IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Henley Estate (Re)*, 2026 NLCA 9
Date: April 1, 2026
Docket Number: 20250101H0011 and 202501H0024

BETWEEN:

JANET M. HENLEY

APPELLANT

AND:

BRIAN A. HENLEY

FIRST RESPONDENT

AND:

JOHN J. HENLEY and
CHRISTOPHER M. HENLEY

SECOND RESPONDENTS

Coram: F.P. O'Brien, F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 201301E12144 (2022 NLSC 103)
Applications Heard:	January 20, 2026
Judgment Rendered:	April 1, 2026

Reasons for Judgment by: K.J. O'Brien J.A.
Concurred in by: F.P. O'Brien and F.J. Knickle JJ.A.

Counsel for the Appellant: Self-Represented
Counsel for the First Respondent: J. Michael Collins
Counsel for the Second Respondents: Geoffrey E. Budden K.C. and Thomas Slade

Authorities Cited:

CASES CITED: *Henley Estate (Re)*, 2022 NLSC 103; *Henley Estate (Re)*, 2023 NLSC 48, rev'd 2024 NLCA 45; *Henley Estate (Re)*, 2024 NLCA 45; *Eco Zone Engineering Limited v. Grand Falls-Windsor (Town)*, 2010 NLCA 15; *S.L. v. M.-E.F.*, 2007 NLCA 12; *Metal World Inc. v. Pennecon Energy Ltd.*, 2014 NLCA 10; *McLean v. Carr Estate*, 1996 CanLII 11078 (NLCA), leave to appeal to SCC refused, 25570 (27 February 1997); *Penney v. Pitts*, 2018 NLSC 76; *Eco Zone v. Grand Falls-Windsor (Town Of), et al.*, 2007 NLTD 182; *Newfoundland and Labrador (Information and Privacy Commissioner) v. Beverage Industry Association of Newfoundland and Labrador*, 2023 NLCA 2; *Roman Catholic Episcopal Corporation of St. John's v. Guardian Insurance Company of Canada*, 2025 NLCA 5; *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, 1997 CanLII 14645 (NLCA); *Finn v. St. John's (City)*, 2007 NLCA 46; *Cable v. CIBC Mortgages Inc.*, 2010 NLCA 31; *Walsh v. Johnson*, 2010 NLCA 6; *Henley Estate (Re)*, 2023 NLSC 47; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Henley Estate,* 2018 NLSC 222; *Henley Estate (Re)*, 2019 NLSC 54, rev'd 2021 NLCA 46; *Hiscott v. Hall*, 2015 NLCA 1; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Dawe v. Morgan*, 2023 NLCA 11; *Walsh v. TRA Company Limited*, 2023 NLCA 23; *Henley Estate (Re)*, 2023 NLSC 49.

STATUTES CONSIDERED: *Judicature Act*, RSNL 1990, c. J-4, section 56.

RULES CONSIDERED: *Court of Appeal Civil Rules, 2025*, NLR 44/25, rules 8(2), 36(1), 7(j), 16, 2, 11; *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 20A, 55.03(1).

TEXTS CONSIDERED: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022).

K.J. O'Brien J.A.:

[1] This decision addresses the timeliness of a Notice of Appeal filed 960 days after the decision under appeal was rendered, but within 30 days of the order appealed from being filed in the court below.

[2] This is the third time the litigation of this estate has come before the Court of Appeal, and the third time on the issue of costs. The parties are all siblings. The proceedings before the judge in the court below involved the interpretation of their father's will and two codicils. It also concerned the enforceability of agreements made between them, as executors and beneficiaries of their father's estate.

[3] There are two applications before the Court. First, the Second Respondents (John Henley and Christopher Henley), apply to dismiss an appeal filed by the Appellant (Janet Henley) in relation to the costs award made in *Henley Estate (Re)*, 2022 NLSC 103 (the "Decision"). Second, the First Respondent (Brian Henley) applies to dismiss a cross-appeal filed by John Henley and Christopher Henley in relation to the merits of the Decision.

[4] Notwithstanding that the Notice of Appeal was filed in compliance with the 30-day time limit established by rule 8(2) of the *Court of Appeal Civil Rules, 2025*, NLR 44/25 (the "*Rules*"), I would find that the appeal should be dismissed for undue delay because of the importance of finality and efficiency in the present circumstances, and concerns of prejudice to the responding parties. For similar reasons, I would also dismiss the cross-appeal.

BACKGROUND

[5] To explain how it is that 960 days passed between the Decision and the filing of the Notice of Appeal, it is helpful to give a chronology.

[6] In the Decision, the judge resolved the issues before him on their merits and decided that each party should bear their own costs. The Decision was rendered on June 23, 2022.

[7] After the Decision was given but before a formal order was filed, Janet Henley and Brian Henley made application for an enhanced costs order under rule 20A of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D (the "Rule 20A Application"). Simply put, a rule 20A application can be brought by a party who made a formal offer to settle that was not accepted. If the offering party obtains a

judgment at trial that is as favorable or more favorable to that party than the terms of the offer, they can apply to the court for an enhanced costs award.

[8] The judge allowed the Rule 20A Application and consequently replaced his original costs award with an order for enhanced costs in favour of Janet Henley and Brian Henley (*Henley Estate (Re)*, 2023 NLSC 48 (the "20A Decision"), rev'd 2024 NLCA 45). The 20A Decision was rendered on March 28, 2023.

[9] A formal order for the disposition on the merits of the Decision and the enhanced costs award of the 20A Decision was filed in the court below on April 26, 2023 (the "April 2023 Order"). This was the first formal order filed.

[10] John Henley and Christopher Henley appealed the 20A Decision to this Court. This Court set aside the 20A Decision and reinstated the original costs award made in the Decision (*Henley Estate (Re)*, 2024 NLCA 45 (the "COA 20A Decision")). The COA 20A Decision was rendered on December 30, 2024. A formal order was filed in this Court on March 13, 2025.

[11] Following the COA 20A Decision, but before the formal order was filed in this Court, a formal order for the disposition on the merits and the costs award of the Decision was filed in the court below on February 3, 2025 (the "February 2025 Order"). This was the second formal order filed in the court below.

[12] Janet Henley filed the Notice of Appeal presently at issue on February 7, 2025. In it, Janet Henley appeals the costs award of the February 2025 Order. This costs award is the "each party bear its own costs" or "no costs" award that was originally made in the Decision on June 23, 2022, but was not captured in the April 2023 Order. Nine hundred and sixty days is the time between the date of the Decision and the filing of the Notice of Appeal.

[13] John Henley and Christopher Henley filed the Notice of Cross-Appeal presently at issue on March 7, 2025. In it, John Henley and Christopher Henley cross-appeal the merits disposition of the February 2025 Order. This merits disposition was originally made in the Decision on June 23, 2022, and was captured in the April 2023 Order and in the February 2025 Order.

[14] John Henley and Christopher Henley concede that if they are successful in their application to dismiss the appeal, then their cross-appeal should be dismissed as well. As such, I will proceed to consider the application to dismiss the appeal first.

SHOULD THE APPEAL BE DISMISSED?

The governing legal principles

[15] An application to dismiss an appeal is governed by rule 36(1)(b) of the *Rules*:

> **36.** (1) A party to an appeal may apply at any time before or at the hearing of the appeal for an order
>
> (a) striking out the notice of appeal; or
>
> (b) dismissing the appeal
>
> on the grounds that
>
> (i) no appeal lies to the Court;
>
> (ii) the appeal is frivolous, vexatious or without merit;
>
> (iii) the appellant has unduly delayed the preparation and perfection of the appeal; or
>
> (iv) the appellant has failed to apply to have the appeal set down for hearing.

[16] The third ground, undue delay, was considered in *Eco Zone Engineering Limited v. Grand Falls-Windsor (Town)*, 2010 NLCA 15 ("*Eco Zone*"). In *Eco Zone* the Court stated that the fundamental principle to be observed on an application to dismiss an appeal for delay is that an appellant is entitled to have their case decided on its merits unless they are responsible for undue delay which has prejudiced the other side (at para. 13). The Court continued to set out the applicable test:

> [14] It is therefore necessary for the party seeking to dismiss the appeal to demonstrate, first, that there has been "undue delay"; secondly, that he or she will suffer "prejudice" if the appeal were to proceed, and then, to balance the significance of the established delay and prejudice against the presumption in favour of allowing cases to be heard on their merits as well as other relevant considerations.

[17] There are several factors that should be considered in applying the test, originally set out in *S.L. v. M.-E.F.*, 2007 NLCA 12, at paragraph 8, and endorsed in *Eco Zone*, at paragraph 15:

> (i) the subject-matter of the litigation;

(ii) the complexity of the issues between the parties;

(iii) the length of the delay;

(iv) the explanation for the delay;

(v) the prejudice to the other litigant;

(vi) the potential merits of the appeal.

[18] The first four factors address whether the delay is "undue". Undue delay is delay that is excessive or disproportionate to the specific circumstances of the case *(Eco Zone*, at para. 16). The sixth factor influences the balancing because the greater the merits of the appeal, the more tolerance the Court will have for delay (*Eco Zone*, at para. 18; and *S.L.*, at para. 9). Balancing the factors is a fact-specific and discretionary exercise. Yet, the discretion to dismiss an appeal is not exercised "lightly" (*Eco Zone*, at para. 20; and *S.L.*, at para. 9).

Submissions of the Applicants John Henley and Christopher Henley

[19] John Henley and Christopher Henley submit that the appeal should be dismissed because three grounds in rule 36(1)(b) are satisfied: (i) no appeal lies to the Court; (ii) the appeal is vexatious; and (iii) the appellant has unduly delayed the preparation and perfection of the appeal.

[20] They raise concerns about efficient use of judicial resources, abuse of court process, finality, significant delay, and prejudice to them. There is considerable overlap in the arguments they make with respect to each ground for dismissal.

[21] With respect to the third ground, they submit that the appeal should be dismissed for undue delay pursuant to the test set out in *Eco Zone*.

Submissions of the Respondents Janet Henley and Brian Henley

[22] Janet Henley and Brian Henley oppose the application to dismiss, primarily because they submit that, despite the delay, the Notice of Appeal was filed in accordance with the *Rules* and a reasonable interpretation of this Court's procedure. In Newfoundland and Labrador, where the procedures of the court appealed from provide for filing a formal order, time to appeal runs from the date that the order is settled and filed (*Rules*, at rr. 7(j), 8(2)).

[23] To better explain her position, Janet Henley divides the delay into three periods.

The First Period: June 2022 to March 2023

[24] The first period is from the Decision (June 23, 2022) until the 20A Decision was decided (March 28, 2023) and the April 2023 Order filed. During this period there was no formal order filed in the court below.

[25] Janet Henley submits that the formal order was not filed during this period because she and Brian Henley made the Rule 20A Application. She submits that caselaw in this province suggests that the court below would have been *functus officio* had the formal order been filed and thus unable to hear the Rule 20A Application. In support of this position, she cites *Metal World Inc. v. Pennecon Energy Ltd.*, 2014 NLCA 10, *McLean v. Carr Estate*, 1996 CanLII 11078 (NLCA), leave to appeal to SCC refused, 25570 (27 February 1997), and *Penney v. Pitts*, 2018 NLSC 76. I will consider these cases further below.

[26] Janet Henley further notes that while the Rule 20A Application was under consideration, the costs award of the decision was suspended by rule 20A.08(3) of the *Rules of the Supreme Court, 1986*:

> (3) If after a trial or hearing
>
> (a) an offer to settle had been made and not revoked or accepted prior to commencement of the trial or hearing; and
>
> (b) an application for a determination as to costs based on the application of Rule 20A is made by a party within 15 days following the filing or delivery of the decision or order
>
> the decision of a judge with respect to costs shall be suspended pending determination of the application in clause (b).

[27] She submits that there is nothing in the *Rules* to suggest that a party can appeal a suspended decision from the court below.

The Second Period: April 2023 to December 2024

[28] The second period is from the April 2023 Order until the COA 20A Decision was decided (December 30, 2024). During this period, the enhanced costs award was

under appeal. As Janet Henley supported the enhanced costs award, which was in her favour, she submits that there was nothing for her to appeal during this period.

The Third Period: December 2024 to February 2025

[29] The third period is from the COA 20A Decision to the filing of the Notice of Appeal. During this relatively brief period, Janet Henley filed the February 2025 Order in the court below and then filed the Notice of Appeal in relation to it. She notes that the Notice of Appeal was filed within 30 days of the February 2025 Order being filed, in compliance with rule 8(2)(a) of the *Rules.*

[30] Janet Henley submits that the *Rules* do not specifically address the circumstances of the present case, that there is no caselaw on point, and that we should adopt a practice and procedure to permit her appeal to be heard on its merits in accordance with section 56 of the *Judicature Act*, RSNL 1990, c. J-4:

> In cases not provided for in this Act, the rules or by the provisions of another Act that are not inconsistent with this Act, or where the practice and procedure in a particular proceeding cannot be ascertained, the court may adopt the practice and procedure that is necessary to permit the proceeding to continue.

[31] Additionally, Brian Henley submits that rule 36(1)(b)(iii) only applies to delay arising after a notice of appeal has been filed.

Analysis

[32] Of the three grounds for dismissing an appeal listed in rule 36(1)(b)(i)-(iii), the third ground directly addresses undue delay, which is at the heart of this appeal. As such, I will conduct the analysis under that ground, using the test discussed in *Eco Zone*. Although *Eco Zone* was decided under the previous formulation of the *Rules*, there is no difference between them relevant to this statement of the law.

Delay before the Notice of Appeal is filed

[33] Brian Henley submits that *Eco Zone* stands for the proposition that rule 36(1)(b)(iii) only applies to delay arising after a Notice of Appeal has been filed. I would not interpret *Eco Zone* or rule 36(1)(b)(iii) so narrowly.

[34] Although *Eco Zone* only considered delay after the Notice of Appeal was filed, that was the delay at issue in that case. In fact, the critical period for the application in *Eco Zone* was not even all the time after the Notice of Appeal was

filed, but rather a period of about nine months in which no action was taken to advance the appeal (*Eco Zone*, at para. 21). The Court concluded that this delay was undue, noting that there were no unusual or exceptional circumstances that might justify a longer than normal time for "perfecting" the appeal. I note that the Court referred to perfecting the appeal, not "preparing" it. Rule 36(1)(b)(iii) refers to delay in the "preparation and perfection" of the appeal.

[35] Although the Court noted in *Eco Zone* that it took over a year to settle the formal order (at para. 4), that order was settled at a hearing before the court below after several meetings had been held (*Eco Zone v. Grand Falls-Windsor (Town Of), et al.*, 2007 NLTD 182, at para. 6). There were multiple parties and complex issues involved. No one submitted that the time to settle the order was "undue" in the circumstances or should be considered in the rule 36(1)(b)(iii) analysis. As such, the Court did not address the issue of delay prior to the Notice of Appeal being filed.

[36] In short, *Eco Zone* does not stand for the proposition that rule 36(1)(b)(iii) only applies to delay arising after a Notice of Appeal has been filed.

[37] As I have noted, rule 36(1)(b)(iii) refers to delay in both the "preparation" and "perfection" of the appeal. The words must have different meanings because every word in legislation is presumed to have a specific role to play in advancing the legislative purpose (*Newfoundland and Labrador (Information and Privacy Commissioner) v. Beverage Industry Association of Newfoundland and Labrador*, 2023 NLCA 2, at para. 67; and Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022), at p. 211). "Perfection" is generally understood as the steps taken following the filing of the Notice of Appeal to ready the appeal for hearing, such as filing the transcript, the factums, etc. This is consistent with how the Court used the word in *Eco Zone*. It is also consistent with how the word is used in rule 16 of *Rules*. Rule 16(1) requires an appellant to diligently carry forward the appeal in accordance with the principle of proportionality and to "perfect" the appeal within the time periods prescribed by the rules. Rule 16 does not address preparation of the appeal.

[38] The interpretation of the *Rules* should not be technical and formalistic, but with a view to ensuring that justice will be done between the parties (*Roman Catholic Episcopal Corporation of St. John's v. Guardian Insurance Company of Canada*, 2025 NLCA 5, at para. 12). As stated in *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, 1997 CanLII 14645 (NLCA):

> [31] The *Rules* are not hurdles of inconvenience to be gotten over, nor are they to be interpreted and applied without reference to their underlying spirit and purpose. The *Rules* attempt to further the fundamental goal of procedural justice. They are to be interpreted by the courts and applied by counsel and parties with that goal in mind, so as to ensure an expeditious and inexpensive determination on the merits in a manner that is fair to all sides.

[39] The purpose of the *Rules* is to provide for the orderly and expeditious administration of justice in the Court (at r. 2). Formal orders are not always filed in the court below. This should not mean that the window for appeal remains open indefinitely.

[40] In my view, "preparation and perfection of the appeal", as it appears in rule 36(1)(b)(iii), should be interpreted broadly so as to enable the Court to consider delay prior to the Notice of Appeal being filed. Such an interpretation enables the dismissal of appeals in cases in which a Notice of Appeal has been filed within 30 days of the filing of the order in the court below, but is nevertheless so excessively delayed that it is unjust for the appeal to proceed in the circumstances of the case. That is the best way of ensuring that justice is done between the parties.

[41] I will now proceed to determine if this appeal should be dismissed, using the framework of *Eco Zone*.

Is the Delay Undue?

[42] John Henley and Christopher Henley submit that the 960-day delay is undue primarily because Janet Henley ought to have put the issues she now wants decided before the Court earlier. They state that she had at least two opportunities to do so.

[43] The first was in 2022 when the Decision was rendered. They state that Janet Henley could have appealed the "no costs" award then, even though she was pursuing the Rule 20A Application. They state that appeals and rule 20A applications can run in parallel, with one proceeding being put on hold pending the outcome of the other. They cite two cases in which appeals and rule 20A applications were managed concurrently: *Finn v. St. John's (City)*, 2007 NLCA 46, at paras. 7-8, and *Cable v. CIBC Mortgages Inc.*, 2010 NLCA 31, at paras. 2, 10-11.

[44] The second opportunity John Henley and Christopher Henley identify is when they appealed the 20A Decision. They submit the issue of costs was before the Court at that time and if Janet Henley wanted to challenge the "no costs" award, then she should have filed a cross-appeal.

[45] John Henley and Christopher Henley submit that allowing the present appeal to continue would be contrary to the principles of finality, proportionality, and judicial economy.

[46] I agree that the delay is undue. Janet Henley could have appealed at the first opportunity identified by John Henley and Christopher Henley. She certainly should have appealed, or cross-appealed, by or before the second opportunity. I will explain further.

[47] First, Janet Henley could have appealed the "no costs" award directly after the Decision was made. Although the award was "suspended" by rule 20A.08(3) pending determination of the Rule 20A Application, this does not mean it was immune from appeal. Pursuant to a previous version of rule 20A.08(3), if a formal offer to settle had been made and a judge subsequently made a decision that included a costs award, the costs award was deemed to be "suspended" and of "no force and effect" *unless* no rule 20A application was brought within 15 days following the filing or delivery of the decision or order. Yet even with a suspended order, an appeal could be pursued (see e.g. *Finn*).

[48] Regarding Janet Henley's concern that the court below would have been *functus officio* had the formal order been filed prior to the Rule 20A Application being determined, I am not convinced this concern is well-founded. The cases she cites in support of her position are distinguishable. *Metal World Inc.* and *McLean* both addressed reconsideration of a decision after the final order had been filed. Neither case addressed rule 20A applications. Although *Penney* did address a rule 20A application, in that case the application was made almost a year after the decision had been rendered, far outside the 15-day period set by the rule.

[49] Even if Janet Henley's concern about filing a final order was well-founded, this Court has accepted a notice of appeal without a formal order being filed in the court below (*Roman Catholic Episcopal Corporation of St. John's*; and *Walsh v. Johnson*, 2010 NLCA 6, at para. 8). As noted in those decisions, if the judge's disposition is not complicated, then the formal order may not be needed to clarify what is being appealed. In the present case, the judge's "no costs" award was straightforward and needed no clarification.

[50] Although Janet Henley could have appealed at this first opportunity, I would not find that her failure to do so created undue delay. My conclusion is different for the second opportunity.

[51] John Henley and Christopher Henley appealed the April 2023 Order specifically with respect to the costs award granted in the 20A Decision. In asking for relief, they requested that this Court allow the appeal, overturn the April 2023 Order for costs, and restore the original order in the Decision that the parties bear their own costs. As such, it was clear that one possible outcome of the appeal was that the original costs award would be reinstated.

[52] If Janet Henley believed the original costs award was in error, she should have raised the issue before the appeal was heard. She could have filed a Notice of Cross-Appeal to put the issue squarely before the Court. I disagree with Janet Henley's submission that rule 11 of the *Rules* does not allow a cross-appeal in such circumstances. The *Rules* are flexible and, as noted above, are interpreted and applied so as to ensure an expeditious and inexpensive determination of the merits of an appeal in a manner that is fair to all sides.

[53] Even if Janet Henley had not filed a Notice of Cross-Appeal, she might still have made submissions with respect to the original costs award in accordance with rule 11(3):

> Failure to file a notice of cross-appeal under subsection (2) shall not preclude a respondent from making submissions on the issues, but the omission may be grounds for an order as to costs.

[54] However, such submissions will not be permitted if it would not be procedurally fair for the Court to hear them. A responding party must have notice of the issues to which they are responding.

[55] Although Janet Henley mentioned the original costs award in her submissions to the Court on the 20A Decision appeal, she did not express an intention to appeal that award at that time. At the hearing, she confirmed that that she was not asking the Court to determine whether the judge had erred in the original costs decision. She agreed that for the Court to do so would not be fair to the other side (Brian Henley's Application, Tab B, Transcript, at pp. 212-213).

[56] In addition to the excessive delay, allowing Janet Henley's present appeal to proceed after the COA 20A Decision has been rendered raises two other concerns.

[57] First, hearing multiple appeals from the same matter is neither an expeditious nor an efficient use of court resources. Multiple appeals after the court below has rendered a final decision on a matter should rarely, if ever, occur. When the Court heard the 20A Decision appeal, there was nothing further for the judge in the court

below to decide with respect to the application. He had decided it on its merits and finally determined costs. Any appeals in relation to his decisions should have been brought at that time.

[58] Second, allowing the appeal to proceed at this stage risks conflicting orders from the Court. The order of the Court following the COA 20A Decision states:

> The costs Order of the Supreme Court arising from the Rule 20A Decision that [John Henley and Christopher Henley] pay enhanced costs to the [Janet Henley and Brian Henley], is set aside. The costs award of the original Decision, that there be no Order as to costs and that all parties bear their own costs, is reinstated.

[59] The order is enforceable and appealable to the Supreme Court of Canada, in accordance with the procedures of that court. To my knowledge, it has not been appealed and thus remains a valid order. Yet, the present Notice of Appeal effectively asks this Court to make an order that contradicts it.

[60] In the result, I would find that despite the Notice of Appeal being filed within 30 days of a formal order being filed in the court below, the delay is undue.

Are John Henley and Christopher Henley prejudiced?

[61] Prejudice can be of two general kinds: *actual* prejudice and *inherent* prejudice. Inherent prejudice can be presumed from the fact of delay itself. In balancing the significance of the delay and prejudice against the presumption in favour of allowing cases to be heard on their merits, actual prejudice is more likely to have a controlling effect on the outcome than inherent prejudice. This is especially so if the actual prejudice is significant and difficult or impossible to ameliorate (*Eco Zone*, at para. 17).

[62] John Henley and Christopher Henley allege both actual and inherent prejudice. In support of actual prejudice, they state that they have made decisions on the basis that the original costs award was not appealed. Specifically, they state that although they were not satisfied with the merits of the Decision, the no costs award encouraged them not to appeal it. They note that the judge stated that he awarded no costs “in an effort to put an end to some divisive intra-familial bickering that had persisted for much too long” (*Henley Estate (Re)*, 2023 NLSC 47, at para. 1). They state that his order had the intended effect on them.

[63] I am satisfied that John Henley and Christopher Henley have been prejudiced by the delay. Their actual prejudice is not as significant as it would be if the passage

of time had resulted in evidence being lost or witness memory being impaired, but there is prejudice nevertheless.

[64] The principle of finality is an important consideration in this case. The law seeks finality to litigation and requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18). An end to litigation enables parties to organize their lives in light of the result and to move on.

[65] When the Henley estate matter was before the court below in 2018, the presiding judge noted that the issues came before the court "after years of complex administration" of the estates of the parties' parents (*Henley Estate (Re),* 2018 NLSC 222, at para. 54). The following year, the same judge described the application before him as part of a "long-running estate dispute" (*Henley Estate (Re)*, 2019 NLSC 54, at para. 9, rev'd 2021 NLCA 46). In the Decision, the judge described the matter as "a family disagreement that has spiraled out of control" (at para. 84). In the COA 20A Decision, this Court referred to the litigation as "protracted" (at para. 2). The cost to the parties of these years of litigation, both financial and personal, has undoubtedly been substantial. Delay that prolongs the proceedings adds to that burden.

What is the potential merit of the appeal?

[66] Although John Henley and Christopher Henley do not assert that the appeal is without merit, the potential merit of the appeal is a factor to be considered under the *Eco Zone* framework.

[67] Janet Henley wishes to appeal the judge's decision that each party bear their own costs. Her primary argument is that she and Brian Henley were successful on the substantive issues before the judge, and that the ordinary rule is that costs "follow the event" (*Rules of the Supreme Court, 1986*, at r. 55.03(1)). Although she acknowledges that the judge had discretion to depart from this ordinary rule, she asserts that he erred in exercising that discretion.

[68] First instance judges have considerable discretion in awarding costs. The Court will not intervene in costs awards unless the court below has made an error in principle, is plainly wrong, or has not exercised its discretion judicially (*Hiscott v. Hall*, 2015 NLCA 1, at paras. 6-9; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC

9, [2004] 1 S.C.R. 303, at para. 27; *Dawe v. Morgan*, 2023 NLCA 11, at para. 14; and *Walsh v. TRA Company Limited*, 2023 NLCA 23, at para. 253).

[69] In the Decision, the judge articulated reasons for exercising his discretion as he did. A "no costs" award is not an unusual order. It was not the only time that the parties received such an order in this litigation. In *Henley Estate (Re)*, 2023 NLSC 49, the judge also ordered that the parties bear their own costs. In that instance, Janet Henley had been unsuccessful in her application before the court, and under the usual rule of costs following the event would have been subject to a costs order. While I acknowledge that Janet Henley has arguments that she wishes to make, on a preliminary assessment, there is no obvious error in the judge's exercise of discretion.

[70] In these circumstances, I would assess the potential merits of Janet Henley's appeal as low.

Should the appeal be dismissed?

[71] In my view, the significance of the established delay and prejudice in this case outweighs any consideration of having the appeal of the costs award decided on its merits. The principles discussed above of judicial economy, finality, and avoidance of potentially inconsistent results, all weigh heavily in favour of dismissing the appeal in the present circumstances. The potential merit of the appeal is low and does not tip the balancing against dismissal. The litigation, which over a year ago was described by this Court as "protracted", should come to an end.

[72] At the latest, Janet Henley's alleged errors with the original costs award should have been put before this Court when the 20A Decision was appealed. Instituting appeal proceedings at this stage results in multiple appeals after the court below had finally disposed of the matter. This sort of "appeal by installments" is not an appropriate use of the Court's resources and should rarely occur, if ever. It is prejudicial to the other side, who will have made decisions based on what they understood was, and was not, settled. Additionally, in a case such as this one, it risks potentially contradictory orders from the Court.

[73] In the result, I would dismiss the appeal for undue delay.

SHOULD THE CROSS-APPEAL BE DISMISSED?

[74] For substantially the same reasons, I would also dismiss the cross-appeal.

COSTS

[75] As I would allow both applications to dismiss, success among the parties is divided. Although Janet Henley was a respondent to Brian Henley's application to dismiss the cross-appeal, she supported the application. Janet Henley and Brian Henley both opposed the application to dismiss Janet Henley's appeal. In these circumstances, I would make no order as to costs.

DISPOSTION

[76] The application of John Henley and Christopher Henley to dismiss the appeal by Janet Henley is allowed.

[77] The application of Brian Henley to dismiss the cross-appeal by John Henley and Christopher Henley is allowed.

[78] There is no order as to costs.

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K.J. O'Brien J.A.

I concur : _____

F.P. O'Brien J.A.

I concur : _____

F.J. Knickle J.A.