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# Judicial Economy, Judicial Extravagance and Pension Splitting under a Matrimonial Property Order

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**Case Commented On:** *McMorran v Alberta Pension Services Corporation*, 2014 ABCA 387

The Court of Appeal decision in *McMorran v Alberta Pension Services Corporation* determines an instrumentally important question in the pension and matrimonial property law areas. In addition, it is procedurally unusual for two reasons. First, although it is a matrimonial property action, the dispute is really between Justice Robert Graesser, the Court of Queen's Bench judge who rendered the decision appealed from (*McMorran v McMorran*, 2013 ABQB 610) and the administrator of the Alberta public service pensions plans, the "appellant" by court order in the Court of Appeal — i.e., not between the former husband and wife who are both "respondents". Second, the concurring judgment of Justice Thomas Wakeling disagrees with the majority judgment of Justices Ronald Berger and Frans Slatter on one statutory interpretation point, but no consequences appear to flow from that disagreement and the two judgments do not engage with each other on the point. The reasons for two separate judgments are not made explicit, but they appear to be a result of different perspectives on the value of judicial economy. And in these days of legal and public focus on access to justice issues and the need for a "culture shift" in the current legal system, I think it is important to consider whether we can afford judicial extravagance.

## A. Facts

Catherine McMorran (the first wife) and Scott McMorran (the husband) divorced in 2002. In 2003, a consent matrimonial property order provided that the first wife had an ownership interest in the husband's Special Forces Pension Plan equal to one-half of the pension that accrued during their marriage, and that her ownership interest would be realized when the husband retired and started to draw the pension. At the time of the divorce, the husband had been a member of the pension plan for about 15 years. He remarried in 2005 to his (unnamed) second wife and he retired in 2011 after 22 years of pensionable service.

## B. Court of Queen's Bench Decision

Justice Graesser determined that, under the terms of the 2003 consent matrimonial property order, the first wife was entitled to a 50% interest in 15/22nds of the husband's pension. The husband was entitled to the other 50% interest in 15/22nds of his pension, plus a 100% interest in the remaining 7/22nds. He also decided that the husband should elect a "joint life not reduced

pension" with the result that his pension during his life would be smaller, but on his death the pension of his survivors would not be reduced; that the first wife was entitled to take her interest in monthly payments; and that the husband, the "participant" in the pension plan, had to name his first wife as his "pension partner" for her share of the pension. There was no appeal from those parts of Justice Graesser's order.

The problem with those parts of the order, as far as Justice Graesser was concerned, was their consequences for the second wife. Naming a "pension partner" determines how long a pension will last; all benefits under the pension end after the participant and his pension partner die. In this case that meant that, if the husband predeceased the first wife, then his second wife would be entitled to his portion of the pension (the other 50% interest of 15/22nds and the 100% interest in the remaining 7/22nds). But if both the husband and the first wife predeceased the second wife, the pension would end and the second wife would receive nothing.

Justice Graesser did not think it fair that the second wife did not receive her own share of her husband's pension. As a result, he took the unusual step of inviting counsel and the pension plan administrator to make submissions about whether the second wife could also be a "pension partner" (ABQB at para 68), a point not raised by the parties in their arguments. He decided that more than one "pension partner" could be designated under the Special Forces Pension Plan. As a result, the challenged paragraph 5 in his order provided:

> 5. It is further ordered that the Plaintiff shall be at liberty to elect a different pension partner for the portion of the pension that is not the Defendant's Share, and can elect a normal pension for his remaining share of the pension.

**C. The Court of Appeal Decision**

Paragraph 5 of Justice Graesser's order was the only part of the order that was appealed. The appellant was the Alberta Pension Services Corporation. It was granted standing to appeal based on section 34(1) of the *Public Sector Pension Plans (Legislative Provisions) Regulation,* Alta Reg 365/1993: "If, on the filing of a matrimonial property order, the Minister is unable to comply with it because . . . it does not comply with this Part . . . , the Minister may apply to the Court to redress the situation arising from that inability so to comply."

This appeal was therefore an appeal on a question of law involving a narrow, albeit instrumentally important, point of statutory interpretation, namely, whether the term "pension partner" in section 2(1)(dd.1) of the *Special Forces Pension Plan Regulation*, AR 369/93 could be interpreted to include more than one pension partner.

**(1) The Majority Opinion**

Justices Ronald Berger and Frans Slatter wrote a 23 paragraph opinion that struck paragraph 5 of Justice Graesser's order.

*(a) Standard of review, burden and onus*

In discussing the standard of review, in addition to noting that Justice Graesser's decision had to be correct because the interpretation of statutes is a question of law, the majority accorded "deference to the decision of the [pension plan] administrator" (at para 10). The "decision" of the administrator that they referred to was the administrator's opinion, proffered to both Justice

Graesser and to the Court of Appeal, about whether Justice Graesser's order was consistent with the provisions of the *Special Forces Pension Plan Regulation*.

Why the deference to the administrator and not the judge? The specialized role of the pension plan administrators is recognized in the provision that gives the administrator standing and also in other provisions in the *Public Sector Pensions Plans Act,* RSA 2000, c. P-41. Relying on *Nolan v. Kerry (Canada) Inc.,* [2009] 2 SCR 678, 2009 SCC 39 (CanLII), which was a more traditional judicial review of an actual decision of the Financial Services Tribunal, the majority noted (at para 10) that "[t]he funding, interpretation, and administration of a pension plan are complex" and "[t]hose charged with administering the plan will develop an expertise in its interpretation and management". This endorsement of expertise and the administrator's mandate under the legislation to represent the interests of all participants in the pension plan, present and future, led the majority to hold that "[s]ignificant weight should be placed on the position of the administrator as to whether particular arrangements are consistent with the plan" (at para 10).

As a result, and even though the administrator was styled the "Appellant" in this appeal, the majority held that "the burden is on the claimants to demonstrate the administrator's conclusion" that "a particular agreement or proposed court order would interfere with the actuarial foundations of the plan" was "unreasonable", and "the onus is also on the claimants to prove that any decision of the administrator on the proper interpretation of the plan is unreasonable" (at para 10). The first wife supported the administrator's position, but the husband benefited from Justice Graesser's interpretation and thus the onus and burden were, effectively, on him.

(*b) Can there be more than one pension partner?*

The majority sets out a number of reasons why the definition of "pension partner" did not support an interpretation of multiple pension partners. The relevant portion of that definition is:

> (dd.1) "pension partner" means
> (i) a person who, at the relevant time, was married to a participant or former participant and had not been living separate and apart from him or her for 3 or more consecutive years, or … (emphasis added)

The majority characterized the phrase "at the relevant time" in the definition of pension partner as "somewhat enigmatic" (at para 14). The most logical time might seem to be the time when the participant in the pension plan began to receive the pension, i.e., when the pension went "into pay". But at the time the husband's pension went into pay in this case, the first wife did not qualify under the definition because the couple had been divorced for nine years. The majority held that "at the relevant time" had to include more than the time when the pension went into pay or else the definition would have specified "at the time the pension goes into pay". The "relevant time" could therefore encompass cases where that time was "at the time their interest accrues under the terms of a matrimonial property order." (at para 14)

As for the issue of whether the definition of "pension partner" would allow for the naming of more than one such person, counsel for the administrator argued and the majority accepted that:

- The phrase "a person who, at the relevant time, was married to a participant", given its ordinary meaning, would contemplate only one "person" because Canadian law contemplates only one spouse at any "relevant time" (at para 15).

- Including more than one pension partner in effect turns the phrase "at the relevant time" into "at any time" (at para 15).
- The definition of "pension partner" goes on to include a cohabitant if no one is married to the participant (at para 15).
- Adding a third party such as the second wife who might receive benefits after both the husband and first wife die would create benefits for which no reserves had been set aside because the pension plan is funded on actuarial assumptions based on two lives, the participant's and his or her pension partner's (at para 16).
- Pensions are funded based on actuarial calculations which require certainty about the number of people who might receive pension benefits and their life expectancies (at para 17).
- The second wife knew or ought to have known, when she married the husband, that his first wife had an interest in his pension (at para 20).
- The generic provisions of the *Interpretation Act*, RSA 2000, c I-8, section 26(3), which provides that "[i]n an enactment, words in the singular include the plural" are inapplicable and inappropriate in the circumstances (at para 21).

The majority therefore concluded (at para 22) that the definition of "pension partner does not support an interpretation that a pension participant can have more than one pension partner."

**(2) The Concurring Opinion**

Justice Wakeling, in his concurring opinion, took 70 paragraphs to reach the same conclusion. He stated the issue somewhat differently (at paras 28 and 29), following the challenged paragraph 5 more closely, as a question of whether the matrimonial property order in this case could divide the husband's pension into two or more discrete units, each of which could have a different pension partner (first wife versus second wife) and payout scheme ("joint life not reduced pension" versus "normal" pension). He concluded in his "Brief Answers" at the beginning of his opinion that the definition of "pension partner" in the relevant legislative context "inexorably leads to the conclusion that a pensioner may have only one pension partner" (at para 32) and that the husband's pension is "one indivisible whole" (at para 33).

After setting out the facts, quoting the relevant statutory provisions, examining the values underlying pension plan administration, summarizing the pension plan administrator's arguments, and reviewing the law about the distribution of these pension benefits on marriage breakdown both before and after major changes in 2003 (that disallowed orders of the type made in this case), some principles of statutory interpretation, and the purpose of the pension plan legislation, Justice Wakeling determined (at para 73) that the outcome of the appeal turned on the meaning of "pension partner."

Justice Wakeling noted that section 2(1)(dd.1) of the *Special Forces Pension Plan* "unequivocally reveals" that a participant may have only one pension partner and that pension partner "has easily identifiable criteria at a very specific time — 'at the relevant time'" (at para 80). It is with respect to the interpretation of the phrase "at the relevant time" that Justice Wakeling disagreed with the majority. He indicated there was no disagreement about what the phrase "at the relevant time" meant, stating that "[b]oth counsel informed us that 'at the relevant time' means when the 'pension goes into pay'", i.e., when the husband started receiving his pension (at para 81). Justice Wakeling also stated, albeit in a footnote, that "[a] careful review of the *Special Forces Pension Plan* in force as of June 23, 2003 supports this interpretation" (at footnote 47). Nevertheless, Justice Wakeling did not discuss the implications of this different

interpretation of "at the relevant time", nor did he discuss whether the first wife qualified if section 2(1)(dd.1) is interpreted that way. He simply noted that a pension only goes into pay once (at paras 81-82) and then moved on to discuss that there can only be one form of pension and one pension partner (at para 83).

Justice Wakeling decided that both the language of the relevant statute and the administration of the pension plan support his conclusion that there can be only one pension partner (at paras 84-89). He ended with a discussion of whether this interpretation is unfair, concluding that not only is it not unfair to the second wife for reasons similar to those advanced by the majority (at paras 90-91), but it is also fairer to all of the pension plan participants because Justice Graesser's order would have burdened the pension plan by increasing pension payouts (at para 92).

**D. Commentary**

**(1) The Interpretation of "Pension Partner"**

Pensions have long been one of the most contentious types of matrimonial property for two reasons: their valuation and their method of distribution. See Jonnette Watson Hamilton and Annie Voss-Altman, The Matrimonial Property Act: A Case Law Review (2 October 2010). However, distribution between the former spouses was not the issue in this case. Instead it was a question of distribution among all spouses, past and present, of the pension participant, and not only in this particular case. Had Justice Graesser's interpretation stood, it could have been adopted by other judges and by couples and lawyers negotiating property divisions on relationship breakdowns in cases where the same definition of pension partner applied.

The idea that a second spouse could be added appears to be a novel notion. It seems fairly obvious that paying one pension for the lives of three people would usually cost more than paying one pension for the lives of two people. And if a second spouse is included, why not a third?

This case illustrates the utility of section 34(1) of the *Public Sector Pension Plans (Legislative Provisions) Regulation,* the section that allows the Minister to apply to the Court when a matrimonial property order does not comply with the pension plan regulation and administration. Someone needs to represent the interests of all of those financially dependent on the pension plan and its long-term fiscal health. However, the Court of Queen's Bench did not accord deference to the expert opinion of the pension plan administrator and the administrator in this case still needed to apply for standing before the Court of Appeal, necessitating an extra court application. The standing and role of the pension plan administrator could be specified in the regulations in order to simplify and lower the costs of the process.

**(2) The "Parties" to the Appeal: Justice Graesser and the Alberta Pension Services Corporation**

Justice Wakeling notes (at footnote 17) that the challenged part of Justice Graesser's order — paragraph 5 — granted relief that had not been sought by the husband. It was Justice Graesser's initiative. Justice Wakeling noted that a court should be reluctant to raise, on its own initiative, a new issue, if only because it increases the parties' costs. While paragraph 5 of Justice Grasser's order favoured the husband and was therefore adopted by him, paragraph 5 was strictly the court's idea. The husband would not have had to defend it before the Court of Appeal had it not been for Justice Grasser's initiative.

The majority opinion says nothing about costs, but Justice Wakeling's opinion concludes with the direction that "[e]ach party is responsible for its own costs" (at para 94). While it is true that the husband benefited from Justice Graesser's paragraph 5, that relief was granted on Justice Graesser's own initiative. It is not clear why all three parties were required to bear their own costs in such circumstances. No reasons are offered for this part of the Court of Appeal's decision.

The addition of the pension plan administrator as the appellant is another unusual aspect of this case. Being cast as the "Appellant" seemed inappropriate. The arguments of the administrator were treated more like the reasons for decision of an administrative tribunal. This is another reason for the relevant legislation to specify the role of the administrator.

**(3) Justice Wakeling's Extravagant Reasons for Decision**

Given that Justice Wakeling's different interpretation of "at the relevant time" did not seem to make a difference to the result or have any consequences for the parties, and given the lack of engagement on that point between the majority and the concurring opinions, was Justice Wakeling's 70 paragraph, 55 footnote judgment necessary or desirable as an alternative or addition to the majority's 23 paragraph disposition of the issue before the court, i.e., the legitimacy of paragraph 5 of Justice Graesser's order? That is the question I address in this part of my post. And it is not simply a question about Justice Wakeling's judgment in this particular case.

A review of those of Justice Wakeling's written judgments that have been posted to the Alberta Courts Court of Appeal website since his appointment to that Court in March 2014 (which followed his appointment to the Court of Queen's Bench in February 2013), reveals an approach to judgment writing that is often the opposite of judicial economy and an unusual decision-making style. His judgments are often lengthy due to the inclusion of matters that do not need to be discussed in order to resolve the matter before the court. This is especially true of the content of some of his footnotes.

*"Judicial economy"* describes *a sort of judicial minimalism or judicial restraint, i.e., s*aying no more than necessary to justify the outcome of a case. See my October 2014 post, Disagreement in the Court of Appeal about the Wisdom of Judicial Economy. It seems to me that the concept of judicial economy has a role to play in access to justice. In *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 — the oft-heeded and much-expanded-upon decision increasing the availability of summary judgments — Justice Karakatsanis, for a unanimous court, wrote about the "recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system" (at para 2). In elaborating on what a shift in culture requires, she enunciated the "proportionality principle":

> A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (at para 28).

Justice Karakatsanis elevated the status of the proportionality principle to that of "a touchstone for access to civil justice" (at para 30). The Court endorsed an understanding of "an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (at para 31).

The Action Committee on Access to Justice in Civil and Family Matters October 2013 Final Report, Access to Civil and Family Justice: A Roadmap for Change, had previously identified a culture shift as something that is urgently needed: "a new way of thinking — a culture shift — is required to move away from old patterns and old approaches" (at 5). Of the six guiding principles that make up this new culture, two seem especially relevant to the concept of judicial economy:

- Put the public first: "For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants. The focus must be on the people who need to use the system" (at 7).
- Simplify, Make Coherent, Proportional and Sustainable: "Our current formal procedures seem to grow ever more complicated and disproportionate to the needs of the litigants and the matters involved. Everyday legal problems need everyday solutions that are timely, fair and cost-effective." (at 8)

How do these ideas fit with the concept of judicial economy? The advantages of judicial economy identified by Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 2001) at 4-5 were three. First, it reduces the burdens of judicial decisions, especially on multi-member courts. It might mean, for example, fewer concurring decisions. Second, and more importantly, it ensures that fundamental errors are made less frequently and are less damaging. The more that is said, especially on matters not argued by counsel, the more that might be wrong. Third, it reduces the risks of unanticipated bad consequences as a result of intervening in a complex system. I would add that resources are freed up by restricting decisions to narrow grounds, whether those resources are a judge's time and energy, judicial clerks' time and energy, or the parties and/or their counsel's time, energy and money.

As I have already noted, Justice Wakeling's approach to judgment writing is unusual. Not only are his judgments often lengthy, with discussion of matters only peripherally related to the issues before him, but they are often heavily footnoted. In this particular case he used 55 footnotes, a large number of which are textual footnotes with "asides" on substantive points, and not simply footnotes citing the authority for a particular point in the text. They often reference English or American authorities, or dissenting opinions. Some pose hypotheticals. To substantiate these points, lengthy quotations from a few of these footnotes are necessary (and see also footnotes 15, 18, 24, 32, and 51):

- Footnote 17 (which is over 500 words long and has therefore been edited): "Mr. McMorran did not apply for this relief. The chambers judge put the interest of Mr. Morran's [sic] second wife into issue on his own motion. . . . This initiative of the motions court brings to mind Justice Cardozo's admonition that a judge 'is not a knight-errant roaming at will in pursuit of his own ideal of beauty and goodness'. *The Nature of the Judicial Process* 141 (1921). Generally speaking, a court should be reluctant to raise, on its own motion, a new issue, the resolution of which will not affect the dispute the

parties have asked the court to resolve. There may be good reasons which account for the failure of the parties to present the question. In addition, additional submissions drive up the costs for all parties. As well, a court must always consider whether by raising a new issue "a reasonable, right-minded and informed person [would] conclude it [was] probable that the adjudicator was not impartial". *Bizon v. Bizon*, 2014 ABCA 174, ¶49. See *The Queen v. Mian*, 2014 SCC 54, ¶39 ("When a judge ... intervenes in a case and departs from the principle of party presentation, the risk is that the intervention could create an apprehension of bias"). This concern was not engaged here. . . . To say more may be inappropriate given that the appellant did not put into issue the propriety of the chambers judge raising and deciding this new issue. See *The Queen v. Mian*, 2014 SCC 54, ¶41 ("An appellate court should only raise a new issue when failing to do so would risk an injustice") & *District of Parry Sound Social Services Administration Board*, [2003] 2 S.C.R. 157, 206 ("The Court of Appeal erred in raising this issue, not chosen by the parties" per Major J.) On the other hand, courts have frequently adopted different solutions to disputes from those proffered by the parties to resolve disputes the litigants have presented for resolution. E.g., *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3, 175 (in determining the nature of the s. 11(d) Charter values – an independent and impartial tribunal in criminal proceedings – the majority, on its own motion, introduced the concept of judicial compensation commissions); . . . .

- Footnote 38: A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) ("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear") & F. Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 543 (1947) ("violence must not be done to the words chosen by the legislature"). See *Henry v. Saskatchewan Workers' Compensation Board*, 172 D.L.R. 4th 73, 110 (Sask. C.A. 1999) (the dissent lamented the majority's focus on the purpose of workers' compensation legislation – "To protect workers and their dependents from the hardship of economic loss sustained through injuries suffered by the worker in the cause of his employment": "It is inconceivable to me ... that the legislature ... provide[d] coverage for suicides [in its workers' compensation legislation] but drafted this enactment so that only the most perceptive [judges] would recognize their intention"); *City of Prince Albert v. Co-Op Health Centre*, 42 D.L.R. 4th 706, 709 (Sask. C.A. 1987) (the dissent rejected the assertion that a medical clinic was a hospital: "[Legislation] could say black is white for certain purposes and it would be so. However, I do not think it is unreasonable to require the legislators to use clear and unequivocal language if they intend to produce a result contrary to that which is the product of reasonable expectation") & *Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("There is no canon against using common sense in construing laws as saying what they obviously mean").
- Footnote 39: *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Justice Holmes, dissenting from the Court's opinion that a telephone wiretap intercept is not a search under the Fourth Amendment, observed that "Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them") & *Johnson v. Southern Pacific Co*., 196 U.S. 14 (1904) (in holding that a statutory ban against a railroad using "any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled without necessity of men going between the ends of cars" included locomotives, the Court declared that the contrary conclusion "appears to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction").
- Footnote 43: Why would an employer insist that bereavement not be available if two parents died in a common accident? An employee, most likely, would be away from work

the same amount of time whether he or she was mourning the death of one or two parents.

- Footnote 54: A court could not order an enhanced payout scheme for the second wife just because she might need more money to help her cope with a foreseeable income shortfall. *Isidore Garon ltée v. Tremblay*, [2006] 1 S.C.R. 27, 41 ("A desire to achieve a favourable outcome to the employees in a particular case cannot dictate which principles apply"); *Alberta v. McGeady,* 2014 ABQB 104, ¶23 ("No ... decision maker can ignore substantive statutory provisions because it believes [it] ... produces unfair results and adopt another norm which it is satisfied produces a more satisfactory result*"); J.W. v. Victims of Crime Financial Benefits Program*, 2013 ABQB 212, ¶35 (a "statutory delegate ... cannot ignore ... legislative direction"); *Hamilton Street Railway v. Amalgamated Transit Union*, 243 O.A.C. 51, 54-55 (Super. Ct. J. (Div. Ct.) 2008) (an arbitrator cannot alter a dismissal clause by inserting "flagrant" and changing the criterion) & *International Association of Machinists and Aerospace Workers Local Lodge 1579 v. L-3 Communications Spar Aerospace Ltd*., 201 L.A.C. 4th 85, 153 (Wakeling 2010) (an adjudicator cannot ignore legislation and a collective agreement to assist workers who lost their jobs on account of a plant closure and received no termination or severance pay).

Not all of Justice Wakeling's footnotes are textual ones making substantive points that might raise a question about whether they can be cited as authority. Some are simple citation footnotes, and still others establish acronyms or other short forms of names. The latter type of footnotes are simply matters of style. For example, in *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 337, a 27 paragraph, 5 footnote decision on an application for leave to appeal, three of Justice Wakeling's five footnotes merely establish short forms or acronyms, as for example when footnote 1 states that "This judgment frequently refers to the City of Edmonton as the 'City'". These are the sort of things that most judges indicate by including the short form or acronym in brackets after the first use of the term in the text (e.g., "This is an application by the City of Edmonton (the City) for leave to appeal").

This style of judgment writing does seem to be Justice Wakeling's norm when he is writing for himself in a concurring or dissenting judgment or on an application for leave to appeal. For example:

- In the December 2, 2014 decision in *Buffalo Trail Public Schools Regional Division No. 29 v Alberta Teachers Association,* 2014 ABCA 407, his 46 paragraph, 28 footnote dissent can be contrasted with the majority's 17 paragraph, no footnote judgment;
- In the December 2, 2014 sentence appeal decision in *R v Murphy*, 2014 ABCA 409, his 68 paragraph, 74 footnote concurring decision stands out when juxtaposed with the majority's five paragraph, no footnote decision;
- In the May 6, 2014 decision in *Can v Calgary (Police Service),* 2014 ABCA 322, his 162 paragraph, 134 footnote concurring opinion stands in stark contrast to the 12 paragraph, no footnote decision of the majority; and
- His May 12, 2014 leave to appeal decision in *Boychuk v Edmonton (Police Service)*, 2014 ABCA 163 ran to 60 paragraphs and 44 footnotes.

Only two of the Court of Appeal cases in which Justice Wakeling has been involved have explicitly referenced the notion of judicial economy, but they do so as a reason for not signing on to his opinions. These are examples of judicial extravagance increasing the burdens of judicial decision-making in a multi-member court. Those two cases are:

- In a May 21, 2014 decision in *Bizon v Bizon*, 2014 ABCA 174, Justices Picard and Costigan concur in four short paragraphs with the result of Justice Wakeling's 86 paragraph, 46 footnote decision. They noted that they agreed with the reasons in paragraphs 66-77 of his judgment and, because that was sufficient to dispose of the issues, stated that "it is unnecessary for us to consider the other issues discussed in the memorandum of judgment of Wakeling J.A." (at para 89).
- In a June 25, 2014 decision in *Lubberts Estate (Re),* 2014 ABCA 216, the two paragraph decision of Justices Picard and Veldhuis concurs in the "conclusion reached by Justice Wakeling that the decision of Justice Ross … is well written and carefully reasoned, and that this appeal must be dismissed [and] finds her decision sufficient to dispose of all issues" (at para 80). This terse comment stands in stark contrast to the 78 paragraph, 44 footnote decision of Justice Wakeling that addresses numerous "other matters" that Justices Picard and Veldhuis found unnecessary to consider.

Justice Wakeling's approach seems out of step with the stated need for a "culture shift" within the Canadian judicial system and the Supreme Court of Canada's call for "proportionality." In the year since *Hryniak v Mauldin* was handed down, it has been extended by lower courts and counsel within and beyond the summary judgment context. See Jonathan Lisus, "Case Comment" The Advocates' Journal (Summer 2014) 7 at 8-9, noting that *Hryniak's* talk of a culture shift has been seized upon in lower courts, as has the emerging doctrine of procedural proportionality in the Canadian justice system which takes into account the appropriateness of process, including considerations of cost, timeliness, and impact on litigation given the nature and complexity of the litigation.

Embracing judicial economy and deciding on narrow grounds appears to fulfill many of the goals of a culture shift identified in *Hryniak v Mauldin*. The principle of proportionality embraced by the Supreme Court would seem to demand judicial economy. Not only does it reduce the burdens of judicial decisions on multi-member courts faced with judicial extravagance, but it ensures that fundamental errors are kept to a minimum. Access to justice concerns suggest that the time and resources that go into crafting the elaborate judgments of Justice Wakeling — and reading them — are extravagances that the legal system and the public can no longer afford.