Court of King's Bench of Alberta

Citation: Piikani Nation v McMullen, 2026 ABKB 35

Date: 20260114
Docket: 1001-10326
Registry: Calgary

Between:

Piikani Nation, Piikani Nation Chief and Council, Piikani Oldman Hydro Limited Partnership, Chief Reg Crow Shoe, Councilor Adam North Peigan and Councilor Erwin Bastien

Plaintiffs

- and -

Dale McMullen, Stephanie Ho Lem, Kerry Scott, Stan Knowlton, Edwin Yellow Horn, Jordie Provost and Shelley Small Legs

Defendants

Docket: 1101-11127

And Between:

Dale McMullen

Applicant

- and -

Piikani Nation

Respondent

Docket: 1401-00460

And Between:

Shelley Small Legs

Plaintiff

- and -

Piikani Nation

Defendant

Docket: 1401-01354

And Between:

Jordie Provost

Plaintiff

- and -

Piikani Nation

Defendant

Reasons for Case Management Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] These actions are part of a larger set of actions (**Case Managed Actions**)[1] under my case management as case management justice (**CMJ**).

[2] Pursuant to an endorsement[2] I issued on March 10, 2025, persons seeking to file applications in the Case Managed Actions are required to follow a process (**Fiat Process**) by which they require my permission (by way of a request (**Fiat Request**) for a fiat (**Fiat**)) before they may bring an application in the Case Managed Actions. I explained the Fiat Process, the historical use of fiat processes in the Case Managed Actions, and the framework for considering Fiat Requests in ***Piikani Nation v McMullen***, 2025 ABKB 481 at paras 8-12.[3]

[3] These Reasons address:

(a) a Fiat Request by Dale McMullen (**McMullen**), and the remaining defendants in action number 1001-10326 (**1001 Action**), namely Stephanie Ho Lem (**Ho Lem**), Shelly Small Legs (**Small Legs**), Kerry Scott (**Scott**), Stan Knowlton, Edwin Yellow Horn (**Yellow Horn**) and Jordie Provost (**Provost**) (all together, **Remaining Defendants**) seeking permission to file an application (**Proposed Discontinuance Set Aside Application**) to set aside a discontinuance of action (**2025 Discontinuance**) filed by Piikani Nation as against the Remaining Defendants in the 1001 Action; and

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[1] As defined in Endorsement #4.
[2] Endorsement #4.
[3] Given the numerous reported decisions in the Case Managed Actions, and the common parties across those actions, it is not possible to use traditional methods to meaningfully define cases for the purposes of these Reasons. Instead, for efficiency, I will simply refer to the numerical citation as the definition. For example, ***Piikani Nation v McMullen***, 2025 ABKB 481 will be referred to as ***2025 ABKB 481***.

(b) a Fiat Request by the Remaining Defendants seeking permission to file an application (**Proposed Striking Application**) to strike the 1001 Action for delay under rules 4.31 and 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*).

[4] For the reasons set out below, both Fiat Requests are denied.

II. Background

[5] The 1001 Action was commenced in 2010. It alleges against the defendants, among other things: breaches of legal and equitable duties relating to the affairs of Piikani Investment Corporation (**PIC**) and Piikani Energy Corporation (**PEC**); arranging PIC/PEC's affairs for their own benefit; improperly spending monies drawn by PIC/PEC from the Piikani Trust; paying themselves exorbitant remuneration; committing the tort of maintenance in respect of lawsuits against the plaintiffs; improperly paying monies belonging to the plaintiffs or some of them; causing PIC/PEC to default on loans to Piikani Trust; breaching the Piikani Trust's trust agreement; failing to prepare financial statements for PIC/PEC and others; failing to report to Piikani Nation's council; and concealing their activities. The claim seeks $6,300,000 in damages and disgorgement of monies received by the defendants.

[6] In 2011, McMullen filed action number 1101-11127 (**1101 Action** or **McMullen Action**) in which he claims indemnity relief against Piikani Nation.

[7] By November 30, 2012, McMullen and the Remaining Defendants had all filed statements of statement of defence in the 1001 Action.

[8] On November 30, 2012, Ho Lem also filed a Counterclaim (**Ho Lem Counterclaim**) against Piikani Nation in the 1001 Action seeking a declaration or damages related to her claim to a right to indemnity under an indemnity agreement. On January 15, 2013, Piikani Nation filed its statement of defence to the Ho Lem Counterclaim.

[9] In 2014, other Case Managed Actions were filed by Remaining Defendants involving claims to indemnity relief against Piikani Nation. Some of those appear to remain extant, including an action by Small Legs (action 1401-00460 (**Small Legs Action**)) and by Provost (action 1401-01354 (**Provost Action**)). I refer to the Ho Lem Counterclaim, the McMullen Action, the Small Legs Action and the Provost Action together as the "**Indemnity Actions**".

[10] By October 2014 orders of ACJ Rooke (**2014 Orders**), the McMullen Action, the Small Legs Action and the Provost Action were all adjourned to be heard at or concurrently with the trial of the 1001 Action.

[11] According to the Remaining Defendants' materials, the 1001 Action was stayed for a period in 2013. Then, from 2013 to 2017, there were various case management meetings, case management orders, and steps related to the production of affidavits of records. In January 2017, Piikani Nation delivered a supplemental affidavit of records.

[12] On January 3, 2017, ACJ Rooke directed (**2017 Order**) the Ho Lem Counterclaim to be adjourned to the trial of the main claim in the 1001 Action, to be heard and determined concurrently.

[13] According to the Remaining Defendants, since January 2017 until now, there has been no questioning or discoveries, no exchange of expert reports and no trial date set in the 1001 Action. There

is no litigation plan in place. However, as set out below, during this same time frame, there have been numerous fiat requests, interlocutory applications, and appeals. As noted by CMJ Graesser: "Despite having been actively litigated since 2010, the lawsuit has not progressed to the questioning phase. It has been bogged down in procedural applications and appeals": ***Piikani v McMullen***, 2024 ABKB 381 at para 2.

[14] In 2020, ACJ Rooke made several decisions addressing numerous fiat requests brought by McMullen and others: ***Piikani Nation v McMullen***, 2020 ABQB 87; ***Piikani Nation v McMullen***, 2020 ABQB 88; ***Piikani Nation v McMullen***, 2020 ABQB 89; ***Piikani Nation v McMullen***, 2020 ABQB 90; ***Piikani Nation v McMullen***, 2020 ABQB 91; ***Piikani Nation v McMullen***, 2020 ABQB 92. The latter decision permitted McMullen to apply to strike or dismiss the 1001 Action against him for delay, but stayed that application pending McMullen's application to disqualify Gowlings. See also the summary at ***Piikani Nation v McMullen***, 2020 ABCA 183 at para 6. McMullen appealed ACJ Rooke's decisions, and his appeal was denied: ***Piikani Nation v McMullen***, 2020 ABCA 366.

[15] In 2024, among other things, CMJ Graesser found McMullen in contempt of court (***Piikani Nation v McMullen***, 2024 ABKB 264 (**Contempt Decision**)), sanctioned McMullen for his contempt (***Piikani v McMullen***, 2024 ABKB 575 (**Sanction Decision)**), and disqualified Gowlings from acting against McMullen (***Piikani v McMullen***, 2024 ABKB 414 (**Gowlings Decision**)).

[16] McMullen appealed the Contempt Decision and the Sanction Decision, and Gowlings appealed the Gowlings Decision. McMullen's Contempt Decision appeal was deemed abandoned and an application to restore it was denied: ***Piikani Nation v McMullen***, 2025 ABCA 114. In June 2025, McMullen advised me that his appeal of the Sanction Decision was also struck, but that he was taking steps to revive both appeals. I am not aware that any such steps have been taken and so I consider the Contempt Decision and the Sanction Decision to be final orders. The appeal of the Gowlings Decision appears to be proceeding: intervenor status has been granted to the Advocates Society (***Piikani v McMullen***, 2025 ABCA 315) and it is my understanding that appeal is scheduled to be heard in February 2026.

[17] In the Sanction Decision, CMJ Graesser provided, among other things, that McMullen shall not be entitled to any costs of defending the 1001 Action up to and including the date of the Sanction Decision. On October 30, 2024, relying on this aspect of the Sanction Decision, Piikani Nation filed a partial discontinuance of the 1001 Action as against McMullen (**McMullen Discontinuance**).

[18] I was appointed CMJ in December 2024 and engaged in a process by which parties provided me information about the various Case Managed Actions, including their status and next steps, following which I directed several case management conferences (**CMCs**) in groups of the Case Managed Actions.

[19] On May 8, 2025, I issued Endorsement #6 in the Case Managed Actions following an April 25, 2025 CMC in certain actions involving PIC and PEC.[4] At that CMC, McMullen had advised of his intention to bring applications to seek state assistance, to request indemnity in relation to PEC's bankruptcy, and to remove Caron and Partners as counsel for the Court Officer in those proceedings. I gave McMullen deadlines to bring Fiat Requests.

[4] The PIC WURA Action, the PN-PEC Action, and the PEC Bankruptcy Action as defined in Endorsement #4.

[20] On June 16, 2025, I held a CMC in the 1001 Action and the Indemnity Actions. At this CMC, Piikani Nation advised that the 1001 Action continued to be extant as against the Remaining Defendants (other than McMullen) but that it was attempting to have direct resolution discussions with them.

[21] On June 30, 2025, I issued Endorsement #10 related to the service list in the Case Managed Actions. As part of that, I directed Piikani Nation and the defendants in the 1001 Action to provide me information about the status of the various third party claims filed in the 1001 Action by July 15, 2025. Piikani Nation and McMullen provided me information but the Remaining Defendants, some of which were also third party plaintiffs, did not separately comply with my direction.

[22] On August 18, 2025, I issued reasons in ***2025 ABKB 481***, denying McMullen's Fiat Requests seeking permission to bring several applications he had earlier proposed. Mullen has appealed ***2025 ABKB 481***.

[23] On August 21, 2025, I issued Endorsement #21 in the Case Managed Actions relating to the June 2025 CMC. In it, I addressed several matters:

(a) McMullen had advised me that he seeks to challenge the McMullen Discontinuance, and I declined to make any directions respecting that given that McMullen had appealed the Contempt Decision and the Sanction Decision, and because McMullen remains restricted from bringing Fiat Requests until he complies with the "McMullen Restriction Decisions" and pays ordered costs (see ***2025 ABKB 481*** at paras 6(a), 34-45);

(b) McMullen had advised that he sought to bring an application to stay the 1001 Action pending his application seeking relief from the state/Attorney General of Canada. I declined to make directions about this because, in ***2025 ABKB 481***, I had denied him permission to bring that proposed application and so the issue was moot;

(c) McMullen had advised that he intended to bring a new application or statement of claim relating to his indemnity agreement. I declined to provide further directions because I had already decided, in ***2025 ABKB 481***, that the relief he sought was covered by the McMullen Action. I directed the parties to the 1001 Action and the Indemnity Actions to consider whether the Indemnity Actions commenced by originating application should be converted to a statement of claim and directed the parties to attempt to reach agreement on the procedural path forward (to my knowledge no agreement has been reached);

(d) McMullen had advised that he sought to pursue contempt proceedings against Piikani Nation and/or Caireen Hanert for breach of the CMJ Graesser's order arising out of the Gowlings Decision. I declined to make directions about that given that the Gowlings Decision was under appeal;

(e) McMullen had advised that he sought to remove JSS Barristers (**JSS**). I declined to make directions about this given that McMullen had previously been unsuccessful in removing JSS as counsel for Gowlings (***2020 ABQB 88***) or to add JSS as a third party (***2020 ABQB 89***) and it was not clear what McMullen would rely on to again seek to remove JSS. As noted above, the appeal of these decisions was dismissed (***2020 ABCA 366***);

(f) Small Legs had advised that she sought to apply to strike the 1001 Action for long delay, and I directed her to bring her Fiat Request by September 19, 2025; and

(g) I provided an update with respect to the status of the third party claims in the 1001 Action, several of which had been struck previously but some of which filed by Scott and Yellow Horn appeared to remain outstanding, but for which service could not be confirmed. I provided further directions to Scott and Yellow Horn to provide information about whether the remaining third party claims had been served and, if so, whether they intended to pursue these claims, by September 19, 2025. I directed that if they did not comply with my direction, their third party claims would be struck without further order.

[24] On August 26, 2025, Ho Lem wrote to me seeking leave to also bring a Fiat Request to strike the 1001 Action for long delay, and I approved her doing so with the same deadline as Small Legs.

[25] As of September 19, 2025, Scott and Yellow Horn had not complied with my August 21, 2025 direction in Endorsement #21 and have never since provided the requested information. Accordingly, their third party claims were struck without further order. There were no remaining third party claims in the 1001 Action. The only parties remaining in the 1001 Action are the plaintiffs and the Remaining Defendants.

[26] On September 19, 2025, I received the Fiat Request from the Remaining Defendants to bring the Proposed Striking Application.

[27] On September 22, 2025, I received a letter from JSS advising that the plaintiffs in the 1001 Action filed the 2025 Discontinuance and that the 1001 Action was now "entirely at an end subject only to costs". That same day, I received a letter from McMullen and Ho Lem objecting to the 2025 Discontinuance. On September 26, 2025, I issued Endorsement #41 confirming that I expected Piikani Nation to respond to the Proposed Striking Application Fiat Request and providing a deadline for the Remaining Defendants and McMullen to bring a Fiat Request to challenge or set aside the 2025 Discontinuance (should they wish to do so).

[28] On October 8, 2025, I received the Fiat Request by McMullen and the Remaining Defendants seeking permission to file the Proposed Discontinuance Set Aside Application.

III. Issues

[29] The issues are:

(a) Should McMullen and/or the Remaining Defendants be granted permission to file the Proposed Discontinuance Set Aside Application?

(b) Should the Remaining Defendants be granted permission to file the Proposed Striking Application?

(c) What is an appropriate order?

IV. Analysis

A. Should Permission be Granted to File the Proposed Discontinuance Set Aside Application?

1. Positions

[30] The proposed applicants assert that the 2025 Discontinuance should be set aside because:

(a) it is invalid because it has never been filed or served;

(b) it is obstructive, unfair and unjust, and violated case management protocols. First, they argue it was a blatant attempt to avoid the Proposed Striking Application. Second, they argue it is a collateral attack on the 2014 Orders directing matters to be heard together at the trial of the 1001 Action. Third, they assert that Gowlings was involved in the service of the 2025 Discontinuance in breach of CMJ Graesser's Gowlings Decision. Fourth, they argue that Piikani Nation intends to raise the same arguments as pleaded in the 1001 Action in its defence of the Indemnity Actions and that "complex issues of *res judicata* and issue estoppel could potentially arise to derail matters";

(c) the 2025 Discontinuance was filed without leave of the Court or consent of all parties, which was required under rule 4.36(2)(a) and (b); and

(d) the 1001 Action must come to a complete end and should be struck "with prejudice", with the same force and effect as a trial of the action on the merits.

[31] The proposed applicants seek costs personally against JSS for "countenancing an abuse of process and misuse of Court resources".

[32] In its response, Piikani Nation explained the difficult decision it had made to file the McMullen Discontinuance following the Sanction Decision. It further advised that it "chose to discontinue the Action as Mr. McMullen's numerous breaches of the Court's Orders, contempt and endless applications made the Action uneconomic to pursue". It advised that it was a less difficult decision to decide to file the 2025 Discontinuance against the Remaining Defendants for economic and equitable reasons. It advised that it had been trying to bring the matter to conclusion with the Remaining Defendants since May 2025, as it advised me in the June 16, 2025 CMC. It confirmed that the initial attempt to file the 2025 Discontinuance was rejected by the Clerk of the Court because it was styled as a "Discontinuance" and not a "Partial Discontinuance", but that it was ultimately filed and served on the Remaining Defendants on October 2, 2025.

[33] Piikani Nation's position is:

(a) McMullen is no longer a party to the 1001 Action, does not have standing to make the Fiat Request, and cannot act on behalf of the Remaining Defendants;

(b) the 2025 Discontinuance was not a breach of this Court's case management directions or endorsements;

(c) the 2025 Discontinuance does not preclude advancement of the Indemnity Actions;

(d) the 2025 Discontinuance was not an abuse of process engaging the Court's inherent jurisdiction. The Remaining Defendants have not lost any substantive rights because the Remaining Defendants appear to seek to set aside the 2025 Discontinuance only so that they can proceed to strike it under the Proposed Striking Application, which would only give them a right to costs which "is the same entitlement they have now" with the 2025 Discontinuance. Further, there are no third party claims left to preserve;

(e) permission to file the 2025 Discontinuance was not required under rule 4.36(1) because no trial date had been set and, in fact, no questioning has yet even occurred; and

(f) the claim for costs as against counsel has no merit.

2. Legal Framework

[34] Rule 4.36 provides:

> Discontinuance of claim
>
> 4.36(1) Before a date is set for trial, a plaintiff may discontinue all or any part of an action against one or more defendants.
>
> (2) After a trial date has been set but before a trial starts, a plaintiff may discontinue all or part of an action against one or more defendants only
>
> (a) with the written agreement of every party, or
>
> (b) with the Court's permission.
>
> (3) After the trial starts, a plaintiff may discontinue all or part of an action only with the Court's permission.
>
> (4) A discontinuance under this rule must be in Form 23 and must be filed and served on each of the other parties and, after the plaintiff serves notice of discontinuance, the defendant is entitled to a costs award against the plaintiff for having defended against the discontinued claim.
>
> (5) The discontinuance of the action may not be raised as a defence to any subsequent action for the same or substantially the same claim.

[35] In an "ordinary situation", rule 4.36 permits the filing of a discontinuance "as of right before a trial date is set": ***Richardson v Richardson***, 2018 ABCA 327 at para 15. After the trial date is set, written agreement of all parties or leave of the Court is required under rule 4.36(2). In some provinces, the line between the right to discontinue and requiring agreement or court permission is drawn earlier, at the close of pleadings: see, for example: Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 23.01. The drawing of the line at the time of trial entry was explained in ***Moon v Sails at the Village on False Creek Developments Corp***, 2012 BCSC 1999 at para 19:

> [19] The Rule that a party is a master of its suit and may proceed with or abandon its case before the proceeding is set for trial is a sensible one. **In general, a party at an**

> **early stage in a proceeding who no longer wishes to prosecute or defend a claim will not be forced to continue, although they may be liable for their opponent's costs. The right to discontinue without leave before a trial date is set is a blunt but effective way of leaving the scope of the litigation within the control of the parties in the early stages of litigation**. Once a trial date is set a divide is crossed and consent of the parties or leave of the Court is required. Indeed, the effectiveness of the dividing line is apparent in this case in which the notice of trial has not yet been filed. The parties are at the early stage of document gathering and production relating primarily to legal relationships at this point, although I recognize a significant amount of work has been done, No examinations for discovery have been conducted. [Emphasis added.]

[36] However, the Alberta Court of Appeal has confirmed that, notwithstanding rule 4.36(1), in some circumstances, there are limits on a plaintiff's ability to file a discontinuance of an action even before a trial date is set. The court has inherent jurisdiction to intervene and to preclude, set aside or ignore the discontinuance: ***Richardson*** at para 15; ***De Shazo v Nations Energy Company Ltd***, 2006 ABCA 400 at para 13; ***Arnston v Arnston***, 2024 ABCA 226 at paras 24, 31, 43.

[37] For example, a plaintiff may not be permitted to discontinue the action if doing so would amount to an abuse of process (which can encompass many misuses of civil procedure); where the *Rules* are being used in an obstructive, abusive or unfair manner; where there are outstanding issues between the parties; where the discontinuance is filed for a collateral purpose (such as to block a legitimate procedural step by a defendant); where the litigation proceedings have reached a certain point such that it would not be appropriate for the plaintiff to "escape by the side door" to "avoid the contest"; or where the relief sought by the plaintiff also benefits the defendant: ***De Shazo*** at paras 11-13; ***Simbajon v Leduc***, 2015 ABCA 321 at para 12, citing ***Fox v Star Newspaper Company***, [1898] 1 QB 636 aff'd [1900] AC 19; ***Arnston*** at paras 31, 37; ***Richardson*** at paras 9, 15-17.

[38] It is helpful to review some examples of when discontinuances have been challenged before the line requiring party consent or court permission was crossed:

(a) in ***Bird Construction Company v Paterson***, 1960 CanLII 268 (AB CA), the Court of Appeal held that, after a plaintiff had obtained an injunction and received a request for particulars of its claim, it could not avoid its undertaking as to damages by filing a discontinuance;

(b) in ***Angelopoulos v Angelopoulos***, 1986 CanLII 2716 (ON SC), the Court refused to allow a discontinuance where the plaintiff sought to use the discontinuance to avoid the effect of, or compliance with, an interim restraining order granted in the action, with the intent of then starting another action;

(c) in ***Boychuk v Boychuk Estate***, 1993 CanLII 6686 (SK CA), the Saskatchewan Court of Appeal set aside a discontinuance in a matrimonial property action following the death of one of the spouses, which would have operated to defeat her estate's claim to her statutory share of the matrimonial property. The discontinuance was filed after the plaintiff's counsel agreed, before the death, not to note them in default so the parties could negotiate a family property division. The plaintiff also failed to notify the clerk that the respondent had died before filing the discontinuance;

(d) in ***Smith v Dueck***, 1997 CanLII 2759 (BC SC), the Court refused to set aside a discontinuance in a fraud claim, even where the plaintiff had not complied with various orders. The plaintiff discontinued because of the plaintiff's deteriorating health and financial situation, as well as the number of chambers applications brought by the defendants. The Court's refusal to set aside the discontinuance was made on the basis that the plaintiff would not be entitled to recommence the action without leave of the court;

(e) in ***Coyle v Coyle (Estate of)***, 2005 ABQB 436, the Court refused to set aside a discontinuance filed in a matrimonial property action following the death of the respondent, where the respondent had been noted in default before he died. The Court placed significant weight on the right of a plaintiff to discontinue an action before the matter was entered for trial under previous rule 225(1), citing ***Eisenkrein v Eisenkrein*** (1984) 53 AR 199, which referred to the right of a plaintiff to discontinue its action under rule 225(1) as "unqualified". In ***De Shazo***, the Court of Appeal distinguished ***Coyle*** because the Court did not consider abuse of process;

(f) in ***De Shazo***, the Court of Appeal upheld a decision to ignore a discontinuance filed to avoid a summary dismissal application;

(g) in ***Moon***, the Court refused to set aside discontinuances in an action by plaintiffs seeking to statutorily rescind real property purchase contracts, or alternatively for damages based on misrepresentation. The defendant was the owner of the property and asserted that it had a legitimate interest in having the misrepresentation claims adjudicated at trial because the allegations had a negative impact on marketing the property. The Court found that the discontinuance was not an abuse of process and was prepared to allow it on the basis that the discontinuance would serve as a defence to the same or substantially the same cause of action in the future;

(h) in ***Glasjam v Freedman***, 2014 ONSC 3878 (Master), the Court acknowledged that the use of a discontinuance as a procedural device to thwart a court process would be an abuse of process. However, the Court refused to set aside a discontinuance at the request of a non-party to the action who sought to force the parties to continue to litigate so that another action could be consolidated with the discontinued action;

(i) in ***Anderson v Anderson***, 2015 SKQB 263, the Court refused to disallow the discontinuance of a petition for the division of family property which had never been served. The respondent had, 6 years later, filed his own petition for family property division but sought to keep the first petition alive because it would have supported a more favourable valuation date. The Court found no prejudice to the respondent because he was in the same position as he was before learning of the unserved petition;

(j) in ***Richardson***, the Alberta Court of Appeal overturned a decision that a plaintiff was entitled to discontinue a matrimonial property claim without leave of the Court where the discontinuance would have precluded the defendant from asserting her claim to matrimonial property due to the passage of limitations, and where there remained outstanding issues between the parties (including money that had been paid into court), and outstanding contempt proceedings. The Court of Appeal allowed the defendant to

first file her counterclaim, and directed this Court to address contempt and other relief before a discontinuance was considered;

(k) in ***Poffenroth Agri Ltd v Brown***, 2020 SKQB 31 aff'd 2020 SKCA 121, the Court struck a discontinuance of an action commenced in Saskatchewan, where the plaintiff had also started an action in Alberta and the Alberta Court had deferred the question of jurisdiction to the Saskatchewan Court. The Court found that the discontinuance was an abuse of process because it attempted to "evade the order" of the Alberta Court;

(l) in ***Condominium Corporation No 082 9220 (Terwillegar Terrace) v Yan***, 2021 ABQB 429 (Master), the Court found a discontinuance was not an abuse of process when an action commenced by way of an originating application was not ready for adjudication because there were 46 outstanding undertakings, the matter had not yet been set down for trial, and there was no summary dismissal application pending;

(m) in ***Hudson v Strata Corporation VIS201***, 2021 BCSC 1309, the Court refused an application by a plaintiff to set aside her own discontinuance in the event an alleged settlement agreement was found not to be binding;

(n) in ***Kawaguchi v Kawa Investments Inc***, 2021 ONCA 770, the Ontario Court of Appeal upheld a decision setting aside a discontinuance that was filed by the plaintiffs in response to defendants advising that they intended to apply for summary judgment dismissing the claim. The plaintiffs made it clear they wished to retain their right to recommence the action against the defendants in the future;

(o) in ***DLC Holdings Corp v Payne***, 2021 BCCA 31, the British Columbia Court of Appeal stated that a discontinuance filed as of right could be set aside where it amounted to an abuse of process, "in the sense of being manifestly unfair to a party in the litigation (again, to prevent an injustice), or otherwise bringing the administration of justice into disrepute". It described that this would only occur in "rare circumstances". In ***DLC***, the Court found that the court below erred by making orders in the action following the discontinuance without first setting aside the discontinuance pursuant to an application to do so;

(p) in ***Fabish v Mackenzie Investments***, 2024 SKKB 75, the Court refused to set aside or ignore a discontinuance where it was filed to avoid a motion to strike the plaintiff's pleading. The Court distinguished the matter from cases where defendants would have been denied crucial remedies they were seeking. In ***Fabish***, the practical outcome of the striking motion would have been the same as the discontinuance – the end of the active claim by the plaintiff (but not on a "with prejudice" basis);

(q) in ***Sekerbank Taş v Arslan***, 2024 SKKB 115, the Court refused to set aside a discontinuance at the request of a non-party to the action; and

(r) in ***Arnston***, the Court of Appeal set aside a discontinuance in a matrimonial property action. The plaintiff discontinued the action after the defendant had engaged the court's family docket court process to get directions to enforce a global settlement the parties had reached years earlier but had not yet fully implemented. The Court of Appeal noted that

> the defendant had the right to obtain a determination of whether he could pursue enforcement of the settlement in the matrimonial property action and, further, that there were several unresolved issues between the parties (including entitlement to funds held in court).

[39] These cases reflect the tension between honouring a plaintiff's right under the rule 4.36(1) to be *dominus litus*, including having the right to decide when to give up prosecution of its claim, while at the same time precluding a plaintiff from abusively doing so to avoid existing court orders or court involvement, or to prejudice already engaged rights of defendants.

3. Decision and Discussion

[40] As a preliminary matter, I find that the applicable rule in this matter is rule 4.36(1) because no trial date for the 1001 Action has been set. Neither the 2014 Orders nor the 2017 Order set the trial date but rather directed the Indemnity Actions to be heard together with the trial in the 1001 Action. This is quite different than the situation addressed in relation to the Fiat Request of Ms. Potts in a different Case Managed Action, where I had already directed the matter to be set down for trial but that had not actually happened at the time of the discontinuance.[5] I disagree with McMullen and the Remaining Defendants that leave was required to file the 2025 Discontinuance under rule 4.36 or otherwise.

[41] I address McMullen and the Remaining Defendants' Fiat Requests below.

a. McMullen's Fiat Request

[42] McMullen's Fiat Request seeking leave to file the Proposed Discontinuance Set Aside Application is not granted, for several reasons.

[43] First, McMullen did not address the "McMullen Restriction Decisions" as described in ***2025 ABKB 481*** at paras 29-46. My direction in Endorsement #41, which provided McMullen a deadline to file his Fiat Request for the Proposed Discontinuance Set Aside Application, did not waive his need to show that he has complied with the Court's processes and has paid required costs before seeking further relief from the Court. For the same reasons as set out in ***2025 ABKB 481*** at paras 29-46, McMullen's Fiat Request is denied.

[44] Second, McMullen is no longer a party to the 1001 Action, and has not been since October 30, 2024. His appeals of the Contempt Decision and the Sanction Decision are no longer extant and, as noted above, are final decisions. Further, McMullen has not brought any Fiat Request to set aside the McMullen Discontinuance. In the circumstances, I find that McMullen has no standing to seek to set aside the 2025 Discontinuance by filing the Proposed Discontinuance Set Aside Application. In this respect, McMullen's position, while different from, is reasonably analogous to the cases in ***Sekerbank*** and ***Glasjam***.

[45] Third, and in any event, even if McMullen was not restricted from bringing this Fiat Request, and even if he had standing to file the Proposed Discontinuance Set Aside Application, it would be hopeless and I would not permit it. My reasons for that include those set out below as it relates to the

[5] See, Endorsement #54 at para 8.

Remaining Defendants, who are also not permitted to bring their Proposed Discontinuance Set Aside Application.

b. The Remaining Defendants' Proposed Discontinuance Set Aside Application

[46] I do not grant permission to the Remaining Defendants to file the Proposed Discontinuance Set Aside Application. I find it has no hope of success, would "accomplish little", the Remaining Defendants would suffer no prejudice to their substantive rights if the Fiat is not granted, and granting the Fiat would cause disproportionate delay and expense. See ***2025 ABKB 481*** at paras 16(i), (j) and (k). My reasons for this conclusion include those set out below.

[47] First, as noted above, because the trial date had not been set, Piikani Nation had the right to file the 2025 Discontinuance. Doing so was not in breach of any of my case management directions or endorsements, and was not seeking to avoid a court order or direction. It was also consistent with the advice of Piikani Nation's counsel in June 2025 that it was attempting to resolve the 1001 Action with the Remaining Defendants.

[48] Second, I am not persuaded that there is any practical merit to the position that the 2025 Discontinuance was not filed or served.

[49] Rule 11.27 "enables the Court to validate service done 'in a manner that is not specified by these rules if the Court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the person served'": ***Thompson v Procrane Inc (Sterling Crane)***, 2016 ABCA 71 at para 11. Service is a specialized form of notice encompassing the conveying of knowledge or information with the intention to affect legal rights: ***Zahmol Properties Ltd v Calgary (City)***, 2012 ABCA 89 at paras 14-16, leave to appeal to SCC refused, 2012 CarswellAlta 1800, [2012] SCCA No 235. It is a practical consideration, not a "magical or formalistic ritual that has to be followed", with its main point that the person served actually receives notice of proceedings: ***Sandhu v MEG Place LP Investment Corporation***, 2012 ABCA 266 at para 19; ***Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v Barry***, 2016 ABCA 354 at para 7; ***Post v Kellogg Brown & Root (Canada) Company***, 2005 ABCA 390 at para 5. Unconventional forms of service that actually bring the legal process to the attention of the person being served are still effective: ***Thompson*** at para 12, citing ***Sandhu*** at para 19.

[50] In this case, Piikani Nation has asserted that it effected service after the Fiat Request (on October 2, 2025) and has provided copies of its service letters addressed to the Remaining Defendants at their email addresses in the service list set out in Endorsement #10 and/or as confirmed to me during a CMC. Further, the Remaining Defendants have jointly brought the Fiat Request to file the Proposed Discontinuance Set Aside Application, so are therefore clearly aware of the 2025 Discontinuance. It would be a wasteful triumph of form over substance to allow the Proposed Discontinuance Set Aside Application to proceed on the basis of lack of service, when any service deficiency could readily be rectified by an application to validate service, by proof of service, or by effecting service now if it has not yet been effected. To complete the record, I direct Piikani Nation to file affidavits of service in relation to the service of the 2025 Discontinuance.

[51] Further, there is no evidence to suggest that Gowlings was involved in the service of the 2025 Discontinuance in breach of the Gowlings Decision and related order, as asserted in the Fiat Request.

This is not addressed in the Remaining Defendants' evidence. And, as noted, the Piikani Nation response to the Fiat Request attaches the service letters, which are from JSS.

[52] Third, this is not a case where Piikani Nation seeks to discontinue and then abusively restart the same litigation, as is sometimes seen. Rather, Piikani Nation understandably wants to end the 1001 Action completely. It has already discontinued the action against McMullen and wants to do the same against the Remaining Defendants, for economic and equitable reasons. It is not, without more, abusive for a plaintiff, having been engaged in expensive litigation for 15 years without material progress toward resolution, to decide it no longer wants to advance its claim. Even if Piikani Nation were to later change its mind, its claims would very likely be long statute barred under the *Limitations Act*, RSA c L-12.

[53] Fourth, while it might be argued that Piikani Nation is seeking to avoid the Remaining Defendants' Fiat Request to file the Proposed Striking Application, this is not the same as ***De Shazo*** or ***Kawaguchi*** where a discontinuance was clearly filed to avoid a summary dismissal application which had the potential to resolve the claim in favour of the defendants *on the merits of the case*.

[54] The present situation is more akin to ***Fabish***, where the discontinuance will effect the same result as the Remaining Defendants' Proposed Striking Application to strike the 1001 Action for delay. That is, the 2025 Discontinuance accomplishes what the Remaining Defendants seek: the end of the 1001 Action against them. The Remaining Defendants' proposed evidence in support of their applications focusses only on the lengthy delay in the 1001 Action and the prejudice they say they suffer with its continued existence.

[55] The 2025 Discontinuance achieves the Remaining Defendants' goal of ending the 1001 Action against them while also saving the Remaining Defendants, Piikani Nation, and the Court the time, effort and resources associated with the Proposed Striking Application.

[56] Further, the Remaining Defendants could not do better substantively if the Proposed Striking Application were to proceed. Neither the 2025 Discontinuance nor a successful Proposed Striking Application would lead to a substantive decision on the merits of the plaintiffs' claim in the 1001 Action. With respect to the costs of the Remaining Defendants for preparing their Fiat Request for the Proposed Striking Application (which they might be entitled to if they were granted leave to proceed with that application and/or did so successfully), that can be addressed as part of the Fiat Process without setting aside or ignoring the 2025 Discontinuance.

[57] Fifth, the 1001 Action is not required to be maintained to preserve the Remaining Defendants' third party claims, as those claims have all been struck with no appeals therefrom.

[58] Sixth, there is no material prejudice to the prosecution or trial of the Indemnity Actions. There will be no trial of the plaintiffs' claim in the 1001 Action, as contemplated by the 2014 Orders or the 2017 Order. But a court order should be interpreted as a holistic document, by reading the language of the order as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context or circumstances in which the order was granted, and the intention of the court granting the order: ***Lay v Lay***, 2024 ABCA 26 at para 10; ***Kantor v Kantor***, 2023 ABCA 237 at para 23; ***Weinrich Contracting Ltd v Wiebe***, 2022 ABCA 176 at para 25. In my view, the 2014 Orders and the 2017 Order, properly interpreted, were never intended to preclude resolution or termination of the plaintiffs' claims in the 1001 Action before trial.

[59] In any event, the Indemnity Actions can proceed to trial without the plaintiffs' claims in the 1001 Action. If the plaintiffs in the Indemnity Actions wish to proceed with those actions, they remain under my case management and the next steps can be addressed in that context. Piikani Nation has acknowledged that neither the McMullen Discontinuance nor the 2025 Discontinuance prevents further advancement of the Indemnity Actions (or their potential conversion to statements of claim). If necessary and appropriate, relief may be sought for use of the records produced in the 1001 Action pursuant to rule 5.33 or pursuant to court granted relief from the common law implied undertaking rule.

[60] Further, I am not satisfied that the 2025 Discontinuance causes a real risk of *res judicata* or issue estoppel that would unduly complicate the Indemnity Actions, as asserted by the Remaining Defendants. I note that the Remaining Defendants did not identify any specific *res judicata* or issue estoppel concerns.

[61] The issue estoppel branch of *res judicata* was explained by the Supreme Court of Canada in ***Toronto (City) v CUPE, Local 79***, 2003 SCC 63 at para 23 (emphasis in original):

> Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.)...

[62] See also: ***Sutherland v Sutherland***, 2023 ABCA 121 at para 13; ***Konkolus v Balanko***, 2024 ABCA 134 at para 16 (footnote 31).

[63] Further, rule 4.36(5) provides that a "discontinuance of an action may not be raised as a defence to any subsequent action for the same or substantially the same claim". Normally a discontinuance does not preclude relitigation: ***Rumancik v Hardy***, 2025 ABKB 277 at para 88.

[64] While there may be some overlap in what would have been decided in the plaintiffs' claims in the 1001 Action and the Indemnity Actions, as it relates to the Remaining Defendants' conduct, because Piikani Nation may rely on some of the same alleged conduct of McMullen or the Remaining Defendants as a defence to the claim for indemnity in the Indemnity Actions, I am not aware of any substantive final decisions made in the 1001 Action which would engage issue estoppel or *res judicata*. For the same reason, the Remaining Defendants do not lose an advantage by not being permitted to apply to have the 1001 Action struck against them for delay; even if successful, that would not involve a finding about the underlying merits of the 1001 Action or the Indemnity Actions, or about the defendants' conduct.

[65] Seventh, there is no prejudice to the Remaining Defendants' costs position if the 2025 Discontinuance is not set aside or ignored.

[66] As noted, costs related to the Fiat Request for the Proposed Striking Application can be addressed within the Fiat Process.

[67] Further, under rule 4.36(4), the Remaining Defendants are "entitled to a costs award against the plaintiff for having defended against the discontinued claim": ***PR Construction Ltd v Colony***

Management Inc, 2023 ABKB 25 at paras 19-21. Piikani Nation does not appear to dispute the Remaining Defendants' potential entitlement to their costs of defending the 1001 Action under rule 4.36(4).[6]

[68] The Remaining Defendants assert that the very same issues engaged in the 1001 Action will have to be determined to resolve the Remaining Defendants' claim to indemnification for costs of the 1001 Action under rule 4.36(4). I note that not all of the Remaining Defendants have extant, filed claims or actions for indemnification against Piikani Nation. Further, if the Remaining Defendants wish to rely on contractual indemnity agreements or a statutory indemnification to support full indemnity costs of defending the 1001 Action under rule 4.36(4), they have the right to take that position. If there is conflicting evidence that is necessary to be resolved to determine their claim to contractual or statutory entitlement, then determining that alleged entitlement may require a trial in any event. In that instance, it may very well be that it will be most appropriately dealt with at a trial of the Indemnity Actions (although I make no finding about that on the record before me). The fact there may possibly be a factual dispute about contractual or statutory cost indemnity entitlement is not prejudice caused by the 2025 Discontinuance. Further, it may also be possible to award the Remaining Defendants costs under rule 4.36(4) on an interim basis pending a determination of contractual or statutory indemnity entitlement.

[69] Eighth, the 1001 Action has not reached a stage where it would be unfair or inappropriate to allow Piikani Nation to discontinue the 1001 Action. As acknowledged by the Remaining Defendants in their proposed joint affidavit, the 1001 Action "is currently not anywhere close to being set down for trial".

[70] In my view, the plaintiffs remain *dominus litus vis a vis* their claims in the 1001 Action. Although the 1001 Action has been extant for over 15 years, unbelievably it is in its very early stages as measured against the life of a civil action. The unfortunate reality is that the 1001 Action represents a high-water mark for the most consumption of judicial and party resources with the least actual advancement of an action. This costly lack of progress has been caused by, among other things, years of excessive interlocutory procedures and appeals during which progress of the 1001 Action has largely sat dormant. The Remaining Defendants appear to have been largely content to have allowed others to direct the course of the litigation. In my view, in all the circumstances, it was not prejudicial to the Remaining Defendants, or abusive, for Piikani Nation to file the 2025 Discontinuance to end the continued unproductive churn of resources on the plaintiffs' claim.

[71] For at least the above reasons, I find it would be hopeless for the Remaining Defendants to be allowed to file the Proposed Discontinuance Set Aside Application, to assert that Piikani Nation required leave to file the 2025 Discontinuance, or to assert that the 2025 Discontinuance was an abuse of process or otherwise should be set aside or ignored.

c. Conclusion

[72] This Fiat Request is denied. Neither McMullen nor the Remaining Defendants are granted permission to file the Proposed Discontinuance Set Aside Application.

[6] Piikani Nation's response to this Fiat Request states that "the Remaining Defendants are free to seek costs in [the 1001 Action]".

B. Should Permission be Granted to File the Proposed Striking Application?

[73] As I have decided not to grant permission to McMullen or the Remaining Defendants to file the Proposed Discontinuance Set Aside Application, there is no claim against the Remaining Defendants to strike. The 1001 Action against them is over and, to the extent necessary, they can point to Piikani Nation's unilateral 2025 Discontinuance against them to show that the claim against them has never been proven and has been abandoned.

[74] In the circumstances, the Proposed Striking Application is moot, unnecessary and would be hopeless.

[75] This Fiat Request is denied. The Remaining Defendants are not permitted to file the Proposed Striking Application.

C. What is an Appropriate Order?

1. Costs re: Proposed Discontinuance Set Aside Application Fiat Request

[76] McMullen and the Remaining Defendants have been unsuccessful with this Fiat Request. Piikani Nation has been successful.

[77] McMullen's participation in the Fiat Request as a non-party to the 1001 Action and not having addressed the McMullen Restriction Decisions warrants cost consequences. I find Piikani Nation is *prima facie* entitled to costs against McMullen for this Fiat Request. I direct the following process for determining costs, in the event the parties cannot agree. Within 2 weeks of these Reasons, each party shall provide me and the other participants to this Fiat Request a written cost submission setting out their costs position. These submissions will be a maximum of 4 pages in letter format, single spaced (excluding authorities, offers, proposed bills of costs, or summaries of proposed reasonable costs actually incurred). Within 4 weeks of these Reasons, each party shall file and serve on the opposing participants and submit to my office any response submission to the other parties' cost submission, to a maximum of 3 pages in letter format, single spaced (excluding authorities).

[78] With respect to the Remaining Defendants, although they were unsuccessful, in the unique circumstances of this case, and given the timing of the 2025 Discontinuance in the context of the 1001 Action overall, I find that it was reasonable for the Remaining Defendants to make the Fiat Request even though I have now found the proposed application to be hopeless. These parties and Piikani Nation shall bear their own costs of this Fiat Request. This is without prejudice to the parties' respective positions related to other costs in the 1001 Action.

2. Costs re: Proposed Striking Application Fiat Request

[79] With respect to the Fiat Request to file the Proposed Striking Application, I have denied the Fiat Request. However, my reason for doing so was because of the filing of the 2025 Discontinuance, which I have found achieved the same substantive result for the Remaining Defendants. Further, Piikani Nation waited to file the 2025 Discontinuance at time when, for practical purposes, the Remaining Defendants had already provided or prepared their Fiat Request, thus rendering it moot and wasting resources. In these unique circumstances, I direct the costs associated with this Fiat Request to be addressed as part of costs in the 1001 Action (addressed below).

3. Costs re: 1001 Action

[80] The 1001 Action is now at an end as against McMullen and the Remaining Defendants, subject to costs.

[81] As per the Sanction Decision, McMullen is not entitled to costs: ***2024 ABKB 575*** at para 161(2).

[82] As noted above, rule 4.36(4) provides that the Remaining Defendants are "entitled to a costs award against the plaintiff for having defended against the discontinued claim". If the Remaining Defendants wish to seek costs against the plaintiffs in respect of the plaintiffs' claims in the 1001 Action, they are entitled to seek costs without a Fiat Request.

[83] If the Remaining Defendants intend to pursue costs of the 1001 Action, they shall advise me in writing **by February 13, 2026**, failing which they will have represented to the Court that they do not intend to seek costs of defending the plaintiffs' claims in the 1001 Action. If any of the Remaining Defendants comply with this direction and advise me that they intend to seek costs of the 1001 Action under rule 4.36, then we will discuss the procedure for determining those costs at our next CMC (at which those Remaining Defendants are expected to attend in person or by Webex).

4. Next Steps

[84] In the Sanction Decision, ***2024 ABKB 575*** at para 161(6), CMJ Graesser directed that "[i]n the event the Nation discontinues the [1001 Action against McMullen], the parties are to arrange a [CMC] to schedule any intended proceedings under Mr. McMullen's Indemnity Agreement".

[85] In Endorsement #21 (August 21, 2025), after suggesting the parties consider whether the Indemnity Actions should be converted to statements of claim, I stated at para 19:

> [19] I direct the parties to these actions attempt to reach an agreement on the procedural path forward, and litigation plan, for the 1001 Action, the 1101 Action, the Small Legs Action and the Provost Action. If the parties cannot agree, we will discuss this question at our next CMC. My present inclination, subject to further submissions at a CMC, is that if there is no agreement reached, and procedural applications are required, I will be setting a schedule for any requested procedural applications for the purpose of getting these actions on a path toward trial.

[86] I directed the parties to schedule a one-hour CMC in September or October 2025, but they did not do so. In Endorsement #41 (September 26, 2025), at para 9, I noted that the parties had not contacted the Court Coordinator and directed them to "immediately schedule a 1.5 hour CMC in these actions in October 2025. Mr. McMullen shall take the lead in scheduling and Piikani Nation's counsel shall provide me an agenda one week before the CMC". I understand that the parties have still not contacted the coordinator to schedule the next CMC.

[87] I direct the parties to immediately schedule with the Court Coordinator a 1.5 hour joint CMC in the 1001 Action, the 1101 Action, the Small Legs Action and the Provost Action, to take place in February 2026. JSS shall take the lead in scheduling the CMC and shall provide an agenda one week before the CMC. The agenda items shall include the possibility of JDR, the determination of costs in the 1001 Action, and the proposed procedures for moving the Indemnity Actions forward.

V. Conclusion

[88] I make the directions and orders noted above. Counsel for Piikani Nation shall prepare the form of order arising out of these Reasons and submit it through KB filing. Rule 9.4(2)(c) is invoked with respect to McMullen and the Remaining Defendants such that the form of order need not be approved by them, but a copy shall be sent to them at the same time they are sent to the Court for filing.

Dated at the City of Calgary, Alberta this 14th day of January, 2026.

M.A. Marion
J.C.K.B.A.

Appearances:

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for Piikani Nation

Dale McMullen, Stephanie Ho Lem, Kerry Scott, Stan Knowlton, Edwin Yellow Horn, Jordie Provost and Shelley Small Legs
Self-represented litigants