

Court of King's Bench of Alberta

Citation: **Big Country Outdoor Superstore Inc v Robertson, 2026 ABKB 610**

Date: 20260901
Docket: 1903 19510
Registry: Edmonton

2026 ABKB 610 (CanLII)

Between:

Big Country Outdoor Superstore Inc., 1937721 Alberta Ltd., 638888 BC Ltd., Clearway Solutions Ltd., and Steve and Cheryl Allison Family Trust

Plaintiffs

- and -

Ronald T. Robertson, Ronald Robertson Family Trust, Grant O. Robertson, Grant Robertson Family Trust, Darrel Padula, Tony Padula Agencies Ltd., Paul Gallo, Simone Brunton and Grant Thornton Limited

Defendants

Reasons for Decision of the Honourable Justice D.J. Kiss

I. Introduction

[1] The Plaintiffs have appealed the March 28, 2024, decision of Applications Judge W.S. Schlosser to summarily dismiss their action against the Defendants arising out of the Plaintiffs' purchase of a gun store in Grande Prairie, Alberta in 2016: ***Big Country Superstore Inc v Robertson***, 2024 ABKB 181.

[2] The lawsuit relates to the overstatement of inventory in the gun store at the time of the purchase in 2016. The Plaintiffs' allegations include claims of fraudulent misrepresentation and

fraudulent concealment in respect of the store inventory against the Defendants Ronald T. Robertson, Ronald Robertson Family Trust, Grant O. Robertson, Grant Robertson Family Trust, Darrel Padula, Tony Padula Agencies Ltd., (“Vendor Defendants”) and the Vendor Defendants’ Accountants, Paul Gallo, Simone Brunton and Grant Thornton Limited (“Accounting Defendants”).

[3] In granting the Defendants’ application for summary dismissal, Applications Judge Schlosser concluded that the Defendants had shown a *prima facie* case that the lawsuit was filed out of time and that the Plaintiffs would not be able to demonstrate, at least on the evidence before him, that they would be able to discharge the burden imposed upon them by s 3(5)(a) of the *Limitations Act*, RSA 2000, c L-13, as amended.

[4] Although the Plaintiff’s Notice of Appeal was filed and served on April 9, 2024, the Appeal has yet to be scheduled and the parties have all filed further preliminary applications. As directed by Justice Martin at a Rule 4.10 Case Conference held on January 20, 2026, the following applications proceeded before me in a half day Special Chambers application on June 19, 2026:

- a) The Vendor Defendants’ application filed on July 17, 2025, to strike or set aside the Plaintiffs’ Notice of Appeal for failure to comply with procedural requirements;
- b) The Accountant Defendants’ parallel application filed on July 21, 2025, to strike or set aside the Plaintiffs’ Notice of Appeal; and
- c) The Plaintiffs’ application filed August 22, 2025, seeking an order allowing for additional evidence to be admitted for the appeal past the 30 day filing deadline of May 9, 2024.

[5] For the reasons that follow I grant the Vendor Defendants’ and the Accountant Defendants’ (collectively “Defendants”) applications and set aside the Plaintiff’s Notice of Appeal.

II. Chronology of Events

[6] The following chronology details the key events that have transpired since the Plaintiffs purchased the gun store from the Vendor Defendants over 10 years ago in March of 2016.

[7] On September 23, 2019, the Plaintiffs commenced the action by filing a Statement of Claim.

[8] The Vendor Defendants filed an application for summary judgment on December 2, 2021. The application was granted by Applications Judge Schlosser on March 28, 2024, and the Plaintiffs’ action was dismissed.

[9] On April 9, 2024, the Plaintiffs filed a Notice of Appeal of Application Judge Schlosser’s summary dismissal decision. The Notice of Appeal indicates “additional evidence will be relied upon by the Appellant”. The Notice of Appeal was served on the Defendants by email with a covering letter stating as follows:

“We have unilaterally selected April 23, 2024 as the date for this Appeal simply as a placeholder. Once the next Special Chambers dates are released this month, we will be in contact with you to arrange a date all parties are available.”

[10] On May 9, 2024, the Plaintiffs' counsel sent an email to the Defendants' counsel advising that she needed to submit a *Freedom of Information and Protection of Privacy Act* ("FOIP") request to the Royal Canadian Mounted Police ("RCMP") for further information relevant to the appeal and that the Plaintiffs would not be in a position to put forward fulsome Affidavit materials or submit further written argument without the RCMP FOIP materials. The Plaintiffs' counsel suggested that the parties enter into a Consent Order setting timelines for the exchange of further Affidavit evidence and written argument.

[11] Later the same day, the Plaintiffs' counsel sent a further email to the Defendants' counsel advising that if the Defendants were not in a position to enter into the requested Consent Order, she would be bringing an application to set forth the next steps in the appeal and seek costs.

[12] On May 14, 2024, counsel for the Vendor Defendants sent a response email confirming that the Vendor Defendants were not prepared to enter into the proposed Consent Order and noting that the Plaintiffs' deadline to file additional evidence for the appeal, which was May 9, 2024, had passed. The email further states the Vendor Defendants "look forward to receipt of your application materials".

[13] On August 20, 2024, the Vendor Defendants filed an application seeking to have the remaining funds from the original purchase and sale contract for the gun store paid out of Court to them. These funds, totalling \$718,591.00 were paid into Court by the Plaintiffs in 2020 and 2021 pending conclusion of the lawsuit ("Pay Out Application").

[14] On October 2, 2024, the Plaintiffs served an application seeking a stay of enforcement of Justice Schlosser's decision pending the appeal, presumably in an effort to prevent the payment of the funds out of Court ("Stay of Enforcement Application"). In support of this application, the Plaintiffs indicated they would rely upon Affidavits sworn on September 30, 2024, by Steve Allison ("Allison Affidavit") and on October 1, 2024, by Mike Davison ("Davison Affidavit"). However, both Affidavits state that they are being sworn "in support of an Appeal of the Order of Applications Judge W.S. Schlosser, dated March 28, 2024, and in support of our Application for a stay of enforcement".

[15] On October 28, 2024, the Vendor Defendants cross-examined each of the Plaintiffs' two affiants, Mr. Davison and Mr. Allison.

[16] On December 17, 2024, the Vendor Defendants filed an application to strike the appeal in Applications Judge Chambers ("Vendor Defendants' Set Aside Application"). This application was adjourned *sine die* on January 6, 2025.

[17] On February 9, 2025, the Accountant Defendants similarly filed an application to strike the appeal in Applications Judge's Chambers ("Accountant Defendants' Set Aside Application").

[18] On April 1, 2025, the parties attended in Justice Chambers seeking a Consent Order setting all four applications – the Pay Out Application, Stay of Enforcement Application, Vendor Defendants' Set Aside Application and Accountant Defendants' Set Aside Application – to a half day Special Chambers application. Justice Ackert did not consider a half day to be sufficient Court time to deal with all these matters and refused to grant the Consent Order.

[19] On May 22, 2025, the Vendor Defendants' Set Aside Application and the Accountant Defendants' Set Aside Application were both brought forward on the Applications Judge Chambers list. The Applications Judge expressed uncertainty about the jurisdiction of an Applications Judge to hear this type of matter and declined to hear the applications.

[20] On July 17, 2025, the Vendor Defendants' Set Aside Application was refiled. On July 21, 2025, the Accountant Defendants' Set Aside Application was also refiled. This time, both applications were made returnable on September 3, 2025, in Justice Chambers, rather than Applications Judge Chambers.

[21] On August 22, 2025, the Plaintiffs filed an application seeking:

1. an order permitting them to rely upon the Allison Affidavit and the Davison Affidavit at the hearing of the appeal;
2. an order permitting them to rely upon additional information that may still be received as a result of the FOIP request submitted to the RCMP; and
3. an order directing the matter to either case management or to a Rule 4.10 Case Conference ("Late Evidence Application").

[22] This application was also scheduled for Justice Chambers on September 3, 2025.

[23] As well, on August 22, 2025, the Plaintiffs submitted a written request to the Court seeking to have a Case Management Justice assigned. On August 27, 2025, Associate Chief Justice Nielsen denied the request noting that it was premature, given there were already applications to strike the appeal scheduled for September 3, 2025.

[24] On September 3, 2026, the Plaintiffs' counsel advised that she was ill. The Plaintiff's counsel did not attend Justice Chambers, nor send an agent on her behalf to speak to the matters. The Defendants sought to proceed with their applications to strike. However, Justice Little adjourned all three applications to Justice Chambers on September 17, 2025.

[25] On September 17, 2025, Justice Lee declined to hear the applications and directed the action to be scheduled for a Rule 4.10 Case Conference.

[26] The parties attended two Case Conferences with Justice Martin on January 5 and 20, 2026. As part of a lengthy Procedural Order, Justice Martin directed that Vendor Defendants' Set Aside Application, the Accountant Defendants' Set Aside Application and the Plaintiffs' Late Evidence Application would all be heard first in one half day Special Chambers application. Justice Martin further directed that the filing deadlines and requirements set out in Civil Practice Note 1 would apply to this hearing, with the exception that any new evidence received by the Plaintiffs through their FOIP request could be submitted to the Court for consideration up to one month prior to the Special Chambers date.

[27] The Plaintiffs did not submit any additional information received through their FOIP request prior to this hearing.

[28] The Plaintiffs did not comply with the filing deadlines in Civil Practice Note 1 for this hearing. The deadline for filing and serving their Special Chambers Brief in support of their Late Evidence Application was February 13, 2026. The Plaintiffs' Brief was dated and filed a week late, on February 20, 2026.

III. Issues

[29] The issues to be determined are:

1. Should the Court set aside or strike the Plaintiffs' Notice of Appeal for failure to comply with the timelines set out in rule 6.14 the *Alberta Rules of Court*, Alta Reg 124/2010 ["Rules"]?
2. Should the Court allow the Plaintiffs to rely upon the late filed (1) Allison Affidavit; (2) the Davison Affidavit; and/or (3) any information they may still receive from their FOIP Request at the hearing of the Appeal?

[30] The second issue will only need to be addressed if the Defendants' application to have the Plaintiffs' Notice of Appeal set aside or struck is unsuccessful.

I. Relevant Legislation

[31] The rules relevant to these issues are rules 1.5 and 6.14 which provide as follows:

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with any procedural requirements, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

- (a) to cure the contravention, non-compliance or irregularity, or
- (b) to set aside an act, application, proceeding, or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity,

(2) An application under this rule must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity.

(3) An application under this rule may not be filed by a party who alleges prejudice as a result of the contravention, non-compliance or irregularity if that party has taken a further step in the action knowing of the prejudice.

(4) The Court must not cure any contravention, non-compliance or irregularity unless

- (a) to do so will cause no irreparable harm to any party,
- (b) in doing so the Court imposes terms or conditions that will
 - (i) eliminate or ameliorate any reparable harm; or
 - (ii) prevent the recurrence of the contravention, non-compliance or irregularity,
- (c) in doing so the Court imposes a suitable sanction, if any, for the contravention, non-compliance or irregularity, and
- (d) it is in the overall interests of justice to cure the contravention, non-compliance or irregularity.

(5) The Court must not cure any contravention, non-compliance or irregularity if to do so would have the effect of extending a time period that the Court is prohibited from extending.

(6) If an order is made under this rule, the Court may also impose a penalty under rule 10.49.

Appeal from applications judge's judgment or order

6.14(1) If an applications judge makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.

(2) A notice of appeal in Form 28 must be filed and served within 10 days after the judgment or order is entered and served and returnable within a reasonable period of time, not exceeding 2 months, after the date the notice of appeal is filed.

(3) An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

(4) The record of proceedings is

- (a) the application before the applications judge;
- (b) affidavits and other evidence filed by the parties respecting the application before the applications judge,
- (c) any transcript of proceeding before the applications judge, which must be ordered and paid for by the appellant, unless the court determines, or the parties agree, that transcripts are not needed, and
- (d) the applications judge's judgment or order and any written reasons given for the decision.

(5) The appellant must file and serve on the respondent to the appeal, within one month after service of the notice of appeal,

- (a) any transcript of proceedings described in subrule (4)(c),
- (b) any additional evidence referred to in subrule (3), and
- (c) any further written argument.

(6) The respondent to the appeal must file and serve on the appellant, within 20 days after service of the documents referred to in subrule (5),

- (a) any further written argument the respondent wishes to make, and
- (b) any additional evidence referred to in subrule (3).

(7) The appellant may, within 10 days after service of the documents referred to in subrule (6), file a brief written argument responding to any unanticipated additional evidence or further argument raised by the respondent.

(8) A party may rely upon its original written argument, if any, that was before the applications judge or any further argument filed under subrule (5)(c) or (6)(a), or both the original argument and the further argument.

IV. Analysis

Issue 1: Should the Court set aside or strike the Plaintiffs' Notice of Appeal for failure to comply with the timelines set out in rule 6.14?

[32] The Defendants submit that the Plaintiffs have not complied with the requirements of rules 6.14(2) and 6.15(5), that they have suffered prejudice as a result and that the appropriate remedy under rule 1.5 is to set aside the Plaintiffs' Notice of Appeal. Practically, the result of setting aside the Notice of Appeal would be that Applications Judge Schlosser's decision to summarily dismiss the Plaintiffs' action on the basis that it was statute-barred would stand and the Plaintiffs would lose the opportunity to proceed with their Appeal.

[33] The Plaintiffs concede that they have not complied with the timelines set out in rule 6.14(5) for filing additional evidence and argument for the Appeal however, they submit that the Defendants' strike request is the most drastic form of relief the Court can grant and that it should be reserved for cases of serious, irreparable prejudice, which has not been demonstrated here.

[34] Further, the Plaintiffs suggest the *Rules* should not be mechanically applied where doing so would defeat the just resolution of an appeal and must be read in the context of the overall scheduling structure of this Court, where an appeal from a summary dismissal application heard by an Applications Judge can take several years.

[35] Finally, the Plaintiffs argue that this relief is not available to the Defendants in this case in light of rule 1.5(3) which prevents a party from alleging prejudice as a result of non-compliance with the *Rules* if that party has taken a further step in the action. The Plaintiffs submit that the Defendants took a clear step in the action when they cross-examined Mr. Allison and Mr. Davison on their Affidavits.

[36] The purpose of the *Rules* is to provide a means by which claims can be fairly and justly resolved through a Court process in a timely and cost-effective way: *Rules*, r 1.2(1). The *Rules* have several uses which include facilitating the quickest means of resolving a claim at the least expense and providing an effective, efficient and credible system of remedies and sanctions to enforce the *Rules*: *Rules*, r 1.2 (2)(b) and r 1.2(2)(e).

[37] The Accountant Defendants note that there is limited Alberta jurisprudence addressing extensions of time to file additional evidence under rule 6.14(5) and suggest that the Court should apply the same test as the one for determining whether to extend time to file an appeal under rule 6.14(2). That well-established test from *Cairns v Cairns*, 1931 CanLII 471 (AB CA) [*Cairns*], requires the Court to consider the following factors:

- (a) whether there was a *bona fide* intention to appeal while the right to appeal existed;
- (b) an explanation for the failure to appeal in time that excuses the delay;
- (c) an absence of serious prejudice such that it would not be unjust to disturb the judgment;
- (d) the applicant must not have taken the benefits of the judgment under appeal; and
- (e) the appeal must have a reasonable chance of success.

[38] In my view, there are significant differences between an application seeking leave to commence an appeal late and an application to set aside a Notice of Appeal on the basis of a breach of procedural requirements. These differences make the *Cairns* test unhelpful here. Once an appeal has been properly commenced, it is our *Rules* that set out the procedure that must be followed to advance the appeal and the factors the Court must consider on an application to strike the appeal.

[39] For the Defendants to succeed in setting aside the Plaintiffs' Notice of Appeal under rule 1.5, they must satisfy several conditions. First, the Defendants must establish that the Plaintiffs have contravened or not complied with a procedural requirement: *Rules*, r 1.5(1). Second, the Defendants must establish they have suffered prejudice because of the contravention or non-compliance: *Rules*, r 1.5(1)(b). Third, their application must have been filed within a reasonable time after the Defendants became aware of the contravention or non-compliance: *Rules*, r 1.5(2). Fourth, as the Defendants are alleging they suffered prejudice, they must not have taken any further steps in the action knowing of the prejudice: *Rules*, r 1.5(3). Finally, even if all of these pre-conditions are met, if the Court determines that it is not prohibited from curing the non-compliance for any of the reasons set out in rule 1.5(4) and the Court decides to exercise its discretion to grant a remedy, or impose a sanction under the *Rules*, the remedy or sanction must be proportional to the reason for granting or imposing it: *Rules*, r 1.2(4).

a) contravention or non-compliance with procedural requirements

[40] The Defendants argue that the Plaintiffs have failed to comply with the procedural requirements set out in both rules 6.14(2) and 6.14(5).

[41] Pursuant to rule 6.14(2) a Notice of Appeal must be filed and served within 10 days after the judgment is entered and served and returnable within a reasonable period of time, not exceeding 2 months after the date the notice of appeal is filed.

[42] The Defendants do not dispute that the Plaintiffs filed and served their Notice of Appeal within the required 10 day timeline. Further, the Notice of Appeal was initially returnable on a "placeholder" date well within the two months specified in rule 6.14(2), but was then adjourned *sine die*.

[43] By letter dated April 9, 2024, the Plaintiffs' counsel advised the Defendants that once the next set of Special Chambers dates were released *that month*, she would be in touch to arrange a date suitable for all parties. The Defendants submit that the Plaintiffs' contravention of this rule arises from the fact that the Plaintiffs' counsel never provided the Special Chambers dates when they became available, or at all, and never canvassed the Defendants' counsel's availability to schedule the appeal.

[44] The Plaintiffs argue that, while they did not provide the Defendants with Special Chambers dates for the hearing of the appeal, they did contact the Defendants on May 9, 2024, to advise they intended to make a FOIP request to the RCMP and to propose the parties enter into a consent order setting timelines for the appeal. However, the Defendants refused to agree to their suggestion.

[45] The Defendants further submit that the Plaintiffs also failed to comply with rule 6.14(5) as they did not provide the additional evidence they seek to rely upon by the deadline of May 9, 2024. The Allison Affidavit and the Davison Affidavit were not sworn until more than four months after this deadline (September 30 and October 1, 2024, respectively), despite the fact that

both of these individuals had previously sworn Affidavits in this action in 2022. The FOIP evidence the Plaintiffs seek to rely upon had still not been produced at the time of this hearing despite being well over two years past their filing deadline.

[46] The Plaintiffs suggest that the Defendants are relying upon “technicalities”. With respect to rule 6.14(2), the Defendants argue that when the initial return date of April 23, 2024 was set, there was an expectation that it would be adjourned to Special Chambers. However, the subsequent scheduling complexities were not caused solely by the Plaintiffs as there have been multiple applications filed that needed to be addressed. Further, with respect to the deadline for filing new evidence, the Plaintiffs argue that, even if it was not provided on time, the Defendants were advised that it was forthcoming and they would have ample time to assess it before the appeal hearing.

[47] In my view, it is clear that the Plaintiffs were well aware of the applicable procedural requirements and their resulting obligations. The Plaintiffs understood the steps they needed to take to advance their appeal and that this responsibility fell to them as the moving party, not the Defendants. This is apparent from the email the Plaintiffs’ counsel sent to the Defendants on May 9, 2024, indicating that if the Defendants refused to enter into a consent order setting timelines for the exchange of further evidence and written argument, the Plaintiffs would be “bringing an application to set forth next steps in this appeal and seek costs”. Despite being advised just five days later that the Defendants would not enter into the proposed consent order, the Plaintiffs did not file an application and took no further formal steps to have their appeal hearing scheduled until they filed an application over seventeen (17) months later, on August 22, 2025, seeking a direction to either to case management or to a rule 4.10 Case Conference.

[48] Similarly, despite the Defendants advising the Plaintiffs on May 14, 2024, that they had missed the May 9, 2024, deadline to file any further evidence for the appeal, the Plaintiffs also took no steps to proceed with an application to extend the timeline for filing additional evidence until August 22, 2025. Notably, the Affidavit of Mekeisha Fuller (a legal assistant at the Plaintiffs’ counsel’s firm) sworn on August 22, 2025, in support of the application to allow the late evidence provides no explanation as to why the Davison and Allison Affidavits were not filed until more than four months past the deadline.

[49] I have no difficulty concluding that the Plaintiffs have failed to comply with the requirements of both rules 6.14(2) and 6.14(5). I do not accept the Plaintiffs’ suggestion that either of these breaches can be characterized as a “technicality of purported non-compliance”.

[50] The scheduling complexities alluded to by the Plaintiffs only arose after the Plaintiffs took no further steps for four months to reschedule the Notice of Appeal after adjourning it *sine die*. At that point, the Vendor Defendants filed their Pay Out Application and a flurry of other applications then followed. As well, I do not accept that the fact that the Defendants would have adequate time to assess any late filed evidence justifies the Plaintiffs’ failure to meet the filing deadline set out in the *Rules*. Accepting this argument would seriously undermine one of the overarching objectives of the *Rules* - ensuring that disputes are resolved in a timely manner.

b) prejudice as a result of the non-compliance or contravention

[51] The second requirement is that the Defendants must establish that they have suffered prejudice as a result of the Plaintiff’s non-compliance. The Defendants, and particularly the Vendor Defendants, allege prejudice on the basis of delay.

[52] The Plaintiffs submit that the Defendants have not established non-compensable prejudice and that any economic impact can be addressed by terms, including costs or scheduling directions.

[53] It is important to note that rule 1.5 does not require that the Defendants establish “non-compensable” prejudice, although rule 1.5(4) prohibits the Court from curing any non-compliance if doing so will cause irreparable harm to any party. Further, rule 1.5 refers only to “prejudice”, while the rule that permits the Court to dismiss an action for delay (rule 4.31) speaks of “significant prejudice”, which is a more onerous test to meet. Rule 4.31 is not applicable here as this is an appeal and the action itself has already been determined. However, the Defendants argue that the remedy available to them should be the same, or even more restrictive than on a rule 4.31 application, as this is an appeal and the Plaintiffs have already had the opportunity to put their case before the Court.

[54] I am satisfied that the Defendants can establish there has been delay. The Plaintiffs do not really contest this, other than to suggest that their actions and the *Rules* should be read in the context of the overall scheduling structure of the Court, where it can often take several years for an appeal to be heard.

[55] Our Court of Appeal adopted the following definition of “delay” in *Humphreys v Trebilock*, 2017 ABCA 116, at para 115 [*Humphreys*]:

[115] “Delay is a relative concept”. It is the product of a comparison between the point on the litigation spectrum that the nonmoving party has advanced an action as of a certain time and that point a reasonable litigant acting in a reasonably diligent manner and taking into account the nature of the action and stipulated timelines in the rules of court would have reached in the same time frame. One measures progress in a specific action and compares it against the progress made by the comparator - the reasonable litigant advancing the same claim under comparable conditions.

[56] It is also well-established that in cases where fraud is one of the allegations, such as here, a faster pace may be required as these allegations are considered to be of such a harmful nature that they are qualitatively different from other allegations and merit unique treatment: *Humphreys* at para 123.

[57] The Plaintiffs’ delay here is easily demonstrated. The Plaintiffs knew they were required to set a hearing date for their Appeal within two months of the filing of the Notice of Appeal in April 2024. Although a placeholder date was set within that two month period, the date was adjourned *sine die* and no further attempts were made to set down the Appeal until August 2025. The Plaintiffs also knew that they had failed to meet their filing deadline by no later than May 14, 2024. Yet the Plaintiffs did not provide the Defendants with any of the late evidence they wished to rely upon for a further four months (with the FOIP evidence still outstanding) and did not bring their application to file evidence late for well over a year after the deadline, in August 2025.

[58] The real issue is whether the Defendants have suffered prejudice as a result of the Plaintiffs’ delay.

[59] “Prejudice” in this context is a broad concept and includes both litigation and non-litigation prejudice. The party alleging prejudice is not restricted to demonstrating that the injury

or damage impairs their right to present full answer and defence. Sometimes the very existence of litigation can threaten an important and legitimate interest of the nonmoving party. A nonmoving party is entitled, at some point, to peace of mind, to know the litigation is over and that the matter behind them: *Humphreys* at paras 132-133, 137.

[60] This action relates to events that occurred over ten years ago. The action was summarily dismissed over two years ago. If the Notice of Appeal is not struck, and should the Appeal be successful, it is unlikely that the trial would be heard before 2029. The witnesses at trial would be questioned about events that occurred in 2016, assuming the material witnesses are even still alive and able to attend the trial at that point.

[61] In the meantime, since approximately 2020, the Defendants have not had access to \$718,591 of the sale proceeds from their business as these funds have been held in Court pending the outcome of the litigation. The Defendants have been denied the opportunity to redeploy those funds in other business ventures, to pursue other potential investments or to use the money to fund their lifestyle.

[62] I therefore find that the Defendants have suffered both litigation and nonlitigation prejudice as a result of the Plaintiffs' delay.

c) application filed within a reasonable time

[63] Rule 1.5(2) imposes a similar obligation on both the Plaintiffs and the Defendants to file their applications within a reasonable period of time after they become aware of the non-compliance with the *Rules*.

[64] The Defendants were aware of the Plaintiffs' non-compliance with the *Rules* by May 14, 2024. The Vendor Defendants' Strike Application was filed approximately seven months later on December 17, 2024, and the parallel application by the Accountant Defendants was filed approximately nine months later on February 9, 2025.

[65] I find that the Defendants' delay in filing their applications was entirely appropriate. After being notified by the Plaintiffs that they were going to bring an application to file their new evidence late and to set deadlines for the Appeal, the Defendants gave the Plaintiffs a reasonable amount of time to provide the additional evidence and to file this application. By the end of the year, when the Plaintiffs had still failed to do either, the Defendants proceeded to file their applications to have the Notice of Appeal set aside.

[66] However, the Plaintiffs' delay in filing their application was not reasonable. Despite expressing their intention to bring this application in correspondence to the Defendants on May 9, 2024, the Plaintiffs took more than fifteen (15) months to finally file their application to extend their filing deadline and to seek direction in terms of scheduling the hearing of the appeal. The Plaintiffs only took this step after the Vendor Defendants had filed the Pay Out Application and eight (8) months after the Vendor Defendants brought their first application to set aside the Notice of Appeal in December 2024.

[67] In my view, the Plaintiffs have provided no meaningful explanation for this delay.

d) no further steps taken in the proceedings

[68] Rule 1.5(3) prohibits a party from bringing an application alleging prejudice arising from non-compliance with the *Rules* if that party has taken a further step in the action knowing of the prejudice. In this case, the Plaintiffs argue that the Defendants took a clear step in the action

when they cross-examined both Mr. Allison and Mr. Davison on their Affidavits in October 2024. I disagree.

[69] The Defendants dispute that the cross-examinations on Affidavit constituted a step in the action and rely on the decision of Justice Shelley in **Warren v Cowling**, 2019 ABQB 403 [Warren]. That case involved an application under rule 4.33 to dismiss an action for long delay. In deciding whether or not a significant step had been taken to advance the action, Justice Shelley stated:

[30] In order to determine whether the contested step advanced the Action, I adopt a functional approach, having regard to its nature, value and quality, genuineness, timing and sometimes the outcome (**Ro-Dar Contracting Ltd v Verbeek Sand & Gravel**, 2016 ABCA 123 at para 21; **Ursa Ventures Ltd v Edmonton (City)**, 2016 ABCA 135; **Nash v Snow**, 2014 ABQB 355 at para 30).

[31] It is clear that filing and serving an application, but not having it heard, does not actually advance the action (**AE v Alberta (Dir. of Child Youth and Family Enhancement)**, 2016 ABQB 591 at para 58; **Steparyk v Alberta**, 2014 ABQB 367 at para 13 -14, aff'd 2015 ABCA 125 at para 10; **Preston v Bent Developments Company Limited**, 2018 ABQB 89 at para 23).

Warren at paras 30-31.

[70] Rule 4.33(2) refers to a “significant advance in an action”, while rule 1.5 requires only that a party must not have taken a “further step” in the action. Regardless, I find that the Defendants’ cross-examination of Mr. Allison and Mr. Davison did not meet even the lower threshold in rule 1.5 and did not constitute a step in the action.

[71] The Defendants filed their Pay Out Application in August 2024. In direct response to that application and in an obvious effort to thwart the Defendants’ attempts to access the proceeds from the sale of the gun store paid into Court, the Plaintiffs filed their Stay of Enforcement Application on October 2, 2024. In the Plaintiffs’ filed Application, under the heading “Material or evidence to be relied upon”, the document states at paragraph 11 “The Affidavits of Mike Davison and Steve Allison, to be filed.”

[72] The cross-examination of Mr. Allison and Mr. Davison was undertaken in this context. These Affidavits were filed by the Plaintiffs in support of an application they initiated. Although the Davison Affidavit and the Allison Affidavit both state they were also being filed in support of the appeal, the Plaintiffs did not actually file an application seeking leave to rely on these Affidavits at the hearing of the appeal for a further ten months.

[73] It is also important to note that as of today’s date, the Plaintiffs’ Stay of Enforcement application has yet to be heard.

[74] I cannot accept the Plaintiffs’ suggestion that Defendants’ cross-examination of two individuals who swore Affidavits in support of an application commenced by the Plaintiffs, and which application has yet to be heard by the Court, constitutes taking a step in the action.

e) proportionate remedy or sanction

[75] Rule 1.5(4)(d) provides that the Court must not cure any contravention or non-compliance with any procedural requirements unless it is in the overall interests of justice to do

so. Rule 1.2(4) explains more generally that, when the Court decides to grant a remedy or impose a sanction, it must be proportional to the reason for granting or imposing it.

[76] The Plaintiffs argue that the requested relief of striking their appeal is entirely disproportionate given the fact (1) their Notice of Appeal was filed and served on time; (2) some of their substantive new evidence for the appeal has been provided and the Defendants have had the opportunity to test that evidence through cross-examination; and (3) the third party materials they are seeking through their FOIP request are being pursued diligently.

[77] I disagree. Other than filing and serving their Notice of Appeal on time and setting the initial return date within the required two month time period, the Plaintiffs' actions have demonstrated a complete disregard for the procedural requirements in the *Rules*. Again, to summarize:

- The Plaintiffs advised the Defendants on May 9, 2024, that they were not going to meet their deadline to submit additional evidence and that they would bring an application to set next steps in the appeal if the Defendants did not enter into a Consent Order. Despite being told only five days later that the Defendants would not enter into a Consent Order, the Plaintiffs did not file this application for a further fifteen months, on August 22, 2025.
- The Plaintiffs did not have the Allison and Davison Affidavits sworn until over four months after their filing deadline had passed. No explanation for this delay has been provided.
- Although the Plaintiffs' counsel claims she made numerous unsuccessful attempts to submit an online FOIP request during the summer of 2024, this task was assigned the following summer to a law student in their office. A FOIP application was finally submitted to the RCMP over thirteen months after the Plaintiffs' filing deadline, on June 23, 2025.
- In response to the FOIP request, the Plaintiffs received a letter dated July 17, 2025, from the RCMP asking for additional information. The letter from the RCMP advised that the file would be closed if the information was not received by them by August 18, 2025. The Plaintiffs did not respond until after this deadline, on August 21, 2025.
- Finally, after receiving clear procedural direction from Justice Martin at two Case Conferences, including an Order directing that the parties must comply with the deadlines in Civil Practice Note 1 for this Special Chambers application, the Plaintiffs still proceeded to submit and file their Brief a week late. Their application should have been struck by the Court Coordinator automatically at that point however, through an apparent oversight on the part of our overworked and understaffed clerk's office, the Brief was allowed to be filed.

[78] The *Rules* state that an appellant has one month to file any additional evidence they intend to rely on for their appeal. It is unclear why the Plaintiffs did not provide at least the Davison and Allison Affidavits by this deadline. With respect to the FOIP request, I am unable to characterize the Plaintiffs' efforts to secure this information as "diligent". The Plaintiffs did not even manage to submit a formal FOIP request until over thirteen months after their deadline had passed. Most concerning however, is that Plaintiffs clearly had no intention of setting a date

for the hearing of the appeal until they received a response to their FOIP request, regardless of how long that might take. By the date of this hearing of this application, it had already been over 26 months since the Plaintiffs filed their Notice of Appeal.

[79] Given the Plaintiffs' blatant and continuing non-compliance with the procedural requirements in the *Rules*, I find that the only appropriate remedy is to set aside their Notice of Appeal. As stated by Justice Wakeling in *Travis v D & J Overhead Door Ltd*, 2016 ABCA 319 at para 105: "Expedition in dispute resolution and finality in litigation are not in competition with justice, but on the contrary are dictated by the considerations of justice". Delay is not an attribute of justice". I am satisfied this remedy is proportional and that it would not be in the overall interests of justice to cure the Plaintiffs' non-compliance at this last date.

Issue 2: Should the Court allow the Plaintiffs to rely upon the late filed (1) Allison Affidavit; (2) the Davison Affidavit; and/or (3) any information they may still receive from their FOIP Request at the hearing of the Appeal?

[80] As I have determined that the appropriate remedy here is to grant the Defendants' applications to set aside the Plaintiffs' Notice of Appeal, there is no need for me to determine this issue.

Conclusion and Costs

[81] The Vendor Defendants' and the Accountant Defendants' Strike Applications are granted and the Plaintiffs' Notice of Appeal is set aside.

[82] As the successful parties, the Vendor Defendants and the Accountant Defendants are entitled to costs. If the parties cannot agree on costs, they may provide me with further written submissions of no more than 3 pages, excluding any attachments, within 30 days of this decision.

Heard on the 19th day of June, 2026.

Dated at the City of Edmonton, Alberta this 1st day of September, 2026.

D. J. Kiss
J.C.K.B.A.

Appearances:

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