

Court of King's Bench of Alberta

Citation: Richard v John's Sandblasting & Painting Ltd, 2026 ABKB 44

Date: 20260119
Docket: 2403 14746
Registry: Edmonton

2026 ABKB 44 (CanLII)

Between:

Napoleon Richard

Plaintiff/Respondent

- and -

John's Sandblasting & Painting Ltd

Defendant/Appellant

**Reasons for Decision
of the
Honourable Justice Douglas R. Mah**

Appeal from the Order by
The Honourable Applications Judge S. A. Wanke

Dated the 2nd day of October, 2025
(Docket: 2403 14746)

A. Background

[1] The Defendant appeals the October 2, 2025 Decision of the Applications Judge (AJ) which dismissed its application to strike the Plaintiff's Statement of Claim as an abuse of process under *Rule 3.68*. The main appeal ground is that the learned AJ failed, in light of established precedent, to properly interpret and apply *Rule 3.68* as it pertains to simultaneous proceedings for the same cause of action.

[2] The Plaintiff, Mr. Richard, was terminated from his employment on August 8, 2022. By his counsel, he initially sued his former employer (the Defendant) for wrongful dismissal in a Civil Claim filed in the Court of Justice (COJ) on June 19, 2024. The Civil Claim was served on the Defendant by email on June 21, 2024 and service was acknowledged by its former legal counsel on July 17, 2024.

[3] While the Civil Claim pleaded damages in excess of the COJ maximum, that maximum was and remains at \$100,000.¹

[4] As explained in the hearing before the AJ, the Plaintiff's counsel reassessed the damages and concluded an action should be started in the Court of King's Bench (KB) in order to preserve his full entitlements. The KB Action was commenced on August 1, 2024, as the limitation date was pressing. It is accepted that the KB Action covers the exact same subject-matter as the Civil Claim. The Civil Claim was formally discontinued on August 15, 2024.

[5] Since that date, there has only been one extant Action.

[6] Both the Notice of Withdrawal of the Civil Claim and the Statement of Claim in the KB Action were served upon the Defendant's former counsel at the same time and under the same letter dated August 20, 2024. The former counsel acknowledged service of both and asked that no steps be taken in the KB Action without notice. No Dispute Note had been filed and no steps taken by the former counsel in the Civil Claim.

[7] A Statement of Defence in the KB Action was filed by the former counsel on December 19, 2024. Beyond that, no steps appear on the Court file to have been taken until September 11, 2025.

[8] On that date, the Defendant changed counsel to its current counsel, who brought the striking out application before the AJ.

B. The Decision Under Appeal

[9] In dismissing the striking application, the learned AJ found:

- No prejudice accrues to the Defendant where the Plaintiff's Civil Claim is subsumed by a subsequent KB Action.
- Notwithstanding any short period of overlap, there is no abuse of process because there is currently only one action before the Court.

C. Argument

[10] The Defendant argues in this appeal that:

- The word "may" as used in *Rule* 3.68 confers a power to be exercised, thus requiring the Court to strike out the action if the necessary condition is present: *R v Moore*, 1985 CanLII 5991 (ON CA) at p 140. Here, the fact of duplicity, however temporary, establishes the necessary condition.
- Even if the word "may" is used in *Rule* 3.68 to denote permissiveness or discretion, that discretion must be exercised judicially and in accordance with

¹ Section 2, *Court of Justice Civil Procedure Regulation*.

established principles: *BCIT (Student Association) v BCIT*, 2000 BCCA 496 at para 23 citing *Borowski v Canada (AG)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at p 358 .

- Either way, one such established principle is that duplicate proceedings are not permitted and constitute an abuse of process, which must result in the Court striking the second action: *Edmonton Northlands v Edmonton Oilers Hockey Club*, 1993 CanLII 7234 (AB KB) at para 26 & 27; *German v Major*, 1985 ABCA 176 at para 6; *Urban Landmarks Master Builder Inc v Lloyd's Underwriters*, 2012 ABQB 224 at paras 28-32; *Grabowski v Karpiak*, 2001 ABQB 1090 at paras 30-32.
- The Court of Appeal in *Whitehead v Taber*, 1985 ABCA 29 at para 4 applied the rule against duplicity in the case of a superior court action being started in the face of an existing provincial court action, which is the situation at hand.
- The AJ failed to apply *stare decisis* or binding legal precedent when she dismissed the striking application.
- Furthermore, the Court's analysis of duplicitous proceedings should focus on preventing abuse of its own process, not prejudice or lack or prejudice to either party.
- The mere overlap in time of existence of both the Civil Claim and the KB action is sufficient to invoke the rule against duplicitous proceedings.
- The efficacy of the Rule of Law depends on scrupulous adherence to *stare decisis* or else our legal system falls into disarray. Master Funduk's famous admonitory adage in *South Side Woodwork v RC Contracting*, 1989 CanLII 3384 (ABKB) at paras 51-53 applies.²
- The Defendant contends that the AJ, by ignoring binding precedent, has effectively overruled the higher court.
- A harsh result for the Plaintiff is not a reason to ignore clear law: *Neis v Yancey*, 1999 ABCA 272 at para 40. All is not lost. He could still blame his lawyer.

[11] The Plaintiff responds:

- The words used in *Rule 3.68* confer discretion and do not, as the Defendant contends, dictate a result. That discretion is inherent in the words "If the circumstances warrant ..." that precede the word "may" which itself conveys discretion.
- *Rule 3.68* gives the Court discretion to determine when an abuse or process (or any other necessary condition in the *Rule*) is present and if so, the appropriate remedy, if any: *Donaldson v Farrell*, 2011 ABQB 11 at paras 11-13.
- The Rules must be applied and interpreted having regard to Foundational Rule 1.2 where "timeliness and cost-effectiveness is put front and centre alongside the

² "The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around."

need for a fair and just result”: *Stout v Track*, 2013 ABQB 75 at para 47. See also: *Donaldson* at para 10.

- The present case is distinguishable from the precedents cited by the Defendant because, unlike those cases, there is presently only one action for a particular cause of action (not two) before any Court. It is an abuse of process where a claimant seeks to prosecute duplicitous actions at the same time: *Ashraf v Munn*, 2021 ABQB 472 at para 30. In the present case, the Civil Claim was withdrawn before the Statement of Claim was served.
- Whether the Defendant is prejudiced by continuation of the new action is part of the abuse of process analysis: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37; *Moore Dry Kiln Co. of Canada Ltd v Green Cedar Lumbar Co. Ltd et al*, 1982 CanLII 2025 (ON SC); *Western Canadian Place Ltd v Con-Force Products Ltd*, 1997 CanLII 14840 (AB KB) at para 35; and *VB v Alberta (Minister of Children’s Services)*, 2004 ABQB 788 at para 31; and *Urban Landmarks* at para 57.

D. Standard of Review

[12] The standard of review for an appeal of an AJ decision to a Justice of this Court is correctness: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166 at para 30; *Stavro Melathopoulos Architect Ltd v Webber Academy Foundation*, 2018 ABCA 38 at para 10 & *Singh v Noce*, 2019 ABCA 55 at para 8.

E. Is This a Case of Post-Fundukian Free-Lancing?

[13] Counsel for the Defendant contends that the AJ’s decision is an example of a disturbing trend of erosion of *stare decisis*.

[14] I agree that *stare decisis* is a foundational principle that assures stability and coherence in our law: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 38 & *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44.

[15] The Defendant relies on two binding precedents that it says the AJ failed to follow: the Court of Appeal’s decision in *German* and Chief Justice Moore’s decision in *Edmonton Northlands*.

[16] However, in neither of these precedent cases (nor in the two other cases – *Urban Landmarks* and *Grabowski* – that it says applies these precedents) was the Court facing a situation where the Plaintiff had chosen to deliberately reduce two concurrent actions to one, seeking to proceed with only the sole surviving action. During the hearing before me, counsel for the Defendant conceded that the cases he cited all involved two subsisting actions for the same matter at the point in time the Court was asked to strike the second action.

[17] Indeed, *German* is not even a case about duplicitous actions. It involved the old Rule 129 (predecessor to current *Rule* 3.68) as authority for striking a hopeless action. The Court of Appeal at para 6 mentioned, by way of example, various forms of abuse of process, one of which was “the rule against multiple prosecution, where a new suit is brought while another is pending ...”

[18] In *Edmonton Northlands* at para 26, Chief Justice Moore did say at para 26:

The courts of Alberta generally recognize a rule against multiple prosecution. It is trite law that commencing a second action while one is currently pending is an abuse of process ... (citing *German* above)

[19] I do not read either case as creating an immutable rule that an abuse of process mandating striking occurs any time a duplicitous action is started. The key concept in both *German* and *Edmonton Northlands* is *multiple prosecution* or the conduct of concurrent actions by the same Plaintiff against the same Defendant for the same cause of action. Where two actions for the same cause are being prosecuted simultaneously, the Defendant is required to defend the same matter on two different fronts.

[20] Here, while there was overlap of about two weeks in the life of each action, the first action was discontinued (without the Defendant ever having to take steps) before the second action was even brought to the Defendant's attention. At any given time, the Defendant was only required to defend on a single front.

[21] In *Edmonton Northlands*, there were two concurrent actions seeking the same relief. The Court struck out the second one because the Plaintiff's remedy was available in the first action. The learned AJ said this exact thing at p 8, lines 18-20 of the Decision Transcript, noting that if there was a multiplicity of proceedings, then the proper thing to do is to strike out all actions but one.

[22] In this sense, it might be said that the AJ not only acknowledged *Edmonton Northlands* as precedent but followed it, by allowing one single action to proceed. That is, the rule to be extracted might be: For any cause of action, there shall be only one action prosecuted in any Court.

[23] Moreover, neither *German* nor *Edmonton Northlands* can or should be construed to mean that if there is any overlap in the existence of duplicitous actions, then the second one must be struck out as an abuse of process. Under this formulation of the rule, the result is harsh and final for the Plaintiff. It would also be unfair.

[24] I pose this dual scenario for why such a rule is untenable. In Scenario 1A, a law firm starts a wrongful dismissal action for a client in the COJ and then decides to revise its approach by preparing a Statement of Claim for the same relief for filing in KB. The law firm sends its employee to the courthouse to file a Discontinuance of the Civil Claim as well as the Statement of Claim. The employee files the Discontinuance first and two minutes later files the Statement of Claim. The Defendant cannot complain (as the Defendant does in the present case) because at no time were there two extant actions for the same thing. However, in Scenario 1B, if the law firm employee had taken those steps in reverse order, under the rule proposed by the Defendant in this case, the Statement of Claim now constitutes an abuse of process and must be struck out.

[25] Under this rule in Scenario 1B, the mere co-existence of the two actions, for even the briefest of moments, is sufficient to consign the second action as an abuse of process even though the consequences are exactly the same for the Defendant as in Scenario 1A.

[26] I do not think that the rulings in *German* and *Edmonton Northlands* can be converted to such a strict and inviolable rule that it encompasses the present case. Legal formalism of this nature operates against fair outcomes, which is the ultimate purpose of the justice system. The

Supreme Court of Canada itself (at para 44 of *Carter*) recognizes that “*stare decisis* is not a straitjacket that condemns the law to stasis.”

[27] The upshot is that the rulings in *German* and *Edmonton Northlands*, cited above, are meant to cover duplicitous proceedings where both actions are being concurrently prosecuted, not where the first is dropped in favour of the second and the overlap has no consequence for the Defendant.

[28] Another way of saying this is that the present case is distinguishable.

[29] The harshness of an outcome is not by itself a reason for side-stepping a rule where the rule is inviolable. Examples would be the expiry of a limitation period, the failure to serve a Statement of Claim before expiry [*Rule 3.26*] or delay in an action [*Rule 4.33*]. But *Rule 3.68* is not inviolable. And producing fair, just and proportionate outcomes is the goal of our system of civil justice. That would not happen here if the Statement of Claim is struck out because of technical temporal overlap with the Civil Claim of two weeks, with no consequence to the Defendant.

F. Discretion

[30] The Defendant relies on the *BCIT* case for the proposition that the exercise of discretion must align with established legal principles. The invocation of the words of Sopinka J in *Borowski* at p 358 that discretion must be “judicially exercised with due regard for established principles” in that case does not mean rote application of a rule regardless of the facts. Besides, as counsel for the Plaintiff pointed out, *BCIT* deals with impermissible deviation from specific statutory criteria, not with a wide-open legal concept such as abuse of process.

[31] The Court in *BCIT* itself cautions against descending into formalism (at para 22):

It is, of course, recognized that courts can lay down factors to be considered in the exercise of discretion, while they cannot lay down rigid rules. Thus, in *Ward v James*, [1965] a1 All ER 563, Lord Denning, MR stated at p 571:

The cases all show that, where a statute gives a discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised and thus ensure some measure of uniformity of decision. From time to time the considerations may change as public policy changes, and so the pattern for decision may change. This is all part of the evolutionary process.

[32] I further agree with counsel for the Plaintiff that discretion is inherent in *Rule 3.68*, even if the “may” confers a power, in that the Court must find that “circumstances warrant” and that a condition under subrule (2) applies. The *Rule* does not mandate a result. The decision-maker must still analyze the facts and circumstances and determine whether a necessary condition exists and if the Order to strike is warranted. In this case, the AJ found that the necessary condition of abuse of process was not established, so no Order was required. Nothing in the

record or the decision transcript indicates that the discretion was not exercised judicially or contrary to binding legal principles.

G. The Role of Prejudice

[33] I realize that there was no mention of the role of prejudice in the abuse of process analysis in either *German* or *Edmonton Northlands*, but I agree with Plaintiff's counsel that the presence or not of prejudice is a factor in determining whether abuse of process has occurred. In *Toronto (City) v CUPE*, the Supreme Court of Canada expressly adopted these words (at para 37):

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.

[34] I do not see how permitting the Plaintiff's KB Action to continue is in any way manifestly unfair to the Defendant or that its continuation in some other way brings the administration of justice into disrepute. If anything, reliance on legal formalism might do so.

[35] The brief period of two weeks during which both the Civil Claim and the KB Action were alive does not, in my view, amount to a misuse of the Court's process. This is because the Civil Claim was discontinued before the Statement of Claim was served, during the two weeks nothing was done to advance either action, the Defendant became aware of the KB Action only after the Civil Claim was terminated and the Defendant at all times only had to respond to one action.

[36] I note the AJ's comments about how the Defendant might have a defence as to quantum based on the fact that the matter was originally commenced in the COJ (Transcript: p 8, lines 6-8). I do not comment on the merits of such a defence. I do note, as the learned AJ did (Transcript: p 5, lines 22-25), that if the monetary limit for damages in the COJ is exceeded, the matter may be transferred to KB.³ There is little difference between transferring a COJ Action to KB and discontinuing that action and recommencing another in KB.

[37] All to say, the Defendant incurs no prejudice in the KB Action proceeding.

H. Result

[38] I accept whole-heartedly the idea that *stare decisis*, especially the vertical type, is foundational and necessary for our legal system. I do not agree that the exercise of permissible discretion is an anathema to *stare decisis* or that the AJ's decision is a portent of its slow demise. Legal precedents should not be applied in a rote and rigid manner that does not consider differences in facts and circumstances, as it could lead to unjust or unintended results. This is a case in which the cited legal precedents are distinguishable, discretion exists and it was exercised judicially. Thus, the lower court in this case did not overrule the higher court.

³ Section 56 of the *Court of Justice Act*. Note that at subsection (4), a party that has abandoned any amount in excess of the COJ limit in a Civil Claim, may reinstate the full claim upon transfer of the action to KB, subject to any conditions that KB considers proper.

[39] I find that the AJ:

- was correct in concluding that no abuse of process occurred on the facts of this case; and
- did not ignore established and binding principles of law in reaching that conclusion.

[40] Accordingly, I dismiss the appeal.

[41] The Plaintiff is awarded his costs of this appeal under Schedule C as a contested Chambers Application requiring a brief [Item 7(1)], payable forthwith.

Heard on the 7th day of January, 2026.

Dated at the City of Edmonton, Alberta this 19th day of January, 2026.

Douglas R. Mah
J.C.K.B.A.

Appearances:

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