Court of King's Bench of Alberta

Citation: Osadchuk v Kidd, 2024 ABKB 448

Date: 20240719
Docket: 1901-02132
Registry: Calgary

Between:

Darrell Osadchuk, David Rankine and Labros Tsaprailis as trustees of Zipcash Financial Trust, Moco Management Inc.., 6M Investments LLC, 1718393 Alberta Ltd., Zipcash 99 LP, Zipcash 1 LP, 1656042 Alberta Ltd, Zipcash 2 LP, 1657601 Alberta Ltd, Zipcash 3 LP, 1657618 Alberta Ltd, Zipcash IV LP, 1669529 Alberta Ltd, Zipcash V LP, 1669536 Alberta Ltd, Zipcash VI LP, 1695273 Alberta Ltd, Zipcash VII LP, 1695266 Alberta Ltd, Zipcash 2013.1 LP, 1711236 Alberta Ltd, Fedilus LP1, 1711236 Alberta Ltd, Fedilus 2014 $US LP, 1711236 Alberta Ltd, Fedilus 2015.1 $US Blended LP, 1711236 Alberta Ltd, Fedilus 2015.4 $US Blended LP, 1711236 Alberta Ltd, Fedilus 2016.1 $US Blended LP, 1711236 Alberta Ltd, Fedilus 2016.2 $US Blended LP, 1711236 Alberta Ltd, Fedilus Bahamas Exempt I LP, International Benefits Management Corp., Fedilus Bahamas Exempt II LP, International Benefits Management Corp, Zipcash VIII LP, and 1711230 Alberta Ltd

Plaintiffs

- and -

James Kidd, Kenneth James Upcraft, Paycenter 1 Inc., Paycenter Solutions Inc., John Does, Jane Does, ABC Corporations and ABC Business Organizations

Defendants

Reasons for Decision
of the
Honourable Justice C.D. Simard

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I. Introduction

[1] The Plaintiffs say that the Defendants defrauded them by inducing them to invest US$48 million in a business the Defendants said would install, manage and operate banking kiosks throughout the United States. The Plaintiffs say that after some initial distributions of cash, the Defendants stopped making distributions and stopped communicating with the Plaintiffs, in suspicious circumstances. The Plaintiffs sue to recover their losses.

[2] The Defendant James Kidd (**Kidd**) says that the Plaintiffs did not validly serve him or the Defendant Paycenter 1 Inc. (**PC1**) before the Plaintiffs' claim expired. PC1 is an Alberta corporation, of which Kidd was a director. PC1 was dissolved in 2018. Kidd says that because the Plaintiffs failed to serve him and PC1 before their claim expired, the claim is now a nullity against him and PC1. The Plaintiffs say that they have effectively served Kidd and PC1.

II. Procedural Background

[3] The Plaintiffs started this action by filing a Statement of Claim on January 25, 2019. They filed an Amended Statement of Claim on January 31, 2019.

[4] On January 22, 2020, Master Prowse granted an *ex parte* order (**Order No. 1**) extending the deadline for service of the Statement of Claim and the Amended Statement of Claim to April 25, 2020. On January 27, 2020, he granted an *ex parte* "Order for Substitutional Service" (**Order No. 2**) that permitted the Plaintiffs to serve Kidd and PC1 by taping a copy of the Statement of Claim and the Amended Statement of Claim to the door of a property in Atlanta, Georgia (the **Georgia Address**). Order No. 2 stated that documents served in this manner would be deemed to have been received by Kidd and PC1 10 days after they were taped to the door.

[5] On February 18, 2020, the Plaintiffs taped the Statement of Claim and the Amended Statement of Claim to the door of the Georgia Address (the **February Service**).

[6] On July 8, 2020, Master Farrington granted an *ex parte* order (the **July 8 Order**) permitting the Plaintiffs to further amend the Amended Statement of Claim, and to serve Kidd and PC1 outside Alberta ("*ex juris*") and substitutionally by "Express Post" to the Georgia Address. The July 8 Order stated that documents served by Express Post would be deemed to have been received by Kidd and PC1 one day following posting.

[7] The Plaintiffs served the Statement of Claim, Amended Statement of Claim and the Amended Amended Statement of Claim in a number of ways, that they say all complied with the July 8 Order (collectively, the **July Mailings**). I will refer to these three pleadings, or any one or more of them that had been issued at the relevant time, as the **Claims**.

[8] Kidd has filed two applications, essentially seeking declarations that the Plaintiffs' service of the Claims was ineffective and that the Court could not validate that service. He filed his first application on June 26, 2020; after the February Service but before the July 8 Order was granted and before the July Mailings. The Plaintiffs have filed three applications, essentially seeking declarations that their service of the Claims on Kidd and PC1 were effective, and that any irregularities in that service should be cured.

[9] Applications Judge Farrington heard all five applications in March 2023. On April 26, 2023, he partly granted one of the Plaintiffs' applications, ordering the revival of PC1 for the limited purpose of defending this action, and declaring PC1 to have been in existence continually since May 2, 2018 as if it had never been dissolved.

[10] On May 9, 2023, Applications Judge Farrington issued his decision on the remainder of the parties' applications and issued a corresponding order on July 5, 2023 (the **July 2023 Order**). He decided that the Plaintiffs had effectively served Kidd and PC1, because:

(a) although Order No. 2 was not in the form of a traditional service *ex juris* order, it expressly authorized the Plaintiffs to serve Kidd and PC1 outside Alberta;

(b) in Kidd's first application, he sought to set aside the Plaintiffs' service under Order No. 2, but he did not seek to set aside Order No. 2 itself, and did not appeal it. Therefore, Order No. 2 remained a valid and unchallenged order at all times;

(c) the Plaintiffs effectively served Kidd and PC1 with the Claims under Order No. 2 on February 28, 2020, within the deadline for service;

(d) Order No. 2 and the Plaintiffs' service under it did not contravene the ***Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*** (the **Convention**);

(e) Ministerial Order 27/2020, issued under the ***Public Health Act,* RSA 2000, c P-37** on March 30, 2020 in response to the COVID-19 pandemic (the **Ministerial Order**), extended the service deadline for the Claims to July 10, 2020; and

(f) the Plaintiffs effectively served Kidd and PC1 with the Claims under the July 8 Order, within the extended deadline for service.

[11] Kidd appealed this decision, and I heard his appeal on June 12 and 14, 2024. PC1 did not appeal, it is not a party to this appeal and it was not represented at the appeal.

III. Issues

[12] The issues I need to determine are:

(a) was the February Service on Kidd effective?

(b) if it was not, did the Claims expire on April 25, 2020?

(c) if they did not, were the July Mailings effective service on Kidd?

(d) if so, when was Kidd effectively served?

(e) what is the Status of Paycenter 1 in this Appeal?

IV. Summary of My Decision

[13] For the reasons that follow, I find that Applications Judge Farrington erred in concluding that the February Service was effective. It was not. However, while I disagree with some of Applications Judge Farrington's reasons, I agree with his conclusions that:

(a) the Claims did not expire on April 25, 2020, because the Ministerial Order extended the service deadline to July 10, 2020;

(b) the Plaintiffs effectively served the Claims on Kidd before July 10, 2020, by way of (one of) the three July Mailings; and

(c) this service complied with the ***Alberta Rules of Court*** (the **Rules**) and the Convention.

V. Standard of Review

[14] The standard of review in this appeal is correctness: ***Savanna Well Servicing Inc v Cleo Energy Corp*, 2023 ABKB 595** at para 2.

VI. Analysis

A. Was the February Service on Kidd Effective?

[15] For the reasons that follow, I have concluded that the February Service was not effective because the Plaintiffs' application for Order No. 2 did not comply with the substantive and mandatory requirements in Rule 11.25(2) and the common law. Applications Judge Farrington erred in finding that the February Service was effective.

1. The Requirements to Obtain a Valid Service *Ex Juris* Order in Alberta

[16] Rule 11.25(2) is the rule that governs the service of the Claims outside Canada. Its precise wording is important in this case, so I have fully reproduced it below:

> 11.25(2) A commencement document may be served outside Canada only if
>
> (a) a real and substantial connection exists between Alberta and the facts on which a claim in an action is based and the commencement document is accompanied with a document or affidavit that sets out the grounds for service of the document outside Canada,
>
> (b) the Court, on application supported by an affidavit satisfactory to the Court, permits service outside Canada, and
>
> (c) the person served with the commencement document is also served with a copy of the order permitting service outside Canada.

[17] Alberta courts have consistently held that there is an additional requirement to obtain a service *ex juris* order that is not expressly stated in Rule 11.25(2): the applicant must also show that it has a "good arguable case": ***Acciona Infrastructure Canada Inc v Posco Daewoo Corporation***, 2019 ABCA 241 at para 14. As explained by Dilts J in ***801 Seventh Inc v CNOOC Petroleum North America ULC,*** 2020 ABQB 198 at para 33: "[t]he requirement to establish a good arguable case does not require evidence of every cause of action, but sufficient evidence for the court to determine that it should assume jurisdiction over the party and the dispute."

[18] Kidd says that Order No. 2 did not and could not have authorized service of the Claims on him in Georgia, because the Plaintiffs did not satisfy the requirements under Rule 11.25(2) and the requirement to show a good arguable case in their application. The Plaintiffs say that Kidd is precluded from making this argument because to do so is a collateral attack on Order No. 2, which Kidd has never appealed, nor applied to set aside.

[19] Applications Judge Farrington agreed with the Plaintiffs. He found that although Order No. 2 was not a "traditional" service *ex juris* order and although the supporting affidavits filed in the application for Order No. 2 "did not deal with the traditional concepts of establishing a real and substantial connection to Alberta and a good arguable case", Order No. 2 expressly and literally permitted the Plaintiffs to serve Kidd and PC1 in Georgia. Court orders are binding in accordance with their terms unless varied, set aside or challenged on appeal. Therefore, he found, Order No. 2 was binding and the February Service effected in compliance with Order No. 2 was valid service *ex juris*.

[20] I disagree. The introductory language in Rule 11.25(2) states clearly that "A commencement document may be served outside Canada **only if**" the requirements in the Rule are met. The requirements of the Rule are mandatory. If the requirements were not met, the Claims could not be served outside Canada.

[21] In the application for Order No. 2, the Plaintiffs did not meet the requirements of Rule 11.25(2). Neither the Claims nor any of the evidence before the Court at that time (comprised of the Affidavit of Edwin Comet sworn January 21, 2020 (the **Comet Affidavit No. 1**) and the Second Affidavit of Edwin Comet sworn January 21, 2020 (the **Comet Affidavit No. 2**)) established that there was a real and substantial connection between Alberta and the facts on which the Plaintiff's claim was based. Other than stating that one corporate Plaintiff was incorporated in Alberta, there was no statement whatsoever connecting Alberta to the alleged facts. There was no evidence upon which the presumptions of a real and substantial connection that are enunciated in Rule 11.25(3) could be based.

[22] The materials also did not satisfy the common law requirement to show that the Plaintiffs had a good arguable case. The Claims did no more than allege the facts on which the Plaintiffs' causes of action were based. In the two Comet Affidavits, Mr. Comet said nothing about the allegations or the Plaintiffs' chance of success. He only described his attempts to serve the Defendants.

[23] These deficiencies in the application materials were not merely formal, or technical, or "non-traditional". They were substantive. Because the mandatory, substantive requirements of Rule 11.25(2) and the common law were not met, Order No. 2 could not authorize the Plaintiffs to serve Kidd *ex juris*, and it did not do so. The February Service was not effective service *ex juris*.

2. Can I Consider the Plaintiff's Subsequent Evidence to Decide if the Requirements Have Been Met?

[24] In oral argument, the Plaintiffs suggested that in determining whether there is a real and substantial connection and a good arguable case, I am not restricted to considering only the evidence that was before Master Prowse when he granted Order No. 2. They say I can consider all the evidence that is now before the Court. For the reasons that follow, I disagree.

[25] In support of that argument, the Plaintiffs cite ***Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, 2011 ABQB 630**. There, the Plaintiff had filed two affidavits in support of service *ex juris* orders granted by the Court. After the defendants challenged the service *ex juris*, the Plaintiff filed three additional affidavits addressing the issues of real and substantial connection, and a good arguable case. Chief Justice Wittmann set aside the orders, because there was no good arguable case. However, in coming to that conclusion, he considered the evidence in all five of the Plaintiff's affidavits. Nowhere in that decision did Chief Justice Wittmann discuss whether he had the authority to consider the Plaintiff's "new" evidence. Because he ultimately set aside the service *ex juris*, the issue of whether or not he could rely on that evidence was not a key point, as it did not prejudice the Defendant. It is quite possible that Chief Justice Wittmann considered all the evidence to give the Plaintiff the benefit of the doubt, and for the sake of completeness.

[26] ***Scott*** therefore does not support the proposition that subsequent evidence is admissible in all cases to help establish the necessary preconditions for an impugned service *ex juris* order. Such a

proposition would be at odds with our Court of Appeal's clear statement in ***Acciona*** that the authorization of service *ex juris* must **precede** the act of service. At para 15 the Court said:

> The party issuing the commencement document is required to establish a threshold argument for "jurisdiction" (a "real and substantial connection" to Alberta) as a **preliminary** step. Once the plaintiff has obtained the order for service *ex juris*, **it can then proceed** to serve the defendant, who might then bring an application to set aside that service on the basis that the Alberta court does not have, or should not assume jurisdiction over the dispute. [emphasis added]

[27] The Court in ***Acciona*** also stated at para 22 that any authority to cure irregularities in service *ex juris* orders after the fact would not apply to substantive irregularities. As I stated above, the Plaintiff's failure to satisfy the Rule 11.25(2) and common law requirements at the application for Order No. 2 were substantive. The Court cannot cure that failure.

[28] In a similar vein, Justice Nixon of this Court recently stated that the Rules governing the service of documents outside Alberta must be construed strictly, and if the mandatory requirements in Rule 11.25 are not complied with, the Court cannot later validate service under Rule 1.5 or Rule 11.27: ***Ball v 1979927 Alberta Ltd*, 2022 ABKB 814** at paras 31- 33.

3. Is Kidd's Argument a Collateral Attack on Order No. 2?

[29] I do not agree that Kidd's approach in this appeal and in the applications before Applications Judge Farrington are collateral attacks on Order No. 2. Rule 11.31 permits defendants who have been served *ex juris* to challenge that service and to challenge this Court's exercise of *prima facie* jurisdiction over them, in a number of different ways. The language in Rule 11.31 is permissive, describing a number of different methods of attack that a defendant "may" pursue. This Court entertains applications to set aside service *ex juris* that take a form different from those specifically listed in the Rule. ***801 Seventh Inc*** is an example of a case where the Defendant applied to set aside the service that was effected under the service *ex juris* order, instead of applying to set aside the order itself. Kidd was therefore entitled to challenge the February Service effected under Order No. 2, and to do so effectively he did not have to also apply to set aside Order No. 2 itself.

B. Did the Claims Expire on April 25, 2020?

[30] Kidd does not dispute that Order No. 1 extended the service deadline for the Claims to April 25, 2020. However, he says that the Ministerial Order did not apply to further extend that deadline, resulting in the Claims expiring on April 25, 2020. If he is correct, given my finding above that the February Service was ineffective, Rule 3.28 would prevent the Plaintiffs from taking any further proceedings in this action against Kidd.

[31] For the reasons that follow, I find that the Ministerial Order effectively extended the April 25, 2020 service deadline to July 10, 2020. Applications Judge Farrington was correct when he came to the same conclusion. Although Kidd disputes that the Ministerial Order applied to extend the April 25, 2020 service deadline, he acknowledges that if it did, the extended deadline would have been July 10, 2020.

[32] Alberta's Minister of Justice issued the Ministerial Order on March 30, 2020, in response to the COVID-19 pandemic. The key parts of the Ministerial Order read as follows:

1. Limitation periods are suspended in the enactments under Appendix A from March 17, 2020 to June 1, 2020.

2. Any period of time within which any step must be taken in any proceeding or intended proceeding is suspended subject to the discretion of the court, tribunal, or other decision-maker from March 17, 2020 to June 1, 2020.

3. For clarity, the limitation period or period of time resumes running on June 1, 2020 and the temporary suspension period shall not be counted.

[33] Part 1 clearly covered any "limitation periods" under the Rules, because Appendix A to the Ministerial Order listed the ***Judicature Act***, and the Rules are a regulation under that Act.

[34] In support of his argument that the Ministerial Order did not extend deadlines for the service of statements of claim like the Claims, Kidd points to two publications issued by the Law Society of Alberta. In these publications, the Law Society stated that the Ministerial Order "does not apply to deadlines in court orders as they are not regulations captured by the Ministerial Order". Essentially, Kidd says that the April 25, 2020 service deadline was "a deadline in a court order" not a "limitation period" under the Rules, and that the executive branch of the Alberta government cannot amend court orders. Alternatively, he argues that the service deadline falls under part 2 of the Ministerial Order, and that Master Prowse already exercised his discretion to extend it when he issued Order No. 2.

[35] In ***O'Chiese First Nation v DLA Piper (Canada) LLP,*** 2022 ABCA 197, our Court of Appeal at paras 10 – 13 provided the following guidance about how to interpret the Ministerial Order:

- the Ministerial Order must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Order, the object of the Order, and the intention of the legislator;
- the Ministerial Order was put in place to address the immediate problem of limitation periods continuing to run during a time in which litigants were unable to fully access our courts;
- the Ministerial Order must therefore be interpreted "in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant";
- we must assume that the Minister of Justice worded the Ministerial Order to address a widespread sweep of time limits and limitation periods necessary for the operation and effectiveness of scores of statutes and associated regulations, including the Rules;
- the Minister of Justice was purposeful in his inclusion of the ***Court of Queen's Bench Act*** and the ***Judicature Act*** and the time limits and limitation periods therein, which have been established for the proper functioning of the administration of justice; and

- that the onset of the pandemic had interrupted this proper functioning was the critical reason why the Ministerial Order was issued in the first place.

[36] In ***O'Chiese First Nation***, the Court found that the time limit set out in Rule 10.10(2), which states that "a lawyer's charges may not be reviewed, whether at the request of the lawyer or the client, if one year has passed after the date on which the account was sent to the client" was a limitation period, and therefore part 1 of the Ministerial Order extended it.

[37] I find that the same analysis applies in this case:

(a) the deadline for the service of a Statement of Claim in Rule 3.26 is a limitation period. The fact that the Court can extend that limitation period by up to three months does not alter the essential nature of that deadline: it is still a limitation period, even after it has been extended;

(b) part 1 of the Ministerial Order was intended to capture this limitation period and it effectively extended the service deadline in this case from April 25, 2020 to July 10, 2020;

(c) even if I am incorrect that the April 25 service deadline is a "limitation period" covered by part 1 of the Ministerial Order, and it is instead a "period of time within which any step must be taken in any proceeding" covered by part 2 of the Ministerial Order, the result would be the same. In that case, the time period would have been suspended, but the Court would have had the discretion to override that suspension. Any exercise of that discretion would have had to occur after the Ministerial Order was issued and the suspension came into effect. Order No. 1, which was issued almost two months before the Ministerial Order, could not have constituted an overriding of the mandatory extension; and

(d) to the extent that Kidd asks me in this appeal to exercise my discretion under part 2, to override the mandatory extension in the Ministerial Order, I decline to do so. There is no evidence before me that would justify such a discretionary overriding.

C. Were the July Mailings Effective Service on Kidd?

[38] To determine whether the July Mailings were effective, I must decide the following sub-issues:

(a) did the July 8 Order satisfy the requirements of Rule 11.25(2);

(b) if so, did the Plaintiffs effectively serve Kidd pursuant to the July 8 Order; and

(c) if so, what was the effective date on which the Plaintiffs served Kidd?

[39] For the reasons that follow, I find that:

(a) the Plaintiffs' application for the July 8 Order and the order itself complied with the mandatory, substantive requirements of Rule 11.25(2) and the common law;

(b) the July Mailings complied with the Rules and the Convention;

(c) one of the three July Mailings complied with the July 8 Order and effectively served Kidd; and

(d) the Plaintiffs served Kidd on July 9, 2020.

1. Did the July Order Satisfy the Requirements of Rule 11.25(2) and the Common Law?

[40] I have described above the requirements that must be met under Rule 11.25(2) and the common law.

[41] The Amended Amended Statement of Claim and the July 6, 2020 Affidavit of Darrell Osadchuk (the **Osadchuk Affidavit**) were before Applications Judge Farrington when he granted the July Order. Those documents provided many details that had not been present in the materials supporting the application for Order No. 2, including:

(a) allegations that:

(i) many of the Plaintiffs were residents of Alberta;

(ii) many of the parties entered into agreements governed by Alberta law and in which they attorned to exclusive jurisdiction of the courts of Alberta;

(iii) some of the Defendants are or were Alberta residents; and

(iv) the alleged torts, including misrepresentations, took place in Alberta; and

(b) evidence that:

(i) PC1 was incorporated in Alberta;

(ii) Kidd was the sole director of PC1 and PC1's corporate registry filings showed a residential address in Calgary for Kidd;

(iii) Osadchuk met Kidd in Calgary and believes that Kidd was resident in Calgary for many years; and

(iv) Osadchuk met with Kidd over many years in Calgary and Kidd made many of the alleged misrepresentations during meetings in Calgary or in phone conversations with Osadchuk while he was in Calgary.

[42] With these details, the documents amply established that a real and substantial connection existed between Alberta and the facts on which the claim in the action were based.

[43] I agree with Chief Justice Wittmann's statements in ***Scott & Associates Engineering Ltd.*** at paras 34 – 37 about the standard that must be met by a Plaintiff to establish a "good arguable case":

- the case must be not fanciful or speculative but grounded upon some evidence upon which an objective trier would say "well, on the basis of the facts presented, the case is arguable and certainly is not to be dismissed out of hand"; and
- the test of whether a particular "Defendant is a "proper or necessary party to an action properly brought against another person served within Alberta" is met where the material filed supports the causes of actions pleaded and

> where all of the Defendants are or may be involved in any of the causes of action -- in other words the facts alleged establish that a Defendant exhibits a "definite connection to the case".

[44] In the Amended Amended Statement of Claim and the Osadchuk Affidavit, the Plaintiffs allege that:

(a) all the Defendants carried out a fraudulent scheme by inducing the Plaintiffs to invest substantial sums into a venture involving the operation of ATM-like kiosks in the United States;

(b) PC1 entered into agreements with many of the Plaintiffs regarding this investment scheme;

(c) Kidd owned PC1, which was the 49% owner of the United States corporation that owned the kiosks;

(d) PC1 was the contract operator of the kiosks;

(e) PC1 made distributions to the Plaintiffs but those distributions ceased in 2017;

(f) after providing some inadequate explanations for why the distributions stopped, Kidd, PC1 and the other Defendants went silent;

(g) Kidd made fraudulent misrepresentations to Osadchuk and other Plaintiffs;

(h) the corporate Defendants were established as Kidd's and another individual's alter egos; and

(i) Kidd personally converted the Plaintiffs' invested funds.

[45] These allegations and evidence establish a good arguable case against Kidd and PC1, to the standard described in ***Scott & Associates Engineering Ltd.***: they establish that the cases against Kidd and PC1 are not fanciful and are not to be dismissed out of hand. They also establish that Kidd and PC1 are proper Defendants, with definite connections to the case.

[46] Kidd argued that the pleadings and evidence establish no case whatsoever against him, let alone a good arguable case, because they do not allege any personal tortious conduct by him and allege no wrong that would make him personally liable for any liability of PC1. I disagree. The allegation that the corporations, including PC1, were incorporated as Kidd's and another individual's alter egos, the allegation that he made fraudulent misstatements and the allegation that all the Defendants were implementing a fraudulent scheme, if supported by sufficient evidence at trial, could result in Kidd being found personally liable.

2. Did the Plaintiffs Effectively Serve Kidd Pursuant to the July Order?

[47] For the reasons that follow, I find that the Plaintiffs effectively served Kidd pursuant to the July Order.

a. How did the Plaintiffs Have to Serve Kidd?

[48] Rule 11.26 governs the manner in which the Plaintiffs were required to effect the service *ex juris* that the July Order authorized. As of July 8, 2020, subrules (1) and (2) of Rule 11.26 stated as follows:

Method of service outside Alberta

11.26(1) Subject to subrule (2), unless the Court otherwise orders, if a document may be served outside Alberta under these rules, the document must be served

(a) by a method provided by these rules for service of the document in Alberta, or

(b) in accordance with the law of the jurisdiction in which the person to be served is located.

(2) Where a document is to be served in a jurisdiction to which the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* applies, the document must be served in accordance with Division 8.

[49] The United States is a jurisdiction to which the Convention applies. Therefore, Rule 11.26(2) mandated that the Plaintiffs had to serve the Claims in accordance with Division 8 of the Rules. The part of Division 8 that governs the service of commencement documents like the Claims is Rule 11.34.

[50] Rule 11.34(1) is mandatory: it says that a commencement document that is to be served in a Contracting State like the United States "must be served" through one of six methods listed in the Rule. The parties agree that the only methods of service that could potentially cover the July Mailings are the two methods listed in Rule 11.34(1)(e) and (f). They read as follows:

11.34(1) A commencement document that is to be served in a Contracting State must be served

…

(e) by another method that is **provided in the Convention** and is set out in rule 11.26(1), unless the Contracting State has objected to that method, or

(f) by a method that is set out in rule 11.26(1) and is **not prohibited by the Convention**. [emphasis added]

b. Were the July Mailings Methods of Service "Set out in Rule 11.26(1)"?

[51] This question is common to determining whether a service method is permitted under either Rule 11.34(e) or (f), so I will address it first. For the reasons that follow, I find that each of the July Mailings were methods "set out in Rule 11.26(1)".

[52] The July Mailings comprised three distinct methods of service:

(a) on July 8, 2020 an assistant at Rose LLP sent the documents from Calgary via Canada Post Xpresspost to Kidd at the Georgia Address, and this package was delivered on July 16, 2020 (the "**Canada Post Mailing**");

(b) on July 9, 2020, Mr. Comet sent the documents from Florida via USPS's "Priority Mail Express 1-Day" service to the Georgia Address, and this package was delivered on July 10, 2020 (the "**USPS Mailing**"); and

(c) on July 9, 2020 Mr. Comet sent the documents from Florida via Federal Express's Standard Overnight Service to Kidd to the Georgia Address, and this package was delivered on July 10, 2020 (the "**Fedex Mailing**").

[53] Rule 11.26(1) is reproduced in paragraph 48 above. The three methods of service "set out" in that Rule are:

(a) a method provided by the Rules for service of the document in Alberta, as set out in subrule (a);

(b) service in accordance with the law of the jurisdiction in which the person to be served is located, as set out in subrule (b); and

(c) a method of service "otherwise ordered" by the Court, as set out in the preamble.

[54] Kidd says that I must effectively "read down" subrule 11.26(1) because it is expressly stated to be "subject to subrule (2)". Therefore, Kidd says, the only way that a Plaintiff can serve commencement documents in a Convention country are methods **expressly described** in the Convention. I disagree. Subrule 11.26(2) does not say that service in a Convention country can only be via a method expressly described in the Convention. It says that service in a Convention country must be in accordance with Division 8. In subrules 11.34(1)(e) and (f), which are part of Division 8, the Alberta Legislature has chosen to permit service by methods that are not expressly described in the Convention.

[55] In making this argument, Kidd relies heavily on the decision of our Court of Appeal in ***Metcalfe Estate v Yamaha Motor Powered Products Co. Ltd.,* 2012 ABCA 240**. In that case, the Court granted a service *ex juris* order that permitted service on the Defendants in Japan, a Convention country. However, the order expressly mandated that service on the Defendants in Japan could only be under the Convention. In Japan, the only way service could be effected under the Convention was through the Japanese Central Authority. While waiting for the Japanese Central Authority to serve the Defendants, the Plaintiffs' Japanese counsel served them by registered mail. That method of service in Japan was not compliant with the Convention, and the Court of Appeal had to decide if it nonetheless constituted valid service on the Defendants.

[56] The *ratio decidendi* of the Court of Appeal's decision was simple: the service *ex juris* order only authorized the Plaintiffs to serve the Defendants in Japan through the Convention (***Metcalfe*** at paras 28 – 30). The Plaintiffs failed to do that, and therefore they did not validly serve the Defendants.

[57] However, the Court also went on to make a number of *obiter dicta* statements about the Convention, which I summarize as follows:

(a) the Convention is "non-mandatory", meaning that it is the law of the forum (in this case, Alberta) and not the Convention, that decides whether a document has to be served abroad (at para 37);

(b) once the law of the forum decides that a document has to be served abroad, the law of the forum also decides how that may be done (at para 38); and

(c) the Convention is "exclusive", meaning that when the law of the forum decides that a document is to be served abroad under the Convention, "the Convention alone provides the relevant channels of transmission for such service" (at para 41).

[58] When ***Metcalfe*** was decided, Rule 11.26(1)(b) was different than it is now. It provided that service to a Convention country "**must** be ... in accordance with a method under" the Convention [emphasis added]. That is clearly the version of the Rule to which the Court of Appeal was referring when it opined about the "exclusive" nature of the Convention (see ***Metcalfe*** at paras 13 and 38).

[59] However, by the time the July 8 Order was granted, Rule 11.26(1)(b) had been amended substantially. At that time, and now, it provides that service to a Convention country "must be in accordance with Division 8". Rule 11.34, which is within Division 8, did not exist when ***Metcalfe*** was decided. Rule 11.34(1)(f) expressly permits service *ex juris* in a Convention country via methods that are outside the channels expressly described in the Convention, as long as those methods of service are "not prohibited by" the Convention.

[60] Therefore, the Court of Appeal's statement in ***Metcalfe*** that "the Convention alone provides the relevant channels of transmission for such service" no longer accurately describes the law in Alberta. The Legislature subsequently changed the law.

[61] For these reasons, I reject Kidd's argument. The words in Rules 11.26, 11.34(1)(e) and (f) must be given their full effect, and should not be read down.

i. Were any of the July Mailings a Method of Service Set Out in Rule 11.26(1)(a), Namely a Method of Service Provided by the Rules for Service of the Document in Alberta?

[62] For the reasons that follow, I find that the July Mailings were not methods of service provided by the Rules for service of the Claims in Alberta, and therefore were not methods of service as "set out in" Rule 11.26(1)(a).

[63] Rule 11.5(1) provides that a commencement document may be served on an individual in Alberta by being left with the individual or by being sent by "recorded mail addressed to the individual". Under the Rules "recorded mail" means "a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing as specified in Part 11". The evidence discloses the dates on which the July Mailings were successfully delivered to Kidd at the Georgia Address. However, the Plaintiffs have not submitted evidence to prove that any of those forms of delivery required an acknowledgement in writing for receipt of the documents.On the record before me, the July Mailings are not "recorded mail".

ii. Were any of the July Mailings a Method of Service Set Out in Rule 11.26(1)(b), Namely Service in Accordance with the Law of the Jurisdiction in Which the Person to be Served is Located?

[64] For the reasons that follow, I find that the July Mailings were each "a method of service in accordance with" the law of Georgia and therefore were methods of service "set out in" Rule 11.26(1)(b).

[65] The Plaintiffs filed an affidavit of Lucas Andrews, an experienced trial lawyer in Atlanta, Georgia. I have reviewed his affidavit, including the description of his qualifications and CV. I find that his affidavit is admissible as expert opinion evidence regarding the law of Georgia, because it satisfies the test set out by the Supreme Court of Canada in ***R v Mohan*, [1994] 2 SCR 9**:

(a) his evidence is relevant to the issue of what methods of service are in accordance with the law of Georgia;

(b) his evidence is necessary because there is no other way to obtain evidence about the law of Georgia;

(c) there is no exclusionary rule that prevents the acceptance of his evidence; and

(d) he has the necessary expertise to provide this evidence.

[66] I also find that the benefit of admitting his evidence outweighs any possible detriment or prejudice of doing so. Kidd has not cross-examined Mr. Andrews, nor submitted his own evidence about the law of Georgia. Mr. Andrews's evidence is therefore uncontested.

[67] In his affidavit, Mr. Andrews has defined the July Mailings as the "July Methods". He opined that "the July Methods would be upheld by a Georgia court as permissible and adequate for purposes of service in the State of Georgia of a lawsuit initiated in Alberta." I have reviewed his analysis of this issue and find it to be logical and well-reasoned. On the basis of his evidence, I find that the July Mailings are methods of service in accordance with the law of Georgia.

iii. Were any of the July Mailings a Method of Service Set Out in the Preamble to Rule 11.26(1), Namely a Method of Service "Otherwise Ordered" by the Court?

[68] For the reasons that follow, I find that the Canada Post Mailing was a method of service "otherwise ordered" by this Court and therefore was a method of service "set out in" Rule 11.26(1).

[69] The July 8 Order permitted service on Kidd by "**Express Post** addressed to James Kidd at 5508 Drexel Way, Atlanta, Georgia, 30346, USA" [emphasis added]. The order did not use the single word "Xpresspost" which drops the initial E and capitalizes the "X" and the "P" within a single word. Xpresspost is a well-known form of delivery service offered by Canada Post. It is this Xpresspost service that the Plaintiffs in fact used in the Canada Post Mailing.

[70] The phrase "Express Post" in the July 8 Order is not defined in that order, nor in the Plaintiff's corresponding application materials. The undefined phrase "Express Post" in the July 8 Order is open to a number of different interpretations and it is therefore ambiguous. To resolve that ambiguity, I am entitled to have recourse to Applications Judge Farrington's reasons: ***Alberta Treasury Branches v Weatherlok Canada Ltd*, 2011 ABCA 314**, citing ***R v Frontenac Gas Co***

(1915), 51 SCR 594. On July 8, 2020, Master Farrington (as he then was) explained this part of his direction in the July 8 Order as follows:

> And what I am going to direct is this: that it be for both Mr. Kidd and Mr. Upcraft, for both of them, (a) will be personal service on them, as indicated in the order, on or before Friday, July 10th, with immediate effect. That's fine for both of those, but the paragraph on each of them should then go on to say, or if personal service is not available, then such service shall be effected by emailing to the -- to the two email addresses and by sending the matter by Express Post, **whichever the fastest version in Canada is**, Express Post to the addresses set out in the order.
>
> And I've done that for a couple of reasons. One of them is that **the Court has found Express Post to be a very reliable service and fast service**. The other is article 10 of the Hague Convention lists and picks some methods that are permitted, and short of going through an intermediary for service, and one of them expressly reserves postal channels. And I think it would be appropriate to expressly adopt that method of service for the purpose of being consistent with the Convention, as well as I think the emails are helpful. [emphasis added]

[71] In these reasons, Master Farrington was clearly referring to a method of service originating in Canada. He did not say "courier service" or "express delivery" or something similar. He did not intend to refer to any or all methods of fast delivery. I find that his authorization of service by "Express Post" in the July 8 Order referred exclusively to the Xpresspost delivery service provided by Canada Post.

[72] Because the Canada Post Mailing was by Xpresspost, it was a method of service ordered by the Court.

c. Were any of the July Mailings a Method of Service "Provided" in the Convention to Which the Foreign Jurisdiction Has Not Objected, as Required in Subrule 11.34(1)(e)?

[73] For the reasons that follow, I find that the Canada Post Mailing complied with Rule 11.34(1)(e) because it was a method of service that is provided in the Convention, and the United States has not objected to that method of service. However, the USPS Mailing and the FedEx Mailing did not comply with Rule 11.34(1)(e) because they were not methods of service provided in the Convention.

[74] The parties agreed that the methods of service "provided in the Convention" that might possibly cover the July Mailings are those provided in Article 10 of the Convention:

Article 10

> Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (b) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (c) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (d) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

[75] I agree with Kidd that article 10(a) in the Convention only covers delivery by postal channels from the domestic jurisdiction (in this case, Alberta) to the person abroad in the target jurisdiction (in this case, Georgia). That is the plain and ordinary meaning of the words "directly" and "abroad" as used in article 10(a), and the parties did not provide me with any authority indicating otherwise. Therefore, I find that the Canada Post Mailing is a method "provided in" Article 10(a) the Convention. Mr. Andrews's uncontested evidence is that the United States has not objected to this method of service.

[76] However, the USPS Mailing and the Fedex Mailing were not methods of service "provided in" the Convention:

> (a) they are not provided in Article 10(a) because they were not sent from Alberta directly to Kidd at the Georgia Address; and
>
> (b) they are not provided in articles 10(b) and (c) because Mr. Comet, the person through whom the Plaintiffs conducted those mailings, was not a "judicial officer, official or other competent person of the State of destination". He was a fraud investigator based in Washington state, not a Georgia-licensed process server.

d. Were any of the July Mailings a Method of Service "Not Prohibited" by the Convention, as Required in Subrule 11.34(1)(f)?

[77] For the reasons that follow, I find that the USPS Mailing and Fedex Mailing complied with Rule 11.34(f) because they were methods of service that are not prohibited by the Convention.

[78] I have carefully reviewed the full text of the Convention, and it does not prohibit the USPS Mailing or the FedEx Mailing. On the contrary: while the Convention does not expressly "provide" these methods of service, it expressly says that it does not "affect" them. Article 19 of the Convention states:

> To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

[79] As noted above, I have accepted Mr. Andrews's uncontested evidence that the USPS Mailing and the FedEx Mailing were methods of service in accordance with the law of Georgia. As such, article 19 of the Convention says these methods of service are not affected by the Convention.

e. Did the July Mailings Comply with the July 8 Order?

[80] I have concluded that each of the three July Mailings complied with Rule 11.26(2), because they were service in accordance with Division 8. However, only one of these three methods of service, the Canada Post Mailing, complied with the July 8 Order. For the reasons that follow, I conclude that the USPS Mailing and the FedEx Mailing did not comply with the July 8 Order and therefore did not constitute valid service on Kidd.

[81] The operative words of the July 8 Order are:

> 3. The Plaintiff/Applicants are hereby permitted to effect service *ex juris* and/or by substitutional service of the Amended Amended Statement of Claim, together with this Order, to be filed, on the Defendant/Respondent James Kidd, by the following means:
>
> (a) by personal service on James Kidd in Canada or the United States of America, with immediate effect;
>
> or, if such personal service is not effected, then service may be effected by the following means:
>
> (b) by email at jkidd@paycenterl.com, with deemed receipt on the day following sending; and
>
> (c) by Express Post, addressed to James Kidd at 5508 Drexel Way, Atlanta, Georgia, 30346, USA, with deemed receipt one day following posting.

[82] Email service is not a live issue in this appeal. The Plaintiffs tried to serve Kidd at the email address named in the July 8 Order, but that address was no longer in service, so the email did not go through.

[83] The approval given in the July 8 Order was very clear: the Plaintiffs were authorized to serve Kidd personally; and if they did not, they could substitutionally serve him via email or via "Express Post". As described above, I have found that the phrase "Express Post" referred only to Canada Post's Xpresspost service. The July 8 Order only authorized the Canada Post Mailing. It did not authorize the USPS Mailing or the FedEx Mailing.

[84] What is the result when a method of service complies with the Rules and the Convention, but it was not authorized by the Court's service *ex juris* order? ***Metcalfe*** provides the answer. There, the service *ex juris* order only mandated service in accordance with the Convention. The July 8 Order only mandated service personally, or via email or Xpresspost. The USPS Mailing and the FedEx Mailing did not comply with the July 8 Order, and therefore they did not constitute valid service of Kidd: ***Metcalfe*** at paras 25 – 30. In ***Metcalfe***, that finding decided the case. The Court of Appeal did not go on to consider whether, despite the service not complying with the service *ex juris* order, it may have otherwise complied with the Rules and therefore been valid.In this case, the USPS Mailing and the FedEx Mailing were not valid service of Kidd because they did not comply with the July 8

Order. The fact that they complied with the Rules cannot override the order and make them valid service.

D. When was Kidd Effectively Served?

[85] Having found that the Plaintiffs validly served Kidd via the Canada Post Mailing, the next issue is the effective date of that service. The uncontested evidence is that the Canada Post Mailing was posted on July 8, 2020 and delivered on July 16, 2020. However, for the reasons that follow, I find that the effective date of service for the Canada Post Mailing was July 9, 2020, being the deemed service date specified in the July 8 Order ("one day following posting"). Therefore, Kidd was successfully served with the Claims and the July 8 Order on July 9, 2020, before the Claims expired. As a result, the Plaintiffs are not prevented from proceeding against Kidd in this Action.

[86] If my finding that the USPS Mailing and the FedEx Mailing do not constitute valid service is incorrect, the uncontested evidence is that the USPS Mailing and Fedex Mailing were posted on July 9, 2020 and were successfully delivered on July 10, 2020.

[87] Kidd argued that the provision in the July Order that deems the effective service date is ineffective, for a number of reasons.

[88] First, Kidd says that because section 23 of the ***Interpretation Act*, RSA 2000 c I-8** only contemplates deemed receipt dates for documents served by prepaid mail to an address in Alberta or Canada, that suggests that the Legislature did not intend to allow deemed service outside Alberta or Canada. I disagree. That provision cannot give rise to such a broad inference. The provision does not address the service of documents outside Canada at all, and in any event, section 23 is expressly excluded from applying to the Rules, in Rule 1.8.

[89] Second, Kidd argues that the entire concept of deemed service is inconsistent with the Convention. He has provided no textual or caselaw support for that proposition. The Convention is entirely silent about deemed service. Thus, I do not find that a deemed service date is precluded by the Convention.

[90] Third, Kidd says that the deemed receipt date is ineffective because Rule 11.26(4) states that service under Subrule 11.26(2) is effected on the date "service is effected under the Convention". The difficulty in interpreting this Subrule is that, while the Convention does address the date on which service is effected for one method of service provided in the Convention, it does not do that for all the service methods provided in the Convention. It says that when service is effected through a Central Authority, that Central Authority is required to issue a certificate that includes the date of service. However, the Convention does not say anything about the effective date of service when the method of service is Article 10(a), as was the case for the Canada Post Mailing.

[91] The Plaintiffs referred me to the following relevant discussion in the *Practical Handbook on the Operation of the Service Convention*, 4th edition, 2016 (the "**Handbook**") at para 204:

> The date of service is also important for the *plaintiff*. Certain national procedural laws require service to be performed within a certain time, under penalty of nullity or lapse of the right of action. While most courts are not unduly formalistic and allow an exception to this rule to the plaintiff on the basis of the particular

> circumstances, some apply these periods strictly. In some cases, the long time required for service may prevent plaintiffs from enforcing their rights, which in turn incites the use of alternative means of transmission or even the evasion of the Convention. A ***Swiss court*** gave up trying to apply the Convention and accepted the service of procedural orders by means of publication in the official journal of the forum, on the grounds that service though the Spanish Central Authority was impracticable for each procedural instrument owing to the endless delay it involved. The ***Belgian*** and ***Luxembourg*** courts have resolved the difficulty in the plaintiff's favour by holding that, as Belgian and Luxembourg law consider service to be complete as soon as the formalities required by their domestic laws have been performed, there is no reason to take account of the actual delivery of the document to its addressee residing abroad to determine whether that document was served within the statutory period.

[92] The Handbook is a publication of the Permanent Bureau of the Hague Conference on Private International Law, and is a companion publication to the Convention. Our Court of Appeal looked to the Handbook for guidance in ***Metcalfe*** at paras 36 and 37, and I do the same in this case.

[93] From the Handbook excerpt I have set out above, it appears that the Convention allows the forum court to determine when service was effected. It is also clear from that passage that various forum courts have done exactly that, including what appears to be deeming an effective service date in the Belgian and Luxembourg examples, and the authors of the Handbook did not comment negatively on those determinations. Thus, it appears that in a circumstance like this, where the Convention does not expressly address the date on which service was effected via article 10(b), the law of the forum can be applied to determine that date. Rule 10.26(2) does not preclude that.

[94] Therefore, if the provision in the July 8 Order providing for a deemed receipt date of the Canada Post Mailing is valid under Alberta law, that deemed receipt date is the effective date of service for the Canada Post Mailing. For the reasons that follow, I find that the deemed receipt date in the July 8 Order is valid under Alberta law.

[95] Rule 11.28 governs substitutional service orders. The July 8 Order was a valid substitutional service order, which Applications Judge Farrington was authorized to grant in the circumstances. The aspects of Rule 11.28 that are relevant are:

> (a) if service of a document inside or outside Alberta is impractical, the Court has the discretion to make an order for substitutional service (Rule 11.28(a));
>
> (b) an application for a substitutional service order must be accompanied by an affidavit setting out why service is impractical, proposing an alternative method of service and stating why that alternative method is likely to bring the document to the attention of the person being served (Rule 11.28(2); and
>
> (c) if a document is served in accordance with an order for substitutional service, service is effected on the date specified in the order (Rule 11.28(4)).

[96] When Applications Judge Farrington made the July 8 Order, the evidence in the Comet Affidavit No. 1 and the Osadchuk Affidavit was before him. Those affidavits established the necessary facts to justify the granting of a substitutional service order. In their application, the

Plaintiffs had asked for permission to tape the Claims to the door of the Georgia Address, which is the method that had successfully brought the Claims to Kidd's attention in the February Service. However, Applications Judge Farrington did not authorize that form of substitutional service because he did not believe that it would comply with the Convention. It is clear that he authorized the Canada Post Mailing instead, as a form of substitutional service. The relevant portion of his reasons are as follows:

> And what I am going to direct is this: that it be for both Mr. Kidd and Mr. Upcraft, for both of them, (a) will be personal service on them, as indicated in the order, on or before Friday, July 10th, with immediate effect. That's fine for both of those, but the paragraph on each of them should then go on to say, or if personal service is not available, then such service shall be effected by emailing to the -- to the two email addresses and by sending the matter by Express Post, whichever the fastest version in Canada is, Express Post to the addresses set out in the order.
>
> And I've done that for a couple of reasons. One of them is that the Court has found Express Post to be a very reliable service and fast service. The other is article 10 of the Hague Convention lists and picks some methods that are permitted, and short of going through an intermediary for service, and one of them expressly reserves postal channels. And I think it would be appropriate to expressly adopt that method of service for the purpose of being consistent with the Convention, as well as I think the emails are helpful.
>
> The reason I say the emails are helpful, Mr. Kidd chose to give that as an address for service on the corporation in some of the agreements that are in evidence, and Mr. Upcraft specifically communicated from that email address. Those two methods of service will have a deemed receipt one day after sending, so those two methods will have effect one day after sending.
>
> And I'm not sure that I'm going to permit the posting method, because I'm not satisfied that it's consistent with the Hague Convention, and so I'm not going to permit the posting method.

[97] Because the necessary preconditions set out under Rule 11.28 were present, Applications Judge Farrington had the discretion to grant a substitutional service order, including the discretion to deem the effective date of that substitutional service. The plain wording of Rule 11.28(4) makes it clear that the Court has the discretion to specify the date on which substitutional service will be deemed to have been effected.

[98] Kidd argued that the deemed service date in the July 8 Order is invalid because it is in essence a "pre-validation" of service that did not comply with the Convention, which the Court of Appeal prohibited in ***Metcalfe***. Under Rule 11.27, the Court can make an order validating service of a document served inside or outside Alberta in a manner that is not specified by the Rules, if the Court is satisfied that the method of service used brought or was likely to bring the document to the attention of the person to be served.

[99] I disagree that the deeming of an effective service date in the July 8 Order was a "pre-validation" under Rule 11.27. It was a valid exercise of Applications Judge Farrington's discretion under Rule 11.28(4). This valid deeming of an effective service date by a court applying the law of

the forum is permitted by the Convention, as is demonstrated by the excerpt from the Handbook that I have reproduced above.

E. What is the Status of Paycenter 1 in this Appeal?

[100] The Plaintiffs argued that because PC1 was not a party to this appeal and was not represented at the appeal, all of Kidd's submissions regarding PC1 should be disregarded and nothing in the July 2023 Order relating to PC1 should be disturbed. Kidd did not dispute that PC1 is not an appellant and is not before the Court in this appeal. However, he argued that because the Plaintiffs served PC1 via Kidd as a director or former director, allowing Kidd's appeal would necessarily affect the Plaintiffs' service of PC1.

[101] In the decision that Kidd has appealed from, Applications Judge Farrington declared that PC1 was validly served with the Claims before July 10, 2020. That declaration was specifically set out in the July 2023 Order. By July 5, 2023, PC1 had been revived. PC1 could have, but it did not, take part in these proceedings or appeal the July 2023 Order.

[102] Because I have concluded that Kidd's appeal must be dismissed, I need not address Kidd's argument that PC1 would be able to take the benefit of his appeal, if that appeal had succeeded.

VII. Conclusion

[103] Kidd's appeal is dismissed. If the parties cannot agree on the costs of this appeal, they may make written submissions to me in the next 45 days.

Heard on the 12th and 14th days of June, 2024.
Dated at the City of Calgary, Alberta this 19th day of July, 2024.

C.D. Simard
J.C.K.B.A.

Appearances:

Michael J. Donaldson KC and Andrea Lutsch
for the Appellant / Defendant James Kidd

David Wachowich KC and Kyle Harder
for the Respondents / Plaintiffs