# Court of Queen's Bench of Alberta

**Citation: Xpress Lube & Car Wash Ltd v Gill, 2019 ABQB 898**

**Date:** 20191122
**Docket:** 0901 09045
**Registry:** Calgary

2019 ABQB 898 (CanLII)

Between:

**Xpress Lube & Car Wash Ltd.**

Appellant (Plaintiff)

- and -

**Gurdeep Gill, Birinder Singh Khangura,
Vincent Lee, Gloria Tang, Longbow Financial Corp.,
Greenfield Holdings Corp. and Amritpal Singh Gill**

Respondents (Defendants)

And between:

**Docket:** 1001 10545

**Xpress Lube & Car Wash Ltd.**

Appellant (Plaintiff)

- and -

**Birinder Singh Khangura, Vincent Lee,
Gurdeep Gill, Kiran Dhaliwal, Gloria Tang,
Longbow Financial Corp., Greenfield Holdings Corp.
and Greenfield Financial Planning Ltd.**

Respondents (Defendants)

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**Reasons for Decision
of the
Honourable Mr. Justice J. T. Eamon**

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## I Overview

[1] The corporate dispute underlying the two Actions between the Plaintiff and Defendants has been ongoing for the past 12 years. The Plaintiff brought the first Action in 2009, and the second Action in 2010. By the fall of 2018, the pre-trial questioning of the Defendants remained incomplete and the Actions had not been entered for trial. The Defendants applied to Master Robertson QC for an Order that the Actions be dismissed because of the Plaintiff's delay in prosecuting them.

[2] Master Robertson QC found inordinate, inexcusable and prejudicial delay. He dismissed the Actions under Rule 4.31 of the Alberta Rules of Court. He refused to dismiss the Actions under Rule 4.33 because the Defendants had not waited a period of three years from the date that the Actions had been significantly advanced before filing their applications. His reasons are reported at ***Xpress Lube & Car Wash Ltd v Gill***, 2019 ABQB 326.

[3] The Plaintiff appeals Master Robertson's decision. It says that one of the Defendants destroyed certain electronic records of the Plaintiff. It claims this seriously hampered its prosecuting the Actions, so the resulting delay was not inordinate. If the delay was inordinate, then it was excusable for the same reason. Further, dismissing the Actions would be inappropriate, because a Court should not reward people who destroy records, the Actions raise meritorious issues, and the Defendants have not been significantly prejudiced by the delay.

[4] The Defendants say that delay was not caused by alleged destruction of records, the delay is inordinate and inexcusable, they have been significantly prejudiced by the delay, and the Actions should be dismissed under Rule 4.31 or alternatively Rule 4.33.

[5] Although this proceeding is technically called an appeal, it is a new hearing. I have therefore re-read all the materials before Master Robertson QC together with his extensive written reasons, the new evidence provided by the Plaintiff, and the parties' very lengthy written arguments on the appeal. I also heard extensive oral submissions. Mr Vogeli QC (who represented the Plaintiff on the delay applications but not in the underlying litigation giving rise to those applications) thoroughly argued the case for his client, but I agree with much of Master Robertson's reasoning and the result.

[6] In summary:

(a) The Plaintiff made very serious allegations of misconduct. In late 2012 it decided it would not prosecute the Actions, and it did almost nothing to advance these actions after May 2013. Instead, it left the Defendants under the suspicion and stress of lawsuits. In the circumstances the delay was inordinate.

(b) There is no excuse or justification for the delay.

(c) The Plaintiff did not rebut the presumed prejudice arising from inordinate and inexcusable delay. Further, the Defendants were likely prejudiced in the Actions by the death of two potential witnesses. The Plaintiff did not rebut these prejudice concerns.

(d) There is no good reason to exercise my discretion to allow the Actions to continue. The Defendants have been prejudiced in their defence of the Actions and there is no means to remedy that prejudice short of dismissing them.

[7] Therefore, I dismiss the appeals. It is not necessary to deal with the Defendants' alternative position that Master Robertson QC should also have dismissed under Rule 4.33.

[8] The Master also awarded the Defendants enhanced costs of the Actions to address the Plaintiff's serious litigation misconduct. The Plaintiff also appeals these costs awards.

[9] While I do not agree with all of the Master's reasons on costs, I agree that the Plaintiff must pay double costs under the Rules from service of formal offers to settle in 2011, and that costs at some point should be further increased to solicitor and client costs to denounce the Plaintiff's serious litigation misconduct and deter others from such behaviour. I have made modifications to the date where solicitor and client costs commence and the amount of costs for reasons explained in Part VI below.

## II Facts

[10] Xpress is a carwash and automobile lubrication business which commenced operations in 2002. It was originally owned by four corporations, each holding 25% of the shares. These corporations were controlled, respectively, by: the Defendant Gurdeep Gill; the Defendant Khangura; the Defendant Lee; and Mohinder Pal Dhillon and his brother Kulwant Dhillon.

[11] During the period leading up to the events in issue in the 2009 Action, each shareholder group had a director on the Board: Mohinder Dhillon, Lee, Khangura and Gurdeep Gill. Each of these individuals from time to time was involved in the operations and management of the business.

[12] In late 2007 or early 2008, the other shareholders came to suspect Gurdeep Gill of misappropriating funds from Xpress during the time he managed the car wash. Mr Gill denied, and still denies, the allegations. In March 2008, the other shareholders removed him from the Board. He was replaced by Kulwant Dhillon, and the Board then consisted of two directors from the Dhillon group, and one each from the Lee and Khangura groups.

[13] Issues soon arose between the Dhillon group on the one side, and the Lee and Khangura groups on the other side. The Board became deadlocked.

[14] In November 2008, the Lee and Khangura groups sued the Dhillon group seeking a corporate oppression remedy. This led to a court ordered bidding process and sale of Xpress' shares. The Dhillons were the successful bidders. On June 16, 2009 the Court ordered the Dhillons to close the transaction and acquire all the shares of Xpress.

[15] Following its acquisition by the Dhillons, Xpress immediately commenced litigation against its former directors and officers (other than the Dhillons) and other individuals related to them.

(a) June 16, 2009: Xpress sued Gurdeep Gill alleging misappropriation of monies from Express over the period 2004-2007.

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(b) November 2, 2009: Xpress amended its 2009 action to sue the other Defendants. This action alleges:

(i) Gurdeep Gill misappropriated monies from Express.

(ii) Khangura and Lee delegated responsibility for some of Xpress' operations to Gurdeep Gill without the Board's permission; failed to effect supervision and systems to deter or detect misappropriation; acted in a conflict of interest in unspecified ways; breached their duties to Xpress of honestly and good faith in unspecified ways; failed to cooperate with the investigation of Gill's alleged misappropriation or frustrated the pursuit of the misappropriated funds from Gill.

(iii) Tang (Lee's spouse), Longbow and Greenfield were retained as external financial consultants of Xpress. They prepared inaccurate financial information; failed to detect misappropriation; and failed to warn Xpress of irregularities or concerns.

(iv) Amritpal Singh Gill (Gurdeep Gill's nephew) had access to Xpress' cash box. As Master Robertson pointed out in his subsequent decision on costs, the Plaintiff effectively characterized this individual as Gurdeep Gill's accomplice.

(c) July 16, 2000: Xpress sued some former directors of Xpress (Khangura, Lee and Dhaliwal [Gurdeep Gill's daughter]), and Xpress' alleged financial consultants (Tang, Khangura, and companies related to Lee and/or Tang [Longbow and the Greenfield entities]) alleging:

(i) The directors and officers mismanaged Xpress.

(ii) The financial consultants prepared inaccurate financial information, failed "to apply their expertise to assess the reasonableness of the financial information", and failed to warn Express of irregularities or concerns with respect to financial information.

[16] The allegations in the 2010 Action span (as Master Robertson correctly concluded) the period 2002 through 2009.

[17] Some of the director and officer Defendants in the 2009 and 2010 Actions added the Dhillon brothers as third party Defendants on the basis that if they are found to have breached duties as directors and officers of Xpress, then the Dhillon brothers breached the same or similar duties they owed to Xpress and should contribute to the loss.

[18] The parties agreed to consent orders dated January 12, 2011 establishing a litigation plan in both Actions. The plan deadlines for completion of pretrial steps were identical for each Action. These plans provided for completion of pleadings January 31, 2011; Plaintiff's affidavit of records February 4, 2011; Defendants' affidavits of records March 4, 2011; Third parties' affidavits of records April 11, 2011; questioning to take place the week of May 2, 2011 and

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during June 2011 if needed; all responses to undertakings and further questioning completed by July 15, 2011; and, request to schedule a trial date by July 29, 2011. Each plan also contemplated pending security for costs applications (ultimately decided by Hall J's decision of July 11, 2011).

[19] Most of the deadlines for questioning were rescheduled into mid-2012. Eventually, most of the first round of questioning was completed by October 2012. The last of these examinations were those of the Dhillons on October 22-25, 2012, at which time the Dhillons gave undertakings to provide additional information.

[20] In early 2012, an issue arose over privilege claims to 18 documents belonging to Lee. These were eventually (in early 2013) referred to Mr Clarke Hunter QC as arbitrator. He issued his decision on these documents on May 17, 2013.

[21] In 2015, counsel for the Lee Defendants informed the Plaintiff that they had made incorrect claims of privilege over two documents that were subject to the arbitration. The Plaintiff says these documents "have yet to be properly disclosed in an Affidavit of Records."

[22] Also, an issue arose over alleged deletion of electronic records from the Plaintiff's computers. The deletions resulted from Lee's use of, and management of electronic records on, Xpress' computers in the 2009 timeframe. Counsel flagged the issue in January 2012, and discussed it in the months leading up to Lee's examination. In June 2012, Lee was examined by counsel for the Plaintiff in pre-trial questioning where this issue could be fully explored. (The Plaintiff points out that the Defendants may not rely on the content of this transcript as proof of the facts therein: Rule 5.31. I agree and I have not considered its contents as evidence on the appeals.)

[23] The parties did not further discuss the records deletion issue after Lee's pre-trial questioning. It was next raised by Xpress in March 2019 in response to the Defendants' applications to dismiss the actions for delay.

(a) The Dhillons assert that Lee deleted surveillance, corporate accounting and business records pertaining to Xpress.

(b) Lee acknowledged that he had deleted some records in the ordinary course after making a copy of them, but no electronic records were destroyed or unavailable. His counsel refers to Lee's evidence that he deleted surveillance video to make space on Xpress' computer for other business purposes after copying the videos to an external hard drive; the videos were produced in the action from the external hard drive; he delivered copies of the accounting and business records to Xpress in connection with the court-ordered share sale in 2009; and Lee made a detailed analysis of lists of the records showing no records are missing.

(c) The Plaintiff disputed Lee's position, particularly in relation to financial records, by further affidavit from Kulwant Dhillon filed October 16, 2019.

[24] Master Robertson QC accurately described the evidence on the question whether the alleged records deletion delayed the actions beyond 2012:

> [83] But there is absolutely no detail of what Xpress has done in the last seven years, and how that has been delayed by the defendants. There is no list of

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> consultants contacted, attempts made to recover, what the barriers have been, and who is left on Xpress' list of possible consultants. There is no explanation why so much time has passed, and there is no explanation of what is going to happen in the future that has not happened yet.

[25] Master Robertson QC concluded that the alleged deletion of records did not explain any delay past mid-2012.

[26] Following the release of Master Robertson's reasons, Kulwant Dhillon swore his third affidavit (filed on October 16, 2019, shortly before the appeal hearing date) asserting, again, that records deletion issues have delayed and impeded Xpress' prosecution of the actions.

[27] This new evidence adds little detail to Kulwant Dhillon's previous assertions that the deletion issues significantly delayed the action. He exhibited a few emails between the Plaintiff and a forensic consultant between May 10 and June 8, 2012. These emails do not suggest there was any significant amount of deleted data; that the circumstances of deletion were suspicious; or that the consultant was ever instructed to complete, or did complete, its investigation and forensic report as it offered in its June 8, 2012 email. The email string ends inconclusively on June 8, 2012.

[28] Mr Dhillon further implies that the impact of the alleged deletions extends past 2012. He deposed in his affidavit filed October 16, 2019:

> As a result, of the lack of complete documentation, Xpress has had to regularly re-evaluate its course and change its strategy in pursuing its claims against the Defendants.

However, the record does not contain any sworn evidence or supporting records indicating that the Plaintiff did any work after mid-2012 on required strategy arising from deleted records.

[29] I turn to whether I can place weight on Kulwant Dhillon's general assertion or whether I might infer from his vague evidence that the Plaintiff was hampered in prosecuting these actions past mid-2012 by records deletion issues.

[30] The issue of deleted records was discussed among counsel in the spring, 2012. Lee's counsel put forth a fulsome explanation of Lee's handling and management of electronic documents. The Plaintiff's counsel then had a full and fair opportunity to test the explanation in pre-trial questioning, which was conducted in June 2012 following extensive records production by both sides.

[31] The Plaintiff had access to forensic assistance and had the hard drives in question. It had legal representation in the Actions. By the completion of Lee's examination, the Plaintiff could evaluate its options and strategies for prosecuting the Actions. The reality was that the Plaintiff thought records were missing and Lee disagreed. I cannot see any realistic prospect that the Plaintiff needed much time, after mid-2012, to decide how to proceed with its Actions in light of any possible missing records.

[32] Rather, the evidence indicates that Xpress became increasingly disinterested in the litigation in 2012. The record is replete with examples of the Plaintiff failing to respond to Defendants' requests for reasonable procedural deadlines, or doing nothing within in a reasonable time.

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(a) The Plaintiff repeatedly and unilaterally delayed the scheduled pre-trial questioning of Lee, Khangura and Tang. Lee's questioning was eventually held in June 2012. The Plaintiff did not reschedule the twice delayed questioning of Khangura and Tang until it served notices to attend on October 4, 2018, a delay of about 6 years.

(b) On November 6, 2012, Lee's counsel asked the Plaintiff's counsel to respond to the Plaintiff's undertakings given during the October 22-25, 2012 questioning by December 7, 2012. None were provided. Lee's counsel later asked for these responses by January 30, 2013 and observed that he had instructions to request case management if they were not received. None were provided in response to that request, either.

(c) The parties, at the suggestion of Lee's counsel, requested a case management judge on April 5, 2013. The Chief Justice assigned a case management judge on April 9, 2013. The case management judge removed herself on November 25, 2013 because the parties had not contacted the case management coordinator within 90 days of the appointment as requested by the Chief Justice's appointing letter.

(d) The Plaintiff did not continue pre-trial questioning after the Lee Defendants delivered their undertaking responses in July 2012, after the Gill Defendants delivered their undertaking responses in November, 2012, or after the arbitrator released his decision on Lee's privilege claims on May 17, 2013.

(e) The Plaintiff delivered its undertaking responses on October 23, 2015, when the three year deadline under Rule 4.33 was looming and due to expire within days. Almost three years had elapsed since the undertakings were given, and almost two years since the case management judge removed herself.

(f) The Plaintiff did nothing after October 23, 2015 to advance the litigation to the knowledge of the Defendants for almost three years. Then, on October 4, 2018, as the three year deadline imposed by Rule 4.33 again loomed, the Plaintiff unilaterally served notices to attend pre-trial questioning and conduct money on counsel for Khangura and Tang with a proposed litigation plan. The notices required Khangura to attend on October 25, and Tang to attend on October 26, 2018. (In response, the Defendants filed their dismissal applications.)

[33] The Plaintiff's proposed litigation plan - delivered about 6 ½ years after the Court ordered plan came off the rails – provided that all questioning be completed by February 29, 2019; primary expert reports be served by April 30, 2019; reply expert reports be served by July 19, 2019; and the matter be entered for trial by July 31, 2019.

[34] It is apparent that the last minute notices to attend and litigation plan were attempts to avoid the consequences of mandatory dismissal under R 4.33 where an action has not been significantly advanced for a period of three years, rather than indicia of a genuine willingness to

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prosecute the litigation. They are a continuation of the Plaintiff's pattern in this litigation of delay and non-responsiveness.

[35] In summary, by mid-2012 the time had come for the Plaintiff to make strategic decisions about the Actions in light of its belief that records were destroyed and Lee's belief that all historical records were available. Kulwant Dhillon might subjectively believe that the pace of the law suit was affected by the deletion issue after mid-2012 but, on the record before me, any delay past mid-2012 remains unexplained.

[36] Like Master Robertson QC, I do not find it necessary to resolve whether, in fact, electronic records have been lost as a result of Lee's actions. When one reads through the voluminous affidavits and briefs on this issue, it becomes apparent that there is simply no evidence that any of this debate delayed prosecution of the litigation past mid-2012. Notwithstanding the additional affidavit from Kulwant Dhillon on the appeal, I agree with Master Robertson QC that there is no explanation why so much time has passed, and no explanation of what is going to happen in the future that has not happened yet, with respect to allegations of missing records.

[37] Master Robertson QC concluded:

> [88] There is simply no air of reality to the assertion that the intended deletion of records, successful or not, in 2009, which was discovered and dealt with at length in 2012 has led to further delay from 2012 ... until 2018 when these applications were filed.

[38] For the above reasons, I firmly agree with his conclusion.

## III Applicable principles

[39] The standard of review of the Master's decision on this appeal is well established. The appeal is de novo and the standard of review is correctness (***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 12). Where new evidence is provided on the appeal it is necessary to make a new assessment (***Gudzinski Estate v Allianz Global Risks US Insurance Company Limited***, 2012 ABCA 5 at para 24).

[40] The Defendants sought to dismiss the actions under Rules 4.31 and 4.33 of the Alberta Rules of Court. These provide:

> 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.
>
> 4.33(2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

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> (a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or
>
> (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.
>
> (3) If the Court refuses an application to dismiss an action for delay, the Court may make whatever procedural order it considers appropriate.
>
> ...
>
> (10) Rule 13.5 [extension of time] does not apply to this rule.

[41] It is well established that these rules must be interpreted and applied in light of the foundational rules in Part 1 of the Rules. These include that:

(a) "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" (Rule 1.2(1)).

(b) The Rules are intended to be used to "facilitate the quickest means of resolving the claim at the least expense" (Rule 1.2(2)).

(c) The "intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it." (Rule 1.2(4)).

[42] Under Rule 4.31(1)(a) the Court may dismiss an action for any delay if there is "significant prejudice". If the delay is found to be "inordinate and inexcusable", then Rule 4.31(2) creates a presumption of "significant prejudice". Under either part of the rule, significant prejudice is a precondition to dismissal for delay (***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at para 2).

[43] ***Transamerica*** summarized the reason for the design of the rules to resolve claims in a timely and cost effective by quoting from ***Humphreys v Trebilcock***, 2017 ABCA 116 at para 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 - 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. People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate and not allow stale actions to survive. 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. Litigation

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delay is a corrosive force in a free and democratic state committed to the rule of law. (Footnotes omitted)

(I have added the underlining in the above quotation).

[44] In ***Transamerica*** the Court continued:

> This passage outlines some of the policy reasons why we have limitation periods for commencing claims, and specific rules like R. 4.31 and R. 4.33 governing delay in prosecuting those claims once they are commenced.

(***Transamerica*** at para 14).

[45] The interpretation and application of Rule 4.31 was recently and authoritatively addressed in ***Transamerica***:

> [15] There are numerous decisions of this Court on the interpretation and application of the delay rules. The core source of the legal principles, however, remains in the *Rules of Court* themselves. While general principles have been established governing delay, each action is slightly different. The application of the rules to the particular facts will always engage an element of judicial discretion, reflected in the word "may" found in R. 4.31(1). There are many different ways that a Master or chambers judge can analyze a delay application; there is no universal mandatory formula.
>
> [16] For example, ***Humphreys v Trebilcock*** at paras. 20, 150-6 proposed a six step analysis:
>
> > (1) Has the plaintiff 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?
> >
> > (2) Is the shortfall or differential of such a magnitude to qualify as inordinate?
> >
> > (3) If the delay is inordinate has the plaintiff provided an explanation for the delay? If so, does it justify inordinate delay?
> >
> > (4) If the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the defendant so as to justify overriding the plaintiff's interest in having its action adjudged by the court? Has the defendant demonstrated significant prejudice?
> >
> > (5) If the defendant relies on the presumption of significant prejudice created by R. 4.31(2), has the plaintiff rebutted the presumption of significant prejudice?
> >
> > (6) Having regard to the verb "may" in R. 4.31(1), is there a compelling reason not to dismiss the plaintiff's action?
>
> This approach might be helpful in many cases, but it is not the only way to analyze delay.

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[17] In some respects the test in ***Humphreys v Trebilcock*** merely restates or paraphrases the text of the rule. For example, the second step in the analysis merely asks whether the delay is "inordinate", as specified in R. 4.31(2). The fourth step is one possible way of analyzing whether there has been "significant prejudice". This is not the exclusive way of testing for prejudice, which is inherently a wide-ranging concept. For example, deciding whether the death of a key witness has "impaired a significantly important interest of the defendant" is not the only, or even the most obvious way of measuring the level of prejudice arising from the unavailability of that witness.

[18] There have been many other judicial formulations of the test. Some of them were cited in ***Arbeau v Schulz***, 2019 ABCA 204 (CanLII) at para. 36:

> Whether delay is "inordinate" is "to be determined in light of all of the circumstances of a particular case": *Kuziw v Kucheran Estate*, 2000 ABCA 226 (CanLII) at para. 30. Inordinate delay is that which is "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case": *Kuziw* at para 31 (emphasis added). "As a rule, until a credible excuse is made out, the natural inference would be that (inordinate delay) is inexcusable": *Lethbridge Motors Co v American Motors (Canada) Ltd*, 1987 ABCA 150 (CanLII) at para 12, quoting *Allen v Sir Alfred McAlpine & Sons Ltd*, [1968]1 All ER 543 at 561 (CA).

As noted, ***Kuziw v Kucheran Estate***, 2000 ABCA 226 (CanLII) at para. 31, 89 Alta LR (3d) 232, 266 AR 284 confirmed that inordinate delay simply 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".

[19] Parts of the test in ***Humphreys v Trebilcock*** may be difficult to apply to particular cases. This is particularly true of the first step, whether "the plaintiff has 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". There is such a wide variety in the detail of particular claims, and in the procedural journeys that particular litigation may follow, so as to make this test untenably theoretical.

[20] At the end of the day, there is no scientific method of determining what "point on the litigation spectrum" a reasonable litigant would have reached. Delay must always be a matter of degree. Secondly, the differential between that theoretical standard and any particular case is incapable of precise definition. As noted in ***Allen v Sir Alfred McAlpine& Sons Ltd.***, [1968] 2 QB 229 at p. 268, [1968] 1 All ER 543 at p. 561 (CA):

> It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case . . .

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> The first and second steps of the proposed analysis in ***Humphreys v Trebilcock*** may merely give an artificial air of certainty and precision to the simple question: "Has there been delay?".
>
> [21] The objective of the exercise must be remembered. It is to determine whether the delay is inordinate, inexcusable, or otherwise, has caused significant prejudice to the defendant. Any particular class of proceedings will include some that proceed quickly, some that proceed slowly, and a great many in the middle. In determining the reasonable expectation of progress for the purpose of striking out an action for delay, regard must be had to all categories. Delay is not fatal just because the litigation has not progressed to the point that the "fastest" or even the "average" proceeding of that type would have reached. In order to be struck, the action must generally fall within the slowest examples of that type of proceeding, and it must be so slow that the delay justifies striking out the claim. Further, even very short delays can be grounds for striking the action if significant prejudice has resulted. "Significant prejudice" remains the ultimate consideration.
>
> (Underlining added)

[46] The required pace of the action is also dependent on the type of allegations that the plaintiff makes. In ***Humphries v Trebilcock***, where the plaintiffs alleged that the defendants committed fraud, the Court stated:

> [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.

[47] Although not particularly material in the present case, I note for the sake of completeness that the Court must also be mindful of defence delay (***Transamerica*** at paras 25-31; ***Fraser v Jeffries***, 2019 ABCA 368 at para 19). The same applies to institutional delay.

[48] ***Transamerica*** addressed the concept of prejudice as follows:

> [42] While there has clearly been delay in the prosecution of this action, R. 4.31 requires "significant prejudice" arising from delay before an action will be struck. The text of the rule makes it clear that prejudice is the most important factor in the analysis.
>
> [43] The initial burden of proving prejudice is on the defendant who is applying to strike out the action. However, if the defendant can establish "inordinate and inexcusable" delay, then significant prejudice is presumed: R. 4.31(2). In that event, however, the presumption is still rebuttable: ***Kuziw*** at para. 50; ***Ravvin Holdings Ltd v Ghitter***, 2008 ABCA 208 (CanLII) at paras. 38-9, 44, 437 AR 66, 96 Alta LR (4th); ***Humphreys v Trebilcock*** at para. 155. It is still open to the plaintiff to show that, despite the presumption, there is insufficient prejudice to warrant striking out the action.

[49] In deciding whether to exercise its discretion to dismiss an action for significant prejudice, the Court should consider the nature of the prejudice and its impact on the parties and the action. The ***Transamerica*** court stated that "[w]hether or not to dismiss for delay turns on prejudice, indeed substantial prejudice" (at para 50). ***Humphries*** reasoned that "if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to

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dismiss the nonmoving party's action?" (at para 156). Again, Rule 1.2(4) provides that the intention of the Rules is that the Court, when exercising a discretion to grant a remedy, "will grant or impose a remedy proportional to the reason for granting or imposing it".

[50] Therefore, in deciding on a remedy, the Court should consider the nature of the prejudice (whether the prejudice is reputational or other non-litigation prejudice or is litigation prejudice), the impact of prejudice (such as whether the case is largely document-based), and whether there are means to remedy the prejudice short of dismissing the action.

## IV Application of Rule 4.31

### (a) Inordinate delay

[51] I agree with Master Robertson's conclusion that the delay in the Actions is inordinate.

[52] The bulk of pre-trial proceedings in many actions relates to historical records production and pre-trial questioning. Alberta provides for wide-ranging pre-trial records disclosure and questioning, including of current and former officers and employees. In many law suits, this gives rise to lengthy pretrial procedures. Management of electronic records may often be time consuming, examinations of former officers and employees may consume months or years of time, and disputes may arise over disclosure obligations relating to specific categories of information.

[53] But this is not such a case. The claims related to misappropriation of funds from, and mismanagement of, a closely held business. There is nothing to indicate that preparing the claims for trial would require lengthy pre-trial examinations of numerous individuals. There were no pending records disclosure issues, except the Plaintiff's refusal to comply with the timelines for records disclosure in the 2009 Action, the alleged records deletion issues and (later) the privilege claim.

[54] None of the circumstances suggested a need for lengthy pre-trial disclosure procedures. This is confirmed by the parties' agreement, by consent orders, in January 2011 that all records disclosure and examinations were to be completed by July 15, 2011. These orders were agreed to by the Plaintiff with knowledge of the records deletion issues which it now claims hampered the progress of the litigation. Kulwant Dhillon's latest affidavit includes that the Plaintiff consulted data restoration professionals in 2009 with respect to the deleted records including financial records.

[55] It might be that the Plaintiff underestimated the time required to complete pre-trial examinations, but that is speculation. The Plaintiff does not say that anywhere in its materials. It does not explain the departures from the court ordered litigation plans. It does not explain why it unilaterally cancelled many pre-trial questionings in 2011.

[56] Even if I assumed that the Plaintiff underestimated the impact of records deletion issues when it agreed to the consent orders, the Plaintiff should have diligently moved forward in June 2012. By then, the Plaintiff had ample time to choose its course in light of its belief that records were deleted.

[57] But the Plaintiff continued its dilatory approach to the litigation. It failed to answer its undertakings from the October 2012 examinations and failed to tell the Defendants when it would do so. Mr Kruger's requests for the undertakings went unanswered.

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[58] Once it had the arbitrator's decision, it ought to have moved to quickly finish the pre-trial procedures. But its failure to deliver its undertakings continued. It didn't arrange any further examinations in a timely way, or at all. It didn't take advantage of the appointment of a case management judge to iron out any other issues that might have concerned it. It simply did nothing.

[59] In 2015, almost three years to the day of the 2012 examinations, it delivered undertaking responses. But it did nothing more. It didn't ask to complete examinations of the Defendants. At this point Khangura and Tang had never been examined, yet by now more than six years had passed since the 2009 Action was commenced.

[60] In October 2018, again almost three years to the day of the Plaintiff's delivery of the undertakings, the Plaintiff served notices to attend for Tang and Khangura and a proposed litigation plan.

[61] The Plaintiff's counsel submits the Plaintiff's activity following October 2012 was "behind the scenes" relating to the records destruction issues. The evidence does not support that inference, as discussed earlier. I find that the Plaintiff did nothing to advance this litigation over that period, apart from the delivery of undertaking responses in a step obviously designed to avoid mandatory dismissal.

[62] The Actions are particularly apt to expose Defendants to prejudice from stress, prejudice to reputation, and prejudice from stale or lost evidence. The Plaintiff alleged theft against the Gills. Breach of professional responsibilities by Khangura and Tang. Breach of fiduciary duty by many of the Defendants.

[63] In ***Jacobs v McElhanney Land Surveys Ltd***, 2019 ABCA 220, the Court observed:

> [69] This interest in timely dispute resolution, no doubt, is attributable to the emergence of "a widespread belief among common law lawyers and judges, litigants and the general public that actions take too long and are too expensive."...
>
> [71] Judges also appreciate that the general public is dismayed and dissatisfied with the slow pace at which some plaintiffs prosecute actions and the barriers recalcitrant defendants can set up to thwart plaintiffs.... They know that they may have to actively manage the litigation process for some actions.

[64] Tang and Khangura may rightly ask, what system of justice forces them to wait 8 years to be examined in a pre-trial questioning? All Defendants may pose this question: what system of justice forces them to wait 8 years to complete pre-trial procedures originally scheduled for a fraction of that time? Why must they wait so many years for a trial over these serious allegations calling their character and honour into question?

[65] Inordinate delay is that which is "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case". The Plaintiff caused delay almost from the outset of the litigation, in failing to deliver its affidavit of records and unilaterally cancelling examinations. That was unreasonable, and contrary to the foundational principles of communication and facilitation under Part 1 of the Rules. But the delay occurring after Mr Kruger demanded the Plaintiff commit to a date to deliver its undertaking responses through late October 2018 went far beyond unreasonable. All the Plaintiff did was the minimum necessary, by participating in the arbitration over a few records, which had been discussed in

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2012, and signing a letter requesting case management. The delay was much in excess of the Plaintiff's earlier dilatory conduct and among the slowest examples of litigation progress. The delay past late 2012 was inordinate.

**(b) Inexcusable delay**

[66] Was there an excuse for the delay? The answer is no.

[67] As I discussed earlier, there is no air of reality to the suggestion that records deletion issues hampered the litigation past mid-2012. I am mindful that two records were provided by Lee in 2015 after Lee realized an error in his earlier privilege claim (para 21 above). Counsel's submissions and evidence do not indicate that this error hindered the Plaintiff in prosecuting the action. Nor do they suggest the records were not informally provided when the error was identified. Nor did this event apparently spur the Plaintiff to do anything.

[68] There was no defence delay, with the exception of the Gills' delay in delivering undertaking responses (which I will address in the next paragraph). The Defendants otherwise promptly carried out their procedural obligations with minor, routine extensions to such steps as filing pleadings. They promptly applied for security for costs and diligently prosecuted those applications. They quickly made their representatives available for pre-trial examinations and cooperated in booking those examinations. Indeed, the progress in the Actions before May 2013 was largely because the Defendants forced or encouraged the Plaintiff to move along. Both before and after May 2013, the Defendants discharged their procedural obligations, complied with the foundational principles by seeking case management in response to the Plaintiff's failure to commit to the defence requests to answer its outstanding undertakings, and did not fail to cooperate or respond in any way.

[69] The delay in the delivery of the Gills' undertaking responses is unexplained, but the Plaintiff does not assert defence delay arising from them and there is nothing on the record to suggest this delay impacted the progress of the Actions. I conclude this specific delay is immaterial.

**(c) Prejudice**

[70] The Defendants are presumed to have suffered significant prejudice because the delay was inordinate and inexcusable (Rule 4.31 (2)).

[71] Has the Plaintiff rebutted the presumption of significant prejudice? For the reasons set out below, I find that (1) the Plaintiff did not rebut the presumption, (2) the Defendants proved actual, substantial litigation prejudice, and (3) the Plaintiff did not prove circumstances alleviating the serious impact of the litigation prejudice.

[72] I will deal first with non-litigation prejudice.

[73] Some of the Defendants deposed to the stress and strain of living under the threat of this litigation for so many years. I accept their evidence. It is plausible, given the lengthy duration of this dispute and the allegations of misconduct levelled against them.

[74] Some Defendants deposed that the litigation adversely affected their health. The Plaintiff disputes that evidence, noting some Defendants had pre-existing medical conditions and there are no medical reports in evidence. I agree with the Plaintiff that it is difficult to assess the cause of health issues based on the present evidentiary record, particularly in a Chambers proceeding. I

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do not think, though, that a delay application should devolve into a medical assessment of the Defendants. It is enough to accept that the litigation is causing them undue stress and strain.

[75] Turning to litigation prejudice, the Defendants Lee, Gill, Khangura and Tang deposed to deteriorating memories from the passage of time. Their evidence is plausible, given the duration of time passed, the witness' age (where that was provided), the wide ranging allegations in the 2010 Action which would need to be answered, and the fact the Plaintiff's witnesses during pre-trial questioning in 2015 frequently (Mohinder Dhillon, approximately 60 times and Kulwant Dhillon, approximately 85 times) answered that they could not recall information.

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[76] I agree that ongoing deteriorating memories of witnesses is a serious concern in this case. Given the allegations, it will be necessary for witnesses to attempt to address numerous events occurring many years ago, and explain their involvement therein, using their memory. For example:

(a) The mismanagement allegations include inappropriate pricing for services offered by Xpress to the public. Pricing would depend on numerous factors including the state of the market, the competition's pricing, and the cost of services from suppliers for things such as chemicals. Witnesses may have to speak to their understanding of such matters at the time, including discussions with sales representatives for suppliers or their information about the competitions' product and pricing.

(b) The allegations against Tang and Khangura include that they were external financial consultants, had overall responsibility (owing to their "professional backgrounds") to prepare financial and tax records for Xpress, had supervision, oversight and management of Xpress' financial affairs, and owed Xpress an obligation to "apply their expertise to assess the reasonableness of financial information provided by Xpress." Resolving these issues would include an assessment of their professional judgment. This is a typical situation where one's memory about one's professional conduct is usually important.

(c) One Defendant was sued for having acted as an interim director for a period of five months during the shareholder litigation in 2009. She may have had a steep learning curve in comparison to a director who had been involved for many years, and likely would need to rely on her memory, and the memory of other participants in the management and supervision of Xpress' business, to place her participation as a director in context and defend allegations of mismanagement.

(d) The misappropriation claim against Gurdeep Gill is partly based on car wash water consumption records and a purported close relationship between water usage and cash revenue. As discussed below, this likely requires witnesses to recall and explain specific events to help dispel the inference which the Plaintiff seeks to draw from the amounts of water consumed in the car wash.

[77] In coming to this conclusion, I have carefully read the draft report prepared by an accounting services firm in 2008 on which the Plaintiff relies in support of its claim that Gurdeep Gill misappropriated cash from the business.

[78] Much of the car wash side of the business collected cash. The majority of the car wash business consisted of coin operated machines and a vacuum system to move the coins to a lock box. The business also included a machine that could accept bills and exchange them for coins to be used by customers to pay in the wash bays. The draft report analyzed revenue loss based on a purposed close relationship between gross revenue and water consumption, and the ratio of $1 and $2 coins to $20 bills in the company's bank deposit receipts during various periods. These periods included the time when Gill managed the car wash (September 2004 through July 2007), and the periods before and after as comparisons.

[79] I was not satisfied that this draft report shows the misappropriation case is primarily documents based. The report is heavily qualified: (1) the authors did not interview Gill but did interview Lee, Khangura and Mohinder Dhillon; (2) the investigation was heavily dependent upon the completeness and integrity of the documentation provided to the authors; (3) the report was subject to revision should additional information come to light after September 2008. Also, Mohinder Dhillon stated in pre-trial questioning that the accounting firm did not receive all the information it requested and therefore suspended work on the matter.

[80] It is apparent from the report that there are matters that would need to be investigated to ascertain whether the draft conclusions were reliable. For example, whether different managers had different operational practices that impacted water usage (such as frequency of cleaning the bays with water) and whether there were changes over time to the amount of water dispensed for each dollar of wash time purchased by a customer.

[81] Moreover, the accounting firm relied on oral representations from Lee, Khangura and Mohinder Dhillon and noted it had not interviewed Gurdeep Gill. I presume that if the firm saw it necessary to mention this, it felt it was material. The report is not merely documents-based.

[82] All of this suggests that Lee, Khangura, Mohinder Dhillon, and Gill, and perhaps others, would have knowledge impacting the analysis which is not reflected in water use and deposit records. Assume for a moment that the accounting services provider remains willing to complete this old draft report. The witness' memories of car wash operation practices would probably significantly affect the weight of the report or help explain away the inferences which the Plaintiff would invite a trial judge to draw from the circumstantial evidence therein.

[83] The Plaintiff did not rebut the concerns over deteriorating memories, or demonstrate that this is mainly a documents-based case which would alleviate these concerns.

[84] The Defendants further submit that three material witnesses died during the delay period.

(a) The first worked for Xpress as a technician on the lubrication side from 2006 until January 2009, when he was terminated for taking money from Xpress. He passed away in November 2013.

(b) The second represented a supplier/installer/maintainer of car wash equipment, and is said to have been familiar with the function and limitations of Xpress' equipment, and local industry and business conditions. Further, he could speak to frequent vandalism of the car wash machines which could have led to opportunities for theft. Therefore, his evidence could have assisted in understanding the revenue variations which are the part of the basis of the

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allegations of theft against Gurdeep Gill. He passed away in late 2014 - early 2015.

(c) The third worked as a sales representative for a chemicals supplier who sold specialty lubricant chemicals to the Xpress. He is said to have been familiar with the car wash and lube shop operations and could speak to the quality of sales management by the Defendants. He passed away in July 2017.

[85] Kulwant Dhillon disputes the significance of these witnesses in his affidavit evidence.

[86] I am not satisfied that there is much prejudice from the passing of the first witness. His involvement with the allegations appears to have been peripheral. His evidence would likely have been lost even if the Actions had proceeded in a timely way, therefore any prejudice was not attributable to the delay as required under case law (***Ravvin Holdings Ltd v Ghitter***, 2008 ABCA 208 at paras 39, 47).

[87] I am satisfied the Defendants were prejudiced by the passing of the supplier representatives.

[88] The trial would likely have been held in 2014, or 2015 at the latest, had the matter been properly prosecuted. Therefore, the Defendants would have been aware well before then of the nature of any expert analyses the Plaintiff proposed to rely on to prove the misappropriation claim. There was a good prospect that the second witness' evidence could have been preserved or heard by the trial judge, before that witness passed. The third witness would have been available, and the Defendants could have called him to help defend the mismanagement allegations. In disputes among business partners, independent evidence from third parties is frequently useful in deciding factual disputes.

[89] Lee further deposed that over the years he has lost contact with other potential witnesses who could speak to the management and operations of the businesses. If found, they may also have suffered fading memory. This aspect of prejudice is too speculative to have any part in the analysis. Lee did not provide any evidence of who these individuals were, their role, or what they could say.

[90] Similarly, Lee claims the passage of time prejudiced the ability of expert witnesses to prepare expert evidence. There is nothing from an expert to substantiate this, and as a judge I am not able to guess about a specific expert's ability to undertake a historical analysis about the management of vehicle service facilities.

**(d) Whether to dismiss the Actions**

[91] The Plaintiff submits there are compelling reasons not to dismiss the Actions.

[92] The Plaintiff submitted that the Defendants' destruction of records should not work in their favour. I reject this argument. I have found the records deletion allegations do not explain any delay past mid-2012.

[93] The Plaintiff submitted, particularly during oral submissions, that the Actions are not frivolous and ought to be heard on their merits. Among other things, the Plaintiff points to the draft report mentioned earlier and some disciplinary actions taken by professional regulators against two of the Defendants.

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[94] In turn, the Defendants argue that the Actions have no merit; that the Plaintiff cannot even explain the quantum of damages that it claims; that there is no rationale for the claim against Dhaliwal, who served as an interim director for a few months in 2009.

[95] The Plaintiff also submits that I should impose strict timelines rather than dismiss the Actions.

[96] I do not find it appropriate to attempt to assess the merits of the claims. A Court might well take into account a lack of merit, in the sense of a claim which lacks serious issues to be tried. As in interlocutory injunction cases, the serious issue standard would be a relatively easy standard to meet. Attempts in Chambers to make a further assessment of the merits are generally inadvisable because they are not productive given conflicting evidence. They are also mostly unnecessary and impractical in delay applications. If the Defendants have been substantially prejudiced in their defence, there is little point to attempting to assess merit of the Plaintiff's case.

[97] In this case, there is very little evidence concerning the merits apart from the old, draft report concerning misappropriation allegations against a single Defendant. I am not prepared to conclude that the Actions have no merit on the limited record before me.

[98] The real issue is that the substantial litigation prejudice cannot be undone. The Plaintiff has irreparably and substantially prejudiced the Defendants' ability to defend themselves. Considering the matter as of October 2018 when the applications were filed, these Actions were at least two years, and likely three years, from trial. The quality of the evidence would naturally continue to deteriorate after October 2018. In these circumstances, the Actions must be dismissed.

## V The Rule 4.33 applications

[99] Master Robertson QC found that the last thing that significantly advanced the Actions before the Defendants filed their applications under Rule 4.33 (on October 17, 2018) was the Plaintiff's delivery of undertaking responses on October 23, 2015. The three year period in which to significantly advance the Actions expired October 23, 2018. The Plaintiff's service of a proposed litigation plan and notices to attend questioning on October 4, 2018 did not significantly advance the Actions.

[100] The Actions were doomed to fail under Rule 4.33 because the notices proposed that the examinations commence after the three year period expired. The Defendants could have ignored those notices and refused to participate. However, the Defendants filed their applications to dismiss on October 17, 2013. The issue therefore arose whether the Defendants saved the Plaintiff's Actions under Rule 4.33 by applying prematurely.

[101] Master Robertson QC reasoned (at para 68) that the period of delay must be determined by looking back from the date the applications were filed, not heard, citing ***Ma v Kwan***, 2019 ABQB 89 at para 22. Three years had not elapsed from October 23, 2015 until the date the applications were filed. Therefore, he refused to dismiss the Actions under Rule 4.33.

[102] The Defendant's counsel say they were obliged to communicate to the Plaintiff that they were not responding to the Notices to Attend because they were not required to attend questioning after the three year period expired. They should not be penalized for communicating candidly as the Rules require. I was invited if necessary to depart from case law because it was

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wrongly decided, or distinguish it because there was nothing the Plaintiff could have done in the few days remaining after October 17, 2018 to advance the litigation.

[103] Case law supports Master Robertson's conclusion that time is measured from the filing date of the dismissal application. See ***Flock v Flock Estate***, 2017 ABCA 67 at para 17(8), and numerous authorities in this Court, including ***Ma v Kwan***, ***Kirkness v Emberley***, 2019 ABQB 159 at para 24 and the numerous authorities cited in footnote 9 of the ***Kirkness*** decision. ***Flock*** is quite specific about the matter:

> ... In addition to the principles affirmed in ***Ro-Dar*** [***Consulting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123] the following additional principles relating to the interpretation of rule 4.33 maintain effect:
>
> ...
>
> 8. The relevant period of delay must be determined by looking back from *the date the application was filed*, not heard: ***Steparyk v Alberta***, 2014 ABQB 367 (CanLII) at para 5.
>
> (Italics in original)

[104] The Defendant's concern to warn the Plaintiff that they would not attend the examinations is valid. Rule 1.2 obliged them to communicate honestly, openly and in a timely way. However, I did not receive argument of how I could accommodate this case in the face of the decision of the Alberta Court of Appeal in ***Flock***. An attempt to distinguish ***Flock*** is unnecessary in view of my conclusions on Rule 4.31 and I express no view whether it can be distinguished.

[105] The Defendants also submit the Plaintiff's undertakings delivered in 2015 did not significantly advance the Actions. I would need to conduct a contextual assessment of the undertaking responses to determine whether or not they significantly advanced the Actions (***Alderson v The Wawanesa Life Insurance Company***, 2019 ABQB 96 at para 24 and authorities cited therein). I did not receive sufficient argument to attempt that assessment, and the attempt is unnecessary in view of my conclusions on Rule 4.31. Accordingly I express no view on the undertakings in question.

## VI The costs appeal

### (a) Overview

[106] Master Robertson QC subsequently awarded costs of the Actions to the successful Defendants based on Column 4 or 5 of Schedule C (as appropriate), enhanced as follows:

(a) Double costs after the date of service of the first round of formal offers.

(b) 80% of solicitor and client costs to the Lee Defendants and 100% of solicitor and client costs of the Gill Defendants, after service of the second round of formal offers.

[107] The formal offers in these directions were as follows: first round, Lee Defendants on February 14, 2011 and Gill Defendants (other than Amritpal Singh Gill) on November 18, 2011; second round, Lee Defendants on June 8, 2012 and Gill Defendants on June 18, 2012. Master

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Robertson's reasons for this award are reported at ***Xpress Lube & Car Wash Ltd v Gill***, 2019 ABQB 756.

[108] The Plaintiff submits the Master should have awarded Schedule C costs on the applicable column, without any increase. First, the Court should find special circumstances and order that Rule 4.29 does not apply to the formal offers. Second, the Plaintiff is not guilty of reprehensible, scandalous or outrageous conduct which would justify an award of solicitor and client costs.

**(b) The Master's reasons**

[109] Master Robertson concluded that enhanced costs should be awarded from June 2012. He recognized that in ***Humphreys v Trebilcock***, 2017 ABCA 232 (***Humphreys #2***), the Alberta Court of Appeal declined to award enhanced costs merely because the Plaintiff had alleged dishonesty and delayed to an extent that its action was dismissed. But in the present case there was also positive misconduct.

(a) The Plaintiff alleged and failed to prove fraud and dishonesty (misappropriation) against Gurdeep Gill, and alleged and failed to prove Amritpal Singh Gill was an accomplice to this misconduct. It continued these allegations after realizing the allegations very likely could not be proven (or, elsewhere in his reasons, without some serious basis for believing that they are true).

(b) The Plaintiff alleged and failed to prove Gurdeep Gill had destroyed evidence. It continued these allegations after realizing the allegations very likely could not be proven (or, elsewhere in his reasons, after the Defendants provided a reasonable explanation).

(c) The Plaintiff deliberately delayed prosecuting the Actions. This delay was a continuation of delay tactics pre-dating the Actions. It was deliberate. It occurred after the Plaintiff made allegations of dishonest behaviour. It occurred in the face of and while ignoring case management. Later in his reasons, he characterized the Plaintiff's conduct as resolution avoidance.

(d) The Plaintiff did not respond to the Defendants' genuine formal offers to settle.

[110] The Master found that solicitor and client costs were appropriate for steps after service of the second round of formal offers in June 2012 and characterized the Gills as suffering the greater harm than Lee.

> [58] For steps taken after the service of the second formal offer, the costs will be further elevated.
>
> [59] By that stage the plaintiff seemed to dig in its heels to do nothing to move towards resolution so costs from that date forward will be at 100 per cent of solicitor client costs for the Gill Defendants (who were expressly accused of wrong-doing) and Kiran Dhaliwal who was represented throughout by the same counsel, and 80 per cent of solicitor client costs for the remaining defendants.

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[111] In coming to these conclusions, the Master made two key inferences. First, the Plaintiff realized it could not prove the allegations of dishonesty that it made in respect of misappropriation and records destruction. Second, the Plaintiff deliberately delayed the action.

[112] As to the inference that the Plaintiff realized it could not prove the allegations of dishonesty, the Master reasoned:

> [18] Although there has been no finding that the assertions were false, counsel for the Gill defendants makes the point that when someone honestly concludes that $500,000 has been stolen from them, the case is normally advanced quickly, before the trail gets cold and while there is some chance of recovery. The very opposite to that behaviour has been demonstrated here. An adverse inference is appropriate.

[113] This inference was significant because it was akin to the well known category of cases ordering solicitor and client costs where a party alleged fraud, without any reasonable basis (cited in the Master's reasons). The Master stated:

> [24] Here, the allegations about Mr. Gill's supposed behaviour were not actually proven to be untrue, but as I reviewed in my decision, the plaintiff had years to try to show that records had been destroyed and that he was guilty of appropriating funds. After being given a thorough explanation by defence counsel about the computer records, the plaintiff did nothing to try to prove its case. That was part of the delay I discussed.
>
> [25] It might be said that it is even more offensive to a defendant to have allegations of dishonesty made against him and then left unproven, than for the plaintiff to go to trial and not be able to prove them. The defendant now has no opportunity to be fully vindicated. The plaintiff can make the assertion that it had sued for dishonest behaviour, but then explain that the claim was dismissed for other reasons.
>
> [26] That is not a satisfactory result. There must be a consequence to making allegations of dishonesty and then sitting on them, after realizing that very likely they could not be proven.

[114] As to the inference that the Plaintiff's delay tactics were deliberate, the Master considered a variety of circumstances. In his earlier reasons dismissing the Actions, he rejected the Plaintiff's explanation for the delay as lacking an air of reality. In his costs reasons, he mentioned that on two separate occasions the Plaintiff did not take a step until the eve of losing its claim under Rule 4.33, and observed "It is hard to see that happening twice, in the same pair of lawsuits, as anything other than deliberate". He also noted other features, including the Plaintiff's failure to engage the case management judge, and later (at para 55) characterized the Plaintiff's conduct as active resolution avoidance.

[115] In the course of his reasons, the Master also found that the formal offers were genuine offers with the costs consequences under Rule 4.29. He would have awarded double costs from the date of service of the first round of offers had he not awarded enhanced costs.

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**(c) The formal offers**

[116] I will start with the formal offers, because they form part of the backdrop of the litigation misconduct which the Master found. As mentioned, the Master (at para 46 of his reasons) found that the offers were genuine offers which would attract costs consequences under Rule 4.29.

[117] I agree that the formal offers were genuine offers under the Rules.

[118] In order to effect costs consequences under the formal offer rules, an offer to settle must be a genuine offer at the time it was served and remained open for acceptance. It is genuine where it was reasonable and realistic in the circumstances at those times, includes an element of compromise, realistically reflects the relative merit of the parties positions at the time, and was made with a reasonable expectation that it will be accepted, not merely a no risk litigation strategy or tactic. These factors must be examined taking into account all of the surrounding circumstances, subjective and objective, existing at the time the offer was served and remained open. (***Singh v Noce***, 2018 ABQB 950 at paras 21- 22 summarizes the many cases on these points). The onus to show that an offer is not genuine or that there is "special reason" to depart from the presumptive rule of double costs is on the losing party (*ibid* at para 35). A formal offer applies where an action is dismissed for delay (***Humphreys #2***).

[119] The parties completed their records disclosure through affidavits of records as follows: Plaintiff, February 4, 2011; Gurdeep Gill, Amritpal Singh Gill, and Lee, March 4, 2011; Dhaliwal, April 7, 2011; Lee supplemental affidavits of records, February 28, 2012 and June 26, 2012. Questioning occurred on the following dates: the Gill Defendants, November 28-30, 2011; Lee, June 11-13, 2012; the Dhillons, October 22-25, 2012.

[120] Rule 4.28 permits a party to serve a formal offer at any time after a Statement of Claim is filed, with a few specific exceptions which do not apply here. Each offer in the present case offered a money judgment. The lowest offer in any Action was $10,000 and some offers were substantially greater.

[121] The Plaintiff essentially asks me to infer from the timing of the offers that they were not genuine. That is not persuasive because the mere fact someone made an early offer does not suggest it is not a genuine offer.

[122] There is very little information about the quantum or prospects of any claim apart from those relating to the misappropriation.

(a) The misappropriation claim is based on the draft accounting report asserting a relationship between water usage and revenue, and a relationship among various denominations of cash in deposit slips.

(b) Gill denied misappropriation and his counsel offered reasons why the methodology of the draft report may be unreliable.

(c) The Plaintiff has not explained its damages claim for mismanagement allegations, apart from the allegations that a Defendant other than Gill should have discovered and reported Gill's alleged misappropriation.

(d) There is no information why any particular Defendant should have discovered the misappropriation allegations.

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[123] There is not enough evidence to persuade me that the offers were ill informed, unreasonable, or tactical only. The Plaintiff bears the burden to prove special circumstances under Rule 4.29 and it has not discharged that burden.

**(d) Litigation misconduct**

[124] I do not, on the correctness standard, agree with the Master's inference that the Plaintiff realized it likely could not prove the allegations of dishonesty. The record simply does not explain enough about the merits to make that inference. The Plaintiff may equally have decided that the claims were not of sufficient value to justify expensive litigation.

[125] But in any case, I do infer that the Plaintiff resolved in late 2012 that it would no longer attempt to prove the allegations for whatever reason. Further, I agree with the Master that the Plaintiff engaged in deliberate resolution avoidance tactics.

[126] It could reasonably be said this misconduct commenced in mid-June 2012 once the Plaintiff examined Lee and therefore could explore the records deletion issues. I have allowed the Plaintiff the benefit of the doubt, and concluded that this misconduct - to delay justice - started in late 2012 with the Plaintiff's failure to answer Mr Kruger's demands for the Plaintiff's undertaking responses. This tactic continued through 2018. During these times, the Plaintiff had no intention of prosecuting the Actions, yet would not back down. It intended to delay and hinder the just resolution of the Actions. When combined with the allegations of dishonesty levelled at Gurdeep Gill and Amritpal Singh Gill (for misappropriation) and Lee (for document destruction), the Plaintiff committed serious litigation misconduct contrary to the foundational principles of Part 1 of the Rules.

[127] In my opinion, the Plaintiffs should pay double costs from the date of the service of the first round of formal offers for all steps through November 30, 2012; except any step pertaining only to Amritpal Singh Gill will not be doubled until service of the Gill Defendants' second round of formal offers (Amritpal Singh Gill did not serve an offer in the first round).

[128] Thereafter, the quantum of costs will be increased to denounce the Plaintiff's serious litigation misconduct and deter others from engaging in similar tactics.

[129] In ***Secure 2013 Group Inc v Tiger Calcium Services Inc***, 2018 ABCA 110 the Alberta Court of Appeal describes when an award of solicitor and client costs is available:

> [15] Solicitor-client costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct by a party: *Young v Young*, 1993 CanLII 34 (SCC), [1993] 4 SCR 3 at 134, 108 DLR (4th) 193. They are only awarded in rare and exceptional circumstances, and may be available if misconduct occurs in the course of litigation: *FIC Real Estate Fund Ltd v Phoenix Land Venture Ltd*, 2016 ABCA 303 (CanLII) at para 4, 403 DLR (4th) 722. A careful analysis of the facts is required: para 5. *FIC Real Estate* at paragraph 4 endorsed circumstances that may justify such an award:
>
> a. blameworthiness in the conduct of the litigation;
>
> b. when justice can only be done by a complete indemnification for costs;
>
> c. when there was evidence that the plaintiff hindered, delayed or confused the litigation, there was no serious issue of fact or law which required lengthy, expensive proceedings, when the misconducting party was "contemptuous" of the

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aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;

d. when there has been an attempt to delay, deceive and defeat justice, imposed the requirement to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents and failing to produce material documents in a timely fashion;

e. positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond the ordinary order of costs;

f. litigants found to be acting fraudulently and in breach of trust;

g. fraudulent conduct including inducing a breach of contract and presenting a deceptive statement of accounts to the court at trial; and

h. an attempt to delay or hinder proceedings, deceive or defeat justice, fraud or untrue or scandalous charges.

[130] Bielby JA and Wakeling JA provided similar examples in ***Pillar Resource Services Inc v Primewest Energy Inc***, 2017 ABCA 19 at paras 8 and 124. In reading any of these examples, one must not lose sight of the exceptional nature of these awards and the character of the conduct required.

[131] The Master found that Gill was the target of both the misappropriation and records deletion allegations. He awarded the Gill Defendants 100% of their solicitor client costs. In contrast, he awarded the Lee Defendants 80% of their solicitor and client costs.

[132] I concluded earlier that the Master erred by inferring that the Plaintiff realized it would very likely be unable to prove its claims. That inference somewhat overstates the degree of the Plaintiff's misconduct.

[133] In his reasons on costs, the Master stated that the Plaintiff accused Gill of destroying records as well as misappropriation of funds. This is an error – the Plaintiff alleged, as the Master found in his reasons dismissing the actions, that Lee destroyed records. Therefore, the Master may have overstated the impact of the misconduct on the Gills and understated the impact on the Lees.

[134] In my opinion, the Plaintiff's misconduct was serious enough to justify an award of solicitor and client costs. Starting no later than late 2012, the Plaintiff intentionally decided that it would not proceed with the claims and to do whatever minimum was necessary to delay resolution of the case. It left the Gills to live under claims of misappropriation (ie, stealing) and in Gill's case, stealing from an employer or in a position of trust. It impugned Tang's and Khangura's professional reputations. It caused most of the Defendants to live under stress. It delayed justice for the Defendants for over 6 years. It intentionally delayed resolution, for whatever reason, and it should have understood the stress, strain and wasted expense and effort that it would cause. The Defendants should not have to pay lawyers to move such a Plaintiff along. Using a publicly funded, mandatory system in this way was reprehensible.

[135] The Plaintiff's conduct toward both Defendant groups was about equally reprehensible so I would not differentiate their costs awards.

[136] I award each Defendant group 80% of its solicitor and client costs.

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## VII Conclusion

[137] The appeal from the decisions to dismiss the actions is dismissed.

[138] The costs award of the Master is varied as follows:

(a) The Defendants will recover costs on column 4 or 5 of Schedule C as appropriate, as the Master ordered. These costs are doubled from the date of service of the first round of formal offers, except any step solely relating to Amritpal Singh Gill is not doubled unless it occurred after service of the Gills' second round of formal offers.

(b) The Defendants are awarded 80% of their solicitor and client costs of the Action for the period on or after December 1, 2012.

(c) This award does not apply to any step where a previous order provided for some other scale or amount of costs applicable to that step.

[139] The costs of the appeal may be spoken to.

Heard on the 13th day of November, 2019.
**Dated** at Calgary, Alberta this 22nd day of November, 2019.

**J. T. Eamon**
**J.C.Q.B.A.**

**Appearances:**

Grant Vogeli, Q.C. and Garth Paulson
Lawson Lundell LLP
for the Appellant (Plaintiff)

Josef G.A. Kruger. Q.C. and Matthew Schneider
Borden Ladner Gervais LLP
for the Respondents (Defendants) Vincent Lee, Gloria Tang, Birinder Singh Khangura, Longbow Financial Corp., and Greenfield Financial Planning Ltd.

Michael Mysak and Justin Duguay
Bennett Jones LLP
for the Respondents (Defendants) Gurdeep Gill, Amritpal Singh Gill, and Kiran Dhaliwal

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