In the Court of Appeal of Alberta

Citation: Ursa Ventures Ltd v Edmonton (City), 2016 ABCA 135

Date: 20160511
Docket: 1501-0197-AC
Registry: Calgary

Between:

Ursa Ventures Ltd.

Respondent
(Plaintiff)

- and -

The City of Edmonton

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment of The Honourable Madam Justice Rowbotham
Concurring Memorandum of Judgment of The Honourable Mr. Justice Martin

Dissenting Memorandum of Judgment of The Honourable Mr. Justice Wakeling

Appeal from the Order by
The Honourable Mr. Justice A.G. Park
Dated the 7th day of July, 2015
Filed the 28th day of August, 2015
(2015 ABQB 438, Docket: 1001 16351)

Memorandum of Judgment of
The Honourable Madam Justice Rowbotham

I. Introduction

[1] This appeal considers r 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010, the so-called "drop dead" rule.

[2] The appeal as argued raises two issues: (i) whether a mandatory step under the *Rules* (here an affidavit of records) always "significantly advance[s] the action"; and (ii) whether the chambers judge erred in finding that the respondent's affidavit of records significantly advanced the action.

[3] *Morasch v Alberta*, 2000 ABCA 24, 250 AR 269 has been overtaken by changes in the *Rules* and the modern approach to civil litigation. *Morasch* considered the now-repealed r 244.1 of the *Alberta Rules of Court*, Alta Reg 390/68 and held that a completed mandated procedural step was always a "thing" which "materially advanced the trial". However, it is not in keeping with the foundational principles underlying the current *Rules* and the modern approach to litigation in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 and *Windsor v Canadian Pacific Railway*, 2014 ABCA 108, 572 AR 317. It does not matter whether the last step taken is mandated by the *Rules* or not: the analysis should be the same. That is, did the substance of the step taken to advance the action (not its form) significantly advance the action?

[4] In the result, the chambers judge did not err in law in his interpretation of r 4.33, and his determination that the respondent's affidavit of records is a significant advance in this action is entitled to appellate deference. Accordingly, the appeal is dismissed.

II. Background

[5] Ursa Ventures Ltd. (Ursa) sued the City of Edmonton for damages relating to a contract to provide electrical components. The Statement of Claim was filed November 1, 2010 and the Statement of Defence on November 24, 2010. Ursa was granted several extensions of time for filing its affidavit of records. A final deadline of December 12, 2011 passed without the affidavit. In late December 2011, the parties corresponded about whether Ursa's counsel would be continuing to act. On February 6, 2012, Ursa's counsel confirmed that he would still be conducting the file.

[6] Another year and a half passed without correspondence or any steps being taken. On October 31, 2013, and within three years after the Statement of Defence, Ursa served its filed affidavit of records along with an invitation to the City to advise, which documents it wished to have copied and delivered. The affidavit contained 26 records.

[7] On February 12, 2014, the City advised of its intention to apply under r 4.33 to have the action dismissed for long delay. The City also continued to press for the delivery of documents. On

October 28, 2014, the City informed Ursa that a representative of the City would be attending at counsel's office to inspect the records. Ursa's counsel advised he would be away and inspection could not take place. The City has not inspected the records or filed its affidavit of records.

III. Decision Below: *Ursa Ventures Ltd v Edmonton (City)*, 2015 ABQB 438

[8] The chambers judge reviewed the history of the litigation and noted that neither party had delivered its affidavit of records in accordance with the time limits in the *Rules.* He observed that recent years had seen a "sea change relating to delay in civil litigation," and r 4.33 should be interpreted accordingly. He also noted that there was no doubt the respondent's affidavit of records had been served within three years of the filing of the Statement of Claim so the real question was whether, using a purposive approach, the filing of the affidavit significantly advanced the action. He found that it did and dismissed the City's application to have the action dismissed.

IV. Analysis

Ground One: Is a mandatory step under the Rules always a "significant advance in an action"?

[9] Rule 4.33 provides that "[i]f 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant". The exceptions in r 4.33 do not apply.

[10] Rule 4.33 must be read in the context of the general delay rule 4.31. The relevant part of rule 4.31 provides that "[i]f delay occurs in an action, on application the Court may dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party." The general delay rule can be triggered at any time by "prejudice". Rule 4.33, the drop dead rule, is not prejudice based and results in automatic dismissal after the three year time period. Accordingly, the drop dead rule is not a case management tool. It is not designed to regulate the efficient prosecution of actions, but rather to prune out actions that have truly died.

[11] Rule 4.33 operates like a limitation period: a cause of action can be saved by issuing a statement of claim one day before the two year limitation expires and likewise, a dormant action can be saved by something that significantly advances it in the 35th month, notwithstanding how much delay there has been to that point. It is noteworthy that r 4.33 says "without a significant advance", not "without continuous significant advancement". It follows that I cannot endorse my colleague's approach of determining what a reasonably diligent litigant would do within the three year period. The drop dead rule permits inaction for close to three years as long as something is done to significantly advance the action prior to the expiration of the three years.

[12] The repealed r 244.1 provided that the court shall dismiss an action if "5 or more years have expired from the time the last thing was done in an action that materially advances the action" (with emphasis).

[13] When the respondent filed its affidavit of records on October 31, 2013, transitional rule, r 15.4, governed; it was repealed the next day (November 1) when r 4.33 came into force. Effective July 25, 2013, both rr 15.4 and 4.33 were amended. In each case, the phrase "elapsed since the last thing done to significantly advance" the action was replaced with "passed without a significant advance in" the action. Accordingly, what follows applies equally to rr 4.33 and 15.4.

[14] Before the new *Rules* were enacted, the Rules Committee rejected itemizing "things" deemed to significantly advance an action. It noted that this approach was not focussed on the functional objective of r 4.33. Rule 4.33 was not aimed at requiring litigants to take formalistic steps every two years which did not truly advance the action, citing *Phillips v Sowan,* 2007 ABCA 101 at para 5, 40 CPC (6th) 378.

[15] By removing the reference to "things," the Legislature shifted the focus of r 4.33 to function and substance, rather than an approach that looked at whether the act fitted into a specific category. Because of this change in focus, the applicability of cases decided under the repealed r 244.1 must be considered in the context of the language and focus of r 4.33.

[16] *Morasch* considered Rule 244.1. Fruman JA held at para 6:

> If the *Rules of Court* require that a step be taken, the completion of that step, in and of itself, materially advances the action: ***Bishop* v. *Grotrian*** (1998), 228 A.R. 73 at 78 (C.A.). Because the *Rules* require that the step be taken, it is considered a step which is necessary to advance an action and its completion is deemed to materially advance the action. The court need not inquire whether the step actually caused the action to advance. The completion of the required step is sufficient, in and of itself, to restart the five-year clock.

[17] She further concluded that a procedural step contemplated but not required by the *Rules* may also be a step which materially advances an action. These steps were to be examined in light of the purpose of r 244.1.

[18] The new *Rules* use a functional approach. Their purpose and intent, as emphasized in the foundational rule 1.2, is to provide fair and just resolution of claims in a timely and cost effective manner. The foundational rules parallel a cultural shift in litigation that deemphasises trial as the dominant mechanism of resolving civil disputes in favor of procedures such as summary dismissal and alternative dispute resolution: *Windsor* at para 15; *Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.*, 2016 ABCA 123 (available on CanLII); *Heurto v Canniff,* 2014 ABQB 534 at paras 13-15, aff'd 2015 ABCA 316.

[19] Under the delay *Rules* 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. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the particular lawsuit. The focus is on substance and effect, not form: *St Jean Estate v Edmonton (City),* 2014 ABQB 47 at para 19, 585 AR 81.

[20] The argument in favour of ruling that a mandatory step must always significantly advance an action is that the litigation cannot advance without that step. However, the question under r 4.33 is whether there has been a significant advance in the action. Was the step essential to the resolution of the action? In many instances, the mandated step will not only advance, but will significantly advance, the action. For example, a statement of defence will normally significantly or substantially advance an action because it narrows the issues and enables the plaintiff to know the case it must meet. But not every mandated formalistic step will always meet the functional test.

[21] The affidavit of records is an example where a functional approach may or may not lead to the conclusion that the particular affidavit of records significantly advanced an action.

[22] Consider a blank affidavit of records. This was the step taken by the plaintiff in *Chan v Calgary Remand Centre*, 2012 ABQB 325, 540 AR 245 (Master). Shortly after the defendants filed their application to dismiss for delay, the plaintiff swore and filed an affidavit of records that did not list any documents. The Master followed *Morasch* and concluded that completing a step required by the *Rules* will always materially advance an action, regardless of whether or not the step actually causes an advance in the action: para 26. Unconstrained by *Morasch*, the result might be different using a functional approach. The court could consider the genuineness and timing of the affidavit and balance that against a possible competing argument that even knowledge that the plaintiff has no relevant and material records can significantly advance an action. The Master's observation that he preferred the bright-line distinction between mandatory and optional steps under r 4.33, because "[i]t is preferable not to look behind steps that are mandated by the Rules because it eliminates this element of uncertainty, it avoids debate, and it will conserve judicial resources ..." (para 27) is acknowledged. Conservation of judicial resources is an important consideration but it is likely that there will be fewer occasions when the challenged step is mandatory not optional.

[23] Rule 4.33 cases that have considered a particular advance in an action will be useful precedents, but they are not determinative. Each piece of litigation is unique and the content, value, and timing of the advance in the action said to "reset the clock" must be assessed within the context of that lawsuit. This is the heart of the functional approach.

[24] The chambers judge acknowledged the "sea change" in approach and adopted the functional approach when he concluded that a mandatory step under the *Rules* does not always "significantly" advance an action.

[25] This ground of appeal is dismissed.

Ground Two: Did the chambers judge err in finding that the respondent's affidavit of records was a significant advance in the action?

[26] Unless the matter in issue is a question of law, reasonableness is the applicable standard for reviewing a chambers judge's exercise of discretion: *Decock v Alberta*, 2000 ABCA 122, 255 AR 234 at para 13.

[27] Schedule 1 of the respondent's affidavit of records contains 26 items. Eight are described by bundle. The chambers judge found that while these might have been better described this was a 'small sin' *per* Côté JA in *Dorchak v Krupka*, 1997 ABCA 89 at para 29, 196 AR 81. The remaining records were sufficiently described.

[28] The City submitted that all the records listed in the respondent's affidavit were already in its possession because it created them or sent them to the respondent. It argued that an affidavit without any substantive evidence or new information cannot significantly advance the action. The chambers judge concluded at para 41:

> A mutual possession of similar or identical records by the parties does not destroy the meaning or foundation or the significance of the records described by either party in the Affidavit of Records. Disclosure of similar or identical records by the litigants means each litigant knows the records produced by the adverse party could be evidence in the litigation process. Specifically, Ursa's Affidavit of Records discloses to the City the records in Ursa's possession and which records Ursa might use to attempt to prove its case at trial. The fact the records might be the same or identical to the records of the City does not impact Ursa's claim nor does it mean Ursa's Affidavit of Records does not significantly advance the action. To the contrary it advises the City of the nature, quality and quantity of Ursa's records. It further allows the City to know the nature of Ursa's production evidence which the City possibly will have to meet in order to defend the claims of Ursa at trial

[29] The City had not filed its affidavit of records and the chambers judge commented at para 45 that this made it impossible to compare the two sets of records but this did not detract from his view that service of the respondent's affidavit was a step that significantly advanced the action.

> Both parties, perhaps, would be reassured that there would be no new evidence or new information emanating from records other than from those records already in the common possession of both parties. The City possibly would learn it already possessed all of the relevant and material records respecting the issues in the litigation. Such disclosure by Ursa might satisfy the City of the case it had to meet through the auspices of document production at trial. There would be no surprises at trial through document production. The fact the City possessed the same records as did Ursa would not mean that Ursa in disclosing an identical document foundation was not significantly advancing the action. Initial disclosure of the records to the opposing litigant and alerting the other litigant to the existence and the nature of its records in its possession is a step which significantly advances the action.

[30] Suppose that the City had filed its affidavit and the respondent simply wrote a letter stating that it had no additional documents, and would be relying at trial on the records listed in the City's affidavit. Surely, this would significantly advance the action because the City would know that there were no other relevant records. Or perhaps in reviewing the respondent's affidavit of records,

the City discovered that it did not have certain records, which were said to have originated from its office. Depending upon the importance of the missing record (perhaps a work order), the discovery of that missing record could significantly advance the action.

[31] Moreover, the filing of the affidavit of records has certain consequences. One essential component of r 5.6(2)(e) is that a party must certify it has no other documents. Since a major objective of discovery is to avoid surprise, the knowledge that there are no "surprise documents" is important. Further, r 5.15 triggers some important admissions about the validity and authenticity of documents in the affidavit of records. When the respondent includes the City's documents in its affidavit, it essentially admits their authenticity.

[32] It is clear that the chambers judge considered this affidavit of records in the context of this lawsuit. He looked at its nature (a sworn affidavit) and the allegations in the pleadings. He was aware of the timing of the affidavit (within weeks of the three-year time limit). He balanced these factors, as he was obliged to do in employing the functional approach. It is not this court's role to reweigh factors. His decision is entitled to appellate deference and this ground of appeal is dismissed.

[33] There are two remaining issues regarding the affidavit of records. The City challenges the chambers judge's decision regarding the sufficiency of the description of the bundled documents. Further, the respondent's affidavit did not include a lease. The chambers judge suggested that a further and better affidavit should be produced respecting the bundled documents.

[34] The respondent is directed to file its affidavit of records and its further and better affidavit of records, including the lease within 30 days of the date of this judgment. The respondent will photocopy all of the records and send them to the City. The City is directed to file its affidavit of records 30 days after receipt of the respondent's affidavit. The respondent is directed to serve upon the City a litigation plan in accordance with r 4.4(2). It must do so within 60 days of the date of this judgment. If the parties cannot agree on a litigation plan, they may apply to the Court of Queen's Bench for directions.

V. Conclusion

[35] Even a step mandated by the *Rules* requires the court to analyse that step using the functional approach to determine whether that step significantly advances the action. The chambers judge adopted this approach. His conclusion that this affidavit of records significantly advanced the action is entitled to deference.

[36] The appeal is dismissed.

Appeal heard on December 11, 2015

Memorandum filed at Calgary, Alberta
this 11th day of May, 2016

Rowbotham J.A.

Concurring Memorandum of Judgment of
The Honourable Mr. Justice Martin

[37] I have read the judgments of my colleagues. We agree that pursuant to Rule 4.33(1) not every step taken to advance an action, whether mandatory or not, will be sufficient to reset the clock; the focus in every case is whether it significantly advanced the action.

[38] Here, the respondent maintains that, by serving an affidavit of records, it did significantly advance the action. We are told that the affidavit was sworn nine months earlier, but not served until hours before Rule 4.33(1) would have extinguished the claim.

[39] The content of the affidavit is lacking. It referred to 20 documents, many that were poorly described or not described. Some documents that were obviously required by the respondent/plaintiff to support its claim were not referenced at all. These shortcomings are not usually fatal, but they reflect on the prospect that this affidavit of records could significantly advance the action. With respect, that is not a finding I would have made. Frankly, I expect counsel was relying on the jurisprudence surrounding the predecessor Rule 244 of the *Alberta Rules of Court*, and in particular, the *ratio* of *Alberta v Morasch*, 2000 ABCA 24, that taking any step required by the Rules is sufficient to meet the test and reset the clock. But we have agreed that is no longer the law.

[40] Although I do not share the chambers judge's view, I cannot say that his conclusion was unreasonable. In such circumstances, his finding is entitled to deference. It is for that reason only that I would dismiss the appeal.

[41] Still, I remain concerned that such an infantile step should be allowed to reset the clock for another three years of inactivity. That would neutralize the important objective of Rule 4.33(1). The idea is that we usher these malingering files to trial or put them out of their misery. Having found as he did, the chambers judge should have imposed a firm litigation schedule as contemplated by Rule 4.33(2).

[42] I would dismiss the appeal.

Appeal heard on December 11, 2015

Memorandum filed at Calgary, Alberta
this 11th day of May, 2016

Martin J.A.

Dissenting Memorandum of Judgment of
The Honourable Mr. Justice Wakeling

I. Introduction

[43] The chambers judge dismissed The City of Edmonton's application under r. 4.33(1) of the *Alberta Rules of Court*[1] for an order dismissing the action of Ursa Ventures Ltd. on the basis that the plaintiff had not significantly advanced its action in a three-year period. Ursa's action is a straightforward commercial law case.

[44] The City appeals this order.

II. Questions Presented

[45] Rule 4.33(1) of the *Alberta Rules of Court* states that the Court of Queen's Bench, on application, must dismiss the action against the moving party "[i]f 3 or more years has passed without a significant advance in an action." Rule 244.1 of the old *Alberta Rules of Court*[2] declares that "where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall ... dismiss ... the action ... ."

[46] Does r. 4.33(1) of the *Alberta Rules of Court* introduce a test different from R. 244.1 of the old *Alberta Rules of Court*? If so, what is it?

[47] Ursa served its affidavit of records on the City roughly three weeks before the end of the three-year period following the date the City filed its statement of defence. Ursa relies on no other activity to resist dismissal of its action.

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[1] Alta.Reg. 124/2010

[2] Alta. Reg. 390/1968.

[48] Has Ursa, by filing an affidavit of records, significantly advanced its lawsuit in the three-year period following its receipt of the City's statement of defence?

III. Brief Answers

[49] The *Alberta Rules of Court* oblige a plaintiff to prosecute an action with reasonable expedition. Those responsible for the creation of the rules have concluded that the administration of justice is compromised by the existence of stale claims. The consequences for plaintiffs whose initial commitment to their action diminishes at a rapid rate and who allow their actions to stagnate is severe – the Court will dismiss their actions.

[50] The judicial branch of government must act as a prudent steward of the resources allotted to it for the administration of justice. It should remove from the litigation highway those actions that have stalled. The state should not expend any more resources than is absolutely necessary on actions that the proponents themselves have ignored.

[51] The text of r. 4.33 is substantially different from its predecessors.

[52] It follows that a new test is now in place.

[53] This, in turn, means that the jurisprudence relating to R. 244.1[3] does not apply to r. 4.33(1) of the new rules.

[54] Rule 4.33(1) considers the relevant time frame – three or more years – and asks whether there has been a significant advance in the action in that period. Its purpose is to promote the advancement of actions at a reasonable pace.

[55] The old rule, R. 244.1, on the other hand, had a much narrower focus. It asked whether a specific thing materially advanced the action.

[56] The new test seeks to identify actions that are not progressing at a sufficiently expeditious pace.

[57] It has two elements that contribute to measuring an acceptable litigation pace.

[58] First, a comparator must be established. To do this, a court must ask how much progress a reasonably diligent plaintiff would make in the applicable time frame. One cannot complain about a party who presses an action ahead at this rate.

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[3] E.g., *Alberta v. Morasch*, 2000 ABCA 24; 183 D.L.R. (4th) 742.

[59] Second, because the purpose of r. 4.33(1) is to attach consequences to unacceptable delay, the standard cannot be the rate of progress of the reasonably diligent plaintiff. A slower pace is the proper measure. An adjustment has to be made to reflect this fact and to establish a measure of unacceptable dilatoriness.

[60] A judgment call must be made as to where the line dividing acceptable from unacceptable delay is. Capable people can disagree on where it should be drawn. But a line nonetheless is needed.

[61] A reasonably diligent plaintiff with a standard straightforward commercial action like Ursa's would probably have a trial date by the end of the three-year period following service of the defendant's statement of defence. This notional plaintiff most certainly would have filed a form 37 request for a trial date.

[62] It is not unfair to insist that a comparator plaintiff in a standard straightforward commercial action with the features of Ursa's claim must have completed questioning of the defendant in the three-year period following service of the defendant's statement of defence. This is not a demanding standard. In the absence of a litigation plan or some other agreement regarding time lines, a court order utilizing different milestones or a compelling explanation for not reaching this point on the litigation spectrum, the Court must dismiss the nonmoving party's stalled action.

[63] Ursa has not met this target. It has fallen far short of the target. It has provided no reasonable explanation for its inaction.

[64] This appeal is allowed and Ursa's action is dismissed.

IV. Statement of Facts

[65] On November 1, 2010 Ursa commenced an action against the City alleging breach of contract and fraudulent or reckless misrepresentation that induced Ursa to bid on an electrical repair contract for the City's trolley busses.

[66] The City served its statement of defence on November 24, 2010. It denied the plaintiff's allegations.

[67] On October 31, 2013 the plaintiff served its affidavit of records, sworn on February 16, 2013.

[68] The parties exchanged inconsequential correspondence between November 24, 2010 and November 24, 2013.

[69] On July 21, 2014 the City applied for an order under r. 4.33 (1) of the *Alberta Rules of Court*[4] dismissing Ursa's action for delay. Its application alleged that "[t]hree or more years have passed without a significant advance in this action ... [and that] the City has not acquiesced to the Plaintiff's delay".

[70] The City took the position before the chambers judge that the relevant period for the purpose of r. 4.33(1) commenced November 24, 2010, the date the City filed its statement of defence.

[71] The chambers judge dismissed the City's application, concluding that Ursa had significantly advanced the action when it served its affidavit of records on the City:[5]

[72] Ursa has met its requirement for the discovery of documents. The Affidavit of Records being served on October 31, 2013 was within the 3 year period. It was a mandated step under the rules. It was a completed step and a thing of substance which significantly advanced the action in a meaningful way by meeting the principle of discovery and disclosure of new documentary evidence on the issues raised in the pleadings. It moved the litigation closer to trial. In an effectual manner it assisted the parties to narrow and define the issues in the litigation.

[73] The City appeals this decision.

V. Applicable Rules of Court

A. Rule 4.33 of the *Alberta Rules of Court*

[74] Part 4, Division 6 of the *Alberta Rules of Court*[6] is entitled "Delay in an Action." It consists of three rules, two of which are relevant for this appeal.

[75] Rules 4.31[7] and 4.33[8] of the *Alberta Rules of Court*, the latter of which came into force on November 1, 2013,[9] read as follows:

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[4] Alta. Reg. 124/2010.

[5] 2015 ABQB 438, ¶ 58.

[6] Alta. Reg. 124/2010.

[7] Rule 4.31 came into force on November 1, 2010. *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 15.15(1).

[8] When the *Alberta Rules of Court* came into force on November 1, 2010, r. 4.33(1) read, in part, as follows: "If 2 or more years has passed after the last thing done". The *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 140/2013, s. 4 changed, effective July 25, 2013, the period from two to three years.

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, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

...

4.33(1) If 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the parties to the application expressly agreed to the delay,

(b) the action has been stayed or adjourned by order, an order has extended the time for advancing the action, or the delay is provided for in a litigation plan,

(c) the applicant did not provide a substantive response within 2 months after receiving a written proposal by the respondent that the action not be advanced until more than 3 years after the last significant advance in the action, or

(d) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

...

(3) The following periods of time must not be considered in computing periods of time under subrule (1):

(a) a period of time, not exceeding one year, between service of a statement of claim on an applicant and service of the applicant's statement of defence;

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[9] Alta. Reg. 122/2012, s. 12.

(b) a period of time, not exceeding one year, between provision of a written proposal referred to in subrule (1)(c) and provision of a substantive response referred to in that subrule.

(4) Rule 13.5 does not apply to this rule.

B. The Antecedents of Rule 4.33(1)

[76] There were three earlier versions of r. 4.33(1).

[77] The first, R. 244.1[10] of the old *Alberta Rules of Court*,[11] was in force from September 1, 1994[12] to October 31, 2010[13] inclusive. It read as follows:

[78] 244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

[79] There was a prospective predecessor to R. 244.1. *Alberta Rules of Court Amendment Regulation (No. 3)*[14] included a new rule – R. 244(2) – and declared that it would come into force on November 1, 1993. But it never did. An amending regulation filed October 20, 1993 stated that R. 244(2) would be law effective September 1, 1994.[15] A second amending regulation filed July 13, 1994 declared a new Part 24 would come into force on September 1, 1994 and the new version did not include R. 244(2).[16] The stillborn R. 244(2) was in this form:

> 244(2) Subject to Rule 244.2, where 5 or more years have expired from the time that the last step was taken in an action or other proceeding that materially advances the action or proceeding, the Court shall, on the motion of a party to

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[10] I have capitalized rule because the old *Alberta Rules of Court* adopted this style. The new *Alberta Rules of Court* do not. Hence, I have not.

[11] Alta. Reg. 390/1968.

[12] Alta. Reg. 234/1994, ss. 2 & 7.

[13] Alta. Reg. 124/2010, r. 15.14(1).

[14] Alta. Reg. 160/1993, s. 26(2).

[15] *Alberta Rules of Court Amendment Regulation, 1993 (No. 3) Amendment Regulation*, Alta. Reg. 283/1993, s. 2.

[16] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 234/1994.

> the action or proceeding, dismiss the portion or part of the action or proceeding that relates to the party bringing the motion.

[80] The second, r. 15.4, as set out below, was in force from November 1, 2010[17] to July 25, 2013:[18]

> 15.4(1) Unless subrule (2) applies, the Court, on application, must dismiss the action as against the applicant if
>
> (a) after coming into force of this rule, 3 years has elapsed since the last thing done to significantly advance the action or
>
> (b) 5 years has elapsed since the last thing done to significantly advance the action,
>
> whichever comes first.
>
> (2) The Court must not dismiss the action if
>
> (a) the parties to the application agreed to the delay,
>
> (b) the action has been stayed or adjourned by order or an order has extended the time for doing the next thing in the action, or
>
> (c) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to an extent that, in the opinion of the Court, warrants the action continuing.

[81] The most recent version of r. 15.4, in force from July 25, 2013[19] to October 31, 2013[20] inclusive, reads as follows:

> 15.4(1) Unless subrule (4) applies, the Court on application, must dismiss the action as against the applicant if

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[17] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 15.15(1).

[18] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 140/2013, s. 4.

[19] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 140/2013, s. 15.

[20] *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 122/2012, s. 12.

(a) after coming into force of this rule, 2 years has passed without a significant advance in the action or

(b) 5 years has passed without a significant advance in the action

whichever comes first.

(2) The Court must not dismiss the action if

(a) the parties to the application agreed to the delay,

(b) the action has been stayed or adjourned by order or an order has extended the time for doing the next thing in the action

(c) the applicant did not provide a substantive response within 2 months after receiving a written proposal by the respondent that the action not be advanced until more than 3 years after the last significant advance in the action.

(4) The following periods of time must not be considered in competing periods of time under subrule (1).

(a) a period of time, not exceeding one year, between service of a statement of claim on an applicant and service of the applicant's statement of defence;

(b) a period of time, not exceeding one year, between provision of a written proposal referred to in subrule (2)(c) and provision of a substantive response referred to in that subrule.

(5) Rule 13.5 does not apply to this rule.

C. Old Delay Rules No Longer in Force

[82] The old delay rules, in force from December 3, 1968[21] to October 31, 2010[22] inclusive, read as follows:

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[21] *Alberta Rules of Court*, Alta. Reg. 390/1968.

[22] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 15.14(1).

243. Except an application under Rule 244, no new step in an action prior to judgment shall be taken after the expiration of one year from the time when the party desiring to take the step first became entitled to do so, except with leave of the court which may impose terms.

244. Where there has been delay the court may dismiss an action for want of prosecution or give directions for the speedy determination of the action and may impose terms.

D. Other Applicable Rules of the *Alberta Rules of Court*

[83] Rule 1.2, in part, of the *Alberta Rules of Court*, is in this form:

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) ... [T]hese rules are intended to be used

...

(d) to oblige the parties to communicate honestly, openly and in a timely way ... .

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

[84] The following segments of Part 4, Division 1 are important:

4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way.

...

4.3(1) For the purpose of these rules, actions are categorized as

(a) standard cases, or

(b) complex cases.

...

(3) If, within 4 months after the date 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.

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.

4.5(1) The parties to an action categorized as a complex case must, within 4 months after the date that the parties agree to the categorization or the Court determines that the action is a complex case,

(a) agree on a complex case litigation plan, and

(b) unless reasons are given in the plan not to do so,

...

(iii) set a date by which disclosure of records will be completed under rule 5.5,
(iv) set a date by which questioning under Part 5 will be completed,

(v) set a date by which all experts' reports and rebuttal and surrebuttal expert reports will be served,
(vi) set a date by which reports of any health care professionals will be obtained, and
(vii) agree on an estimated date to apply for a trial date.

(2) When a complex case litigation plan or an amendment to the plan is agreed to, the plaintiff must file it and serve it on all parties.

...

4.8(1) On application, the Court may direct whether an action is to be categorized as a standard or complex case.

VI. Analysis

A. The *Alberta Rules of Court* Require a Plaintiff To Prosecute an Action in an Expeditious Manner

1. The Purpose of an Enactment and Its Text Are of Fundamental Importance

[85] A court must give contested text an interpretation that "best ensures the attainment of its objects"[23] and a meaning it may reasonably bear, taking into account the ordinary meaning of the words in the enactment.[24] "A fundamental rule is that neither a word nor a sentence may be given a

[23] *Interpretation Act*, R.S.A. 2000, c. 1-8, s. 10 ("An enactment shall be interpreted as being remedial, and shall be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects"); *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 331 ("All legislation is animated by an object the legislature intends to achieve"); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 807 ("The correct approach, ... generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose"); *City of Montreal v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 156 ("Identifying the purpose of a regulation can be helpful in determining the meaning of a given word or expression"); *Hills v. Canada*, [1988] 1 S.C.R. 513, 534 (a statute is a means to bring into effect a political objective) & *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919) ("where you have rival constructions of which the language of the statute is capable you must resort to the object of the statute ... [and adopt] the construction which best gives effect to the governing intention").

[24] *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26; [2012] 1 S.C.R. 149, 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 704 ("where, by use of clear and unequivocal language capable of only one meaning ... it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Thomson v. Canada*, [1992] 1 S.C.R. 385, 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Caminetti v.*

meaning that it cannot bear."[25] The interpretation that honours these complementary yet competing principles reduces the risk that undue emphasis of one will deprive the other of any meaningful force. Attaching undue weight to the purpose may result in the adoption of a meaning that the words cannot bear. [26] Overzealous pursuit of an undeniable legislative purpose must not cause one to overlook the limited scope of the words the legislators used.[27] On the other hand, undue focus on

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United States, 242 U.S. 470, 485-86 (1917) ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and the meaning commonly attributed to them"); R. Sullivan, Sullivan on the Construction of Statutes 28 (6th ed. 2014) ("It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012) ("Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense").

[25] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012). See also *The Queen v. Rodgers*, 2006 SCC 15, ¶ 18; [2006] 1 S.C.R. 554, 572 ("where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent"); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 807 ("Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention") per Dickson, J.; *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4 ("A court may never [give the text an implausible meaning]"); *Sansom v. Peay*, [1976] 3 All E.R. 375, 379 (Ch. D.) ("it would not be permissible for me to construe sub-s (9) in a manner which I thought was fair or reasonable unless the wording permits that construction"); *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 961 F. 2d 667, 671 (7th Cir. 1992) ("Compromises [the product of accommodations made by legislators responding to competing interests] draw unprincipled lines between situations that strike an outside observer as all but identical") & Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 543 (1947) ("violence must not be done to the words chosen by the legislature"). Courts that ignore this principle thwart the legislative will; they effectively rewrite the enactment. See *United Food and Commercial Workers, Local 401 v. XL Foods Inc. (Calgary Beef Plant)*, 2016 ABCA 31, ¶ 51.

[26] E.g., *Henry v. Saskatchewan Workers' Compensation Board*, 172 D.L.R. 4th 73, 110 (Sask. C.A. 1999) (having committed itself to a liberal interpretation of a no-fault statute enacted to provide workers with an income when they were unable to work on account of a workplace injury, the majority concluded that suicide committed at the workplace but not caused by workplace events was a workplace injury and compensable – a result subsequently reversed by legislative amendment; the dissenter opined that "[i]t is inconceivable ... that the legislature ... [intended] to provide coverage for suicides but drafted this enactment so that only the most perceptive would recognize their intention") & *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) (the Court refused to give unambiguous legislative text its plain meaning – penalize a church for hiring a foreigner – a resident Englishman – to serve as its pastor in contravention of a statute making it unlawful for any person to contract with a foreigner residing outside the United States to 'perform ... service of any kind in the United States' – because it was satisfied Congress did not intend the result the plain meaning mandated holding that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers [– Congress only intended to prohibit employers from hiring foreign manual labourers]").

[27] Purpose does not trump text. *The Queen v. Trudel*, [1992] 2 S.C.R. 731, 777 (it is wrong to give a statute a meaning that it cannot bear in order to promote equality and multiculturalism); *Canadian Fishing Co. v. Smith*, [1962] S.C.R. 294, 307 ("Where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it"); *Purba v. Ryan*, 2006 ABCA 229, ¶ 38; 397 A.R. 251, 262 (the Court rejected out-of-hand the notion that a court could order a jury trial when the plaintiff's damage claim for $74,000 was below the legislative bright-line demarcation of $75,000); *The Queen v. McGeady*, 2014 ABQB 104, ¶ 23; [2014] 7 W.W.R. 559, 571 ("No statutory decision maker can ignore substantive statutory

the text without adequate regard to the admitted purpose of the legislation may cause the court to adopt from several permissible meanings an interpretation that does not best promote the legislative purpose.[28]

[86] The legislative text is the best source for ascertaining the enactment's goal.[29] "A part of the legislation devoted to the legislative purpose is usually an indisputable marker of the [purpose of the statute]".[30]

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

[87] Rule 1.2(1)[31] of the *Alberta Rules of Court* unambiguously declares that the rules serve two important purposes.

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provisions because it believes ... [they] produce unfair results") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Text 343 (2012) ("The mere statement of the spirit-over-letter concept gives reason to doubt its validity. ... The concept is, in practice, a bold assertion of an unspecified and hence unbounded judicial power to ignore what the law says, leading to 'completely unforeseeable and unreasonable results'"). See Manning, "Second Generation Textualism", 98 Cal. L. Rev. 1287, 1290 & 1304 (2011) ("Second generation textualism argues that law making inevitably involves compromise; that compromise sometimes requires splitting the difference; and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose. … [J]udges who pursue a statute's background purpose at the expense of its implemental detail therefore risk undermining rather than furthering legislative design").

[28] E.g., *Johnson v. Southern Pacific Co*., 117 F. 462 (8th Cir. 1902) (the Court, applying a Congressional enactment passed to promote the safety of railroad employees, declined to conclude that the provision banning the use of "cars" not equipped with couplers coupling automatically by impact applied to locomotives) rev'd 196 U.S.1 (1904) (the Court understandably concluded, to promote the safety objects of the enactment – workers were losing their lives or limbs manually coupling and uncoupling rolling stock – that a "locomotive" was a "car" for the purpose of a statutory ban against a railroad using "any car ... not equipped with couples coupling automatically by impact and which can be uncoupled without necessity of men going between the ends of cars").

[29] *Alberta v. Cardinal*, 2013 ABQB 407, ¶ 52; 565 A.R. 271, 286 ("The best source of the goal the legislature pursues is the text itself"); *Aldridge v. Williams*, 44 U.S. 9, 24 (1845) ("The law as it is passed is the will of the majority of both houses and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used") & *Exxon Mobil Corp. v. Allapattah Services Inc.*, 545 U.S. 546, 568 (2005) ("the authoritative statement [of legislative intent] is the statutory text, not the legislative history or any other extrinsic materials. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"). See also *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) ("There is ... no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give effect to its wishes"). A review of legislation dealing with related subject matter and predecessor acts may also be helpful. *Chieu v. Canada*, 2002 SCC 3, ¶ 34; [2002] 1 S.C.R. 84, 104 & R. Sullivan, Sullivan on the Construction of Statutes 28-29 (6th ed. 2014).

[30] *Alberta v. Cardinal*, 2013 ABQB 407, ¶ 52; 565 A.R. 271, 286. See also Radin, "A Short Way with Statutes", 56 Harv. L. Rev. 388, 398 (1942) ("the practice [of setting forth the purpose in the preamble] gives us a fairly definite notion of what the statute means to accomplish").

[88] The first is the fair and just resolution of a claim. This is not a new proposition. "The courts exist to do justice".[32] The fair and just resolution of disputes has been the goal of rules of court since at least November 1, 1875, the date the first modern rules of court introduced by the *Supreme Court of Judicature Act, 1875*[33] came into force in the United Kingdom.

[89] The second purpose is the "timely and cost-effective" resolution of a claim. This 2010 pronouncement is a recent development. No mention of this objective is made in earlier versions of the *Alberta Rules of Court*. The English rules of court did not mention this topic until 2013.[34] Reference in court rules to this concept is a response to a widespread belief among common law lawyers and judges, litigants and the general public that actions take too long and are too expensive.[35]

[90] Objectives are, generally speaking, not self-executing. They will not be achieved unless those who participate in the administration of justice have an understanding of the overall goals of

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[31] Supra, Part V.D.

[32] Lord Dyson, M.R., "The Application of the Amendments to the Civil Procedure Rules" (18th Lecture in the Implementation Program – District Judge Annual Seminar) ¶ 14 (March 22, 2013). See also *Miscallef v. ICI Australia Operations Pty. Ltd*., [2001] NSWCA 274, ¶ 64 ("the ultimate obligation of a court is to seek to attain justice").

[33] 38 & 39 Vict., c. 77, ss. 2 & 16 & 1st sch. *The Rules of Court, 1875*. See *Davies v. Ely Lilly & Co.*, [1987] 1 All E.R. 801, 804 (C.A.) ("Litigation ... is designed to do real justice between the parties"); *Clairmonte v. Canadian Imperial Bank of Commerce*, 12 D.L.R. 3d 425, 442 (Ont. C.A. 1970) (Laskin J.A., as he then was, spoke against a procedural protocol that gave prominence to the "technicality of pleading") & *Civil Procedure Rules 1998*, S.I. 1998/3132, r. 1.1(1) ("These Rules ... [have] the overriding objective of enabling the court to deal with cases justly").

[34] Rule 1.1(1) of the *Civil Procedure Rules 1998*, S.I. 1998/3132 was amended effective April 1, 2013 to read: "These Rules ... [have] the overriding objective of enabling the court to deal with cases justly and *at proportionate cost*" (emphasis added). *Civil Procedure (Amendment) Rules 2013*, S.I. 2013/262 (L.1).

[35] E.g., *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 1; [2014] 1 S.C.R. 87, 92 ("Trials have become increasingly expensive and protracted"); *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 73; 315 C.C.C. 3d 337, 370-71 (civil trials are expensive and often occur long after an action is commenced) per Wakeling, J.A.; *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") per Lord Woolf; *Westminster City Council v. Clifford Culpin & Partners* (Eng. C.A. June 18, 1987) ("This case is typical of the large number of applications to strike out claims for want of prosecution which are constantly before our courts. ... Their causes and consequences are pernicious. They are caused by inexcusable dilatoriness or inefficiency on the part of lawyers and sometimes others, such as insurers"); *Allen v. Sir Alfred McAlpine & Sons*, [1968] 1 All E.R. 543, 546-47 (C.A.) ("All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time") & *Tyler v. Custom Credit Corp.*, [2000] QCA 178, ¶ 3 ("Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute").

the publicly funded court system and discharge the obligations imposed on them.[36] This observation applies to both litigants and judges. If the parties do not abide by the rules and the judges do not enforce them the objectives will be unachievable.[37]

[91] Common law civil procedure is based on the adversarial system that places some limits on the role of the judiciary and values party autonomy.[38] Under traditional common law regimes, the parties make many important litigation decisions – when to commence an action and against whom it will be made and on what grounds and what strategy to adopt in its prosecution.[39] A plaintiff has to decide how much time and money to devote to it. This greatly affects the speed at which it will be prosecuted.[40] A defendant also makes important decisions in the course of the life of an action. The defendant's response may significantly affect the rate at which litigation

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[36] See *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] 1 A.C. 1197, 1207 (H.L.) ("I have no faith that the exercise of the power [to dismiss for want of prosecution] ... would produce any greater impact on delay in litigation than the present principles") per Lord Griffiths & *Westminster City Council v. Clifford Culpin & Partners*, (Eng. C.A. June 18, 1987) ("The proceedings involved in killing a claim on the one hand, and trying to keep it alive on the other, can take far longer and cost far more than its trial. And such proceedings are necessarily entirely sterile and unproductive in relation to substantial matters") per Kerr L.J.

[37] *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"); *Westminster City Council v. Clifford Culpin & Partners* (Eng. C.A. June 18, 1987) ("the [want of prosecution] principles ... are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays".) per Kerr L.J.; *Crick v. Hewlett*, 27 Ch. D. 354 (1884) (the Court granted the moving party's application to dismiss the plaintiff's action for want of prosecution because he failed to enter the action for trial within six days of having served a notice for trial as required by *The Rules of the Supreme Court, 1883) & Quagliano v. United States*, 293 F. Supp. 670, 672 (S.D.N.Y. 1968) "Strict compliance with the rules is necessary if we are to achieve our goal of current calendars"). *The Civil Procedure (Amendment) Rules 2013*, s. 1. S.I. 2013/262 (L.I.) introduced a new r. 1.1(2)(f): "Dealing with a case justly and at proportionate cost includes so far as it is practicable ... (f) enforcing compliance with rules, practice directions and orders". See *Thevarajah v. Riordan*, 2015 UKSC 78, ¶ 13 (the Court confirmed the importance of rule-compliant litigation conduct) & *Mitchell v. News Group Newspapers Ltd.*, [2013] EWCA Civ. 1537, ¶¶ 40-43 (the Court emphasized the importance of rule compliance and stated that noncompliance exemptions would be granted for trivial breaches if relief was sought promptly and in other cases only if there was a compelling explanation).

[38] A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 529 (3d ed. 2013) & 15 W. Holdsworth, A History of English Law 132 (1965).

[39] See *Le v. 1055168 Alberta Ltd.*, 2013 ABQB 431, ¶ 26; 567 A.R. 206, 211 ("The new Rules have a focus on party self-determination"); *Nash v. Snow*, 2014 ABQB 355, ¶ 34; 58 C.P.C. 7th 126, 135 ("The Rules ... place responsibility on the parties to manage their dispute") & *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABQB 517, ¶ 71; 365 A.R. 344, 356 ("the Court is not a litigation babysitter").

[40] *International Capital Corp. v. Schafer*, 2010 SKCA 48, ¶ 25; 319 D.L.R. 4th 155, 165 ("The burden of advancing the litigation remains with the plaintiff").

proceeds. A recalcitrant defendant may easily serve as an anchor forestalling any litigation advances.

[92] But courts also play a critical function. They have always assumed ultimate responsibility for ensuring that public funds invested in the administration of justice are wisely used.[41] The judicial branch, as the steward of valuable public resources, attempts to put these resources to their highest and best use.[42] They 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.[43]

3. The *Alberta Rules of Court* Impose Distinct Obligations on Litigants

[93] The *Alberta Rules of Court* promote expeditious litigation[44] in two distinct ways. One tells the parties to proceed in a timely way and directs how this is to be done.[45] The other attaches a consequence for noncompliance with the first obligation.[46]

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[41] A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 530 (3d ed. 2013). Alberta courts are also keenly aware of the high costs litigants bear. *Sweezey v. Sweezey*, 2016 ABCA 122, ¶ 12 ("Common sense dictates that ... [the parties] find a less expensive and divisive way to determine whether contested corporate expenses Mr. Sweezey claims are justifiable"). This is one reason why Alberta courts attempt to match the resolution procedure that is best suited to the nature of the dispute. "Alberta courts are dedicated to resolving disputes in the least amount of time practicable and at the lowest possible cost". *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 76; 315 C.C.C. 3d 337, 373 per Wakeling, J.A.

[42] See *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 88; 315 C.C.C. 3d 337, 380-81 ("If the moving party's position is unassailable, it makes sense to allocate as few public and private resources as possible to resolve a dispute the outcome of which is obvious") per Wakeling, J.A.

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

[44] So did R. 244.1. *Huynh v. Rosman*, 2013 ABQB, ¶ 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").

[45] *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABQB 517, ¶ 63; 365 A.R. 344, 354 (the *Alberta Rules of Court* contemplate that "litigation ... [will] proceed in an orderly and civil manner") & *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] A.C. 1197, 1207 (H.L.) ("Once a litigant has entered the litigation process his case [must proceed]... in accordance with a timetable as prescribed by the Rules of Court or as modified by a judge") per Lord Griffiths.

[94] Rules 1.2 and 4.4(1)[47] and Part 4, Division 1,[48] entitled "Responsibility of Parties", catalogue some of the responsibilities that litigants shoulder.

[95] Rules 1.2 and 4.4(1) support the conclusion that litigants have an obligation to prosecute and defend an action with reasonable expedition. The former rule expressly states that the parties must "facilitate the quickest means of resolving the claim", whereas the latter insists that the parties to a standard action clear defined litigation hurdles in "reasonable time considering the nature of the action".

[96] Part 4, Division 1 of the *Alberta Rules of Court* particularizes the abstract values incorporated in rr. 1.2 and 4.4(1) and imposes specific obligations on the parties designed to expedite the action.

[97] The nature of these obligations is a function of the type of litigation.

[98] There are two types of cases – standard and complex.[49]

[99] Rule 4.5 of the *Alberta Rules of Court* compels parties in a complex case early on in the litigation process[50] "to agree on a complex case litigation plan" that incorporates deadlines for important litigation milestones. If they are unable to do so, the court may establish a complex case litigation plan.[51] Those who fail to abide by governing norms display contempt for the court process.[52]

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[46] Rules of court attach consequences not sanctions to noncompliance with rules or orders. A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 531-34 (3d ed. 2013).

[47] Supra, Part V.D.

[48] Rules 4.1 to 4.8 are in Part 4, Division 1.

[49] If the parties are unable to agree on the correct characterization of a case, the Court may do so by order. *Alberta Rules of Court*, r. 4.8(1). If, within four months after the statement of defence is filed, the parties have not agreed on whether a case is standard or complex and the Court has made no determination, the action is categorized as a standard case. *Alberta Rules of* Court, r. 4.3(2)

[50] This obligation must be discharged "within 4 months after the date that the parties agree to the categorization or the Court determines that the action is a complex case".

[51] *Alberta Rules of Court*, r. 4.6(1).

[52] E.g., *Dreco Energy Services Ltd v. Wenzel*, 2006 ABQB 356, ¶ 44; 399 A.R. 166, 178.

[100] While r. 4.4 does not require the parties in a standard case to develop a litigation plan, it recognizes the value inherent in such a document and authorizes the court to order the adoption of a litigation plan or proposal.

[101] To summarize, in the absence of a compelling reason a plaintiff must prosecute a standard action taking into account any timelines set out in the *Alberta Rules of* Court, including a litigation plan, if there is one, and the general obligation to prosecute an action at a reasonable pace. A plaintiff whose action is a complex case must advance it in accordance with the schedule contained in a complex case litigation plan.

4. A Litigant's Right To Have a Court Resolve a Dispute May Have a Temporal Dimension

[102] An application to dismiss an action for want of prosecution engages two distinct principles.[53] The first recognizes that the nonmoving party is entitled to have the dispute resolved by the court.[54] The second accepts that timely resolution of lawsuits is desirable[55] because a lawsuit may cause significant prejudice either to the party against whom a remedy is sought[56] or a person

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[53] *Faris v. Eftimovski*, 2013 ONCA, 360; 363 D.L.R. 4th 111, 120 ¶ 24 (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 expedited and time efficient manner").

[54] *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp.*, [1981] A.C. 909, 977 (H.L.) ("Every civilized system of government requires that the state should make available to all citizens a means for the just and peaceful settlements 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 some citizen, the defendant"); *Filipchuk v. Ladouceur*, 2001 ABCA 26, ¶ 5; 277 A.R. 192, 193 ("given the effect of the rule upon the right to litigate, the interpretation most favourable to the preservation of that right should be adopted"); *Clairmonte v. Canadian Imperial Bank of Commerce*, 12 D.L.R. 3d 425, 440 (Ont. C.A. 1970) ("[the plaintiff] should be given every reasonable assistance to have her day in Court if the defendant can be adequately protected in costs and in the expedition of the trial") *& Allen v. Sir Alfred McAlpine & Sons Ltd*., [1968] 1 All E.R. 543, 550 (C.A.) (an application for striking an action the delay of which is wholly attributable to the defendant was dismissed because it would result in the loss of "all remedy without a trial").

[55] *Blencoe v. British Columbia*, 2000 SCC 44, ¶ 146; [2000] 2 S.C.R. 307, 386-87 ("For centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values") per LeBel, J. & *Fitzpatrick v. Batger & Co.*, [1967] 2 All E.R. 657, 659 (C.A.) ("It is of the greatest importance in the interests of justice that ... actions should be brought to trial with reasonable expedition") per Salmon, L.J. See also 1 The Supreme Court Practice 1970, at 390 ("public policy demands that the business of the courts should be conducted with expedition").

[56] *Allen v. Sir Alfred McAlpine & Sons Ltd*., [1968] 1 All E.R. 543, 548 (C.A.) (a defendant's claim against a third party may be jeopardized by lengthy delay).

whose interests are directly connected to the defendant.[57] The Magna Carta recognizes that delay is not an attribute of justice.[58] "The delay of justice is a denial of justice".[59]

[103] The very existence of an action may be problematic for the defendant.[60] A professional whose integrity is attacked may suffer.[61] His or her livelihood may be endangered. An action may prevent the administration of an estate.[62] A contingent liability may interfere with the defendant's ability to execute a business strategy[63] and complicate reporting obligations to regulators and auditors. As well, the costs associated with the defence of an action may be considerable.[64] This is the sum of the costs attributable to lost productivity triggered by the assignment of productive personnel to defence tasks and the fees of counsel and experts.

[104] Delay may compromise the fairness of a trial. If the plaintiff does not proceed at a reasonable rate the ability of the defendant to contest the version of the facts advanced by the

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[57] *Allen v. Sir Alfred McAlpine & Sons Ltd*., [1968] 1 All E.R. 543, 546 (C.A.) ("His estate cannot be administered whilst this suit is hanging over it. His widow cannot receive the money he bequeathed to her") per Lord Denning, M.R.

[58] "To no one will we deny or delay right or justice". Ch. 40.

[59] *Allen v. Sir Alfred McAlpine & Sons Ltd*., [1968] 1 All E.R. 543, 546 (C.A.) per Lord Denning, M.R.

[60] *Tyler v. Custom Credit Corp*., [2000] QCA 178, ¶ 2 ("ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them").

[61] *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 ("It is...a grave injustice to professional men to have a [fraud] charge...outstanding for this time") (C.A.) per Lord Denning, M.R.

[62] *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 552 (C.A.) & *Snow v. Snow*, 2015 NSWSC 90.

[63] *Biss v. Lambeth Health Authority*, [1978] 1 W.L.R. 382, 389 (C.A.) ("The business house was prejudiced because it could not carry on its business affairs with any confidence – or enter into any forward commitments – while the action for damages was still in being against it") per Lord Denning M.R.

[64] *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2015 ABQB 300, ¶ 81 ("In these times of expensive, and often delayed, access to justice, litigants should be mindful that when the process begins, stress is placed on the parties' resources and the Court's resources"); *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 547 (C.A.) ("Dickens tells how [delay] exhausts finances, patience, courage, hope") & *Miscallef v. ICI Australian Operations Pty. Ltd.*, [2001] NSWCA 274, ¶ 60 ("Apart from the irrecoverable costs thrown away, the defendant's executives faced a future of wasted opportunity costs in dealing with their lawyers").

plaintiff may be jeopardized. Speaking in the context of an automobile accident, Chief Justice McRuer of the Ontario High Court of Justice said this:[65]

> No one who has presided over trials involving motor accidents can help but be impressed with the importance of an accurate account of the facts surrounding the accident and the frailty of human memory. I think it would be most unfair to the defendant in this case to be called upon to defend himself in an action ... which arises out of an accident that happened over seven years ago.

[105] The second principle tempers the force of the first. As a result, 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. In other words, the right to be heard may have a temporal dimension.

[106] Many actions proceed at a pace that does not run afoul of the principle that an action has temporal limits.[66] In these cases, the plaintiff has the resources and the interest needed to press the action ahead at a rate to which the defendant takes no objection.

[107] But there are actions the dilatory prosecution of which prompts the defendant to take issue with the speed at which they are prosecuted.[67] In these cases, the explanation for the delay may be inadequate resources to fund the litigation[68] or a lack of interest in seeking resolution of the claim. The plaintiff may be content to have an extant action.

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[65] *May v. Johnston*, [1964] 1 O.R. 467, 471 (H.C.J. 1961). See also *Clough v. Clough*, [1968] 1 All E.R. 1179, 1181 (C.A.) (the passage of six years from the date of the automobile collision has prejudiced the ability of the two defendant drivers to establish the events that preceded the collision that injured the plaintiff passengers) & *Miscallef v. ICI Australian Operations Pty. Ltd*., [2001] NSWCA 274, ¶ 57 ("By reasons of the delay, the memories of every relevant witness would have faded a little more. The chances of witnesses, particularly elderly medical witnesses, retiring, moving, becoming unfit to testify, or dying would increase").

[66] *Fitzpatrick v. Batger & Co*., [1967] 2 All E.R. 657, 659 (C.A.) ("I am happy to say that in the vast majority of cases, these actions are brought on for trial quite promptly").

[67] E.g., *Forest Resources Improvement Association of Alberta v. Moore*, 2015 ABQB 588 (notices to attend questioning and a supplemental affidavit of records did not save the plaintiff's action from a want of prosecution dismissal order) & *Terroco Drilling Ltd. v. Tusk Energy Corp*., 2014 ABQB 419, ¶ 10; 69 C.P.C. 7th 205, 209 (Master) (production of copies found in an affidavit of records did not prevent the court from dismissing the action under r. 4.33(1)).

[68] *May v. Johnston*, [1964] 1 O.R. 467, 470 (H.C.J. 1961) ("The statement that the plaintiff did not have funds to proceed with the action is not an excuse").

5. Part 4, Division 6 of the *Alberta Rules of Court* Imposes Consequences on a Plaintiff for Dilatory Prosecution of an Action

[108] Part 4, Division 6 of the *Alberta Rules of Court* informs litigants who do not discharge their obligation to resolve disputes in a timely manner and proceed in a dilatory fashion that there may be consequences.

[109] It does so in two explicit ways – rr. 4.31(1) and 4.33(1).[69]

[110] One makes no use of a specific time frame and adopts an abstract standard to measure the delay and allows the court to dismiss the action if delay is excessive. The other features a precise period of time and an abstract test to measure the progress of the action in the relevant time period and compels the court to dismiss the action if delay exists.

a. The Leading Features of Rule 4.31(1)

[111] The first option – r. 4.31(1) – states that a court may dismiss an action for want of prosecution.

[112] Other Canadian jurisdictions[70] and common law states, including the United Kingdom,[71] Australia,[72] New Zealand[73] and the United States[74], also authorize their superior courts to dismiss

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[69] In addition, a superior court has the inherent jurisdiction to dismiss an action that is stale. See *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 547, (C.A.) "[striking out for want of prosecution] is a stern measure; but it is within the inherent jurisdiction of the court") *& Link v. Wabash Railroad*, 370 U.S. 626, 630 (1962) (a federal District Court "acting on [its] ... own initiative, [has the jurisdiction] to clear [its] ... calendar of cases that have remained dormant because of inaction or dilatoriness of the parties seeking relief"). Abuse of process also is a useful concept. *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd.*, [1998] 2 All E.R. 181, 191-92 (C.A. 1997).

[70] *Supreme Court 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, r. 24.01(1) ("The court may on motion dismiss an action for delay"); *Law Society of Manitoba v. Eadie*, 54 Man. 2d 1, 3 (C.A. 1988) ("A litigant is entitled to have his case decided on the merits unless he is responsible for undue delay which has prejudiced the other party"; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 24.01(1) & 48.14 (an action may be dismissed for delay under stipulated conditions*); 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); *Rules of Civil Procedure*, R. 24.01(1) & 48.14 (P.E.I.) (an action may be dismissed for delay under stipulated conditions); *Civil Procedure Rules*, RR. 4.22(1) & 82.18 (N.S.) (an action must be dismissed for delay if no trial date is set within five years after the date the

action is commenced and may be dismissed for delay if the plaintiff has not brought the action to trial "in a reasonable time"); *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 prejudiced the defendant); *Braithwaite v. Bacich*, 2011 NSSC 176, ¶¶ 7-91 (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 court must dismiss an action for want of prosecution "where for five or more years no step has been taken that materially advances the action" and may dismiss an action if the delay has prejudiced the defendant); *Muckpaloo v. Mackay*, 2002 NWTSC 12, ¶ 14 ("Rule 327(1)(b) is mandatory"); *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 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).

[71] *The Civil Procedure Rules 1998*, S.I. 1998/3132 (in force April 26, 1999) r. 3.1(1) (the court retains its inherent jurisdiction to dismiss for want of prosecution or abuse of process); r. 3.1(2)(m) ("the court may ... make any other order for the purpose of managing the case and furthering the overriding objective [dealing with cases justly and at proportionate cost]") & r. 3.4(2)(c) ("The court may strike out a statement of case if it appears to the court ... (c) there has been failure to comply with a rule, practice direction or court order"); *Rules of the Supreme Court 1965*, S.I. 1965/1776 (in force October 1, 1966) Ord. 24, r. 16(1) ("If any party who is required by any of the foregoing rules or any order made thereunder, to make discovery of documents or produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed..."); Ord. 25, r. 1(4) ("If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may do so or apply for an order to dismiss the action"); Ord. 26, r. 6(1) ("If a party against whom an order is made under rule 1 or 5 [interrogatories] fails to comply with it, the Court may make such order as it thinks just, including, in particular, an order that the action be dismissed...") & Ord. 34, r. 2 ("Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of such application, the Court may order the action be dismissed accordingly..."); *The Rules of the Supreme Court, 1883* (in force October 24, 1883) Ord. 25, r. 1(4) ("If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may apply ... for an order to dismiss the action"); Ord. 31, r. 21 ("If any party fails to comply with any order to answer interrogatories, or the discovery or inspection of documents ... [h]e shall ..., if a plaintiff, be liable to have his action dismissed for want of prosecution") & Ord. 36, r. 12 ("If the plaintiff does not within six weeks after the time when he first became entitled to give notice of trial under the last preceding rule ... give notice of trial, the defendant may ... apply to the court or judge to dismiss the action for want of prosecution"). See also *Consolidated General Orders of the High Court of Chancery* (1860) Ord. 21, r. 1 (a defendant may move to dismiss a bill for want of prosecution if "[w]ithin four weeks after the evidence has been closed, the

plaintiff [has not] ... set down his cause and obtain[ed] and serve[d] a *subpoena* to hear judgment") & Ord. 33, r. 10 (a defendant may move that a bill be dismissed for want of prosecution in a number of stipulated default scenarios by the plaintiff).

[72] *Uniform Civil Procedure Rules 2005*, r. 12.7(1) (N.S.W.) ("If a plaintiff does not prosecute the proceedings with due dispatch, the court may order that the proceedings be dismissed or make such other order the court thinks fit"); *Hobbs v. Australian Securities and Investments Commission*, 2013 NSWCA 432, ¶ 52 ("It is therefore necessary to have regard to the 'overriding purpose' referred to in s. 56 [of the *Civil Procedure Act 2005*], being 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings'"); *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 state for doing the act; a defendant ... may apply to the court for an order dismissing the proceeding for want of prosecution"); *Tyler v. Custom Credit Corp. Ltd.*, [2000] QCA 178, ¶ 2 (the Court listed a number of factors that must be considered by a court exercising its r. 280 discretion, including the nonmoving party's prospects of success, the existence of delay, who is responsible for the delay, whether there is an explanation for the delay, how far the litigation has progressed and whether the delay compromises the fairness of any trial); *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 a 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); *Court Procedure Rules 2006*, 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"); *Crawford v. Australian Capital Territory*, [2015] ACT 282, ¶ 24 ("It is completely unsatisfactory for a party to allow itself to drift casually into non-compliance with the orders of the Court then, after it is in default, to seek to explain away its non-compliance by submissions to the Court unsupported by sworn evidence"); *Rules of the Supreme Court 1971*, Order 4A, r. 28 (W. Austl.) ("A case that is on the Inactive Cases List [inactive for twelve months] for 6 continuous months is taken to have been dismissed for want of prosecution") & *Supreme Court Rules*, rr. 24.01 & 24.02 (S.Austl.) (the Court may dismiss a proceeding for want of prosecution if the plaintiff fails to serve a statement of claim or otherwise comply with stipulated rules).

[73] *High Court Rules*, r. 15.2 (effective February 1, 2009) ("Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if – (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment ... ").

[74] *Federal Rules of Civil Procedure*, R. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order a defendant may move to dismiss the action or any claim against it"); *Lucas v. Miles*, 84 F. 3d 532, 535 (2d Cir. 1996) (in a R. 41(b) application the court must consider the duration of the noncompliance, whether the plaintiff should have known that noncompliance would result in dismissal, the prejudice the delay has caused the plaintiff, the court's "interest in managing its docket [along] with the plaintiff's interest in receiving a fair chance to be heard" and whether a less drastic sanction may be appropriate) & *Link v. Wabash Railroad*, 370 U.S. 626, 630 (1962) (Rule 41(b) does not preclude a District Court from dismissing an action that has "remained dormant because of the inaction or dilatoriness of the parties seeking relief"). See generally, Comment, "The Local Rules of Civil Procedure in the Federal District Courts", 1966 Duke L.J. 1011, 1065-69.

stale actions. There is universal recognition that dormant actions should be dealt with.[75] Embedded in all these rules is the message that dilatory prosecution of an action has harsh consequences.

[113] Rule 4.31(1) has three leading features.[76]

[114] First, the moving party must establish the existence of inordinate and inexcusable delay and attendant significant prejudice attributable to the delay. Some jurisdictions define prejudice narrowly and restrict its scope to trial fairness. Has the moving party's ability to defend itself at trial been compromised by the passage of time?[77] A key witness may have died or be unavailable for other reasons.[78] Important documents may have been misplaced or destroyed.

[115] Second, there is no minimum time frame that protects a dawdling plaintiff. An application may be brought any time the moving party wishes.

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[75] How other states with similar legal traditions cope with common problems is always instructive. Much can be learned from comparative jurisprudence. See *The Queen v. Simmons*, [1988] 2 S.C.R. 495, 516 ("American courts have the benefit of two hundred years' experience in constitutional interpretation. This wealth of experience may offer guidance to the judiciary in this country"); *Can v. Calgary Police Service*, 2014 ABCA 322, n. 102; 315 C.C.C. 3d 337, n. 102 per Wakeling, J.A. ("Good ideas are a function of their soundness and rational roots; not where they originated); *Lubberts Estate*, 2014 ABCA 216, n. 20; [2014] 10 W.W.R. 41, n. 20 per Wakeling, J.A. ("A survey of related foreign law often promotes a better understanding of the law of one's own jurisdiction"); *Sahaluk v. Alberta*, 2015 ABQB 142, n. 71; 75 M.V.R. 6th 10, n. 71 ("The study of American law generally promotes useful insights") & *Marley v. Rawlings*, [2013] Ch. 271, (C.A. 2012) (the Court reviewed the law in Canada, Australia, New Zealand, New York and South Africa), rev'd, [2014] UKSC 2, ¶ 85 ("As frequently happens, the law north [Scotland] and south of the border [England and Wales] have something to learn from the other").

[76] For an excellent discussion of r. 4.31(1) see Justice Yamauchi's reasons in *Donnelly v. Brick Warehouse Corp.*, 2013 ABQB 621; 573 A.R. 29.

[77] The merits of this restrictive view have been challenged. *Biss v. Lambeth Health Authority*, [1978] 1 W.L.R. 382, 389 (C.A. 1977) ("the prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely; not knowing when it is going to be brought to trial.") per Lord Denning, M.R. & *International Capital Corp. v. Robinson Twigg & Ketilson*, 2010 SKCA 48, ¶ 45; 319 D.L.R. 4th 155, 172 (the Court recognized that delay impacts a moving party in many ways other than trial fairness: "The Court should be sensitive to the impact of claims which put in question the professional, business or personal reputation of the defendant or which involve significant or ongoing negative publicity for the defendant"). The House of Lords declined to adopt the challenger's position, aware that remedial measures would soon be introduced: *Grovit v. Doctor*, [1997] 1 W.L.R. 640, 644 (H.L.) & *Department of Transport v. Chris Smaller (Transport) Ltd.*, [1989] 1 A.C. 1197, 1207 (H.L.).

[78] *Bremur Vulcan Schiffbau Und Maschinenfabrik v. South Indian Shipping Corp.*, [1981] A.C. 909, 934 (C.A. 1979).

[116] Third, the rule bestows a discretion on the court. The adjudicator may decline to dismiss the nonmoving party's action even though the moving party has established inordinate and inexcusable delay and significant prejudice.

b. The Leading Features of Rule 4.33(1)

[117] The second option – r. 4.33(1) – introduces a very different test. The court must dismiss the nonmoving party's action if "3 or more years has passed without a significant advance in the action."

[118] There are also three noteworthy characteristics of this provision.

[119] First, unlike r. 4.31(1), r. 4.33(1) compels the adjudicator to dismiss the nonmoving party's action if the criterion the rule adopts is met.[79] This is a clear sign that r. 4.33(1) is not a paper tiger.

[120] Second, again unlike r. 4.31(1), r. 4.33(1) has a stipulated timeline. A moving party may not apply for relief until three years has passed since the nonmoving party commenced the action. There is no similar time barrier in r. 4.31(1). Rule 4.31(1) allows a moving party to apply any time the nonmoving party's inactivity causes inordinate and inexcusable delay and serious prejudice.

[121] Third, the r. 4.33(1) criterion asks whether there has been a significant advance in the action in the applicable time frame. It puts a stipulated period of time under the microscope. Rule 4.33(1)'s predecessors put one thing or one step under the microscope. The difference is akin to looking at a single photograph as opposed to a feature length film. The two experiences are totally different.

[122] As "significant advance" is not a defined term in the *Alberta Rules of Court* or the *Interpretation Act*,[80] reference to reputable dictionaries[81] may assist in giving meaning to these

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[79] Rule 244.1 was also mandatory. *Alberta v. Morasch*, 2000 ABCA 24, ¶ 5; 183 D.L.R. (4th) 742, 744 ("[Rule 244.1] is written in absolute terms and is mandatory").

[80] R.S.A. 2000, c. 1-8, s. 28(1).

[81] R. Sullivan, Sullivan on the Construction of Statutes 39 (6th ed. 2014) (the Oxford English Dictionary and Webster's "are widely accepted as authoritative").

words. Dictionaries indicate "a range of meanings that the word is capable of bearing".[82] This is a good starting point in the interpretation process.[83]

[123] According to Webster's[84], "advance", as a noun, may mean "moving forward < the ~ of the infantry >". The Oxford English Dictionary[85] definition that is most applicable, taking into account the fact that the word "advance" appears in a rule of court dealing with delay,[86] is this: "A going forward, onward ... . 1. The action of going forward or onward, forward motion; progression (in space) ... 2a. ... Onward movement in any process or course of action; progress".

[124] "Advance", in the context of r. 4.33(1),[87] means progress in an action. Has the nonmoving party caused the action to progress along the litigation spectrum – statement of claim, statement of defence, affidavit of records, questioning, request to schedule a trial date and so on?

[125] In order 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.[88]

[126] The next question is whether the measured advance is significant.

[127] In r. 4.33(1) "significant" is an adjective modifying the noun "advance". Webster's offers this definition of "significant" as an adjective: "having or likely to have influence or effect: deserving to be considered: important, weighty or notable < even though the individual results may

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[82] R. Sullivan, Sullivan on the Construction of Statutes 33 (6th ed. 2014). See also R. Sullivan, Sullivan on the Construction of Statutes 41 (6th ed. 2014) ("[a dictionary meaning] does not purport to ... indicate the meaning of a word used in a particular context, in relation to a particular set of facts").

[83] R. Sullivan, Sullivan on the Construction of Statutes 43 (6th ed. 2014).

[84] Webster's Third New Dictionary of the English Language Unabridged (1971).

[85] 1 Oxford English Dictionary (2d ed. 1989).

[86] *Bell 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").

[87] *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").

[88] See *Nash v. Snow*, 2014 ABQB 355, ¶ ¶ 29 & 30; 58 C.P.C. 7th 126, 134 ("the court must take a macro view of what transpired in the three-year window...[and] must view the whole picture of what transpired in the three year period framed by the real issues in dispute"). On June 12, 2014 Justice Topolniski dismissed a standard negligence case arising from a bar fight. The plaintiff filed her claim on June 8, 2008. Discoveries were completed by May 15, 2009. In the period between May 15, 2009 and November 13, 2013, the date the defendant filed for dismissal for long delay, the parties exchanged two unproductive settlement letters and the plaintiff filed on October 29, 2013 a notice to admit facts. A reasonably diligent plaintiff would have had this action tried by November 13, 2013.

seem small, the total of them is ~ >". Oxford's[89] most useful definition is this: "Important, notable".

[128] These dictionary definitions and the context support the conclusion that to be classified as a significant advance there must be important or notable progress in the action.[90] It is not enough that there has been some progress.

[129] Obviously, not all actions will advance at the same rate. A complex case consumes more time at each stage and may have more stages than a standard case.[91] For example, the time required to collect from a large enterprise 500,000 records consisting of 5 million pages[92] and describe them will far exceed that needed to compile an affidavit of records reporting the existence of fifty letters and memoranda totalling 100 pages in a run-of-the-mill wrongful dismissal case. A complex case may involve numerous applications. These subsidiary contests may absorb a large chunk of the parties' time and delay the commencement of the trial.

[130] It will be helpful in considering r. 4.33(1) applications to classify actions by their degree of complexity.

[131] This process starts with the classification adopted in r. 4.3(1) – a case is either standard or complex.

[132] But finer gradations within each of these categories may be useful. For example, most personal injury cases are standard cases. There are at least two types of personal injury actions – catastrophic and noncatastrophic. One distinguishing feature is the amount of time it takes for the plaintiff's condition to stabilize. Most counsel will be reluctant to commence questioning until the injured person's condition is constant. They will not want to conduct separate liability and damages questioning sessions. This means that there will be a longer period between the commencement date of the action and the start of questioning in a catastrophic case than in a noncatastrophic case.

[133] Two issues relating to r. 4.33(1) still need to be resolved.

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[89] 15 Oxford English Dictionary (2d ed. 1989).

[90] See *Nash v. Snow*, 2014 ABQB 355, ¶ 40; 58 C.P.C. 7th 126, 136 ("The analysis mandated by the new [*Rules*] is about the real quality of what was done in the context of the real issues in dispute over a given period.").

[91] See *Dreco Energy Services Ltd. v. Wenzel*, 2006 ABQB 356, ¶ 44; 399 A.R. 166, 178-182 for a list of the steps taken in a "large corporate commercial and intellectual property lawsuit".

[92] M. Herrmann, The Curmudgeon's Guide to Practicing Law 35 (2006) ("At our firm, a case with only 2 million pages of documents is a small case; big cases involve tens – or hundreds – of millions of pages ... The information is so vast that we could never read it all in our lifetime").

[134] First, what is the appropriate yardstick that can be used to reliably measure whether there has been important or notable progress in an action in a designated period.

[135] To answer this question, it is important to remember that r. 4.33(1) is, in essence, about delay. 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.

[136] A comparator has to be constructed to identify the existence of delay and if it is important or notable.

[137] To my mind, the best way to do this is to pose two distinct questions.

[138] The first asks how much progress a reasonably diligent party[93] complying with the applicable *Alberta Rules of Court* and making reasonable demands on the other party would make in the applicable time frame. The answer provides a comparator. The reasonableness standard is incorporated into r. 4.4(1). Rule 4.4(1) provides that the plaintiff in a standard action must advance the case to specific points on the litigation spectrum "within a reasonable time considering the nature of the action".

[139] But the model needs to be modified. A plaintiff's action cannot be dismissed on account of delay just because the nonmoving party does not advance the action with the same expedition as a reasonably diligent plaintiff would display. The standard cannot be that high. Some adjustment to the comparator has to be made to reflect the fact that a severe consequence is attached to delay. The reasonably diligent plaintiff, by definition, does not procrastinate. Just the opposite is the case.

[140] This means that the comparator plaintiff proceeds at a pace that is slower than the reasonably diligent plaintiff.

[141] But how much slower?

[142] The margin cannot be so great that it defeats the purpose of the foundational rules and r. 4.33(1).

[143] Generally speaking, the size of the adjustment or margin of toleration for dilatoriness must be a function of the type of case. The margin will be smaller for a standard case than a complex

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[93] See *Ingle v. Partridge*, 55 Eng. Rep. 378, 378 (Ch. 1863) (the Court declined to dismiss for want of prosecution because the plaintiffs "have shown not only reasonable diligence but that they have proceeded actively with the suit") & *Kelinge v. Audley*, 4 Ir. Eg. R. 630 (Ch. 1842) (the Court declined to dismiss a bill for want of prosecution because the nonmoving party diligently prosecuted the suit).

case. And the margin for a catastrophic personal injury case will be greater than that for a noncatastrophic personal injury case. This is because it takes longer to complete a step in a complex case as opposed to a standard case and in a catastrophic case as opposed to a noncatastrophic case.

[144] Over time, a body of case law will emerge that catalogues the point on the litigation spectrum that each type of case[94] must reach or risk being dismissed for delay under r. 4.33(1).

[145] The second task is to establish the applicable time period. When does it start and when does it end?

[146] The moving party must state the time period on which it relies. Rule 4.33(1) declares that the applicable period is "3 or more years". There may be a number of start dates that are defensible, as the following examples reveal.

[147] Suppose that B terminated A's employment on January 10, 2010. On January 5, 2012 A served a filed action against B alleging that B breached A's employment contract by dismissing him without reasonable notice. On January 15, 2012 B served on A a filed statement of defence claiming that A shot B after B reprimanded A for reporting to work late and in an intoxicated state and that B dismissed A for cause and has discharged any obligations to A under their employment agreement. On February 1, 2012, A served on B an affidavit of records. And on March 31, 2012 B served on A an affidavit of records. Counsel for A and B discussed convenient questioning dates in the period ending June 30, 2012. Neither side did anything on the file after June 30, 2012.

[148] Against this backdrop, B files an application on January 6, 2015 seeking a r. 4.33(1) order dismissing A's action. B alleges that in the period commencing January 6, 2012 and ending January 5, 2015 that there has not been a significant advance in A's action. To succeed B would have to satisfy the Court of Queen's Bench that A's action should be farther along the litigation spectrum than it presently is to qualify as a significant advance in the action. What point on the litigation spectrum must a standard wrongful dismissal action reach to constitute a significant advance in the action?

[149] In this hypothetical B has brought a r. 4.33(1) application as soon as three years had passed following the commencement of A's action. There could be only one relevant time period.

[150] If B waited until January 15, 2016 to complain about A's stagnant action, an issue arises relating to the relevant period. Is B entitled to select the time frame commencing July 1, 2012 and

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[94] I would expect that an acceptable rate of progress for a standard noncatastrophic personal injury action will be the same as for a straightforward commercial action. An action will be dismissed if within a three-year period following service of the defendant's statement of defence the plaintiff has not completed questioning of the defendant.

ending January 14, 2016? If so, the plaintiff has not advanced the action at all in that period. Or is the relevant time period January 6, 2012 to January 14, 2016 inclusive? If so, the plaintiff's chance of surviving a r. 4.33(1) application increases because there was some progress made before July 1, 2012.

[151] In my opinion, the better interpretation of the text of r. 4.33(1) is that the r. 4.33(1) moving party is entitled to select the applicable period – in this case, July 1, 2012 to January 14, 2016. Nothing in r. 4.33(1) suggests that the moving party is denied the privilege of framing the application in the most advantageous manner possible.

6. Statutory History of Rule 4.33(1)

[152] Rule 4.33(1) is markedly different from the predecessor rules.

[153] Rule 244.1 obliged the court to ask whether five or more years had expired since the "last thing that was done ... that materially advances the action".[95] To answer this query the adjudicator had to identify in the action's historical record the "things" that had occurred, determine if any of the things "materially" advanced the action and then select the most recent example and decide whether this last thing occurred less than five years before the key date.

[154] The critical focus was solely on one aspect – one thing – of the historical procedural record.[96] This emphasis did not encourage a party to pursue an action in a reasonably timely manner.[97] Just the opposite, it promoted the dilatory prosecution of an action. So long as either the moving or the nonmoving party completed a step required by the *Alberta Rules of Court* the clock measuring delay was reset.[98] The court was not asked to consider where on the litigation spectrum

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[95] *Alberta v. Morasch*, 2000 ABCA 24, ¶ 12; 183 D.L.R. (4th) 742, 745 ("Rule 244.1 refers to 'things', not steps, which broadens the scope of activities that might materially advance an action") & *Phillips v. Swan*, 2007 ABCA 101, ¶ 5; 40 C.P.C. 6th 378, 380 ("This demands a functional analysis. Did the ... [preparation of an economic report to be used for the assessment of damages] ... genuinely further the litigation in a meaningful way?").

[96] For this reason, generally speaking, cases interpreting R. 244.1 of the old *Alberta Rules of Court* are of minimal value. Cf. *Nash v. Snow*, 2014 ABQB 355, ¶ 39; 58 C.P.C. 7th 126, 136 (Topolnisky, J. gave a lukewarm endorsement of the continued value of R. 244.1 jurisprudence: "the applicability of [pre-November 2013] cases must be considered in the context of the present language and focus of Rule 4.33") & *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2015 ABQB 300, ¶ 74, rev'd, 2016 ABCA 123 (Jones, J. agreed with Topolnisky, J.'s assessment in *Nash v. Snow* of the value of R. 244.1 jurisprudence).

[97] *Le. v. 1055168 Alberta Ltd.*, 2013 ABQB 431, ¶ 41; 567 A.R. 206, 213 ("One thing in five years, with no excuse, is lamentable, but without remedy for the defendant in this case"). See also *Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce*, 2003 ABCA 259, ¶ 26; 330 A.R. 379, 384 ("the very purpose of [Rule 244.1(1)] ... is to encourage expeditious litigation").

[98] *Alberta v. Morasch*, 2000 ABCA 24, ¶ 6; 183 D.L.R. (4th) 742, 744 & *Bishop v. City of Calgary*, 1998 ABCA 23, ¶ 21; 228 A.R. 73, 78. An interpretation more conductive to expedition was used if the thing alleged to materially

an action should be in the period under review – five or more years – to qualify as a significant advance in an action, bearing in mind the overarching imperative of the timely prosecution of an action.

[155] The same observation applies to r. 15.4 in the form it was from November 1, 2010 to July 25, 2013. To apply this rule the decision maker had to select from the historical record of activity in the litigation "things" that "significantly advanced the action"[99] and then isolate the last member of this set of litigation activities before deciding whether this thing occurred within the applicable time frame.

[156] The interpretation of r. 4.33(1) is not the same as the interpretation given R. 244.1 and r. 15.4 as it was from November 1, 2010 to July 24, 2013.

[157] The explanation for this is simple. The text of r. 4.33(1) is substantially different from its two immediate predecessors – r. 15.4 and R. 244.1.[100] "If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning."[101] The new text fairly read presents a new

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advance the action was not a step required or contemplated by the rules. In this scenario, the court considered whether the nonmoving party has "caused the action to materially advance".

[99] *Laboucan v. Red Healing Society*, 2011 ABQB 377, ¶ 21; 527 A.R. 7, 10 (Master) ("A thing that substantially advances an action must be substantial or solid").

[100] See *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66, ¶ 70; [2014] 8 W.W.R. 581, 604-05 (the Court gave different meanings to r. 4.22 of the new *Alberta Rules of Court* and R. 593(1)(i) of the old *Alberta Rules of Court* because the text of the two rules was dramatically different) & *Greenbuilt Group of Companies Ltd. v. RMD Engineering Inc.*, 2013 ABQB 297, ¶ 94; [2013] 11 W.W.R. 156, 191 ("The new service *ex juris* rules jettisoned past practice").

[101] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012). See also *The Queen v. A.D.H.*, 2013 SCC 28, ¶ 30; [2013] 2 S.C.R. 269, 286-87 ("Legislative evolution and history may often be important parts of the context within which to conduct the modern approach to statutory interpretation"); *Canadian Human Rights Commission v. Canada*, 2011 SCC 53, ¶ 48; [2011] 3 S.C.R. 471, 497 ("This piece of legislative history .. strongly suggests that 'costs' was used as a term of art when the intention was to confer authority to award legal costs"); *The Queen v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 885 ("To understand the scope of s. 72(1), it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute"); *Crupi v. Employment and Immigration Commission*, [1986] 3 F.C. 3, 10 (C.A.) (comparing the current and the immediately preceding act made it clear that a person detained in a maximum security psychiatric institution for observation pending trial was not ineligible for unemployment insurance because he was an inmate of "any prison or similar institution") & R. Sullivan, Sullivan on the Construction of Statutes 664 (6th ed. 2014) ("When two successive versions of a provision are compared to one another, it is often apparent that a substantive change was intended").

meaning. It follows that *Alberta v. Morasch*,[102] the leading case interpreting R. 244.1, does not apply to r. 4.33(1).

[158] The interpretation I have given r. 4.33(1) is consistent with foundational r. 1.2(1): "The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in a timely and cost-effective way". Using as a measure of dilatory prosecution the different degrees of advancement associated with the comparator plaintiff and the nonmoving party compels a plaintiff to advance an action in a consistent and timely basis.

[159] The imposition of this obligation and the adoption of this yardstick to measure its observance mirrors the key components of the obligations thrust on parties in standard and complex cases by rr. 4.4(1) and 4.5(1) respectively. Rule 4.4(1) insists that a standard action proceed at an orderly and reasonably expeditious pace. "[T]he parties to an action must, within a reasonable time considering the nature of the action, complete each ... steps or stages in the action".[103] Rule 4.5 directs the parties in a complex action to enter into a litigation plan with stipulated features. By definition, the litigation milestones enshrined in a litigation plan represent a joint endorsement of the speed at which the action will advance. If the litigants cannot craft their own litigation plan, the court may do it for them. Presumably, a litigation plan that has the judicial stamp of approval will advance the litigation at a reasonable rate.

[160] Rule 4.33(1) forces a plaintiff to comply with the *Alberta Rules of Court* and advance an action in both a consistent and timely manner. A party who does so will not be adversely affected by r. 4.33(1).

[161] This emphasis on rule compliance and expedition is mandated by the foundational rules of the *Alberta Rules of Court* in force as of November 1, 2010, as foreshadowed by the *Civil Procedure Rules, 1998* in force as of April 26, 1999.[104] Lord Woolf, M.R., in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd.*, a 1997 Court of Appeal decision, emphasized the importance of this theme:[105] "We think that the change in culture[106] which is already taking place will enable

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[102] 2000 ABCA 24; 183 D.L.R. (4th) 742.

[103] *Alberta Rules of Court*, r. 4.4(1).

[104] S.1. 1998/3132.

[105] [1998] 2 All E.R. 181, 191 (C.A. 1997). See also *Thevarajah v. Riordan*, [2015] UKSC 78, ¶ 13 (the Court confirmed that litigants must comply with the *Civil Procedure Rules, 1998* and other binding norms) & *Mitchell v. News Group Newspapers Ltd.*, [2013] EWCA Civ 1537, ¶ 38 (the Court announced an intention to adopt a "tougher and more robust approach to rule-compliance").

[106] The new values introduced by the 2010 *Alberta Rules of Court* may fairly be considered as a "change in culture", a phrase Lord Woolf favoured, if one uses as the measuring stick, the express recognition of the values that need to be

the courts to recognize for the future, more readily than heretofore, that a wholesale disregard for the rules is an abuse of process."

[162] If a plaintiff encounters conditions that may jeopardize meeting the modest targets r. 4.33(1) establishes[107] and the defendants are unwilling to assent to anticipated delays[108] in a litigation plan or other document, the prudent plaintiff may ask the Court to grant an order contemplated by rr. 4.4(2) and 4.6(1).[109] The former allows the Court to approve a proposed litigation plan or a proposal for a specified step in a standard case. The latter, in the context of a complex case, allows a court to give its imprimatur to a litigation plan or revise an existing litigation plan.

[163] Plaintiffs who do not advance their actions in accordance with the standards this judgment adopts can expect little sympathy from the court.[110] A court must have zero tolerance for those who

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pursued if the public administration of justice is to continue to serve as a viable dispute resolution service. One must be aware, in comparing post 2010 conditions with earlier eras that conventional trials as the ultimate method of dispute resolution have been declining in many common law jurisdictions for over fifty years. Galanter, "The Vanishing Trial: An Examination of Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 459-60 (2004) (the "portion of [American] federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980's") & Twohig, Baar, Myers & Predko, "Empirical Analysis of Civil Cases Commenced and Cases Tried in Toronto 1973-1994" in 1 Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review 77, 127 (1996) (trials declined both in absolute and percentage terms as the method of resolution from 1973 to 1994).

[107] *International Capital Corp. v. Robinson Twigg & Ketilson*, 2010 SKCA 48, ¶ 6; 319 D.L.R. 4th 155, 158 (the action did not advance while two of the defendants' criminal trials were incomplete) & *Allen v Sir Alfred McAlpine & Sons Ltd*., [1968] 1 All E.R. 543, 560 (C.A.) (the action did not advance until the medical condition of the plaintiff stabilized).

[108] See *Brian W. Conway Professional Corp. v. Perera*, 2015 ABCA 404 ¶ 29 (the Court characterized communications between the parties as a standstill agreement that relieved the nonmoving party of the obligation to advance its action while the standstill agreement is in effect).

[109] *Miller v. News Group Newspapers Ltd.*, [2013] EWCA Civ 1537, ¶ 41 ("applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanctions made after the event").

[110] The Court of Appeal of England and Wales, in *Mitchell v. News Group Newspapers Ltd.*, [2013] EWCA Civ 1537, ¶ 41, gave the legal profession some helpful advice:

> [M]ere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. ... But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when solicitors are

inexcusably fail to advance their actions in a consistent and timely manner. If the courts do not insist that plaintiffs abide by these lenient timelines and dismiss dormant actions they will be part of the litigation landscape.[111]

B. There Has Not Been a Significant Advance in Ursa's Action Since the City Served Its Statement of Defence

[164] Ursa's action is properly characterized as a standard commercial law case.[112] Because the parties did not agree whether Ursa's action was a standard or complex case before March 25, 2011, a date four months after the City filed its defence, the action is deemed to be a standard case. This accords with common sense. There is no reason to categorize it as a complex action. The amount claimed is not large. The issues are not difficult to resolve. There are only two parties. And there are not many documents.

[165] A reasonably diligent plaintiff prosecuting a standard commercial law case like Ursa's would have filed a form 37 request to schedule a trial date and received a trial date by the end of the three-year period following service of the defendant's statement of defence.

[166] To reflect the fact that the standard is undue delay and not the clip at which a reasonably diligent party advances an action, an acceptable pace for the purpose of r. 4.33(1) is slower. This point on the litigation spectrum where the plaintiff has completed questioning of the moving party

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> facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue.

So did Lord Denning, M.R., in *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp.*, [1981] A.C. 909, 933 (C.A. 1979):

> [Eleven] years ago ... we started to strike out actions at law for want of prosecution. That development has had some beneficial results. It has taught practitioners that they must observe the time schedules provided by the Rules of Court. They must enter in their diaries that latest dates by which writs must be issued and served, pleadings delivered, discovery made, and cases set down for trial. They must keep dates or get them extended by consent: else they may find themselves in serious trouble.

[111] See 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 its predecessor").

[112] *Alberta Rules of Court*, r. 4.3(3).

is the appropriate measure of acceptable dilatoriness. Ursa must have proceeded with sufficient alacrity to have reached that point on the litigation spectrum when the applicable time frame expired.

[167] It did not. Ursa's action was not anywhere close to where it should have been at a point three years after the City served its defence. Its action stalled a long time ago.

[168] As Ursa's action has not made a significant advance in the three-year period the City identified, the chambers judge had to dismiss Ursa's action.

[169] The chamber judge's conclusion that Ursa served an affidavit of records that complies with the *Alberta Rules of Court* does not assist Ursa. It had to move its action far beyond the affidavit of record point on the litigation spectrum.

[170] The Court notes that the amount of time that Ursa has probably devoted to defending the City's r. 4.33(1) application far exceeds what it devoted to the action before July 21, 2014, the date the City filed its r. 4.33(1) application. This says a lot about Ursa's commitment to its action.

V. Conclusion

[171] The appeal is allowed. The City's application under r. 4.33 is granted; the action of Ursa Ventures Ltd. against The City of Edmonton is dismissed.

Appeal heard on December 11, 2015

Memorandum filed at Calgary, Alberta
this 11th day of May, 2016

Wakeling J.A.

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