In the Court of Appeal of Alberta

Citation: Humphreys v. Trebilcock, 2017 ABCA 116

Date: 20170419
Docket: 1603-0275-AC;
1603-0276-AC
Registry: Edmonton

Between:

Appeal No. 1603-0275-AC

V. Lorne Humphreys and Brodlor Foods Inc.

Respondents
(Plaintiffs)

- and -

Barry Trebilcock

Appellant
(Defendant)

And Between:

Appeal No. 1603-0276-AC

V. Lorne Humphreys and Brodlor Foods Inc.

Respondents
(Plaintiffs)

-and-

Sebastian Hanne, Juergen Hanne, Calgary Ventures Inc., Contura Consulting Ltd., Bauland Inc., Lux Real Investments Ltd. and Troyvest Estates Ltd.

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice P.B. Michalyshyn
Dated the 14th day of October, 2016
Filed on the 9th day of December, 2016
(2016 ABQB 579, Docket: 0603 15792)

Memorandum of Judgment

The Court

I. Introduction

[1] This is an appeal from a motion court's decision[1] in a standard commercial action dismissing the defendants' delay applications under r. 4.31(1) of the *Alberta Rules of Court*[2].

II. Questions Presented

[2] The respondents commenced their action against the appellants and others on December 14, 2006. It probably will not be tried until 2020. The respondents claim that the appellants engaged in fraudulent business practices.

[3] Roughly 9.5 years after the plaintiffs started their lawsuit, the appellants invoked r. 4.31(1) and sought dismissal of the plaintiffs' action.

[4] The appellants allege that the plaintiffs have prosecuted their action in such a dilatory manner that it constitutes inordinate delay, that the inordinate delay is inexcusable and that this inordinate and inexcusable delay has caused them significant litigation and nonlitigation prejudice.

[5] To support their claim of litigation prejudice they assert that several persons they had intended to call as witnesses have either died or disappeared and that they have lost some important documents. In addition, they say that the memories of potential witnesses have degraded with the passage of time. These facts have compromised their ability to defend the claims the plaintiffs have made against them.

[6] Barry Trebilcock, one of the applicants, swore in his supporting affidavit that the continued existence of this suit has caused him significant nonlitigation prejudice: "I am in the agricultural research business and have been in this business for over 20 years. The ... lawsuit impacts my ability to apply for government grants for research and development related to agriculture, and it is effecting [sic] my employment opportunities, as its disclosure impacts my financial stability". The nonmoving parties have not challenged this assertion.

[7] Sebastian Hanne is another moving party. Part of his affidavit reads as follows:

> I, as well as the other Defendants, have had for the past decade an apparently indeterminable $3.5 Million claim hanging over each of us. … [I]t continues to

[1] *Humphreys v. Trebilcock*, 2016 ABQB 579.

[2] Alta. Reg. 124/2010.

> have [a deleterious effect] on my character and credit worthiness, which at 34 years of age and pursuing a business career I continue to experience as a substantial burden.

[8] Again, the plaintiffs neither cross-examined the deponent nor led any evidence relating to prejudice[3].

[9] The motions court dismissed the two delay applications.

[10] Did it commit reversible errors? Are there errors of principle? Is the disposition plainly wrong?

[11] If so, what is the proper disposition of the appellants' r. 4.31(1) applications?

[12] To answer this query several other questions must be answered.

[13] Is delay a feature of this action? Have the plaintiffs prosecuted their action at a slower pace than a reasonable claimant in comparable circumstances would have?

[14] If so, is the differential of such a magnitude that it may be described as "inordinate", an essential attribute of delay this Court has adopted in applying r. 4.31(1)?

[15] Has the nonmoving party provided an explanation for the delay? If so, is the delay inexcusable?

[16] If so, has this delay "resulted in significant prejudice" to any of or all the defendants? Is this because the defendants have proven on a balance of probabilities that all or some of them have endured significant prejudice on account of the plaintiffs' delay? Or is it because of the rebuttable legal presumption stated in r. 4.31(2)? If the latter, have the plaintiffs rebutted the presumption?

[17] If the applicants have met the criteria for granting relief under r. 4.31(1), is there any compelling reason why the adjudicator should nonetheless decline to grant relief?

III. Brief Answers

[18] The motions court committed four reversible errors.

[19] First, it failed to explain its conclusion that inordinate and inexcusable delay were not features of the plaintiffs' action. Given that almost ten years had lapsed since the plaintiffs commenced their action and a trial was still years away, a detailed and compelling explanation was required. Absent cogent reasons, the record requires the contrary conclusion.

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[3] *Humphreys v. Trebilcock*, 2016 ABQB 579, ¶11.

[20] Second, the motions court failed to ask the right questions in the right order. It did not start its analysis with a consideration of delay. How much delay is there? Is this delay inordinate because of the nature of the claim or for any other reason? Have the plaintiffs provided an explanation for the delay? What is it? Does it justify or excuse the pace at which the litigation has proceeded? Instead, the motions court initially asked whether the moving party had established that the nonmoving party's delay had caused it litigation prejudice. Had the motions court undertaken this study we expect that it would have been hardpressed to reach the conclusion that it did.

[21] Third, the motions court did not address the moving parties' nonlitigation prejudice complaints.

[22] Fourth, the record compelled the motions court to dismiss the plaintiffs' action. The plaintiffs' delay was of such a magnitude and nature that it could only be described as inordinate, inexcusable and the cause of the significant prejudice the defendants endured. The motions court's contrary decision was clearly wrong.

[23] The plaintiffs have prosecuted their action in a dilatory manner and it has resulted in delay in the action. This action was commenced on December 14, 2006 and has been moving glacially for a very long time. The delay is so pronounced that it must be described as inordinate. There is nothing in this record to justify any other conclusion.

[24] Mr. Humphreys provided an explanation for this delay in an affidavit he filed in support of a June 9, 2016 application he made for the variation of a case management order. He swore that the plaintiffs, after the appointment of Aran Veylan, Q.C., to The Provincial Court of Alberta on October 12, 2012, "struggled to obtain continuous representation of counsel". The law firm that represented the plaintiffs in the period between October 12, 2012 and January 1, 2016, the date the plaintiffs retained Mr. Belzil, had assigned at least three different lawyers to the plaintiffs' file. But it was not until sometime in the last quarter of 2015 that the plaintiffs' dissatisfaction prompted them to search for new counsel. Mr. Belzil agreed to act for them on January 1, 2016.

[25] While we understand that the introduction of new counsel to the file caused the plaintiffs inconvenience and expense, this regrettable background does not provide a valid explanation for the delay. First, the plaintiffs did not decide to change counsel until sometime in the last quarter of 2015. They retained Mr. Belzil effective January 1, 2016. This is a relatively short period of time. Second, the plaintiffs' delay became inordinate before October 12, 2012. By then, the plaintiffs' action should at least have been set down for trial, if not tried. Third, the plaintiffs alone are responsible for the conduct of their own lawyers.

[26] Given the complete absence of evidence explaining why the plaintiffs had made so little progress in this action before they decided to look for new counsel sometime in the last quarter of 2015 – there was no allegation that the defendants had engaged in unwarranted obstructive

behaviour – an adjudicator must conclude that the plaintiffs are wholly responsible for the pedestrian pace at which their action has advanced along the litigation spectrum.

[27] There is no valid excuse for the plaintiffs' delay. A contrary decision cannot be reached on this record.

[28] Prejudice includes litigation and nonlitigation prejudice.

[29] The plaintiffs' inordinate delay has caused the appellants significant nonlitigation prejudice.

[30] This is attributable to several factors.

[31] First, the plaintiffs allege that the appellants have engaged in fraudulent acts. This exacerbates the stress normally associated with being a defendant in a lawsuit. Common sense supports the conclusion that such claims probably have damaged the appellants' business reputation in the community in which they operate and have harmed their interests in the short or long term or both. It is more likely than not that enterprises familiar with the defendants and these claims have been unwilling to do business with the defendants. This causes financial hardship.

[32] Second, those who make claims of this nature must prosecute them with reasonable expedition. So long as they do the law forces the alleged wrongdoers to patiently endure the harm these unproven claims may do to their reputations and their ability to do business in favour of the plaintiffs' interest in securing a judicial determination of their differences with the appellants.

[33] Third, the plaintiffs have not proceeded with reasonable expedition. More than ten years have passed since the plaintiffs commenced their action. It will not be tried, in all likelihood, until 2020.

[34] Fourth, it follows that the plaintiffs' interest in securing a judicial determination of their dispute with the appellants is no longer more important than the appellants' interest in carrying on business without fear that unsubstantiated claims of fraudulent conduct in an extant lawsuit will cause others in the circle in which the appellants function to refrain from doing business with them.

[35] The appellants have also made out a case of litigation prejudice. This is largely attributable to the undeniable fact that a person's ability to recall events diminishes with the passage of time. Degraded memories will undoubtedly adversely affect the appellants' witnesses. As this action will most likely not be tried before 2020, their witnesses will be questioned about events that occurred between 2003 and 2006 – fourteen to seventeen years ago. In addition, the appellants have not had the opportunity to question Mr. Humphreys. That a paper trail may exist does not adequately reduce the prejudice that the appellants more likely than not will experience in defending themselves in a 2020 trial.

[36] In addition, the proof of inordinate and inexcusable delay triggered the rebuttable legal presumption that the moving parties have borne the burden of significant prejudice. The nonmoving parties have not rebutted this presumption.

[37] There is no good reason not to exercise our discretion in favour of the moving parties.

IV. Statement of Facts

A. Statement of Claim

[38] On December 14, 2006 V. Lorne Humphreys and Brodlor Foods Inc., a company Mr. Humphreys controls, commenced an action against Sebastian Hanne, Juergen Hanne, Ralph Walker and Barry Trebilcock, seven named corporations controlled by Juergen or Sebastian Hanne[4] and a number of natural persons and corporations that the plaintiffs were unable to identify.

[39] We will set out the plaintiffs' main allegations.[5]

[40] In 2006 Casual Food Concepts Inc., a corporation ultimately controlled by Sebastian Hanne, breached a 2003 consulting agreement with Brodlor Foods Inc. whereby Casual Food Concepts Inc. retained and compensated Brodlor Foods Inc. to provide various management services to the former.

[41] In 2006 All in Good Taste Inc., a corporation controlled by Casual Food Concepts Inc., breached 2005 executive compensation and executive management agreements with Mr. Humphreys. These agreements obliged Mr. Humphreys to provide executive services to the corporation and the corporation to compensate Mr. Humphreys for doing so.

[42] Casual Food Concepts Inc. and All in Good Taste Inc. were vehicles through which the plans of Messrs. Humphreys, Trebilcock, Hanne, Hanne and Walker to market sub and pasta franchises were to be effected.

[43] Casual Food Concepts Inc. and All in Good Taste Inc. collectively owe Brodlor Foods Inc. and Mr. Humphreys $219,129.92 plus interest on account of these breaches.

[44] Casual Food Concepts Inc. and All in Good Taste Inc. owe Brodlor Foods Inc. $135,791.59 plus interest on account of capital advances Brodlor Foods Inc. made to allow both corporations to carry on daily operations.

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[4] Casual Food Concepts Inc., All in Good Taste Inc., Calgary Ventures Inc., Contura Consulting Ltd., Bauland Inc., Lux Real Investments Ltd. and Troyvest Estates Ltd.

[5] A second amended statement of claim filed July 7, 2009 is the most recent iteration of the plaintiffs' claim.

[45] Both the 2003 consulting agreement and the 2005 executive compensation and management agreements gave Brodlor Foods Inc. an option to acquire shares in Casual Food Concepts Inc. and All in Good Taste Inc.

[46] In 2003 and 2007 Brodlor Foods Inc. exercised its options under each of these agreements and became a shareholder in Casual Food Concepts Inc. and All in Good Taste Inc.

[47] In 2007 All in Good Taste Inc. sold its principal and other assets to third parties for a sum in excess of $2,125,000.

[48] The plaintiffs complain about the role played by All in Good Taste Inc., Casual Food Concepts Inc., Lux Real Investments Ltd., Barry Trebilcock and others whose identity is unknown to the plaintiff in the distribution of the sale proceeds. The key passages in their second amended statement of claim are set out below:

> 57. The [All in Good Taste Inc. transfers (AIGT Transfers)] … were made with the intent to delay, hinder or defraud creditors and others, including the Plaintiffs, of their just and lawful actions, suits, debts and damages against AIGT, and the Plaintiffs have been injured, delayed, prejudiced or postponed by the AIGT Transfers.
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> …
>
> 59. The AIGT Transfers were fraudulent conveyances and the Plaintiffs plead the *Statute of Elizabeth*, 13 Eliz. 1, c. 5 and the *Fraudulent Preferences Act*, R.S.A. 2000, c. F-24.
>
> 60. Alternatively, the AIGT Transfers were fraudulent preferences contrary to the *Fraudulent Preferences Act*, R.S.A. 2000, c. F-24.
>
> 61. At the time of the AIGT Transfers, AIGT was in insolvent circumstances or in the alternative was unable to pay its debts in full or in the alternative knew that it was on the eve of insolvency.
>
> 62. The effect of the AIGT Transfers was to prefer [Casual Food Concepts Inc., Lux Real Investments and Trebilcock] … over the Plaintiffs and all other creditors of [All in Good Taste Inc.] … .

[49] In 2007 Casual Food Concepts Inc. sold its assets and distributed the sale proceeds and other funds.

[50] These transfers were fraudulent and injured the plaintiffs. The wrongdoers were Casual Food Concepts Inc., Bauland Inc., Calgary Ventures Inc., Lux Real Investments Ltd. and others who the plaintiffs cannot identify.

[51] Juergen and Sebastian Hanne breached their fiduciary duties as directors of Casual Food Concepts Inc. and All in Good Taste Inc. and have damaged the plaintiffs. Parts of the second amended statement of claim read as follows:

> 86. In breach of their fiduciary duties as directors of [All in Good Taste Inc.] … owed to Brodlor and Humphreys as creditors of … [All in Good Taste Inc.], Juergen Hanne or Sebastian Hanne or both of them, embarked on a policy of stripping assets from … [All in Good Taste Inc.] when it was insolvent or on the eve of insolvency, including purporting to grant a general security agreement to Calgary Ventures [Inc.] in May of 2007; the sale of the 105 St. Building on or about July 31, 2007; and sale of the balance of the … [All in Good Taste Inc.] assets including equipment and good will in May of 2008, and distributing the proceeds to some or all of the Defendants.
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> …
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> 89. Trebilcock, being a director of … [All in Good Taste Inc.], acted in association with Juergen Hanne and Sebastian Hanne and knowingly participated with them in the aforesaid breaches of their duties, whereby Trebilcock is personally liable in respect of the aforesaid breaches.

[52] Casual Food Concepts Inc. and All in Good Taste Inc. engaged in oppressive conduct to the detriment of the plaintiffs and caused the value of Brodlor Foods Inc.'s shares in Casual Food Concepts Inc. shares to diminish in value by $800,000.

[53] The plaintiffs claim that "the acts and omissions of the Defendants including, but not limited to, … fraudulent conveyance and fraudulent preferences, breach of fiduciary duties and oppression of shareholders and creditors … [has caused Humphreys and Brodlor to incur damages of $3,255,000 attributable to] loss of reputation, loss of opportunity [and] loss of use of funds".

[54] The plaintiffs claim $300,000 punitive damages against Juergen and Sebastian Hanne: "[T]he actions of Juergen Hanne and Sebastian Hanne have been deliberately calculated to cause harm to the … Plaintiffs. Further, the … actions of Juergen Hanne and Sebastian Hanne have been egregious and high handed and are worthy of sanction of punitive costs".

B. Statements of Defence

[55] On February 6, 2007 and October 14, 2008 Sebastian Hanne, Juergen Hanne, Ralph Walker, Barry Trebilcock, Casual Food Concepts Inc., All in Good Taste Inc. and Contura

Consulting Ltd. filed a statement of defence and a second amended statement of defence respectively.

[56] On September 15, 2009 Calgary Ventures Inc., Bauland Inc. and Lux Real Investments Ltd. filed a statement of defence, as did Troyvest Estates Ltd.

[57] These defendants deny most of the facts that the plaintiffs allege and that they had any obligation to the plaintiffs or have breached any obligation they might have had to the plaintiffs.

C. Status of the Action

[58] Most of the parties filed affidavits of records before May 10, 2007. Some filed supplementary affidavits of records on October 14, 2008 and in January 2010.

[59] On October 22, 2008 the plaintiffs cross-examined Juergen and Sebastian Hanne on their affidavits of records.

[60] On January 26 and 27, 2010 the plaintiffs questioned employees of Bauland Inc.

[61] On April 6 and from May 11 to 18, 2010 the plaintiffs questioned Messrs. Trebilcock, Crombie and Walker.

[62] On August 2, 2011 the Court of Queen's Bench granted Brodlor Foods Inc. judgment against Casual Food Concepts Inc. for $52,098 and All in Good Taste Inc. for $242,090; it also granted Mr. Humphreys judgment against All in Good Taste Inc. for $218,204.

[63] The plaintiffs questioned Juergen Hanne from December 12 to 14, 2011 and on August 15 and 16, 2012.

[64] This action has been under case management since 2011.

[65] In a March 19, 2015 case management order the chambers judge ordered the parties to complete their questioning before September 30, 2015. Notwithstanding that Mr. Trebilcock's counsel wrote the plaintiffs' counsel four times before September 4, 2015 requesting that Mr. Humphreys submit to questioning and Brodlor Foods Inc. make its corporate representative available for questioning before September 30, 2015, the plaintiffs failed to do so.

[66] The plaintiffs questioned Sebastian Hanne on May 8, 2015 and Juergen Hanne on the answers to his undertakings on July 9, 2015.

[67] On March 30, 2016 Mr. Belzil filed a notice of change of representatives and subsequently served it on the parties. His firm now acts for the plaintiffs.

[68] On June 9, 2016 the plaintiffs filed an application to vary the timelines incorporated in the March 19, 2015 case management order and a supporting affidavit of Mr. Humphreys. A part of this affidavit recounts the problems the plaintiffs had in retaining counsel after October 12, 2012:

> 3. Since October 2012, when the plaintiffs' prior counsel, Aran Veylan, Q.C., was appointed to the Provincial Court, the plaintiffs have struggled to obtain continuous representation of counsel. The file was with the former Knisely Nage Anderson firm. Derek Anderson was responsible for the file at first, although he is primarily a criminal litigator. Eventually Sean Moring held the file and conducted the matter at the time of the case management order of March 19, 2015. Mr. Moring was attentive to the file, but unfortunately left the firm to seek alternative employment midway through 2015.
>
> 4. After Mr. Moring's departure the file was reassigned again in the firm. The plaintiffs grew dissatisfied with the lack of continuity and sought out new counsel towards the end of 2015. Rackel Belzil LLP was retained January 1, 2016 and requests were made to the former Knisely firm, now Barr Picard LLP to transfer the files. Delay was encountered with respect to obtaining the files and … the complete file was not obtained from the Barr Picard firm until April 2016.

[69] A week later, on June 16, 2016, Mr. Trebilcock applied under r. 4.31 of the *Alberta Rules of Court* for an order dismissing the plaintiffs' action. He filed his own affidavit. The important paragraphs are set out below:

> 5. I … believe that [the] last step taken against me as by the Plaintiffs was on April 6, 2010 when I was questioned … .
>
> …
>
> 7. The subject matter of the within lawsuit deals with various matters that happened as far back as 2003. … [T]he delay from filing the Statement of Claim until today's date … [is] over nine … and one-half … years … …. [T]he delay from the last step taken against me until present [is] … over six … years … . … I am seriously prejudiced by the fact that this matter has not proceeded to trial, and is currently not set down for trial. I am in the agricultural research business and have been in this business for over 20 years. The within lawsuit impacts my ability to apply for government grants for research and development related to agriculture, and it is affecting my employment opportunities, as its disclosure impacts my financial stability.
>
> 8. … I have a valid defence to the Plaintiffs' claims as against me as I was not involved in the alleged breaches or termination of the consultation agreement, the executive management agreement or the executive compensation agreement. At no

> time do I believe that I owed a duty of care or fiduciary duty towards the Plaintiffs. I have not been involved in any fraudulent conveyance or fraudulent preferences. However, due to the length of time from the date the Statement of Claim was filed until today's date, it will make it more difficult for me to address my various defences at the trial of this matter, which … will probably not happen until 2018.

[70] The next day, June 17, 2016, Sebastian Hanne, Juergen Hanne, Calgary Ventures Inc., Contura Consulting Ltd., Bauland Inc., Lux Real Investments Ltd. and Troyvest Estates Ltd. made the same r. 4.31 application. They filed Sebastian Hanne's affidavit. The most important segments are reproduced below:

> 5. The Plaintiffs' allegations concern matters that are alleged to have transpired 13 years ago, in 2003 … . Yet the Plaintiffs have yet to even complete their discoveries. More recently, for fully a year, from May 8, 2015, until the date of the within application, the Plaintiffs have completely ignored the Court's Order. And this most recent abandonment comes on the heels of the Plaintiffs' prior 3-year hiatus from their litigation, between December 12, 2011 and September 3, 2014, during which, again, as with this most recent abandonment, the Plaintiffs just chose without warning to go silent, eventually returning, again as with this most recent abandonment, on the basis that their desertion of their claims was attributable to something their prior counsel did, or did not do. I note, from my reading of Humphreys' Affidavit, … [that] they now wish to revisit my discovery that took them in excess of 8 years to complete.
>
> 6. In the result, I, as well as the other Defendants, have had for the past decade an apparently indeterminable $3.5 Million claim hanging over each of us. Aside from the deleterious effect it continues to have on my character and credit worthiness, which at 34 years of age and pursuing a business career I continue to experience as a substantial burden … . [D]uring this inordinate passage of time potential witnesses in defence of these allegations have died, or moved on to unknown whereabouts, or have aged, all with the result that the Applicant Defendants have been significantly prejudiced.
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> …
>
> 10. The Defendant, Juergen Hanne, and potential witness, David Crombie, are both advanced in age. A decade of delay has significantly prejudiced Hanne's ability to defend, and Crombie's ability to address, allegations respecting 13-year-old events.
>
> 11. … [W]ith the passage of such an inordinate amount of time, physical evidence has been lost … further significantly prejudicing the Defendants' ability to defend this indeterminable action. The Defendant …, [All in Good Taste Inc.], over the duration of the litigation moved office locations, misplacing in 2008 documentary

> evidence of Humphreys' misappropriation of funds. In 2009 and 2010, server migration data losses, as well as a virus, caused the loss of archived … [All in Good Taste Inc.] financial data. Most of the corporate Defendants' original banking records have past their 10-year archival period, as are likely those of the Plaintiffs, and are now, or soon will be, inaccessible to the corporate Defendants.
>
> 12. The Defendants have not yet even had the opportunity, after 10 years, to discover the Plaintiffs' case, and at the expense of the passage of another full year, lost what was their opportunity to do so when the Plaintiffs chose in June of last year to ignore the Court's order in favour of again abandoning their lawsuit.

[71] The applicants argued that the plaintiffs' actions should be dismissed because the inordinate and inexcusable delay in advancing their claims impaired their ability to defend themselves and caused them nonlitigation prejudice.

[72] Both of the affidavits of Messrs. Trebilcock and Hanne attached as an exhibit the procedure card for the plaintiffs' action.

[73] This exhibit gives one a clear picture of what has and has not been done in the prosecution and defence of this action.

[74] The motions court dismissed the applications.[6]

[75] It summarized its conclusion this way:[7]

> For reasons which follow, I am not persuaded that the allegations of actual prejudice satisfy the test of significant prejudice under Rule 4.31(1).
>
> Nor am I persuaded that in all of the circumstances of this case, the delay in the action as a whole has been inordinate and inexcusable, such that under Rule 4.31(2) delay would be presumed to have resulted in significant prejudice to the defendants.

[76] After recording its primary conclusions, the motions court addressed head on some of the moving parties' litigation prejudice complaints and dismissed them.

[77] It noted that the death of potential witnesses occurred shortly after the plaintiffs commenced their action and that any prejudice the defendants may suffer was not attributable to the pace at which the plaintiffs pressed their action ahead.[8]

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[6] 2016 ABQB 579, ¶ 49.

[7] Id. ¶¶ 13 & 14.

[78] The fact that the whereabouts of some executive assistants or corporate secretaries were unknown[9] did not sway the motions court. The defendants had failed to explain precisely the evidence these potential witnesses may provide.

[79] Nor did the court find determinative the fact that Juergen Hanne and another potential defence witness were now old men.[10] It noted that there was no evidence that they were unable to recall key events or had other impairments that old age may present.

[80] The court dismissed the argument that important documents were now missing:[11]

> The action was commenced by Statement of Claim issued December 14, 2006 and defended on February 6, 2007. Affidavits of records, under the *Rules of Court* as they then were, were filed in May 2007. Lengthy and detailed affidavits were filed by the parties in relation to applications for security for costs … [and] summary judgment against the plaintiffs.
>
> The parties then having identified … [or] produced relevant and material records [or both], and having geared up for substantive applications as noted, it is hard to accept without more Hanne's allegations now that records have been lost or will be inaccessible. Or that records allegedly lost in 2008 or 2009/10 are relevant to a delay application brought in 2016.
>
> …
>
> In this case, there is little reason to doubt that the parties and their then-counsel complied with their obligations under the former *Rules* by preparing, swearing and then filing affidavits of records as already noted.

[81] The motions court did not tackle the impact witnesses' degraded memories may have on trial fairness.

[82] Nor did it address the nonlitigation prejudice detailed in the supporting affidavits.

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[8] Id. ¶ 17.

[9] Id. ¶ 18.

[10] Id. ¶ 19.

[11] Id. ¶¶ 21, 22 & 24.

V. Applicable Rules of Court

A. Delay Rules

[83] The current *Alberta Rules of Court*[12] came into force on November 1, 2010.

[84] Rule 4.31 of the new *Alberta Rules of Court*[13] is as follows:

> 4.31(1) If delay occurs in an action, on application the Court may
>
> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.[14]

[85] Delay was also dealt with in the *Alberta Rules of Court*[15] in force before November 1, 2010:

> Part 24
>
> Delay in Prosecution of Action
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> …
>
> 243(2) For the purposes of this Part, prejudice to adverse parties in an action caused by delay can be of any nature and is not restricted to procedural or evidentiary difficulties.
>
> …

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[12] Alta. Reg. 124/2010.

[13] Rule 4.31(2) came into force July 25, 2013. *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 140/2013, s. 3.

[14] This rule is based on principles expressed in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 547 & 560 (C.A.) to the effect that inordinate and inexcusable delay in the prosecution of an action justifies the inference that the moving party has endured serious prejudice.

[15] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 234/94.

> 244(1) Where there has been a delay in an action, the Court on application by a party to the action may, subject to any terms prescribed by the Court,
>
> (a) dismiss the action in whole or in part for want of prosecution, or
>
> (b) give directions for the expeditious determination of the action.
>
> (2) If the Court denies the relief sought under subrule (1)(a), the Court
>
> (a) shall prescribe terms or give directions that, in the opinion of the Court, are sufficient to substantially prevent or remedy, as the case may be, any non-trivial prejudice caused to any adverse party by reason of the delay, and
>
> (b) may prescribe terms or give directions that, in the opinion of the Court, will prevent further delay in the action.
>
> (3) If in the opinion of the Court it is unable to devise terms or directions that are sufficient to satisfy subrule 2(a), the Court shall find that there has been serious prejudice to the party moving to dismiss the action.
>
> (4) Where, in determining an application under this Rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay shall be prima facie evidence of serious prejudice to the party that brought the application.
>
> 244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

[86] The *Alberta Rules of Court Amendment Regulation*,[16] in force September 1, 1994, introduced Part 24, as it appeared until October 30, 2010.

[87] Of interest are the changes to Part 24 made by the *Alberta Rules of Court Amendment Regulation (No.3)*[17] that were supposed to come into force on November 1, 1993 but never did. Some of the important provisions read as follows:

> Part 24
>
> Delay in Prosecution of Action

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[16] Alta. Reg. 234/94.

[17] Alta. Reg. 160/93.

242.1 For the purposes of this Part the following applies:

(a) unless there is evidence to the contrary, the expiry in an action … of the period of time referred to in Rule 243(1) is evidence of prejudice to each adverse party in the action …;

(b) prejudice to adverse parties in an action … caused by delay is not restricted to procedural or evidentiary difficulties and includes the following:

(i) substantive prejudice;

(ii) fading memory of witnesses;

(iii) unavailability of records;

(iv) increased difficulty in enforcing an ultimate judgment;

(v) increased difficulty in securing and enforcing contribution or indemnity from others;

(vi) interest, expenses or income lost.

243(1) Other than making an application under Rule 244, no party shall in an action …, except with the leave of the Court, take a new step before judgment where more than one year has expired from the time that the party first became entitled to take that step.

(2) The Court shall not grant leave under this Rule where the Court is of the opinion that due to the circumstances it is unable to prescribe terms or give directions to which the leave is subject that will be sufficient to substantially prevent or remedy any prejudice caused to any adverse party by reason of the expiry of the period of time referred to in subrule (1).

…

244(1) Where there has been a delay in an action …, the Court may, subject to any terms prescribed by the Court,

(a) dismiss the action … for want of prosecution, or

(b) give directions for the speedy determination of the action … .

(2) Subject to Rule 244.2, where 5 or more years have expired from the time that the last step was taken in an action … that materially advances the action …, the

> Court shall, on the motion of a party to the action …, dismiss that portion or part of the action … that relates to the party bringing the motion.

[88] Rules 243 and 244 of *The Supreme Court Rules*,[18] in force as of January 1, 1969, read as follows:

> 243 Except an application under Rule 244, no new step in an action prior to judgment shall be taken after the expiration of one year from the time when the party desiring to take the step first becomes entitled to do so, except with leave of the court which may impose terms.
>
> 244 Where there has been delay the court may dismiss an action for want of prosecution or give directions for the speedy determination of the action and may impose terms.

B. Foundational and Other Rules

[89] Other rules also merit consideration. They are set out below:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) … [T]hese rules are intended to be used
>
> …
>
> (d) to oblige the parties to communicate honestly, openly and in a timely way … .
>
> 4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way.
>
> 4.2 The responsibility of the parties to manage their dispute and to plan its resolution requires the parties
>
> (a) to act in a manner that furthers the purpose and intention of these rules described in rule 1.2

[18] Alta. Reg. 390/68.

VI. Analysis

A. Alberta Does Not Condone Litigation Delay

1. Litigation Delay Is a Longstanding and Corrosive Problem

[90] Litigation delay harms those who are directly and indirectly involved in an action tainted by inaction, the civil justice system as a whole and the greater community.[19] Litigation is a form of stress that has the potential to make those directly and indirectly affected unhappy – litigation is expensive, introduces uncertainty and may undermine a person's ability to earn a livelihood and to plan ahead – and may diminish the productivity of the persons affected by the unresolved dispute.[20] People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate[21] and not allow stale actions to survive.[22] When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered.[23] Litigation delay is a corrosive force in a free and democratic state committed to the rule of law.

[91] Common law courts have always had available the tools to stop litigation delay. In the past many chose not to use them.[24]

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[19] *The Queen v. Jordan*, 2016 SCC 27, ¶ 19; [2016] 1 S.C.R. 631, 649 ("An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole").

[20] *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19, ¶ 68 per Wakeling, J.A. ("[litigation causes] stress, inconvenience and distraction & *McPhilemy v. Times Newspapers Ltd. (No.2)*, [2001] EWCA Civ 933, ¶ 20; [2001] 4 All E.R. 861, 872 ("[litigation causes] inconvenience, anxiety and distress").

[21] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 6(1)(1953) ("In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law") & *Brisbane South Regional Health Authority v. Taylor*, [1996] HCA 25; 186 C.L.R. 541, 552 per McHugh J ("the right of the citizen to a speedy hearing of an action that had been commenced was acknowledged by Magna Carta itself. Thus for many centuries the law has recognized the need to commence actions promptly and to prosecute them promptly once commenced").

[22] *The Queen v. Jordan*, 2016 SCC 27, ¶ 2; [2016] 1 S.C.R. 631, 644 ("the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously").

[23] Id. ("the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs").

[24] There are many examples of courts, in effect, condoning litigation procrastination. E.g., *Birkett v. James*, [1978] A.C. 297, 322, 325, 334 & 336 (H.L.) (courts regularly declined to dismiss an action for want of prosecution if the limitation period had not expired and the nonmoving party could file another action) & Court of Appeal of Alberta Practice Note (1978) ("While the Court has in the past shown a reluctance to deprive a litigant of a cause of action by reason of delay, it must be considered that the over-all harm to the practice generally, and to other parties, must not be lost sight of. The Court feels obligated to notify the profession that after the 1st of January, 1979 ... the matter will be looked at more strictly than has been the developing practice").

[92] Lord Denning, M.R., in a famous passage in *Allen v. Sir Alfred McAlpine & Sons Ltd.*,[25] documented the law's history of tolerating delay: "All though the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare [in Hamlet] ranks it among the whips and scorns of time … . Dickens [in BleakHouse] tells how it exhausts finances, patience, courage, hope".

[93] Delay is still a problem.[26]

[94] But it should not be.

[95] A new era[27] was introduced effective November 1, 2010, the date the current *Alberta Rules of Court*[28] came into force. Part 1: Foundational Rules of the *Alberta Rules of Court* directed courts[29] and litigants "to facilitate the quickest means of resolving the claim at the least expense".[30]

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[25] [1968] 1 All. E.R. 543, 546-47 (C.A.). This judgment set out the modern practice of dismissing actions utilizing the superior court's inherent jurisdiction to confront abuses of process. *Birkett v. James*, [1978] A.C. 297, 318 (H.L. 1977).

[26] See *Kuziw v. Kucheran Estate*, 2000 ABCA 226, ¶ 21; 266 A.R. 284, 290 ("systemic delay in the delivery of civil justice has been a recurring problem over the centuries and remains a constant focal point for criticism today"); *Lethbridge Motors Co. v. American Motors (Canada) Ltd.*, 1987 ABCA 150, ¶16; 40 D.L.R. 4th 544, 548 (Alta. C.A. 1987) ("delay [in civil litigation] has been a continuing problem in Alberta); *Lachman Holdings & Management Co. v. Speakman*, 1983 ABCA 223, ¶2; 48 A.R. 22, 23 ("This is merely another case in which the court is faced with the question of how long ... a party is bound to have litigation or the threat of litigation hanging over him") & Gertner, "Dismissal for Want of Prosecution: A Decade After Allen v. Sir Alfred McAlpine & Sons Ltd." in Studies in Civil Procedure 33 (E. Gertner ed. 1979) ("One of the oldest but still most common complaints about the law is the delay which, to the layman, must seem endemic to the litigation process").

[27] In 1997 Lord Woolf, in *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.*, [1998] 2 All E.R. 181, 191 (C.A. 1997), referred to this new era as a "change in culture". In 2014 Justice Karakatsanis, in *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 2; [2014] 1 S.C.R. 87, 92, repeated this message: "[T]here is a recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system".

[28] Alta. Reg. 124/2010.

[29] See *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 163; 91 C.P.C. 7th 73, 135-36 per Wakeling, J.A. (dissenting in the disposition) ("If the courts do not insist that plaintiffs abide by these lenient timelines and dismiss dormant actions they will be part of the litigation landscape"); *Mitchell v. News Group Newspapers Ltd.*, [2013] EWCA 1537, ¶ 41 ("If departures [from the rules] are tolerated then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue") & *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp.*, [1981] A.C. 909, 933 (C.A. 1979) ("[Eleven] years ago ... we started to strike out actions at law for want of prosecution. That development has had some beneficial results. It has taught practitioners that they must observe the time schedule provided by the Rules of Court").

[30] Id. r. 1.2(2)(b) & (3)(a). See *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 111; 92 C.P.C. 7th 259, 307 (chambers)("It is in the public interest for disputes to come to an end") & *Brisbane South Regional Authority v.*

[96] Claimants who fail to proceed with appropriate expedition may be subject to harsh consequences. They may lose their right to prosecute their actions.

2. There Is No Theoretical Foundation To Justify Litigation Delay

[97] Courts condone litigation delays because they underestimate the harm delay causes the community and fail to take this into account when cataloguing the benefits associated with a person having the right to seek judicial validation of a position one has taken in a dispute with another.[31]

[98] Just because a prospective plaintiff may have a constitutional right to commence an action does not mean that the court can never withdraw the welcome mat. It can. One of the implicit conditions attached to the right to invoke the litigation process is that the plaintiff not abuse the judicial process and infringe the rights of others.[32]

[99] The court has the jurisdiction to ensure that litigants do not abuse their rights and unjustifiably adversely affect the interests of their adversaries and others who are directly or indirectly affected by unresolved litigation.[33]

[100] The right of access to the courts is not absolute in nature.

[101] A litigant's right to have a court resolve a dispute may have a temporal limitation.[34] An action that is not prosecuted with reasonable diligence may lose its status as the means by which a

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Taylor, [1996] HCA 25; 186 C.L.R. 541, 553 ("the public interest requires that disputes be settled as quickly as possible").

[31] Lord Diplock, in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp.*, [1981] A.C. 909, 977 (H.L.), expressly explains the rationale for this basic principle:

> Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of dispute between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.

[32] *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp.*, [1981] A.C. 909, 977 (H.L.).

[33] Id.

[34] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶¶ 105 & 106; 91 C.P.C. 7th 73, 117 per Wakeling, J.A. (dissenting in the disposition).

constitutional right is validated and become an unwarranted burden or irritant that a defendant does not have to endure.[35]

3. Strategies To Combat Litigation Delay

[102] Common law jurisdictions have adopted different strategies to combat litigation delay.

[103] Some have procedural rules that expressly grant a court jurisdiction to dismiss an action if the nonmoving party has failed to reach stipulated milestones within designated time lines established by the rules of court or court order – bright-line rules.[36] Rules of this nature provide decision makers with clear directions and minimize their exercise of discretion.

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[35] Id.

[36] Many jurisdictions have adopted bright-line rules. E.g., *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 24.01(1)(c) (an action may be dismissed if the plaintiff has failed "to set the action down for trial within six months after the close of pleadings") & 48.14(1) ("Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances ... : The action has not been set down for trial or terminated by any means by the later of the fifth anniversary of the commencement of the action and January 1, 2017"); *Rules of Court* N.B. Reg. 82-73, RR. 26.01(c) ("A defendant who is not in default under these rules or under an order of the court, may apply to have the action dismissed for delay where the plaintiff has failed ... (c) to set the action down for trial within six months after the close of pleadings") & 26.05(8) ("On the status hearing, the court may ... (b.1) dismiss the action"); *Rules of Civil Procedure*, R. 24.01(c) (P.E.I.) ("A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed .... (c) to set the action down for trial within six months after the close of pleadings") & 48.11(8)(b) ("At the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and ... (b) if the presiding judge is not satisfied that the action should proceed, the judge may dismiss the action for delay"); *Civil Procedure Rules*, RR. 4.22(1) & 82.18 (N.S.) (an action may be dismissed for delay if no trial date is set within five years after the date the action is commenced and may be dismissed for delay if the plaintiff has not brought the action to trial "in a reasonable time"); *Rules of the Supreme Court 1986*, S.N.L. 1986, c. 42, Sch. D., r. 40.11 ("Where a plaintiff does not apply to set a proceeding down for trial, the defendant may apply to set it down for trial or apply to the Court to dismiss the proceeding for want of prosecution, and the Court may order the proceeding to be dismissed or make an order that is just"); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 327(1)(b) (a court must dismiss an action for want of prosecution "where for five or more years no step has been taken that materially advances the action"); *Uniform Civil Procedure Rules 1999*, r. 280(1) (Qld.) ("If – (a) the plaintiff ... is required to take a step required by these rules or comply with an order of the court within a stated time; and (b) the plaintiff ... does not do what is required within the time stated for doing the act; a defendant ... may apply to the court for an order dismissing the proceeding for want of prosecution"); *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, R. 24.01 (Vict.) ("The Court may order that a proceeding be dismissed for want of prosecution if the plaintiff ... (b) does not within a reasonable time after the commencement of the proceeding – (i) file and serve notice of trial; or (ii) apply to have a date fixed for the trial of the proceeding"); *Supreme Court Rules 2000*, S.R. 2000, No. 8, rr. 371 & 372 (Tasmania) (the Court may dismiss an action if the plaintiff does not deliver a statement of claim in a timely manner or discharge discovery obligations); *Rules of the Supreme Court 1971*, Order 4A, r. 28 (W. Austl.) ("A case that is on the Inactive Cases List [inactive for twelve months] for 6 continuous months is taken to have been dismissed for want of prosecution") & *Court Procedures Rules 2006*, S.L. 2006 - 29, r. 1110(1) (A.C.T.) ("A defendant ... may apply to the court for an order dismissing the proceeding for want of prosecution if the plaintiff – (a)

[104] Many jurisdictions have created more abstract rules that allow a court to dismiss an action for undue delay.[37] These rules provide the adjudicator with little direction and a broad discretion. They effectively compel the court to balance the moving party's interest in expeditious resolution of an action against the nonmoving party's interest in having a judicial determination of its dispute with the moving party. Rule 4.31(1) of the *Alberta Rules of Court* is an example of this genre.

B. The Main Features of Rule 4.31 of the *Alberta Rules of Court*

1. The Ordinary Meaning of "Delay" and "Significant Prejudice"

[105] Rule 4.31(1) authorizes a court to dismiss an action if the nonmoving party has prosecuted it at such a slow pace that delay has occurred and the delay has resulted in significant prejudice to the moving party. To make r. 4.31(1) more effective, r. 4.31(2) introduces a rebuttable legal presumption: proof of inordinate and inexcusable delay is proof of significant prejudice.

[106] In order to apply this rule one must know what the markers of "delay" and "significant prejudice" are.

[107] Neither "delay" nor "significant prejudice" are defined terms in the *Alberta Rules of Court*.[38]

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is required to take a step ... required by these rules, or to comply with an order of the court, not later than the end of a particular time; and (b) does not do what is required before the end of that time").

[37] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-7(7) ("If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed"); *The Queen's Bench Rules*, r. 4-44 (Sask.) (the Court may dismiss a claim if "satisfied that the delay is inordinate and inexcusable and that it is not in the interests of justice that the claim proceed"); *Queen's Bench Rules*, Man. Reg. 553/88, r. 24.01(1) ("The Court may on motion dismiss an action for delay"); *Civil Procedure Rules*, R. 82.18 (N.S.) ("A judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time"); *Rules of Court*, Y.O.I.C. 2009/65, R. 2(7) ("If upon application by a party it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed"); *Federal Court Rules*, S.O.R./98-106, R. 167 ("The Court may, at any time, on the motion of a party who is not in default of any requirement of these Rules, dismiss a proceeding ... on the ground that there has been undue delay by a plaintiff, applicant or appellant in prosecuting the proceeding); *The Civil Procedure Rules*, 1998, S.I. 1998/3132, r. 3.1(1) (the court retains its inherent jurisdiction to dismiss for want of prosecution or abuse of process); *Uniform Civil Procedure Rules 2005*, r. 12.7(1) (N.S.W.) ("If a plaintiff does not prosecute the proceeding with due despatch, the court may order that the proceedings be dismissed or make such other order as the court thinks fit"); *Supreme Court Civil Rules 2006*, r. 12(2) (S. Austl.) (the Court may, on application or on its own motion, dismiss an action for unnecessary delay); *High Court Rules*, L.I. 2016/225, r. 15.2 (N.Z.) ("Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if – (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment") & *Federal Rules of Civil Procedure*, R. 41(b) (U.S.A.) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it").

[38] Nor are they defined in predecessor versions of the *Alberta Rules of Court*.

[108] The Court must give these terms meaning.

[109] To do so one must identify the potential permissible meanings[39] of these terms, taking into account their ordinary meanings, all the rules in the *Alberta Rules of Court*, the purpose of the text and the fact that the *Alberta Rules of Court* function in a litigation environment.[40] If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text.[41]

[110] Surprisingly, this court did not undertake this task when it first considered delay under *The Supreme Court Rules* that came into force on January 1, 1969.[42]

[111] We will undertake this analysis.

[112] What is the ordinary meaning of "delay" and "significant prejudice" in the context of a part of civil rules of court dealing with the consequences of dilatory prosecution of an action?

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[39] A permissible meaning is one that a reasonable reader could have given the text when it was produced. *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 81 per Wakeling, J.A. An implausible meaning is not a permissible meaning. *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4 ("A contrary meaning would give the text an implausible meaning. A court may never do this"); *Valard Construction Ltd. v. Bird Construction Co*., 2016 ABCA 249, ¶ 184; 57 C.L.R. 4th 171, 236 per Wakeling, J.A. in dissent ("The text of the bond does not support the interpretation the trial judge gave it") ; 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") & 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").

[40] *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26; [2012] 1 S.C.R. 149, 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *Thomson v. Canada*, [1992] 1 S.C.R. 385, 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them"); R. Sullivan, Sullivan on the Construction of Statutes 28 (6th ed. 2014) ("It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012) ("Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense").

[41] *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919) ("where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention") *& Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14 (1904) (the Court refused to interpret "car" in railway safety legislation narrowly – "any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars" – and exclude locomotives in order to promote the safety of railway employees responsible for coupling and uncoupling activities).

[42] Alta. Reg. 390/68, RR. 243 & 244. Instead, the Court, in *Marshall v. Fire Insurance Co. of Canada*, 71 W.W.R. 647, 652-53 (1969), *Tiesmaki v. Wilson*, 23 D.L.R. 3d 179, 182 (1971) and *Lachman Holdings & Management Co. v. Speakman*, 1983 ABCA 223, ¶ 10; 48 A.R. 22, 25 (1983), adopted the English dismissal-for-delay test set out in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 561 (C.A.) without any consideration of the normal principles of statutory interpretation. The English Court of Appeal formulated a test to govern a superior court's exercise of its inherent jurisdiction to respond to abuses of process.

[113] Reference to authoritative dictionaries is helpful.[43] These sources record a range of potential meanings[44] from which the court must select the most suitable for the context.

[114] We will first consider "delay".

[115] "Delay is a relative concept".[45] It is the product of a comparison between the point on the litigation spectrum that the nonmoving party has advanced an action as of a certain time and that point a reasonable litigant acting in a reasonably diligent manner[46] and taking into account the nature of the action and stipulated timelines in the rules of court would have reached in the same time frame.[47] One measures progress in a specific action and compares it against the progress made by the comparator – the reasonable litigant[48] advancing the same claim under comparable conditions.

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[43] *Alberta Government Telephones v. Arrow Excavators & Trenchers (1972) Ltd.*, 1989 ABCA 214, ¶ 8; 62 D.L.R. 4th 188, 191 & *Donnelly v. Brick Warehouse Corp.*, 2013 ABQB 621, ¶¶ 38 & 41; 573 A.R. 29, 38 & 39.

[44] R. Sullivan, Sullivan on the Construction of Contracts 32 (6th ed. 2014) ("[dictionaries] reveal the full range of senses a word may have or the different ways it may be used").

[45] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 135; 91 C.P.C. 7th 73, 128 per Wakeling, J.A. (dissenting in the disposition) ("if a pediatrician opines that an infant's fine motor skills are developmentally delayed, he or she comes to that conclusion because the infant patient does not display the fine motor skills of most infants in the same cohort age. Most infants of the same age constitute the comparator group"). According to Webster's Third New International Dictionary of the English Language Unabridged (2002) "delay", as a noun, means "the act or practice of delaying: Procrastination"; as a verb delay means "to cause to be slower or to occur more slowly *than normal*" (emphasis added). The Oxford English Dictionary (2d ed. 1989) gives a comparable meaning.

[46] *The Queen v. Jordan*, 2016 SCC 27, ¶¶ 183-84; [2016] 1 S.C.R. 631, 703 per Cromwell, J. ("The reasonable inherent time requirements are concerned with identifying a reasonable period to get a case similar in nature to the one before the court ready for trial and to complete the trial. ...[T]he courts must determine how long the case should reasonably take (or have taken)"); *Depar Management Ltd. v. Piute Petroleums Ltd.*, 1992 CarswellAlta 796, ¶ 11 (Q.B.) ("While the litigation activities might theoretically continue daily until the matter is brought on to trial, it is expected that, having regard to reasonable schedules, there may be some reasonable delay in the flow of litigation") *Wallersteiner v. Moir*, [1974] 3 All E.R. 217, 243 (C.A.) ([inordinate means] much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case"); & *Spitfire Nominees Pty. Ltd. v. Hall & Thompson*, [2001] VSCA 245, ¶ 38 (Vict. C.A.) (the Court recognized the need to establish a comparator).

[47] *Haymour v. Owners Condominium Plan No. 802 2845*, 2016 ABQB 393, ¶ 36 ("Delay is inordinate when it exceeds what is reasonable having regard to the nature of the issues in the action and the circumstances of the case"); *Franchuk v. Schick*, 2013 ABQB 532, ¶ 22 ("Inordinate delay is delay that is in excess of what is reasonable having regard to the nature of the issues in the action and the circumstances of the case") & *Deis v. Koch Oil Ltd.*, 2001 ABQB 997, ¶ 11; 304 A.R. 371, 375 ("Inordinate delay is delay in excess of what is reasonable, having regard to the nature of the issues in the action and the circumstances of the case").

[48] See *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 876 & 882 (Sup. Ct. App. Div. 1994) (in order to identify delay one must ascertain how much litigation progress one can reasonably or fairly demand).

[116] Not all actions will advance in lockstep. A complex case[49], as opposed to a standard one, consumes more time at each stage and may have more stages. And some standard cases are likely to move along the litigation spectrum at a slower rate than others. A claim alleging breach of a detailed and complicated noncompetition promise by a defendant covering his tracks and vigorously resisting progress [50]will take more time to prosecute than a simple debt action.[51] That is also the case if one is measuring the duration of a catastrophic personal injury action as opposed to a noncatastrophic personal injury suit.[52]

[117] How large must the differential be between the two points before it constitutes delay?[53]

[118] In 1968 Lord Justice Salmon, in the context of discussing a superior court's inherent jurisdiction to confront abuses of its process[54] in *Allen v. Sir Alfred McAlpine & Sons Ltd.*,[55] opined that the delay must be "inordinate".[56]

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[49] Rule 4.3(1) of the *Alberta Rules of Court* categorizes actions as either standard or complex cases.

[50] *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356, ¶ 44; 399 A.R. 166, 178 ("the Defendants have been obstreperous. Court imposed deadlines have not been met or have been met with reluctance. This situation has proved frustrating for the plaintiff as well as for the Court").

[51] See *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356, ¶ 44; 399 A.R. 166, 178-82 for a record of the interlocutory applications in a "large corporate commercial and intellectual property lawsuit".

[52] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 132; 91 C.P.C. 7th 73, 127-28 per Wakeling, J.A. (dissenting in the disposition).

[53] See *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 143; 91 C.P.C. 7th 73, 129 per Wakeling, J.A. (dissenting in the disposition) ("Generally speaking, the size of the adjustment or margin of toleration for dilatoriness must be a function of the type of case. The margin will be smaller for a standard case than a complex case").

[54] *The Queen v. Caron*, 2011 SCC 5, ¶ 24; [2011] 1 S.C.R. 78, 93 ("The inherent jurisdiction of the provincial superior courts, is broadly defined as 'a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so' "); *The Queen v. Cunningham*, 2010 SCC 10, ¶ 18; [2010] 1 S.C.R. 331, 341-42 ("Superior courts possess inherent jurisdiction to ensure that they can function as courts of law and fulfill their mandate to administer justice"); *Shreem Holdings Inc. v. Barr Picard*, 2014 ABQB 112, ¶ 28; 585 A.R. 356, 365 ("inherent jurisdiction describes a jurisdictional claim made by a superior court based on a determination that it is needed to discharge its constitutional function as a court and there is no statutory provision which bestows this jurisdiction on the court"); Jacob, "The Inherent Jurisdiction of the Court", 23 Current Leg. Prob. 23, 44-45 (1970) ("Under its inherent jurisdiction, the court has undoubted power to compel observance of its process and obedience of and compliance with its orders. These powers are inherent in the sense that they are necessary attributes to render the judicial function effective in the administration of justice. They are ... exercised ... by summarily terminating the proceedings ... by stay or dismissal or judgment as the case may be"); Mason, "The Inherent Jurisdiction of the Court", 57 Austl. L.J. 449, 454-55 (1983) (the power to stay proceedings for want of prosecution is a power the court has to prevent abuse of process); Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings", 113 L.Q. Rev. 120, 124 (1997) ("After [1885] it became common to describe the power to stay an action to prevent abuse of process as arising by virtue of the inherent jurisdiction"); Lacey, "Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution", 31 Fed. L. Rev. 57, 64 (2003) ("The [inherent] jurisdiction was originally conferred on the superior courts of the common law in England, and was derived not by virtue of any statute or rule of law but by the very nature of such courts as superior courts of record") & Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand",

[119] This court has consistently adopted this standard to measure an unacceptable deviation from the norm for close to fifty years. *Marshall v. Fire Insurance Co. of Canada*,[57] a 1969 decision, was the first. Other panels of this court have followed this course.[58] So have other courts.[59]

[120] Webster's Third New International Dictionary of the English Language Unabridged[60] presents this possible meaning of 'inordinate': "exceeding in amount, quantity, force, intensity or scope the ordinary, reasonable or prescribed limits: extraordinary". In this context inordinate means that the differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable.

[121] Setting the measures of deviation at this mark makes sense. One must remember that the consequence of the moving party meeting the dismissal test is loss of the nonmoving party's right to prosecute an action. It would be unjust to deprive the nonmoving party of the right to prosecute an action for minor or trivial delay.

[122] One must note that "there is no minimum time frame that protects a dawdling plaintiff. An application [for dismissal under r. 4.31] may be brought any time the moving party wishes".[61]

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11 Canterbury L. Rev. 220, 225 (2005) ("The inherent jurisdiction of the High Court is ... comprised of ... parens patriae, punishment for contempt of court, judicial review, bail and jurisdiction over officers of the Court").

[55] [1968] 1 All E.R. 543, 561 (C.A.).

[56] *Depar Management Ltd v. Piute Petroleums Ltd.*, 1992 CarswellAlta 796, ¶ 11 (Q.B.) ("'inordinate delay' is 'unreasonable delay'").

[57] 71 W.W.R. 647, 652-53. (Alta. Sup. Ct. App. Div.).

[58] E.g., *Tiesmaki v. Wilson*, 23 D.L.R. 3d 179, 182 (1971); *Lachman Holdings & Management Co. v. Speakman*, 1983 ABCA 223, ¶ 10; 48 A.R. 22, 25; *Miller v. Duwors*, 1981 ABCA 219, ¶ 1; 63 A.R. 141, 142; *Alberta Government Telephones v. Arrow Excavators & Trenchers (1972) Ltd.*, 1989 ABCA 214, ¶ 7; 62 D.L.R. 4th 188, 190-91; *Demarco Oil & Gas Inc. v. 309506 Alberta Ltd.*, 1993 ABCA 5, ¶ 3; 14 C.P.C. 3d 71, 72; *Volk v. 331323 Alta. Ltd.*, 1998 ABCA 54, ¶ 20; 212 A.R. 64, 69 (1998) & *Kuziw v. Kucheran Estate*, 2000 ABCA 226, ¶ 15; 266 A.R. 284, 288.

[59] E.g., *Penney v. Lush*, 139 Nfld. & P.E.I.R. 113, 117 (Nfld. C.A. 1996); *Michaud v. Robertson*, 2003 NBQB 288, ¶ 20; 49 C.P.C. 5th 353, 360; *Spitfire Nominees Pty. Ltd. v. Hall & Thompson*, [2001] VSCA 245, ¶ 10 (Vict. C.A.); *Hancock Family Memorial Foundation Ltd. v. Fieldhouse*, [2005] WASCA 93, ¶ 99 & *New Zealand Industrial Gases Ltd. v. Andersons Ltd.*, [1970] N.Z.L.R. 58, 61 (C.A. 1969).

[60] 2002. See also 7 The Oxford English Dictionary ("inordinate ... 2. Not kept within orderly limits, immoderate, intemperate, excessive").

[61] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 115; 91 C.P.C. 7th 73, 124 per Wakeling, J.A.(dissenting in the disposition). See also *Depar Management Ltd. v. Piute Petroleums Ltd.*, 1992 CarswellAlta 796, ¶ 13 (Q.B.) ("under Rule 244 [delay] clearly need not be one year in length [as is the case under R. 243] and delay of any period can be found by a court sufficient so as to dismiss for want of prosecution"). This characteristic

[123] At this stage of the analysis it is noteworthy that some allegations made by a nonmoving party may be of such a harmful nature to a moving party that they are qualitatively different from other allegations and merit unique treatment when considering r. 4.31(1).[62] Fraud may be such an allegation. A litigant who alleges fraud may be under an obligation to advance the action with reasonable expedition, that is at a faster pace than that expected of a reasonable litigant pursuing a claim that does not allege fraud or a comparable wrong.[63] This means that any delay may not escape being characterized as inordinate delay if the nonmoving party advances a fraud claim. In other words, a nonmoving party who claims that the moving party has committed fraud or a comparably egregious form of misconduct runs a greater risk that delay attributable to the nonmoving party may be characterized as being inordinate than does a plaintiff in other actions not alleging fraud.[64]

[124] Now we will discuss "prejudice".

[125] Both Webster's Third New International Dictionary of the English Language Unabridged[65] and The Oxford English Dictionary[66] support the conclusion that "prejudice" in r. 4.31(1) of the *Alberta Rules of Court* means injury or damage suffered by the moving party as a result of the nonmoving party's dilatory prosecution of its action. There is no basis to conclude that the injury or damage must impair a person's right to present a full answer and defence. This is a broad concept and easily embraces litigation and nonlitigation prejudice.

[126] Of interest is the fact that from September 1, 1994 until October 30, 2010 there was an express declaration in the *Alberta Rules of Court*[67] that "prejudice to adverse parties in an action caused by delay can be of any nature and is not restricted to procedural or evidentiary difficulties".

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distinguishes r. 4.31(1) from 4.33(2) of the *Alberta Rules of Court*. An applicant must wait until three or more years have passed before applying for relief.

[62] See *Pillar Resource Services Inc. v. Prime West Energy Inc.*, 2017 ABCA 19; 96 C.P.C. 7th 1 (the Court upheld the trial judge's award of full-indemnity costs in favour of the plaintiff against defendants who alleged fraud on the part of the plaintiff).

[63] See *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 874 (Sup. Ct. App. Div. 1994) (a plaintiff who files a claim just before the limitation period is about to expire must proceed with expedition).

[64] Whether the delay is excusable is another independent inquiry.

[65] Webster's Third New International Dictionary of the English Language Unabridged (2002) ("prejudice ... 1a: injury or damage due to some judgment or action of another ... resulting detriment").

[66] 12 The Oxford English Dictionary (1989) ("I.1.a. Injury, detriment or damage, caused to a person by judgment or action, in which his rights are disregarded; resulting injury; hence, injury to a person or thing likely to be the consequence of some action").

[67] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 234/94.

This provision was probably unnecessary as the ordinary meaning of prejudice is broad enough to capture litigation and nonlitigation prejudice.[68]

[127] In effect, the same broad notion of what constitutes prejudice applied both before and after November 1, 2010.

[128] "Significant", in the context of a procedural court rule focusing on delay, means prejudice that is more than minor or trivial. It must be important enough to justify the attachment of a serious consequence adverse to the interests of the nonmoving party. Webster's Third New International Dictionary[69] offers this potential meaning: "deserving to be considered: important, weighty, notable". The Oxford English Dictionary[70] states that significant may mean "[i]mportant, notable".

[129] The use of the adjective "significant" is not a substantial departure from the old test – "serious prejudice" – adopted by Lord Justice Salmon in *Allen v. Sir Alfred McAlpine & Sons Ltd.*[71] and first approved by this court in *Marshall v. Fire Insurance Co. of Canada*.[72]

[130] There is no doubt that the passage of time may impair a moving party's ability to defend its interests at the trial of an action. "Delay may compromise the fairness of a trial".[73] The unavailability of crucial witnesses – death, impairment or disappearance – may diminish the strength of the moving party's case. The passage of time may also have impaired a prospective witness' ability to access stored data.[74] A potential witness' mental health may have declined and place the person in a position where he or she no longer can retrieve material in a memory bank. Or a party may have lost exhibits. This may be attributable to disastrous fires or floods or mistakes made by movers or document managers.

[131] Many Alberta courts have recognized this form of prejudice – litigation prejudice – as a legitimate interest meriting protection.[75] This is not controversial.

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[68] 1W. Stevenson & J. Côté, Civil Procedure Guide 1996, at 1041 ("Rule 243(2) resolves the debate as to whether the prejudice had to be 'procedural', or whether 'substantive' prejudice is to be counted").

[69] Webster's Third New International Dictionary of the English Language Unabridged (2002).

[70] 15 The Oxford English Dictionary (1989).

[71] [1968] 1 All E.R. 543, 561 (C.A.).

[72] 71 W.W.R. 647, 652-53 (Alta. Sup. Ct. App. Div. 1969).

[73] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 104; 91 C.P.C. 7th 73, 116 per Wakeling, J.A. (dissenting in the disposition).

[74] *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 886 (Sup. Ct. App. Div. 1994).

[75] E.g., *Brace v. Williams*, 2016 ABCA 384 (the Court upheld the dismissal of the appellant's action under r. 4.31(1) because the appellants' inordinate and inexcusable delay caused the respondents' significant litigation prejudice); *Renkinn Developments Inc. v. Stevens*, 2016 ABQB 549, ¶ 63 (Master) (the Court dismissed the plaintiffs'

[132] But a moving party may suffer significant prejudice even if his or her ability to defend an action is not seriously infringed by the failure of the nonmoving party to press an action ahead with reasonable diligence. [76]

[133] Sometimes the very existence of litigation may threaten an important and legitimate interest of the moving party. If so, the nonmoving party's failure to advance the claim against the moving party with reasonable diligence may significantly prejudice the moving party.[77]

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ten-year-old action invoking the r. 4.31(2) presumption); *Stabilized Water of Canada Inc. v. Better Business Bureau of Southern Alberta*, 2016 ABQB 543, ¶¶ 32-35 (Master) (the Court dismissed a fourteen-year-old action under r. 4.31 in which the plaintiffs' corporate representatives had not been questioned noting the death and absence of most of the defendants' key witnesses) & *Kuziw v. Kucheran Estate*, 2000 ABCA 226, ¶ 54; 266 A.R. 284, 296 (the Court upheld the chambers judge's decision to dismiss the *Family Relief Act* application for want of prosecution).

[76] *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 177; 92 C.P.C. 7th 259, 325 (chambers) ("Defendants ... are unwilling participants in an adversarial process. They should not have to endure for unreasonable periods of time the stress and inconvenience that outstanding litigation causes"); *Armstrong v. Armstrong*, 2006 ABCA 228, ¶ 40; 30 R.F.L. 6th 279, 287 (chambers) ("Relevant prejudice is not limited to the mechanics of litigation. Some involves the parties' lives"); *Huynh v. Rosman*, 2013 ABQB 218, ¶ 21; 559 A.R. 319, 323 ("The purpose of ... [R.244.1] was to prevent actions from languishing unnecessarily and to prevent parties from facing constant threat, stress and uncertainty from a pending lawsuit for an indeterminate amount of time"); *Angevine v. Blue Range Resources Corp.*, 2007 ABQB 443, ¶ 17; 423 A.R. 37, 43 ("parties should not, for an indeterminate period of time, be forced to face the constant threat, stress and uncertainty of a pending lawsuit"); *Hughes v. Simpson-Sears Ltd.*, 52 D.L.R. 4th 553, 560 (Man. C.A. 1988) ("Prejudice is inherent in delay"); *Biss v. Lambeth Southwark and Lewisham Area Health Authority*, [1978] 1 W.L.R. 382, 392 - 93 (C.A. 1977) per Geoffrey Lane, L.J. ("there are many ways in which defendants may be prejudiced by continued delay. ... [T]he nurses whose competence and standards of care are in question are no doubt suffering at least some apprehension as to what may happen or be said at the trial. Why, one may ask, should they continue to have to suffer?"); *Tyler v. Customs Credit Corp.*, [2000] QCA 178, ¶ 2 ("ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them"); *Cooper v. Hopgood & Ganim*, [1998] QCA 114; [1999] 2 Qd. R. 113, 124 (Queens.) ("ordinary members of the community are entitled to get on with their lives... . The psychological as well as commercial effects of such a state of affairs ought not to be underestimated"); *Weston v. Publishing and Broadcasting Ltd.*, [2012] NSWCA 79, ¶ 173 (the Court recognized nonlitigation prejudice as a form of prejudice); *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 887 (Sup. Ct. App. Div. 1994) ("a significant potential area of prejudice is that which a defendant suffers by reason of being placed at risk for many years, from the time proceedings are issued, in relation to a serious claim against it. ... Where a claim is made against individuals relating to their probity or their competence, especially their professional competence, and the claim is for many millions of dollars, then it is not hard to infer that defendants against whom such allegations are made are under a heavy burden. When that burden is ... unjustifiably drawn out over many years, it is easier still to infer serious prejudice of the relevant kind to a defendant"); *Policy Management Ltd. v. Colonial Mutual Life Assurance Society Ltd.*, [2005] NZHC 464, ¶ 59 (the Court approved *Biss v. Lambeth Southwark and Lewisham Area Health Authority*) & Alberta Law Reform Institute, Alberta Rules of Court Project: Consultation Memorandum No. 12.14, at 39 (October 2004) ("defendants should not be forced to live with ' the Sword of Damocles' hanging over their heads for inordinate periods during which they face the unsettling prospects of potentially being found liable for indeterminate and potentially substantial amounts of money").

[77] *Fitzpatrick v. Batger & Co.*, [1967] 2 All E.R. 657, 659 (C.A.) ("It is of the greatest importance in the interests of justice that ... actions should be brought to trial with reasonable expedition").

[134] Suppose that the nonmoving party claims that the moving party is an incompetent and dishonest lawyer.[78] The defendant immediately files a defence contesting the plaintiff's version of the facts and the characterization of his legal skills. The plaintiff does nothing for the next twelve months. Thirteen months after the plaintiff filed its claim, the defendant moves under r. 4.31(1) for dismissal. The lawyer has a special regulatory practice – broadcasting – that is used by a small group of clients who need this particular expertise. As a result of the lawsuit the lawyer's legal practice has shrunk considerably and placed in jeopardy the defendant's ability to meet his or her financial obligations and earn a livelihood.[79] The defendant gives careful consideration to moving for summary judgment but concludes that factual controversies may undermine successful pursuit of this strategy.[80] The moving party has suffered significant prejudice.

[135] Or suppose that the moving party is the executor of an estate and cannot distribute the estate assets to beneficiaries until the deceased's obligations, if any, to the nonmoving party have been finalized. The plaintiff does nothing for a year to advance the action after the defendant filed a defence. The dilatory prosecution of the nonmoving party's action has jeopardized not only the interests of the moving party but those whose interests are inextricably linked to the moving party.[81] There is no good reason why the delay application should be dismissed on the basis that the moving party has not suffered significant prejudice.

[136] Or suppose that A sells her home to B for $2 million. Within the applicable limitation period B sues A for $1 million alleging that A acted dishonestly and failed to disclose to B that the

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[78] See *Hancock Family Memorial Foundation Ltd. v. Fieldhouse*, [2005] WASCA 93 (W. Austl.) (the plaintiff alleged that the defendant law firm breached its fiduciary and common law duties to it); *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863 (Sup. Ct. App. Div. 1994) (the plaintiff alleged that the defendant's negligent conduct of an audit failed to disclose fraudulent acts of an officer of the plaintiff and led to the insolvency of the plaintiff) & *Spitfire Nominees Pty. Ltd. v. Hall & Thompson*, [2001] VSCA 245 (Vict. C.A.) (the plaintiff alleged that its lawyers failed to make necessary inquiries to protect the plaintiffs when it purchased a restaurant).

[79] *International Capital Corp. v. Schafer*, 2010 SKCA 48, ¶ 45; 319 D.L.R. 4th 155, 172 ("The Court should be sensitive to the impact of claims which put in question the professional, business or personal reputation of the defendant, which put the livelihood of the defendant at risk or which involve significant or ongoing negative publicity for the defendant"); *Hancock Family Memorial Foundation Ltd. v. Fieldhouse*, [2005] WASCA 93, ¶ 148 (W. Austrl.) ("There is inevitable prejudice in a professional person having unresolved allegations of negligence in the conduct of his profession extant against him"); *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 887 (Sup. Ct. App. Div. 1994) (a plaintiff's claim of professional negligence on the part of the defendant puts the defendant's professional reputation at risk) & *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 552 (C.A.) per Lord Denning, M.R. ("It is ... a grave injustice to professional men to have a [fraud] charge ... outstanding for so long").

[80] *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶ 45; 584 A.R. 68, 78.

[81] *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 552 (C.A.) per Lord Denning, M.R. ("[the widow] has been unable to administer the estate whilst this claim is hanging over it. ... If this case is allowed to drag on indefinitely, she herself may be dead before it comes to trial") & *Snow v. Snow*, 2015 NSWSC 90, ¶ 36 ("I do not think that [a stay is appropriate] ... since it leaves the Defendant uncertain as to what is to occur in the administration of the estate. It must not be forgotten that the deceased died almost 2 years ago").

home contained mold. A promptly files a defence denying this. A had just completed substantial renovations to her home before she sold it to B and had construction reports that she provided to B that verified the excellent condition of her home before she sold it to B. After A was served with B's claim, A heard a rumor that B had subsequently been charged with growing marijuana in residential homes. A would have sought summary judgment against B had B showed any interest in pursuing his claim. B did nothing to advance his claim for twelve months. A now has an opportunity to purchase a business at an excellent price from a friend but is reluctant to make an offer while burdened with this contingent liability to B. While A is confident that she can defend B's action in spite of the delay, she believes that B has abused the legal process to her detriment.

[137] There is no good reason why a business organization may not be significantly prejudiced by an extant lawsuit. Lord Denning made this point in *Biss v. Lambeth Southwark and Lewisham Area Health Authority*:[82] "The business house was prejudiced because it could not carry on its business affairs with any confidence – or enter into forward commitments – while the action for damages was still in being against it. … There comes a time when it is entitled to have some peace of mind and to regard the incident as closed".

[138] This court has not, as far as we can tell, dismissed an action on account of delay because of nonlitigation prejudice. But it has responded favourably to the concept that prejudice embraces both litigation and nonlitigation prejudice. In 1987 Chief Justice Laycraft, delivering judgment for the Court in *Lethbridge Motors Co. v. American Motors (Canada) Ltd.*[83] did so. No panel, as far as we have been able to determine, has retreated from that position in the last thirty years.[84] This is not surprising given that R. 243(2) of the old *Alberta Rules of Court*[85] expressly declared that "prejudice to adverse parties in an action caused by delay can be of any nature and is not restricted to procedural or evidentiary difficulties". The fact that this declaration did not appear in the new *Alberta Rules of Court* recognizes that it was superfluous.

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[82] [1978] 1 W.L.R. 382, 389 (C.A.) See also *Lev v. Fagan* (Eng. C.A. March 8, 1988) per May, L.J. ("it is no small thing to have an allegation of theft and dishonesty ... made against a man ... and maintained over a period of ten years ... [while the] action has been crawling along").

[83] 1987 ABCA 150, ¶¶ 14 & 20; 40 D.L.R. 4th 544, 548 & 549 (1987).

[84] See also *Angevine v. Blue Range Resources Corp.*, 2007 ABQB 443, ¶ 17; 423 A.R. 37, 43 ("parties should not, for an indeterminate periods of time, be forced to face the constant threat, stress and uncertainty of a pending lawsuit. ... [I]t is unjust to force parties to live with unresolved litigation hanging over their heads") & *Lucas v. Mydland*, 24 C.P.C. 4th 196, 202 (Alta. Q.B. 1997) (the Court dismissed an action characterized by inordinate and inexcusable delay, in part, because the moving party "has been prejudiced by ... being forced to conduct his affairs with this action hanging over his head").

[85] The *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 234/94 introduced this provision effective September 1, 1994.

[139] We will now consider the purpose of the *Alberta Rules of Court* to determine whether there is any need to adjust the ordinary meaning of "delay" and "significant prejudice" in r. 4.31(1).[86]

2. The *Alberta Rules of Court* Serves Two Important Purposes

[140] The Foundational Rules set out in Part 1 Division 1 of the *Alberta Rules of Court* unequivocally declare that "[t]he purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a *timely* and cost-effective way".[87]

[141] A proclamation that the civil procedure rules are designed to fairly and justly resolve disputes is not a novel idea. "The fair and just resolution of disputes has been the goal of rules of court since at least November 1, 1875, the date the first modern rules of court introduced by the *Supreme Court of Judicature Act, 1875* came into force".[88]

[142] But the second dimension of this pivotal foundational rule does not have the same historical roots. Earlier versions of the *Alberta Rules of Court* are silent on the beneficial aspects of timely and cost-effective litigation protocols. This is also true in England and Wales. Rule 1.1 of *The Civil Procedure Rules 1998* introduced these goals effective April 26, 1999. The important parts of this provision are set out below:

> 1.1 – (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as practicable –
>
> …
>
> (b) saving expense,

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[86] *Flock v McKen*, 2017 ABCA 67, ¶ 25 ("Rule 4.33 must be read in light of the fundamental rules – rule 1.2(2)(b) stipulates that the *Rules of Court* are intended to facilitate the quickest means of resolving a dispute at the least expense on the merits"); *Securum Finance Ltd. v. Ashton*, [2001] Ch. 291, 309 (C.A.) ("The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind) & *Hobbs v. Australian Securities and Investments Commission*, 2013 NSWCA 432, ¶ 52 ("It is therefore necessary to have regard to the 'overriding purpose' referred to in s. 56 [of the *Civil Procedure Act 2005*], being 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings'").

[87] Alta. Reg. 124/2010, r. 1.2(1) (emphasis added). See also *Alberta Rules of Court*, rr. 1.2(2)(b) ("these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense") & 1.2(3)(a) ("the parties must ... facilitate the quickest means of resolving the claim at the least expense") & *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 105; 92 C.P.C. 7th 259, 304 (chambers) ("Justice is more than a defensible and rational explanation for the disposition a court pronounces that explains to the parties and the community why the dispute was resolved the way it was; it is also a predisposition to the insistence that disputes be resolved as quickly as reasonably possible in accordance with the time lines fashioned by procedural rules")

[88] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 88; 91 C.P.C. 7th 73, 108-09 per Wakeling, J.A. (dissenting in the disposition).

…

(d) ensuring that it is dealt with expeditiously and fairly … .

[143] The purposes served by the *Alberta Rules of Court* do not require a refinement of the ordinary meaning of r. 4.31(1). A direction to interpret the rules to accomplish the expeditious resolution of differences is honored if the delay rule attaches onerous consequences to litigants who do not prosecute their actions with reasonable dispatch[89]. Nor is it unfair to prefer the interests of those who are harmed by the conduct of litigants who do not invest the resources needed to advance their action with reasonable urgency over those who are dilatory.[90] In addition, judicial resources are scarce and should not be made available to advance cases that have been largely ignored by those responsible for their prosecution.[91]

3. Rule 4.31(2) Creates a Rebuttable Presumption of Law

[144] Rule 4.31(2) came into force on July 25, 2013.[92] It reads as follows: "Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application".

[145] Justices Bryant, Lederman and Fuerst, in The Law of Evidence in Canada,[93] record the most important features of a rebuttable presumption of law:

> Common law or statutory rebuttable presumptions are a legal device mandating that upon proof of the basic fact (Fact A), another fact (Fact B), is presumed in the

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[89] 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2017, at 4-67 (2017) (" Delay in a suit is anathema to all the principles of the 2010 *Rules* (efficiency, proportionality, and economy").

[90] The nonmoving party's lack of resources does not justify an abridgment of the moving party's rights.

[91] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 92; 91 C.P.C. 7th 73, 112 per Wakeling, J.A. (dissenting in the disposition) ("A court house is not a garage for parked actions"); *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.*, [1998] 2 All E.R. 181, 191 (C.A. 1997) ("to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process"); *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 547 (C.A.) ("we will … do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay") & *Tubman v. Olympia Oil Corp.*, 276 F. 2d 581, 583 (2d Cir. 1960) ("If trials are to be secured within a reasonable period from the date of the commencement of the action the calendars should not be clogged with cases where no serious effort is being made to prosecute them").

[92] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 140/2013. A related version was in force before November 1, 2010. This was Rule 244(4) of the old *Alberta Rules of Court*. It reads as follows: "Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay shall be prima facie evidence of serious prejudice to the party that brought the application".

[93] 149-50 (4th ed. 2014).

> absence of rebutting evidence. The proponent of a rebuttable presumption has the onus to prove the basic fact. Once the basic fact is established, the party against whom the presumption operates has either an evidential or a persuasive (legal) burden to satisfy the legal consequence of the presumption.
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> …
>
> Thus, a rebuttable presumption is a "rule of law compelling the trier of fact to reach the conclusion *in the absence of evidence to the contrary*". No prescribed language or formula is necessary in order to create a statutory rebuttable presumption.

[146] Professors Morgan, Maguire and Weinstein, in Cases and Materials on Evidence,[94] a 1957 text, set out the general acceptable understanding of a rebuttable presumption:

> When the basic fact is established, the existence of the presumed fact must be assumed unless and until specified conditions are fulfilled. What those conditions are is the subject of conflicting decisions. … The great Thayer insisted that the term presumption should be employed only in this sense and Wigmore agrees. Most modern judges are accepting of this view… .

[147] What is the nature of this evidence that must exist before the nonmoving party can escape the consequences of a rebuttable presumption of law?

[148] Justices Bryant, Lederman and Fuerst offer this guidance:[95] "In order to satisfy many of the statutory presumptions governing civil actions, a party has the onus to prove the existence or non-existence of the presumed fact to a balance of probabilities".

[149] We are satisfied that upon proof by the moving party of the basic fact – inordinate and inexcusable delay on a balance of probabilities – the presumed fact – significant prejudice – must be found to exist unless the nonmoving party has proven on a balance of probabilities that the moving party has not suffered significant prejudice. This conclusion adequately recognizes the seriousness of the consequences litigation delay presents in our community without depriving the nonmoving party of a reasonable opportunity to challenge this conclusion.

4. Essential Rule 4.31 Queries

[150] In order to apply r. 4.31 an adjudicator must answer six distinct questions.

[151] First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?

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[94] E. Morgan, J. Maguire & J. Weinstein, Cases and Materials on Evidence 438-39 (4th ed. 1957).

[95] The Law of Evidence in Canada 156 (4th ed. 2014).

[152] Second, is the shortfall or differential of such a magnitude to qualify as inordinate?

[153] Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?

[154] Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court?[96] Has the moving party demonstrated significant prejudice?

[155] Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?

[156] Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action?[97] This question must be posed because of the verb "may" in r. 4.31(1).[98]

C. Applications of the General Principles Governing Rule 4.31

1. Standard of Review

[157] An appeal court uses the correctness standard to evaluate an original court's disposition of a legal question and the plainly wrong standard – palpable and overriding error – to evaluate fact findings and the application of legal standards to facts.[99]

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[96] *Paxton v. Allsopp*, [1971] 3 All E.R. 370, 376 (C.A.) per Davies, L.J. ("when there has been a very substantial period of delay, it is nearly always impossible for there not to be some prejudice to the defendant").

[97] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 116; 91 C.P.C. 7th 73, 124 per Wakeling, J.A. (dissenting in the disposition) ("the rule bestows a discretion on the court. The adjudicator may decline to dismiss the nonmoving party's action even though the moving party has established inordinate and inexcusable delay and significant prejudice") & *Ross v. Crown Fuel Co.*, 37 D.L.R. 2d 30, 50-51 (Man. C.A. 1963) ("The Court ... [has] the power to refuse the defendant's application ... despite unreasonable delay, if it appeared manifest that injustice would result from a dismissal without trial. ... [C]ases falling into this latter category ... are the exception rather than the rule").

[98] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 116; 91 C.P.C. 7th 73, 124 per Wakeling, J.A. (dissenting in the disposition).

[99] *Housen v. Nikolaisen*, 2002 SCC 33, ¶¶ 36-37; [2002] 2 S.C.R. 235, 262-63 & *Flock v. McKen*, 2017 ABCA 67, ¶ 13. Other commonwealth jurisdictions have adopted similar standards of review. E.g., *McPhilemy v. Times Newspapers Ltd. (No.2)*, [2001] EWCA Civ 933, ¶ 7; [2001] 4 All E.R. 861, 866-67 ("The court must resist the temptation to substitute its own view for that of the judge unless satisfied that his discretion has been exercised on a basis which is wrong in law; or that the conclusion that he has reached is so plainly wrong that his exercise of the discretion intrusted to him must be regarded as flawed"); *P.C.R.Z. Investments Pty. Ltd. v. National Golf Club Holdings Ltd.* [2002] VSCA 24, ¶ 32 (Vict. C.A.) ("Generally speaking, an error of principle must be shown in the way

[158] The motions court committed four reversible errors.

[159] First, it failed to provide any helpful explanation for its holding that the admitted delay did not constitute inordinate delay. Given that the motions court was asked to adjudge a r. 4.31(1) application almost ten years after the suit commenced and it was still years away from trial, it was obliged to provide compelling reasons to support a conclusion that the delay in this proceeding was not inordinate. It was incumbent upon the motions court to quantify the delay it believed was embedded in this action. What were the litigation milestones that the comparator action would have reached? Why did the adjudicator believe that the substantial shortfall was not inordinate?

[160] With respect, the following passage, an extract from the decision that deals with delay, does not provide an acceptable explanation for the court's conclusion: [100]

> [W]hile counsel for Trebilcock agrees that I need to look at the whole of the action, Trebilcock's brief affidavit fails to address the whole of the action except in the most general terms. It revisits Trebilcock's complaint that nothing in the litigation has involved him for a long time … . It mentions the plaintiffs' delays in relation to the March 19, 2016 case management order. But … "the analysis of the delay under Rule 4.31 is broader than merely a review of the last litigation activities".

[161] We note that each of the affidavits of Messrs. Trebilcock and Hanne contains as an exhibit the court's procedure card. This document provides a detailed record of the litigation. It is beyond dispute what happened in the period between December 14, 2006, the date the plaintiffs filed their suit, to October 14, 2016, the date the motions court issued its decision. It was equally obvious that as of October 14, 2016, this action was not likely to be tried for several years. The defendants had not even started their questioning of Mr. Humphreys.

[162] Second, the motions court failed to ask the right questions in the correct order. The failure to adopt this strategy unnecessarily increases the risk that the decision maker will overlook an important consideration and arrive at an unsound conclusion.[101] It did not start its analysis with a consideration of delay, the logical departure gate on the journey to judgment. Instead it focused on the prejudice concept. This was an error. It should have first considered what milestones a reasonable plaintiff prosecuting a fraud action with reasonable expedition would have reached in a comparable case. It did not identify the quantum of the measured differentials when comparing the

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the discretion was exercised or some substantial injustice must be established in the result arrived at") & *Bradbury v. Westpac Banking Corp*, [2009] NZCA 234, ¶32; [2009] 3 N.Z.L.R. 400, 411 ("the award will not be upset unless contrary to principle as by adopting a wrong approach or disregarding a material factor, or wholly wrong").

[100] 2016 ABQB 579, ¶ 28.

[101] *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 117 ("The likihood that a court will wisely and rationally resolve a … problem increases significantly if it asks the right questions in the correct order") & *Estate of Roger v. Helvering*, 320 U.S. 410, 413 (1943) ("In law also the right answer usually depends on putting the right question").

comparator's action and Mr. Humphreys' action. Nor did it ask why these cumulative delays were not inordinate. Had the motions court undertaken this study we believe that it would have been hardpressed to reach the conclusion that it did. And had it concluded that there was inordinate delay, it would have had to probe further. Did the nonmoving party provide an explanation for the delay? And, it if did, was the explanation adequate to justify the nonmoving party's pedestrian pace? Or was the delay inexcusable?

[163] Third, the motions court failed to consider the moving parties' allegations of nonlitigation prejudice.

[164] Fourth, the record compelled the motions court to conclude that the delay was both inordinate and inexcusable. With respect, the motions court's contrary conclusion was clearly wrong. And had the motions court held that the delay was both inordinate and inexcusable, this basic fact determination would have triggered a rebuttable legal presumption that the delay caused the moving parties significant prejudice.

[165] In the next part, we chart our pathway to judgment.

2. Our Solution

[166] The plaintiffs commenced their action on December 14, 2006. It is a standard commercial law case. They allege that the defendants committed fraud.

[167] The plaintiffs are obliged to prosecute their action with reasonable expedition. This is a faster rate than is required of a claimant who does not allege fraud or a comparable wrong.

[168] The plaintiffs did not proceed with reasonable expedition. Any delay that was not trivial or minor is inordinate. One will recall that the plaintiffs conceded that there was delay. They should have had their case tried years ago. To adopt the reference of Justice Binnie to the tale of the Flying Dutchman in *Lax kw'alaaqms Indian Band v. Canada,*[102] there is still no end in sight.

[169] Have the plaintiffs provided an explanation for the delay?

[170] They have.

[171] The law firm that represented the plaintiffs from sometime shortly after October 12, 2012 until January 1, 2016 assigned at least three different lawyers to their file. This turnover eventually troubled the plaintiffs. They "grew dissatisfied with the lack of continuity and sought out new counsel towards the end of 2015". Once they made up their mind to change lawyers they acted quickly. They retained Rackel Belzil LLP on January 1, 2016. Within several months their new law firm had the old firm's complete file.

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[102] 2011 SCC S6, ¶ 41; [2011] 3 S.C.R. 535, 556.

[172] It is noteworthy that Mr. Humphreys did not blame the defendants for the delay. This accounts for the motions court's statement that "the plaintiffs have made no case that the defendants have contributed to the delay by failing or refusing appropriately to cooperate".[103]

[173] For several reasons the plaintiffs' explanation does not pass muster. First, the plaintiffs' delay became inordinate before Mr. Veylan ceased to act for the plaintiffs. This is a fraud case. The plaintiffs' action should, at least, have been set down for trial by then, if not tried. Second, a litigant cannot defend an almost ten-year litigation period during which relatively little progress has been made by complaining about lawyer turnover in the last quarter of 2015. Third, the plaintiffs are responsible for the legal representation provided by the lawyers they selected. The appellants did not force the plaintiffs to select the law firm that the plaintiffs abandoned in late 2015.[104]

[174] We agree completely with Lord Justice Ward's holding in *Hytec Information Systems Ltd. v. Coventry City Council*[105] that the sins of the lawyers are usually the sins of the client:

> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages …; thirdly, it seems to me that it would become a charter for the incompetent … .

[175] The plaintiffs have not provided a satisfactory excuse to account for their failure to press their action ahead with reasonable expedition. They do not allege that the defendants have engaged in acts either intended or having the effect of interfering with the ordinary advance of the action.

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[103] 2016 ABQB 579, ¶ 42.

[104] *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 168; 92 C.P.C. 7th 259, 323 (chambers) ("Mr. Travis, not the respondents, must assume responsibility for the inadequate representation the counsel he selected provided") & *Link v. Wabash Railroad*, 370 U.S. 626, 633-34 (1962) ("[the party] voluntarily chose this attorney ... and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").

[105] [1997] 1 W.L.R. 1666, 1675 (C.A. 1996). See also *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 165; 92 C.P.C. 7th 259, 322 (chambers) ("[the client] is responsible for the missteps of his counsel"); *International Capital Corp. v. Schafer*, 2010 SKCA 48, ¶ 45; 319 D.L.R. 4th 155, 173 (Sask. C.A. 2010) ("If a litigant engages a lawyer and the lawyer then fails to have matters forward expeditiously, the litigant should bear the burden of his or her own choice of counsel and should not expect to have that burden shifted wholly to a defendant who played no role in retaining or instructing the lawyer"); *Hughes v. Simpson-Sears Ltd.*, 52 D.L.R. 4th 553, 559-60 (Man. C.A. 1988) ("A plaintiff is responsible for delays occasioned by his solicitors"); *Training in Compliance Ltd. v. Dewse*, [2000] EWCA Civ J0710-18, ¶ 66 ("in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself"); *Shtun v. Zalejska*, [1996] 1 W.L.R. 1270, 1286 (C.A.) (it is "irrelevant" whether the nonmoving party's delay is the fault of the party or the party's lawyer) & *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 878 (Sup. Ct. App. Div. 1994) ("the plaintiff cannot be excused merely by blaming its behaviour on its professional advisors").

[176] Has the inordinate and inexcusable delay for which the plaintiffs are responsible impaired an important interest of the defendants? If so, is it sufficiently important to justify an order dismissing the plaintiffs' action?

[177] The moving parties have proved that it is more likely than not that the nonmoving parties' inordinate and inexcusable delay has caused them nonlitigation and litigation prejudice.

[178] The plaintiffs have alleged that Messrs. Trebilcock, Sebastian Hanne and Juergen Hanne, Calgary Ventures Inc., Contura Consulting Ltd., Bauland Inc., Lux Real Investments Ltd. and Troyvest Estates Ltd. have engaged in fraudulent acts that have harmed them. Business persons and businesses should not have to endure allegations of this nature for any more time than it would take a litigant acting with reasonable expedition to prosecute such a claim to trial.

[179] Even if the plaintiffs had not alleged that the moving parties had engaged in fraud, their actions have been outstanding far too long. There comes a point when its temporal dimension has exceeded its allowable maximum lifespan.

[180] We are also satisfied that the appellants have made out a case of litigation prejudice.

[181] Several reasons account for this determination.

[182] First, the ability of persons to recall events accurately diminishes with the passage of time.[106] This is true even for persons with above-average recall skills. In this case witnesses will probably be asked in 2020 about events that occurred between 2003 and 2006 or between fourteen and seventeen years ago.

[183] Second, the appellants have not had the opportunity to question Mr. Humphreys, either in his capacity as a plaintiff or the representative of the corporate plaintiff. This means that the

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[106] See *M.L. Bruce Holdings Inc. v. Ceco Developments Ltd.*, 2015 ABQB 604, ¶ 50 (Master) ("in light of the fact that the claim is based on oral agreements, memory lapse seems likely. Even if a plaintiff witness feels he or she has a very clear recollection of events, the witness' ability to answer questions in cross-examination may be compromised, because such questions often probe topics to which the witness has not given much, if any, thought"); *Roebuck v. Mungovin*, [1994] 2 A.C. 224, 234 (H.L.) per Lord Browne-Wilkinson ("In the ordinary case the prejudice suffered by a defendant caused by the plaintiff's delay is the dimming of witnesses' memories. ... I have no doubt that [specific evidence] ... is not necessary and that a judge can infer that any substantial delay ... leads to a further loss of recollection"); *Brisbane South Regional Health Authority v. Taylor*, [1996] HCA 25; 186 C.L.R. 541, 551 ("Prejudice may exist [on account of the passage of time] without the parties or anybody else realizing that it exists"); *Lovie v. Medical Assurance Society NZ Ltd.*, [1992] 2 N.Z.L.R. 244, 254 (H.C.) ("One needs to guard ... against the danger of discounting the arguments based on the dimming of memories simply because often they cannot be adequately demonstrated"); *Spitfire Nominees Pty. Ltd. v. Hall & Thompson*, [2001] VSCA 245, ¶ 40 (Vict. C.A.) ("[the lower court] could be well satisfied that the defendants and their witnesses would be placed at a distinct disadvantage by the plaintiffs having allowed 11 years to elapse before evidence could be given at trial") & *Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("Loss of memory ... is not always reflected in the record because what has been forgotten can rarely be shown").

plaintiffs' star witness will not be required to disclose critical facts on which the plaintiffs rely until up to seventeen years after the events transpired. This is grossly unfair.

[184] Third, while it is true that the disclosed documents will undoubtedly provide a paper trail tracking the distribution of assets, it is inevitable there will be questions the answers to which cannot be found in the documents. It is unrealistic to insist that moving parties catalogue these lacunae. They cannot possibly know at this stage of the litigation where the gaps are. This is especially so given that they have not had the opportunity to question Mr. Humphreys and explore his perception of the key events.

[185] The Supreme Court of Victoria, Appeal Division faced a similar dilemma in *Bishopsgate Insurance Australia Ltd. v. Deloitte Haskins & Sells*.[107] The plaintiff, a company in liquidation, sued its former auditors for professional negligence. It alleged that the auditors, in reviewing the financial year ending December 31, 1982 during the first part of 1983, did so in a negligent manner and failed to detect the fraudulent acts of one of its officers to the detriment of the plaintiff. On July 20, 1993 the defendant applied for a permanent stay of proceedings. The Master dismissed the application without costs, despite the "entire lack of progress in the action". The Victoria appeal court allowed the appeal and dismissed the plaintiff's proceeding for want of prosecution. It did so on account of litigation and nonlitigation prejudice. Of particular interest is the Court's response to the argument that this was a dispute in which the documentary evidence would be of significance:[108]

> If the plaintiff be right, then there will be undoubtedly entries in its books to which it will point and say that they required to be referred to in the auditor's reports and its accounts required qualification. But the question of prejudice is to be looked at from the viewpoint of the defendant having to conduct its case many years after the conduct of that audit and having regard to the delay, since issue of the writ, and in particular by comparing the defendant's position with what it would have been if the case had been tried promptly. No doubt there will be some working papers still available. But the defendant and its witnesses will have to give evidence explaining what steps it took or, more likely, why it did not take steps to qualify the accounts or draw attention to the entries. That will require the defendant and its staff to recall events relating to an audit 13 or so years earlier and possibly evidence from other witnesses then employed by the plaintiff as to possible proffered explanations. … The conduct of the defence must in those circumstances be very difficult for the defendant … .

[107] [1999] 3 V.R. 863 (1994).

[108] Id. 886.

[186] Fourth, the rebuttable presumption of law created by r. 4.31(2) is activated.[109] The plaintiffs have not rebutted it.

[187] The moving parties have demonstrated that the nonmoving parties' inordinate and inexcusable delay has caused them significant prejudice. The motion court's decision to the contrary was not a conclusion open to it.

[188] There is no reason, let alone a compelling reason, not to dismiss the actions of Mr. Humphreys and Brodlor Foods Inc.

VII. Conclusion

[189] This appeal is allowed. The plaintiffs' claims against Messrs. Trebilcock, Hanne and Hanne, Calgary Ventures Inc., Contura Consulting Ltd., Bauland Inc., Lux Real Investments and Troyvest Estates Ltd. are dismissed pursuant to r. 4.31(1) of the *Alberta Rules of Court*.

Appeal heard on April 3, 2017

Memorandum filed at Edmonton, Alberta
this 19th day of April, 2017

Costigan, J.A.

Watson, J.A.

Wakeling, J.A.

[109] *Brace v. Williams*, 2016 ABCA 384, ¶ 6 ("Merely because the party prejudiced cannot itemize every impact of prejudice is not an answer to the presumption") & *Kuziw v. Kucheran Estate*, 2000 ABCA 226, ¶ 27; 266 A.R. 284, 291 ("Proof of inordinate and inexcusable delay is in and of itself prima facie evidence of serious prejudice to the party that brought the application. Without more, the applicant has proven its case").

Appearances:

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