not have legal capacity to be sued. Rule 2.1 was therefore found to be inapplicable.

The Respondent also argued that Rule 2.6 provided the Applicant the option to name a litigation representative without the agreement of the Respondent. Justice Dario found this argument disingenuous, as the Applicant's submissions made clear that they were effectively seeking a ruling with the same result as an Application under Rule 2.6.

Reference was made to Rules 2.12, 2.6, 2.16, and 2.21 regarding the proper representative to be appointed. Dario J. determined that a representative Defendant pursuant to Rule 2.6 was inappropriate, as the representative would not represent multiple parties' interests. It was not clear to Justice Dario what type of litigation representative should be appointed. However, the Applicant's Application invoked Rule 1.4(2), which provided the Court significant discretion to make decisions which support the overall purpose of the Rules. On that basis, the Court directed the Respondent to provide the Plaintiff with the name of an appropriate individual to act as a litigation representative. If that direction was not followed, the Court reserved the right to appoint a litigation representative under Rules 2.16 and/or 2.21.

Justice Dario then moved on to consider the Application of the Respondent to strike or summarily dismiss. The Respondent argued that there was an improper allegation of vicarious liability without legal basis. Dario J. reviewed the facts and law and dismissed this Application.

The final issue was the Appeal of the Costs Award. At the initial hearing on Costs, the Plaintiff took no position. The Applications Judge based his Costs Award on jurisprudence. The Plaintiff argued that the Judge failed to account for the factors enumerated in Rule 10.33, awarding 45% indemnity. Dario J. agreed with this argument, and found the Costs Award unreasonable.

NEW STAR ENERGY LTD V LAM, 2024 ABKB 167

(MALIK J)

Rules 1.5 (Rules Contravention, Non-Compliance and Irregularities), 3.1 (Rules Govern Court Actions) and 3.2 (How to Start an Action)

The Applicant applied to set aside a Consent Judgment.

The Applicant argued that the Consent Judgment did not comply with Rule 3.1 and therefore did not constitute a proceeding before the Court under section 8 of the *Judicature Act,* RSA 2000, c J-2. Rule 3.1 requires a proceeding to be brought and carried out in accordance with the Rules. Rule 3.2 requires an Action to be commenced by filing a Statement of Claim, Originating Application, or a Notice of Appeal. The Consent Judgment did not comply with Rule 3.2 as it was the first document submitted to the Court as an originating document.

The Applicant also argued that the Court could set aside the Consent Judgment under Rule 1.4(2)(b) as the process followed was contrary to law.

The Court dismissed the Application. The Court noted that the Applications Judge who endorsed the Consent Judgment would have been aware that Rule 3.2 was not followed as the Court endorsed the Consent Judgment and assigned it a new Court File Number. Malik J. determined that the Court did not have any further jurisdiction as the Applicant did not apply to set aside the Consent Judgment under Rule 1.5 or formally appeal it.

ATB FINANCIAL V DIMSDALE AUTO PARTS LTD, 2024 ABKB 143

(NIXON ACJ)

Rules 2.2 (Self-Represented Litigants), 2.23 (Assistance Before the Court) and 9.4 (Signing Judgments and Orders)

This Decision concerned the interference of a party unrelated to the litigation (the "Uninvolved Third Party") in a foreclosure action. The Uninvolved Third Party had positioned himself as a "minister" and "*amicus curiae*" without any legal basis or standing in the case; he had attempted to argue on behalf of one of the Defendants.

The Court found the Uninvolved Third Party's actions to be the unauthorized practice of law, breaching the *Legal Profession Act*, RSA 2000, c L-8. The Court dismissed the arguments advanced by the Uninvolved Third Party as legally baseless and disruptive.

Further, given the Uninvolved Third Party's history of abusive litigation practices, the Court concluded that he should be prohibited from participating in King's Bench proceedings unless he is a named party, preventing him from acting as an agent, *amicus curiae,* or McKenzie Friend under Rules 2.22 and 2.23. In addition, the Court ordered that he be prohibit-

ed from entering Alberta Courthouses without authorization and must adhere to specific communication restrictions with the Court.

Pursuant to Rule 9.4(2)(c), the Court dispensed with the approval of the Order by the Uninvolved Third Party and the Defendant he claimed to represent.

DYNAMO COATINGS LTD V ALBERTA BUILDING TRADES COUNCIL BENEVOLENT SOCIETY (A.B.T.C.B.S.), 2024 ABCA 36

(FETH JA)

Rules 2.23 (Assistance Before the Court), 14.5 (Appeals only with Permission) and 14.14 (Fast Track Appeals)

The Applicant, pursuant to Rules 14.5(1)(a) and 14.5(2), sought permission to appeal a Decision denying an Application to restore its Appeal after being struck for failing to meet filing deadlines (the "Application").

Feth J.A. cited *Al-Ghamdi v Alberta*, 2016 ABCA 403 for the test for granting permission to Appeal an Order of a single Judge under Rule 14.5(2). Namely, the Appellant must establish that the Order to be reviewed (a) raises a question of general importance which on its own deserves panel review, (b) rests on a reviewable and material issue of law worthy of panel review, (c) involves an unreasonable exercise of discretion which had a meaningful effect on the outcome of the Decision and the outcome is worthy of panel review, or (d) rests on a palpable and overriding error of important facts affecting the Order made and the Order is worthy of panel review.

Citing *Alberta Health Services v Wang,* 2017 ABCA 261, Feth J.A. continued to say that the Court may also consider whether there are conflicting Decisions on the point, the standard of review that would be applied on the Appeal, and whether there are other good reasons why a full panel of the Court should review the Order under Appeal. Importantly, new arguments are not properly presented on Appeal, and certainly not as the basis for permission to Appeal.

In response to the Applicant's argument that there was no reason for it to believe the Appeal was to be fast-tracked under Rule 14.14(2), Feth J.A. commented that the Appeal Decision met the criteria of a fast-track Appeal as set out in Rule 14.14(1), and that fast-track Appeals are not limited to those matters otherwise specifically set out in Rule 14.14(2).

In response to the Applicant's argument that the Court had misinterpreted Rule 2.23(3)(a), Feth J.A. stated that given the permissive language in Rule 2.23, it is not mandatory that permission be granted.

Having found that the Applicant failed to demonstrate why the interests of justice would be served by allowing a further level of review or that there had been any error in principle in reaching those discretionary decisions, Feth J.A. denied the Application.

BEHIELS V TIBU, 2024 ABKB 12

(LEMA J)

Rules 3.3 (Determining the Appropriate Judicial Centre) and 3.5 (Transfer of Action)

The Plaintiff in the crossclaim sought to transfer a long-running Action from Edmonton to Calgary, primarily based on her long-ago relocation from Camrose to Calgary, her health concerns, and the disproportionate share of witnesses based in and around Calgary.

The Court focused its analysis on the first branch of Rule 3.5, being whether it was unreasonable for the Action to be carried on in Edmonton. The Court then considered Rule 3.3 in the context of determining the issue of who bore the onus in a change-of-venue Application.

The Court noted that Rule 3.3 provides that the appropriate judicial centre is either: (a) the closest judicial centre, by road, to the Alberta residence or place of business of all the parties, or (b) if a single judicial centre cannot be determined, the closest judicial center to the party commencing the Action. Citing *Odland v Odland,* 2017 ABCA 397, the Court stated that if the Plaintiff's selection of judicial centre is in compliance with Rule 3.3, then the onus of proving the Plaintiff's choice was unreasonable is on the Defendant; however, if the Plaintiff's selection does not comply with Rule 3.3, then the onus shifts to the Plaintiff. The Court determined that the onus was on the Applicant to prove that Edmonton was an unreasonable venue for the remainder of the Action, since the Applicant did not challenge the cross-Defendant's selection of Edmonton in the first place and filed her crossclaim in Edmonton.

Next, the Court referred to leading authority which provided factors for gauging venue reasonableness, including: (a) the number of parties or witnesses in the current and proposed judicial centres; (b) the nature of the issues in the lawsuit; (c) the relationship between the parties in respect of the issues in the lawsuit; (d) the parties' financial resources; (e) the stage of proceedings; (f) the convenience of location for pre-Trial motions; and (g) the location of relevant assets.The Court applied the factors to the facts and dismissed the Application, concluding that the balance of convenience favoured the Action continuing in Edmonton. The Court decided the Application based on the following factors: (a) central-events location closer to Edmonton than Calgary; (b) the Applicant had concurred with Edmonton as the place of Trial; (c) the Applicant's move to Calgary was not a reason for a venue change on its own; (d) the location of witnesses; (e) the Applicant's financial means and health considerations; (f) the location of counsel; (g) Trial-time availability; (g) remote-appearance aspect; and (h) the Applicant's self-representing status.

PREVATT V PREVATT, 2024 ABKB 31

(REED J)

Rules 3.12 (Application of Statement of Claim Rules to Originating Applications) and 13.6 (Pleadings: General Requirements)

This was an estate matter involving various Applications. One of the Applications was pursuant to section 10 of the *Powers of Attorney Act,* RSA 2000, c P-20 (the "*PAA*"), commenced by way of Originating Application, seeking that the Respondent be directed to pass accounts pursuant to the *PAA.*

In her written argument in response to the Applicant's Originating Application, the Respondent raised the issue of limitations for the first time and contended that the relief sought by the Applicant was barred by the *Limitations Act*, RSA 2000, c L-12 (the "*LA*"). The Applicant argued that the Respondent cannot rely on the *LA* as a defence since she did not expressly plead it and only raised it in her written argument long after the parties had already spent two years litigating the issues.

The Court observed that according to section 3(1) of the *LA*, a party can only avail themselves of a limitations defence if they expressly plead the *LA*. The Court referred to the Rules, specifically Rule 13.6(3), which mandates that a party relying on a limitations defence must specifically plead it. The reason for this requirement, as stated in the Rule, is to prevent surprises. The Court stated that pleading the *LA* is a requirement under both the *LA* and the Rules.

Justice Reed further analyzed that since the Applicant initiated the Application through an Originating Application, the Respondent, in the absence of a consent Order or Court Order to the contrary, had no right under the Rules to file a response pleading. The Applicant relied on the decision of Master Hanebury in *Geophysical Service Incorporated v Devon ARL Corporation,* 2015 ABQB 137, which supports the argument that the statutory requirement also applies to Actions commenced by way of Originating Application.

Justice Reed's analysis emphasized the importance of notifying the Applicant in writing if a limitations defence is to be relied upon when an Originating Application is the commencement document, and where the Respondent doesn't necessarily have an opportunity to file a response Pleading, as they would if the Action had been started by Statement of Claim. Justice Reed noted that the Respondent must seek relief under Rule 3.12 to allow the filing of a defence to the Originating Application, at the very least. Failing to do so would undermine the purpose of that section of the *LA* and result in significant procedural unfairness towards the Applicant. The Court held that it was the Respondent's responsibility to inform the Applicant of their intention to rely on a limitations defence under the *LA*. Additionally, the Respondent could have sought leave from the Court to treat the Originating Application as a Statement of Claim, but they neglected to do so. Justice Reed emphasized that pleading the *LA* when relying on it is crucial to prevent surprise and prejudice to the claiming party.

The Court dismissed the Respondent's attempt to rely upon the *LA*, noting that the Respondent failed to comply with the Rules and with the *LA.*

ALBERTA (ADMINISTRATOR OF ADMINISTRATIVE PENALTIES) V ALBERTA (LAND AND PROPERTY RIGHTS TRIBUNAL), 2024 ABKB 43

(ARCAND-KOOTENAY J)

Rules 3.15 (Originating Application for Judicial Review) 3.18 (Notice to Obtain Record of Proceedings), 3.19 (Sending In Certified Record of Proceeding) and 3.22 (Evidence on Judicial Review)

This was a Judicial Review wherein the Administrator of Administrative Penalties (the "Administrator") sought to overturn the Land and Property Rights Tribunal's ("LPRT") decision that significantly reduced a penalty for the Respondents from $12,000 to $1,000. The Review was initiated due to concerns about whether the LPRT's decision conformed to the standards of reasonableness as established by the Supreme Court of Canada in the pivotal decision of *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

The Court first looked to the Rules to ensure the necessary procedural steps for Judicial Review had been taken. The Court noted that Rules 3.15 to 3.19 provide the jurisdictional basis for Originating Applications for Judicial Review. The LPRT rendered its decision on July 26, 2022, leading the Applicant to file an Originating Notice on September 12, 2022, and subsequently serve it upon the Respondent. This Action fulfilled the requirements set out in Rule 3.15.

Additionally, the Certified Record of Proceedings was filed on October 31, 2022, with a Supplemental Certified Record of Proceedings following on February 11, 2023, in accordance with Rules 3.18 and 3.19, thereby incorporating these documents into the Court Record. The analysis concluded that all procedural mandates of the Rules concerning the initiation and processing of the Judicial Review had been satisfactorily met.

The Court found that the Administrator had provided sufficient reasons and rationale for imposing a $12,000 penalty during the Appeal to the LPRT, which the LPRT did not adequately engage with. The LPRT's decision to reduce the penalty was within its jurisdiction, but the Court deemed the reasons for the reduction unsupported by the evidence presented.

The Court also noted that new evidence introduced by the Respondents was inadmissible, as it had not been presented before the LPRT, and the Respondents did not make an Application to allow new evidence, pursuant to Rule 3.22.

Conclusively, the Court determined the LPRT's decision to reduce the penalty lacked logical reasoning, failing to meet standards of justification, transparency, and intelligibility, and thus was not justified given the factual and legal constraints. Consequently, the Court quashed the LPRT's decision, finding it unreasonable, and reinstated the Administrator's original penalty decision.

KOESTER V WHEATLAND COUNTY, 2024 ABKB 103

(REED J)

Rules 3.15 (Originating Application For Judicial Review), 3.18 (Notice To Obtain Record Of Proceedings), 3.19 (Sending In Certified Record Of Proceedings), 3.22 (Evidence On Judicial Review), 6.28 (Application To Seal Or Unseal Court Files) and 6.34 (Application To Seal Or Unseal Court Files)

This was an Application for Judicial Review of certain resolutions passed by Wheatland County ("Wheatland") sanctioning Councillor Glenn Koester ("Councillor Koester") for violations of Wheatland's Code of Conduct Bylaw, being Wheatland County Bylaw No. 2022-5 in force at the relevant times (the "Code").

In accordance with Rule 3.19, Wheatland requested a restricted Court access Order for the record of proceedings filed in the Judicial Review, pursuant to Part 6, Division 4 of the Rules. The Court granted this request on June 23, 2023, with the consent of both parties (the "Sealing Order").

This Application dealt, in part, with the maintenance of the Sealing Order. The Court noted that the only evidentiary record sealed by the Sealing Order was the relevant investigation report, which related to the complaints filed against Councillor Koester, which was submitted to Wheatland. The Court examined Rule 6.34, which provides that an Application to seal a Court file must be filed, and Rules 6.34-6.36, which require evidence that the Application is served upon persons with any relevant standing, and that there has been no publication pending the Application. The Court concluded that the parties had not fulfilled the requirements outlined in these Rules, as there was no filed Application, nor was there any evidence that Rules 6.34-6.36 had been complied with. As a result, the Court could not make a determination regarding the maintenance of the Sealing Order until the Rules had been complied with.

Councillor Koester sought to have the investigation report made public and his motion was voted down and defeated by Council in Resolution CM-2022-04-54 (the "IR Disclosure Resolution"). Wheatland argued that the Originating Application did not challenge the IR Disclosure Resolution. It further argued that Councillor Koester was barred by Rule 3.15(2) from challenging the IR Disclosure Resolution, suggesting such a challenge would be an impermissible collateral attack since the relief sought is not included in the Originating Application.

The Court considered Rule 3.18(2), which provides that Wheatland is to include further disclosure if it exists such as: (a) the written record, if any, of the decision or act that is the subject of the originating Application for Judicial Review; (b) the reasons given for the decision or act, if any; (c) the document which started the proceeding; (d) the evidence and exhibits filed with the person or body, if any; and (e) anything else relevant to the decision or act in the possession of the person or body.

The Court examined Rule 3.18(2) and acknowledged that previous case law had determined that an Applicant is entitled to disclosure as a fundamental aspect of procedural fairness. The concept of procedural fairness is subjective and dependent on the specific circumstances. The Court highlighted Rule 3.15 which states that an Originating Application must be filed seeking the appropriate relief and, in this case, Rule 3.15 has not been adhered to. The Originating Application did not request the relief in question, and there was no proper Judicial Review of the IR Disclosure Resolution. No such claim was pleaded or argued, and neither *certiorari* nor *mandamus* was sought. Consequently, the Court held that the request for "An order requiring

Council to publicly disclose the Investigation Report" could not be granted.

Counsellor Koester's Application further invoked Rule 3.22, which allows the Court to consider certain evidence on Judicial Review, requesting an Order for certiorari regarding the resolutions. The Court emphasized that the standard practice is to conduct Judicial Review based on the record of proceedings submitted by the public body (in this case, Wheatland), with the use of Affidavits being considered exceptional. However, the Court recognized that there are specific exceptions to this standard procedure. Both parties acknowledged that Rule 3.22 governs the admissibility of the Affidavit evidence presented by Counsellor Koester. The Court also recognized that there are limited situations where additional evidence may be taken into account.

The Court then evaluated various Affidavits to determine their overall admissibility. Ultimately, the Court decided that the parties could submit appropriate Applications to request the lifting of the Sealing Order in accordance with the Rules. Until then, the details of this Application would remain confidential.

2145448 ALBERTA LTD V BEVERAGE CONTAINER MANAGEMENT BOARD, 2024 ABKB 113

(FRIESEN J)

Rule 3.23 (Stay of Decision Under Review)

The Applicants sought Judicial Review of decisions of the Respondent. The Respondent investigated and found evidence suggesting the Applicant's facility contravened certain Regulations. That determination was sent to a hearing of an administrative panel, and was found to be accurate. The Applicants sought Judicial Review of the hearing decision, along with a Stay of the decision under review, pursuant to Rule 3.23.

The Court noted that the test under Rule 3.23 is the same as a test for an interlocutory Injunction arising out of *RJR-MacDonald Inc v Canada (Attorney General),* [1994] 1 SCR 311. The Respondent argued that the Stay Application was, in fact, seeking a mandatory Injunction, as the decision cancelled the Applicants' permit, which would then have to be reinstated. Therefore, the more stringent test set out in *R v Canadian Broadcasting Corp*, 2018 SCC 5, should apply. However, Justice Friesen highlighted that the fundamental question before the Court is always fairness. That is, whether the relief sought would be just and equitable in all the circumstances. The Court found that no unfairness would result from applying the higher test. The Applicants were therefore required to prove a strong *prima facie* case that their Judicial Review was likely to succeed. They failed to do so and, therefore, the Court denied the Stay Application.

GREEN THEME DESIGN LTD V 0974016 BC LTD, 2024 ABKB 7

(REED J)

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

This Action contained three Applications: (1) an Application by the Plaintiff to commence three derivative Actions; (2) an Application by the Defendants to strike the Plaintiff's claim pursuant to Rule 3.68, and; (3) an Application by the Plaintiffs by Counterclaim seeking the removal of a *lis pendens* certificate from the title of their land and the release of $350,000 held in trust related to a specific portion of that land. The Plaintiff's Application to commence three derivative Actions had been resolved by Consent Order and was not considered by the Court in this Judgment.

In addressing the Application to strike the Statement of Claim pursuant to Rule 3.68, the Court embarked on a detailed examination of the Plaintiff's Statement of Claim. The Court considered whether the Pleadings, as presented by the Plaintiff, were indeed frivolous or lacked a reasonable cause of action. Noting that the Statement of Claim was not perfect, the Court concluded that the necessary legal thresholds that would warrant striking an Action had not been met. However, the Court stated that the Defendants could leverage other avenues to strike the Statement of Claim, such as Summary Dismissal.

Turning to the Application brought by the Plaintiffs by Counterclaim, the Court evaluated the evidence to determine whether maintaining the certificate of *lis pendens* was justified or if it unduly burdened the Applicant's property rights. Ultimately, the Court found that the Plaintiffs by Counterclaim were, in essence, seeking Summary Judgment, engaging Rule 7.3. Referring to the Decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49, the Court concluded that based on the evidence before the Court, no triable issues had been raised. In addition, the Court noted that the *lis pendens* engaged the *Land Titles Act,* RSA 2000, c L-4 ("LTA"). Following its review of the LTA, the Court held that the *lis pendens* contravened s. 149 of the LTA.

In conclusion, the Court rejected the Defendants' Application to strike the Statement of Claim. It recognized the validity of the Applicant's request to remove the *lis pendens*, thereby ordering its removal and ruled that the $350,000 held in trust should be immediately released to the Plaintiffs by Counterclaim.

COALITION FOR JUSTICE AND HUMAN RIGHTS LTD V EDMONTON (CITY), 2024 ABKB 26

(MARTIN J)

Rule 3.68 (Court Options To Deal With Significant Deficiencies)

The Court began by noting that issues of accessible housing and ensuring unhoused persons have a place to live are "national issues that impact all Canadians". To address those issues, both government and community must work together. While there is no solution to the current crisis, it is "only through consultation, cooperation, and compassion" that a way forward will be found.

The Coalition for Justice and Human Rights Ltd. (the "Coalition") filed a Statement of Claim challenging the City of Edmonton (the "City")'s response to encampments on public land. Among others, the Coalition sought public standing in the Action, and declarations for various Charter violations by the City's policies, practices, and bylaws with respect to preventing unhoused persons from staying in encampments.

The City applied for an Order striking the Action for lack of public standing by the Coalition. Further, the City argued that section 24(1) Charter remedies were unavailable to parties claiming public interest standing, and the City sought to strike the claim on the basis that there was an insufficient record to find Charter breaches.

The Court denied the Coalition public interest standing and struck the Action.

Importantly, the City took the position that the evidence derived from the Questioning on Affidavit of the Coalition's president established that the Coalition did not have direct involvement with the issue at stake, did not work with unhoused Edmontonians, had minimal, if any community recognition, did not conduct public outreach, and had no experience in the matter at stake.

Justice Martin explained that Applications to strike pleadings for lack of standing are advanced under Rule 3.68(1) and Rule 3.68(2)(d). Generally, if an applicant establishes that a commencement document is an abuse of process under Rule 3.68(2)(d), the Court may strike it under Rule 3.68(1)(a). On such Applications, "evidence may be considered, facts as pleaded are not presumed to be true, and the issue of standing does not attract the 'plain and obvious' standard".

To grant public interest standing, the Court must generously and liberally weigh the following three cumulative factors. First, whether the case raises a serious justiciable issue. Second, whether the party that started the Action has a real stake or genuine interest in its outcome. Third, whether the proposed Action is a reasonable and effective means of bringing the Action to Court.

The Court did not hesitate in finding that the existence of encampments populated by unhoused persons and the availability of housing for unhoused persons created a serious justiciable issue. This factor weighed in favour of granting the Coalition public interest standing.

However, the Court found that the Coalition was a young organization without a reputation for advocating for unhoused persons. This Action was the first housing-related litigation undertaken by the Coalition. The Court reviewed in detail the founding objectives of the Coalition and its initiatives. It held that even

though "one of the Coalition's objectives is to demand accountability from all levels of government in the context of human rights, upon review of the evidence before this Court, the Coalition does not in fact bear any of the hallmarks of a party with a real stake or genuine interest in the outcome". This factor weighed against granting public interest standing.

Turning its mind to final factor, the Court found that it did not weigh in favour of granting the Coalition standing. The evidence before the Court was insufficient to establish that the Coalition could present a well-developed factual setting that allowed for the appropriate adjudication of the Action.

After weighing all three factors, the Court denied the Coalitions' request for public interest standing and granted the City's Application to strike the Action.

JL ENERGY TRANSPORTATION INC V ALLIANCE PIPELINE LIMITED PARTNERSHIP, 2024 ABKB 72

(HORNER J)

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

The Defendants applied to summarily dismiss, under Rule 7.3, portions of the Statement of Claim which were time-barred pursuant to the *Limitations Act,* RSA 2000, c L-12 (the "*Limitations Act*"). The Defendants also applied to strike, under Rule 3.68, portions of the Statement of Claim for lack of jurisdiction.

Horner J. commented that *Hryniak v Mauldin,* 2014 SCC 7 sets out the analytical framework for determining whether there is "no merit" or "no defence" to a claim pursuant to Rule 7.3. The Applicant for Summary Dismissal must show that there is no genuine issue requiring a Trial, such that the Court is able to reach a fair and just determination on the merits. This condition is satisfied where the process (1) allows the Judge to make the necessary findings of fact, (2) allows the Judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Citing *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49, Horner J. further commented that cases based on the expiration of the limitation period often satisfy the first two parts of the test. The third criterion acts as a final check to ensure that a Summary Judgment would not cause any procedural or substantive injustice to either party.

Having found that the quality of the evidence was such that it was fair to conclusively adjudicate this Action and that Summary Dismissal could fairly resolve the dispute, Horner J. held that the limitation issue could addressed summarily. Horner J. granted the Defendants' Application for Summary Dismissal.

With respect to the Defendants' Application to strike the claims to the extent that they included claims for infringement of patents which occurred in the US, and which were committed by companies registered in the US, Horner J., citing *TR Technologies Inc v Verizon Communications Inc,* 2011 ABQB 390, commented that Alberta Courts do not have subject matter jurisdiction of US patent matters and held that if the Action had survived Summary Dismissal, the Plaintiff's claims of patent infringement related to US patents should be struck under Rule 3.68(2)(a).

ORICA CANADA INC V ARVOS GMBH, 2024 ABKB 97

(REED J)

Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 13.6 (Pleadings: General Requirements)

In this Application, the Third Party Defendants, ("Arsopi"), sought a Stay or, in the alternative, a dismissal of the Third Party Claim filed against them by ARVOS, under the *International Commercial Arbitration Act,* RSA 2000, c I-5. ARVOS, primarily operating in Germany, had initiated claims against Arsopi, a Portuguese entity, stemming from a contract governed by German law, which included an arbitration clause. Arsopi contended that the claims fell within the scope of this arbitration agreement, necessitating a referral to arbitration and a Stay of the Third Party Claim. While not plead in its Application, Arsopi urged the Court to strike the Third Party Claim in whole or in part.

The Court considered the evidence presented, including expert testimony on German law regarding the arbitration clause, and found the clause to be valid, broad, and encompassing of the disputes in question. Despite this, the Court identified one claim ("TFA Claim") arising purely under Canadian law and not subject to the arbitration agreement, thus remaining within the Court's jurisdiction.

The Court also examined the applicability of German limitations law, acknowledging that the claims, if arbitrated in Germany, would likely be barred by limitations periods. However, the Court found that this factor did not invalidate the arbitration agreement itself, which remained operative and enforceable.

Arsopi's late-stage request to strike the claims, rather than stay them due to alleged limitations issues, was denied due to procedural fairness and lack of proper notice to ARVOS. Specifically, Arsopi did not appropriately signal this intent in its Application, failing to invoke Rule 3.68, which pertains to striking out a claim for not disclosing a reasonable cause of action or for being otherwise abusive of the Court process.

Furthermore, Arsopi did not adequately plead the *Limitations Act*, RSA 2000, c T-5 ("*Limitations Act*") or address limitations law. The Court noted that the procedural oversight was significant as Rule 13.6(3) and the *Limitations Act* require explicit pleading of a limitations defence, ensuring parties are not taken by surprise.

Consequently, the Court directed the parties to arbitration for the respective claims pursuant to the arbitration clause, while the TFA Claim was left to be resolved in Court.

RK V GSG, 2024 ABKB 121

(MAH J)

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

Multiple parties brought Applications to strike Pleadings for deficiencies, pursuant to Rule 3.68. One such Pleading was a Statement of Claim, in which the Plaintiff failed to connect the facts pleaded with the causes of action alleged. While both were provided, the Plaintiff failed to explain how the facts supported each alleged cause of action.

Justice Mah provided an overview of the jurisprudence on striking a Pleading under Rule 3.68. Having regard to the case law, Mah J. concluded that if there are sufficient facts pleaded to support a cause of action, it should not be struck. Where some facts are missing, the Court could order particulars or amendments. Where there are no facts pled at all which support a legal element of a cause of action, it may be properly struck out.

The Defendant argued that the claim was also barred by operation of the *Limitations Act,* RSA 2000, c L-12. The Plaintiff argued that a limitations defence is properly the subject of an Application for Summary Dismissal, pursuant to Rule 7.3, rather than an Application to strike, pursuant to Rule 3.68. Justice Mah rejected that argument, stating that if there are no discoverability concerns on the facts pled, the expiry of the limitation period may be patent on the fact of the Pleadings and may be susceptible to an Application to strike. However, in this case, the allegations were not time-barred on their face, and therefore would be properly the subject of a Summary Dismissal Application.

The Plaintiff further argued that the Application to strike was barred because the Defendants had each filed a Statement of Defence. The Court rejected this argument, noting that each Defendant alleged in their Statement of Defence that the Statement of Claim disclosed no valid cause of action.

In reviewing the Statement of Claim, Justice Mah found that claims which had no basis in law could not be fixed through amendment and were therefore struck. Similarly, claims for which an element could not be proven through amendments to provide further detail were struck. Finally, for claims where an absolute defence existed, the claim was struck.

SR V EDMONTON (POLICE SERVICE), 2024 ABKB 126

(WHITLING J)

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

The legal proceedings focused on two main Applications: the Plaintiff sought to strike the portion of the Defendants' Statement of Defence, pursuant to Rule 3.68, which asserted that the Plaintiff's lawsuit was barred by the *Limitations Act,* RSA 2000, c L-12 (the "*Limitations Act*"). The Defendants cross-applied for an order striking the Plaintiff's entire Statement of Claim on the basis that it was entirely out of time pursuant to the *Limitations Act*. The Court was tasked with determining whether the Plaintiff's Statement of Claim was filed in a timely

manner, a decision that hinged on interpreting when the limitation period for a claim of negligent investigation actually begins.

The Court concluded that the issue of the limitation period was dependent on the specifics of the case and could not be resolved through mere procedural motions to strike pursuant to Rule 3.68. The Court emphasized that such matters require a thorough examination of the facts, and cited case law which states that for a limitation defence, Rule 7.3 is applicable, and not Rule 3.68.

In examining the Defendants' Application to strike the Plaintiff's entire Statement of Claim, the Court found that the arguments submitted by the Defendants had already been considered by the Court and rejected in a previous Decision. The Court determined their re-argument in the context of the present Application was unnecessary, and therefore, would not be considered.

As a result, both the Plaintiff's and Defendants' Applications were dismissed.

WILYMAN V COLE, 2024 ABCA 41

(PENTELECHUK, HO AND WOOLLEY JJA)

Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant commenced a medical malpractice action against the Respondents for harm suffered following a medical procedure performed by the Respondent (the "2003 Action"). The 2003 Action was struck out. In May 2022, the Appellant sought to revisit the 2003 Action, first seeking permission to file a late Appeal. When that Application was denied, he commenced a new Action against the Respondents (the "2022 Action").

Counsel for the Respondents asked the Court of King's Bench to strike the Appellant's 2022 Action through the process set out in Civil Practice Note 7, the "Vexatious Application/ Proceeding Show Cause Procedure" ("CPN7"). They asked that CPN7 be used on the basis that the 2022 Action sought "to re-litigate a decided issue or issues, is a collateral attack, and/or is a duplicate proceeding". It was determined that the 2022 Action was a suitable candidate for the CPN7 procedure. The Chambers Justice reviewed the purpose of the CPN7 procedure, noting that it is not for close calls; it is only for matters where the deficiencies in Pleadings are apparent on their face. The CPN7 process considers only "restricted forms of evidence", including "documents and records that are evidence that the Apparently Vexatious Application or Proceeding is an attempt to litigate an issue that has already been decided".

The Chambers Justice concluded that the Appellant's 2022 Action appeared on its face to be a collateral attack on the decision to strike the 2003 Action. The Chambers Justice concluded that it was not appropriate to consider additional evidence, in part because Rule 3.68(3) prohibits evidence in relation to whether a filing "... discloses no reasonable claim or defence to a claim ...". Thus, the Appellant appealed the striking of his Claim, and asked the Alberta Court of Appeal to consider new evidence.

The Court of Appeal went on to state that CPN7 does not change the substantive law established by Rule 3.68 and cases that applied the Rule. Rather, it changes the procedural entitlements of the party who's claim is impugned. Ordinarily, a party seeking to strike

a claim must file an Application and supporting Affidavit and serve it on the opposing party. The matter is usually decided following an oral hearing in civil Chambers, although the Court has the jurisdiction to resolve a matter in writing. Conversely, under CPN7, a party seeking to strike a claim may write to the Court asking that the CPN7 process be invoked. If the Court is satisfied that the matter is suitable for resolution through CPN7, it notifies the party with the impugned claim that the Court is considering making an Order staying or dismissing their claim. That party has 14 days to file a response, to which the party who requested the CPN7 may respond. The Court then makes its determination based on written materials. Under this process little or no evidence is provided, no oral hearing is conducted and importantly, the burden of proof shifts from the party seeking to strike the claim, to the party who's claim is in jeopardy of being struck.

After reviewing the relevant jurisprudence on the matter, the Court agreed that CPN7 should only be used where the defect on the Pleading is evident on its face and there is a reason to prefer CPN7 to the ordinary Court procedure under Rule 3.68. That includes cases where a litigant is at risk of using other procedures to abuse the Court's process, or where the party's Pleading is so clearly hopeless that the ordinary procedures would be an utter waste of time, money and resources. Ultimately, a Judge must decide whether the circumstances justify placing the burden of proof on the party who's pleading is impugned and denying that party an oral hearing.

When the Court applied this to the facts before them, the Court concluded that the Chambers Justice did not implement this approach and did not reflect on whether the CPN7 process was preferable to the ordinary process for considering an Application to strike.

That said, the Court was nonetheless satisfied that they could not intervene as the Appeal raised questions of mixed fact and law reviewed for palpable and overriding error, which is a very high standard. In so holding, however, the Court emphasized that CPN7 ought to be reserved for exceptional cases, particularly where the effect of the Decision is to terminate a party's claim before the Court, and that CPN7 should not supplant the ordinary Rule 3.68 procedure.

WANG V ALBERTA HEALTH SERVICES, 2024 ABCA 58

(FEEHAN, KIRKER AND GROSSE JJA)

Rules 4.10 (Assistance by the Court), 9.4 (Signing Judgments and Orders) and 10.44 (Appeal to Judge)

The Parties were engaged in longstanding litigation. In that context, the Respondent was awarded full indemnity Costs against the Appellants, which Costs were fixed by an Assessment Officer. Pursuant to Rule 10.44, the Appellants appealed the Assessment Officer's Decision (the "Assessment Appeal").

That Assessment Appeal did not proceed for a period of time, after which the Respondent filed a Writ of Enforcement and garnished funds from the Appellants' bank account. The Appellants objected to the proposed distribution of the garnished funds and brought an Application seeking, amongst other relief, a Special Chambers hearing date for the Assessment Appeal. The Chambers Judge decided that the Appellants required leave from the Court of King's Bench to extend the time for the Assessment Appeal. The Appellants then sought

permission from the Court of Appeal to appeal that Decision. Leave was granted with respect to one ground of Appeal: whether it was an error to require the Appellants to seek leave to extent the time for the Costs Appeal.

In its analysis, the Court held that the Assessment Appeal was outstanding; there was no need to restore it as the Chambers Judge had held, and there was no indication that the Appellants had filed the Assessment Appeal out of time such that an extension to that deadline was required. While the Chambers Judge was critical of the Appellants' delay, it was an error to require the Appellants to seek any form of permission with respect to the Assessment Appeal, which remained extant.

In the result, the Court allowed this Appeal and directed the Appellants to seek a Case Conference in respect of the Assessment Appeal pursuant to Rule 4.10. The Court took carriage of preparing the Judgment at hand and invoked Rule 9.4(2)(c) to dispense with the need for the parties' approval thereof.

ESFAHANI V SAMIMI, 2024 ABCA 16

(STREKAF JA)

Rules 4.13 (Appointment of Case Management Judge), 4.14 (Authority of Case Management Judge), 14.5 (Appeals Only with Permission) and 14.40 (Applications to Single Appeal Judges)

This was an Application for permission to Appeal pursuant to Rule 14.5(1)(b), where the Applicant challenged a Case Management Justice's Decision to allow a family law Application to proceed in morning chambers.

The Court reviewed the test for permission to Appeal, as applied in *Pander v Chopra,* 2023 ABCA 249. The Court emphasized the broad discretion granted to Case Management Justices under Rules 4.13 and 4.14(c) to manage Actions for fair and efficient conduct and resolution. The Court held that the Applicant failed to establish a serious legal question or a reasonable chance of success. Furthermore, the matter was moot as the original Application was already heard, and the Applicant's late submission of additional materials did not comply with Rule 14.40(2).

For the reasons outlined above, the Court held the Applicant failed to meet the legal test, and the Application for permission to Appeal was denied.

LC V ALBERTA, 2024 ABKB 151

(GRAESSER J)

Rule 4.16 (Dispute Resolution Processes)

At a Case Management Conference, the Court asked the Plaintiffs in a long-running Class Action to explain their objections to going to a Judicial Dispute Resolution ("JDR"). The Plaintiffs provided an Affidavit stating, among other things, that they did not want to go to a JDR before getting proper disclosure as they believed the Defendant had something to hide.

The Court considered whether to direct the parties to participate in an alternate dispute resolution process ("ADR") under Rule 4.16(4) and (5). The Court noted the benefits of ADR such as early settlement, and noted that there is no rule or best practice as to when is the best time for an ADR to occur. The Court also noted that the Rules emphasize party autonomy and party control over their litigation. As such, and given the Plaintiffs' resistance to ADR, the Court declined to Order that a JDR take place.

ZACHRY ENERGY INTERNATIONAL INC V SINOPEC SHANGHAI ENGINEERING CO LTD, 2024 ABCA 24

(ANTONIO, HO AND DE WIT JJA)

Rule 4.31 (Application to Deal with Delay)

The Appellant appealed a Decision of a Case Management Justice (the "CMJ") dismissing its Counterclaim against the Respondent for inordinate delay under Rule 4.31. The Appeal was unsuccessful.

Writing for the Court, Antonio J.A. explained that CMJs have detailed knowledge of the progress of an Action and can best assess the reasons for and effect of delay. Dismissing Actions for delay involves an element of discretion and such decisions are entitled to deference on appeal unless the discretion is based on an error in principle or is clearly unreasonable. Whether the prosecution of an Action was delayed, whether the delay was "inordinate and inexcusable", and whether the delay caused "significant prejudice", are largely questions of fact. Therefore, a Decision to dismiss an Action for delay will by disturbed on Appeal only if it discloses a palpable and overriding error.

If there is delay in an Action and the delay caused significant prejudice to a party, Rule 4.31(1)(a) allows for the dismissal of the Action. Rule 4.31(2) presumes significant prejudice if the delay is found to be inordinate and inexcusable. Lastly, in determining whether to dismiss the Action or to find delay that is inordinate and inexcusable, Rule 4.31(3) requires the Court to ask whether the party applying to dismiss the Action has participated in or contributed to the delay.

The CMJ found inordinate and inexcusable delay in the prosecution of the Counterclaim and thus prejudice was presumed. However,

the CMJ also found prejudice in fact. Appeal Justice Antionio noted that Rule 4.31 permits dismissal where the Applicant proves actual prejudice, "whether or not the presumption has also been proved".

The Appellant argued that the CMJ failed to properly consider the facts and evidence. The Court noted that while the CMJ addressed these matters in a generalized way, he did not commit palpable or overriding errors in his findings or the characterization of facts. The CMJ's reasons were reasonably intelligible even if he did not recite every fact and nuance of argument in his conclusions, as he was not required to do so.

Lastly, the Appellant suggested that the CMJ erred in finding prejudice to the Respondent from the "potentially failing memories" of witnesses absent cogent evidence. The CMJ relied on *Song v Alberta*, 2020 ABKB 583 for the proposition that "'there is no requirement that a defendant provide proof of failing memories' which the 'law recognizes ... weaken over time'". Further, he found evidence that the certain witnesses' memories were indeed failing. The Court of Appeal found that the CMJ cited the correct law and properly applied it to the facts before him. The Appeal was dismissed.

ABOU SHAABAN V BALJAK, 2024 ABKB 28

(MARION J)

Rules 4.33 (Dismissal for Long Delay), 5.2 (When Something is Relevant and Material) and 5.33 (Confidentiality and Use of Information)

The Appellants appealed an Applications Judge's Decision to dismiss their Action for long delay pursuant to Rule 4.33.

Rule 4.33 requires the Court to dismiss an Action if three or more years have passed without a significant advance in the Action. The Court noted that a significant advance is one that moves the Action forward in a meaningful way and that whether a step significantly advances the Action is determined by a context-sensitive, substance-over-form approach.

The Court agreed with the Applications Judge that each step taken after some of the Defendants served their Affidavit of Records did not constitute a significant advance in the Action. One of the steps that the Court considered was the filing of an Affidavit sworn by a non-party witness (the "Niehaus Affidavit"). However, the Court determined that the Niehaus Affidavit did not contain relevant and material information as contemplated by Rule 5.2.

The Appellants also argued that their efforts in a separate Originating Application seeking production of records (the "Records Application") significantly advanced the Action. The Respondents argued that any records produced in the Records Application would be bound by the implied undertaking set out in Rule 5.33 not to use them for collateral purposes. However, the Court determined that, even if the Appellants could use those records, the Records Application was separate from the Action, was unknown the Respondents, and did not result in the disclosure of relevant and material information.

The Court dismissed the Appeal.

WESTERN INDUSTRIAL SERVICES LTD V BRENNAN, 2024 ABKB 50

(LEMA J)

Rule 4.33 (Dismissal for Long Delay)

In this matter, the Court aimed to answer two questions: whether the joint filing of a request to schedule a Trial date could be considered a "significant advance" under Rule 4.33, and secondly, whether a Defendant's unsuccessful efforts to rouse a dormant Plaintiff constituted as "participation" in "proceedings" such that the Defendant should be regarded as having waived the accumulated delay. Ultimately, the Court concluded the answer to each question was no, dismissing the Plaintiff's Action under Rule 4.33(2).

In arriving at this conclusion, the Court undertook a comprehensive review of the legal principles discerned from previous decisions involving Rule 4.33. At the Application for dismissal, the Defendant who was seeking dismissal argued that the last significant advance was the joint filing of the request for Trial ("Form 37") on October 28, 2019. Justice Lema concluded that merely filing Form 37 is not a significant advance, especially where the Form is submitted prematurely. In the present case, the Court rejected the Form 37 as a significant advance, noting the parties had not pursued Dispute Resolution or obtained a Dispensation Order (both aspects per Rule 8.4(3)(a)), and no Trial date was set.

In the alternative, the Plaintiff proposed that the "last significant advance" was the Defendant's unsuccessful requests for Case Management and later a Case Conference (January 20 and February 3, 2022, respectively). Per the Plaintiff, these steps significantly advanced the Action in the sense that options for progress were explored and narrowed. However, the Court disagreed, stating that the rejection of the Defendant's requests was no guarantee that requests by the Plaintiff would also be denied. The Plaintiff may have raised or emphasized different or additional factors or considerations or otherwise convinced the Court that Case Management or a Case Conference would or could be useful. Further, requests by the Plaintiff at a different time may have been treated differently.

The Court went on to emphasize that a significant advance pursuant to Rule 4.33 requires, at a minimum, *an advance*. The Court did not accept that a request, which was subsequently denied, represented any real advance, as the Action remained where it was before the requests, and did not move any closer to Trial. Though the Court did mention that Case Management Meetings and Case Conferences can represent or be the framework for significant advances, the requests for Case Management and a Case Conference in this case, being both unilateral (Defendant only) and, in any case, unsuccessful, did not represent significant (or any) advances.

The Court then turned its attention to the possible exception in Rule 4.33(2)(b), and whether there was sufficient participation by the Defendant to qualify as a waiver of the Defendant's delay-associated rights. The exception in Rule 4.33(2)(b) operates "where Defendants have actively participated in an action to an extent and degree that could lead a Plaintiff to fairly assume that the Defendant has waived the delay." In this case, no Application was filed at the material time of the litigation the Court was examining. Therefore, and on a threshold point, any "participation" by the Defendant in this Action had to fit within the verbiage of "a proceeding being taken" found in Rule 4.33(2)(b). Thus, the Court asked whether the Defendant's exploratory steps towards a Judicial Dispute

Resolution ("JDR"), Case Management, or a Case Conference, or any of them, amounted to "proceedings".

The Court concluded that even using the broadest understanding of "proceedings", the letters from the Defendant proposing a JDR were not "proceedings." At most, they were preliminary steps *towards a proceeding*, which a JDR itself would represent. The same logic was applied to the Defendant's letters to the Court requesting Case Management and, later, a Case Conference. Such letters were preliminary steps, which can themselves also be fairly characterized as "proceedings" since, like a JDR, they are also a component or element of an Action. However, both requests were denied, therefore no such "proceedings" were ever launched.

With none of the letters themselves amounting to "proceedings", and with no JDR, Case Management or Case Conference actually occurring or even agreed to by the Plaintiff, there was no "participation" by the Defendant within the meaning of Rule 4.33(2)(b). Further, the Defendant's "let's get moving" activities not only did not get any results, they also could not be read as unequivocal signs of waiver of or acquiescence to the accumulated delay. As the Plaintiff did not respond to the JDR and as the Case Management and a Case Conference were refused, the Defendant did not have to elect between getting on board (or back on board) the Action train or stepping away. As the Court saw it, the Defendant was free to invoke its dismissal-for-delay rights without having signalled waiver or acquiescence to the Plaintiff, at least in any unequivocal sense.

Therefore, the Court ordered that with no significant advance in the Action, no waiver by the Defendant of the accumulated delay, and no other exception explaining or justifying the delay, the Plaintiff's Action must be struck per Rule 4.33(2).

PILON V LAVOIE, 2024 ABKB 177

(HENDERSON J)

Rule 4.33 (Dismissal for Long Delay)

The Trial in this matter, set for April 2020, was adjourned because of the COVID-19 pandemic. On July 4, 2023, the Plaintiff applied for a 4-month suspension of the Action under Rule 4.33(9). The Defendant cross-applied to dismiss the Action under Rule 4.33(2).

Justice Henderson found that the Plaintiff was not entitled to a suspension of the Action because, when the Plaintiff filed her Application to suspend time, more than 3 years had already passed without any significant advance in the Action. The Action was therefore dismissed for long delay pursuant to Rule 4.33(2).

Rule 4.33(2), often referred to as the "Drop Dead Rule", provides that if 3 or more years have passed without a significant advance in an Action, the Court must dismiss the Action. The Rule is mandatory and leaves no room for discretion. However, there are two exceptions to the Drop Dead Rule. First, if the Action has been adjourned by Order under Rule 4.33(2)(a). Second, if, after the 3-year period lapsed, the Defendant participated in further steps that were taken in the Action, and the Court considers the Defendant's participation in these steps a continuation of the Action under Rule 4.33(2)(b).

In analyzing the first exception to Rule 4.33(2), Henderson J. noted that Actions can been

stayed or adjourned by Court Orders. However, the Order adjourning the Trial was not such an Order because it did not prevent the parties from taking further steps in the Action. For example, the Order did not prevent the Plaintiff from answering Undertakings given at Questioning.

The second exception to Rule 4.33(2) was also not engaged. The Plaintiff argued that after she had filed her Application to suspend time, the Defendant appeared in Court to seek an adjournment. The Plaintiff argued that by seeking an adjournment to a date when both parties were available, the Defendant had "participated" in further steps in the Action. Justice Henderson rejected this argument, noting that the Defendant's partition "to seek a date when the parties were both available is not the type of acquiescence that is contemplated by the Rule".

As a collateral argument, the Plaintiff tried to extend the 3-year timeframe under the Drop Dead Rule by pointing to medical incapacity or disability. The Court noted that despite the Plaintiff's chronic pain, she was able to retain and instruct counsel to commence the proceedings in 2019 and to be ready to proceed to Trial in April 2020. While the Court of Appeal has not addressed the question of whether a Plaintiff's incapacity or disability can extend the

3-year time, the Plaintiff in this case has been suffering from serious and long-standing issues. Absent any evidence that the Plaintiff was unable to instruct counsel and participate in the litigation, there was no basis to permit an extension of the time limitation in Rule 4.33(2), even assuming such an extension was permissible in law.

The Court concluded that no steps significantly advanced the Action until 3 years and 75 days later. As the Plaintiff filed her Application after the expiry of the "drop dead" date, the Court was unable to grant the Application as it would have amounted to a retroactive suspension period. Imposing suspension periods retroactively under Rule 4.33(9) is not allowed as it would detract from the mandatory nature of Rule 4.33(2). Accordingly, litigants seeking to invoke a suspension period by an Application for relief under Rule 4.33(9) must do so prior to the expiry of the "drop dead" time period.

SWALEH V LLOYD, 2024 ABCA 9

(KHULLAR, ROWBOTHAM AND FETH JJA)

Rule 4.33 (Dismissal for Long Delay)

The Defendant appealed a Decision by a Chambers Justice dismissing his Appeal of an unsuccessful Rule 4.33 Application. The Court of Appeal found no error in the Chambers Justice's Decision and dismissed the Appeal.

The lawsuit claimed negligence of the Defendant, a lawyer. In reviewing the background of the matter, the Court noted that the Plaintiff had applied to add the Law Society of Alberta and Alberta Lawyers Indemnity Association as parties to the Action. However, the Plaintiff's Application was dismissed by the Applications Judge. Further Appeals by the Plaintiff to the Court of King's Bench and Court of Appeal were also dismissed (the "Appeals").

For the purpose of the Defendant's Appeal, it was noteworthy that both the Applications Judge and the Chambers Justice found that the Plaintiff's Application to add the parties significantly advanced the Action under Rule 4.33.

Rule 4.33 states than Action must be dismissed if three or more years have passed without a significant advance unless, since the delay, the Plaintiff has participated in proceedings that warrant the continuation of the Action.

The Appellant advanced two arguments. First, the Chambers Justice failed to consider the functional approach under Rule 4.33. Second, the Chambers Justice failed to properly apply the functional approach when it determined that the Appeals significantly advanced the Action.

On the first point, the Court found that the Chambers Justice understood the principles applicable to Rule 4.33. The Chambers Justice considered the history of the matter and summarized the parties' submissions before the Applications Judge with respect to the functional approach. Further, the Chambers Justice was alert to the discussion between the Applications Judge and the Respondent regarding the addition of parties to an Action, noting that "knowing who the parties [are] is a significant advance".

On the second point, the Court found that the Defendant had advanced the same argument in the Courts below. There was no error in the Chambers Justice's finding that the Appeals constituted a significant advance in the Action.

The Chambers Justice's Decision was entitled to deference and the Appeal was dismissed.

GEOPHYSICAL SERVICE INCORPORATED V EDISON SPA, 2024 ABKB 27

(HORNER J)

Rules 5.1 (Purpose of this Part (Disclosure of Information)), 5.2 (When Something is Relevant and Material), 5.3 (Modification or Waiver of this Part) and 5.25 (Appropriate Questions and Objections)

The Applicant applied to compel the Respondent to answer certain questions and Undertakings which the Respondent objected to during Questioning (the "Questioning"). The Court reviewed how relevance and materiality are determined and noted that per Rule 5.1(1), the information disclosure Rules are intended to encourage early disclosure of facts and records so that both the parties and the Court have the evidence needed to expeditiously resolve the dispute. Further, the Court set out that litigants are required to answer questions that are both relevant and material, for which no valid objection has been raised per Rule 5.25(1) and (4).

The Court reviewed Rule 5.2 and set out the following with respect to relevance and materiality: (1) relevance is primarily determined by the Pleadings; (2) the Pleadings determine the issues, and relevance must be determined in relation to the issues; (3) Courts must look at the Pleadings when determining whether a particular piece of information is relevant; (4) materiality is determined by whether the information in question can significantly help to prove a fact in issue, either directly or indirectly; there is no fixed standard of what is "material", so an element of judgment is required to determine whether a particular piece of information is material; and (5) the less amenable a fact is to direct proof, the wider the circle of materiality.

The Court additionally noted that the Court of Appeal had found that the three-part analytic scheme proffered by the Respondent as not being helpful. It delineated: primary evidence (facts directly in issue) and secondary evidence (facts from which the existence of primary

evidence may be inferred) as being compelled to be disclosed and tertiary evidence (facts that may lead to secondary evidence) as not being compelled to be disclosed. The Court noted that tertiary evidence does not by itself, render the fact immaterial and irrelevant under Rule 5.25.

The Court further noted that the disclosure Rules are intended to prevent abusive, vexatious, overly burdensome, and/or disproportionately expensive disclosures and limit the ability of a party to engage in an overly long discovery process that delays the resolution of the underlying dispute pursuant to Rule 5.3(1). The Court additionally noted that disclosure is not required "just because some remote and unlikely line of analysis can be advanced" and lines of discovery that are unrealistic, speculative, or without an air of reality" can be rejected. The Court specified that a party seeking to compel disclosure must show some reason why the fact at issue could reasonably be expected to help determine one or more issues.

The Court additionally specified: that at the production stage of litigation, the Court should not measure the parties' proposed line of argument "too finely"; the Rules are intended to prevent abusive and/or excessive discovery processes and not to cut off legitimate lines of inquiry; and the party seeking disclosure does not need to prove conclusively that the information will be of any assistance to them.

The Court reviewed the Undertakings and objections from the Questioning and made individual determinations, with respect to each.

PTW CANADA LTD V SMITH, 2024 ABKB 83

(NEUFELD J)

Rules 5.1 (Purpose of this Part - Disclosure of Information), 5.2 (When Something is Relevant and Material), 5.3 (Modification or Waiver of this Part), 5.5 (When Affidavit of Records must be Served), 5.6 (Form and Contents of Affidavit of Records), 5.11 (Order for Record to be Produced) and 5.12 (Penalty for not Serving Affidavit of Records)

The Plaintiff applied for an Order pursuant to Rule 5.11 compelling the Defendants' full production of records within a specified period. The Plaintiff had previously been granted an Anton Pillar Order which included injunctive provisions in respect of one of the individual Defendants and which appointed in Independent Supervising Solicitor ("ISS") to gather and prepare evidence which resulted in the corporate Defendant and an additional individual Defendant later being added as Defendants to the Action

The Court noted that the parties had exchanged Affidavits of Records pursuant to Rules 5.5 and 5.6 and reviewed Rules 5.1 and 5.2. The Court noted that the records relevant and material to the allegations contained in the Statement of Claim must be identified as required under the Rules which would include records regarding communications with known Plaintiff customers, suppliers, and employees before and after the hiring of the individual Defendant. The Court held that this would also include the records relating to communications amongst and between the individual Defendants and the corporate Defendant prior to their departure from the Plaintiff. The Court ultimately determined that the Defendants did not adequately identify or disclose records that

were in their control and which were relevant and material to the Action. The Court ordered that the Defendants' complete Affidavit of Records be sworn and served within 120 days.

The Plaintiff also sought an injunction, relying on Rule 5.3, which would enable the ISS to oversee document production by the individual Defendants. The Court set out that ordering the ISS to take on a novel and continuing role was not warranted, noting that (1) it was not satisfied that requiring the ISS to undertake a new role would save costs, as the fundamental disagreement as to scope of documents that were producible had been resolved; (2) in the event the Defendants did not provide sufficient Affidavit in Records in compliance with its decision, the Plaintiff was permitted to apply for relief which would be a more economical method than interposing the ISS into the process; and (3) utilizing the ISS as a mechanism for overseeing document production would contravene the fundamental principle, and that such Orders are to be granted sparingly and should be restricted in scope and duration.

The Court found that the Plaintiff was entitled to $1,500 in Costs from each of the Defendants, and that if they failed to provide sufficient Affidavits of Records, they should expect a much higher Costs Award as contemplated in Rule 5.12(1).

MANTLE MATERIALS GROUP, LTD (RE), 2024 ABKB 19

(NIXON ACJ)

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

Mantle Materials Group, Ltd. ("Mantle") brought an Application to convert their Action under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "*BIA*") to a proceeding under the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 (the "*CCAA*") because the statutory time periods provided for by the BIA were not flexible enough to address Mantle's reclamation obligations pursuant to environment protection orders ("EPOs"). The conversion was not opposed. However, Travelers Capital Corp. ("Travelers") applied to compel responses to Undertakings and questions.

After granting Mantle's Application to convert their Action under the *BIA* to a proceeding under the *CCAA*, Nixon A.C.J. considered Travelers' Application to compel answers to certain Undertakings and questions. The Court noted that Rule 5.2 and Rule 5.25 address this issue, and the question to consider is whether the Undertaking or question is relevant and material. The specific Undertakings and questions at issue were set out in Schedule A of Travelers Application to compel answers and were not reproduced in the Decision. However, the Court held that the questions that were relevant and material addressed Mantle's liabilities and indemnities and addressed Mantle's ability to indemnify certain individuals (including one of Mantle's directors) from personal liabilities under the EPOs. Mantle was also ordered to answer one Undertaking. The Court held that the remainder of the questions and Undertakings, which involved questions regarding companies, who were not parties to the Application, were not relevant. Accordingly, Mantle's Application was granted in part.

BM V WS, 2024 ABKB 158

(LEMA J)

Rules 5.2 (When Something is Material and Relevant) and 5.13 (Obtaining Records from Others)

Lema J. dismissed the Plaintiffs' Rule 5.13 Application (the "Application") to compel the Defendant's psychologist to disclose to the Plaintiffs the Defendant's complete patient file, which contained the Defendant's pre-existing mental state (the "Records").

Lema J. took note of the fact that the Plaintiffs did not show that they had made any request for the Records to the Defendant directly or, failing production, any Application to compel the Defendant to produce the Records. Citing *CNOOC Petroleum North America ULC v 801 Seventh Inc,* 2023 ABCA 97, Lema held that that alone would be sufficient to dismiss the Application, since Rule 5.13 implicitly requires that the Records "cannot be obtained from a party".

Lema J. continued to consider, under Rule 5.2, whether the Records were relevant and material. Citing T*errigno v Butzner,* 2023 ABCA 124, Lema J. commented that relevance is determined primarily by the Pleadings, and materiality relates to whether the information can help, directly or indirectly, to prove a fact in issue. There is no fixed standard as to what is material and an element of judgment is required.

Lema J. found that the Plaintiffs, who had already obtained the psychologist's synopsis of the Defendant's condition (the "Synopsis"), did not provide evidence to show that the Defendant's pre-existing mental state was likely to add anything to the Synopsis, and thereby failed to prove that the Records were material. More fundamentally, the Plaintiffs did not show that the Records were relevant to the issue at bar. Accordingly, Lema J. dismissed the Application.

GIESBRECHT V PRPICK, 2024 ABKB 51

(DEVLIN J)

Rules 5.3 (Modification or Waiver of this Part) and 5.33 (Confidentiality and Use of Information)

The Defendant, Danica Prpick ("Ms. Prpick"), sent a letter to the RCMP titled "Organized Crime in Redcliff Alberta" that alleged that public officials and members of the media were involved in corruption and criminal conduct in the Town of Redcliff's administration. Ms. Prpick also sent an email to a lending officer at the Bank of Montreal ("BMO") alleging that one of the Plaintiffs, Shanon Simon, had engaged in unethical and illegal conduct that damaged Ms. Prpick (the "BMO Email"). The BMO Email came to light when it was produced in a separate Action, which was subsequently joined with the within Action for procedural purposes. The three Plaintiffs were all closely associated with Redcliff in both elected political and public service staff positions; they sued Ms. Prpick for defamation.

Ms. Prpick objected to the admission of the BMO Email into evidence on the basis that its use would breach the implied undertaking

rule. The Plaintiffs argued that the implied undertaking rule is not absolute and that the Court may grant dispensation from it where appropriate. Justice Devlin noted that whether the BMO Emailed can properly be used as evidence begins with Rule 5.33, which codifies the common law implied undertaking rule. Further, Rule 5.33 places explicit statutory limits on the collateral use of otherwise private materials produced involuntarily through the civil discovery process. Justice Devlin held that the use of documents produced in one lawsuit to advance another is *prima facie* an infringement of Rule 5.33 and requires express permission of the Court. The party seeking to use the protected discovery documents bears a "heavy burden" of satisfying the Court that a collateral use should be allowed.

Justice Devlin noted that the factors that must be considered in determining whether to grant relief from an implied undertaking, which equally apply to an inquiry under Rule 5.33(1)(a), were summarized in *Iozzo v Weir,* 2004 ABQB 359 at para 9 ["*Iozzo*"]. Ultimately, the analysis turns on the balance between the mutual prejudices at stake and the impact on the administration of justice. The Court declined to follow the ruling in *Ochitwa v Bombino*, 1997 CanLII 14899 (AB LB) ["*Ochitwa*"], that "the public interest favours disclosure as the Defendants, if they have defamed the Plaintiff should not be permitted to hide their defamation behind the protection of the implied undertaking rule." Justice Devlin held that the *Ochitwa* decision "erases the rule" and "[p]reventing otherwise useful but confidential information from being used or disseminated is the express purpose of r. 5.33." The fact that this may forestall a party from pursuing an otherwise valid claim is a contemplated outcome of the Rule. Rather, the proper approach under Rule 5.33(1)(a) is to balance the interests that come into competition when an exemption from the Rule is sought. Ultimately, after considering the *Iozzo* factors, Devlin J. held that allowing an exception to Rule 5.33 would be contrary to the proper administration of justice and declined to admit the BMO Email.

SUNCOR ENERGY INC V UNIFIED ALLOYS LTD, 2024 ABKB 70

(PRICE J)

Rules 5.17 (People Who May be Questioned) and
6.14 (Appeal from Application Judge's Judgment or Order)

The Plaintiff brought a claim against the Defendants following an explosion and large fire caused by ruptured pipes manufactured by the Defendants. The Defendants in turn issued Third Party Claims against various companies, including Technip USA, Inc. ("Technip"). All the parties agreed to a Consent Scheduling Order that provided for a process for the Questioning of third parties.

Despite the Plaintiff providing several notices regarding the Questioning of a Technip employee, with no objections, one Defendant, during the Questioning, took the position that there was no adversity of interest between the Plaintiff and Technip. Subsequently, the Defendant applied to strike out the transcript in relation to the examination of that employee. Applications Judge Farrington dismissed the Application, and the Defendant appealed the Decision.

The Court noted that under Rule 6.14, the standard of review on an Appeal from an Applications Judge's Decision, where no new

evidence had been adduced, was whether the Applications Judge was correct based on the records what was before him. Additionally, Rule 5.17 sets the framework of who may be questioned. The Court also noted that the determination of whether a party is adverse in interest requires the examinations of the Pleadings and the factual context of the case.

Considering that Technip disputed the Defendants' liability to the Plaintiff in its Third Party Defence, and acknowledging that the Plaintiff followed the procedure set out in the Consent Scheduling Order and provided notice on several occasions without objection from the Defendants, the Court concluded that there was an adversity of interest between the Plaintiff and Technip.

In the result, the Appeal was dismissed.

HABINA V SARETSKY, 2023 ABKB 24

(DEVLIN J)

Rule 5.33 (Confidentiality and Use of Information)

The individual Parties were former business partners. They were involved in case-managed litigation that spanned multiple Actions. In the lead-up to the hearing of several pre-Trial Applications, the Applicant's former spouse retained the Respondent's counsel to act in the divorce proceedings against the Applicant. The lawyer ceased acting for the Applicant's former spouse in the divorce proceedings, but the Applicant nonetheless applied in this Action for the lawyer's removal as counsel to the Respondent based on alleged conflicts.

In considering whether a conflict existed, Justice Devlin noted Rule 5.33, which prohibits the collateral use of private information which was involuntarily produced in litigation. Justice Devlin observed that, had the lawyer not withdrawn as counsel in the divorce proceedings, there may have been valid concerns about the potential for breaches of Rule 5.33. The Court held that those concerns did not exist in the present circumstances, however.

Ultimately, Justice Devlin concluded that there was no reason or requirement to remove the Respondent's counsel from acting in these proceedings. Justice Devlin dismissed the Applicant's Application, but Ordered that the parties bear their own Costs.

BAKER LAW FIRM V COLORS UNLIMITED INC, 2024 ABKB 53

(LABRENZ J)

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

This was an Appeal from an Applications Judge's Order refusing to compel the disclosure of a settlement agreement as between two of the Respondents and non-party individuals. The Appellant alleged that the settlement agreement amounted to a fraudulent preference designed to defeat the Appellant's claim for outstanding legal fees.

The Court began its analysis by setting out the standard of review applicable to an Appeal of this nature. Justice Labrenz referred to the following principles as arising from Rule 6.14 and the related case law: (a) an Appeal from an Applications Judge's Judgment or Order is an Appeal on the record of proceedings before the Applications Judge, but may also be based on additional evidence that is relevant and material; (b) the standard of review on all issues is one of correctness; (c) although an Appeal on the record, the Appeal is viewed as being *de novo* due to the possible expansion of the factual records from what was before the Applications Judge; and (d) where the record has not been enhanced, it is not an error for the Court to summarily rely on or affirm the Applications Judge's Decision if the Court views it as correct in fact and law.

Justice Labrez noted that the standard of review on the review of a Decision of an Applications Judge pursuant to Rule 6.14 is correctness. Justice Labrenz noted that the Appellants had put forward no new evidence on Appeal. In the result, Justice Lebrenz found no error in the Applications Judge's Decision and therefore dismissed the Appeal. The Court granted leave to make submissions on costs should the Parties not be able to reach an agreement on their own.

ISSA V BMB INC, 2024 ABKB 159

(MARION J)

Rules 6.14 (Appeal from Master's Judgment or Order), 7.3 (Summary Judgment) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

This was an Appeal of two Orders of an Applications Judge.

The Defendants, a corporation and the individual owner (the "Owner") (together, the "Defendants"), shared the same legal counsel, who requested the Plaintiff not to note the Defendants in Default without prior written notice. Despite this, the Owner was not included in the Statement of Defence filed by the corporation due to an apparent counsel error. Subsequently, the Defendants applied for Summary Dismissal pursuant to Rule 7.3.

Despite counsel's request, the Plaintiff noted the Owner in Default without prior written

notice. In response, the Owner filed an Application to set aside the Default (the "Setting Aside Application").

Applications Judge Prowse issued two Orders: (1) Setting aside the Noting in Default against the Owner (the "Setting Aside Order"); (2) Granting Summary Dismissal of the Plaintiff's claim against the Defendants (the "Summary Dismissal Order"). The Plaintiff appealed both Orders.

The Court noted that, pursuant to 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 Applications Judge. However, new evidence may be admitted if the Judge hearing the Appeal considers it relevant and material.

In upholding the Setting Aside Order, the Court confirmed that when fairness requires it to be granted, Rule 9.15(3) gives the Court discretion to set aide a Default Judgment. The Court held that the Owner showed that she had an arguable defence because: (1) the failure to file a defence was a mistake on the part of her counsel; (2) her counsel's correspondence and the Summary Dismissal Application clearly indicated her intention to defend; and (3) the Plaintiff unfairly attempted to take advantage of the mistake made by the Owner's counsel, while the Owner promptly filed the Setting Aside Application.

With respect to the Summary Dismissal Order, the Court considered the test for Summary Judgment from *Weir-Jones Technical Services Inc v Purolator Courier Ltd,* 2019 ABCA 49, which requires that the Court be able to make the necessary findings of facts, apply the law to the facts, and be satisfied that Summary Judgment is a proportionate, more expeditious and less expensive means than a Trial to achieve a just result.

Furthermore, Rule 7.3(1)(b) allows a Defendant to apply for Summary Dismissal if "there is no merit to a claim or part of it." The Court applied the principles from *Hryniak v Mauldin*, 2014 SCC 7, and held that it was not possible to fairly resolve this dispute on a summary basis, as the Defendants had not adduced sufficient evidence which, on the balance of probabilities, established there was no merit to all of the Plaintiff's claims.

As a result, the Court dismissed the Appeal against the Setting Aside Order and allowed the Appeal of the Summary Dismissal Order.

RADI V AUDET, 2024 ABKB 168

(DEVLIN J)

Rule 6.14 (Appeal from Applications Judge's Judgment or Order) and 14.75 (Disposing of Appeals)

The Appellant sold a car to the Respondent "as is." Minutes later, the engine of the car exploded. The buyer won damages at Trial, and the seller appealed, alleging factual errors. The Appellant sought to admit fresh evidence on Appeal pursuant to Rule 6.14.

The Appellant argued that the Court should take a "hybrid approach," combining an Appeal on the record with a partial *de novo* hearing based on the fresh evidence. Justice Devlin considered the test for fresh evidence on Appeal. He stated there is no such thing as a

hybrid Appeal. Either the Appeal is heard on the record or it is heard *de novo.* Further, the Appellant failed to meet the criteria for fresh evidence, as the evidence he sought to enter was in the Appellant's possession before the initial Trial, lacked credibility, and was not available for cross-examination.

Justice Devlin ultimately dismissed the entire Appeal, finding that no palpable and overriding error was shown and the arguable error would not have led to a different result. Pursuant to Rule 14.75, Devlin J. dismissed the Appeal.

GODSMAN V GODSMAN, 2024 ABKB 11

(HARTIGAN J)

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

The Respondent applied to determine the validity of an immediate Enduring Power of Attorney and Personal Directive. The Applicants sought Summary Judgment to dismiss that Application. Marjory Godsman completed an Enduring Power of Attorney and Personal Directive in 2020, naming the Respondent as her Attorney and Agent. She also completed a second set of the same documents in 2021, naming the Applicants as joint Attorneys and Agents. The Respondent argued that Ms. Godsman lacked capacity to execute the documents in 2021.

The Court considered Rules 7.2 and 7.3 and the relevant case law on the topic of Summary Judgment. In particular, Justice Hartigan considered the proper approach to Summary Dispositions, including that it must be fair to resolve the dispute on the available record, and there must be no genuine issue requiring Trial. Justice Hartigan found that the evidentiary record available was substantial, including Affidavits and filed cross-examination transcripts.

The Respondent suggested that the evidence of one affiant was subject to issues of credibility that required viva voce evidence, to allow the Court to more effectively assess its veracity. The Court held that this was not a compelling argument, as conflicting Affidavit evidence does not preclude a Summary Decision. Further, the particular evidence at issue was not necessary to determine the ultimate issue.

The Court similarly rejected an argument that new witnesses could be tendered at an oral hearing if allowed, which could provide further evidence. Justice Hartigan found that the record before the Court was sufficient to determine the issues and additional witnesses were not required.

Ultimately, Hartigan J. found that the 2021 documents were valid, and summarily dismissed the validity Application.

BLACKMAN V BEHIELS, 2024 ABKB 3

(APPLICATIONS JUDGE PARK)

Rule 7.3 (Summary Judgment)

The Defendants brought an Application for Summary Dismissal pursuant to Rule 7.3, and section 3 of the *Limitations Act*, RSA 2000, c L-12 (the "Act").

The Court confirmed that Summary Dismissal may be awarded to an Applicant who establishes that there is no "genuine issue for trial." There will be no issue requiring a Trial when the Judge is able to make the necessary findings of fact on the record before them, apply the law to those facts, and be satisfied that the process reflects a proportionate, timely, and cost-effective means to achieve a just result.

The Court further confirmed that the analysis to be undertaken by the Court on Summary Dismissal was set out by the Alberta Court of Appeal in its decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 ("*Weir-Jones*"). The Alberta Court of Appeal subsequently clarified the Summary Dismissal test set out in *Weir-Jones* noting that the *Weir-Jones* standard sanctions Summary Dismissal if the presiding Judge is left with sufficient confidence in the record such that he or she is prepared to exercise judicial discretion to summarily resolve the dispute. More specifically, if the moving party has proved the material facts on the balance of probabilities and advances the law that vindicates their position, Summary Dismissal is appropriate. The outcome does not have to be obvious. Summary Dismissal cannot be granted if the Application presents a genuine issue requiring a Trial.

The Court also clarified that Summary Dismissal is available based on a defence arising under the Act, and the same principles apply: the Defendant must prove, on the balance of probabilities, the facts necessary to establish the date at which the Plaintiff had knowledge of an injury caused by the Defendant and resulting in damage, and that no genuine issue requiring Trial exists.

The Court was satisfied that it could resolve the matter on a summary basis, and granted the Defendants' Application for Summary Dismissal.

LIBERTY MORTGAGE SERVICES LTD V SHAW, 2024 ABKB 92

(ALONEISSI J)

Rules 7.3 (Summary Judgment) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

Liberty Mortgage Services Ltd. ("Liberty") was a lender to the Defendants. Individual Defendants had personally guaranteed the mortgages. The Defendants defaulted on their mortgages with Liberty and Liberty commenced an Action. The Defendants failed to defend the Action, and were Noted in Default. Liberty subsequently sought Summary Judgment, pursuant to Rule 7.3, allowing it to enforce the Defendants' guarantee. The Defen-

dants applied to have the Noting in Default set aside, pursuant to Rule 9.15.

The Court summarized the law on Summary Judgment as follows:

"Summary judgment is to be granted where there is 'no genuine issue requiring a trial', which will be the case when the process (1) allows the Judge to make the necessary findings of fact, (2) allows the Judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

The Court considered the difference between an "arguable defence" for the purpose of an Application to set aside a Noting in Default, and "no defence" for the purpose of granting Summary Judgment. Justice Aloneissi acknowledged that the applicable definitions could lead to a finding that the Defendant has an "arguable defence" while simultaneously having "no defence." This oddity creates issues only in the exact scenario present in this case, where the two Applications are decided simultaneously.

On the issue of setting aside the Noting in Default, the Defendants argued they had an arguable defence that the mortgages were unenforceable. The Court considered the position but found that it did not amount to an arguable defence. The Court also found that the Application to set aside the Noting in Default was not filed promptly. As such, the Court denied the Defendants' request to set aside the Noting in Default. The Court also found that the Defendants' proposed defences did not raise a genuine issue requiring Trial. As such, the Court granted Liberty's Application for Summary Judgment.

DURAND V HIGGINS, 2024 ABKB 108

(DEVLIN J)

Rule 7.3 (Summary Judgment)

When considering the suitability of this matter for Summary Judgment under Rule 7.3, Devlin J adopted the principle respecting Summary Judgment and civil proceedings from *McDonald v Sproule Management GP Limited,* 2023 ABKB 587. Specifically, Summary Judgment cannot be granted if the Application presents a genuine issue for Trial.

Citing *Hryniak v Mauldin*, 2014 SCC 7 and *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 ("*Weir-Jones*"), Devlin J. commented that there will be no genuine issue requiring a Trial when the process (1) allows the Judge to make the necessary findings of fact, (2) allows the Judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

Citing the four key considerations to apply when considering the suitability of a matter for summary dispositions laid out in *Weir-Jones,* Devlin J. commented that the analysis does not have to proceed sequentially, or in any particular order. The Judge may determine, during any stage of the analysis, that Summary Judgement is inappropriate because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result," or there is a genuine issue requiring a Trial.

Applying this framework of analysis, Devlin J. concluded that the Court was able to resolve all the issues on this case on the material presented, and that the *Weir-Jones* threshold for Summary Judgment disposition was met.

CONDOMINIUM CORPORATION NO 0210494 V ROTZANG, 2024 ABKB 111

(JOHNSTON J)

Rules 7.3 (Summary Judgment), 7.5 (Application for Judgment by Way of Summary Trial), 7.6 (Response to Application), 7.7 (Application of Other Rules), 7.8 (Objection to Application for Judgment by Way of Summary Trial), 7.9 (Decision after Summary Trial), 7.10 (Judge Remains Seized of Action), 7.11 (Order for Trial) and 13.18 (Types of Affidavit)

The Plaintiffs, a condo corporation and its owners, applied to proceed by way of Summary Trial against the Defendant condo corporations.

The Defendants objected on proceeding via Summary Trial and sought to have the Plaintiffs' Affidavit struck for failing to comply with Rule 13.18(3) (which requires an Affidavit in a Summary Trial be sworn on the basis of personal knowledge).

The Court noted that if an Affidavit is sworn on information and belief, the source of the information must be disclosed. While business records may be an exception to the hearsay rule, authentication is usually required. The Defendants also challenged certain paragraphs of the Affidavit, arguing that they provided legal opinion and argument based on the Affiant's interpretation of certain bylaws. The Court agreed that this type of evidence is generally considered improper, as Deponents should only provide evidence based on personal knowledge of the facts in issue. Consequently, the Court decided to strike some paragraphs of the Affidavit.

Further, the Court assessed whether the case was suitable for Summary Trial under Rules 7.5 to 7.11. The Plaintiffs argued that the case involved a straightforward contractual interpretation, with no credibility issues, and that a full Trial would result in significant Costs for the parties involved, as well as prejudice certain Plaintiffs. The Defendants disagreed, asserting that the issues were complex and could not be resolved solely through affidavit evidence. They, specifically, argued that the Court needed to hear testimony from key witnesses regarding the enforceability of an agreement. Additionally, the Defendants claimed that the resolution of this matter hinged on the credibility of several witnesses, and that the Court lacked crucial evidence.

Justice Johnston sided with the Plaintiffs, concurring that this case was appropriate for Summary Trial due to its lack of complexity. Justice Johnston referenced the Court of Appeal's decision in *Dunn v Condominium Corporation No 042 0105*, 2024 ABCA 38 at paragraph 17, which stated, "Condominium bylaws are more akin to laws and regulations passed by a legislative body than contractual provisions, and courts have interpreted them accordingly," noting that such cases are particularly well-suited for summary adjudication. The Court emphasized that both parties were expected to present their strongest arguments during Summary Trial Applications, and there was no justification for the Defendants' failure to submit additional evidence, especially considering their examination of multiple parties during

Questioning and their ability to examine more if necessary. Subsequently, the Court evaluated the merits of the case and ultimately granted Judgment in favor of the Plaintiffs.

YU V ZHU, 2024 ABKB 154

(ROTHWELL J)

Rule 7.3 (Summary Judgment)

This was a Decision of a Summary Trial pursuant to Rule 7.3. The Trial focused on determining issues such as retroactive and ongoing child support, potential imputation of income, spousal support, and division of matrimonial property. The Court found that there was sufficient evidentiary basis upon which to decide the matter and that it would not be unjust to do so without a Trial.

The Court was guided by the four-step approach to retroactive child support, as outlined in *DBS v SRG*, 2006 SCC 37. Following an analysis on the facts, the Court determined that it was appropriate to award the Plaintiff retroactive child support.

Next, the Court determined if the Plaintiff was entitled to spousal support. The Court found the Plaintiff's claim for compensatory entitlement weak, as she had not provided any evidence to support her claim that being a primary caregiver prevented her from finding work. However, finding that the Plaintiff's income was far lower than the Defendant, the Court was satisfied the Plaintiff was entitled to non-compensatory spousal support.

The Court then considered what property would be considered "matrimonial." The Court found that the Defendant had transferred matrimonial property in an effort to defeat the Plaintiff's property claim. Therefore, the relevant property was to be considered matrimonial. The Court also considered property held in China, finding that none of the properties in China were brought into the matrimonial regime.

In conclusion, the Court directed the Defendant to provide child and spousal support. Furthermore, the Court mandated, among other provisions, that the Defendant issue equalization payments to the Plaintiff, representing her portion of the proceeds from the sale of matrimonial property.

CANADIAN NATURAL RESOURCES LIMITED V HARVEST OPERATIONS CORP, 2024 ABCA 3

(MARTIN, ROWBOTHAM, AND PENTELECHUK JJA)

Rule 7.3 (Summary Judgment)

The Appellants (collectively, "CNRL") appealed a Chambers Judge's Decision to grant partial Summary Judgment in relation to certain oil and gas agreements between the parties.

One of the Respondents ("Harvest") assigned significant oil and gas assets under several agreements to the other Respondent (the "Agreements"). Most of the Agreements did not require CNRL to consent to the assignments, but some of the Agreements explicitly required CNRL's consent. CNRL filed a Statement of Claim seeking, in part, a declaration that Harvest's assignments were of no force and effect as all of the Agreements required CNRL's consent prior to an assignment taking effect. The Chambers Judge granted partial Summary Judgment for those Agreements that did not explicitly require CNRL's consent finding that they could be easily bifurcated from the main Action.

The Appellate Court noted that while partial Summary Judgment is contemplated under Rule 7.3, a nuanced assessment is required as to whether it is appropriate in the circumstances, balancing the risk of inconsistent findings and duplicative proceedings against the prospect that resolution of a claim will significantly advance access to justice, and be the most proportionate, timely and cost-effective approach. Based on the evidentiary record, the Court noted that it could not determine whether the validity of the assignments under Agreements explicitly requiring CNRL's consent would have no possible impact on the interpretation of the remaining Agreements not requiring consent.

For those reasons, the Court of Appeal held that partial Summary Judgment would not be fair and just and allowed Summary Judgment to be set aside for all Agreements.

LEMAY V ZEN RESIDENTIAL LTD, 2024 ABKB 49

(LEONARD J)

Rules 9.4 (Signing Judgments and Orders) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicant, Mr. Lemay, filed two Applications against his landlord, Zen Residential Ltd. ("Zen"), claiming overpaid rent and interest ("Lemay Rent Application") and penalty under the *Residential Tenancies Act*, SA 2004, c R-17.1 ("Lemay RTA Application"). Documents for both Applications were filed by Mr. Botar, an abusive litigant prohibited from personally appearing at the Edmonton Court of King's Bench Clerks' counters. Mr. Botar also stated in both Applications that he was Mr. Lemay's "legal representative" and "MacKenzie Friend".

Unaware of the Lemay RTA Application, Acting Chief Justice Nielsen issued an Order under the Lemay Rent Application. The Order stated,

among other things: (1) Mr. Botar was guilty of Contempt of Court for filing documents; (2) Mr. Botar had also engaged in the unauthorized and illegal practice of law; (3) There was no valid Lemay Rent Application proceeding before the Court as the documents filed by Mr. Botar were done so illegally. Mr. Lemay was instructed to submit a replacement Statement of Claim to Acting Chief Justice Nielsen. The Lemay Rent Application was terminated because Mr. Lemay did not submit a replacement Statement of Claim in time.

In the Lemay RTA Application, Mr. Lemay appeared before Applications Judge Schlosser and obtained an Order that found Zen in breach of the *Residential Tenancies Ac*t. Zen did not attend that hearing. Subsequently, when Mr. Lemay applied to the Court for an Order requiring Zen to pay a penalty, Zen cross-applied to set aside the Order of Applications Judge Schlosser pursuant to Rule 9.15 on the basis that the Application was illegally filed.

Justice Leonard noted that Mr. Botar's activities in both the Lemay Rent Application and the Lemay RTA Application were functionally and substantively identical. Relying on the principles of "horizontal *stare decisis*" and "judicial comity" from *R v Sullivan*, 2022 SCC 19, Justice Leonard stated that she was bound by the conclusions of Acting Chief Justice Nielsen. On that basis, Justice Leonard concluded that Lemay RTA Application was never properly before the Court.

In the result, Justice Leonard set aside the Order of Applications Judge Schlosser and stayed the Lemay RTA Application. Furthermore, if Mr. Lemay failed to submit replacement originating filings by March 1, 2024, the matter would be struck out. Mr. Lemay's approval of the Order was dispensed with pursuant to Rule 9.4(2)(c).

REININK V ALBERTA (LABOUR RELATIONS BOARD), 2024 ABCA 63

(ANTONIO JA)

Rules 9.4 (Signing Judgments and Orders), 14.8 (Filing a Notice of Appeal) and 14.37 (Single Appeal Judges)

The Applicant in this matter sought extension of time for her Appeal a Decision of the Alberta Court of Queen's Bench (as it then was).

The Applicant failed to file her Notice of Appeal within the time-period provided by Rule 14.8. She, therefore, asked the Appellate Court to exercise its discretion pursuant to Rule 14.37(2)(c) to extend this timeframe. The Court referenced *Cairns v Cairns* (1931), 26 Alta LR 69, to outline the factors for such discretion, emphasizing the necessity for the Applicant to demonstrate a reasonably arguable Appeal, a criterion the Court found unmet due to the Applicant's attempt to re-litigate previously settled matters.

The Court invoked Rule 9.4(2)(c) and prepared the resulting Order.

CONDOMINIUM CORPORATION 052 0580 (O/A THE TRADITION AT SOUTH-BROOK) V CARRINGTON HOLDINGS LTD, 2024 ABKB 55

(MANDZIUK J)

Rule 9.12 (Correcting Mistakes or Errors), 9.14 (Further or Other Order after Judgment or Order Entered), and 10.39 (Reference to Court)

This was a Costs Decision arising from an Application by the Defendants to dismiss the Action pursuant to Rule 4.31 and 4.33 under which some of the Third Party Defendants also applied to dismiss the Claim against them (the "Underlying Application"). The Defendants were successful at the Underlying Application and the Court directed that: (1) the Plaintiff would pay the Defendants' Costs; (2) the Plaintiff would pay the Costs of the Third Parties who attended and made representations (the "Third Parties Entitled to Costs"); (3) those who did not attend and make representations would not have their Costs; (4) and that Costs would be under Schedule C (together the "Underlying Decision").

The Plaintiff applied, pursuant to Rule 9.12, to have the Court correct the Order corresponding to the Decision (the "Underlying Application Order") and requested that the Court address a referral by the Assessment Officer under Rule 10.39.

The Court reviewed Rule 9.12 and, among other things, noted that it is known as the "slip rule" which is designed to allow a Court to correct an error in a judgment that is "plain and manifest." The Plaintiff asserted that the Order should be amended as it erroneously gave the Third Parties Entitled to Costs, costs of the Action not just costs of the Underlying Application.

The Court determined that the Underlying Application Order contained no mistake, no irregularity, and reflected the Court's intention as set out in its Decision. The Court additionally noted that the parties approved the form of Order more than a year ago.

The Court set out Rule 10.39(1) as the authority pursuant to which the Assessment Officer requested direction as to which Column under Schedule C was to be used to assess the Costs owed to each of the Third Parties Entitled to Costs.

The Court noted that that: (1) the appropriate Column in Schedule "C" is determined by the amount claimed in the Plaintiff's Statement of Claim; (2) the amount claimed by the Plaintiff in their pleadings and the amount of the Plaintiff's recovery are the only numbers that are material; and (3) the Plaintiff should, in fairness, pay the costs of Third Parties where third party proceedings follow naturally and inevitably upon the institution of an Action, in the sense that the Defendant had no real alternative but to join the Third Party.

The Court noted that there was no settlement, the amount claimed by the Plaintiff was sufficient to resolve the disagreement over which column of Schedule "C" applied, and that the Defendants' decision to bring the Third Parties into the Action was inevitable upon the initiation of the Action.

The Court determined that the Third Parties Entitled to Costs would have their Costs awarded at Column 5 rates (on the assumption that this matched the amount claimed in the Statement of Claim), which was subject to the Assessment Officer's approval of their individual Costs claims.

The Court additionally noted that the Third Parties Entitled to Costs submitted that they were entitled to extra half days under item 8(1)(b) of Schedule C with respect to the Underlying Application. The Court set that the Third Parties Entitled to Costs were to submit their Bills of Costs and it would be up to the Assessment Officer to decide what was appropriate under their powers in Rules 10.35-10.43.

The Court noted that the Plaintiff made an Application (in the alternative) to, in essence, clarify the Order under Rule 9.14. The Court reviewed Rule 9.14 and set out that it: (1) granted the Court the power to make a further Order when it is needed to provide the litigants with the relief to which they are entitled, and (2) that it is not to be used when a further Order would amount to a variation of the original Order.

The Court, accordingly, determined that it was not prepared to make any Order which would, in effect, vary the Underlying Decision. The Court further clarified that that the Defendants and the Third Parties Entitled to Costs would have their Costs of the Action payable by the Plaintiff, under Schedule C, which also included Costs of the Underlying Application.

O'KANE V LILLQVIST-O'KANE, 2024 ABCA 32

(CRIGHTON, HO, AND DE WIT JJA)

Rule 9.13 (Re-Opening Case)

The Parties appealed from a Judgment arising from a family dispute. The Trial Judge had issued a written Decision and three follow-up Endorsements.

The Wife in her Cross-Appeal argued that the Trial Judge was inconsistent in his treatment of post-Trial submissions under Rule 9.13. Specifically, the Wife argued that the Trial Judge accepted certain post-Trial submissions from the Husband on one issue, but rejected her post-Trial submission in which she argued the Judge made a palpable and overriding error by not taking Judicial Notice of certain tax liabilities.

Rule 9.13 gives the Court discretion to vary a Judgment before it is entered or, if the Court is satisfied there is good reason to do so, it may hear more evidence in order to modify the Judgment or its reasons for it.

The Court held that the Trial Judge could not be faulted for refusing to take Judicial Notice of the tax liability. Ultimately, it was the responsibility of the Wife to ensure that the record before the Trial Judge adequately addressed the issue.

In turning its attention to Rule 9.13, the Court noted that the Rule must be "used sparingly." It cautioned litigants that Rule 9.13 is not intended to be used a vehicle to "shore up evidential gaps" nor is it a "new occasion for the losing party to advance new argument which he or she simply did not think of before." Further, the Court warned that Trial Judges who invite further submissions under Rule 9.13 and then issue subsequent Endorsements "may introduce questions around what properly forms part of the evidentiary record" and thus "open themselves up to criticism as to the proper use of post-trial submissions."

MILOT LAW V SITTLER, 2024 ABCA 39

(FEEHAN JA)

Rules 9.13 (Re-Opening Case) and 14.5 (Appeals Only with Permission)

The Applicants, Heather and Sheldon Sittler (the "Sittlers"), sought to appeal a Chambers Judge's earlier Order (the "Earlier Order"). The Respondent, Milot Law, cross-appealed the Earlier Order and also sought to appeal a subsequent Order dismissing its Application to vary the Earlier Order. Milot Law also filed an Application regarding the necessity of leave for Cross-Appeal and Appeal.

In the analysis, the Court discussed the relevance of Rules 9.13 and 14.5 of the *Alberta Rules of Court*. It highlighted that Rule 14.5(1)(b) mandates permission to appeal any pre-Trial decision concerning time periods, but noted that this provision wasn't contested.

Regarding Rule 9.13, which allows for an Order to be varied, the Court discussed Milot Law's Application under this Rule and Section 187(5) of the *Bankruptcy and Insolvency Act*. The Court ruled that the Chambers Judge's decision not included in the formal Order cannot be appealed.

In conclusion, the Court emphasized the importance of formal Orders in appellate proceedings, specifying the limitations of what can be appealed based on the content of those Orders.

TING V TING, 2024 ABKB 25

(HARRIS J)

Rule 9.14 (Further or Other Order After Judgment or Order Entered)

The Court previously granted a mobility Order allowing a mother to relocate a child to South Carolina (the "Mobility Order"). The parties appeared before the Court to clarify the terms of the Mobility Order and submitted questions about its interpretation.

The Court noted that, once an Order is entered or is otherwise perfected, the Court is generally *functus* and may not set aside or alter the Order. In other words, the Court has no jurisdiction to revise that Order even if there is a change in circumstances. However, Rule 9.14 provides an exception that allows the Court to make a further or other Order to give effect to the original Order.

As a result, the Court answered each of the questions the parties raised about the terms of the Mobility Order and directed the parties to prepare an Order reflecting those answers.

PARENT, EXECUTOR OF THE ESTATE OF BEVERLY ERICKSON V AXSEN, 2024 ABKB 10

(LITTLE J)

Rules 9.15 (Setting Aside, Varying and Discharge Judgments and Orders), 9.16 (By Whom Applications are to be Decided) and 10.37 (Appointment for Assessment)

The Applicants brought an Application set aside an *ex parte* freezing Order (the "Order") issued by Romaine J. The Order restrained the Defendants from dealing with any of their exigible property and required third party institutions to disclose financial records.

Justice Little noted that while the Applicant's counsel did not specifically refer to Rule 9.15 or 9.16 in the Application, Rule 9.15(2) requires such an Application to be brought within 20 days of the Order being served or coming to the attention of the Defendants. Counsel agreed that this requirement was waived. Further, under Rule 9.16, an Application brought pursuant to Rule 9.15 to set aside is to be brought before the Judge who granted the Order unless the Court orders otherwise, which was also set out in Romain J.'s Order. However, exceptions can be made when a Judge is not available or when, for example, "it was issued some time ago in morning chambers and the issuing judge would not likely be in a better position than any other judge to re-think the matter." In this case, counsel agreed that Romaine J. consented to the Application being heard by another Judge since she was starting a long Trial. Further, two other Justices had heard Applications to vary the Order by permitting funds to be released for living expenses.

The Court ultimately granted the Application to set aside the Order. Counsel for the Applicants sought full indemnity Costs to be assessed pursuant to Rule 10.37. Justice Romaine held that if Counsel were unable to agree on Costs, whether full indemnity or otherwise, they were to provide written submissions on Costs not exceeding five pages.

VIRTUE V PARK, 2024 ABKB 85

(FEASBY J)

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

The Appellants appealed an Order (the "Set Aside Order") setting aside a previous Order discharging a Restrictive Covenant on their property (the "Discharge Order").

The appeal period to appeal the Discharge Order elapsed before the Respondents applied for the Set Aside Order (the "Set Aside Application"). As such, the Discharge Order could only be set aside if the Respondents established that they had a right of notice of the Set Aside pursuant to Rule 9.15(1). To have standing to make an Application under Rule 9.15(1)(a), a person must be an "affected person" meaning a

person who is legally affected by the Judgment or Order rather than a person who may have a personal or moral stake in the proceedings.

The Court noted that whether the Appellants were affected by the Set Aside Order and, therefore, had standing in the Set Aside Application turned on the validity of the Restrictive Covenant. The Court found that the Restrictive Covenant was ambiguous as the specific lands subject to the Restrictive Covenant, and it therefore was unenforceable.

The Court allowed the Appeal and awarded Schedule C costs to the Appellant.

ANDERSON V NOVHAUS INC, 2024 ABKB 95

(MAH J)

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

The individual Defendant applied under Rule 9.15(1) to set aside a Summary Judgment awarded against him personally and against the corporate Defendant. He claimed that he did not appear in Court on the required day due to two interfering events or circumstances: (1) he was in a remote part of Africa with limited technology resources and unable to attend; and (2) the Court granted a procedural Order on August 9, 2023 setting the matter for hearing on September 6, 2023 based on a misapprehension that the individual Defendant had consented to the September 6, 2023 hearing date.

The Court noted that Rule 9.15(1) permits the Court to revoke a Judgment or Order made following a Trial or hearing at which an affected person did not appear because of accident, mistake, or insufficient notice. Citing *Hammond v Hammond*, 2019 ABQB 522, the Court also noted that the purpose of the Rule is to remediate the injustice caused to a non-attending party where that party would have attended but for some "interfering" event or circumstance.

The Court held that the individual Defendant's situation did not fall into these categories. This was not a case where any sort of "accident" was alleged that prevented the individual Defendant from attending Court. Nor was it a question of "insufficient notice" since the individual Defendant admitted to having more than two months of advance notice and had been communicating regularly with counsel for the other side regarding the Application during those two months. In addition, not physically being available was not a mistake.

The Court then addressed the individual Defendant's alleged interfering circumstances. The Court noted that being unavailable for the Court date on which the other side insists on proceeding behooves the unavailable party to do something, which the individual Defendant failed to do during an entire month before the hearing date. In addition, even if the procedural Order was made under a misapprehension induced by Plaintiff's counsel, which the Court denied, such misapprehension was not an "interfering event" in that it did not prevent the individual Defendant from attending Court through counsel or remotely.

As a result, the Defendants' Application to set aside the Summary Judgment Order was dismissed.

NORTH AMERICAN POLYPROPYLENE ULC V WILLIAMS CANADA PROPYLENE ULC, 2024 ABKB 152

(NEUFELD J)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.31 (Court-Ordered Costs Award), 10.33 (Court Consideration in Making Costs Award) and 10.39 (Reference to Court)

This Decision dealt with the Costs to be awarded to the successful Defendants following the Trial of a lengthy, high-value Action. The Defendants sought 50% of their actual legal fees and 100% of their recoverable disbursements (amounting to approximately $6 million) or in the alternative, Costs based on Column 5 of Schedule C with a multiplier and 100% of their recoverable disbursements (amounting to approximately $4.5 million). The Plaintiff argued that Costs should be based on Column 5 of Schedule C, but with the application of a smaller multiplier, and the Plaintiff also argued for reductions to the Defendants' claimed disbursements (amounting to approximately $1.7 million).

The Court begin its analysis by discussing the general principles applicable to Costs Awards: first, that the successful party is ordinarily entitled to Costs; second, that Costs Awards are discretionary, but must be guided by the factors set out under Rule 10.33; and third, that the Court may employ a variety of tools or approaches in determining how to arrive at an Award of reasonable and proper Costs as guided by Rule 10.31. The Court also considered the general rule that Costs awarded on a party-and-party basis should typically provide partial indemnification of approximately 40–50% of the successful Party's actual fees incurred, but that these fees must be evaluated for reasonableness as guided by Rule 10.2.

The Court considered the parties' positions as to each of the relevant matters under Rule 10.33 and found both mitigating and aggravating factors. Justice Neufeld held that, in the circumstances, where sophisticated and well-funded litigants are involved in high-stakes litigation, an Award based on a percentage indemnity would be more appropriate than the application of Schedule C, which was not designed with complex commercial litigation in mind.

In the result, the Court directed the parties to an Assessment Hearing before a Review Officer for a determination of the reasonableness of the fees and disbursements incurred by the Defendants. The Review Officer was directed to award Costs on a 45% indemnity basis, in light of the mixed results of the analysis under Rule 10.33. The Court excluded an assessment of the claimed Expert Witness fees from the Review Officer's purview, and instead ordered some deductions based on the argumentative stance taken by one of the Defendants' Expert Witnesses. Justice Neufeld also denied the recovery of fees related to certain Interim Applications where the Defendants were not successful, or which were resolved on a without Costs basis. Justice Neufeld noted that a further reference could be brought before the Court under Rule 10.39, if necessary to the Review Officer.

ROCK RIVER DEVELOPMENTS LTD V VILLAGE OF NAMPA, 2024 ABCA 42

(HO JA)

Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 14.5 (Appeals Only with Permission) and 14.37 (Single Appeal Judges)

The Applicant sought permission to Appeal a Costs Award and applied to extend the time to file as the time to apply for permission to Appeal had expired. After the Applicant was unsuccessful in seeking a permanent injunction, the Respondent sought a Costs Award of 35% of its solicitor and own client Costs, totalling approximately $16,100. The Chambers Judge granted Costs payable forthwith in the amount of $15,425, concluding that Schedule C Costs were not "overly helpful" because they did not adequately capture the work done or the quantum of value at issue. The Applicant argued that the Chambers Judge erred in ordering Costs payable forthwith rather than in the cause per Rules 10.29 and 10.33, erred in departing from Schedule C Costs, and erred by misinterpreting *McAllister v Calgary (City)*, 2021 ABCA 25.

The Court noted that when an Application for permission to Appeal is not filed within the time limit, Rule 14.37 stipulates that a single Judge may extend the time. The factors that guide the Court's determination are set out in *Cairns v Cairns,* 1931 CanLII 471 (AB CA) ("*Cairns*") but they do not set rigid requirements and ultimately the Court has discretion to extend time when justice requires it. Further, since the Application for permission to Appeal was related to Costs of less than $25,000, Rules 14.5(1)(e) and (g) applied, and permission is required from a single Judge. The test for permission to Appeal a Costs Award pursuant to Rule 14.5(1)(e) is set out in *Brill v Brill*, 2017 ABCA 235, and the test for permission to Appeal a Costs Award pursuant to Rule 14.5(1)(g) is set out in *Rocks v Ian Savage Professional Corporation*, 2015 ABCA 77.

With respect to the Application for an extension of time, the Court held that the majority of the *Cairns* factors weighed in favour of granting an extension because the Application for permission to Appeal was uploaded 38 minutes after the deadline, which was a result of the Applicant's counsel experiencing a severe illness and technical difficulties while uploading. However, the tests for permission to Appeal under both Rule 14.5(1)(e) and (g) also requires an assessment of the arguable merit of the proposed Appeal. Therefore, both Applications turned on a consideration of the merits of the Appeal. The Court held that the proposed grounds of Appeal did not advance a reasonably arguable Appeal as it was within the Chambers Judge's discretion to conclude that Costs were appropriately payable forthwith and it was open to the Chambers Judge to conclude that Schedule C Costs were insufficient because the matter required cross-examinations and briefs. The Applicant also argued that the Appeal raised issues of importance to the parties and in general because it raised issues about the consistent application of Rules 10.2, 10.31, and 10.33. The Court rejected this argument, holding that the Chambers Judge's decision was fact-specific and discretionary. In the result, Ho J.A. held that "[e]ven if I exercised my discretion and granted an extension of time, I would dismiss the application for permission to appeal."

NORTH V DAVISON, 2024 ABKB 52

(MAH J)

Rules 10.28 (Definition of "Party"), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Court considered the appropriate Costs Award in relation to an Application to place several companies into full receivership (the "Plaintiff Application") and an Application to place several companies into the control a representative of the Plaintiffs (the "Interim Receiver Application").

The Court noted that the successful party is presumptively entitled to Costs under Rule 10.29(1) and that the determination of Costs was discretionary considering the factors in Rules 10.31 and 10.33.

With respect to the Interim Receiver Application, the Court determined that the Plaintiffs were entitled to Costs even though the Plaintiffs did not bring that Application. The Court determined that it is the expense of effort and money to advance or defend a position that makes one a party under Rule 10.28 for the purposes of awarding Costs for an Application.

The Court awarded the Plaintiffs three times Schedule C Column 5 costs. The Court noted that the matters at issue were complex, the amounts claimed were between $40-50 million, the Defendants did not advance their position in a reasonable manner, and the Plaintiffs were substantially successful in the Plaintiff Application and advancing their position in the Interim Receiver Application. As such, the Court determined that enhanced Costs were appropriate.

BREEN V FOREMOST INDUSTRIES LTD, 2024 ABKB 9

(YAMAUCHI J)

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

This was a Costs Decision following a Trial. In the Trial Decision, the Court dismissed the claim of a President and CEO (the "Employee") that he had been wrongfully dismissed from his employment with his employer (the "Employer"). With regards to the Counterclaim, the Court determined that the Employee had violated several duties owed to the Employer and awarded damages and Costs to the Employer. However, the parties were not able to agree on the quantum of the Costs Award. The Employer argued for full indemnity Costs, while the Employee argued that the Employer should only receive party-party Costs.

The Court considered Rule 10.29 and the factors outlined in Rule 10.33, which included the outcome of the case, its complexity, and the behavior of the parties involved, in order to determine the appropriate Costs. Exercising its discretion, the Court concluded that this case met the criteria for full indemnity Costs, given the exceptional and uncommon circumstances surrounding the Employee's actions both

before and during the litigation process. These actions included a lack of honesty, making misrepresentations, and misusing company funds. The Employee argued that the Employer was attempting to use Costs as a means to harm him or as a form of oppression. However, Justice Yamauchi stated that "Impecuniosity... is not a valid reason to deny costs."

BOELMAN V BOELMAN, 2024 ABKB 30

(LEONARD J)

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

This is an Application for Costs by the Plaintiff in a family matter. Citing *Shaw v Shaw*, 2014 ABQB 165 and *Cador v Chichak,* 1998 ABQB 881, Leonard J. commented that Costs in family law matters normally follow the same principles applicable to other litigation.

Leonard J. further commented that Rule 10.29 confirms the general rule that a successful party is entitled to Costs against the unsuccessful party, subject to the Court's general discretion. Leonard J. further noted that, pursuant to *Lameman v Alberta*, 2011 ABQB 532, a Trial Judge's discretion must be exercised judicially and in accordance with established principles.

Leonard J. cited *McAllister v Calgary (City of),* 2021 ABCA 25 for the Costs assessment framework, and commented that the starting point in making a Costs Award is to look at the factors outlined in Rules 10.33(1) and 10.33(2). After the factors under Rule 10.33 are considered, the Court is directed to Rule 10.31, which provides options for making Costs Awards. A successful party is entitled either to reasonable and proper Costs, as set out in Rule 10.31(1)(a), or to any other amount the Court considers appropriate in the circumstances, as set out in Rule 10.31(1)(b).

Leonard J. considered the applicable factors under Rules 10.33(1) and 10.33(2). Specifically, the Plaintiff's substantial success, the complexity of the claim, the importance of the issues, the apportionment of liability, the conduct of the parties, as well as the Plaintiff's misconduct.

When considering the amount of Costs that should be paid by the Defendant to the Plaintiff under Rule 10.31, Leonard J. commented that it is important that the Costs awarded be balanced; while the Costs Award must reflect the factors set out in Rules 10.33(1) and 10.33(2), it must also not overly penalize the Defendant. To strike an appropriate balance, Leonard J. awarded Costs against the Defendant under Schedule C, Column 3.

SERINUS ENERGY PLC V SYSGEN SOLUTIONS GROUP LTD, 2024 ABKB 123

(MARION J)

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

This Application concerned the allocation of Costs following a case with mixed outcomes, specifically in *Serinus Energy PLC v SysGen Solutions Group Ltd,* 2023 ABKB 625. The Court faced the task of determining appropriate Costs in a context where both parties experienced partial victories. Serinus Energy PLC ("Serinus") received a net judgment accounting for both the Statement of Claim and the Counterclaim, notwithstanding that the legal expenses incurred by both parties substantially surpassed the financial awards granted.

In its deliberation, the Court invoked Rules 10.29(1), 10.31, and 10.33, highlighting the Court's extensive discretion in awarding Costs. The Court noted that its discretion aims to ensure an equitable balance between the litigation's outcomes and the financial burdens shouldered by the parties. Furthermore, drawing upon the precedent set by *McAllister v Calgary (City),* 2021 ABCA 25, the Court underscored its authority to depart from the "reasonable and proper costs" framework, enabling it to order either reduced or enhanced Costs as it sees fit. The Court underscored the potential inadequacy of applying Schedule C for Costs in a straightforward manner, pointing out that such an application might not achieve reasonable partial indemnification for either party or mirror an amount that the losing party could reasonably be expected to pay, thereby necessitating substantial adjustments to Schedule C.

In evaluating the Costs implications stemming from the mixed successes in both the Statement of Claim and the Counterclaim, the Court also investigated whether either party had attained substantial success during the proceedings. Recognizing the diverse approaches in existing jurisprudence, the Court embarked on a detailed analysis guided by the provisions of Rule 10.33.

After examining the relevant factors, including the success achieved by each party in their respective claims and the overall divided success across the Action, the Court arrived at its conclusion. It was held that Costs should be awarded to each party for their independent claim, with these amounts subject to mutual offset.

LEONARD V LEONARD, 2024 ABKB 124

(MARION J)

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

This was a Costs Decision addressing whether parties to an agreement can claim contract-based double solicitor-client Costs against each other related to the implementation of the agreement and, if not, whether some other Costs Award was warranted.

The parties separated in February 2021 and entered into a Divorce & Property Contract (the "Agreement") in February 2023. The Agreement dealt with, among other things, the sharing of the husband's employment pension (the "Plan"). The parties each executed a T2220E form for the Plan transfer, which was rejected by the employer's insurance company plan administrator (the "Administrator"). Subsequently, the parties completed a T2151 form as advised by the Administrator, but this form was also rejected due to missing information. Despite the parties' attempts to provide the correct information to the Administrator, they received a Plan value with an incorrect accrual end date.

The wife filed an Application seeking various Orders related to the Plan transfer and double Costs on a solicitor-client basis based on a clause in the Agreement, which provided that if one party breached the contract and enforcement was needed by the other party, the breaching party must cover all associated enforcement costs on a double solicitor-client basis (the "Costs Provision"). In contrast, the husband sought $20,000 for his time spent on the matter.

The Court first addressed whether the wife could claim double solicitor-client Costs against the husband. Considering the principles of contractual interpretation, the Court interpreted the Agreement and determined that the purpose of the Costs Provision was to encourage efficient and cooperative implementation of the Agreement. The Court found that the wife's Application did not engage the "enforcement" of clauses of the Agreement and denied her claim for double solicitor-client Costs. Additionally, the Court expressed doubt about the enforceability of the Costs Provision but did not make any findings on this issue.

After denying the husband's claim of $20,000 in compensation because he failed to provide evidence to justify his position, the Court then determined the appropriate Costs Award regarding the wife's Application.

The Court considered the general Costs principles under Rules 10.29, 10.31, and 10.33 and held that neither party should be entitled to Costs because: (1) the wife did not obtain the relief she sought; (2) much of the Court intervention was required because of the Administrator's uncooperative approach to this matter; (3) much of the Costs associated with the Plan transfer could have been avoided had the wife brought her Application immediately upon learning that the Administrator would not cooperate regarding the Plan transfer, rather than engaging in protracted and unproductive communications with the husband; (4) the husband, being a self-represented litigant, was not entitled to any solicitor-client Costs except in appropriate circumstances, which the Court found did not exist in this case.

Therefore, both parties were ordered to bear their own Costs.

ABOU SHAABAN V BALJAK, 2024 ABKB 125

(MARION J)

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

In this matter, the parties were unable to agree on Costs and, therefore, required a Costs decision from the Court. The Defendants sought Costs of the Appeal and argued that they should be entitled to enhanced Costs. They based their Costs position on Column 4 of Schedule C, Item 8(1) and relied on the language that states that for complex Chambers Applications, the Court may direct that Costs relating to an Appearance to argue before an Appeal Court apply, instead of the Costs in this Item. Thus, arguing that Items 19 and 20 of Schedule C should be applied.

In the Court's Decision, Justice Marion considered the general Costs principles. The Defendants did not provide any case authority to support that the Appeal should be treated as complex justifying Court of Appeal-type Costs as contemplated by the commentary in Item 8(1) of Schedule C. Justice Marion then turned to the common law and concluded that, generally speaking, Courts will only apply the Court of Appeal-level Costs from Items 19 and 20 of Schedule C where the Application is unusually lengthy or the underlying record or legal issues are unusually complex or costly. Therefore, in the matter at hand, the Court was not satisfied that the Appeal was anything other than a typical Special Application with its usual trappings and concluded that it was not appropriate to depart from Schedule C or to award Court of Appeal-level Costs as claimed by the successful Defendants. The Court did note that the Defendants' failure to provide their actual costs prevented the Court from assessing whether the enhanced Costs the Defendants claimed would provide them reasonable partial indemnification, full indemnification, or over-indemnification. In these circumstances, the Court drew an adverse inference against the Defendants in respect of what their actual solicitor-client Costs were in respect of the Appeal and found that the claimed enhanced Costs would likely provide unreasonable indemnification in the circumstances.

The Defendants were awarded Costs, plus GST, based on Item 8(1) of Schedule C. The Plaintiffs had been completely successful in the Costs Application and were entitled Costs of a contested Application. Although no Court attendance was necessary, the Court's direction required written submissions and, further, the Court found that the full amount of item 7(1) of Schedule C was appropriate to factor in the Defendants' failure to follow Justice Marion's clear direction as noted above.

DRAKE V LAMBERT, 2024 ABKB 170

(EAMON J)

Rule 10.31 (Court-Ordered Costs Award) and 10.33(Court Considerations in making Costs Award)

The Applicant and Respondent were parties to a formal property and separation agreement (the "Agreement") and each alleged breaches of the Agreement via Applications which were heard during a Special Chambers Application (the "Special Application"). Following the outcome of the Special Application, the Applicant sought Costs and interest, with Costs to be assessed on a solicitor and client basis under a provision of the Agreement which provided for such indemnity. The Respondent resisted the Application on the basis the Applicant was not entirely successful in her Application and breached a mediation requirement in the Agreement (the "Mediation Requirement"). The Court found that the Applicant was substantially successful in the Special Application but did breach the Mediation Requirement.

Among other things, the Court noted that: (1) a successful party to an Application, a proceeding, or an Action was entitled to a Costs Award against the unsuccessful party, subject to a variety of considerations including the Court's general discretion under Rule 10.31, but that entitlement may not always obtain; (2) a party need not be successful on each argument or claim to relief to qualify for this Costs entitlement; (3) where success is mixed to the extent that it cannot be said that one party was substantially successful, no order should be made as to costs and the parties will bear their own Costs, but where success is divided on multiple issues, an apportionment of Costs may be appropriate with reference to Rule 10.31(3)(c); (4) the exercise of discretion must be case-specific taking into account not only the degree of success by each party but also such factors as the conduct of the parties, the necessary length of the trial and the nature and significance of the evidence presented; (5) the Court will ordinarily hold the parties to the their bargain to pay Costs on a solicitor and client basis, but the Court has discretion to refuse to enforce that bargain based on litigation conduct, proportionality of the expense related to the amounts in issue, degree of success achieved, harshness, and other factors; and (6) Rule 10.33(2) permits the Court to consider a variety of factors including inefficient conduct of litigation, refusals to admit matters that ought to have been admitted, and misconduct of litigation.

The Court determined that the Applicant was entitled to recover Costs notwithstanding her breach of the Mediation Requirement because the Respondent's positions in the litigation were so unreasonable and contrary to the foundational principles in Part 1 of the Rules that it would be unjust and inappropriate to deprive the Applicant of Costs or absolve the Respondent from liability to pay Costs, or exercise its discretion to deprive the Applicant of her entitlement to receive them on a solicitor and client basis. More specifically, the Applicant's conduct in the circumstances did not disentitle her to Costs and the Respondent's litigation conduct was to be discouraged and deterred. The Court acknowledged that breaching the Mediation Requirement was an error in judgment but that it did not give rise to or excuse the unreasonable positions the Respondent had taken in the litigation.

The Court found that although taking positions without merit is not usually sufficient to justify an award of solicitor and client Costs, the appropriate question in the circumstances was, whether the Court should exercise its discretion relieve the Respondent of his bargain to pay them. The Court determined that the

Respondent did not present a meritorious defence to paying spousal support and had made bare allegations of dishonesty, fabrication of evidence and abuse of process against the Applicant, all of which were unfounded.

COALITION FOR JUSTICE AND HUMAN RIGHTS LTD V EDMONTON (CITY), 2024 ABKB 148

(MARTIN J)

Rules 10.32 (Costs in a Class Proceeding) and 10.33 (Court Consideration in Making Costs Award)

The Court had previously denied the Plaintiff's request to be granted public interest standing and granted the Defendant's application to strike the Action. This Decision dealt with the Costs arising from those proceedings.

Justin Martin observed that, at common law, there were previously four factors that the Court would consider when deciding whether to depart from the ordinary rule that a successful party is entitled to Costs in the context of public interest litigation. These four factors were later codified under Rule 10.32: (1) the public interest; (2) whether the Action involved a novel point of law; (3) whether the proceeding or Action was a test case; and (4) considerations related to access to justice.

In addition to these factors, Justice Martin noted that Rule 10.33 provides a list of factors that the Court may consider in making a Costs Award and further factors to consider in deciding whether to deny or vary an amount of Costs. Justice Martin held that the two sets of factors (under Rules 10.32 and 10.33) may both be considered in accordance with their relevance to the matter at hand—they are not mutually exclusive.

Here, the Court found that, while the Plaintiff lacked public interest standing, its Action did bring substantial attention to the underlying issues related to the plight of unhoused Edmontonians and unhoused persons throughout Canada. The Court found that the Action did not raise a novel point of law, but that it was a form of test case related to the legality of the Defendant's policy on dismantling encampments. With respect to access to justice, the Court recognized the difficulties unhoused persons face in bringing litigation forward and the importance of public interest litigation in addressing that difficulty.

In light of those factors, the Court awarded the Defendant $11,500 in Costs, which amounted to approximately half of the amount sought.

PLASTK FINANCIAL & REWARDS INC V DIGITAL COMMERCE BANK, 2024 ABKB 4

(LITTLE J)

Rule 10.33 (Court Considerations in Making Costs Award)

Digital Commerce Bank ("DCB") sought Costs following an Application by Plastk Financial & Rewards Inc. ("Plastk") to confirm and expand interim Injunctions was dismissed. DCB's position was that as the successful party, it was contractually entitled to full indemnity Costs in the amount of $256,602.08 but would accept $125,000, representing partial indemnity.

Justice Little agreed that DCB was wholly successful, but disagreed that DCB was entitled to full or partial indemnity Costs. Justice Little held that while the primary contract entitled DCB to Costs of enforcement for breaches of the contract, he was not prepared to decide that any breach was entirely one-sided.

Justice Little then considered whether Costs pursuant to *McAllister v Calgary (City)*, 2021 ABCA 25 ("*McAllister*") were appropriate, holding that: "... my read of *McAllister* is that the quantum of costs it sanctions are more appropriate in situations that involve 'prosecuting a claim from Statement of Claim to judgment in a protracted piece of litigation involving arguably novel liability' (para 3)."

The Court found that *McAllister* Costs were not appropriate because the case was not yet in the "substantive phase" as it involved multiple interlocutory applications to date.

Justice Little then considered the factors in Rule 10.33, holding that most of the factors "are applicable to completed actions" and that "[f]ew of those factors play into this interlocutory application which was but one in a series of related interlocutory applications." The Court ultimately granted DCB $25,000 in Costs, plus reasonable disbursements, recognizing that the Application was more than a routine Chambers Application, that DCB was required to expend considerable legal resources, and that Schedule C Costs would be inadequate.

PORTER V CONDOMINIUM CORPORATION NO. 042 5177, 2024 ABKB 140

(BELZIL J)

Rule 10.33 (Court Considerations in Making Costs Award)

The Court considered the appropriate Cost Award after dismissing the Applicant's Originating Application. The Applicant owned a condo and was in a dispute with condo corporation and its board of directors (the "Board") about whether certain rental agreements were prohibited short-term rentals as a result of the condo bylaws, and as a result of a permanent injunction that had been previously granted.

The Court considered the factors set out in Rule 10.33. Belzil J. declined to award solicitor

and own client costs after concluding that there were no exceptional circumstances such as litigation misconduct to justify such an award.

However, the Court also determined that the Applicant made serious and unsubstantiated allegations of impropriety against members of the Board. The Court noted that the Applicant could have avoided the dispute by consulting with the Board about whether his purported leases would be problematic, which he did not.

As a result, the Court costs in the amount of triple Column 2 of Schedule C.

BLENCH V CHENG, 2024 ABCA 73

(WATSON JA)

Rules 10.52 (Declaration of Civil Contempt) and 14.48 (Stay Pending Appeal)

The Applicant sought a Stay, pursuant to Rule 14.48, of Dunlop J.'s Order that the Applicant physically attend before him on February 29 to show cause why additional sanctions should not be imposed for failing to comply with the terms of a previous Order. Justice Watson began by noting that "... an application for a stay - or in effect an injunction in relation to something - are subject to the same test which is in the nature of an equitable remedy being granted by a court", citing the three-part test for a Stay from RJR-MacDonald Inc. v Canada (Attorney General), [1994] 1 SCR 311.

The Respondent argued that the lack of the Applicant's "clean hands" was a barrier to the Application. Justice Watson agreed that the clean hands doctrine falls within the general boundaries of the types of policies that are applied to equitable remedies. However, the doctrine was that not applicable to the specific issue of the Application, being whether the Applicant had to attend in person as ordered by Dunlop J.

Justice Watson found there was an "arguable question" on whether there was a serious issue to be tried, that being whether it was necessary to impose a personal attendance requirement on the Applicant. As to whether the irreparable harm branch of the test was met, Watson J.A. rejected the Applicant's Affidavit evidence that she was so destitute that she could not travel back to Canada from Thailand. Further, the Court noted, citing Rule 10.52, that the "purpose of civil contempt is to act in a regulatory manner and in a coercive manner to ensure compliance with the orders that are made by the court." Justice Watson commented that "[c]ivil contempt is used with caution in the sense that it is mainly to make sure that orders of the court are complied with." As such, "it is difficult for me to see irreparable harm in her favour."

On a balance of convenience, Justice Watson was not satisfied that the Court of Appeal should interfere with Dunlop J.'s Order, noting that that it was an Order that Dunlop J. could have changed on his own and that the involvement of the Court of Appeal of Alberta in any phase of a process decision, "especially on a small point mentioned here", would be damaging to the operation of the Alberta Court of King's Bench as it would be harmful to its ability to make authoritative Orders. In the result, the Application for a Stay was denied.

ZVP (RE), 2024 ABKB 150

(MALIK J)

Rule 11.29 (Dispensing with Service)

The Applicants applied to adopt a child. The Application included the biological mother's consent and an Affidavit of Reference, but it did not include the biological father's consent. The biological father had also not been personally served with Notice of the hearing as contemplated by section 64(1)(g) of the *Child, Youth and Family Enhancement Act*, RSA 2000 c C-12 (the "*Act*"). In the biological mother's Affidavit, she deposed that she had only met the child's biological father several times, that she did not know the biological father's last name, that she was sexually assaulted by the biological father the last time she saw him, and that she would not feel safe to contact the biological father and advise him of the child.

Justice Malik held that Notice of a Court Application is a fundamental civil right and should only be deviated from in exceptional circumstances. However, while the *Act* requires that the biological father be personally served, section 64(8) of the *Act*, which addresses alternative means of service, does not preclude the application of Rule 11.29 in exceptional circumstances. Justice Malik held that if the biological mother swore and filed a further Affidavit that satisfied the Rule 11.29 requirements, he would be prepared to issue an Order dispensing with service to allow the adoption process to move forward.

CNOOC PETROLEUM NORTH AMERICA ULC V ITP SA, 2024 ABCA 17

(STREKAF JA)

Rules 14.1 (Definitions) and 14.57 (Adding, Removing or Substituting Parties to an Appeal)

ITP SA ("ITP") applied to be named or added as a Respondent on an Appeal by the Plaintiff CNOOC Petroleum ("CNOOC") regarding disputed privilege claims advanced by CNOOC over certain records. During a prior Application, one of the Defendants contested some of CNOOC's privilege claims, and ITP actively participated in that Application by filing written materials and making submissions. Subsequently, CNOOC appealed the Order resulting from that Application but identified ITP's status in the Appeal as "not a party on Appeal."

Citing Rule 14.1(1)(m), which defines "Respondent" as a person named as a Respondent to an Appeal, Strekaf J.A. noted that ITP was not named by CNOOC and rejected ITP's submission to be confirmed as a party.

Strekaf J.A. then laid out the test for adding an Applicant as a Respondent under Rule 14.57: (i) whether the Applicant has a legal interest in the outcome of the proceedings; (ii) whether it is just and convenient to add the Applicant; and (iii) whether the Applicant's interests can be adequately protected only if it is granted party status.

Applying the above test, Strekaf J.A. held that ITP should be added as a Respondent. Strekaf

J.A. determined that ITP had a legal interest in the proceedings, brought this Application promptly, and were entitled to have their own counsel address the issues. As such, the Application was granted.

CARBONE V DAWES, 2024 ABCA 13

(STREKAF JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal a decision dismissing her Application to vary a Scheduling Order in respect of a Security for Costs Application filed by the Respondents. The Applicant commenced an Action for alleged wrongdoings in relation to a cosmetic surgery. The Respondents filed Security for Costs Applications. An Applications Judge granted a scheduling Order for the Security for Costs Applications, which was varied. The revised schedule required the Applicant to conduct cross-examination on Affidavits between September 14 and 22, and to file and serve all Affidavit evidence by September 29.

The Applicant did not receive the transcripts of the cross-examination before her Affidavits were due, and applied on September 28 for an extension. The Chambers Judge determined that the deadlines in the scheduling Order were peremptory on the Applicant, and she could have requested expedited transcripts. The Application was therefore dismissed, and the Applicant was required to file her Affidavit evidence the next day. The Applicant served unfiled copies of her Affidavit evidence on September 29, and filed copies on October 3. The Applicant sought to Appeal the Decision.

The Court of Appeal considered whether permission to Appeal was required, pursuant to Rule 14.5. Justice Strekaf noted that Rule 14.5 requires permission to Appeal any pre-Trial decision respecting adjournments, time periods, or time limits, or on Applications to vary an Order scheduling limitation steps. Strekaf J.A. determined that Rule 14.5 therefore applied, and permission to Appeal was required.

The Court stated that, to obtain permission to Appeal under Rule 14.5, the Applicant must establish: (1) a serious question of general importance; (2) a reasonable chance of success on Appeal; and (3) that the Appeal will not unduly hinder the progress of the Action or cause undue prejudice without any proportionate benefit.

On the first branch, a "serious question of general importance" was stated as a matter of policy, principle, or law that might have precedential value. The Court determined that the Applicant did not meet this part of the test, as the Applicant argued that Chambers Judge was not impartial and denied her procedural fairness. These were not serious questions of general importance, nor did they have a reasonable chance of success. The Application was dismissed.

LS V MK, 2024 ABCA 64

(ANTONIO JA)

Rule 14.5 (Appeals Only with Permission)

The Applicant sought permission to Appeal a Costs decision. Justice Antonio noted that since the proposed Appeal concerned Costs only, permission to Appeal was required pursuant to Rule 14.5 and the Applicant was required to establish the criteria set out in *Brill v Brill,* 2017 ABCA 235.

The Court held that the Application for permission to Appeal did not involve a question of general importance and the issues revolved around the specifics of the family-law case, which were fact sensitive. The Applicant argued that the Appeal raised important questions of finality and enforceability of Court Orders because the Chambers Judge varied an earlier Order which required each party to pay part of the Costs of an aborted reunification process. Justice Antonio rejected this argument, noting that the prior Order was not brought to the attention of the Chambers Judge. Ultimately, Antonio J.A. denied the Application for permission to Appeal.

XU V MA, 2024 ABCA 81

(FETH JA)

Rules 14.5 (Appeals Only with Permission), 14.16 (Filing the Appeal Record) and 14.88 (Cost Awards)

The Applicant applied for permission to Appeal a Decision of the Court which denied the Applicant's second Application to restore his Appeal after it was struck for failing to file the Appeal Record by a date set by the Court (the "Second Restoration Application"). The Applicant filed an Appeal of a Trial Decision which was struck for failing to file the Appeal Record by the deadline set out in Rule 14.16(3). The Applicant's first Application to restore the Appeal was allowed but the Applicant was directed to file his Appeal Record by a specified date, which the Applicant failed to meet, and the Appeal was struck for a second time.

The Applicant applied pursuant to Rule 14.5(1)(a) and Rule 14.5(2) for permission to Appeal the Second Restoration Application. The Court noted that: (1) its role under Rule 14.5(1)(a) is that of a gatekeeper; (2) permission to Appeal a Decision of single Judge of the Court of Appeal is to be granted rarely; and (3) an Applicant must show a compelling reason to require the Applicant and Respondent to reargue the issue, and for three Judges of the Court of Appeal to decide the issue.

The Court further noted that an Application for permission to Appeal is not a rehearing of the Applicant's Second Restoration Application, but rather an Applicant must demonstrate a reviewable and material issue of law worthy of review by a full panel of the Court which on the facts was required to arise from the Order of the Court denying the Second Restoration Application and not the original Trial Decision.

The Court noted jurisprudence which set that pursuant to Rule 14.5(2), the Applicant must

establish that the Order of the single Judge being reviewed: (1) raises a question of general importance which on its own deserves panel review; (2) rests on a reviewable and material issue of law worthy of panel review; (3) involves an unreasonable exercise of discretion which had a meaningful effect on the outcome of the decision and the outcome is worthy of panel review; or (d) rests on a palpable and overriding error of important facts affecting the Order made and the order is worthy of panel review (together the "Permission to Appeal Factors"). The Court additionally noted that other factors that may be considered include: whether there are conflicting decisions on the point; the standard of review that would be applied on the Appeal; and whether there are other good reasons why a full panel of the Court should review the Order under Appeal.

The Court determined that the Applicant's submission failed to demonstrate that the interests of justice would be served by allowing a further level of review, noting that the Applicant provided an inadequate explanation for the delay in the matter and his stated desire to Appeal the Trial decision alone, did not serve to meet the significant burden on him to establish that the Court's decision warranted a panel review. The Court also noted that the Applicant had failed to establish any of the Permission to Appeal Factors. The Court accordingly denied the Application and awarded the Respondent Costs pursuant to Rule 14.88.

ARDMORE PROPERTIES INC V STURGEON SCHOOL DIVISION NO 24, 2024 ABCA 88

(ANTONIO, FEEHAN, AND FAGNAN JJA)

Rule 14.5 (Appeals Only with Permission)

Significant Costs were awarded against the Plaintiff after its claim was dismissed as limitation barred. The Plaintiff filed two Appeals, one regarding the substantive issues between the parties, and the second regarding the Costs Award. Eventually, the Plaintiff discontinued the substantive Appeal but pursued the Costs Appeal.

Rule 14.5(1)(e) makes it clear that a Costs Decision cannot be appealed to the Court of Appeal without permission. Costs Decisions are highly discretionary and permission to Appeal is granted sparingly. The purpose of the Rule is to "bring finality to costs orders and to conserve this Court's time by screening out hopeless appeals on the issue of costs." Therefore, parties face a high threshold in seeking permission to Appeal Costs decisions, and they are not set aside unless they are plainly wrong or the Judge below made an error in principle.

The test for permission to Appeal a Costs Award requires: (a) a good arguable case having sufficient merit to warrant scrutiny by a panel of the Court; (b) issues of importance to the parties and in general; (c) that the Costs Appeal has practical utility; and (d) that no delay in the proceeding will be caused by the Costs Appeal.

The Court found that Plaintiff failed to establish that, on its facts, the Costs Decision raised an issue of general or public importance. Questions of general or public importance involve matters of "policy, principle or law that might have precedential value". None were present on the facts. Accordingly, the Appeal was dismissed.

BEHRISCH V BEHRISCH, 2024 ABCA 101

(FETH JA)

Rules 14.5 (Appeal Only with Permission) and 14.37 (Single Appeal Judges)

The Application was regarding permission to appeal a Consent Order granted during an early intervention case conference and to extend the time for filing the Appeal. This case involved a family law matter between a husband and wife with five children.

The Court reviewed Rule 14.5(1) and Rule 14.37. According to Rule 14.5(1)(d), an Appeal of a Consent Order requires permission to appeal. The Applicant must show that the Appeal raises an important legal question, has a reasonable chance of success, and any delay will not hinder the progress of the case or cause prejudice. Rule 14.37(2) allows for an extension of time to file an Appeal Application. The Court considered the factors outlined in *Wandler v Crandall*, 2017 ABCA 115, and concluded that an extension was justified in this case.

The Applicant's health issues and the timing of receiving the Consent Order significantly affected her ability to file the Appeal on time. The Court found that granting an extension is in the interest of justice. The Application also met the requirements for permission to appeal under Rule 14.5(1). The Applicant's request for an extension of time to file her permission to Appeal the Application was granted, along with the permission to Appeal the Consent Order.

MARSHALL V LEE, 2024 ABCA 86

(GROSSE JA)

Rules 14.14 (Fast Track Appeals), 14.16 (Filing the Appeal Record), 14.55 (Responsibility of Parties to Manage an Appeal) and 14.65 (Restoring Appeals)

The Applicant sought to restore her Appeal of a Decision of the Court of King's Bench that addressed parenting and child support (the "Application"). Grosse J.A. granted the Application and extended time for the restoration of the Appeal to the date of the Order.

The Applicant filed her Notice of Appeal on July 21, 2023, without the assistance of counsel. The Appeal was a fast-track Appeal. As a result, the Applicant had one month to file her Appeal Record pursuant to Rules 14.14(2) and 14.16(3). The Applicant submitted her Appeal Record on August 18, 2023, but it was rejected on the basis that she did not upload a separate copy of the transcripts. On the same day, the Applicant took steps to rectify the error and submitted a separate copy of the transcripts. On August 21, 2023, the Applicant served counsel for the Respondent with unfiled copies of the Appeal Record and transcripts.

On August 22, 2023, the registry rejected the Applicant's transcripts because it was not apparent that the submission was copied to opposing counsel. On August 22, 2023, the Applicant's Appeal was struck because the Appeal Record was not filed within the time mandated by the Rules (the "Struck Notice"). Upon receiving the Struck Notice, the Applicant

retained counsel who help her prepare and file the Application three days after receiving the Struck Notice.

The Respondent argued that the Appeal must be deemed abandoned pursuant to Rule 14.65(3)(b) because more than three months had passed since the Appeal was struck and the Application had not yet been granted. In response, Grosse J.A. commented that when an Appeal is struck, it may be restored with the filed written consent of the parties, which did not happen in this case.

Grosse J.A. further commented that parties and counsel should be mindful of Rule 14.55(1), which provides that parties to an Appeal are responsible for managing the Appeal and for planning its resolution "in a timely and cost-effective way". Grosse J.A. further cited *1664694 Alberta Ltd v Beljan Development Management,* 2022 ABCA 41 for the proposition that responsible management of an Appeal includes reacting responsibly to non-prejudicial slips.

BRADY V VAN DEURZEN, 2024 ABCA 66

(ANTONIO JA)

Rule 14.16 (Filing the Appeal Record – Standard Appeals)

The Applicant applied to restore his Appeal, which was struck due his failure to file an Appeal Record in accordance with Rule 14.16(3)(a).

The Court noted that the onus was on the Applicant to demonstrate that restoring the Appeal was in the interests of justice considering the factors set out in *Shenner v Tornqvist*, 2023 ABCA 240. Antonio JA determined that Applicant's evidence did not assist in determining whether the Appeal could succeed. The Court noted that the Applicant did not apply to restore his Appeal for two months and determined that restoring the Appeal would prejudice the Respondents.

The Court denied the Applicant's Application and awarded enhanced costs to the Respondents.

OKEKE V CHEN, 2024 ABCA 28

(PENTELECHUK, HO, AND WOOLLEY JJA)

Rule 14.32 (Oral Argument)

The Plaintiff appealed an Order denying his Application to strike the Statement of Defence and to enter Judgment against the Defendant.

The Plaintiff sought a virtual hearing of the Appeal, which was denied. The Plaintiff indicated on his Notice of Appeal that the matter

could be dealt with in writing. As a result, the Appeal was considered in writing, and without oral argument, pursuant to Rule 14.32(2).

The Plaintiff sought to strike the Statement of Defence as disclosing no reasonable defence, and that the Statement of Defence was frivolous, irrelevant, improper, and constituted an abuse of process. The Application to strike was dismissed and the lower Court had ordered the Plaintiff to provide Security for Costs which was previously ordered. The Chambers Judge referred to the decision for Security for Costs, as it suggested that there was some merit to the Statement of Defence. He also noted that there were factual and legal matters not suitable for an Application to strike.

On Appeal, the Plaintiff argued that the Chambers Judge erred in relying on the Security for Costs Decision to determine whether there was merit to the defence. The Court of Appeal noted that Decision not to strike a Statement of Defence is discretionary and entitled to deference. There was no error identified that would warrant appellate intervention. Therefore, the Appeal was dismissed.

ANAND V ANAND, 2024 ABCA 70

(ANTONIO JA)

Rule 14.48 (Stay Pending Appeal)

The Applicant applied for a Stay pending Appeal of an Order releasing $223,726.50 to the Respondent in respect of the net proceeds from the sale of their family home (the "Underlying Order") and, in the alternative, sought an Order setting the disputed amount of $83,769.23 (the "Disputed Amount") in trust, pending the outcome of the Appeal. The Underlying Order was granted in response to an Application to interpret a Consent Order that determined how the proceeds of the sale of the family home would be distributed between the parties (the "Consent Order").

The Court noted that the exercise of the Court's discretion to grant a Stay pending Appeal pursuant to Rule 14.48(b) is guided by a three-part test, which requires that (1) there is a serious question to be tried; (2) there will be irreparable harm if the Stay is not granted; and (3) the balance of convenience favours granting the Stay.

The Court set out that an Appeal presents a serious issue if it is not frivolous or vexatious and determined that the Applicant's arguments asserting that the Chambers Judge erred in interpreting how the Consent Order should be applied had sufficient merit to satisfy the first element of the test.

With respect to the second element of the test, the Court noted Court reluctancy to grant Stays for money judgments and set out that the Applicant needed to establish a reasonable prospect that the Respondent would not be able to repay any amount ordered on Appeal. The Court concluded that there was a reasonable prospect that the Respondent would not be able to repay any amount ordered on Appeal.

With respect to the third element of the test, the Court rejected the Applicant's assertion that because the Respondent earned a for-

midable wage and would, therefore, not be inconvenienced by an Order restraining the entire amount of the sale proceeds. The Court, in any event, found that that the balance of convenience was satisfied by granting the alternate relief sought by the Applicant.

The Court accordingly granted the Application in part by determining that the Disputed Amount was to be held in trust pending the outcome of the Appeal, and interest in respect of the restrained amount, was to be accounted for, according to the terms of the Consent Order.

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(KHULLAR, ROWBOTHAM, AND DE WIT JJA)

Rule 14.88 (Cost Awards)

The Respondent was successful on two Appeals. The first Appeal was in relation to an Application for advice and direction in an Estate Matter. The second Appeal was of the Costs Award. The Respondent applied to have costs of the Appeals settled but the Application raised several issues.

First, Rule 14.88(3) states that, unless otherwise ordered, Costs of an Appeal will be determined on the same scale that applied to the Order or Judgment in the Court below. While Costs were awarded in the Court below at two times Schedule C, Column 5, the Court of Appeal noted that automatic doubling of Costs should not be the norm. For example, in the Court below there were findings of misconduct. However, there was no misconduct by the Appellants in relation to the Appeals.

Second, Costs were awarded in the Court below under Column 5 because of the value of the Estate. Accordingly, Column 5 was the proper column for the Appeal on the merits. However, the appropriate column for the Costs Appeal was Column 1 since the amount of Costs awarded in the Court below fell within that column.

Third, the Appellants argued for only one set of Costs. The Court of Appeal disagreed and noted that it was the Appellants who commenced two Appeals. Since factums were necessary on both Appeals, Costs were awarded in relation to both.

Fourth, at the end of the oral hearing, the panel requested supplemental submissions on a point of law. The Appellants proposed that Item 22 of Schedule C was the relevant item, as it dealt with appearances on contested Applications before the Appeal Court, including brief. The Respondent proposed Item 12 of Schedule C as the relevant item, as it dealt with written argument at the request of the Trial Judge. The Court of Appeal was persuaded that Item 22 was the proper item for both the supplemental submissions and the appeal Costs submissions.

Lastly, the Respondent had made two *Calderbank* offers. The first offer after the factums in the merits Appeal were filed but before factums in the Costs Appeal were filed. The second offer, after the release of Judgment. The Court of Appeal found the first *Calderbank* offer to be a genuine offer which was bested. The second *Calderbank* offer had not been bested as it sought quadruple Costs. Therefore, the Respondent was entitled to double Costs from the date of the first *Calderbank* offer.