

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Janssen Inc. v. British Columbia*,
2026 BCCA 308

Date: 20260722
Docket: CA51405

Between:

Janssen Inc. and Johnson & Johnson

Appellants/Applicants
(Defendants)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Plaintiff)

And

**Apotex Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company,
Ethypharm Inc., Noramco Inc., Pharmascience Inc., Joddes Limited,
Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Purdue Pharma L.P.,
The Purdue Frederick Company Inc., Ranbaxy Pharmaceuticals Canada Inc.,
Sun Pharmaceutical Industries Ltd., Sanis Health Inc., Sandoz Canada Inc.,
Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited,
Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd.,
Actavis Pharma Company, Valeant Canada LP / Valeant Canada S.E.C.,
Bausch Health Companies Inc., Kohl & Frisch Limited, McKesson Corporation,
McKesson Canada Corporation, Nu-Quest Distribution Inc., Procurity Inc.,
Shoppers Drug Mart Inc., uniPHARM Wholesale Drugs Ltd., and
LPG Inventory Solutions**

Respondents
(Defendants)

Before: The Honourable Justice Winteringham
The Honourable Mr. Justice Riley
The Honourable Justice Francis

On an application to vary: An order of the Court of Appeal for British Columbia,
dated May 27, 2026 (*Janssen Inc. v. British Columbia*, 2026 BCCA 233,
Vancouver Docket CA51405).

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Place and Date of Hearing:

Vancouver, British Columbia
June 25, 2026

Place and Date of Judgment:

Vancouver, British Columbia
July 22, 2026

Written Reasons by:

The Honourable Justice Francis

Concurred in by:

The Honourable Justice Winteringham

The Honourable Mr. Justice Riley

Summary:

The applicants, Janssen Inc. and Johnson & Johnson, apply to cancel the order of a justice quashing their appeal. The applicants allege the justice erred in interpreting s. 36(1) of the Class Proceedings Act [CPA] to provide no right of appeal from an order under s. 17(2) of the CPA. They also argue the justice erred in following the obiter comments in Nippon Yusen Kabushiki Kaisha v. Ewert, 2023 BCCA 142 [Ewert].

Held: Application dismissed. The justice made no legal error in finding the obiter in Ewert was authoritative and following it. There is no basis for this Court to consider afresh the statutory interpretation issues raised by the appellant.

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Reasons for Judgment of the Honourable Justice Francis:**I. INTRODUCTION**

[1] The applicants, Janssen Inc. and Johnson & Johnson (collectively, “Janssen”), apply to cancel the order of a justice in chambers quashing their notice of appeal.

[2] The application is brought in the context of a class proceeding commenced by the Province of British Columbia (the “Province”) on behalf of itself and the federal, provincial, and territorial governments to recover health care, pharmaceutical, and treatment costs with respect to prescription opioids from 1996 onwards. The Province claims that the wrongful conduct of the pharmaceutical manufacturers, which include Janssen, caused or contributed to the opioid epidemic. The action was certified in January 2025 and the defendants’ appeal from the certification decision was dismissed in reasons indexed as *Noramco LLC v. British Columbia*, 2026 BCCA 272.

[3] In October 2025, three groups of defendants brought document production applications, which were heard over five days in chambers. Janssen was the only defendant to seek document discovery from class members pursuant to s. 17(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA].

[4] Justice Ross dismissed Janssen’s application for leave to obtain documentary discovery from class members. He also dismissed the applications brought by the other defendants. His reasons are indexed as *British Columbia v. Apotex Inc.*, 2026 BCSC 209.

[5] Four defendants appealed from the judge’s decision. Three of the defendants sought leave to appeal, which Justice Butler granted in reasons indexed as *Sanis Health Inc. v. British Columbia*, 2026 BCCA 234. Janssen declined to apply for leave to appeal, asserting that it had an appeal as of right from the order dismissing its application under s. 17(2) of the CPA. The Province applied to quash Janssen’s appeal. In reasons indexed as *Janssen Inc. v. British Columbia*, 2026 BCCA 233,

Butler J.A. quashed the appeal. He found, on a proper interpretation of the interplay between s. 13 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [CA Act] and s. 36(1) of the CPA, Janssen has no right of appeal from an order made under s. 17(2) of the CPA. He concluded Janssen's notice of appeal was a nullity.

[6] Janssen now applies to this Court, pursuant to s. 29 of the CA Act, to cancel the order quashing its appeal. They argue that Butler J.A. erred in law in concluding s. 36(1) of the CPA is a bar to certain appeals.

[7] For reasons that follow, I would dismiss Janssen's application.

II. ISSUES AND POSITIONS OF THE PARTIES

[8] Janssen alleges that Butler J.A. made errors of law in his interpretation of s. 36(1) of the CPA. They allege that he erred by interpreting s. 36(1) of the CPA based on subsequent unrelated amendments to the CA Act, by failing to apply the modern rule of statutory interpretation to s. 36(1), and by interpreting s. 36(1) based on the discretionary nature of the order under appeal. They submit, on a correct interpretation of the statutes at play, they have an appeal as of right from the order declining to give them leave to obtain discovery from class members under s. 17(2) of the CPA.

[9] The Province submits that the central question in this application is not whether Butler J.A. was correct in law in his conclusion that the combined effect of s. 36(1) of the CPA and s. 13(3) of the CA Act bars an appeal from an order under s. 17(2) of the CPA. Rather, they say the primary issue is whether he made a legal error when he found the *obiter dicta* in *Nippon Yusen Kabushiki Kaisha v. Ewert*, 2023 BCCA 142, leave to appeal to SCC ref'd, 40763 (21 December 2023) [*Ewert*], to be authoritative and dispositive of this issue. In *Ewert*, this Court reasoned that s. 36(1) of the CPA only grants a right of appeal from orders enumerated in that section and it restricts appeal rights from other orders made under the CPA.

[10] In characterizing the legal issue as a broad question of statutory interpretation, Janssen asks this division to interpret the statutory framework afresh.

In my view, Janssen's framing of the legal issue is unhelpful for two reasons. First, even though this is a review application under s. 29, Janssen treats it as a rehearing of the application to quash, raising all the same arguments that were made and disposed of by Butler J.A. Second, by characterizing the primary issue as one of statutory interpretation rather than *stare decisis*, Janssen avoids the central reason their appeal was quashed: the outcome was informed by prior authoritative jurisprudence of this Court.

[11] In my view, the central question on this application is whether Butler J.A. erred when he held that the *obiter* in *Ewert* was authoritative and followed it. For reasons discussed below, I find he made no error in doing so. There is no basis for this division to consider the statutory interpretation anew because there is authority in earlier jurisprudence of this Court to assist with the proper interpretation of the interplay between the *CA Act* and the *CPA* with respect to appeals to this Court.

[12] Before discussing the dispositive issue, it is helpful to set out the statutory framework governing appeals under the *CPA*.

III. LEGISLATIVE FRAMEWORK

[13] This Court, as a court of appeal, is a statutory court and has only the jurisdiction and rights of appeal conferred by statute.

[14] Section 13 of the *CA Act* is the starting point for determining whether this Court has jurisdiction to hear an appeal. This provision allows for appeals from orders of the Supreme Court or its judges, with certain exceptions:

Appellate jurisdiction

13 (1) An appeal may be brought to the court

(a) from an order of

(i) the Supreme Court, or

(ii) a judge of the Supreme Court, or

(b) in any matter for which jurisdiction is given to the court under an enactment of British Columbia or Canada.

(2) Despite subsection (1), an appeal may not be brought to the court

- (a) from a limited appeal order, unless leave to appeal is granted by a justice, or
- (b) from an order of an associate judge of the Supreme Court.

(3) If another enactment of British Columbia or Canada provides that there is no appeal or a limited right of appeal from an order or matter referred to in subsection (1), that enactment prevails.

[...]

[Emphasis added.]

[15] Section 36(1) of the *CPA* addresses appeals from certain orders made under that statute. It provides:

Appeals

36 (1) Any party may appeal to the Court of Appeal from

- (a) an order certifying or refusing to certify a proceeding as a class proceeding,
- (b) an order decertifying a proceeding,
- (c) a judgment on common issues, and
- (d) an order under Division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

[16] The order under appeal in this case was made under s. 17(2) of the *CPA*, which enables a defendant, with leave of the court, to discover other class members after the discovery of the representative plaintiff. An order under s. 17(2) is not expressly enumerated under s. 36(1) as an order from which a party may appeal to the Court of Appeal.

IV. SHOULD THE CHAMBERS ORDER BE CANCELLED?

A. Standard of Review

[17] The standard of review on an application to cancel the order of a single judge is highly deferential. As this Court recently stated in *Bryzzhev v. University of British Columbia*, 2026 BCCA 213 at para. 13:

... The review is not to be treated as a re-hearing. For a review division to interfere with the order of a justice in chambers, an applicant must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts: *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5–7.

[18] On this application, the dispositive issue is whether the chambers judge erred in determining that *Ewert* was authoritative and should be followed. This division will only interfere with that determination if we find that it was wrong in law or principle.

B. The Chambers Judge's Reasons

[19] On the quash application, the Province argued the Court has no jurisdiction to hear appeals from orders made under s. 17(2) of the *CPA* because s. 36(1) of the *CPA* does not expressly allow for appeals from such orders. Janssen argued that nothing in s. 36 limited its right to appeal an order made under s. 17. They suggested the Court should disregard the *obiter* in *Ewert* on this point.

[20] Justice Butler found the *obiter* in *Ewert* was authoritative and dispositive of the issue. In his view, *Ewert* set out the proper approach to appeal rights for orders made in class proceedings after certification, namely that “if the order is specifically addressed in the [CPA], but is not listed in s. 36(1) of the *CPA*, then no appeal will lie under s. 13 of the [CA Act]”: *Ewert* at para. 38. He found *Ewert* reflected a considered reasoning of this Court on an issue that had been directly raised and fully argued. The *obiter* in *Ewert* formed part of the “wider circle of analysis” that was “obviously intended for guidance” on the Court’s jurisdiction with respect to appeals from orders made under the *CPA*: *Janssen Inc.* at para. 17, citing *R. v. Henry*, 2005 SCC 76 at para. 57; *R. v. Dingwall*, 2023 BCCA 16 at para. 31.

[21] Applying the *Ewert* framework, Butler J.A. found there was no right of appeal from an order made under s. 17(2):

[29] Obtaining discovery from class members other than representative plaintiffs is relief specifically addressed in the *CPA*, unique to class actions, and only available following certification. It is not a matter listed in s. 36(1). Accordingly, the order is not appealable as of right.

[22] Further, Butler J.A. accepted the Province’s argument that it defied logic for a judge’s discretionary decision on whether to grant leave to discover other class members would be appealable as of right to this Court. He noted that discovery orders under Part 7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SC Rules], are limited appeal orders for which leave is required.

[23] Justice Butler rejected Janssen’s argument that properly interpreted, s. 36 permits appeals from certain orders under the *CPA* without restricting the right to appeal from other orders made under the *CPA*. He held that this would be inconsistent with the text of s. 13(3) which “clearly limits appellate jurisdiction when another enactment ... provides for a limited right of appeal”: *Janssen Inc.* at para. 28. It would also be inconsistent with *Ewert*, where “this Court reasoned that s. 36(1) must be interpreted in a way that would give it legal effect when read in conjunction with s. 13” of the *CA Act*: *Janssen Inc.* at para. 27. Thus, he found s. 36 should be interpreted to limit the right to appeal from orders made under the *CPA* to those orders and circumstances provided for in ss. 36(1)–(4).

C. Jurisprudence on the Interpretation of s. 36 of the *CPA*

[24] *Ewert* is the most recent and express statement from this Court on the interplay of s. 13 of the *CA Act* and s. 36 of the *CPA*, but it is not the only authority on this point. *Ewert* reflected a chain of analysis that has developed over a number of prior decisions of this Court. It is worth discussing the prior jurisprudence and how it informed the reasoning in *Ewert*.

[25] In *Coburn and Watson’s Metropolitan Home v. Bank of Montreal*, 2018 BCCA 432 [*Coburn*], this Court heard and dismissed an appeal from an order, made under s. 17 of the *CPA*, granting the defendants leave to discover class members in addition to the representative plaintiff. Justice Tysoe, writing for this Court, expressed some concern about the Court’s jurisdiction to entertain such an appeal, but he determined the issue did not need to be decided in the circumstances:

[13] Prior to the hearing of this appeal, the Court expressed concern about its authority to entertain the appeal and requested counsel to be in a position to address the concern. We have reservations about the Court’s jurisdiction as a result of the fact that s. 36(1) of the *Class Proceedings Act* does not list an order under s. 17 as one of the orders that can be appealed to this Court. Although s. 36 does not explicitly prohibit the Court from entertaining appeals of other orders, it could be interpreted as an implicit prohibition. However, the defendants do not take the position that the Court lacks jurisdiction to deal with this appeal.

[14] It is my view that the issue of jurisdiction need not be decided because, having heard submissions on the merits of the appeal, it is my conclusion that the appeal should be dismissed in any event.

[Emphasis added.]

[26] A year later, the issue arose again in another appeal from the same class action, but in the context of a chambers application before Justice Newbury: *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 35 at paras. 8–9 (Chambers) [*Coburn #2*]. The representative plaintiff had entered a settlement agreement with several of the defendants. Two class members sought to appeal the order approving that settlement. In chambers, Newbury J.A. was asked to consider whether a right of appeal exists from a settlement order made under the CPA and whether a member of the plaintiff class could bring such an appeal in this province.

[27] Justice Newbury referred the issues to a division of the Court for determination, but in doing so, she made the following comments:

[32] Leaving aside the procedural questions for the moment, I will say that I would grant leave to appeal in this case if leave were necessary. No one contends, however, that an appeal from an order approving the settlement of a class action is a "limited appeal order" within the meaning of the Rules; thus no leave is necessary, assuming that a right to appeal a settlement order exists and that such an appeal may be brought by a member of a plaintiff class.

[33] I am inclined also to the view that in British Columbia, the fact that an appeal from a settlement order is not listed in s. 36 of the CPA may not be fatal to such an appeal. *Samos and Harrington*, the only authorities directly on point (although they were decided prior to the amendment of s. 7 of the *Court of Appeal Act*) suggest that contrary to the ruling of the Ontario Court of Appeal in *Dabbs*, s. 36 may be 'supplemented' by a more general right of appeal provided by s. 6(1)(a) of the *Court of Appeal Act*.

[Emphasis added.]

[28] A division of this Court then quashed the appeal, finding it did not have the jurisdiction to hear an appeal by a class member from an order approving a settlement: *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308, leave to appeal to SCC ref'd, 38872, 38873 (26 March 2020) [*Coburn #3*]. Justice Harris, writing for this Court, confined the focus of the reasoning

on the question raised on appeal: whether a class member has a statutory right under the *CPA* or the *CA Act* to appeal an order approving a settlement: *Coburn #3* at para. 26. He concluded that class members had no right of appeal under s. 6 (now s. 13) of the *CA Act* because it confers rights on parties, and class members are not parties.

[29] Even though the issue before this Court in *Coburn #3* related to the appeal rights of class members, the Court's reasoning on this issue is instructive with respect to the interpretation of s. 36 of the *CPA*:

[23] I infer that in addressing appeal rights and conferring them on parties, the Legislature intended to limit the appeal rights of class members except as provided in s. 36. The appeal rights of class members are found in s. 36(2)–(4). Those subsections do not provide a right for a class member to appeal an order approving a settlement or seek leave to act as the representative plaintiff in relation to such an order. Rather, those subsections provide a right to class members to apply for leave to act as the representative plaintiff in relation to appeals under s. 36(1) that the representative plaintiff has not pursued or has abandoned, or they provide a right to class members to apply for leave to appeal orders determining or dismissing individual claims. I note that neither Home Depot nor Wal-Mart has applied to act as a representative plaintiff.

[24] In my opinion, the Legislature clearly turned its mind to the rights of class members to appeal orders in class proceedings. In doing so, it evinced an intention to render general appeal rights, found in s. 6 of the *CAA*, subject to the limited rights of appeal found in the *CPA*, which take precedence over the *CAA*. Given the precise language in s. 36 of the *CPA*, I can only infer that the Legislature intended to exclude a right of appeal for class members in relation to orders approving settlement. If such a right existed under s. 6 of the *CAA*, s. 36 would be redundant and its intention frustrated. This conclusion is reinforced, in my view, by the placement of s. 36 in the Division governing settlement of class actions reflecting an intention of the Legislature to regulate rights of appeal in certain matters specific to class proceedings.

[25] Had the Legislature intended to confer appeal rights on class members in respect of settlement orders, I would expect to see a provision to that effect. Indeed, since parties to a settlement reach an agreement between themselves and seek court approval of their agreement, it would be peculiar for them to seek to appeal an order endorsing what they agreed to. An objecting class member is in a different position and would have an “interest” in an appeal not shared by the parties. Given the care the Legislature has taken in crafting the balance between the rights and protections afforded to parties and class members in class proceedings, this issue is one that the Legislature must have had in mind. By failing to provide class members with appeal rights, it may be inferred that such appeal rights were intended to be excluded. It was not necessary for the Legislature to include language in

the CPA expressly excluding a class member's right to appeal a settlement approval order.

[26] I reiterate that my reasoning is intended only to address the specific issue before the Court. I express no opinion on whether a party may nevertheless appeal an order approving or rejecting a settlement. It may be, for example, that a party in a class proceeding remains entitled by virtue of s. 6 of the CAA to appeal an order rejecting a settlement. That question should await a proper case. Furthermore, I am not holding that s. 36 of the CPA is a complete code exhaustively defining appeal rights in class proceedings. Many orders are made in a class proceeding that are of a type made in many other kinds of litigation and which are, by their nature, not unique to or particularly characteristic of a class proceedings. My reasoning here is confined to the question on appeal: whether a class member has a statutory right under the CPA or the CAA to appeal an order approving a settlement.

[Emphasis added.]

[30] While *Coburn #3* does not pronounce more broadly on appeal rights under the CPA, the analysis in the passages above reflects a reasoned approach to determining when a party has a right of appeal from an order made in a class proceeding. Justice Harris specifically discussed the intent of the Legislature and the interplay between the CPA and CA Act. He declined to opine generally on the available appeal avenues or jurisdiction in other scenarios, noting it should await a proper case. Later, this Court expanded on this point in *Strohmaier v. K.S.*, 2019 BCCA 388.

[31] *Strohmaier* was an appeal from an order of a case management judge granting carriage of a proposed class proceeding to a particular law firm and representative plaintiffs. A preliminary question was whether this Court had the jurisdiction to hear the appeal. Justice Fisher, writing for this Court, cited *Coburn #3* for the proposition that in addressing appeal rights and conferring them on parties, the Legislature intended to limit the appeal rights of class members except as provided in s. 36: *Strohmaier* at para. 31. After discussing Ontario authorities holding that the general appeal legislation should govern appeals from orders not expressly addressed in Ontario's *Class Proceedings Act*, this Court held:

[34] The same applies in British Columbia. In my view, s. 36(1) of the Class Proceedings Act addresses appeal rights only in respect of specified orders made after certification has been either granted or refused. It

does not restrict appeal rights in respect of orders not specifically addressed in the statute, particularly orders made prior to certification—many that are the type made in other kinds of litigation.

[35] As Skolrood J. noted, the *Class Proceedings Act* does not deal expressly with carriage motions, but the courts have addressed the issue on numerous occasions and have provided a body of jurisprudence to guide the analysis. The jurisdiction of the Supreme Court to entertain a carriage motion stems in part from s. 13 of the *Class Proceedings Act*, which gives the court discretion to stay “any proceeding related to the class proceeding on the terms the court considers appropriate”. It also stems from the Supreme Court’s broad jurisdiction under the *Supreme Court Civil Rules* to make orders as to the conduct of civil proceedings, as well as s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 which mandates the avoidance of a multiplicity of proceedings: see *Nelson v. Merck*, 2006 BCSC 1549 at para. 29.

[36] I agree with the parties that the appellate jurisprudence reflects this broad jurisdiction. Various orders, including those from carriage motions, have been addressed on appeal: see, for example *Richard v. British Columbia*, 2004 BCCA 337 (carriage motion); *Dahl v. Royal Bank of Canada*, 2006 BCCA 369 and *Unlu v. Air Canada*, 2013 BCCA 112 (summary trial); *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 (application to strike pleadings). Many of these orders are not specific to class proceedings.

[Emphasis added.]

[32] This brings us to *Ewert*, which was an appeal from an order dismissing the defendants’ application to amend the order certifying a class action against them in British Columbia, to consolidate it with similar proceedings in Quebec and Ontario. The respondent applied to quash the appeal on the basis that leave to appeal was required but not sought.

[33] Justice Harris, writing for this Court in *Ewert*, found that an order granting or refusing an application to amend a certification order under s. 8 of the *CPA* could be appealed pursuant to s. 36(1)(a) of the *CPA* because an order dismissing a proposed amendment to a certification order could be interpreted, for the purposes of s. 36 appeal rights, as an order refusing to certify a proceeding on different terms. As such, s. 36(1)(a) of the *CPA* conferred a right of appeal on the appellants: *Ewert* at para. 33.

[34] Because this Court found a jurisdictional basis for the appeal, there was no need to consider the broader question of the effect of s. 36(1) of the *CPA* on the Court's general jurisdiction. Justice Harris nevertheless offered the following:

What is the effect of s. 36(1) of the *CPA*?

[36] While what I have said is sufficient to dispose of the application to quash for lack of jurisdiction, it is worthwhile to say something more about the effect of s. 36(1) of the *CPA*. Section 36(1) must have some legal effect when read in light of s. 13 of the *CAA*. If any order made by a Supreme Court judge under the *CPA* was appealable under s. 13, the section would be otiose.

[37] This Court had the opportunity to consider this issue in *Strohmaier v. K.S.*, 2019 BCCA 388 [*Strohmaier*]. There, the Court, in connection with whether a carriage order could be appealed, observed at para. 34:

The same applies in British Columbia. In my view, s. 36(1) of the *Class Proceedings Act* addresses appeal rights only in respect of specified orders made after certification has been either granted or refused. **It does not restrict appeal rights in respect of orders not specifically addressed in the statute**, particularly orders made prior to certification—many that are the type made in other kinds of litigation.

[Bold emphasis added by Harris J.A. in *Ewert*.]

[38] From this, I take it that authority in this Court supports the view that if the order is specifically addressed in the statute, but is not listed in s. 36(1) of the *CPA*, then no appeal will lie under s. 13 of the *CAA*. On the other hand, if an order made in a class proceeding is not specifically addressed, then an appeal will lie under s. 13 of the *CAA*. As the court noted in *Strohmaier*, many of these orders are of a type made in other litigation. Finally, if the type of order is listed in s. 36(1) of the *CPA*, the order is appealable.

[Emphasis added.]

D. *Stare Decisis*

[35] Janssen argues that Butler J.A. should not have followed *Ewert* because *obiter* from another division of this Court is neither binding nor authoritative. In any case, they say that *Ewert* is wrong and this Court should not follow it.

[36] This gives rise to the primary issue in this application: whether it was a legal error for Butler J.A. to find that *Ewert* was authoritative and to follow it. To answer this question, it is necessary to consider two issues: 1) whether the comments in *Ewert*, being *obiter*, have authoritative force; and 2) whether the principles of horizontal *stare decisis* applied such that *Ewert* was authoritative on the issue.

1. *Ratio v. Obiter*

[37] Not every statement in a judgment will be binding. It is clear that lower courts must follow the dispositive *ratio decidendi* of higher court cases. It is less clear to what extent *obiter* comments must also be followed. In *Henry*, the Supreme Court of Canada articulated a modern approach to *stare decisis* in which the Court rejected a “strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which ... may safely be ignored:” at para. 52. Equally, the Court cautioned against an approach, an extension of the “*Sellars* principle”, in which every statement of a Supreme Court of Canada majority, no matter how incidental, is binding: *Henry* at paras. 55–56.

[38] In the face of these two contrary approaches to *obiter*, Justice Binnie noted:

57 The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

[Emphasis added.]

[39] In this case, Butler J.A. considered the *Henry* framework and found that the *obiter* comments in *Ewert* were “obviously intended for guidance” and therefore should be accepted as authoritative: *Janssen Inc.* at para. 17.

[40] I agree. The division in *Ewert*, which also included Butler J.A., sought submissions on the issue of this Court’s jurisdiction to hear appeals not enumerated in s. 36(1) of the *CPA*. The matter was argued thoroughly before them. The *obiter* in issue begins with the phrase, “it is worthwhile to say something more about the

effect of s. 36(1) of the CPA”: *Ewert* at para. 36. It is not clear why this Court would consider it worthwhile to say something more if they did not intend for their opinion on the issue to be of some guidance, weight, or authority in later cases. In my view, these factors bring the comments in *Ewert* within the “circle of analysis” that should be accepted as authoritative.

[41] Further, *Ewert* was not an isolated decision. Rather, it builds on and adopts the reasoning in *Strohmaier* and was made following a number of earlier authorities such as *Coburn*, *Coburn #2*, and *Coburn #3*. *Ewert* reflects a clear and well articulated line of reasoning that has developed over time as this Court has had the opportunity to interpret and provide guidance on the interplay between the CA Act and different sections of the CPA.

[42] I reject Janssen’s submission that the comments in *Ewert* were mere *obiter* that can be ignored. The comments of the Court in *Ewert* are authoritative. There was no error for Butler J.A. to find as such.

2. Vertical v. Horizontal *Stare Decisis*

[43] *Ewert* was decided by a different division of this Court. The extent to which this division should follow an authoritative decision of another division of our Court is a question of horizontal *stare decisis*.

[44] Vertical *stare decisis* requires that “courts render decisions that are consistent with the previous decisions of higher courts”: *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at para. 56, rev’d on other grounds, 2013 SCC 72.

[45] Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province, meaning decisions of the same level of court should be followed for reasons of judicial comity and for supporting *stare decisis* generally: *R. v. Sullivan*, 2022 SCC 19 at para. 65. The operation of horizontal *stare decisis* also helps to balance stability and predictability against correctness and the orderly development of the law: *Sullivan* at para. 66. A court is required by the principles of judicial comity

and horizontal *stare decisis* to follow a binding prior decision of the same court in the province: *Sullivan* at para. 86.

[46] In *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612, the Court discussed the application of horizontal *stare decisis* in the following way:

[72] As a general rule, this court is bound to follow its past decisions, even if an individual judge or a different panel of the court disagrees with them. As Sharpe J.A. explained on behalf of a five-judge panel in *Fernandes v. Araujo*, 2015 ONCA 571, 127 O.R. (3d) 115, at para. 45:

As an intermediate court of appeal, we are ordinarily bound to follow our past decisions, even decisions with which we disagree. It is important that we do so. Our common law legal tradition rests upon the idea that we will adhere to what we decided in the past. As expressed in the Latin phrase *stare decisis*, we stand by things that have been decided. The rule of precedent provides certainty, consistency, clarity and stability in the law. It fosters the orderly and efficient resolution of disputes and allows parties to obtain reliable legal advice and to plan their affairs accordingly.

[73] Even so, this court may depart from its own precedents. When this court is asked to overrule one of its own decisions, the court first asks whether the earlier decision was correctly decided. If the court determines that the earlier decision was wrongly decided, the court then asks whether the decision should be overruled, based on weighing the “advantages and disadvantages of correcting the error”, by focusing on “the nature of the error, and the effect and future impact of either correcting it or maintaining it”, including “the effect and impact on the parties and future litigants” and “on the integrity and administration of our justice system”: [citations omitted].

[47] In *R. v. R.G.S.*, 2023 BCCA 52 at para. 88, leave to appeal to SCC ref’d, 40607 (24 August 2023), this Court considered the limited circumstances in which an intermediate appellate court will overturn prior decisions:

There are generally three circumstances in which an intermediary appellate court may overturn prior decisions: where the decision was rendered *per incuriam*, that is where binding authority or statutory authority had been overlooked, and if considered, would have resulted in a different decision; where there is a manifest slip or error, “mistake, not a difference of opinion, being the criterion” or “an error so obvious and clear ...that...it is beyond any argument”; and the third, where the decision was neither *per incuriam* or based on a manifest slip or error, but was still wrong and circumstances require an overruling (*R. v. Neves*, 2005 MBCA 112 at paras. 75–83).

[Emphasis added.]

[48] None of these circumstances were expressly argued on this application, nor do they arise with respect to *Ewert*. The comments in *Ewert* were not *per incuriam*, they were not based on a slip or error, and no circumstances have been raised that can be said to require *Ewert* to be overruled. What Janssen is essentially asking is for this Court to reconsider the issue that was discussed in *Ewert* and arrive at a different conclusion. That is not the role of this Court on an application under s. 29.

[49] As an intermediate appellate court, we generally follow our past decisions because doing so promotes stability in the law and in society more broadly. When horizontal *stare decisis* is observed, parties face predictable outcomes when they come before this Court, and they are able to plan their affairs to avoid litigation altogether. This is not to say that the law is fixed in time or that this Court will never overrule a prior decision. However, by identifying only limited circumstances in which this Court will overturn prior decisions, this Court has repeatedly reaffirmed the importance of stability and incrementalism in the development of the law.

[50] In this case, I find that it was appropriate for Butler J.A. to follow the authoritative guidance of this Court in *Ewert*, and he committed no legal error in doing so.

[51] An issue that was not before us was whether the order Janssen seeks to appeal could be construed as a limited appeal order from which Janssen would be entitled to seek leave to appeal. As noted by Butler J.A., in its application below, Janssen relied, in part, on Rule 7-1(10)–(13) as an alternative basis for the orders sought. However, Janssen did not bring an application for leave to appeal. Counsel for Janssen repeated before this Court that it did not seek leave to appeal because it had a right of appeal and the order in issue is not a limited appeal order. Therefore, we make no comment on whether Janssen could have sought leave to appeal on the basis that the order may be characterized as an order under Rule 7 of the *SC Rules*, which would be a limited appeal order pursuant to Rule 11(a)(iii) of the *Court of Appeal Rules*, B.C. Reg. 120/2022.

V. DISPOSITION

[52] For the foregoing reasons, I would dismiss Janssen’s application to cancel the order quashing their appeal.

“The Honourable Justice Francis”

I AGREE:

“The Honourable Justice Winteringham”

I AGREE:

“The Honourable Mr. Justice Riley”