# Court of Queen's Bench of Alberta

**Citation: 4075447 Canada Inc v Pacrim Developments Inc, 2018 ABQB 358**

**Date:** 20180502
**Docket:** 0701 06236
**Registry:** Calgary



Between:

**4075447 Canada Inc., Nominee for the Beneficial Owner, Eau Claire Hotel Operating Trust**

Plaintiff

- and -

**Pacrim Developments Inc., W.M. Fares & Associates Inc., Carruthers & Associates Architects Inc., PCL Construction Management Inc., Maxam Contracting Ltd., Strathcona Mechanical Ltd., Heritage Caulking & Restoration Ltd., Hemisphere Engineering Inc. and Donalco Inc.**

Defendants

- and -

**Snyder General Corporation, McQuay International, Olympic International Limited, Olympic International Agencies Ltd., AAF-McQuay Incorporated, AAF-McQuay Canada Inc. operating as McQuay International, McQuay Canada Inc., ABC Ltd., John Doe, Hemisphere Engineering Inc., Carruthers & Associates Architects Inc., Strathcona Mechanical Ltd., Heritage Caulking & Restoration Ltd., Defendant Ltd. and Richard Row**

Third Parties

**Corrected judgment:** A corrigendum was issued on May 7, 2018; the corrections have been made to the text and the corrigendum is appended to this judgment.

---

**Memorandum of Decision**
**of**
**A.R. Robertson,Q.C. Master in Chambers**

---



## Introduction

[1] The Sheraton Eau Claire Hotel was built in downtown Calgary about 20 years ago. The plaintiff sued about 11 years ago for alleged errors in constructing the heating, ventilation and air conditioning ("HVAC") system. The plaintiff asserts that it only discovered the claim a long time after the injury.

[2] These applications are to dismiss for long delay and prejudice under rule 4.31. They bring to the fore problems that arise when a plaintiff sues very late – long after the facts occurred that gave rise to the claim. Here, the plaintiff was getting close to the 10 year ultimate limitation when it sued.

[3] There had been anomalous problems with the HVAC system. The discovery of occasional leaks from time to time did not lead the plaintiff to realize that it had a claim until over nine years after construction was complete. The plaintiff alleges that only in 2006 did it understand the cause of its problems with the HVAC system. It sued in 2007. Some of the defendants were named in the action initially. Later, more defendants were added.

[4] As the style of cause discloses, many of the defendants have been named as third parties by other defendants. In the context of this application, that is a particularly important factor, because the significant prejudice alleged to have been suffered by one defendant spills over to others. To the extent that a defendant is not able to obtain evidence to support its third party claim for indemnity, or perhaps evidence from a third party allowing it to defend either the main claim or the third party claim against it, and to the extent that it is not able to count on a third party for actual financial indemnity in the case that liability is found, further prejudice is asserted. There has been a bankruptcy; corporate parties have ceased to exist; the whereabouts of some witnesses is unknown; some witnesses have died.

[5] After pleadings and affidavits of records were exchanged, there were discussions about proceeding to mediation to try to resolve the claim. Unfortunately, the discussions about mediation took about four years. By then, it became apparent that some, at least, of the defendants or third parties were not interested in mediation. In the meantime, nothing had happened to move the lawsuit forward.

[6] Although the lawsuit began to move forward then, it still was not with much speed.

[7] Does the late advancement of a claim puts some additional burden on the plaintiff to get the claim moving? Nine years after the events that gave rise to the dispute, it can fairly be

assumed that (a) some witnesses, at least, are already unavailable, (b) documents may have already been destroyed or lost, and (c) memories are already likely to be faint, even before the claim was filed. In such circumstances, the need to get the claim moving takes on a greater significance.

[8] In any lawsuit, the advancement of the claim itself, the questioning, the undertakings requested and their answers, and the transcripts all tend to preserve evidence. Investigations can be done once a claim is recognized. Relevant and material records can be identified; witness statements or at least self-generated memos summarizing relevant history can prepared; lost records can be recognized as being gone - all while memories may be still relatively fresh and they may be probed to fill in blanks.

[9] But when the evidence has already been perforated by faded memories of long-ago events, conversations, notes and other records, one question becomes whether that pre-claim period is a factor to be taken into account when looking at the subsequent accumulation of delay once the claim has been made.

[10] The pre-claim period cannot be taken into account in an application under rule 4.33: that "drop dead" rule acts like a limitation period. If the action is significantly advanced 35 months after the last step, the clock is re-set: ***Ursa Ventures Ltd v Edmonton (City)***, 2016 ABCA 135 at para. 11; ***Flock v Flock Estate***, 2017 ABCA 67 at para. 27; and ***Barlot v Eisner***, 2017 ABQB 636 at para. 11. It stands to reason that pre-trial delay is not relevant to an application under 4.33.

[11] But rule 4.31 deals with delay and consequential prejudice. If the Court finds that the delay has been inordinate and inexcusable, significant prejudice is presumed. But the rule starts "If delay occurs in an action ...". Should the Court take into account delay that occurred pre-action? Does that late start colour expectations of how the claim should be advanced?

[12] Courts have often noted that prejudice that is asserted by the defendant is sometimes not the result of the delay in bringing the action. A witness might die in a motor vehicle accident, so his or her evidence is accordingly unavailable regardless of how slowly the claim is prosecuted. Another may die unexpectedly of natural causes or in an incident unrelated to the lawsuit within a year or so of the event that gave rise of the claim. The plaintiff cannot be faulted for the unavailability of evidence from that witness. It is not delay that has led to the prejudice; it is the consequence of the normal passage of time during a period where progress is being made at a reasonable pace.

[13] However, sometimes a plaintiff knows that a key witness for the defence is already of an advanced age, or is suffering from a terminal disease, and the plaintiff deliberately moves the claim slowly without at least trying to seek evidence *de benne esse*. In my view that knowledge of the urgency is a factor that may be taken into account when a defendant finally moves to dismiss for delay: ***Canadian Imperial Bank of Commerce v Androsoff***, 2015 ABQB 215.

[14] Should a similar approach apply here?

[15] I have concluded that there has been inordinate and inexcusable delay and although significant prejudice is accordingly presumed, I have found that there has been significant prejudice. Furthermore, when a claim is first identified years after the events in question, there is an expectation that the claim will not be delayed.

[16] Counsel who appeared for the plaintiff on these applications was not the counsel for the plaintiff throughout the relevant time frame. His firm became involved only after the first application to dismiss was filed.

**The Parties**

[17] There is a multitude of parties here. It is useful to have a *dramatis personae* to understand the roles of the various parties in this construction dispute.

[18] **W.M. Fares & Associates Inc.** was the property developer and it was the agent of the owner in the construction of the hotel. **Pacrim Developments Inc.** originally owned the hotel. **Carruthers & Associates Architects Inc.**, were, of course, the architects. **Hemisphere Engineering Inc.** was the mechanical consultant. One or more of the **McQuay** entities manufactured the HVAC system. One or both of the **Olympic** entities supplied the HVAC system. **Strathcona Mechanical Ltd.** installed the HVAC riser. PCL Construction Management Inc., Maxam Contracting Ltd. (collectively "**PCL/Maxam**") only constructed the superstructure of the hotel, not the HVAC riser system. However, the plaintiff asserts that PCL/Maxam was responsible for project management, supervision, and quality control of the HVAC riser system. PCL/Maxam seconded some employees to W. M. Fares, creating some commonality of interest between them and confusion in the facts, which can only be sorted out with *viva voce* testimony, as discussed below. **Heritage Caulking & Restoration Ltd.** provided caulking and sealing services. **Donalco Inc.** provided fire-proofing. **Snyder General Corporation** is related to the McQuay defendants.

[19] All have similar, but somewhat distinct, perspectives on delay and the impact on their clients' ability to proceed, and many have brought separate applications to dismiss.

***PCL/Maxam***

[20] Counsel for the applicants PCL/Maxam speaks of the directions given by the Alberta Court of Appeal, and in particular the tests set out in ***Humphreys v Trebilcock***, 2017 ABCA 116 to determine whether a claim should be dismissed for long delay and prejudice. In that case, the Court of Appeal stated that the right of access to the courts is not absolute, and has a temporal limitation period. People expect that the mechanisms constructed for the resolution of disputes will process those disputes at a reasonable rate.

[21] Furthermore, she submits that litigation delay must be considered in light of the foundational rules in the *Alberta Rules of Court* and on an application under rule 4.31, although the applicant bears the initial onus to establish that there has been delay that is inordinate, the Court in ***Humphreys*** said that "inordinate delay" means delay that is in excess of what is reasonable having regard to the issues and the circumstances of the litigation.

[22] She asserts that there has been inordinate delay here. To support that submission she reviews in detail the steps that have been taken, and when.

[23] The statement of claim was issued in June 2007, and the application to dismiss was brought in August 2017, over 10 years later. During that period, nothing of significance occurred following September 2009 for the next four years and three weeks. Counsel prepared a helpful chronological chart identifying the major steps and the gaps of inactivity.

[24] The plaintiff asserts that four years passed while its counsel unsuccessfully tried to set up a mediation.

[25] However, no mediation efforts were actually completed. The plaintiff did not complete its questioning, and it only actually questioned three of the parties. The steps taken were delayed and sporadic.

[26] On October 7, 2013 (more than six years after the statement of claim was filed), the plaintiff served an expert report, and then on October 30, 2013 a consent order was granted setting out a litigation plan. The order required the following questioning (of either the party's litigation representative or employee or former employee) on or before the dates indicated:

(a) The plaintiff's questioning of W.M. Fares by March 31, 2014;

(b) The plaintiff's questioning of PCL's and Maxam by April 30, 2014;

(c) The plaintiff's questioning of Hemisphere Engineering and Strathcona Mechanical by May 31, 2014;

(d) The plaintiff's questioning of Heritage Caulking by June 30, 2014; and

(e) The defandants' questioning of the plaintiff by July 31, 2014;

[27] All undertakings were require to be answered within a reasonable period of time, not to exceed 60 days from the date of questioning.

[28] The first steps taken by the plaintiff after the consent order was the questioning of an employee of W. M. Fares on April 9, 2014. Five months later, the plaintiff questioned the representative of Strathcona Mechanical. By this time, the plaintiff was already behind in taking steps directed under the consent order.

[29] PCL/Maxam submits that it is apparent that the consent order was only sought to avoid a "drop dead" application that may have been looming under the then five-year delay rule (now a three year rule under rule 4.33). PCL/Maxam asserts that this became apparent because the litigation plan was not followed, at all. But in any event, it was only a partial litigation plan. It did not address questioning by the defendants or of the defendants/third parties.

[30] A few things were done in 2014.

[31] Then there was another 14 month delay, with another questioning of the representative of Strathcona Mechanical on November 27, 2015, and then the questioning of PCL/Maxam on February 4, 2016. By this time the plaintiff was almost two years behind schedule.

[32] At that point there was a flurry of activity. Hemisphere Engineering was by then bankrupt. There was a court order that lifted the *Bankruptcy and Insolvency Act* stay of execution, and the questioning of the Hemisphere representative took place May 17, 2016. Hemisphere's undertaking responses were provided on June 22, 2016. PCL/Maxam provided its undertakings June 30, 2016.

[33] Then there was another 13 month period of inactivity until PCL/Maxam filed its application to dismiss, on August 2, 2017.

[34] Counsel submits that is important to look at the steps set out in the 2013 litigation plan that have *still* not been done over four years later. She submits that W.M. Fares was supposed to have been questioned by March 31, 2014, and that has still not been done. A former employee was questioned in April 2014, but not the corporate representative. (I will return to this point, below.)

[35] Carruthers & Associates Architects were supposed to be examined by March 31, 2014. That has still not been done. Carruthers & Associates no longer exists.

[36] PCL's representative was supposed to been questioned by April 30, 2014. It was finally done in February 2016, almost 2 years late.

[37] Hemisphere and Strathmore Mechanical were to have been questioned by May 31, 2014. Strathmore Mechanical was questioned in September 2014, only four months late, and again in 2016, which was 18 months after the deadline.

[38] Hemisphere was questioned May 2015, two years after the deadline.

[39] Heritage Caulking was supposed to have been questioned in June 2014. That has still not been done.

[40] The plaintiff has now decided that it has completed pre-trial questioning, but that important fact was not shared with the rest of the parties until after the filing of this application. PCL/Maxam questions the sincerity of the plaintiff's assertion, discussed below.

[41] Over a ten-year period, there have been only five days of questioning. When one asks whether that represents a reasonable advancement of the action, counsel submits that the answer is clearly, "No." There has been a general pattern of delay and minimal effort to move the case forward.

[42] Counsel refers to several cases that talk about a 10 year lifespan of litigation, after which there is a "presumptive ceiling", or perhaps a "best before date", or at least a dynamic exists where questions must be asked as to why the case has not made it to trial. Those cases are ***ML Bruce Holdings Inc v Ceco Developments Ltd***, 2015 ABQB 604, ***Mintage Financial Corp v Altenhofen***, 2013 ABQB 486, ***McCarthy v Shindeler***, 2017 ABQB 511, and ***Regco Petroleums Ltd v Gerling Canada Insurance Company***, 2014 ABQB 459 as well as, less directly, ***Humphreys***.

[43] ***Humphreys*** involved a case that had been underway for approximately 9 ½ years. Although the Court of Appeal did not discuss a "best before date" they described the pace of the litigation as "glacial". She submits that that is an appropriate description here. The Court said that when there is a delay of this kind, "a detailed and compelling explanation" is required from the plaintiff. None was given. The claim in ***Humphreys*** was dismissed for delay.

[44] Some other cases also do not specifically talk about a 10 year "best before date", but they deal with similar facts. For example, in ***The Owners: Condominium Plan No 982 6403 v CPI Crown Properties International Corporation***, 2017 ABQB 562, 2017 CarswellAlta 1680, over a 13 year period, seven defendants had been questioned, there had been a court approved litigation plan that was not adhered to, and there was a four-year delay during which there had been only unsuccessful settlement discussions.

[45] That dispute was also a construction lawsuit. At paragraph 56, Justice Shelley said:

> Also relevant is the nature of the lawsuit. This [is] not a case where it was necessary to wait a number of years to determine the extent of the plaintiff's injuries or whether they would resolve. This is a construction lawsuit related to alleged construction defects and a project that was constructed between 1998 and sometime before 2003. While there were a number of parties and it was necessary to undertake steps to determine whether the defects were curable, the

> cost of curing them, and the responsibility for the defects, these do not explain or justify the plaintiff's lack of action in pursuing this lawsuit.

[46] She submits that this quoted passage applies equally here. The plaintiff knew by March 2006 what the problems with the HVAC riser system were.

[47] She notes that in ***Stabilized Water of Canada Inc. v Better Business Bureau of Southern Alberta***, 2016 ABQB 543, 2016 CarswellAlta 1882, Master Prowse dismissed a claim for long delay where there had been four years of delay plus three other one-year periods of delay, but pretrial questioning had actually been completed. Here, the questioning is not close to being completed. Even if the plaintiff has completed its questioning (which is challenged), the defendants clearly have not.

[48] In ***ML Bruce***, the lawsuit had been continuing for 12 years, and there had been a four-year period of inactivity, a three-year period of inactivity, and then a one-year period of inactivity. That case was not a "documents based case". PCL/Maxam submits that this case is not either.

[49] Accordingly, there are several case authorities dismissing cases with similar facts, similar delays, and similar issues.

[50] After this application was filed, the plaintiff circulated a form 37, which is a document to be signed by all counsel telling the court their expectations as to such factors as numbers of witnesses, trial time, expert reports, and stating that they are ready for trial. Rule 8.4(3)(b) specifically requires that the parties requesting a trial date must, "certify that questioning under Part 5 is complete". The defendants and third parties clearly could not do that here. The plaintiff knew that.

[51] I note that form 37 also requires the parties to "certify that any undertaking given by a person questioned under Part 5 has been discharged": rule 8.4(3)(e). I will return to this, below, in the context of the plaintiff's assertions that the case has been delayed by undertakings not yet discharged.

*"Inexcusable Delay"*

[52] Regarding whether the delay was "inexcusable", although the plaintiff asserts that the delays were not unusual and that there are 20 active parties, counsel for PCL/Maxam points out that there are not 20 active parties. There are actually only six active parties. There are four "McQuay" parties, and some have not defended. Some have been struck (Heritage Caulking and Carruthers), and although Donalco defended, it is no longer active.

[53] One of the excuses put forward by the plaintiff is that (regardless of the precise number) there are multiple parties. Scheduling things was difficult. PCL/Maxam submits that the allegations in the plaintiff's brief about how difficult it was to coordinate activities with so many litigants is really nothing more than editorial comment. There is very little evidence to support how difficult it was. The affidavits filed in support offer no meaningful detail. PCL/Maxam suggests that the Court is being asked to infer that there were difficulties.

[54] I note that the court practice allows case management when the movement of a case to trial is cumbersome, and a multitude of parties is a typical reason for seeking case management. None was sought here. Furthermore, since 2010, the *Rules of Court* have expressly allowed masters in chambers to make procedural orders (as was done here) to set deadlines, without

formal case management authority. Masters often give those orders, without the consent of one or more parties, when we see delay - although typically the delay complained of is the defendant's.

[55] Furthermore, ***Humphreys*** involved a case with a multitude of parties, and the Court of Appeal did not see that as an excuse for the long delay.

[56] PCL/Maxam submits that the evidence from the plaintiff offers detail of only three instances of "scheduling difficulties".

[57] The first excuse is that the questioning of a former employee of W.M. Fares had to be re-scheduled. That delayed things one week.

[58] The second is that the questioning of PCL/Maxam's representative had to be re-scheduled. That delayed things only two weeks, and that occurred after it was *already* about two years after the deadline set in the litigation plan.

[59] The third is that the examination of the Hemisphere Engineering representative had to be re-scheduled. It was initially scheduled for January 11, 2016 (already almost 18 months late), and it was re-scheduled to May 17, 2016 because of the bankruptcy and the need to lift the stay.

[60] All of these delays are trivial, immaterial delays that are not relied upon by the applicants. The total delay arising from these events is about five months and three weeks.

[61] Parenthetically, she notes that the fact that Hemisphere Engineering is now in bankruptcy highlights the prejudice caused by the delay in the prosecution of the action. Indemnity from that party is now in serious question.

[62] Another excuse for the delay is that the plaintiff was interested in settling the case, and that somehow explains over four years of inactivity in prosecuting the action.

[63] There is no detail given by the plaintiff of difficulties making any progress in getting parties to agree to mediate, agree on a mediator, or finding a date. The only evidence of delay is that the chosen mediator became unavailable for a period of months due to a family problem. The only evidence of actually trying to settle the claim is that a global settlement offer was made by the defendants, rejected by the plaintiff, and it was not countered.

[64] Counsel submits that even if there had been detailed evidence of attempts at settling, mere discussion about settlement does not satisfy the expectations under rule 4.33: ***McKay v Prowse***, 2017 ABQB 694 at paragraph 18 and the cases cited therein. Also, discussions about taking steps in the action do not significantly advance the action for rule 4.33: ***Simpson v Canada (Attorney General)***, 2015 ABQB 451, 2015 CarswellAlta 1278, at paragraph 34, citing ***Fletcher Challenge Energy Canada Inc. v Jonust Farms Ltd***, 2014 ABQB 518 at para. 42. She asserts that the same approach applies to rule 4.31 when considering whether there has been inordinate delay.

[65] Another excuse put forward is that there was a change in counsel by some of the defendants. However, there is no evidence that the new counsel for those defendants asked for any extension of time. Counsel argues that the assertion that this was required is purely conjecture by the plaintiff. Furthermore, the fact that counsel had to be replaced for some of the parties is a further symptom of the long delay and the reason why there should be a "shelf life" to litigation.

[66] As to the change in counsel by the plaintiff in 2015 (but within the same law firm), that is not an excuse. That is merely the plaintiff's problem: ***Humphreys*** at para. 25 and 173.

[67] A further excuse put forward by the plaintiff for the delay is the supposed delay in PCL/Maxam's failure to answer undertakings given in 2008. She notes that there was no request for any reply for over 10 years, but in any event the undertakings arose in the context of a summary dismissal application that PCL/Maxam withdrew before it was heard. The case came to court only on the question of costs, PCL/Maxam was directed to pay costs, and since the summary dismissal application was withdrawn the undertakings were never responded to.

[68] I note that the plaintiff's recent distribution of a form 37 makes it clear that the answers to those 10-year-old undertakings are apparently no bar to its preparation for trial. The plaintiff was ready to certify that "any undertakings have been discharged". If it was not waiting for them, it cannot properly claim that the failure to provide them contributed to delay.

[69] The fact that the plaintiff no longer is interested in the answers is confirmed by the affidavit of Scott Oades, the plaintiff's corporate representative. He deposes that the plaintiff is ready, willing and able to proceed forthwith to trial.

*Presumption of Prejudice*

[70] Once there has been delay that is inordinate and inexcusable, there is a presumption that the delay has caused prejudice to the defendants. The burden to rebut this presumption is on the plaintiff: ***Morrison v Galvanic Applied Sciences Inc***, 2017 ABQB 514, 2017 CarswellAlta 1551 at para. 53 (affirmed orally January 12, 2018 by Kenny, J.) and ***Humphreys*** at para. 155.

[71] Here, there is absolutely no evidence to rebut the presumption of prejudice. The plaintiff has not cross-examined the applicants' witnesses on this point, and has offered no evidence of its own. The most that it says is that this is a documents-based case.

[72] PCL/Maxam takes serious issue with that assertion. Its role in the project is one of the central issues from its perspective. Records put what would normally be a straight-forward matter into some doubt, and the evidence of witnesses would be necessary to straighten out the confusion on this central issue.

[73] There is a memo dated October 24, 1997 from W.M. Fares & Associates to "all subcontractors". It specifically says, "W.M. Fares & Associates are the project managers", and *not* PCL/Maxam. Three employees of PCL/Maxam were seconded by PCL/Maxam, and actually working on behalf of W.M. Fares, as noted in that memo. One of them was Bruce Ernst.

[74] However, many other documents call this relationship into question. One document sets out the responsibilities of the "PCL-Maxam Project Manager" and specifically says that one responsibility was "prime responsibility to coordinate and administer the contracts and monitor the performance of trade contractors". Another document sets out the responsibilities of the "PCL-Maxam Project Superintendent". It says that that person, "supervises the on-site work, quality control and inspections", among other things. A memo dated September 18, 1997 from W.M. Fares and Associates Inc. to Kevin Skinner, PCL/Maxam, a joint venture, says, "I am confirming that PCL Maxam will provide a project coordinator for the Sheraton Hotel construction effective immediately until October 1998". Minutes of a project management meeting held December 2, 1997 says that Mr. Ernst was there for "PCL-Maxam, a joint venture" directly contradicting the October 24, 1997 memo as to whom Mr. Ernst was working on behalf of.

[75] Counsel asserts that these circumstances, alone, demonstrate that *viva voce* testimony and memories of witnesses, will be important simply to establish the relative responsibilities of PCL/Maxam and W.M. Fares. This alone belies the assertion that this is merely a "documents-based" case.

[76] In order to defend its case, PCL/Maxam will have to rely on witnesses who were seconded to W.M. Fares. As well, it will have to present as witnesses several individuals who were supervisors or foremen on the project.

[77] Accordingly, PCL/Maxam asserts that the documents themselves demonstrate actual prejudice that cannot be answered by the bald assertion that this is a "documents-based" case.

[78] The evidence discloses that many of the witnesses cannot now be located, or at least the various defendants do not know the location of many of their potential witnesses. The inability to locate a witness is, in and of itself, some evidence of prejudice. Justice Shelley spoke of this in ***The Owners: Condominium Plan No 982 6403*** at paragraph 67:

> Similarly, it is no answer to the argument that a party has been prejudiced because witnesses are no longer locatable, to suggest that the witnesses might not have had any evidence to assist the party alleging prejudice. In fact, it begs the question. How can they know if these potential witnesses might have provided useful evidence when the ability to locate them has been impaired or eliminated through the passage of time – that is, by the very delay that forms the basis of the prejudice argument.

[79] Fading memories have long been recognized as prejudice. This was recently discussed in ***Humphreys*** at para. 182, but it was also mentioned long ago in ***Costigan v Ruzicka***, 13 D.L.R. (4th) 368 (C.A., 1984) where Laycraft, J.A., said:

> Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions.

[80] Here, the memories would be over 20 years old. Even when the claim was started, over nine years after the errors are said to been made, the plaintiff would have known, or ought to have known, that witnesses might not be available either by death, disability, or simple loss of contact, and that the memories of those remaining would be wanting.

[81] Counsel for PCL/Maxam points out that if it were not apparent when the lawsuit was started in 2007, it became apparent in 2009 that records were missing. Both the McQuay and the Olympic parties delivered affidavits of records that said that records had been destroyed. Nonetheless, it still took the plaintiff another eight years before getting started with questioning.

[82] As mentioned at the outset, there are many third party claims (and fourth party claims and notices to co-defendants). In addition to the usual cross-connection of evidence in any lawsuit (a witness for party A may give evidence that reminds witness B of other evidence), where every party relies to some extent on the memory and records of everyone else, defendants sometimes rely on the evidence of third parties to demonstrate their indemnity claim. Questioning produces admissions by the party questioned. That process presumes that the witness can remember what he or she should admit.

[83] Where witnesses are no longer available, or no longer remember facts, it prejudices the position of all other parties – including the plaintiff.

[84] Furthermore, where there are multiple defendants and third-party claims, the inability to actually recover on joint and several liability entitlements is further prejudice: ***Humphreys***, at para. 87.

[85] ***Humphreys*** also recognizes that there can be non-litigation prejudice, and for some least some of the parties here, the mere existence of the claim has led to prejudice. Mr. Fares' own name is the core of his company's name, and for the last 13 years he has had to carry on business in the hotel development industry with a cloud of this unresolved claim relating to a major Calgary hotel hanging overhead.

[86] One party (Olympic International Limited) is owned by an individual who wanted to shut the company down and retire. He has had to keep it active in order to continue defending this claim. That is, his personal life has been directly affected by the delay in resolving this dispute, and that is one of the types of delay specifically recognized in ***Humphreys***, at para. 135. Non-parties "whose interests are inextricably linked to the moving party" may suffer prejudice from the delay. That is one reason why the Court of Appeal said at paragraph 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. Litigation is a form of stress that has the potential to make those directly and indirectly affected unhappy… and may diminish the productivity of the persons affected by the unresolved dispute.… Litigation delay is a corrosive force in the free and democratic state committed to the rule of law.

*Discretion*

[87] Rule 4.31 contemplates an over-arching discretion to decline the application to dismiss for long delay, even if there is prejudice. Where there is a compelling reason, the Court can dismiss the application. PCL/Maxam argues that there is no compelling reason shown in the materials before the Court. There was no frustration of progress by the defendants; the plaintiff has just neglected its claim.

***Olympic International Limited***

[88] Counsel representing Olympic International Limited made it clear that she did not represent the other "Olympic" defendant.

[89] She relies on the 10 year "best before date" as establishing a presumption that delay has been inordinate and inexcusable. Once this circumstance exists, the burden falls to the respondent under rule 4.31. Furthermore, she submits that the burden of showing that there is a compelling reason not to dismiss under rule 4.31 (which arises because of the use of the word "may" in paragraph 4.31(1)) also falls upon the plaintiff although the cases do not specifically express this conclusion.

[90] As to the question of trial readiness and the assertion that the plaintiff has completed questioning, in cross-examination the witnesses for the plaintiff and both counsel seemed unsure whether the plaintiff had actually questioned a corporate representative of W.M. Fares.

[91] She describes the plaintiff's current attempts at trying to demonstrate that the case is almost ready for trial as "disingenuous". She notes that within the week prior to the first day of oral argument, counsel for the plaintiff served an application to set a trial date. These steps are clearly being taken now in an attempt to avoid dismissal of the claim, after the applications to

dismiss have been brought. Such unilateral steps are not to be taken into account in determining whether the delay has been inordinate and inexcusable: ***Flock v Flock Estate***, 2017 ABCA 67, 2017 CarswellAlta 294 at para. 17, sub-paragraph 8; ***Steparyk v Alberta***, 2014 ABQB 367, 2014 CarswellAlta 956, at para. 5; ***Riviera Developments Inc v Midd Financial Corp.***, 2002 ABQB 853, 2002 CarswellAlta 1150 at para. 39; and ***Trout Lake Store Inc v Canadian Imperial Bank of Commerce***, 2003 ABCA 259, 2003 CarswellAlta 1321, at para. 32.

[92] Counsel points out that this case is a construction claim, just as the claims were in ***The Owners: Condominium Plan No 982 6403*** and ***Stabilized Water of Canada***. A construction case does not have an inherent expectation of some delay, as there is in a personal injury case where the development of evidence about diagnosis, recovery, and prognosis takes time.

[93] As to what is "reasonable" in considering whether a delay has been "inordinate", reference may properly be made to the litigation plan. It was submitted here by the plaintiff, and it was formalized in the consent order on October 30, 2013. That is the starting point for determining whether the delays are "inordinate". If those deadlines had been followed, the case would now either be on the eve of trial or, perhaps, already heard.

[94] She also notes that it is interesting to look at the litigation plan to determine what has not been completed. She echoes PCL/Maxam's submissions on this point.

[95] Although the litigation plan contemplated that the defendants were to question the litigation representative, or an employee or former employee, of the plaintiff on or before July 31, 2014, that was clearly intended to take place *after* the previous four subparagraphs of the litigation plan/order had been complied with by the plaintiff.

[96] The only thing done under the litigation plan by July 31, 2014 was the examination of an employee of W.M. Fares.

[97] As to the assertion by the plaintiff that the questioning has now been complete, it is no answer to these applications that the parties could have been examined in any sequence under the *Rules* (the plaintiff is not required to examine first, for example, although that sequence is often followed). The litigation plan actually set out the sequence.

*A Plaintiff's Expected Response to Assertions of Delay*

[98] Counsel echoed PCL/Maxam's submission on the plaintiff's burden to explain the delay. The expectation of the plaintiff's response to an assertion of inordinate and inexcusable delay is set out in paragraph 19 of ***Humphreys***, where the Court of Appeal made its reference to the 10 year period and indirectly suggested that it agreed with the "best before date" approach suggested in cases decided in lower courts:

> Given that almost 10 years had lapsed since the plaintiffs commenced their action and a trial was still years away, *a detailed and compelling explanation* was required.

(The emphasis is mine.)

[99] There was no "detailed and compelling explanation" given by the plaintiff here in response to the application. To the extent that there is any information, there are no exhibits to support the assertion. Counsel submits that I cannot give any weight to bald assertions of efforts with no details and no corroborating documentation where one would expect there to be some.

There are only bald assertions of it being difficult to move the case forward with multiple parties, with only the three excuses discussed by counsel for PCL/Maxam.

[100] The plaintiff asserts that this is a complex case. However, the Court of Appeal addressed what is a complex case in ***Humphreys*** at paragraph 16. They said, "a complex case, as opposed to a standard one, consumes more time at each stage and may have more stages." Here, counsel points out that there have been only five days of questioning over 10 years. There is no evidence that this case is "complex" other than the fact that there are multiple parties.

[101] Olympic International also points out that there was no cross-examination on supporting affidavits and no affidavit evidence filed in response. The assertion that there is prejudice has not been rebutted at all, let alone satisfactorily. The presumption of significant prejudice remains.

[102] As to non-litigation prejudice, discussed in ***Humphreys***, she points out that the owner of her client, Olympic International, is a sole proprietor of the shares. He intended to retire in 2012. He cannot, because of this lawsuit. His life has been interfered with by a case that should have gone to trial, or been otherwise resolved, long ago.

[103] As to the assertion that this is a "documents case", she joins with counsel for PCL/Maxam to argue that it is not. There is no evidence to support that assertion, but the nature of the case is one that involves construction, design, and inspection. Oral testimony is essential in a case such as this.

[104] She also points out that in 1998-99, when the relevant facts took place, the use of emails in business was in its infancy. There is not the library of email transmissions that we often find now to document communications, meetings, thoughts, expectations, and the like. Even when printed originals and copies of records may have been destroyed, it may be the case in a more recent dispute that emails and digital copies of letters are available by the examination of computer hard drives. But this case goes back far enough that that inquiry would offer little, if any, assistance.

[105] The question of inability to recover on indemnity claims was specifically set out in proposed former rule 242.1, although it never came into force. It was discussed in ***Humphreys*** at paragraph 87. "Prejudice" was defined in that never-enacted rule as including, "increased difficulty in securing and enforcing contribution or indemnity from others". The Court of Appeal considered this form of the rule to be "of interest".

[106] The Court's discussion of prejudice generally makes it clear that this sort of prejudice can be taken into account. This is very much a live issue here, where some of the parties no longer exist, are bankrupt, or at least they are no longer active.

[107] It is believed that Hemisphere has some insurance, but no one is aware of how much it has, if it is insured at all. Current counsel for the plaintiff (not counsel arguing this application ) has deposed that there *may* be insurance. The result is that other parties may have to pick up a disproportionate share of liability where liability might otherwise be joint and several and apportioned between them.

[108] As to the "compelling reason", Olympic relies on their counsel's own response to the distributed form 37: she would not sign it. To do so would have acknowledged that the case was ready for trial, when it is clearly not. The bald assertion by the plaintiff that it is ready for trial cannot be taken as an indication that the action is actually ready for trial. Accordingly, it cannot

be said that there is a compelling reason not to dismiss for delay, on the basis that the case is ready for trial. It isn't.

***W.M. Fares & Associates Inc.***

[109] Counsel for W.M. Fares & Associates Inc. asserts that when determining whether the delay has been "inordinate", a question to ask is whether the plaintiff has been moving the case forward with reasonable dispatch, and this involves taking into account the fact that the claim was filed just before the expiration of the ultimate limitation period. This is an important factor. One who starts late should move quickly, before evidence is lost to absent witnesses, missing records, or faded memories.

[110] As to the steps taken to move the matter towards mediation, there is no reason why the lawsuit itself could not have been moved forward while also trying to move the case to mediation over that four year period.

[111] As to the loss of documents and the need to rely on personal memory, he notes that only certain people were actually regularly on-site. Many of the defendants rely on the evidence of others to determine exactly what happened on site. All defendants are inter-dependent for evidence in claims such as this, and suffer prejudice as a result when the ability of others to present evidence has become impaired by delay.

[112] Furthermore, W.M. Fares would have had no obligation to retain many of the documents that crossed their desks at the time. It would not have been onsite on a regular basis during construction. It is entitled to expect to rely on PCL/Maxam, Hemisphere Engineering, and others, who were actually on site, to tell other parties, and the Court, exactly what happened. But that ability has been significantly impaired by the delay.

***Strathcona Mechanical Ltd.***

[113] Counsel for Strathcona Mechanical Ltd. submits that Strathcona Mechanical can demonstrate clear prejudice.

[114] Its corporate representative, Neil Touw, was questioned in September 19, 2014, and its former employee, John Mace, was questioned on November 27, 2015. However, its Project Manager on the hotel died in 2010, and its former General Manager for Alberta died in 2016. Neither were examined by the plaintiff.

[115] All three of its foremen for the hotel project are no longer employed by Strathcona, and a journeyman and an estimating/purchasing agent for Strathcona on the hotel project are also no longer employed by Strathcona. None of them were examined.

[116] He acknowledges that the project manager on the hotel project, who died in 2010, did not die during the latter part of the period of delay. Nonetheless, in 2010 the lawsuit was already beginning to become stale. In ***The Owners: Condominium Plan No. 0982 6403***, at para. 66, the Court accepted that although a foreman may have died "when the action was still relatively young (three years from its commencement and approximately eight from the time of the relevant events)" that contributed to the prejudice that the defendant was able to rely upon. The circumstance is the same here.

[117] Strathcona also alleges prejudice resulting from the inability to enforce its rights to share any liability jointly and severally, because of the disappearance of parties, in addition to its inability to question them to obtain appropriate evidence.

***Hemisphere Engineering Inc.***

[118] Counsel for Hemisphere Engineering Inc. explains that his client no longer exists. It became a numbered company and then it was assigned in the bankruptcy. He was instructed to sign a consent order to lift the stay of proceedings that existed under the *Bankruptcy and Insolvency Act*, but the company has since ceased to exist at all.

[119] One of his potential witnesses has died. Two others have left the company and his principal does not know where they are. One of those individuals who have disappeared swore the affidavit of records in 2008. The corporate officer was examined, but he has no personal knowledge of the issues relating to the construction of the hotel. He lives in Edmonton, and he was not on-site during construction. He no longer even works for Hemisphere.

[120] Hemisphere was supposed to provide engineering details regarding the HVAC and fire stopping which are at the core of the lawsuit. But as a result of the delay, Hemisphere has no ability to defend itself. It is not able to provide evidence now as to its role, its responsibilities, what it may have delegated others, and who had what duties. Even if he knew the answers to some of these questions he would be unable to present evidence demonstrating them. Hemisphere no longer has any meaningful way of presenting its case.

***Snyder General Corporation and the McQuay Entities***

[121] Counsel representing Snyder General Corporation and the McQuay entities submits that this case is the "poster child" for inordinate delay without any excuse. The presumption of prejudice applies, and he joins with other counsel in noting that there is no evidence challenging the evidence of prejudice put forward by the applicants. No effort at all has been made in this regard.

[122] I had commented during previous oral argument that the defendants who asserted that witnesses who were no longer available who had important evidence had not put forward any information as to what that important evidence might be. I suggested that they might have deposed that the witness was personally involved in the installation of the HVAC riser, or that he was in charge of keeping records, or some other role. Furthermore, they had not submitted evidence as to what steps they took to try to locate them. Counsel submits that imposing a burden on the defendants to explain the importance of their witnesses, and what they did to try to locate them was inappropriate. In light of the burden of proof, they need not prove these things. Simply proving that there were witnesses, and that they are apparently no longer available, is more than enough. It is the burden of the plaintiff to show that there is no significant prejudice, once "inordinate and inexcusable delay" is shown.

***4075447 Canada Inc., Nominee for Eau Claire Hotel Operating Trust***

[123] The plaintiff argues that, despite its complaints about unanswered undertakings from a decade ago, it is now ready to proceed to trial.

[124] The consent order did not require it to question corporate representatives of all parties, and in fact it specifically gave deadlines for examining *either* the corporate representative *or* employee or former employee.

[125] It has now done all of that that it wants to do. It has not examined anyone from Carruthers or from Heritage Caulking. Early on, by 2013, counsel for Carruthers had advised that the company had shut down, there were no assets, and there was no insurance. Obviously, from

the perspective of the plaintiff, there is no point pursuing that defendant. I believe the same circumstances apply to Heritage Caulking.

[126] Furthermore, the consent order does not prevent the defendants from conducting its questioning, either of the plaintiff, or of each other pursuant to the third party and other claims over as between and among the defendants. There is no rule of court and, and nothing in the consent order, that requires the defendants to wait until the plaintiff's questionings are complete.

[127] No one has challenged this assertion (that the plaintiff is ready willing and able to go to trial) by other evidence, despite the assertions by the defendants that this is a newly advanced posture.

[128] The plaintiff has already served its expert reports, and asserts that the case is document dependent and expert driven. It is not a claim advanced in fraud, as was the case in ***Humphreys***, and it is not a case where the action is "years away from trial" from the plaintiff's perspective as was the case in ***Humphreys***. To the extent that the action is years away from trial, the question is why that is, when the plaintiff is ready willing and able to proceed. The plaintiff did nothing to prevent the other parties from taking the steps of the could have taken to get ready for trial.

[129] He points out that there was no complaint of prejudice at all until around the time that these applications began to be filed.

[130] He questions whether it can be said that there is "inordinate and inexcusable delay" the plaintiff is ready for trial, but the defendants are not, and where the plaintiff has completed all of the steps that it wants to do prior to trial within a period just over 10 years

[131] He submits that there must be some obligation on the defendants to do more than nothing to move the case forward.

***Replies***

[132] Counsel for PCL/Maxam responded that the facts in this case are the same as in the many cases relied upon by the defendants to support their application. The fact that it was a multiparty claim, the fact that the production is document intensive, and the fact that it is a commercial dispute are factors present in other cases dismissed for delay. In ***Humphreys***, although it dealt with a fraud claim, the Court of Appeal said that the claim would have been dismissed even if were not a fraud case.

[133] The defendants have not done anything to delay the case. They have been responsive, respectful and have participated when called upon to do so. When the plaintiff wanted to proceed to mediation, the defendants were willing to take part. When the defendant presented a consent order to try to move the file along, they consented. When called upon to attend questioning, they did.

[134] ***Humphreys*** calls for a "detailed and compelling explanation for the delay" as the case approaches 10 years. That has not been done. Essentially, the response is a bald assertion that the defendants have not met their duty, but there is no evidence, for example, of unanswered correspondence, or failure by the defendants to meet any of their deadlines. In the circumstance, the circulation of the form 37 is properly described as a "Hail Mary pass", a desperate attempt with only a small chance of success, when time is about to run out.

[135] Counsel for W.M. Fares submitted that in the analysis of whether the plaintiff is ready for trial, although it is, technically speaking, not necessary to examine the corporate representative,

the plaintiff examined an employee. In order to make use of the transcripts at trial it is necessary to have the proper representative adopt the employee's evidence.

[136] Accordingly, it is very clearly the practice, bordering on necessity, to conduct at least a brief examination of a corporate representative. Otherwise, the plaintiff would be left only with the ability to cross-examine the witness on the transcript and only if that witness testified on behalf of W.M. Fares. It is with this in mind that the plaintiff's assertion that it is ready willing and able to proceed to trial must be considered.

[137] There is evidence of at least two defendants actively trying to push the case forward.

[138] In 2011, there was repeated correspondence from counsel for Hemisphere as well as counsel for Strathcona to plaintiff's counsel asking about the status of the mediation, over a period from April 1, 2011 to September 28, 2011. Plaintiff's counsel finally responded by letter of March 11, 2013, well over a year after defence counsel apparently gave up asking, and his letter started, "although this file has been dormant for a period of time, my instructions are to renew efforts to have a mediation."

[139] By letter of April 8, 2013, counsel for W.M. Fares responded as follows:

> Do you have a list of mediators that are currently under consideration?
>
> Given that the statement of claim in this matter was filed almost 6 years ago, I believe it is incumbent on all of us to move this matter forward quickly.

[140] The first application for dismissal on the basis of delay was filed on August 2, 2017, over four years later. There was some activity during the intervening period, although not continuously. There was a 14 month delay between September 19, 2014, when the representative of Strathcona was questioned and November 27, 2015 when the questioning of that representative continued. Activity generally stopped on June 30, 2016 when PCL/Maxam provided its responses to undertakings.

[141] Then PCL/Maxam waited about 13 months before filing its application to dismiss. Others followed with theirs.

**Analysis**

[142] The four years spent trying to set up a mediation is very troubling. The affidavit of counsel who was acting for the plaintiff at the time asserts that the agreed-upon proposed mediator agreed to act in late November 2010. Plaintiff Counsel's intention was to schedule it in March or April of 2011. But that didn't happen, and then the proposed arbitrator became unavailable in early 2012 and he was off work from then until November 2012, perhaps nine months. What about the time from November 2010 to early 2012? Nothing of significance seems to have happened.

[143] And then after the proposed arbitrator was back in the saddle in November 2012, there was a further delay to October 2013 when a mediation agreement was circulated, and the explanation is the change in counsel by other parties. However, the first change in counsel did not occur until August, 2013. What about the nine-month period from November 2012 until August 2013? And that is assuming that everything should have ground to a halt because of the proposed arbitrator's difficulties in early 2012. He did not have to participate in the circulation of a mediation agreement. The plaintiff must have assumed that he would return to work and able to take the matter on, or else another mediator would have been suggested, or mediation would have been abandoned and steps would have been taken in the litigation.

[144] It is clear that the arbitrator's unavailability for about nine months did not materially contribute to the four years and two months spent on this exercise.

[145] Accordingly, the facts are clear that the case proceeded extremely slowly from almost the beginning.

[146] In my view, the delay pre-claim is a factor that may be taken into account when considering an application for delay under rule 4.31, For the reasons mentioned above, it is not relevant to an application under 4.33 (except for purposes of directing procedural steps under rule 4.33(3)), but when the evidence is already likely stale, it is appropriate to expect that the case will be prosecuted with some vigour.

[147] When it is apparent early on that evidence has already been destroyed in the ordinary course of business or otherwise, that is another factor to take into account in considering complaints about how slowly the claim is taking.

[148] The case law is clear that it is primarily the plaintiff's responsibility to move its case forward. Sometimes there are counterclaims and cross claims amongst defendants and others (as here) but where it is clear that none of them would have been advanced but for the fact that the plaintiff brought the claim, complaints that the defendants/third party plaintiffs did not push their claim ring hollow when years go by when the plaintiff does nothing.

[149] When there is already clear prejudice that has become apparent early on, there is no incentive for a defendant to move the claim forward under its own steam or to apply to dismiss when the lack of activity suggests that the plaintiff may have lost interest in advancing the claim. That is especially true when there are multiple parties, as here, because whoever tries to push the case forward will almost certainly end up doing the heavy lifting in getting things moving.

[150] We see that here on the application to dismiss. PCL/Maxam asserts that it has no liability at all for the HVAC riser, and applied for summary dismissal years ago (as mentioned, the application was abandoned). But it was the party that started this cavalcade of applications, and it was its counsel who took the lead in making the arguments. I assume that PCL/Maxam's costs associated with the application will be higher than others, and that is a proper factor to take into account in an award of costs.

[151] When a procedural order is granted, either on consent of the parties or without, the court expects that it will be followed. If variations are necessary, either there should be clear consent from the parties or an application should be brought to vary it. Court orders should not simply be ignored when it is no longer convenient.

[152] The consent order here was barely given any attention after it was granted.

[153] It set out the expected sequence of the questioning. It assumed the usual practice of waiting until the plaintiff had conducted at least critical examinations before the defendants would examine. The almost complete failure of the plaintiff to follow it, after the plaintiff took four years to conclude that mediation was not going to be conducted, is something that the defendants were entitled to consider when determining whether to even bother setting up their own examinations. The evidence in the case was stale when it was begun. Why would they aggressively push it forward?

[154] There is no evidence that the defendants materially slowed the litigation. The letters mentioned above show that at least two of the defendants were trying to push the mediation forward, and it took months for the first one even to receive an answer from plaintiff's counsel.

[155] When he did respond, he candidly acknowledged that the claim had been "dormant for a period of time".

[156] In my view, the nature of the claim (about nine years old when it was begun because of the difficulty the plaintiff had in diagnosing the problem) mandated some reasonably prompt steps to push the case forward. Case management might have helped. I would suggest that a litigation plan might have helped, but as we can see from the facts, apparently it would not have helped.

[157] However, I do not rest my decision on this "it was already stale" analysis. The plaintiff has shown only occasional interest in advancing its claim.

[158] It is difficult for me to see how there can be a fair trial in this matter. The factual circumstances are so old it would be astonishing if witnesses had clear recollections of events. Missing records, missing witnesses, and missing parties would complicate the trial of the claim even more. Stale evidence does not only impair the ability of the defendant to protect itself; it impairs the ability of the plaintiff to prove its case. Since the burden of proof generally lies with the plaintiff, the slow advancement of claims rarely works in its favour.

[159] Rights of indemnity have been lost, or at least the potential to actually recover on those rights.

[160] Even if the presumption of significant prejudice is disregarded, I find that there is clear evidence of actual prejudice.

[161] In ***Humphreys***, the Court of Appeal set out the questions to ask on an application of this nature:

> In order to apply r. 4.31 an adjudicator must answer six distinct questions.
>
> > 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?
> >
> > Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
> >
> > Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
> >
> > 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? Has the moving party demonstrated significant prejudice?
> >
> > 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?

> 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? This question must be posed because of the verb "may" in r. 4.31(1).

[162] These are my answers to these questions:

1. Yes.
2. Yes.
3. No.
4. Yes, and yes.
5. No.
6. No.

[163] In this checklist, the Court of Appeal did not specifically focus on the word "inexcusable" in rule 4.31: the test is whether the delay has been "inordinate *and inexcusable*". It may be considered to have been addressed under question three where the subsidiary question is posed, "If so, does it justify inordinate delay?" The Court clearly considered the question of "excuse" in its direction that "a clear and compelling explanation for the delay" be required.

[164] However, for the sake of completeness, in addition to the list of questions set out above, I would also ask, "Has there been a valid excuse given for the delay, or have the defendant's actions excused the delay?"

[165] My answer here to that question is, "No."

**Conclusion**

[166] Accordingly, the action is dismissed in its entirety.

[167] If the parties are unable to agree on costs, they may contact the masters' chambers clerk to arrange for a hearing.

Heard on the 21st day of February and the 26th day of April, 2018.
**Dated** at the City of Calgary, Alberta this 2nd day of May, 2018.

**A.R. Robertson, Q.C.**
**M.C.C.Q.B.A.**

**Appearances:**

Christine Plante and Denise Brunsdon
Bennett Jones LLP
for the Applicant (Defendant) PCL Construction Management Inc. and Maxam Contracting Ltd.

Karen Wyke and Arif Chowdhury
Fasken Martineau DuMoulin LLP
for the Applicant (Defendant) Olympic International Limited

Patrick Clark
HMC Lawyers LLP
for the Applicant (Defendant) W.M. Fares & Associates Inc.

Michael Corbett
Parlee McLaws LLP
for the Applicant (Defendant) Strathcona Mechanical Ltd.

G. Cameron Peacock
Brownlee LLP
for the Applicant (Defendant) Hemisphere Engineering Inc.

Jerry J. Patterson and David P. Konkin
Dentons Canada LLP
for the Applicants (Defendants), Snyder General Corporation, McQuay International, AAF-McQuay Incorporated, AAF-McQuay Canada Inc. operating as McQuay International, and McQuay Canada Inc.

Stuart J. Weatherill
Emery Jamieson LLP
for the Respondent (Plaintiff) 4075447 Canada Inc., nominee for the beneficial owner, Eau Claire Hotel Operating Trust

Stephen Carter-Edwards
Gowling LaFleur Henderson LLP
for the Defendant Carruthers & Associates Architects Inc.

---

**Corrigendum of the Memorandum of Decision**
**of**
**A.R. Robertson,Q.C. Master in Chambers**

---

Paragraph 162

1. Changed from No to Yes