In the Court of Appeal of Alberta

Citation: Jacobs v. McElhanney Land Surveys Ltd., 2019 ABCA 220

Date: 20190604
Docket: 1803-0315-AC
Registry: Edmonton

Between:

Anthony Jacobs

Respondent
(Plaintiff)

- and -

McElhanney Land Surveys Ltd.

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment of the Honourable Mr. Justice Wakeling and the Honourable Mr. Justice Feehan

Dissenting Memorandum of Judgment of the Honourable Mr. Justice McDonald

Appeal from the Order by
The Honourable Mr. Justice R.A. Graesser
Dated the 19th day of October, 2018
Filed the 21st day of December, 2018
(2018 ABQB 867, Docket: 1303 16767)

Memorandum of Judgment

The Majority:

I. Introduction

[1] This appeal considers the "drop-dead" rule – 4.33(2) of the *Alberta Rules of Court*.[1]

II. Questions Presented

[2] Rule 4.33(2) states that a court must dismiss an action if three or more years "have passed without a significant advance in an action".

[3] Master Schulz held that Anthony Jacobs had not significantly advanced his wrongful dismissal suit against McElhanney Land Surveys Ltd. in the applicable period and dismissed his action.

[4] Justice Graesser came to the opposite conclusion.[2] He set aside the dismissal order.

[5] The chambers judge concluded that three different acts or group of acts each constituted a significant advance in Mr. Jacobs' action.

[6] Justice Graesser held that an application for summary judgment that was never heard qualified as a significant advance.[3] Can an application that is never heard be an advance? A significant advance?

[7] He also characterized a notice to admit to which McElhanney Surveys responded as improper and having no legal effect as a significant advance. Can a notice to admit that has no legal effect advance an action?

[8] Justice Graesser accorded "significant advance" status to a single email from Mr. Jacobs to McElhanney Surveys' counsel asking for potential summary judgment hearing dates that evoked no response.[4] Can an unanswered email regarding potential hearing dates be characterized as an advance in an action? A significant advance?

[9] How does a court measure a "significant advance in an action"? What are the benchmarks?

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[1] Alta. Reg. 124/2010.

[2] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 120.

[3] Id. ¶ 67.

[4] Id. ¶ 114.

III. Brief Answers

[10] None of the three acts or group of acts qualify as an advance.

[11] The parties were not any closer to the resolution of their dispute at the end of the three-year period than they were at its start.

[12] McElhanney Surveys' appeal is allowed and the order Justice Graesser pronounced on October 19, 2018 is set aside. Master Schulz's order dismissing Mr. Jacobs' action is revived. As a result, Mr. Jacobs' action is dismissed under r. 4.33(2) of the *Alberta Rules of Court*.[5]

IV. Statement of Facts

A. History of Mr. Jacobs' Action

[13] On November 26, 2013 Mr. Jacobs filed a statement of claim against McElhanney Surveys and Steve Yanish.[6] He alleges that McElhanney Surveys employed him on May 14, 2012 as a land survey senior party chief to work in northern Alberta and constructively dismissed him on February 26, 2013.[7] He claims $33,721.63 on the basis of quantum meruit for the increased duties he performed between October 2, 2012 and February 26, 2013, and damages of $450,000 representing the remuneration he would have received during the remainder of the contract term.[8]

[14] On January 21, 2014 McElhanney Surveys filed a comprehensive statement of defence.[9] It admits it employed Mr. Jacobs as a land survey senior party chief from May 14, 2012 to February 26, 2013.[10] It set out the terms of his employment recorded in an offer letter and other sources.[11] McElhanney Surveys related the events surrounding Mr. Jacobs' demands that it increase his salary.[12] McElhanney Surveys states that it paid Mr. Jacobs $114,772.45 for his services while employed by McElhanney Surveys.[13] It asserts that Mr. Jacobs voluntarily resigned[14] and that it

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[5] Alta. Reg. 124/2010.

[6] Appeal Record tab 1. Mr. Jacobs discontinued the action against Mr. Yanish.

[7] Id. ¶¶ 1 & 2.

[8] Id. ¶ 4 ff.

[9] Id. tab 2.

[10] Id. ¶¶ 6 & 7.

[11] Id. ¶ 11.

[12] Id. ¶¶ 16-23.

[13] Id. ¶¶ 8 & 9.

[14] Id. ¶ 7.

had the right under its employment agreement with the plaintiff to terminate his employment at any time by providing him with the minimum statutory notice or payment in lieu of notice.[15]

[15] Mr. Jacobs promptly filed a reply – January 27, 2014 – and his affidavit of records – March 24, 2014.[16]

[16] This action is categorized as a standard case, as opposed to a complex case.[17]

[17] On May 6, 2014 McElhanney Surveys served its affidavit of records.[18]

[18] On June 13, 2014 McElhanney Surveys filed a security-for-costs application returnable June 24, 2014.[19]

[19] On June 19, 2014 Mr. Jacobs filed a summary-judgment application returnable June 24, 2014.[20]

[20] On June 24, 2014 Master Breitkreuz stayed "[a]ll proceedings ... until such time as Jacobs pays into Court [$10,000 in security for costs]".[21] He gave Mr. Jacobs thirty days to pay this sum into court.[22]

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[15] Id. ¶ 11.

[16] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 7.

[17] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 4.3(3) ("If, within 4 months after the date of a statement of defence is filed, the parties do not agree on whether the action is a standard or complex case, and the Court does not otherwise order, the action is to be categorized as a standard case").

[18] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 8.

[19] Appeal Record tab 3.

[20] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 8.

[21] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 9. Mr. Jacobs did not argue that this stay had any impact on the outcome of McElhanney Surveys' r. 4.33(2) application. A stay, the duration of which is under the control of the party whose action is stayed, is not a "stay" under r. 4.33(2)(a) of the *Alberta Rules of Court*. *Willard v. Compton Petroleum Corp.*, 2015 ABQB 766, ¶ 40 ("*Carter* can easily be distinguished on the grounds that the action had been stayed until the plaintiff took an identifiable step, which was in its sole power to do in order to move the action forward. The court held that it would be contrary to the purpose of the *Rules* to allow the plaintiff, having failed to take this step, to then hide behind the stay and claim protection from a drop dead application") & *Carter v. Sears Canada Inc.*, 2011 ABQB 732, ¶ 41; 529 A.R. 394, 400-01 ("Where ... the Action has been stayed until the Plaintiff takes an identified step, such as providing an address for service, as is the case here, the Plaintiff has the sole power to take that step and to move the matter forward. ... Having failed to take that step, the Plaintiff cannot now hide behind the Stay and claim protection under Rule 15.4(2)(b). That cannot be the intention of the Rule. It would be contrary to the purpose of the *Rules of Court* set out in Rule 1.2(1), 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"). A stay the duration of which is not under the control of the party whose action is stayed is a "stay" under r. 4.33(2)(a). A stay might be appropriate if the subject

[21] On July 21, 2014 Mr. Jacobs paid $10,000 into court.[23]

[22] On July 21, 2014 Mr. Jacobs filed a second summary-judgment application. It was returnable in masters chambers on July 30, 2014. He also filed a sixty-six paragraph supporting affidavit.[24]

[23] On July 24, 2014 McElhanney Surveys filed an application returnable July 25, 2014 seeking an adjournment of Mr. Jacobs' summary judgment application.[25]

[24] Master Wacowich, in an order pronounced July 25, 2014, adjourned the July 30, 2014 summary judgment application "to a Special Application to be heard by a Justice of the Court of Queen's Bench at the next available mutually convenient date to both parties".[26]

[25] On July 28, 2014 Mr. Jacobs filed an application returnable July 29, 2014 to set aside Master Wacowich's July 25, 2014 order.[27]

[26] The parties appeared before Master Wacowich on July 29, 2014.[28]

[27] Master Wacowich denied Mr. Jacobs' application.[29] But he did order that McElhanney Surveys may cross-examine Mr. Jacobs at a mutually convenient time or failing mutual agreement, at a time determined by the court.[30]

[28] In a September 16, 2014 email Mr. Jacobs informed McElhanney Surveys' counsel that there were available dates in masters special chambers in January and February 2015.[31]

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matter of an action is also the basis of criminal charges against the defendant. E.g., *Demeter v. Occidental Life Insurance Co. of California*, 11 O.R. 2d 369 (Master's Chambers 1975).

[22] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 10.

[23] Id. ¶ 12.

[24] Appeal Record tab 4. The supporting affidavit is not in the appeal record and was not before us.

[25] Id. tab 5.

[26] Id. tab 9.

[27] Id. tab 6.

[28] Id. tab 10.

[29] Id.

[30] Id.

[31] Affidavit of Anthony Jacobs sworn July 25, 2017 and filed July 26, 2017, exhibit B. Appellant's Extracts of Key Evidence A30.

[29] In a September 22, 2014 email McElhanney Surveys' counsel reminded Mr. Jacobs that a Queen's Bench justice had to hear the summary judgment application on account of Master Wacowich's order and helpfully provided Mr. Jacobs with the name and contact information for the justice chambers coordinator.[32] This was a generous act.

[30] After Mr. Jacobs contacted the justice chambers coordinator, he asked, in another September 22, 2014 email to McElhanney Surveys' counsel, if January 22 or 23, 2015 was acceptable.[33]

[31] Counsel responded on September 24, 2014 stating that the proposed dates were not acceptable and that counsel would contact the justice chambers coordinator and provide alternate dates.[34]

[32] In an October 2, 2014 email counsel proposed dates in the last two weeks of March, 2015 and most of April, 2015.[35]

[33] This was not satisfactory to Mr. Jacobs. In an October 2, 2014 email he stated that he would file an "application tomorrow to get the courts to assign a date as soon as possible".[36]

[34] This prompted another October 2, 2014 email from counsel:[37]

> The previous dates you provided were for Masters' Chambers. As you are aware, and as directed by the Court, the matter is to be heard in Justice Chambers and we are to pick dates that work for both parties. In order for the matter to be heard there are required steps that have to happen first. For example, there will be examinations on affidavits, transcripts that will have to be filed in Court and then written briefs that will be due in accordance with the timeline prescribed by the Rules. I have given you dates that work for our office taking into consideration the required steps prior to the hearing. Should you not wish to work out a date between us, and you file an application in light of what I have advised, I will be bringing this email to the Court's attention and asking for costs.

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[32] Id. A31.

[33] Id. A31 & A32.

[34] Id.

[35] Id. A33.

[36] Id.

[37] Id.

[35] Mr. Jacobs did not apply for a court-appointed date and never selected any of the many dates counsel had proposed in her October 2, 2014 email. He provided no explanation for this course of conduct.

[36] Approximately eight months later – on June 1, 2015 – Mr. Jacobs served McElhanney Surveys with a notice to admit facts.[38]

[37] On June 16, 2015 McElhanney Surveys served a response to notice to admit.[39] The key provision asserted that "[g]iven the Affidavit, the Order, and that no cross-examination has taken place, the Notice to Admit is wholly inappropriate".[40]

[38] In the roughly fifteen-month period following June 16, 2015 Mr. Jacobs did not communicate with McElhanney Surveys.[41]

[39] On October 11, 2016 Mr. Jacobs sent an email to McElhanney Surveys' counsel:[42]

> I know it's been awhile since we have communicated but now I am ready to have this special application heard.
>
> I just spoke with Peggy for scheduling and she gave me the following dates: June 6, 7, 9, 13-16, 20-23, 27-30 year 2017.
>
> I am available on any of those dates. Please choose the earliest one so that we will be *within the statute of limitations of 3 years without taking some action*.
>
> As soon as I get a response from you I will call Peggy back to confirm scheduling.

[40] McElhanney Surveys' counsel did not respond.

[41] Even though Mr. Jacobs was aware of the need to take some action in a three-year period, he did nothing.[43]

[42] The Court of Queen's Bench never heard Mr. Jacobs' summary judgment application.

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[38] Affidavit of Steven T. Yanish sworn October 20, 2017 and filed October 23, 2017 exhibit A. Appellant's Extracts of Key Evidence A43.

[39] Id. A58.

[40] Id. A59, ¶ 7.

[41] *Jacobs v. McElhanney Land Surveys Ltd*., 2018 ABQB 867, ¶¶ 107 & 108.

[42] Affidavit of Anthony Jacobs sworn July 25, 2017 and filed July 26, 2017, exhibit C. Appellants Extracts of Key Evidence A35 (emphasis added).

[43] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶¶ 107 & 108.

B. McElhanney Surveys Applied for Dismissal Under Rule 4.33(2)

[43] On July 14, 2017 McElhanney Surveys applied for the dismissal of Mr. Jacobs' action on account of long delay under r. 4.33(2) of the *Alberta Rules of Court* or delay resulting in significant prejudice under r. 4.31(1).[44]

C. Master Schulz Dismissed Mr. Jacobs' Action

[44] Master Schulz dismissed Mr. Jacobs' action for long delay under r. 4.33(2).[45] She did not consider r. 4.31(1).

D. Mr. Jacobs Appealed to the Court of Queen's Bench

[45] Mr. Jacobs appealed Master Schulz's order to the Court of Queen's Bench.

E. Justice Graesser Set Aside the Dismissal Order

[46] Justice Graesser allowed the appeal and set aside the dismissal order.[46]

[47] The chambers judge concluded that there were three steps taken in the three-year period ending July 14, 2017 – July 15, 2014 to July 14, 2017[47] – that constituted a significant advance in the litigation.

[48] The first was Mr. Jacobs' July 21, 2014 application for summary judgment supported by a sixty-six paragraph affidavit and the events it set in motion.[48] Here are Justice Graesser's reasons:

> [75] My conclusion is that the application filed on July 21, 2014 materially advanced the action. The application before Master Wacowich on July 29 materially advanced the action by adjourning it for defence-requested cross-examination and ordering conduct money for McElhanney to question Mr. Jacobs (resolving a dispute over that issue).
>
> [76] The action was further advanced by the correspondence between the parties ... trying to come to agreement on scheduling the summary judgment application.

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[44] Appeal Record tab 7.

[45] Proceedings of February 6, 2018, at 32 ("The onus is on the plaintiff [to move the case towards resolution] ... and the plaintiff has failed to move his case along").

[46] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 120. The order was filed December 21, 2018.

[47] See *Flock v. McKen*, 2017 ABCA 67, ¶ 17; 91 R.F.L. 7th 39, 48 ("The relevant period of delay must be determined by looking back from *the date the application was filed*, not heard") (emphasis in original).

[48] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶¶ 66 & 75.

> Those steps ended on October 2, which I find was when the action stopped being advanced by Mr. Jacobs relating to his summary judgment application.

[49] Justice Graesser opined that it was "incumbent on ... [Mr. Jacobs] to apply to have the summary judgment application set down".[49]

[50] But he did not. The summary judgment application was never heard.

[51] The second step that Justice Graesser concluded constituted a significant advance consisted of Mr. Jacobs' notice to admit facts served June 1, 2015 and McElhanney Surveys' response served June 16, 2015.[50]

[52] The chambers judge noted that McElhanney Surveys did not deny the facts set out in the notice to admit in its June 16, 2015 response to notice to admit.[51] He held that this was an important point:[52]

> [87] McElhanney could have simply responded that the facts are not admitted. The case law says that non-admission is not significant advancement. ...
>
> [88] In this regard, the sticks were moved forward to June 1, 2015 (the Notice to Admit date) or June 16, 2015 (the reply date). Serving the Notice to Admit on McElhanney advanced the action significantly, because McElhanney provided no meaningful response ... within the scope of Rule 6.37(3).

[53] The third step arose when Mr. Jacobs again asked McElhanney Surveys' counsel in an October 11, 2016 email for potential summary judgment dates and the law firm failed to respond:[53]

> [113] ... Failing to answer Mr. Jacobs' correspondence of October 2016 and replying instead in July 2017 with an application to dismiss for delay is not tardiness, but it evidences purposeful delay. ...
>
> [114] In my assessment, because of McElhanney's conduct, the time limits on Jacobs were reset ... sometime after October 2016 and well before July 2017 on account of McElhanney ignoring Mr. Jacobs' correspondence. ...

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[49] Id. ¶ 66.

[50] Id. ¶ 88.

[51] Id.

[52] Id.

[53] Id. ¶¶ 113 & 114.

[54] Justice Graesser addressed r. 4.31(1) – delay resulting in serious prejudice. He held the delay was not "inordinate" and that McElhanney Surveys had not established that it had suffered "any real prejudice".[54]

F. McElhanney Surveys Appeals Justice Graesser's Order

[55] On November 16, 2018 McElhanney Surveys filed a civil notice of appeal against the whole of Justice Graesser's order.[55]

V. Applicable Provisions of the *Alberta Rules of Court*

[56] The important parts of the *Alberta Rules of Court*[56] follow:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> …
>
> 4.4(1) Unless the parties otherwise agree, or the Court otherwise orders, and subject to matters arising beyond the control of the parties, the parties to an action categorized as a standard case must, within a reasonable time considering the nature of the action, complete each of the following steps or stages in the action:
>
> (a) close of pleadings;
>
> (b) disclosure of information under Part 5;
>
> (c) at least one of the dispute resolution processes described in rule 4.16(1), unless the requirement is waived by the Court;
>
> (d) application for a trial date.
>
> (2) A party to an action categorized as a standard case may serve on the other party a proposed litigation plan or a proposal for the completion or timing of any stage or step in the action, and if no agreement is reached, any party may apply to the Court for a procedural or other order respecting the plan or proposal.
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> …

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[54] Id. ¶ 118.

[55] Appeal Record tab 13.

[56] Alta. Reg. 124/2010.

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 … .

(2) Where … 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

(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 … .

…

6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, summary trial or trial, either or both of the following:

(a) any fact stated in the notice, including any fact in respect of a record … .

…

(3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that

(a) denies the fact … for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted … or

(b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part,

(i) privileged, or

(ii) irrelevant, improper or unnecessary.

…

> (5) A denial by a party must fairly meet the substance of the requested admission and when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

VI. Analysis

A. The Foundational Rules of the *Alberta Rules of Court* Promote Expedition

[57] Litigation delay is a pressing concern.[57]

[58] This Court, taking its cue from the Foundational Rules of the *Alberta Rules of Court*,[58] has decried litigation delay:[59]

> 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 delay is a corrosive force in a free and democratic state committed to the rule of law.

[59] Alberta has two rules that focus on litigation delay.

[60] Alberta does not want stalled actions on its litigation highway.

[61] Rule 4.31 authorizes a court to dismiss an action featuring inordinate and inexcusable delay that has significantly prejudiced the moving party. A party may apply at any time for relief[60]

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[57] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 93; [2017] 7 W.W.R. 343, 370 ("Delay is still a problem"); *Kuziw v. Kucheran Estate*, 2000 ABCA 226, ¶ 21; 266 A.R. 284, 290 ("systemic delay in the delivery of civil justice has been a recurring problem over the centuries and remains a constant focal point for criticism today") & *Blencoe v. Human Rights Commission*, 2000 SCC 44, ¶ 140; [2000] 2 S.C.R. 307, 384 per LeBel, J. ("Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians").

[58] Alta. Reg. 124/2010.

[59] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 90; [2017] 7 W.W.R. 343, 368-69.

if the nonmoving party's inaction constitutes inordinate and inexcusable delay and causes the moving party serious prejudice.

[62] Rule 4.33(2) compels[61] a court to dismiss an action that reveals no significant advance in an action in a period of three or more years. A moving party is relieved of the burden of proving prejudice.[62]

[63] These relatively abstract rules[63] – some jurisdictions have bright-line rules[64] – are the product of the friction between two important goals on which the modern *Alberta Rules of Court* are based.

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[60] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 115; 91 C.P.C. 7th 73, 124 per Wakeling, J.A. ("there is no minimum time frame that protects a dawdling plaintiff. An application may be brought any time the moving party wishes").

[61] *Flock v. McKen*, 2017 ABCA 67, ¶ 17; 91 R.F.L. 7th 39, 48 ("The rule is mandatory and does not allow for the exercise of discretion").

[62] *Flock v. McKen*, 2017 ABCA 67, ¶ 17; 91 R.F.L. 7th 39, 48 ("The question of prejudice to the applying party from the delay is irrelevant. No inquiry into that issue is necessary") & *Willard v. Compton Petroleum Corp.*, 2015 ABQB 768, ¶ 20 ("The applicant does not have to demonstrate any prejudice as dismissal is mandatory once the requisite period of inactivity has been proven").

[63] Other Canadian jurisdictions have comparable rules. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-7(7) ("If, on application by a party, it appears to the court that there is a want of prosecution in a proceeding, the court may order that the proceeding be dismissed"); *Crepjnack v. British Columbia Hydro and Power Authority*, 2011 BCSC 1357, ¶¶ 15 & 16; 15 C.P.C. 7th 44, 48-49; (an action may be dismissed for delay if it has been inordinate and inexcusable and jeopardizes the prospect of a fair trial); *The Queen's Bench Rules*, r. 4-44 (Sask.) (the Court may dismiss a claim if "satisfied that the delay is inordinate and inexcusable and that it is not in the interests of justice that the claim proceed"); *International Capital Corp. v. Robinson Twigg & Ketilson*, 2010 SKCA 48, ¶ 17; 319 D.L.R. 4th 155, 162-63 (a court may dismiss a claim for inordinate and inexcusable delay if it is in the interests of justice to do so); *Queen's Bench Rules*, Man. Reg. 553/88, rr. 24.01(1) ("The court may, on motion, dismiss ... an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party") & 24.02(1) ("If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action"); *D.L. v. C.P.*, 2019 MBQB 42, ¶ 32 ("A sharper, perhaps harsher, dawn is at hand. Particularly with Rule 24.02 now in force, with its very limited exceptions, counsel and parties will have to be most vigilant to advance actions. Stagnant actions will be weeded out, and active claims finished swifter"); *Rules of Court*, N.B. Reg. 82-73, RR. 26.01 & 26.05 (a court may dismiss an action for delay under prescribed conditions); *Michaud v. Robertson*, 2003 NBQB 288 (an action may be dismissed for inordinate inexcusable delay that is likely to seriously prejudice the defendant); *Civil Procedure Rules*, R. 82.18 (N.S.) ("A judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time"); *Hiscock v. Pasher*, 2008 NSCA 101, ¶ 21; 302 D.L.R. 4th 325, 333 (a motion for dismissal for want of prosecution should be granted if there has been inordinate and inexcusable delay that gives rise to a substantial risk that a fair trial is not possible or likely has caused serious prejudice to the defendant); *Braithwaite v. Bacich*, 2011 NSSC 176, ¶¶ 7-9 (a motion for dismissal under R. 82.18 may be granted if there has been inexcusable inordinate delay and the defendant is likely to be seriously prejudiced on account of the delay); *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 40.11 (the Court may dismiss a proceeding for want of prosecution if the plaintiff does not apply to set a proceeding down for trial); *Dawe v. Brown*, 373 A.P.R. 40, ¶ 7 (Nfld. Tr. Div. 1994)

("The defendant ... must satisfy this Court that there has been an inordinate and inexcusable delay on the part of the plaintiff which delay is likely to preclude a fair trial of the issues to be adjudicated or to cause prejudice to the defendant"); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 327(1)(b) ("A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court (a) may, with or without terms, dismiss the action or proceeding for want of prosecution ... or (b) shall dismiss so much of the action or proceeding as it related to the applicant where for five or more years no step has been taken that materially advances the action or proceeding"); *Northwest Territories v. 831594 N.W.T. Ltd.*, 2017 NWTSC 57, ¶ 7 (the Court applied *Humphreys v. Trebilcock*); *Rules of Court*, Y.O.I.C. 2009/65, R. 2(7) ("If upon application by a party it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed"); *SAAN Stores Ltd. v. 328995 Alberta Ltd.*, 2006 YKSC 46, ¶¶ 17-19 (a court may dismiss an action for want of prosecution if there has been inordinate inexcusable delay that has caused or is likely to cause serious prejudice to the defendants); *Federal Court Rules*, S.O.R./98-106, R. 167 ("The Court may, at any time, on the motion of a party who is not in default of any requirement of these Rules, dismiss a proceeding or impose other sanctions on the ground that there has been undue delay by a plaintiff, applicant or appellant in prosecuting the proceeding") & *Nichols v. Canada*, 36 F.T.R. 77, 79 (1990) (a court may dismiss an action if there has been inordinate inexcusable delay and the delay is likely to seriously prejudice the defendants).

[64] E.g., *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 24.01(1)(c) (an action may be dismissed if the plaintiff has failed "to set the action down for trial within six months after the close of pleadings") & 48.14(1)1 ("Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances ... : 1. The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action. 2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of having been struck off"); *Faris v. Eftimovski*, 2013 ONCA 360, ¶¶ 37 & 42; 363 D.L.R. 4th 111, 122 & 123 ("On a rule 24.01 motion, an action should not be dismissed unless: (a) the delay is intentional and contumelious; or (b) the plaintiff or his or her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible. ... [T]he status hearing judge ... was correct to place the onus on the ... [plaintiff to demonstrate] that there is an acceptable explanation for the delay in the litigation and that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice"); *Rules of Court* N.B. Reg. 82-73, R. 26.01(c) ("A defendant who is not in default under these rules or under an order of the court, may apply to have the action dismissed for delay where the plaintiff has failed ... (c) to set the action down for trial within 6 months after the close of pleadings") & 26.05(8) ("On the status hearing, the court may ... (b.1) dismiss the action"); *Rules of Civil Procedure*, RR. 24.01(c) (P.E.I.) ("A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed ... (c) to set the action down for trial within six months after the close of pleadings") & 48.11(1) ("Where an action in which a statement of defence has been filed has not been set for trial or ... terminated by any means within one year after the filing of a statement of defence, the case management coordinator shall serve on the parties a status notice ... that the action will be dismissed for delay unless it is set down for trial or terminated within ninety days after service of the notice"); *Civil Procedure Rules*, R. 4.22(1) (N.S.) (an action may be dismissed for delay if no trial date is set within five years after the date the action is commenced); *Uniform Civil Procedure Rules 1999*, r. 280(1) (Qld.) ("If – (a) the plaintiff ... is required to take a step required by these rules or comply with an order of the court within a stated time; and (b) the plaintiff ... does not do what is required within the time stated for doing the act; a defendant ... may apply to the court for an order dismissing the proceeding for want of prosecution"); *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, R. 24.01 (Vict.) ("The Court may order that a proceeding be dismissed for want of prosecution if the plaintiff ... (b) does not within a reasonable time after the commencement of the proceeding – (i) file and serve notice of trial; or (ii) apply to have a date fixed for the trial of the proceeding"); *Supreme Court Rules 2000*, S.R. 2000, No. 8, rr. 371 & 372 (Tasmania) (the Court may dismiss an action if the plaintiff does not deliver a statement of claim in a timely manner or discharge discovery obligations); *Rules of the Supreme Court 1971*, Order

[64] The first goal is the fair and just resolution of claims.[65] "The courts exist to do justice".[66] Citizens have a constitutional right to bring their claims before the courts.[67]

[65] The second goal is the "timely"[68] resolution of claims. "Delay is not an attribute of justice".[69]

[66] The second goal may abridge a person's right to have his or her case resolved by a judge.[70] "[A] plaintiff must prosecute an action in a timely manner or face the prospect that the right to be heard has expired before the plaintiff has secured a resolution of the claim".[71]

[67] Timely dispute resolution was not a prominent feature of the *Alberta Rules of Court* in force before November 1, 2010. But this changed and reasonable expedition enjoyed equal billing with just dispute resolution in the rules in force after October 31, 2010.

4A, r. 28(1) (W. Austl.) (" If a case is on the Inactive Cases List [inactive for twelve months] for 6 continuous months ..., the case is taken to have been dismissed for want of prosecution") & *Court Procedures Rules 2006*, S.L. 2006 - 29, r. 1110(1) (A.C.T.) ("A defendant ... may apply to the court for an order dismissing the proceeding for want of prosecution if the plaintiff – (a) is required to take a step ... required by these rules, or to comply with an order of the court, not later than the end of a particular time; and (b) does not do what is required before the end of that time").

[65] *Alberta Rules of Court,* Alta. Reg. 124/2010, r. 1.2(1).

[66] Lord Dyson, M.R., "The Application of the Amendments to the Civil Procedure Rules" (18th Lecture in the Implementation Program – District Judges' Annual Seminar) ¶ 14 (March 22, 2013). See also *Davies v. Eli Lilly Co.*, [1987] 1 All E.R. 801, 804 (C.A.) ("Litigation ... is designed to do real justice between opposing parties").

[67] *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp*., [1981] A.C. 909, 977 (H.L.) per Lord Diplock ("Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by ... the defendant").

[68] *Alberta Rules of Court,* Alta. Reg. 124/2010, r. 1.2(1). See *The Queen v. Jordan*, 2016 SCC 27, ¶ 1; [2016] 1 S.C.R. 631, 643 ("Timely justice is one of the hallmarks of a free and democratic society"); *Ursa Ventures Ltd. v. City of Edmonton,* 2016 ABCA 135, ¶ 102; 91 C.P.C. 7th 73, 115 per Wakeling, J.A. ("The Magna Carta recognizes that delay is not an attribute of justice") & *Langenecker v. Sauvé*, 2011 ONCA 803, ¶ 3; 286 O.A.C. 268, 269 ("An order dismissing an action for delay is obviously a severe remedy. The plaintiff is denied an adjudication on the merits of his or her claim. Equally obviously, however, an order dismissing an action for delay is sometimes the only order that can adequately protect the integrity of the civil justice process and prevent an adjudication on the merits that is unfair to a defendant").

[69] *Travis v. D&J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 105; 92 C.P.C. 7th 259, 304 (chambers).

[70] *Faris v. Eftimovski*, 2013 ONCA 360, ¶ 24; 363 D.L.R. 4th 111, 120 ("a court [asked to dismiss an action for want of prosecution] must balance the plaintiff's interest in having a hearing on the merits and the defendant's interest in having the matter resolved in an expedient and time-efficient manner").

[71] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 105; 91 C.P.C. 7th 73, 117 per Wakeling, J.A.

[68] The current rules expressly state that a standard case must reach designated milestones "within a reasonable time considering the nature of the action"[72] and that there must be a complex case litigation plan for complex cases.[73]

[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."[74]

[70] Modern courts, more so than has been the case in the past,[75] are aware of the need to resolve actions in a timely fashion and the critical role they play in the achievement of this goal.[76] They

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[72] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 4.4(1).

[73] Id. r. 4.5(1).

[74] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 89; 91 C.P.C. 7th 73, 109 per Wakeling, J.A. See also *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 1; [2014] 1 S.C.R. 87, 92 ("Trials have become increasingly expensive and protracted") & *Grovit v. Doctor*, [1997] 1 W.L.R. 640, 643 (H.L.) ("Actions ... take much longer to come to trial than they should and the general impression given to the public is that litigation is a very long drawn-out process with which they should try to avoid becoming involved").

[75] See *Birkett v. James*, [1978] A.C. 297, 322, 325, 334 & 336 (H.L.) (courts regularly declined to dismiss an action for want of prosecution if the limitation period had not expired and the nonmoving party could file another action) & Court of Appeal of Alberta Practice Note (1978) ("While the Court has in the past shown a reluctance to deprive a litigant of a cause of action by reason of delay, it must be considered that the overall harm to the practice generally, and to other parties, must not be lost sight of. The Court feels obligated to notify the profession that after the 1st January, 1976, ... the matter [will be] looked at more strictly than has been the developing practice").

[76] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 92; 91 C.P.C. 7th 73, 111-12 per Wakeling, J.A. ("[Courts] have always assumed ultimate responsibility for ensuring that public funds invested in the administration of justice are wisely used. ... [Public resources] should not be squandered on actions that are not moved along in accordance with the rules of court or court order. A court house is not a garage for parked actions") & *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 76; 315 C.C.C. 3d 337, 373 per Wakeling, J.A. ("Alberta courts are dedicated to resolving disputes in the least amount of time practicable and at the lowest possible cost"). See *Arbuthnot Latham Bank Ltd. v. Trafalgar Holding Ltd.*, [1998] 2 All E.R. 181, 191 (C.A. 1997) per Lord Woolf, M.R. ("We think that the change in culture which is already taking place will enable courts to recognize for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 529 (3d ed. 2013) ("The English adversarial system has traditionally had three principal features: party autonomy, limited judicial responsibility for outcomes, and party control of the litigation process. The transfer of litigation control to the court has not affected the first two features, though of course it has significantly altered the third feature") & 15 W. Holdsworth, A History of English Law 116-17 (1965) ("common law procedure has, like the systems of procedure in Roman and early German law, adopted the principle of 'party presentation', and not the principle of 'judicial investigation'. Pollock has made it clear that this has been true of the procedure of the common law throughout its history and is still true today").

understand that "[o]bjectives ..., general speaking, [are] not self-executing"[77] and that they must enforce anti-delay rules if they are to be effective.[78]

[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.[79] They know that they may have to actively manage the litigation process for some actions.

[72] It is somewhat surprising that the administration of justice has taken so long to accept that expeditious resolution of actions is of fundamental importance. Complaints about delay appear in

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[77] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 90; 91 C.P.C. 7th 73, 110 per Wakeling, J.A.

[78] *Warren v. Warren*, 2019 ABCA 20, ¶ 67 (chambers) ("Rule compliance is a fundamental obligation of those who participate in a public dispute resolution process that promotes timely and cost-effective determination of controversies and recognizes that unresolved disputes are inimical to the welfare of the community"); *Travis v. D&J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 105; 92 C.P.C. 7th 259, 304 (chambers) ("Justice is more than a defensible and rational explanation for the disposition a court pronounces that explains to the parties and the community why the dispute was resolved the way it was; it is also a predisposition to the insistence that disputes be resolved as quickly as reasonably possible in accordance with the timelines fashioned by procedural rules: 'Expedition in dispute resolution and finality of litigation are not in competition with justice, but on the contrary are dictated by considerations of justice'. Delay is not an attribute of justice"); *The Queen v. Garrioch*, 2015 ABCA 180, ¶ 13 (chambers) ("Failure to insist that parties observe the rules is tantamount to an invitation to ignore them. Consistent enforcement of the rules ... is the best way to promote the orderly and just resolution of appeals"); *Mitchell v. News Group Newspapers Ltd.*, [2013] EWCA 1537, ¶ 41 ("If departures [from the rules] are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue") & A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 534 (3d ed. 2013) ("The court's response to litigation default ... will determine whether ... [*The Civil Procedure Rules 1998*] litigation system is more satisfactory than under its predecessor").

[79] *Travis v. D&J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 177; 92 C.P.C. 7th 259, 325 (chambers) ("Defendants ... are unwilling participants in an adversarial process. They should not have to endure for unreasonable periods of time the stress and inconvenience that outstanding litigation causes"); *Huynh v. Roseman*, 2013 ABQB 218, ¶ 21; 559 A.R. 319, 323 "(The purpose of ... [r. 244.1] was to prevent actions from languishing unnecessarily and to prevent parties from facing constant threat, stress, and uncertainty from a pending lawsuit for an indeterminate amount of time"); *Tyler v. Customs Credit Corp.*, [2000] QCA 178, ¶ 2 ("ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continued threat of litigation and its consequences hanging over them") & Alberta Law Reform Institute, Alberta Rules of Court Project: Consultation Memorandum No. 12.14, at 39 (October 2004) ("defendants should not be forced to live with 'the Sword of Damocles' hanging over their heads for inordinate periods during which they face the unsettling prospect of potentially being found liable for indeterminate and potentially substantial amounts of money").

Shakespeare's works[80] and accounted for some of the reforms introduced by the *Supreme Court of Judicature Act, 1875*.[81]

B. Rule 4.31 Assists Defendants Who Have Suffered Serious Prejudice Caused by Inordinate and Inexcusable Delay Without Regard to a Stipulated Period of Delay

[73] *Humphreys v. Trebilcock*[82] considered the benchmarks of an action suitable for dismissal on account of inordinate and inexcusable delay. The Court noted that "[d]elay is a relative concept"[83] and explained the inquiry that must be conducted to identify delay:[84]

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

[74] This inquiry discloses whether delay is a feature of the nonmoving party's prosecution of its action.[85] If delay is present, the court must then assess whether the delay is inordinate. It opined

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[80] *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 546-47 (C.A.) per Lord Denning, M.R. ("All through the years men have protested at the law's delay, and counted it a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time").

[81] 38 & 39 Vict., c. 77. See 15 W. Holdsworth, A History of English Law 117 (1965) ("if we compare this new [1875] system of common law procedure with the old, we must admit that the claim of the commissioners to have made it simple, economical and speedy was justified").

[82] 2017 ABCA 116; [2017] 7 W.W.R. 343. See also *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶¶ 111-16; 91 C.P.C. 7th 73, 118-24 per Wakeling, J.A.

[83] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 115; [2017] 7 W.W.R. 343, 377. See also *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 135; 91 C.P.C. 7th 73, 128 per Wakeling, J.A. ("Delay is a relative concept. It requires a comparator. For example, if a pediatrician opines that an infant's fine motor skills are developmentally delayed, he or she comes to that conclusion because the infant patient does not display the fine motor skills of most infants in the same cohort age. Most infants of the same age constitute the comparator group").

[84] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 115; [2017] 7 W.W.R. 343, 377-78.

[85] *Government of the Northwest Territories v. 831594 Alberta Ltd.*, 2017 NWTSC 57, ¶ 28 ("I am not satisfied that the Defendants have established any inordinate or inexcusable delay on the part of the Plaintiff. There undeniably has been significant delay on this matter, but I conclude it is almost entirely attributable to choices and decisions made by the Defendants"). A defendant may frustrate the plaintiff's prosecution of its action by failing to attend scheduled discoveries, failing to answer undertakings, refusing to disclose relevant documents, seeking frequent adjournment of court applications, filing frivolous applications, disobeying court orders and utilizing similar delaying tactics. *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356, ¶ 44; 399 A.R. 166, 178 ("Unfortunately, the Defendants have been

that "inordinate means that the differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable".[86]

[75] The Court considered a demanding standard appropriate:[87]

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

[76] If the moving party has established that the nonmoving party has prosecuted its action at such a pedestrian pace so as to constitute delay and that it is of such a magnitude as to be "inordinate", consideration must be then given to whether this "inordinate delay" is inexcusable. Has the nonmoving party provided an explanation for the delay that justifies its dilatory prosecution of its action?[88]

[77] If the moving party has established the presence of inordinate and inexcusable delay, the next question focuses on the harm this delay has caused to the moving party.[89] Has the moving party demonstrated significant prejudice?[90] Or the moving party may rely on the rebuttable presumption in r. 4.31(2):[91] "Where … 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." In this situation, the nonmoving party must demonstrate on a balance of probabilities that the delay has not caused the moving party significant prejudice.[92]

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obstreperous. Court imposed deadlines have not met, or have been met with reluctance. The situation has proved frustrating for the Plaintiffs as well as the Court").

[86] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 120; [2017] 7 W.W.R. 343, 381.

[87] Id. at ¶ 121; [2017] 7 W.W.R. at 381.

[88] Id at ¶ 153; [2017] 7 W.W.R. at 392.

[89] Id. at ¶ 154; [2017] 7 W.W.R. at 392.

[90] Id. See also *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 28; 400 D.L.R. 4th 512, 524 ("an application to strike for persistent delay is more properly brought under R. 4.31, which requires proof of prejudice").

[91] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 155; [2017] 7 W.W.R. 343, 392.

[92] Id. at ¶ 149; [2017] 7 W.W.R. at 391-92 ("upon proof by the moving party of the basic fact – inordinate and inexcusable delay … – the presumed fact – significant prejudice – must be found to exist unless the nonmoving party has proven on a balance of probabilities that the moving party has not suffered significant prejudice"). See also *Faris v. Eftimovski*, 2013 ONCA 360, ¶ 32; 363 D.L.R. 4th 111, 122 ("The test ... requires the plaintiff to demonstrate that there was an acceptable explanation for the delay and establish that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice") & L. Abrams & K. McGuinness, Canadian Civil Procedure

[78] Rule 4.31 authorizes a court to dismiss an action that displays these features. It does not compel a court to dismiss an action.

C. Rule 4.33(2) Assists Defendants in Actions that Have Not Been Significantly Advanced in a Period of Three or More Years

[79] Rule 4.33(2) compels a court to dismiss an action if the moving party establishes that the nonmoving party has not made a "significant advance" in the action in a period of three or more years.[93]

[80] Neither the *Alberta Rules of Court*[94] nor the *Interpretation Act*[95] defines "significant advance".

[81] What do the words mean, keeping in mind the fact that they are part of rules of court?

[82] There is no better starting point than a reference to reputable dictionaries.

[83] The leading English-language dictionaries provide a similar definition for "advance" as a noun. It means a forward movement to effect a purpose.[96]

Law 638 (2d ed. 2010) ("There is division within the case law as to whether the presumption of prejudice is conclusive or whether the plaintiff is entitled to bring forward evidence to demonstrate that no prejudice has been suffered. The stronger theoretical argument is probably that evidence indicating an absence of prejudice should be received on any motion for dismissal, although as a practical forensic matter it is difficult to see how one could establish to the court's reasonable satisfaction that no witness has forgotten anything of importance, that all witnesses are ready, willing and able to testify, and that all tangible evidence remains available and in good shape").

[93] A moving party should state the applicable period in which it claims the nonmoving party has not significantly advanced its action. It is entitled to select the applicable period. If the moving party does not identify the start and end points of the period it complains about, the end date is the date of the r. 4.33(2) application. *Flock v. McKen*, 2017 ABCA 67, ¶ 17; 91 R.F.L. 7th 39, 47-48. The moving party may select another period. There is nothing in r. 4.33 that precludes a moving party from selecting a period in excess of three years or with a different end date than the application date. *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 17; 400 D.L.R. 4th 512, 520-21 ("Rule 4.33(1)(d) confirms that any 3 year period of inactivity will require dismissal of the action, subject only to an exception where the defendant has participated in steps after the expiry of the 3 years to the extent that it would be unjust to dismiss the action"); *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 151; 91 C.P.C. 7th 73, 130 per Wakeling, J.A. ("the r. 4.33(1) moving party is entitled to select the applicable period ... . Nothing in [r. 4.33] ... suggests that the moving party is denied the privilege of framing the application in the most advantageous manner possible") & *Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce*, 2003 ABCA 259, ¶ 31 ("once it is shown that there is a gap of five years or more between meaningful things done to advance the litigation, the court is obliged to dismiss the action ... . A delaying party cannot extend the five-year period ... by unilaterally taking an action before the application to dismiss is made").

[94] Alta. Reg. 124/2010.

[95] R.S.A. 2000, c. 1-8.

[84] A consensus also exists as to the meaning of "significant" as an adjective. It may mean "important, weighty or notable", a definition presented in Webster's Third New International Dictionary of the English Language Unabridged.[97]

[85] Taking into account the context – an application for dismissal for long delay,[98] "significant advance" means important or notable progress towards the resolution of an action.

[86] To determine whether there is a significant advance – important or notable progress – a court must assess at the start and end points of the applicable period the degree to which the factual and legal issues dividing the parties have been identified and the progress made in ascertaining the relevant facts and law that will affect the ultimate resolution of the action.[99] Has anything that happened in the applicable period increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action?[100] Are the parties at the end of the applicable period much closer to resolution than they were at the start date?[101]

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[96] Webster's Third New International Dictionary of the English Language Unabridged 30 (2002) ("to move forward along a course or toward a terminus or goal: make to proceed or to progress"); 1 The Oxford English Dictionary 182 (2d ed. 1989) ("A going forward, onward or upward"); The American Heritage Dictionary of the English Language 24 (5th ed. 2016) ("A forward move, as toward an objective; a progressive step: *an advance in genetic engineering*") (emphasis in original) & New Oxford American Dictionary 23 (3d ed. 2010) ("a forward movement: *the rebels' advance on Madrid was well under way*") (emphasis in original).

[97] Webster's Third New International Dictionary of the English Language Unabridged 2116 (2002) ("having or likely to have influence or effect: deserving to be considered: important, weighty or notable < even though the individual results may seem small, the total of them is ~ >"). See also 15 The Oxford English Dictionary 458 (2d ed. 1989) ("Important, notable"); The American Heritage Dictionary of the English Language 1630 (5th ed. 2016) ("2. Having or likely to have a major effect; important: *a significant change in the tax laws*. 3. Fairly large in amount or quantity: *significant casualties*") & New Oxford American Dictionary 1626 (3d ed. 2010) ("sufficiently great or important to be worthy of attention; noteworthy: *a significant increase in sales*") (emphasis in original).

[98] *Bell's ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, ¶ 27; [2002] 2 S.C.R. 559, 580-81 ("context ... inevitably play[s an important role] when a court construes ... a statute") & *Hills v. Canada*, [1988] 1 S.C.R. 513, 561 ([a word's] real meaning will depend on the context in which it is used").

[99] *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 11; 400 D.L.R. 4th 512, 518 ("Whether an action has been 'significantly advanced' involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the Rules of Court") & *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 125; 91 C.P.C. 7th 73, 126 per Wakeling, J.A. ("to determine whether an action has progressed in the designated period one must contrast the place on the litigation spectrum an action occupied at the start and end points of the applicable time frame").

[100] *Morrison v. Galvanic Applied Sciences Inc.*, 2019 ABCA 207, ¶ 35 ("A significant advance exists if the nonmoving party in the applicable timeframe has done something that increased by a measurable degree the likelihood that either the parties or the court would have sufficient information to rationally assess the merits of the parties' positions and be

[87] But the nature of the advance does not have to promote the interests of one side so much more than the other that the outcome of the dispute is obvious and summary judgment is inevitable.[102]

[88] Examples will help explain how these abstract norms may work.

[89] Suppose A sues B Co. for wrongful dismissal. B Co. moves for dismissal of A's action under r. 4.33(2). As of the commencement date in the applicable period, A had filed his action, B Co. had filed a statement of defence, and each of A and B Co. had filed their affidavit of records. B Co. alleges that it had cause to summarily dismiss A and had no obligation to provide A with reasonable notice of A's termination date or pay A a sum equal to that which he would have earned had B Co. given to him reasonable notice. B Co.'s defence is that A used his position as B Co.'s payables department supervisor to defraud B Co. of over $250,000 in a ten-year period preceding A's dismissal. B Co.'s affidavit of records catalogues the paper trail of A's fraudulent acts.

[90] Suppose in the applicable period following the r. 4.33(2) start date A had conducted two days of questioning of B Co.'s officer. The officer, relying on the documents in B Co.'s affidavit of records and the fruits of B Co.'s investigation, provided a detailed explanation of A's fraudulent acts over the last two years of his employment representing $100,000 of the alleged $250,000 total. A and B Co. agreed to adjourn A's questioning of B Co. after two days so that A could reassess his position. A does not file a notice of discontinuance. But A never contacts B Co. again to reschedule the questioning of B Co.'s officer or for any other purpose.

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in a better position to either settle or adjudicate the action"); *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 20; 400 D.L.R. 4th 512, 521 ("steps that serve to narrow the issues, complete the discovery of documents and information, or clarify the positions of the parties might well significantly advance the action") & *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 19; 91 C.P.C. 7th 73, 90 ("the functional approach inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality").

[101] *Weaver v. Cherniawsky*, 2016 ABCA 152, ¶ 26; 38 Alta. L.R. 6th 39, 46 ("For a step to significantly advance an action it must move the parties closer to resolution").

[102] *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 28; 400 D.L.R. 4th 512, 524 ("A significant advance does not have to be so definitive that it would support an application for summary judgment"). *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.* illustrates this point. The Court set aside an order dismissing a contact action because in the applicable time frame the defendant produced information gleaned from over 2000 gravel sale invoices that disclosed how much gravel the defendant had shipped from a crushed gravel stockpile. This was vital information because there was a dispute over how much gravel the plaintiff had actually crushed. The Court said this: "The new information provided on October 22 was important to both sides. It confirmed that the stockpile of gravel had now been sold, which crystallized the amount that the respondents possibly admitted was owing. It also provided a firm amount against which the competing claims could be measured: the appellant's measurement of the claim based on its estimates, and the respondents' measurement of the claim based on actual deliveries". Id. at ¶ 29; 400 D.L.R. 4th at 524.

[91] The court must ask if B Co.'s ability to document and explain how A defrauded it of $100,000 is a significant advance given that the combination of B Co.'s statement of defence and affidavit of records had already provided a detailed paper record of A's fraudulent acts.

[92] Arguably it would. Questioning should convince A that B Co. can prove that he defrauded it. The plaintiff has no chance of success. It does not matter whether A defrauded B Co. of $100,000 or $250,000. A will realize that if he refuses to abandon his claim, B Co. will be in a position to apply for summary dismissal. A will undoubtedly have to pay costs to B Co.

[93] Sometimes questioning will not provide the parties with new information and cannot be a significant advance.[103]

[94] Suppose P alleges that D defamed him. P and D are candidates for public office. D claimed in a public debate that P cheats at golf and is morally bankrupt. P sues D. D invokes the defence of fair comment.[104] D asserts that D's statement about P's character is a matter of public interest, based on fact – P cheats at golf, and that the statement was made without malice. Both P and D file their affidavits of records. P wins the election and does nothing in the three-year period preceding D's application under r. 4.33(2) other than question D. D repeats the position set out in her statement of defence. As P's questioning of D produced nothing the parties did not already know, P is not in a better legal position than he was before he questioned D. The facts and the law were exactly the same as they were when the pleadings closed.

[95] Settlement discussions that produce concessions may or may not focus the dispute and bring the parties closer to resolution.

[96] Suppose E sues F for negligence. When F turned right in his Ford F-150 without signalling F knocked E off his bicycle. E broke his leg and had a concussion. Four and six months after this incident E is involved in two more crashes. He is rear-ended while driving his car and stopped at a red light. E becomes depressed and cannot work. E, in the course of settlement discussions with F, agrees that he will only attribute four months of his work-loss claim to F's negligence. E and F confirm this in subsequent correspondence. This concession relieves the parties of the need to chronicle the impact the two subsequent collisions had on E's inability to work. In this context, the settlement concession represents a significant advance. It eliminates five trial days.[105]

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[103] *Delver v. Gladue*, 2019 ABCA 54, ¶ 13 ("There is no evidence that the plaintiff ... provided any important new information within the relevant three year period, or that the [settlement] proposals made by her narrowed the issues or clarified the parties' positions").

[104] Halsbury's Laws of Canada, Defamation 284 (2009).

[105] E.g., *Pacquin v. Whirlpool Canada LP*, 2016 ABQB 147, ¶ 21 (Master) ("[Settlement offers] clearly show the parties becoming closer on particular issues ... and even agreement on some issues ... . The parties also made progress in identifying the true issues in dispute, whether formally or otherwise") & *Sutherland v. Brown*, 2018 ABCA

D. The Two Delay Rules Provide Defendants with Relief in Different Conditions

[97] Each delay rule presents different benefits for a defendant who is dissatisfied with the pace at which a plaintiff is prosecuting an action.

[98] Because r. 4.31, unlike r. 4.33(2), does not give a dawdling plaintiff a three-year buffer zone, a defendant who can prove that the plaintiff's dilatory prosecution of a claim in a period less than three years[106] has caused the defendant significant prejudice may wish to invoke r. 4.31. This rule benefits the defendant for whom the "very existence of an action may be problematic".[107] For example, a professional whose integrity or competence is challenged, may exercise a dramatic revenue loss that cannot be reversed until the action is resolved.[108]

[99] On the other hand, because r. 4.33(2) does not require the moving party to prove the dawdling plaintiff has caused it significant prejudice, the defendant whose ability to defend itself is not compromised by the delay and for whom the action is nothing more than an inconvenience, may be willing to wait three years or more before applying for a long-delay dismissal order.

E. The Chambers Judge Committed Three Reversible Errors

[100] On July 14, 2017 McElhanney Surveys filed its application for dismissal of Mr. Jacobs' action on account of long delay.

[101] July 14, 2017 is the end point of the minimum three-year period referred to in r. 4.33(2) of the *Alberta Rules of Court*.[109]

123, ¶ 14; 19 C.P.C. 8th 33, 36 ("Progress towards settlement may ... constitute a significant advance in an action for the purpose of rule 4.33").

[106] *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 120; 91 C.P.C. 7th 73, 125 per Wakeling, J.A. ("Rule 4.31(1) allows a moving party to apply anytime the nonmoving party's inactivity causes inordinate and inexcusable delay and serious prejudice").

[107] Id. at ¶ 103; 91 C.P.C. 7th at 115.

[108] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 123; [2017] 7 W.W.R. 343, 381 ("A litigant who alleges fraud may be under an obligation to advance the action ... at a faster pace than that expected of a reasonable litigant pursuing a claim that does not allege fraud or a comparable wrong. This means that any delay may not escape being characterized as inordinate delay if the nonmoving party advances a fraud claim"); *International Capital Corp. v. Schafer*, 2010 SKCA 48, ¶ 45; 319 D.L.R. 4th 155, 172 ("The court should be sensitive to the impact of claims which put in question the professional, business or personal reputation of the defendant, which put the livelihood of the defendant at risk or which involve significant or ongoing negative publicity for the defendant") *& Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 552 per Lord Denning, M.R. ("It is...a grave injustice to professional men to have a [fraud] charge...outstanding for so long") (C.A.).

[109] *Flock v. McKen*, 2017 ABCA 67, ¶ 17; 91 R.F.L. 7th 39, 48.

[102] In the absence of an express statement in a r. 4.33(2) application designating a period in excess of three years with specific start and end dates, the end date will be the date the r. 4.33(2) application was filed and the start date will be three years earlier.

[103] The relevant three-year period in this case is from July 15, 2014 to July 14, 2017 inclusive.

1. An Unheard Summary Judgment Application Does Not Significantly Advance an Action

[104] It is difficult to conceive of a fact pattern in which an unheard summary judgment application could be characterised as a significant advance in an action.

[105] A summary judgment application usually is based on allegations that are contained in a statement of claim and legal principles that are expressly or implicitly embedded in a statement of claim. They present nothing new.

[106] A supporting affidavit generally documents a version of facts more or less reflective of factual allegations advanced in the statement of claim. It may provide some elaboration.

[107] The fact that the plaintiff has devoted resources to filing an application for summary judgment and produces a product that identifies with more precision the important facts on which it relies is of minimal value until it is tested by a court hearing.

[108] A summary judgment application that is dismissed may be characterized as a significant advance factually and legally.

[109] This is because both the moving and nonmoving parties have probably filed affidavits, cross-examined the deponents and filed briefs. Both sides have a better understanding of the facts-in-issue and the legal differences that divide them. A dismissed summary judgment application may advance the parties understanding of the facts that may be proven and how the law applies to the facts.

[110] This Court opined in *Broeker v. Bennett Jones Law Firm*[110] that "[a]n unheard summary judgment application does not, by itself, significantly advance the action".

[111] Justice Graesser did not explain in detail why he believed that Mr. Jacobs' unheard summary judgment application represented a significant advance in his action. He did not analyze the supporting affidavit and identify features of it that may have distinguished it from Mr. Jacobs' statement of claim.

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[110] 2018 ABCA 414, ¶ 6. See also *Weaver v. Cherniawsky*, 2016 ABCA 152, ¶ 20; 38 Alta. L.R. 6th 39, 45 ("This was merely a failed attempt to schedule a JDR and nothing more. ... [T]he failed attempt did not move the lawsuit forward in a meaningful way").

[112] But he did adjudge that an application, even if not heard, may advance the action and meet the r. 4.32(2) test:[111]

> Where active steps are being taken to advance an application that has a likelihood of advancing the action, especially one like summary judgment, I do not think it can be said that all of those steps do not count, and none of them advance the markers unless the application actually proceeds, let alone succeeds. In my view, the markers are moved until the application is heard, or until active steps to move the application along cease.

[113] We fundamentally disagree with the concept that the potential of an unheard application is a marker of the advancement of an action.

[114] Suppose A, a National Hockey League general manager, offers B, also a NHL general manager, the opportunity to trade places in the next draft of young prospects if B will give A a defenceman on its American Hockey League roster that A is high on. B declines. Had B accepted A's offer B would have drafted player M.B. with A's earlier pick. A selected M.B. M.B. turned out to be a goal-scoring phenomenon. B selected a dud with his later selection. The defenceman that A wanted and B refused to trade never played a game in the National Hockey League. B would have given up nothing had he accepted A's offer. B could not, with a straight face, assert that he significantly advanced his team's prospects because he had a chance to draft M.B.

[115] "What ifs" do not count in most walks of life. And they do not count here.

[116] Rule 4.33(2) measures results, not what might have happened if something had been done. What is important is not a step's potential, but what was done.[112]

[117] Justice Graesser suggests that a dismissed summary judgment application "may still narrow the issues and focus the parties on the real (remaining) issues in dispute".[113]

[118] We do not disagree.[114] But this is not what happened here. Mr. Jacobs never pressed ahead to secure a hearing of his summary judgment application.

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[111] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 71.

[112] *Delver v. Gladue*, 2019 ABCA 54, ¶¶ 13 & 15 ("While the outcome of any step is not determinative, the test is whether there was a significant advance in the action, not whether unaccepted proposals or attempted procedures could have resulted in a significant advance in other circumstances. ... We reach a similar conclusion with respect to the unsuccessful proposal to schedule a trial of an issue to determine whether the vehicle was driven with consent").

[113] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 64.

[114] E.g., *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 13 ("Given that this action must continue, neither side would welcome a detailed recitation of the strengths and weaknesses of its case. In any event, both ...

2. Mr. Jacobs' Notice to Admit Under Rule 6.37 Did Not Advance His Action

[119] On June 1, 2015 Mr. Jacobs served McElhanney Surveys with a notice to admit.[115]

[120] On June 16, 2016 McElhanney Surveys served Mr. Jacobs with its response. Paragraph 7 claimed that Mr. Jacobs' notice to admit was "wholly inappropriate".[116]

[121] While it would have been preferable had McElhanney Surveys expressly stated that it objected to the notice to admit as "irrelevant, improper or unnecessary" under r. 6.37(3)((b)(ii), counsel for Mr. Jacobs confirmed in oral argument that McElhanney Surveys implicitly relied on r. 6.37(3)(b)(ii). This is a fair reading of the response.

[122] A party served with a notice to admit under r. 6.37(1) of the *Alberta Rules of Court* has three options.

[123] It may do nothing. If it does nothing, it is presumed to have admitted "the matters for which an admission is requested" on the twenty-first day after the date of service.[117]

[124] Or it may serve a response either denying the facts or asserting that the notice to admit is "irrelevant, improper or unnecessary".[118]

[125] If a responder denies a fact it must explain "in detail" why the fact cannot be admitted.[119]

[126] If a responder asserts that the notice to admit is "irrelevant, improper or unnecessary", it is not obliged to explain why.

[127] A notice to admit that a responder claims is "irrelevant, improper or unnecessary" has no legal effect – other than a possible future costs consequence[120] – and cannot be characterized as a step that advances an action.[121]

[counsel] ... have already persuasively recorded the limitations of the oppositions' position in their briefs and oral arguments").

[115] Appellant's Extracts of Key Evidence A43.

[116] Id. A58.

[117] *Alberta Rules of Court,* Alta. Reg. 124/2010, r. 6.37(3).

[118] Id. r. 6.37(3)(a) or (b).

[119] Id.

[128] If a notice to admit produces no response or a response that admits some of the facts set out in the notice to admit, it may or may not be characterized as an advancement in the action.

[129] Suppose a notice to admit lists only facts that the defendant has already admitted in a statement of defence. A party that secures a second admission of facts cannot be said to have advanced its suit.[122]

[130] Justice Graesser erred in concluding that "the sticks were moved forward to June 1, 2015 (the Notice to Admit date) or June 16, 2016 (the reply date). Serving the Notice to Admit on McElhanney advanced the action significantly, because McElhanney provided no meaningful response, and no response within the scope of Rule 6.37(3)".[123]

3. The Failure of McElhanney's Surveys' Counsel to Reply Within a Reasonable Period to Mr. Jacobs' October 11, 2016 Email Cannot Be Characterized as an Advancement of Mr. Jacobs' Action

[131] On October 11, 2016 Mr. Jacobs, after radio silence approaching fifteen months, contacted McElhanney Surveys' counsel by email and asked counsel to provide some potential hearing dates for the dormant summary judgment application.

[132] Counsel never replied.

[133] Mr. Jacobs did nothing.[124]

[134] These two events cannot be characterized as an advancement of the action. They did nothing whatsoever to assist in the resolution of the facts or the law.[125]

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[120] See *Canadian Southern Petroleum Ltd. v. Amoco Canada Petroleum Co*., 168 A.R. 126, 130 (Q.B. 1994) ("the proper remedy is one of costs. It is to be dealt with by the trial judge, if and when the matter is, in fact, proved, and it is shown that the refusal to admit is not justified or is not reasonable").

[121] *Bourne v. Alberta*, 2008 ABCA 165, ¶ 3; 55 C.P.C. 6th 1, 2.

[122] How many declarations of invalidity does a plaintiff need? See *Black v. Law Society of Alberta*, 63 D.L.R. 4th 98, 101 (Alta. Q.B. 1989) (the Court stayed a second trial attacking the constitutionality of the anti-national law firm rules on the ground that the plaintiffs had already secured a declaration that the rules were unconstitutional and invalid).

[123] *Jacobs v. McElhanney Land Surveys Ltd*., 2018 ABQB 867, ¶ 88.

[124] He could have served on McElhanney Surveys a "proposal for the completion or timing of any stage or step in the action" and apply to the court under r. 4.4(2) if McElhanney Surveys did not respond. Or he could have relied on r. 4.10(3) and asked the Court for a conference to set down a hearing date. This was a straightforward wrongful dismissal action that a court could easily dispose of in an afternoon on a summary judgment or summary trial application.

[125] *330626 Alberta Ltd. v. Ho & Laviolette Engineering Ltd.*, 2018 ABQB 398, ¶ 35 ("Setting dates for questionings that never occur or commencing a step that is not then completed ,do not significantly advance the action").

[135] Justice Graesser's determination that the "time limits on Jacobs were reset ... sometime after October 2016 and well before July 2017 on account of McElhanney ignoring Mr. Jacobs' correspondence" is incorrect.[126] While we agree with Justice Graesser's criticism of counsel for failing to respond within a reasonable time to Mr. Jacobs' October 11, 2016 email,[127] this failure does not change the nature of the email – a simple request for potential hearing dates. Had counsel responded and provided potential hearing dates, this would not have qualified as a significant advance.

VII. Conclusion

[136] The appeal is allowed.

[137] Justice Graesser's order pronounced October 15, 2018 is set aside and Master Schulz's order pronounced February 6, 2018 and entered March 12, 2018 is reinstated. As a result, Mr. Jacobs' action against McElhanney Surveys is dismissed under r. 4.33(2) of the *Alberta Rules of Court*.

Appeal heard on April 1, 2019

Memorandum filed at Edmonton, Alberta
this 4th day of June, 2019

Wakeling J.A.

Feehan J.A.

[126] *Jacobs v. McElhanney Land Surveys Ltd.*, 2018 ABQB 867, ¶ 114.

[127] Counsel should have replied within a reasonable period. Rule 4.2(b) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, provides that a party "in an action categorized as a standard case [must] ... respond in a substantive way and within reasonable time to any proposal for the conduct of an action". Rule 7.2-7 of the Code of Conduct obliges a lawyer to answer communications with "reasonable promptness". This obligation applies to counsel communicating with an unrepresented person because of r. 7.2-12 of the Code of Conduct.

McDonald, J.A. (dissenting):

Introduction

[138] I have read my colleagues' Memorandum of Judgment and must respectfully disagree. For the reasons set out herein, I would dismiss the appeal.

[139] This is an appeal from the decision of the chambers judge allowing in turn the appeal from the Master's decision wherein she granted the application brought by McElhanney Land Surveys Ltd (McElhanney) for an order dismissing the lawsuit pursuant to rule 4.33. The effect of the chambers judge's decision was to restore the action.

Facts

[140] This action is a claim by Anthony Jacobs (Jacobs) against his former employer McElhanney, and Steve Yanish for a number of causes of action including breach of contract and constructive dismissal. Jacobs filed his statement of claim on November 26, 2013.

[141] On January 21, 2014, McElhanney filed its statement of defence.

[142] On March 24, 2014 and May 6, 2014 respectively, Jacobs and McElhanney served their affidavits of records.

[143] On June 13, 2014, McElhanney filed an application for security for costs, which was granted on June 24, 2014 and required Jacobs to post $10,000. The application was granted in part due to Jacobs being a US resident with no evidence of Alberta assets that could be used to satisfy a costs award. Jacobs posted the $10,000 on July 21, 2014.

[144] On July 21, 2014, Jacobs filed an application for summary judgment returnable on July 30, 2014. On July 24, 2014, McElhanney filed an application to adjourn that summary judgment application.

[145] On July 25, 2014, a Master granted McElhanney's adjournment application (and also granted an order to abridge the time for service of that application) and directed that Jacobs' summary judgment application be adjourned to special chambers and heard by a Justice of the Court of Queen's Bench at the next mutually agreeable date. Jacobs had been served late on July 24, 2014 with the application, but did not appear the next day to oppose it. The Master also restrained Jacobs from contacting McElhanney's current employees.

[146] On July 28, 2014, Jacobs filed an application maintaining his opposition to the adjournment being granted (presumably unaware that it had already been granted) and in his grounds for that application stated that the defence had filed its application purposely on short notice knowing that Jacobs was a US resident who had to fly to Canada from the US.

[147] On July 29, 2014, the same Master confirmed his July 25 order, and directed that McElhanney, at a mutually convenient time, may cross-examine Jacobs on his affidavit in support of his summary judgment application.

[148] Several attempts were made to schedule the application as directed by the court, with emails being exchanged between Jacobs and McElhanney's counsel between September 16 and October 2, 2014.

[149] On June 1, 2015, Jacobs served written interrogatories on McElhanney's counsel to be completed by Steve Yanish, McElhanney's branch manager. These written interrogatories were never answered. Also on June 1, 2015 Jacobs served McElhanney's counsel with a Notice to Admit Facts. On June 15, 2015 McElhanney filed its Response.[128]

[150] On October 11, 2016, Jacobs emailed McElhanney's counsel regarding the summary judgment application.[129] Counsel never responded.

[151] On July 5, 2017, Jacobs booked court reporting services for July 25, 2017, intended to be used for his questioning of Steve Yanish. Jacobs mailed the required conduct money to McElhanney's counsel on the same date.

[152] On July 14, 2017, McElhanney filed its application for dismissal of the action for delay per rule 4.33 and 4.31.

Decision Below

[153] The chambers judge correctly cited *Bahcheli v Yorkton Securities Inc.*, 2012 ABCA 166, for the proposition that the standard of review to be applied by a chambers judge on an appeal from a Masters' decision is correctness, such that no deference is owed.

[154] The chambers judge also cited and relied upon the decision in *Janstar Homes Ltd v Elbow Valley West Ltd*, 2016 ABCA 417. In *Janstar*, this Court had occasion to consider the foundational rule 1.2 in the context of an appeal from a chambers judge's decision involving rule 4.33 where it stated at para 26 as follows:

> With respect to the foundational rule 1.2, two comments are in order. First, it does not override the clear mandatory language of rule 4.33. Second, it does not have the effect of requiring a defendant, in any manner, to assume carriage of an action where the plaintiff is not actively advancing its own claim. The initiative at all times remains with the plaintiff to pursue its lawsuit in a timely fashion: *XS*

[128] Response to Notice to Admit is reproduced as Schedule "A".

[129] Reproduced as Schedule "B"

> *Technologies Inc v Veritas DGC Land Ltd.*, 2016 ABCA 165 at para 7. **On the other hand, a defendant is obliged, pursuant to the foundational rule 1.2, not to engage in tactics that obstruct, stall or delay an action that the plaintiff is advancing**. (Emphasis added)

[155] It is clear from the chambers judge's decision that he was troubled by McElhanney's conduct throughout the litigation. Specifically, he wrote at 2018 ABQB 867 at paras 113-114:

> **Using a functional approach in looking at the defendant's actions, I see a pattern of delay and obstruction once Mr. Jacobs posted the security for costs he was ordered to put up.** The response to the Notice to Admit was clear obstruction. Failing to answer Mr. Jacobs' correspondence of October 2016 and replying instead in July 2017 with an application to dismiss for delay is not tardiness, but it evidences purposeful delay. Under the pre-2010 rules regarding delay, this behavior might have had no consequences for McElhanney. But following November 2010, there are responsibilities on defendants in the foundational rule 1.2 and the approach of 'make me do it' (by having to repeatedly make court applications to get the defendant to do something) is not behavior that should be rewarded.
>
> In my assessment, because of McElhanney's conduct, the time limits on Jacobs were reset in June 2016[sic] on account of the response to his Notice to Admit, and then again sometime after October 2016 and well before July 2017 on account of McElhanney ignoring Mr. Jacobs' correspondence. **Ignoring correspondence for many months until after an arguable drop dead date has passed is not appropriate and should not be countenanced.** (Emphasis added)

Analysis

[156] Palpable and overriding error is the standard of review for failing to dismiss an action for long delay when questions are of mixed fact and law: *Flock v Flock Estate*, 2017 ABCA 67 at para 13, 49 Alta LR (6th) 41; *Weaver v Cherniawsky*, 2016 ABCA 152 at para 15, 38 Alta LR (6th) 39; *Ro-Dar Contracting Ltd v Verbeek Sand and Gravel Inc*, 2016 ABCA 123 at para 11. Findings of fact are entitled to deference absent palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8 and 10.

[157] I will now consider both these matters relied upon by the chambers judge in coming to his conclusion regarding McElhanney's conduct throughout the litigation. First, on June 1, 2015 Jacobs had served McElhanney's counsel with a Notice to Admit Facts "for the purpose of a summary trial".

[158] Rule 6.37 governs the procedure relating to a Notice to Admit Facts. Of particular relevance is rule 6.37(3) and rule 6.37(5) which provide:

> (3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that
>
> > (a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or
> >
> > (b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part,
> >
> > > (i) privileged, or
> > >
> > > (ii) irrelevant, improper or unnecessary.
>
> …
>
> (5) a denial by a party must fairly meet the substance of the requested admission and when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

[159] McElhanney's filed Response of June 15, 2015 stated that "No application has been filed or served for Summary Trial in this action" and "The Plaintiff has not made himself available for cross-examination". McElhanney's Response did not deny the facts sought to be admitted and set out in detail the reasons why the facts cannot be admitted, as mandated by rule 6.37(3)(a), nor did it assert a claim of privilege as mandated by rule 6.37(3)(b)(i). Furthermore, it did not use the phrase "irrelevant, improper or unnecessary" as mandated by rule 6.37(3)(b)(ii). The statement that Jacobs "has not made himself available for cross-examination" was found by the chambers judge to be untrue. Furthermore, McElhanney's Response in no way "fairly meet[s] the substance of the requested admission[s]" as mandated by rule 6.37(5).

[160] In oral submissions before this Court, Jacobs' counsel stated that McElhanney had purported to come within rule 6.37(3) but did not do so, and rather just advanced a blanket conclusion that "was improper". It is clear on its face that McElhanney's Response was non-compliant with the provisions of rule 6.37.

[161] Previously, if a party upon whom a Notice to Admit Facts was served did not comply with the requirements of the former rule 230 and 230.1, the only consequence was a possible costs award following trial.

[162] However, with the enactment of foundational rule 1.2, the consequences for a deliberate disregard of rules 6.37(3) and 6.37(5) can be far greater.

[163] The chambers judge specifically found that McElhanney's Response to Jacobs' Notice to Admit Facts "was clear obstruction". In my opinion, the chambers judge committed no palpable and overriding error in coming to this conclusion and appellate intervention therefore is not warranted.

[164] Second, the chambers judge found that "[f]ailing to answer Mr. Jacobs' correspondence of October 2016 and replying instead in July 2017 with an application to dismiss for delay is not tardiness, but it evidences purposeful delay". The correspondence in question was an email dated October 11, 2016 sent by Jacobs to McElhanney's counsel. Had Jacobs not sent this correspondence and simply done nothing, then McElhanney's application in July 2017 to dismiss would have been entirely appropriate.

[165] However, the Law Society of Alberta Code of Professional Conduct, chapter 7 provides:

> 7.2-7 A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

In my opinion, a lawyer owes this same duty to a self-represented litigant. Jacobs' email clearly contemplated a response that was never provided. Rather, in July 2017, McElhanney's counsel brought the application to dismiss. This gives all the appearance of being an ambush. The chambers judge committed no palpable and overriding error in coming to his conclusion on this either. In my opinion, the chambers judge's characterization of McElhanney's conduct as "stonewalling" is amply justified on the record.

[166] In light of the chambers judge's ruling regarding McElhanney's conduct throughout this litigation, I do not find it necessary to comment upon the chambers judge's rulings with respect to Jacobs' application for summary judgment filed July 2014.

[167] Finally, as regards McElhanney's application for dismissal pursuant to rule 4.31, the chambers judge stated:

> [118] I do not find his delay in this matter to be inordinate, and some of it is excused by McElhanney's lack of co-operation throughout. Presumed prejudice does not arise. There was no evidence of any real prejudice adduced by McElhanney.

In my opinion, given the record, the chambers judge's ruling on this is eminently reasonable.

Conclusion

[168] Under the circumstances, and having regard to the degree of deference owed to the chambers judge in this matter, I see no basis for appellate intervention. It therefore follows that the chambers judge's reset in June 2015 (not 2016 as written) and subsequently to October 2016 is appropriate. Accordingly, I would dismiss the appeal.

Appeal heard on April 1, 2019

Memorandum filed at Edmonton, Alberta
this 4th day of June, 2019

McDonald, J.A.

Schedule "A"

	Clerk's stamp:
COURT FILE NUMBER	1303 16767
COURT	COURT OF QUEEN'S BENCH
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**Anthony Jacobs**
DEFENDANTS	**McElhanney Land Surveys, Ltd. and Steve Yanish**
DOCUMENT	**RESPONSE TO NOTICE TO ADMIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Alexandra C. Bochinski DLA Piper (Canada) LLP 1201 Scotia 2 Tower 10060 Jasper Avenue Edmonton, AB T5J 4E5 Phone: (780) 429-6824 Fax: (780) 702-4361 File No.: 10375-00001/RXS

1. The Defendant, McElhanney Land Surveys Ltd. ("**McElhanney**") states that the Notice to Admit Facts [Written Opinions] (the "**Notice to Admit**") is in respect of an application for Summary Trial.

2. No application has been filed or served for Summary Trial in this action.

3. The Notice to Admit refers to the Plaintiff's Affidavit, filed July 21, 2014 (the "**Affidavit**").

4. The Notice to Admit asks McElhanney to admit facts in respect of the Affidavit.

5. Pursuant to the Order of the Honourable Master R. Wacowich, filed July 30, 2014 (the "Order"), a copy of which is attached to this Response, McElhanney's counsel may cross-examine the Plaintiff on the Affidavit, at a mutually convenient time.

6. The Plaintiff has not made himself available for cross-examination.

7. Given the Affidavit, the Order, and that no cross-examination has taken place, the Notice to Admit is wholly inappropriate.

8. McElhanney makes this Response without prejudice to its right to bring an application to set aside the Notice to Admit, with costs.

Schedule “B”

9/10/2018

Subject: Choose date for special application to be heard in McElhanney case no. 1303 16767

From: ANTHONY JACOBS (exclusivelandsur@bellsouth.net)

To: alexandra.bochinski@dlapiper.com;

Date: Tuesday, October 11, 2016 4:33 PM

Ms. Bochinski,

I know it's been awhile since we have communicated but now I am ready to have this special application heard.

I just spoke with Peggy for scheduling and she gave me the following dates: June 6,7,9,13-16,20-23, 27-30 year 2017.

I am available on any of those dates. Please choose the earliest one so that we will be within the statute of limitations of 3 years without taking some action.

As soon as I get a response from you I will call Peggy back to confirm scheduling.

Thank you,
Anthony Jacobs

Appearances:

N.B. Okoye
for the Respondent

C.W. Brusnyk
for the Appellant