Court of Queen's Bench of Alberta

Citation: Cochrane (Town) v Austech Holdings Inc, 2021 ABQB 666

Date: 20210820
Docket: 1101 05026, 1101 09439
Registry: Calgary

Between:

Docket 1101 05026

The Town of Cochrane

Plaintiff

- and -

Austech Holdings Inc., Austech Consulting Limited, 641269 Alberta Ltd., 593267 Alberta Ltd., Geo-Engineering (MST) Ltd., Whissell Contracting Ltd., Whissell Contracting Calgary Ltd., Whissell Contracting Ltd. carrying on business as Whissell Contracting, Whissell Contracting Calgary Ltd . carrying on business as Whissell Contracting, the said Whissell Contracting, 593267 Alberta Ltd. carrying on business as Bow Ridge Investments, the said Bow Ridge Investments, 641269 Alberta Ltd. carrying on business as Bow Ridge Developments, the said Bow Ridge Developments, Austech Holdings Inc., Austech Consulting Limited, 641269 Alberta Ltd. and 593267 Alberta Ltd. carrying on business as Austech Group and/or Bow Ridge Investments and/or Bow Ridge Developments, the said Austech Group, Reid Crowther & Partners Ltd., Earth Tech Inc., G. Douglas Dey, G. Douglas Dey carrying on business as G. Douglas Dey Engineering, the said G. Douglas Dey Engineering, Jim Clark, D. Wayne Tomlinson, Rob Johnston, Robin J. Fitzgerald, G.A. Geoffrey, Robert Saunders, M. Stepanek, 620208 Alberta Limited, Reid Built Homes Calgary Ltd., Reid-Built Homes Ltd., Lincolnberg Homes Ltd., Lincolnberg Homes (Calgary) Inc., Bay-Cor Developments Inc., Hilltop Developments Ltd., Hilltop Developments Ltd. carrying on business as Hilltop Homes, and the said Hilltop Homes and Can-Cor Enterprises Ltd.

Defendants

And Between:

Docket 1101 09439

Laura Akitt, Gary Arsenault, Kim Arsenault, Giovanni Bastone, Elizabeth Bastone, Chloe Cartwright, Condo. Corp. 0113522, Patsy Cowan, Dean Schultz, Russell Coulter, Arlene Coulter, Nikki Coward, Simon Coward, Jason Crone, Beverly Crone, Milton Da Silva,

Tereza Da Silva, Andrew Davies, Susan Davies, Jeffrey Goodman, Russ Doell, Jenn Doell, James Gordon, Donna Winter Gordon, Niel Graham, Jamie Grant, Amanda Harwood, Charlotte Henderson, Al Hinger, Bonnie Hinger, Carl Hulsemann, Susan Hulsemann, Cyril Jenniex, Lucy Jenniex, Jessie Jonassen, Sandra Scott, Richard Keller, Caroline Keller, Kent Kennedy, Micheline Kennedy, Kelly Matheson-King, Loran King, Art Laurenson, David Loader, Barbara Atkinson, Paul Lord, Alice Lord, Marggie Marks, Gradey McMahon, Treena McMahon, Tyler Orton, Faye Orton, Mark Seaman, Angela Seaman, Susanna Roberts, Charles Scott, Ronald Skaalid, Elaine Skaalid, Donald Bradley Smith, Lorna Smith, Darren Thompson, Jennifer Thompson, Ronald Melanson, Doreen Wilson, Trevor Wiebe, Debra Wiebe, Jeff Yaremichuk, Pauline Yaremichuk and Franklin Young

Plaintiffs

- and -

The Town Of Cochrane, Austech Holdings Inc., Austech Consulting Limited, 641269 Alberta Ltd., 593267 Alberta Ltd., Geo-Engineering (MST) Ltd., Whissell Contracting Ltd., Whissell Contracting Calgary Ltd., Whissell Contracting Ltd. carrying on business as Whissell Contracting, Whissell Contracting Calgary Ltd. carrying on business as Whissell Contracting, the said Whissell Contracting, 593267 Alberta Ltd. carrying on business as Bow Ridge Investments, the said Bow Ridge Investments, 641269 Alberta Ltd. carrying on business as Bow Ridge Developments, the said Bow Ridge Developments, Austech Holdings Inc., Austech Consulting Limited, 641269 Alberta Ltd. and 593267 Alberta Ltd. carrying on business as Austech Group and/or Bow Ridge Investments and/or Bow Ridge Developments, the said Austech Group, Reid Crowther & Partners Ltd., Earth Tech Inc., G. Douglas Dey, G. Douglas Dey carrying on business as G. Douglas Dey Engineering, the said G. Douglas Dey Engineering, Jim Clark, D. Wayne Tomlinson, Rob Johnston, Robin J. Fitzgerald, G.A. Geoffrey, Robert Saunders, M. Stepanek, 620208 Alberta Limited, Reid Built Homes Calgary Ltd., Reid-Built Homes Ltd., Lincolnberg Homes Ltd., Lincolnberg Homes (Calgary) Inc., Bay-Cor Developments Inc., Hilltop Developments Ltd., Hilltop Developments Ltd. carrying on business as Hilltop Homes, and the said Hilltop Homes, Can-Cor Enterprises Ltd., Robert Allan Powell, Pattie- Jay Callaghan, Jason Martin Lane, K. Danielle Connelllane, Seth Baker, Dianne Graham, Paul Janzen, Cindy Janzen, Jodi Barth, Antoon Peter Reuvers, Maria Engelina Reuvers, Jason Robert Lowe, Kim Julie Williams-Lowe, Priya Batchelor, Nancy Harrison, David A. Lymburner, Ronald H. Fortin, Allyson R. Fortin, Gerhard Scheutt, Janet Hughes, Ian Hughes, Douglas J. Krebes, Linda Jelic, Scott David Hennig, Sandra Godfrey, Christophe Larribeau, Jeffrey Goodman, Gregory Sargent, Stacy Sargent, Eric Kilmury, Tammy Kilmury

Defendants

- and -

Carl F.J. Hulsemann, Sue J. Hulsemann, Faye A. Orton, Tyler N. Orton, Christophe Larribeau, Amanda Larribeau, Dean Lewis Schultz, Patsy Marie Cowan, and KTA Structural Engineers Ltd.

Third Party Defendants

Reasons for Judgment
of the
Honourable Madam Justice G.A. Campbell

I. Introduction

[1] The failures of gabion style retaining walls (the "Gabion Walls") constructed as part of a 1990s new residential property development known as Bow Ridge Subdivision Phase 3 (the "Development") located on the south shore of the Bow River in Cochrane, Alberta spawned two lawsuits for damages.

[2] The Town of Cochrane (the "Town") commenced the first lawsuit against 58 defendants (or 40 separate legal entities) (the "Town Action"). Sixty-nine individual homeowners (the "Homeowners") in the Development commenced the second lawsuit (the "Homeowners' Action") against 89 defendants (comprised of 40 separate legal entities, the Town of Cochrane and some 31 individual homeowners). Collectively, with the Town Action defendants, the defendants in the Homeowners' Action are referred to as the "Defendants". The Town and the Homeowners are collectively referred as the "Plaintiffs" and the Town Action and the Homeowners' Action are collectively referred to as the "Actions".

[3] The Actions involve claims of professional negligent design, negligent construction, negligent misrepresentation, negligent advice, failure to warn and breach of contract related to design, engineering, construction and landscaping deficiencies in and around the Gabion Walls and the associated overland drainage system. The Actions seek damages of no less than $20 million to repair the Gabion Walls.

[4] In late May and early June 2019, five of the Defendants brought applications to have the Actions against them dismissed (the "Dismissal Applications") for inordinate and inexcusable delay pursuant to rule 4.31 of the *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*"). These five Defendants (collectively referred to as the "Applicants") are:

(a) the developer of the Development, Austech Holdings Inc., Austech Consulting Limited, 641269 Alberta Ltd., 593267 Alberta Ltd., 593267 Alberta Ltd. carrying

on business as Bow Ridge Investments, the said Bow Ridge Investments, 641269 Alberta Ltd., carrying on business as Bow Ridge Developments, the said Bow Ridge Developments, Austech Holdings Inc., Austech Consulting Limited, 641269 Alberta Ltd. and 593267 Alberta Ltd. carrying on business as Austech Group and/or Bow Ridge Investments and/or Bow Ridge Developments, the said Austech Group (the "Austech Defendants");

(b) the designer of the overland drainage including the swale on top of, or adjacent to, the Gabion Walls, retained in 1997, Reid Crowther & Partners Ltd., Earth Tech Inc., Jim Clark, D. Wayne Tomlinson, Rob Johnston, Robin J. Fitzgerald and G.A. Geoffrey (the "RCPL Defendants");

(c) the contractor for construction of the Gabion Walls undertaken in 1999, Whissell Contracting Ltd., Whissell Contracting Calgary Ltd., Whissell Contracting Ltd. carrying on business as Whissell Contracting, the said Whissell Contracting (the "Whissell Defendants");

(d) the preparers of a preliminary slope stability assessment issued in 1994, Robert Saunders and Milos Stepanek (the "Saunders/Stepanek Defendants"); and

(e) the provider of structural engineering advice to the Almor Defendants in 2003, KTA Structural Engineers Ltd. (the "KTA Third Party Defendants").

[5] The Applicants adopted the facts, law and argument of one another in relation to specific legal issues identified by the application. Each Applicant provided their own evidence, argument and perspective on the issue of how the delay was of significant prejudice specific to them on their ability to defend the Actions.

[6] The Plaintiffs provided separate evidence and submissions but were united in their opposition to the Dismissal Applications.

[7] For the reasons that follow, I find there is inexcusable, inordinate delay in these Actions. Although it therefore follows that prejudice is presumed, I also find that there is significant prejudice. In the result, the Actions against the Applicants are dismissed.

II. Factual Summary

A. Construction and Failure of the Gabion Walls

[8] In the mid-1990s, the Austech Defendants proposed to develop certain bare lands (the "Lands") in or near the Town into a new residential subdivision, which became the Development. The Development, which was built on a hillside, required the construction of retaining walls to support the steep natural grade of the Lands and provide relatively more level homeowner lots.

[9] The Austech Defendants retained a number of consultants to assist in the design and construction of the Development.

[10] During the design phase, it was determined that Gabion Walls would be an appropriate type of retaining wall for the Development. The Gabion Walls were constructed of wire baskets filled with large rocks that retained the earth above them and acted as a solid retaining wall. Concrete draining swales were also constructed around the Gabion Walls for drainage.

[11] Almor Engineering Associates Ltd. ("Almor Engineering"), Almor Testing Services Inc. ("Almor Testing") and James B. Montgomery (collectively, the "Almor Defendants") were retained to design the Gabion Walls and to provide certain geotechnical services for the Lands.

[12] The Almor Defendants subcontracted with G. Douglas Dey, G. Douglas Dey carrying on business as G. Douglas Engineering and G. Douglas Dey Engineering (the "Dey Defendants") for the structural design of the Gabion Walls and for conducting field inspections. Mr. Dey passed away in 2003.

[13] In or about 1994, the Almor Defendants subcontracted Geo-Engineering (MST) Ltd. (the "Geo Defendant") to undertake a preliminary slope stability assessment for the Lands (the "Assessment"). The Saunders Defendant worked on the Assessment and authored a report titled, "A Report on Preliminary Slope Stability Assessment" dated June 1994 (the "1994 Report"). The Stepanek Defendant reviewed the 1994 Report in his capacity as the Geo Defendant's geotechnical engineer after which the Geo Defendant issued the 1994 Report to the Almor Defendants. Since then, the Saunders/Stepanek Defendants have had no other involvement with the Development.

[14] The Almor Defendants also engaged the Geo Defendant in relation to the original construction of the Gabion Walls in 1999 and 2000 and again with respect to remedial work to the Gabion Walls in 2003. The successor entity to the Geo Defendant assigned itself into bankruptcy on May 26, 2015.

[15] In 1997, the Austech Defendants retained the RCPL Defendants to provide engineering design and construction services restricted to site grading, utilities and lot servicing for storm sewer systems, storm water management and overland drainage features, roads, sidewalks, curbs, gutters and catch basins.

[16] In 1999, the Gabion Walls were constructed by the Whissell Defendants, which acted as general contractor under the supervision of the Almor Defendants. Since the construction of the Gabion Walls was completed in 2000, the Whissell Defendants have had no other involvement with the Development.

[17] A number of home builders (the "Builders") built homes in the Development and were responsible for final grading, landscaping and lot drainage for the homes in the Development.

[18] In 2003, the Town learned that a small portion of one of the Gabion Walls was shifting or otherwise showing signs of failure (the "First Wall Failure"). The Town undertook an investigation into the cause of the First Wall Failure. The Town retained McIntosh Lalani Engineering Ltd., Nazim S. Lalani, Marty D. Ward and A.W. McIntosh (the "McIntosh Lalani Defendants") to act as its consultant in the investigation.

[19] In 2004 remedial work was undertaken that included retrofitting part of one of the Gabion Walls and removing and replacing another portion of the Gabion Walls. The Town, the Austech Defendants, the Almor Defendants and the Geo Defendant undertook and paid for the remediation of the First Wall Failure. The KTA Third Party Defendants acted as a subconsultant to one of the Almor Defendants with respect to these remediation efforts.

[20] At the time, after further investigation, the RCPL Defendants allegedly advised the Town that the First Wall Failure was not the result of any errors or deficiencies in their services but due to improper drainage caused by the Builders in the Development (the "Builder Defendants"), the

homeowners and the Town. As a consequence, the RCPL Defendants did not participate in the remediation or payment of costs of the First Wall Failure.

[21] Sometime between 2007 and 2009, there was further and more expansive movement and signs of failures in portions of the Gabion Walls in areas other than those that were retrofitted or replaced as a result of the First Wall Failure (the "Second Wall Failure").

[22] On May 19, 2009, the Town engaged Stantec Consulting Ltd. ("Stantec") to prepare a comprehensive report outlining the causes of the Gabion Wall Failures, whether the Gabion Walls could be partially remediated or whether they required complete replacement and the costs associated with the various options.

[23] The Stantec Report dated April 6, 2010, (the "Stantec Report") opined that eventually the entirety of the Gabion Walls would need to be removed and reconstructed using a different retaining wall system at an estimated cost of between $5.8 million to $8.5 million.

[24] The Stantec Report opined that the movement of the Gabion Walls may have been due to a combination of poor construction methods or post construction factors such as water discharge and other retaining wall structures installed after the Gabion Walls. In particular, the Stantec Report opined that the design and construction of the Gabion Walls was defective in ways including: inadequate safety against sliding; unsuitable clay fill material and base drainage gravel, inadequate or lacking provision for drainage and for frost protection; an undermining of the base of the Gabion Walls during construction; and poor preparation of base drainage gravel and subgrade materials underlying the Gabion Walls.

[25] The Actions were commenced as a result of the Stantec Report opinion and recommendations.

[26] On April 8, 2011, the Town Action was commenced by filing a Statement of Claim for damages due to the failure of the Gabion Walls.

[27] In 2011, the Town suggested that the Development homeowners commence legal action, including against the Town, claiming damages due to the failure of the Gabion Walls.

[28] On July 7, 2011, the Homeowners' Action was commenced by filing a Statement of Claim for damages due to the failure of the Gabion Walls. Some of the homeowners in the Development who did not agree to be plaintiffs were named as Defendants in the Homeowners' Action. Later in July, an Amended Statement of Claim was issued adding the Town as a Defendant in the Homeowners' Action.

[29] The two Actions have proceeded together as they are nearly identical, claiming against similar Defendants for similar breaches of duty. The Actions cannot be consolidated, however, because the Town is a Defendant in the Homeowners' Action.

[30] The parties agreed to have the Actions heard concurrently, with evidence in each Action being admissible in the other. Liability and damages are at issue in both Actions. Expert evidence will be central to these determinations.

[31] The Gabion Walls still exist and are available for inspection.

[32] There are no Tolling Agreements or Standstill Agreements between the Plaintiffs and the Defendants.

B. Chronology of the Actions

[33] A detailed chronology of the litigation steps taken in the Actions is attached as a Schedule to these Reasons.

III Rule 4.31 Application

A. Applicable Legal Principles

[34] The Applicants have not brought "drop dead" applications under rule 4.33 that would require an analysis of the litigation steps taken in a discrete three-year or more period.

[35] Rather, the Applicants have applied under rule 4.31 for dismissal based on overall delay in the Plaintiffs' prosecution of the Actions. The focus in this type of application is on the qualitative features of the overall delay in the litigation, as opposed to a more quantifiable analysis that focuses on the time gaps between significant advances in the action: ***Kametani v Holman***, 2018 ABQB 18 at para 19.

[36] Rule 4.31 permits a court to dismiss all or part of a claim if it determines that delay in the action has resulted in significant prejudice to a party. Rule 4.31(2) provides that if the delay is "inordinate and inexcusable" it is presumed to have caused significant prejudice: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at para 43. As an alternative to dismissing the action, the court may make a procedural or other order allowed by the *Rules*.

[37] Rule 4.31 is not a mandatory provision; the court retains discretion not to dismiss an action even if there is delay and significant prejudice.

[38] The applicant has the onus of showing that the delay is inordinate and inexcusable or that the delay has or will result in significant prejudice: ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at para 31. If the applicant shows that the delay is inordinate and inexcusable, the burden then shifts to the responding party to rebut the presumption of significant prejudice.

[39] The key to success on this type of delay application is establishing that significant prejudice exists, whether actual or presumed, that is a direct result of the delay; this is the "ultimate consideration": ***Transamerica*** at para 21. If delay is found, the same delay must have directly caused or resulted in the prejudice alleged: ***OmniArch Capital Corporation v Bishop***, 2020 ABCA 472 at para 31.

[40] Applications to deal with delay are considered in the context of the Foundational Rules at Part 1 of the *Rules*: ***Alston v Haywood Securities Inc***, 2020 ABQB 107 at para 37.

[41] The Foundational Rules impose obligations on all parties in conducting their litigation to advance the action. The key objectives of the Foundational Rules include: encouraging timely and cost-effective resolution of claims that is both fair and just (r 1.2(1)); open, honest and timely communication between parties (r 1.2(d)); identification of the real issues in dispute (r 1.2(2)(a)); and for all parties to manage the litigation, including responding "in a substantive way and within a reasonable time to any proposal for the conduct of an action" (rr 4.1 and 4.2(b)).

[42] Thus, the objective of rule 4.31 is to promote timely, cost-effective, fair and just resolution of claims by providing for a remedy when delay in prosecuting a claim has resulted in presumed or actual significant prejudice to a party.

[43] Our Court of Appeal in ***Humphreys v Trebilcock***, 2017 ABCA 116, leave denied 2017 CarswellAlta 2724, at paras 151-156 suggested that some or all of the following questions might be useful in determining a rule 4.31 application:

> First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the timeframe under review?
>
> Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
>
> Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?
>
> Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?
>
> Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action? This question must be posed because of the verb "may" in r. 4.31(1).

[44] More recently, our Court of Appeal clarified that ***Humphreys*** does not prescribe a "universal mandatory code" for determining rule 4.31 applications: ***LDS v SCA***, 2021 ABCA 59 at para 18.

[45] While general principles have been established to guide the analysis undertaken in determining delay applications, there is a recognition that because each action is different, "[t]he application of the rules to the particular facts will always engage an element of judicial discretion, reflected in the word "may" found in R. 4.31(1). There are many different ways that a Master or chambers judge can analyze a delay application; there is no universal mandatory formula": ***Transamerica*** at para 15. For this reason, in assessing delay, the court will review what has happened throughout all of the action and not just the steps taken in respect of one of the parties.

[46] In assessing delay, the obligation to advance the action with timeliness, cost-effectiveness and efficiency rests with all of the parties: rr 1.2(2)(d), 1.2(3)(a) and 4.1. Thus, any defence delay may be factored into the court's analysis and ultimate exercise of discretion in deciding whether the delay is inordinate and inexcusable, and if there has been any significant prejudice sustained by a party.

B. Have the Applicants Established Delay?

[47] The first question requires determining whether there has been delay in the prosecution of the Actions. The Applicants bear the burden of establishing this delay.

[48] The assessment of delay is fact based, "there is no scientific method…": ***Transamerica*** at para 20. The analysis requires consideration of the action as a whole to determine whether it has

failed to reach the point on the litigation spectrum that a reasonably acting litigant would have attained within the time frame under review: ***4075447 Canada Inc v WM Fares & Associates Inc***, 2020 ABCA 150 at para 14 (***WM Fares***) and ***Humphreys*** at para 150.

[49] The court assesses an action's progress, or lack thereof, from when the action commenced until the time the rule 4.31 application was brought: ***Arbeau v Schulz***, 2019 ABCA 204 at para 27. In May 2019, when the first of the Dismissal Applications was filed, the Town Action had been ongoing for eight years and one month, while the Homeowners' Action was two months shy of eight years. For the purpose of this decision, I will refer to the Actions as ongoing for eight years at the time the Applicants filed their Dismissal Applications.

[50] The Applicants contend that there has been overall delay in the prosecution of the Actions. They assert that during the timeframe in which these eight-year-old Actions have shuffled along, little has occurred to advance them beyond the close of pleadings. The Applicants highlight the following:

- The Actions have stalled in the discovery phase, with only a handful of complete Affidavits of Records having been delivered by the Homeowner Plaintiffs.
- None of the parties have been questioned in either of the Actions.
- Even though the Plaintiffs had the Stantec Report before commencement of the Actions, the Plaintiffs retained a second expert, Coffey Geotechnics Inc. ("Coffey"), who completed an expert opinion (the "Coffey Report") for them. The Plaintiffs then retained Dr. Neil H. Wade of Wade Geotechnical Consultants Ltd. to review the Coffey Report and provide them with an expert opinion (the "Wade Report"). Despite having these three expert reports in hand by the end of 2013, the Homeowners sought out a fourth expert, Anast Demitt, and the Plaintiffs together, a fifth expert, Tetra Tech EBA Engineering, now Tetra Tech Canada Inc. ("Tetra Tech"), which has also provided an expert opinion. However, none of these experts opinions are useful for trial.
- There has been no attempt to schedule mediation since the initial mediation attempt failed in 2014.
- The Plaintiffs never secured a litigation plan, despite being in Case Management since late 2012 and directed to do so in June 2014.

[51] The Applicants also point to there being no express agreement or court order suspending or delaying the litigation of the Actions. To the contrary, litigation was to have been pursued while the Plaintiffs sought out other expert opinions.

[52] The Plaintiffs say there has been no delay in prosecuting the Actions. They contend that there have been no material periods when the Actions were dormant. The Plaintiffs say they moved the Actions forward on several fronts as they pursued a workable remediation plan that would foster settlement through alternative dispute resolution (ADR), while simultaneously taking the necessary litigation steps to exchange pleadings and information, address multiple Defendant applications and streamline the Actions with settlements and discontinuances that have reduced the number of parties and narrowed the issues for trial.

[53] The Plaintiffs point to the record of litigation activity and emphasize the unique and complex nature of the Actions in support of their position that there has been no delay. They

highlight the multi-party nature of this lawsuit as a factor that necessitated more than the usual time to prosecute. The sheer number of parties involved was significant at the outset, with over 60 Plaintiffs and dozens of Defendants and Third Parties, together with their numerous counsel. Since the Actions were commenced, several parties have changed counsel at least once.

[54] As another complexity, the Plaintiffs point to the unique and complex relationship between the numerous Plaintiffs. There is an unusual relationship between the Town and the Homeowners, with the Town being a Plaintiff in the Town Action and a Defendant in the Homeowners' Action, precluding any consolidation of the Actions.

[55] There is also a complicated relationship amongst the individual Homeowners. The Plaintiffs say there is no mechanism to unite the affected Homeowners to pursue the Homeowners' Action, with no individual Homeowner having a direct link to overall damages. Some of the affected homeowners did not agree to be Plaintiffs and were named as Defendants by the Homeowners. Meanwhile, some of the Homeowners were added as Third-Party Defendants by some of the Defendants in the Homeowners' Action.

[56] I have reviewed the litigation record of the Actions from their commencement in 2011 until the time of the Dismissal Applications in May and June 2019.

[57] As a high level overview, from 2011 until September 2014, pleadings and documents were filed, served and exchanged; five corporate Defendants were revived by court-order (on application by the Plaintiffs); two separate rule 3.68 applications (by the Almor Defendants) and one summary dismissal application (by the Whissell Defendants) were commenced, heard and dismissed; applications by six of the Defendants (the Geo Defendant, the RCPL Defendants, the Austech Defendants, the Whissell Defendants, the Almor Defendants and 934957 Alberta Ltd.) to add 38 homeowners as Third-Party Defendants to the Actions were commenced, heard and adjourned *sine die*; three expert opinions (Stantec, Coffey and Wade) were disclosed to the Defendants and the Homeowners advised that they had retained a fourth expert, Mr. Demitt; there was a general consensus that early ADR would be pursued; a Mediator was appointed and the mediation process commenced and ended without progress; four litigation plans were proposed but not responded to; the Actions were put into case management in late 2012 and four case management conferences were held (March, May and September, 2013 and June 2014).

[58] More specifically, from January 2014 to June 2014, mediation was stalled by the question of the appropriate repair solution for the Gabion Walls. The Coffey and Wade Reports quantified their partial remediation solution as costing between $600,000 and $900,000. The parties in attendance at the January 2014 mediation meeting noted that if this cost was shared equally amongst all of the Defendants, each Defendant would be liable to pay approximately $10,000. However, the Stantec Report had recommended the entirety of the Gabion Walls required remediation, with an estimated cost of between $5.8 million to $8.5 million. The Mediator confirmed that the selection of the appropriate repair needed to be resolved between the Plaintiffs, first. There is evidence the Homeowners were frustrated with the apparent conflict between themselves and the Town regarding the acceptable remediation solution. The Defendants waited for the Homeowners to decide if they would accept the partial remediation solution proposed in the Coffey and Wade Reports. The Mediator noted that the Defendants did not necessarily agree that the entirety of the Gabion Walls needed to be remediated. He referenced his efforts to "win the defendant group over to the idea of the entire length of the wall being remediated."

[59] In June 2014, the Homeowners advised they would not accept the partial remediation proposed in the Coffey and Wade Reports. They further advised that they had retained Mr. Demitt, whose preliminary opinion was that the entirety of the Gabion Walls should be remediated. It was clear at this point that the push for early ADR had ended. At a Case Management Meeting in late June 2014, the Town advised the Case Management Justice that "it appears that mediation is dead for now or mostly dead". The Case Management Justice expressly recommended, given the apparent impasse as to the appropriate remediation "fix", that mediation and litigation should be pursued in parallel, with consideration given to a collectively retained expert but that a litigation plan needed to be put in place.

[60] As will become evident, the Plaintiffs pursued little activity on the litigation track to advance the Actions after that time. Other than completing the Almor Settlement, including questioning of the Almor Defendants' representative, the Plaintiffs mostly responded to Defendant applications.

[61] From October 2014 to March 2016, the Plaintiffs concluded and obtained court approval of the Almor Settlement. Six months later, questioning of the Almor Defendants' representative by all interested parties proceeded for three days, concluding on September 9, 2016.

[62] The Almor Defendants were significant parties to the Actions, having been involved in both the design and construction phases of the Gabion Walls as well as the repairs conducted after the First Wall Failure. Although it took two years without much else happening, it appears that this significant settlement, apparently for a "jaw dropping" amount, advanced the Actions. The settlement reduced the number of Defendants, presumably reduced the remaining Defendants' exposure and provided for questioning of a key witness, the Almor Defendants' representative, by the Plaintiffs and the Defendants, including the Applicants. It is unclear, however, whether the settlement narrowed the issues to be addressed at trial with the remaining parties. As the Applicants point out, neither of the Plaintiffs approached any of them to discuss the effect of the Almor Settlement on their liability or exposure, or to discuss the facts and issues that remained in dispute after the Almor Settlement.

[63] Between April 2015 and June 2016, a summary dismissal application was heard and granted in favour of the McIntosh Lalani Defendants. A second summary dismissal application brought in April 2015 by certain homeowner Defendants in the Homeowners' Action resulted in settlements in June 2015, with associated Partial Discontinuances being filed in October 2015. These summary dismissal applications were all initiated by the applying Defendants. As the Applicants point out, the success of the summary dismissal applications and discontinuances suggest that these parties should never have been Defendants in the first place. As such, it is difficult to see how these steps in the litigation narrowed the issues for trial with the remaining Defendants.

[64] In June 2018, nine of the Builder Defendants brought summary dismissal applications, which resulted in settlements and Partial Discontinuances filed in December 2018. While these settlements, prompted by the Builder Defendants, reduced the number of Defendants (the Applicants now remain the only active Defendants in the Actions, together with the Geo Defendant if the stay in its bankruptcy is lifted, and the Town in the Homeowners' Action), it is unclear whether these settlements reduced the Applicants' liability and exposure.

[65] In April 2019, the Plaintiffs provided their latest expert opinion, the Tetra Tech Report, to the Defendants along with a detailed Litigation Plan. Almost five years after receiving the

concurrence of the Case Management Justice to seek out a new expert opinion but directed to implement a Litigation Plan, the Plaintiffs finally acted on both processes, providing the Defendants with a joint expert's report and proposing a Litigation Plan.

[66] The above discussion demonstrates that this is not a case where the Plaintiffs have taken no steps for several years or seem uninterested in prosecuting their claims; there was activity taking place. But, the question under rule 4.31 is not whether the Plaintiffs have taken any action; rather, it is whether they have failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within eight years.

1. Questioning

[67] With respect to questioning, the evidence suggests that it may have been on hold until mediation failed in 2014; however, in the ensuing five years, the Plaintiffs have not questioned a single witness, other than the Almor Defendants' representative.

[68] The Applicants say that the Plaintiffs have yet to determine whether there is a need to question any of them and hence have made no effort to schedule questioning. The Town responded to say that it must question approximately five parties, although it provided no further details. The Homeowners submit that their questioning of defence witnesses and officers will be very limited. Should these Dismissal Applications be denied, the Applicants indicate that they will need to question 25-28 of the Homeowners and eight Town witnesses to prepare for trial.

[69] By this point in the litigation, eight years after the filing of the Statements of Claim, one would reasonably expect that there would have been some progress made to question relevant witnesses, especially when the early attempt at mediation failed. The Plaintiffs' decision to focus on ADR has seemingly led them to question only one of the Defendant groups, and, most notably, none of the Applicants.

[70] I find that a litigant acting reasonably would have conducted at least some, if not all, questioning of the Defendants in eight years, especially given the direction from the Case Management Justice in June 2014.

2. Document Production

[71] With respect to document production, the evidence suggests that the Plaintiffs required complete document production by the Defendants, yet their own document production is apparently not complete. Sixteen of the Homeowners' Affidavits of Records are not sworn and include only the same two documents (the same two reports from Stantec). Having reviewed the Homeowners' Affidavits of Records, the Applicants submit that only four of the 66 Affidavits of Records are what they would consider to be a fulsome outline of potential producible records. They argue that the other 62 affidavits are missing important records, such as any documented conversations between the Homeowners and the Town, landscaping documents, details regarding lot grades and building contracts, all of which are related to the triable issues.

[72] The Applicants contend that the Town's Affidavit of Records is also clearly deficient, providing examples of what they believe are missing documents. These include emails between Russell Coulter, one of two Homeowners who acted as representative for the Homeowner; the Toovey Report dated June 26, 2002; meeting minutes for June 23, 2005; letters to Dimigen and Schartner; and Almor Reports dated November 15, 2002 and June 27, 2005.

[73] I accept the Plaintiffs' argument that the Applicants have had the Plaintiffs' Affidavits of Records since 2012 and should have pursued their allegations of deficient disclosure a long time ago. The Applicants had an obligation under the Foundational Rules to raise their concerns about the alleged deficiencies and any limitation of action arguments at an earlier time so that the Plaintiffs could address them. Although both parties contributed to the current incomplete state of document production, I find that any delay in production has been subsumed by more significant delay in other aspects of the case.

3. Expert Opinions

[74] Most significantly, in the last eight years, no expert opinion has been obtained as to the specific proximal cause(s) of the Gabion Wall Failures, the applicable standards of care, whether there was a breach of the requisite standards of care by any of the Defendants, nor about who bears ultimate responsibility for the failures. Expert opinion on these factors lies at the heart of any negligence action.

[75] The Town retained their first expert, Stantec, in May 2009 and received the Stantec Report approximately one year later in April 2010. The Stantec Report prompted the filing of the Actions in 2011. The Stantec Report was not made available to the Defendants until two years later in August 2013.

[76] After commencing the Actions, the Plaintiffs retained their next expert, Coffey, in August 2011. A year and a half later, in December 2012, Coffey issued the Coffey Report to the Plaintiffs. The Coffey Report was not made available to the Defendants until March 2013. The Plaintiffs next retained Dr. Wade in 2013 to review the Coffey Report. By December of the same year, Dr. Wade issued the Wade Report to the Plaintiffs, which was then made available to all parties.

[77] In June 2014, the Homeowners advised that they had retained Mr. Demitt. Notwithstanding that he was retained in early 2014, it appears that Mr. Demitt only conducted a visual review of the Gabion Walls and documented conditions related to the performance of the wall system. The Applicants did not receive a copy of Mr. Demitt's expert report until January 2020 (the "Demitt Report"), almost six years later, and approximately seven months after filing their Dismissal Applications. The Demitt Report notes at page 7 that "[a]dditional information needs to be gathered to properly develop opinions of the proximal cause of the failure." No estimate is given as to when a final report could be completed or whether instructions had been given to gather the missing information and provide an opinion as to the proximal cause of the failure.

[78] Although the Demitt Report was finalized after the relevant time period under consideration in these Dismissal Applications, I mention it to note that even this report, in its current state, does not help the parties understand causation or any of the other fundamental aspects of negligence. While the Demitt Report assigns responsibility to some, but not all of the Defendants (specifically, Almor, Dey, Whissell and RCPL), the comments regarding proximal causation are not much different from the conclusions reached in the Stantec Report in 2010. Namely, that the design and construction of the Gabion Walls was defective in many ways and that the Gabion Wall Failures were the result of the acts, failures or omissions of many parties over a lengthy period of time. This latest opinion suggests the Plaintiffs are no further ahead in establishing causation against each Defendant, and, specifically the Applicants, than they were in 2010.

[79] In November 2015, the Plaintiffs decided to retain Tetra Tech. They ran into a potential conflicts issue, eventually resolved it and formally retained Tetra Tech in December 2016. The information regarding these delays was never communicated to the Defendants.

[80] Two years later, in December 2018, the Tetra Tech Report was completed but was not provided to the Defendants until four months later in April 2019. Information regarding the delays in finalizing the Tetra Tech Report was never communicated to the Defendants. This was almost five years after the Town first advised the Defendants of its intention to retain another expert.

[81] The long-awaited Tetra Tech Report identifies the source of the problems with the Gabion Walls and provides a remediation plan, including a cost estimate. Like all of the other expert opinions in this case, however, the Tetra Tech Report does not address the elements required to prove a professional negligence action, including the applicable standard of care, whether there was a breach of the relevant standard of care and causation.

[82] The Plaintiffs acknowledge that a trial concerning the Actions must determine responsibility for the Gabion Wall Failures. As the Town explained in its brief, "understanding the cause of the Gabion Wall failures... is paramount before any final resolution is possible, trial or ADR. With this in mind, the Plaintiffs obtained and served four expert reports and numerous other expert documents... three days of questioning have occurred....". Yet, eight years after the filing of the Statements of Claim, while the Plaintiffs know what the problems with the Gabion Walls were, that they can be remediated and costs for so doing, there is still no liability expert opinion in this professional negligence action. All that has been now determined is the cost of the Plaintiffs' preferred remediation option, an option and a cost the Defendants are entitled to dispute and, it appears, may very well dispute.

[83] In ***Nova Pole International Inc v Permasteel Construction Ltd***, 2020 ABCA 45 at para 39, the Court found that the five-year delay in obtaining an expert report on damages was a major contributing factor in the delay of the actions as a whole. Although in the unusual circumstances of that case the Court found that the delay was excusable, that conclusion does not change their finding that five years to obtain an expert report constituted delay. I find that the five-year period it took to obtain the Tetra Tech Report contributed to the overall delay in prosecuting the Actions.

4. Conclusion on Delay

[84] In my view, despite the activity that has occurred since the filing of the Statements of Claim eight years ago, such as the time taken to respond to numerous applications, settlements with parties, discontinuances, attendance at case management meetings, discussions surrounding mediation and disclosure of four expert opinions, there has been delay in prosecuting the Actions.

[85] This is a construction negligence claim. This type of claim typically does not have the same prospect of some delay that might arise, for example, in a personal injury claim where it can take time to obtain evidence about recovery and prognosis.

[86] As of May and June 2019, the Actions are still far from being entered for trial.

[87] Rule 8.4 identifies the steps that must be completed before a trial date can be scheduled. In this case, a number of steps remain incomplete: many of the Homeowners need to swear Affidavits of Records; there may be further document production; questioning of the remaining

parties in the Actions and of any expert witnesses needs to begin; undertakings need to be discharged; expert evidence needs to be obtained and finalized; and expert witnesses need to be retained to testify at the trial. Rule 5.34 provides that the clerk cannot schedule a trial date unless expert reports have been exchanged. Furthermore, there is no Litigation Plan in place to ensure completion of all these steps.

[88] The Plaintiffs submitted that they could be ready for trial in approximately nine months, yet their April 2019 proposed Litigation Plan provided for a more than two-year time frame to complete the steps necessary before trial entry. Their proposed Litigation Plan detailed steps for completing document production and questioning, all within an eight-month period. The Plaintiffs then proposed to file their primary expert report within 18 months, followed by the Defendants' primary expert report and the Plaintiffs' sur-rebuttal expert report several months later; questioning of the experts would occur during this time. The 2019 proposed Litigation Plan would have had them applying for a trial date slightly more than two years after litigation activity resumed and they anticipated needing up to 20 days for the trial.

[89] Given the significant litigation steps that remain to be completed, I find that two years, as the Applicants suggest, and as the Plaintiffs outlined in their 2019 Litigation Plan, is a reasonable estimate of the time required for the Actions to be ready for trial. Thus, by the time a trial is scheduled, not accounting for the time that has elapsed to deal with these Applications, the Actions will have been extant for more than 10 years.

[90] Delay is incremental and it is difficult to fix a specific point when the passage of time becomes delay: ***Royal Bank of Canada v Levy***, 2020 ABCA 338 at para 23. On the facts of the case before me, despite the number of parties and the alleged complexity, I conclude that the Plaintiffs have not advanced the Actions to the point on the litigation spectrum that a litigant acting reasonably would have attained within an eight-year period. I conclude that the Applicants have established delay.

C. Is the Delay Inordinate?

[91] Having determined that there has been delay in prosecuting the Actions, the next question is whether this delay is inordinate.

[92] Inordinate delay is delay that is "much in excess" of what is reasonable having regard to the nature of the issues in the action and the circumstances of the case: ***Arbeau*** quoting ***Kuziw*** at para 31. Any delay that is "not trivial or minor is inordinate": ***Humphreys*** at para 168.

[93] Factors to consider in determining whether the delay is inordinate include: the complexity of the matter; the number of parties; the possible advanced age or health of key witnesses; the proceedings that have happened throughout the years; any prolonged periods of inactivity; and any obstructive actions by a defendant to unduly delay the action: ***M L Bruce Holdings Inc v Ceco Developments Ltd***, 2015 ABQB 604 at para 41. Also relevant is whether or not the case is a "documents" case or a "memories" case.

[94] The Applicants contend that the delay here is inordinate. They urge the court to consider pre-lawsuit delay as an important factor in determining whether the post-lawsuit delay is inordinate.

[95] The Applicants stress that it has been more than 20 years since the Gabion Walls were designed and constructed. The Gabion Wall Failures occurred in 2003 and then again in 2008 or

2009. The Actions commenced in April and July 2011. At the time the Actions were filed, 11 or 12 years had passed since the design and construction of the Gabion Walls.

[96] The Applicants assert that nearly a decade of glacial progression over events that occurred 20 years ago is far beyond what is reasonable and is more than trivial or minor delay; it clearly constitutes inordinate delay.

[97] The Applicants challenge the Plaintiffs' assertion that they can be ready for trial in less than one year, given the history of the progress made in the Actions to date. Further, the Applicants contend that the extent and adverse effect of delay will only increase, given that the prospect of reaching trial remains far off.

[98] Time before a statement of claim is filed is not considered in delay applications such as this. This is because any prejudice and adverse effect on witness memories caused by the progression of time before the action was commenced has already been accounted for in the statutory limitation periods. Despite this, the total time from the underlying events may not be "completely irrelevant to the issue of prejudice to witness memories": ***Alston*** at para 95.

[99] The Plaintiffs argue that any delay, if found, does not qualify as inordinate delay as it could not be classified as "much in excess of what was reasonable."

[100] When considering whether delay has been inordinate, ***Humphreys*** directs the court to determine whether the difference between where the action should reasonably be and where it is, is of such a magnitude as to qualify as inordinate.

[101] In ***Levy***, the Court of Appeal at paragraph 19 acknowledged that while each defendant in an action is entitled to expect that the claim against them will be pursued diligently, there are practical limits to that proposition. In that case, the Court found that even though RBC's litigation activity over the 10-year period led the appellants to perceive that they were merely spectators to the action, the appellate Court affirmed the Case Management Justice's finding that the litigation steps taken, including questioning and settlement with numerous parties, had narrowed the issues against the remaining defendants. The Court commented, however, that it was a borderline case: at para 26. By contrast, in the Actions before me, there is no clear evidence that the settlements narrowed the issues in relation to the Applicants and there has been virtually no questioning or expert opinion to confirm the scope of the Actions.

[102] I find that after the passage of eight years the Actions either should have been resolved through ADR, or failing that, they should have been ready for entry for trial, with completed questioning, document production complete and usable expert reports as to liability and damages.

[103] In particular, I find the delay in completing questioning, obtaining the Tetra Tech Report and a useable expert opinion is inordinate.

[104] With respect to questioning, as set out in more detail below, I do not accept the Plaintiffs' arguments that this is a documents case. I find that witnesses memories of their specific roles in the design and construction of the Gabion Walls will be relevant. Further, the Plaintiffs know there are Defendants of advanced ages who will likely need to testify in their defence of the Actions. This knowledge gives some urgency to diligently prosecute the Actions without delay. These factors contribute to my finding that the delay is inordinate.

[105] With respect to a useable expert opinion, as discussed, it took almost five years from when the Plaintiffs expressed their intention to obtain another expert opinion, for them to then provide the Applicants with the Tetra Tech Report. This is more time than it took to prepare the Stantec, Coffey and Wade Reports combined, and, given its scope, it does not appear to have furthered either the mediation or litigation processes.

[106] Despite the settlement with the Almor Defendants, the Actions are no further along the litigation spectrum against the remaining Defendants than they were after mediation failed in 2014. The Plaintiffs have advocated ADR since the commencement of the Actions in 2011, but after eight years ADR has yet to happen. It now appears that ADR is unlikely and a trial is inevitable.

[107] The complexity and age of the Actions was evident in 2011 and the Plaintiffs should have proceeded along parallel tracks as the Case Management Justice advised. There is an expectation that actions will proceed without delay; this expectation is especially so for claims that are not identified until years after the events giving rise to the claim: ***4075447 Canada Inc v Pacrim Developments Inc***, 2018 ABQB 358 at para 15 ("***WM Fares***", affirmed by the ABCA) (***Pacrim***).

[108] By the time the Actions are ready to be set down for trial, at the earliest in 2023, they will have been ongoing for 12 years (10 years for the purposes of the time calculation under rule 4.31). The trial itself will be even further in the future and will contemplate events that occurred a minimum of 20 to 24 years prior - a delay that is clearly inordinate in the circumstances.

D. Is the Delay Excusable?

[109] Given my finding that the delay is inordinate, the next question is whether it is excusable. While inordinate delay is a temporal measure of what is reasonable or unreasonable, it may still be excusable in the circumstances of the case: ***John Barlot Architect Ltd v Atrium Square Investments Ltd***, 2017 ABQB 749 at para 32.

[110] The responding party has the burden of establishing that the delay is excusable: ***John Barlot Architect*** at para 34 and ***Altex International Heat Exchanger Ltd v Foster Wheeler Limited***, 2018 ABQB 620 at para 64.

[111] The Plaintiffs' two main explanations for the delay are somewhat intertwined. First, they rely on ***Nova Pole*** to argue that delay in advancing the Actions as a result of time spent pursuing ADR is justifiable because it was a mutually agreed upon delay. Second, and connected to this first argument, is that a key aspect of the purported agreement to pause litigation was to wait for the Plaintiffs' further expert opinion. The Plaintiffs say that inadequacies in the three prior expert opinions required them to obtain a fourth expert report (and presumably the fifth expert opinion). They submit that obtaining expert evidence can be a difficult process that takes time and is a relevant consideration in assessing and excusing delay.

[112] I first address the alleged difficulties in obtaining expert evidence as an excuse for the delay and then consider whether the parties agreed to put litigation on hold, or whether the Applicants acquiesced to this situation. I will also address the Plaintiffs' submissions regarding defence delay and institutional delay.

1. Difficulty in Obtaining Expert Evidence

[113] The Plaintiffs argue that the main objective of the litigation in the Actions was to solve the problem of the Gabion Wall Failures. The first step was to determine the options available

for repairing or replacing the Gabion Walls. The second step was to determine the costs associated with the various options. The last step was to determine through negotiation, litigation, or otherwise, responsibility for the costs. As such, the Plaintiffs argue there could be no meaningful progress in pursing either litigation or mediation in the absence of an appropriate expert opinion.

[114] The Plaintiffs then explain the difficulties they encountered in obtaining an acceptable expert who had adequate qualifications, was free of conflicts and willing to undertake the significant work to complete a new expert opinion.

[115] The Plaintiffs, or at least the Town (the evidence is unclear), began the exercise of trying to hire a new expert in the summer of 2014, after the June 2014 Case Management Meeting. Despite the importance of retaining the new expert as soon as possible (an importance expressly recognized by counsel for the Town during the June 2014 Case Management Meeting), to save legal costs, two of the Homeowners were personally involved in arranging the retainer rather than counsel. This change in decision-making authority was within the control of the Plaintiffs and may have contributed to the delay.

[116] During the two-year period between the summer of 2014 and the summer of 2016, the Plaintiffs actively considered 12 engineering firms in Alberta and British Columbia as potentially suitable to complete an investigation and make recommendations for remediation of the Gabion Walls, including providing cost estimates. Nine of those 12 firms were deemed unsuitable or were unavailable, although the Plaintiffs provided no evidence as to why they deemed some firms unsuitable. These were matters largely within the control of the Plaintiffs and contributed to the delay.

[117] In August 2015, unbeknownst to the Defendants, the Plaintiffs entered into a Standstill Agreement whereby the Homeowners would, for the purpose of finalizing a settlement agreement with the Almor Defendants, co-operate with the Town to jointly engage an engineering firm to find a remediation solution and settle with as many of the Defendants as possible. This suggests that the decision to retain a joint expert was delayed due to disagreements between the Plaintiffs, a matter within their control that contributed to the delay.

[118] In November 2015, the Plaintiffs finally agreed to retain Tetra Tech; there was a six-month delay while the Plaintiffs resolved a potential conflict of interest. It took a further seven months, from May to December 2016, for the Plaintiffs to formally retain Tetra Tech. The evidence suggests that this delay was due to negotiations between the Homeowners, the Town representatives and Tetra Tech, without the involvement of counsel. Again, these were matters within the control of the Plaintiffs and contributed to the delay. In the result, Tetra Tech was not formally retained until two and a half years after the June 2014 Case Management Meeting.

[119] Tetra Tech was instructed to address many topics including confirming the source of the Gabion Wall Failures, developing a cost-effective remediation solution, ensuring an emergency response plan and guarantying the ability to implement the remediation solution to completion.

[120] The Plaintiffs state that Tetra Tech then encountered several unavoidable and challenging obstacles in completing their investigation and opinion, including weather that delayed physical inspections, additional time required to cautiously inspect and avoid causing unintentional damage to non-party homeowners' properties and unexpected further damage to some 300m of the Gabion Walls, most of which was situated on private property. Furthermore, because not all

portions of the Gabion Walls required the same remediation solution, Tetra Tech needed to assess and provide different responses for different parts of the Gabion Walls. While some of these difficulties were unavoidable during this six-month period, the scope and breadth of the Tetra Tech retainer was a matter within the control of the Plaintiffs, who could have narrowed it, and further contributed to the delay.

[121] In June 2017, Tetra Tech provided two proposed remediation options to the Plaintiffs, which required their joint agreement. It took the Plaintiffs from June to October 2017, to decide which remediation option they wished to pursue. This was a matter within the control of the Plaintiffs and further contributed to the delay.

[122] Although Tetra Tech had largely completed its opinion by June 2017, it was unable to deliver its final opinion because it required the Plaintiffs to arrange for access to numerous affected properties to obtain a survey. One year later, in October 2018, the Plaintiffs and Tetra Tech finally decided that Tetra Tech would complete its opinion without the survey because the Town and the Homeowners could not agree on who should be responsible for arranging access to current homeowners' properties. These were matters within the Plaintiffs' control and contributed to the delay.

[123] Finally, in December 2018, the Plaintiffs received the Tetra Tech Report. They made it available to the Defendants in April 2019. The Plaintiffs have given no reason for the five-month delay in forwarding this report to the Defendants. In the result, it took four years and 10 months from the June 2014 Case Management Meeting to deliver the new jointly retained expert's opinion to the Defendants. This was a matter within the control of the Plaintiffs and contributed to the delay.

[124] In ***Humphreys*** at paras 24, 25 & 173, the Court rejected the plaintiffs' purported excuse for delay which was that they had struggled to obtain continuous representation of counsel and eventually had to retain new counsel when they became dissatisfied with the prior firm they had hired. The Court held that the plaintiffs alone were responsible for the conduct of their own lawyers. Similarly, I find that the Plaintiffs here must bear sole responsibility for the conduct of their expert and the time it took to secure their new expert report. The Plaintiffs already had three expert reports. Delay resulted from the Plaintiffs' decision to seek the opinion that would give them the answer they sought, presumably, that entire remediation of the Gabion Walls was required.

[125] There are many parties and steps were required to be taken to determine the nature of the defects in the Gabion Walls and the costs to remediate them. But the Plaintiffs have known what the problems were with the Gabion Wall since the issuance of the Stantec Report 2010 and were put on notice that the Defendants might not agree to engage in an ADR process based on a new expert opinion that merely addressed the appropriate fix and its costing with no allowance for any contributory role the Plaintiffs may have played in the Gabion Wall Failures.

[126] I find that the time it took to obtain the Tetra Tech Report is not an excuse for the delay, particularly since this was the Plaintiffs' fourth expert opinion. Significantly, under the current retainer with Tetra Tech, it is unable to act as an expert witness for the Plaintiffs at trial. Furthermore, this fourth opinion does not address standards of care, breaches of those standards of care, responsibility or causation and thus does not advance the litigation.

[127] This quest for a fourth expert opinion does not excuse the Plaintiff's inaction in prosecuting the Actions.

2. Alleged Agreement to Pause Litigation

[128] The Plaintiffs further submit that any delay in finalizing the Tetra Tech Report is excusable because the Defendants, and notably, these Applicants, agreed to pause litigation to await the expert report that would form the basis for ADR or, in the alternative, because the Defendants and these Applicants acquiesced to any associated delay.

[129] The Plaintiffs say there were two separate phases during which there was an agreement to mediate that excuses any litigation delay.

[130] The first ADR attempt was between May 2013 and June 2014 when all parties present at the May 2013 Case Management Meeting agreed that the preferred approach to resolution was to pursue ADR and avoid costly litigation. The Mediator was appointed and held an initial mediation meeting in early 2014 with many of the Defendants present. The Plaintiffs disclosed their three expert reports (Stantec, Coffey and Wade) and other documentation to facilitate the mediation. Subsequently, the Mediator determined that mediation was premature due to insufficient information and disagreement regarding the appropriate remediation solution for the Gabion Wall Failures and the associated cost. While the Plaintiffs say this mediation attempt led to the Almor Settlement, with the settlement funds contributing a considerable amount towards the costs of remediation, it is not clear how this settlement resulted.

[131] The Plaintiffs assert that the second ADR attempt that excuses any litigation delay, and the key one at issue in relation to the Tetra Tech Report, was between June 2014 and May 2019 when ADR and litigation were expressly paused to permit the Plaintiffs to jointly obtain a new expert opinion with the explicit intention of returning to ADR.

[132] Thus, the Plaintiffs contend that from May 2013 until the filing of the Dismissal Applications, the parties' mutual strategy was to land on an acceptable remediation solution for the Gabion Wall Failures and its cost, that would, after June 2014, be determined by an expert jointly retained by the Plaintiffs.

[133] The Plaintiffs acknowledge there was never any formal agreement between the parties to delay litigation to pursue ADR. They contend, however, that at critical junctures over the past eight years, all of the Defendants, including the Applicants, affirmed through their conduct, or their silence, their shared understanding to focus on ADR and minimize litigation.

[134] The Plaintiffs point to a number of communications from the Applicants as evidence of their implicit agreement or acquiescence.

[135] For example, in December 2015 counsel for the Austech Defendants, Mr. Wallace, submitted the following in his legal brief to the Court in connection with the application for court approval of the Almor Settlement:

> While both actions were commenced in 2011, the focus of all parties in both actions since April 2013 has been to pursue the early resolution of the two actions by alternative dispute resolution, which the parties evaluated and agreed would facilitate a timely and cost effective method to resolve the issues.

> … the alternative dispute resolution approach was raised at a case management conference in late May 2013. At that time, this Honourable Court agreed with the approach proposed by all parties as a method to achieve resolution.
>
> … The alternative dispute resolution approach resulted in the parties agreeing not to proceed to questioning for discovery.
>
> Notwithstanding, questioning was delayed by agreement, numerous parties in these actions have already sworn and served their Affidavit of Records, including a number of Plaintiffs and the Austech Defendants.
>
> Almor has not sworn and served an Affidavit of Records. Obviously, it has not yet been subjected to questioning. If the Court approves the Perringer Agreement as presented, Almor will become a non-party to the actions, and the non-settling parties' ability to question Almor as an adverse party will be extinguished.

[136] In my view, this passage from the Austech Defendants' counsel's legal brief does not evidence an agreement to pause litigation. Rather, Austech's counsel was focused on maintaining his client's right to question the settling Almor Defendant and offering an explanation as to why such questioning had not yet occurred. His comment speaks to the history of the Actions and not necessarily to the plan going forward. Furthermore, Austech's counsel made this comment in December 2015, in the absence of any indication from the Plaintiffs that they had not yet retained the new joint expert in the previous 18 months. It is impossible to know whether his submissions would have been the same had he known the true state of affairs.

[137] I further note that the minutes from the May 2013 Case Management Meeting appear to discuss document production, not questioning, which casts doubt on whether all parties shared Mr. Wallace's understanding of the nature of the alleged agreement:

> Mr. Wallace, counsel for Austech said: The amounts of money that were being discussed to perhaps bring this matter to conclusion by an ADR were I think agreed upon by counsel at that meeting favourable enough to encourage an early ADR *and perhaps avoid* the necessity for excessive document production and similar types of steps…. But in the summer months --- and that *if we could bring this thing to resolution for the amounts of money and the issues that were being discussed at that meeting*, many parties would be saved, I think, the obligation to produce their records …and I'd like that to be considered as part of any type of establishment of timeframes, production of the records, because I think the ADR is the key issue that we should be discussing in this case management.
>
> [Then there is a discussion about the fact that not all parties were in attendance, in particular, the KTA Third Party Defendants.]
>
> Then the Case Management Justice said: It also sounds *as if an early attempt at resolution is the best procedure* and is approved by all. And so I'm hesitant to set timelines at this point about document production when that might succeed. I can set deadlines far in advance and people can wait on this. That would be fine but I don't see the utility in having people incur costs to produce materials and affidavits of records and all of the like, unless absolutely necessary. And we won't know that until we've had the mediation. [Emphasis added.]

[138] To put this in context, this Case Management Meeting was held in May 2013. The parties attempted mediation between January and June 2014, without success. To the extent there was an agreement reached in May 2013, I find that it would not have carried forward beyond the attempted and abandoned mediation. In sum, I am not persuaded that Mr. Wallace's comments are evidence of an all-party agreement to postpone questioning and certainly not to postpone all litigation steps after the June 2014 Case Management Meeting.

[139] The Plaintiffs also point to an email sent in November 2017 by Mr. Corrigan, counsel for the Whissell Defendants, to counsel for the homeowners who were not Plaintiffs, but who had been named as Third Party Defendants in the Homeowners' Action and were being released from the Actions. This email was copied to all parties, inquiring about the defence group's questioning rights of these non-Plaintiff homeowners. He wrote:

> We have been advised by the plaintiff counsel that *an offer and new report are forthcoming*. Ideally, *I don't think* the defence group wants to be forced into early discoveries of the settling third parties, due to the time and expense associated with that. *I suspect* my defence colleagues would be inclined to hold off on questioning until we see the offer and reports from [the Homeowners' counsel]. [Emphasis added.]

[140] Similarly, at the November 2017 Case Management Meeting, counsel for the Austech Defendants advised the court that there was "a significant interest in all of the parties to have this dealt with by some method other than long protracted litigation. We are waiting for the Plaintiffs to produce an expert's report." He then requested that no deadline be imposed for the questioning of a third-party homeowner who was not a Plaintiff Homeowner and was being released from the Actions "because we want that to take a back seat to any effort to try and get to a mediation and try to resolve the issue without any unnecessary questioning."

[141] I note that in these communications, counsel for Whissell and Austech were seeking to preserve rights against third party defendants who were being released from the Actions. Given that questioning of the primary parties had not yet taken place, and given the continued promise of a "forthcoming" new expert opinion, it was reasonable for the Defendants to postpone questioning of settling third-parties whom they might never need to question once the full details of the case against them became apparent. This was in keeping with their responsibility to conduct actions in a cost-effective manner.

[142] The Plaintiffs argue that the representations made at this 2017 Case Management Meeting, in particular, Mr. Wallace's comments that the Defendants were waiting for the Plaintiffs to produce an expert's opinion and another counsel's representation that Mr. Wallace was speaking for the Defendant group, make it clear that counsel for the Austech Defendants had consulted with counsel for all of the other Defendants about the proposal to delay questioning of the third-party homeowners and had their agreement to this proposal. Further, they stress that none of the other Defendants present at the meeting objected to this statement.

[143] The Plaintiffs submit that the Applicants had an obligation under the *Rules* to correct any misunderstandings or incorrect statements when they became aware of them. The Plaintiffs state that at no time did any of the Applicants ever put them on notice that they no longer agreed to the strategy of pausing litigation to pursue ADR. The Plaintiffs say that the remarks conveyed to them by counsel for the Austech and Whissell Defendants, as representatives of all of the

Defendants, indicated a continued interest in resolving the dispute through some method other than protracted litigation, namely through ADR.

[144] Essentially, the Plaintiffs' evidence is that they "were led to believe that the mutually acceptable arrangement was to avoid pursuing litigation with the specific purpose of obtaining expert evidence that would allow joint resolution."

[145] I do not find that Mr. Wallace's and Mr. Corrigan's comments with respect to postponing third-party questioning necessarily meant that all of the Defendants, including the Applicants, had agreed that there was no need to pursue questioning of the primary parties or take other litigation steps. In particular, I do not find evidence of an agreement of all parties to avoid litigation steps entirely.

[146] To find an agreement to delay, it must be possible to discern the fundamental elements of such an agreement: the identity of the parties, when the standstill began and any other essential terms: ***Bugg v Beau Canada Exploration Ltd***, 2006 ABCA 201 at para 9 and ***Servus Credit Union Ltd v BRB Building Corp***, 2016 ABQB 428 at paras 31 & 36. It is vital that all parties to an action agree to putting the litigation on hold: see ***Middleton Energy Management Ltd v TransCanada Pipelines Limited***, 2017 ABQB 669 at para 41 (Master Robertson). Both Master Robertson in ***Middleton*** and Master Farrington in ***Laughren v McAleer***, 2019 ABQB 501 noted that it is best to formalize such agreements into a standstill agreement. Master Farrington stated at para 30, "It is one thing to hold a matter in abeyance for practical reasons for a period of time. It is quite another thing to hold it in abeyance for eight years without something more formal."

[147] In ***Nova Pole*** at para 28, the Court explained that a mutual decision to delay the advancement of litigation is a relevant consideration in assessing and excusing delay:

> … *All* parties voluntarily participated in an informal arrangement to postpone completion of the questioning of Nova Pole's officer until Nova Pole produced an expert report on damages. *All* parties were of the view that this manner of proceeding would be more efficient, even though it was not contemplated by the rules. … [Emphasis added.]

[148] I note that in ***Nova Pole***, the evidence was that *all* parties agreed to the delay. Furthermore, the Court made an express finding that the arrangement to postpone questioning was suggested by some of the defendants and third party defendants and that Nova Pole agreed to the postponement "so long as it is adjourned unconditionally on the Plaintiff": at para 9. These facts are what prompted the Court to conclude that all parties bore some responsibility for the delay.

[149] Despite the Plaintiffs' urgings, I find that the situation here is unlike the facts in ***Nova Pole***. In this case, there are too many unanswered questions to conclude there was an implicit agreement to delay the litigation.

[150] First, did all of the Defendants agree to the delay or only some of the Defendants and, if so, when? All of the Applicants vociferously deny having been party to any such agreement. Second, for how long did the parties agree to pause litigation, if at all? Third, did the parties agree to wait five years for an expert opinion that did not address causation or apportion responsibility? Fourth, what was the parties' understanding of the intended scope of the expert's opinion - was it for use in ADR only or was it also intended for trial? Fifth, and most importantly, what was the plan if ADR failed? There was no guarantee that the Defendants

would have agreed to share the cost of the full remediation solution, particularly given this was the key issue in dispute in the initial attempts at mediation that led to its failure, and given the Plaintiffs' own conflicting expert opinions as to what would constitute a satisfactory repair.

[151] The Plaintiffs appear to have assumed throughout the conduct of the Actions that the Defendants would accept liability and participate in ADR to divide up the costs of the Plaintiffs' chosen remediation solution. Yet this was the same assumption that the KTA Third Party Defendant during the 2014 Case Management Meeting expressly warned should not be relied on if pursuing ADR. Further, the Plaintiffs' own submissions acknowledge that identifying causation and apportioning responsibility are key aspects of the case to be determined.

[152] I also reject the Plaintiffs' argument that the Applicants acquiesced to the delay through their conduct or silence. There is no duty on a party to expressly advise that it does not acquiesce to delay: ***Flock v Flock Estate***, 2017 ABCA 67, leave denied 2017 CarswellAlta 1991, at para 24.

[153] There is no rule that a defendant can only apply for dismissal due to delay if it has voiced an objection at some earlier time. Also, participation in a step in the litigation, or the failure to expressly indicate that a defendant is proceeding "without prejudice", does not stop the clock: ***Levy*** at para 23. On the facts of ***Levy***, neither the defendants' failure to bring a cross application to dismiss for delay when the plaintiff brought an application for a litigation plan, nor the failure to object to the litigation plan or to indicate that the defendants were proceeding "without prejudice", amounted to acquiescence in the delay that had accumulated incrementally in the previous 10 years. Nor was it held to be a waiver of any of the prejudice that resulted. Silence is not acquiescence, nor does silence permit the court to conclude that a defendant has waived its right to complain of delay: ***Flock*** at para 22 and ***Trademark Calgary Holdings Inc v Hub Oil Company Ltd***, 2019 ABQB 42 at paras 90 & 93.

[154] I accept the Applicants' submissions that their continued efforts to inquire about the progress of the Plaintiffs' new expert opinion demonstrates that they were invested in seeing the Actions move forward in some manner; while they were interested in ADR, their interest was not acquiescence to delay. Although there is no duty to expressly advise that a party does not acquiesce to delay, I find that Mr. Wallace and Mr. Corrigan both sought updates and indicated their dissatisfaction with the Plaintiffs' lack of progress.

[155] As examples, in June 2015, Mr. Wallace suggested the scheduling of a Case Management Meeting to discuss an ADR process but was advised by the Homeowner’s counsel that while he liked the idea it, was “a little premature”. In October 2015, Mr. Wallace requested a progress report and noted that it had "been some time since there was any advancement of this action." In January 2017, Mr. Wallace followed up again on the status of the engineering opinion and expressed his surprise that more progress had not been made.

[156] The email sent by Mr. Corrigan on November 22, 2017, put forth by the Plaintiffs as evidence of the Defendants' agreement to pause litigation in anticipation of ADR says, "We have been advised by plaintiff counsel that an *offer and new report are forthcoming*." The "forthcoming" report was not provided for more than a year and a half. That same month, Mr. Wallace requested a further update. The Homeowners' counsel responded that the engineers had made significant progress and he hoped they could schedule an ADR in early 2018. It is clear from these communications that the Defendants' expectation was that the new expert opinion was coming shortly. Unfortunately, that was not the case.

[157] The Applicants argue that at no time did the Plaintiffs communicate the extent of, and reasons for, the delay in obtaining the new expert opinion, which they ought to have done to satisfy their obligations under the Foundational Rules. In July 2018, Mr. Wallace noted that "it is taking unusually long without an explanation." In general, it was only upon the Applicants' prodding that the Plaintiffs provided any updates at all, which continually promised the new expert opinion was "forthcoming" or would be ready a few months hence.

[158] Acquiescence depends on knowledge, capacity and freedom: ***Manitoba Métis Federation Inc v Canada (Attorney General)***, 2013 SCC 14 at para 147. As such, it is difficult to apply the principle of acquiescence against a party who was "misled by false, willfully incomplete, or non-existent accounting at material times": ***Coulombe v Sabatier***, 2006 ABQB 618 at para 198.

[159] The Applicants submit that the Plaintiffs cannot rely on the equitable principle of acquiescence because of the cumulative effect of the Plaintiffs' action in providing allegedly false or misleading evidence, providing insufficient and incomplete records, the lack of transparency with respect to the unreasonable delay in securing and producing their expert evidence and the unknown state of the Plaintiffs' case and the timing of next steps.

[160] Leaving aside the Applicants' allegations of misleading and false evidence and of incomplete document production, which have not been proven, the Plaintiffs' failure to keep the Applicants informed of the numerous delays in securing their fourth and fifth expert and then the subsequent delays in finalizing their respective opinions meant that the Applicants did not have a complete understanding of the situation; in other words, they did not have the knowledge necessary for valid acquiescence. Further, when they inquired as to the status of the pending expert opinion, they were always told that it was "forthcoming". Even if I were to accept the Plaintiffs' evidence that these communications constituted agreement or acquiescence by the Applicants to pause all litigation efforts, which I do not, the permission or acquiesce would have been rescinded when the opinions were not "forthcoming" or provided within a few months as contemplated by the parties. I find that the Applicants did not acquiesce to the delay.

[161] Overall, I find that in the early stages of the Actions, ADR was explored and all parties were interested in pursuing resolution by such means. When ADR failed, the evidence suggests ADR was of continuing interest to some of the Applicants, but not at the expense of a timely resolution.

[162] While ADR may be desirable, there is always the real possibility that it will fail and litigation will be necessary. Thus, both avenues should have been pursued in tandem. As Master Schulz said in ***McKay v Prowse***, 2017 ABQB 694 at para 20, affirmed 2018 ABQB 975, further affirmed 2020 ABCA 131, "[c]ounsel must practice with one eye on settlement and another on the requirements of the *Rules of Court*."

[163] The Case Management Justice expressly commented on the requirement to pursue both avenues at the June 2014 Case Management Meeting. After learning from the Town that mediation was "dead" because they could not agree on the appropriate "fix", she asked the parties whether they might "collectively find a person that they would trust to have … designs that would satisfy people so that there's some collective consensus." She then commented:

> it seems to me that the process that the Town has put in place [to as quickly as possible retain a design engineer to provide a design that is the "fix" they will stand behind together with its estimated cost and then attempt to mediate a

> resolution based on those numbers] would be the only thing that I can think of at this point in time that may move this forward but if the Town is doing it alone, ... it's done in the context of [the Town's] litigation privilege... But there may be some benefit, if you think this is worth doing, to make that a more collective-based process.

[164] While it is unclear from these comments whether by "collective" she meant an expert jointly retained by the Plaintiffs and Defendants or just by the two Plaintiff groups, her next comment leaves no doubt, "But … I think we need to look at a parallel litigation track."

[165] Significantly, in response to this suggestion by the Case Management Justice, counsel for the KTA Third Party Defendant counsel had this to say:

> … just in reaction to your comment and there seems to be an underlying assumption, based on some things that are being said here, is if only we knew what it would cost to fix this now, then the rest of the case would a simple mediation as to how we split our responsibility for that number.
>
> I don't want the Court to be under any illusion that there's any appetite on the defence side of the case here to proceed in that fashion and the reason is, that a key position of the defence group is that the plaintiffs are the author of their own misfortune…. A key position of the defence group will be that the Plaintiffs have consistently breached the obligations and restrictions that are placed on their use of the homes….The engineering group and the contractors group built a wall which, our position is, was perfectly capable of withstanding the loads and would be in its original position today but for the actions of the Plaintiffs.
>
> So it doesn't really matter if someone today says, given current circumstances, how strong a wall would you have to build and what would it fix because none of the defence group is going to be interested in that number. The number they're going to be interested in would be premised on the basis that the Plaintiffs have acted appropriately in accordance with their legal obligations and the restrictions on their title and what would it cost to fix that wall. So there's more moving parts here… than meets the eye. That's all I wanted to say on the mediation issue.

[166] In response, the Case Management Justice stated that "we will need a litigation plan for sure" and that she looked forward to receipt of the plan that summer. Plaintiffs' counsel then agreed to circulate a proposed litigation plan to close pleadings and finalize the exchange of records and expressed the intent to revisit the plan in the fall. There was no further discussion about ADR or pausing litigation to pursue ADR only.

[167] Consistent with the parallel approach suggested by the Case Management Justice, in August 2014, the Homeowners' counsel sent a proposal to the Defendants to mediate a settlement based on a jointly retained expert, paid for by the Defendants. A few days later, the Homeowners' counsel proposed an abbreviated Litigation Plan. The Defendants did not reply to either proposal. This non-response ought to have put the Plaintiffs on notice that the Defendants might not be agreeing with their proposals and should have prompted them to file an application to finalize a litigation plan. At the very least, especially in light of the comments made by counsel for the KTA Third Party Defendants, the Plaintiffs should have obtained an express

formal agreement from the Defendants that litigation would be paused pending receipt of the new expert opinion, if they believed that was the agreed to approach.

[168] In ***WM Fares***, the Alberta Court of Appeal found that "the parties never participated in mediation, they only discussed mediation. It cannot be said in this case that the appellant was devoting resources to mediation and was unable to prepare for litigation": at para 17. The Court concluded that the litigation steps did not need to come to a halt during the years the parties discussed mediation processes. Similarly, in this case, there were no further ADR processes after the failed attempt in early 2014 and the parties were given express direction to pursue parallel tracks. Instead, the Plaintiffs focussed exclusively on finding a remediation solution acceptable to both of them for the purposes of ADR and took little, if any, steps to move the litigation forward.

[169] It is clear that the overall delay in the Actions was caused by the ongoing discussion, but lack of agreement, between the Town and the Homeowners in working out an acceptable remediation solution for the Gabion Walls and the Plaintiffs' clear preference to resolve this matter through ADR, rather than litigation.

[170] I conclude from the evidence that, as of June 2014, the focus on "early ADR" had failed, mediation was "dead" and the Plaintiffs were to have pursued both ADR and litigation going forward. They had no basis for concluding that ADR was the only track to pursue. I find that it was the Plaintiffs alone who decided to pursue only ADR. Their focus on ADR is not an excuse for failing to progress with the litigation steps in the Actions, as they had been directed to do by the Case Management Justice.

3. Defence Delay

[171] The Plaintiffs also allege defence delay. They argue that during the periods of impugned delay the Defendants did nothing to advance the litigation. If the trial of the Actions is now delayed, the Plaintiffs say it is because the Applicants have done nothing to prepare themselves. The Plaintiffs suggest that they have in no way impeded the Applicants from retaining their own experts, questioning any party, or pursuing their own claims and defences.

[172] The Plaintiffs point to the Applicants' failure to question any of the Plaintiffs or Third Party Defendants from whom they seek contribution and indemnity.

[173] I accept the Applicants' response that while there is no rule that requires a plaintiff to conduct questioning first, in the normal course of litigation, plaintiffs typically conduct their questioning first. In ***Transamerica***, the Court confirmed that plaintiffs have the primary obligation to move litigation forward and there are many tools in the *Rules* to ensure this happens. Defendants have a secondary obligation to discharge their own procedural obligations, and they cannot complain about delay when they have failed to protect their own interests, by delaying questioning or otherwise, but they do not have an obligation to do anything in the face of inactivity by the plaintiff: at para 27.

[174] I do not find any evidence of delay by the Applicants that has contributed to the overall delay in this case. None of the late provision of pleadings cited by the Plaintiffs have materially delayed the Actions, which, with the exception of the KTA Third Party Defendant's Affidavit of Records, were all provided by 2012 in any event.

[175] Further, I find there was little the Applicants could have done to move the Actions forward. Rule 5.35 is clear that the Plaintiffs must deliver their expert report first, following

which the Defendants must serve their report. With no expert evidence as to standard of care and causation to establish liability, and now recently, new expert evidence regarding damages, the Applicants would have been unable to retain their own experts (be it an expert to critique the Plaintiffs' expert opinion or to carry out an entirely new separate assessment), or take any other steps to build their defences.

4. Institutional Delay

[176] The Plaintiffs also attribute some of the delay to institutional delay, suggesting that over two of the eight years were consumed by applications brought by various Defendants. As such, they argue that the delay is excusable and does not contribute to the overall delay.

[177] I do not accept that institutional delay contributed to the inordinate delay that I have found. Multiple applications are not uncommon in matters with numerous parties. A plaintiff who includes dozens of defendants in an action should expect interlocutory applications, such as applications for summary dismissal, the addition of third parties and other similar applications. Further, plaintiffs are expected to continue to drive their action forward, even if it means multi-tasking. While interlocutory applications take time, there are lulls in these applications as the parties wait for court dates, availability of parties for cross-examination, receipt of transcripts and so on. Plaintiffs should be cognizant of their obligation to move their action forward and ensure compliance with the *Rules*. The onus remains with the plaintiff to take steps to advance an action or risk having it struck for inordinate delay.

5. Conclusion on Excusable Delay

[178] As the Court of Appeal stated in ***Humphreys*** at para 96: "Claimants who fail to proceed with appropriate expedition may be subject to harsh consequences. They may lose their right to prosecute their actions."

[179] For all these reasons, I find that the Plaintiffs have not established an excuse for their inordinate delay in prosecuting the Actions. I further find the Applicants did not contribute to the delay, nor did they agree or acquiesce to pause all litigation steps for five years to await an expert opinion.

E. Has the Delay Resulted in Significant Prejudice?

[180] The Applicants contend that the inordinate and inexcusable delay has caused them significant litigation and nonlitigation prejudice. They assert that the delay has resulted in actual prejudice in the form of fading memories, lost records and missing witnesses, all of which will compromise their ability to defend themselves in the Actions.

[181] Since I have concluded there was inordinate delay that is inexcusable, the Applicants are entitled to rely on the presumption of significance prejudice under rule 4.31(2). The Plaintiffs, however, retain the opportunity to rebut this presumption: ***Transamerica*** at para 43.

[182] Prejudice "means injury or damage suffered by the moving party as a result of the nonmoving party's dilatory prosecution of its action": ***Humphreys*** at para 125. It is not necessary to conclude that the defendant's right to present a full answer and defence has been impaired; rather, prejudice in rule 4.31 is a broad concept that "easily embraces litigation and nonlitigation prejudice": ***Humphreys*** at para 125.

[183] Significant prejudice is prejudice that is "important enough to justify the attachment of a serious consequence adverse to the interests of the nonmoving party": ***Humphreys*** at para 128.

[184] It is an undeniable fact that a person's ability to recall events diminishes with the passage of time: ***Humphreys*** at para 35. In ***The Owners: Condominium Plan No 982 6403 v CPI Crown Properties International Corporation***, 2017 ABQB 562 at paras 64 and 65 Justice Shelley explained:

> …the law recognizes that memories of witnesses or potential witnesses weaken over time.
>
> …
>
> It is not a satisfactory response to the prejudice that arises through failing memories to suggest that witnesses can rely on answers given previously, if they have no memory at trial. One of the reasons for a trial is to hear the evidence of witnesses expected to recount the relevant events, not to read portions of transcripts and statements given years before. This is undoubtedly one of the reasons why parties are expected to pursue their lawsuits diligently - that is, the recognition that memories fade and witnesses disappear or die with the passage of time, compromising the effectiveness of the trial process.

[185] The effects of the passage of time on memories can make for unfair trials. Master Robertson held in ***Middleton*** at para 38:

> It is not an option for one sophisticated party unilaterally to simply keep a claim alive by taking occasional steps forward until it finds a convenient time to move to trial. It brings the administration of justice into disrepute by the lengthy delay alone, but also the eventual decision will be hampered by faint memories of witnesses who no longer remember or, when they have long retired or resigned, no longer have the same interest in assisting in the assembly of evidence. And when a witness is cross-examined on a detail that he or she has not thought about for 13 or more years, the reply will at least be uncertain or otherwise subject to some doubt, through no fault of the witness or the party presenting the witness.

[186] In this case, the Gabion Walls were built between 1999 and 2000 and then repaired in 2003. The earliest I have found this matter could be ready for trial is 2023, with the actual trial date even further in the future. At that time, witnesses will be asked questions about their involvement in events that occurred 20 to 25 years prior.

[187] Each of the Applicants have provided evidence that the memories of their potential witnesses have deteriorated with the passage of time. The Whissell Defendants and the RCPL Defendants also indicate they have lost some important documents, which although not lost during the period of delay, are no longer available to refresh memories.

[188] The Applicants say that as the Geo Defendant is now bankrupt, indemnity or contribution from that party is in doubt. This fact, they say, demonstrates the actual prejudice caused by the delay here.

[189] As an example, the KTA Third Party Defendants provided evidence that their representative, Verlin Koch, who was 71 years old in June 2019, can no longer remember key matters that would assist them with their defence. This is not surprising given that the events in question occurred in 2003.

[190] Even more time has passed since the Saunders/Stepanek Defendants did their work. Mr. Saunders prepared a preliminary slope stability assessment for the Development in 1994, and Mr. Stepanek, as the senior engineer, reviewed his report. They were 35 and 63 years of age, respectively, at the time, and they have had no further involvement in the Development. Mr. Saunders deposed that he no longer has any personal documents or records related to his work; the only document that exists is the report itself. In addition, the corporation he worked for at the time, the Geo Defendant, is now bankrupt. I find there is no doubt, due to the passage of time and increasing age (they were 60 and 88, respectively, when the Dismissal Applications were filed), that Saunders', and especially Stepanek's, memories of their involvement have degraded over the intervening years.

[191] I accept the Applicants' evidence that their witnesses' memories have faded and that many of the Applicants' witnesses will be of advanced ages by the time of trial.

[192] The Plaintiffs submit there is no risk that these fading memories will jeopardize the Applicants' case since they submit it is primarily a "documents" case. The Plaintiffs suggest that the Applicants' witnesses can easily refresh their memories through reference to available documents. They further argue that the Applicants could have obtained statements from their own witnesses to respond to the information provided in the earlier expert reports. The Plaintiffs stress that the Applicants themselves acknowledge that individual memories would have been unhelpful and unreliable in any event, because of the relative insignificance of this project to many of the witnesses who worked on so many other more significant projects. The Plaintiffs argue that individual memories would be of minimal assistance here, regardless of the passage of time.

[193] The Plaintiffs also assert that much of the relevant evidence has been preserved - the Gabion Walls remain *in situ* and they are available for further tests and inspection to evaluate their structure and performance. The Plaintiffs submit that individual memories will not reveal the cause of the Gabion Wall Failures. They point to Mr. Demitt's ability to prepare his expert opinion in 2019 to argue that the passage of time since the commencement of the Actions has not impeded any party's ability to ascertain the cause of the Gabion Wall Failures.

[194] The Plaintiffs point to their evidence in support of their submission that there are no missing witnesses as the Applicants have alleged. Further, those individuals who are now deceased did not pass during the period of litigation delay. Any missing documents resulted from the Applicants' own unfortunate actions and occurred long before the period of litigation delay.

[195] In sum, the Plaintiffs assert that witnesses' memories are not relevant since this is a documents case; the presumption of prejudice has therefore been rebutted.

[196] I am not satisfied that this is primarily a documents case. Although there is no question that a great deal of the factual evidence could be admitted through documentary evidence and that expert opinions will, to a large extent, frame and define the issues, in this professional negligence action, a key issue will be whether the Applicants breached the requisite standards of care.

[197] It is difficult to see how the standard of care issues could be resolved entirely on the basis of records and expert evidence alone without hearing from witnesses. *Viva voce* testimony will be required to establish what actually happened during the design, construction and repair of the Gabion Walls. The assessment of whether these Applicants performed their work with the

requisite care and skill will require the evidence of the engineers and contractors who participated in the design, construction and repairs of the Gabion Walls in 1994, 1999, 2000 and 2003. Records of general practices from decades ago might have been lost and, regardless, are no substitute for memory of verbal communications regarding the scope of retainers; information provided to the various personnel on the ground; actual work performed; precautions taken; and how the work might have changed from the documented plans to address unexpected construction issues as they arose, and so on. And for those Applicants against whom the Plaintiffs have alleged negligent misrepresentation, the details of discussions between the various parties will be important.

[198] As an example of the need to provide *viva voce* evidence at trial, Mr. Demitt opined that there remains uncertainty regarding the cause of the Gabion Wall Failures. He advised that "it may not be possible to apportion responsibility for the litany of issues related to the failure of the retaining walls to any one party associated with the design and construction of the retaining walls given the information available to date. Additional information needs to be gathered to properly develop opinions of the proximal cause of the failure. Furthermore, it is likely that no single factor will be determined to be the proximal cause and the multiple factors acting in combination may ultimately be determined to be the cause of the observed [Gabion Walls Failures] ... and it may be determined that no single party may be responsible for the defects. It may also be determined that the actions or decisions of multiple parties may have contributed to the many failures of the [Gabion Walls]."

[199] *Viva voce* testimony will be necessary to establish these contributing actions and decisions.

[200] Where there are multiple defendants and third-party claims, the inability to obtain evidence to support joint and several liability entitlements, due the passage of time or other causes, results in further prejudice: ***WM Fares*** at para 84. In interdependent claims such as exist in this case, all defendants suffer prejudice when the ability of others to present evidence has become impaired by delay: ***WM Fares*** at para 111.

[201] Also, in a case such as this, the scope and applicability of contributory negligence needs to be determined at trial, which requires *viva voce* evidence. In particular, there will be issues relating to the instructions given by homeowners to landscapers, changes in landscaping and yard slopes over time, as well as steps taken by homeowners, if any, to manage surface water on lots, etc.

[202] In ***Xpress Lube & Car Wash Ltd v Gill***, 2019 ABQB 898 at paras 75-76, Justice Eamon found that, given the time that had passed (at least 12 years since the events in question), the witnesses' age and the wide-ranging allegations the defendants would need to answer, the delay in that case would result in significant litigation prejudice.

[203] In ***Pacrim*** at para 18, the court explained the need for *viva voce* testimony to establish the relative responsibilities of parties for alleged deficiencies in the HVAC system in a construction project. The role of one of the defendants in the project was a central issue in the case and witness evidence was necessary to straighten out the confusion on that key point.

[204] In this case, the expert evidence will identify the deficiencies in the Gabion Walls and may opine as to the cause of their failure. While it may be possible for an expert to point to which defendant was responsible for a particular aspect of the Gabion Wall Failures, that

defendant will need to rely on witness testimony to confirm or deny whether it undertook the actions alleged.

[205] In ***Humphreys***, the Court held that even in a financial fraud case it was inevitable that there would be questions for which the answer would not be in the documents. The Court further held that it is unrealistic to insist that the moving party catalogue any such lacunae.

[206] The Applicants here, in defending themselves against allegations that they breached the applicable standard of care, may need to call evidence to challenge the foundation facts and assumptions used and conclusions reached by the Plaintiffs' experts. As an example, the Whissell Defendants challenge the Demitt Report suggestion that they were responsible for grading the lots and subdivision and building the swales.

[207] In ***Nova Pole***, the Court addressed the issue of expert opinions, which as a matter of law and practice, can only be based on a foundation of facts and require memories of those facts. At para 46, the Court held:

> The Defendants' ability to challenge the assumptions that form the basis of expert opinions depends on the memory of witnesses, their own or the Plaintiff's witnesses. Either way, the fading memories over time will make it more difficult to obtain reliable evidence or to challenge the Plaintiff's evidence. This is not a situation where, as noted in the passage from *Ravvin* that was quoted by the Master, there is "prior discovery evidence or affidavit evidence" regarding these issues. Preservation of relevant evidence was not possible, because of the Plaintiff's delay in providing expert reports.

[208] Notwithstanding the Plaintiffs' assertions to the contrary, I accept the Applicants' evidence and argument that, given the very long passage of time since the events in issue, their witnesses (assuming they can be found and are willing to testify), will be unable to remember the details necessary and relevant to their defence of the Actions. The design and construction of the Gabion Walls were completed over 20 years ago. The memories of witnesses have most certainly faded.

[209] Contrary to the Plaintiffs' argument that each Applicant's small role in this Development means their memories would have been limited in any event, I find this fact makes the prejudice from fading memories all the worse - whatever memories the Applicants' may have had when the Actions were filed will have further faded further during the ensuing eight years of delay.

[210] There is also the effect of the Geo Defendant's bankruptcy to consider on the Applicants' ultimate responsibility for any liability assessed against them. It is not known whether the stay will be lifted against the Geo Defendant and the Plaintiffs will be able to proceed against the Geo Defendant's insurer. The result is that these Applicants may be responsible for a disproportionate share of liability that might otherwise be joint and several and apportioned between them.

[211] In these circumstances, the Plaintiffs have not rebutted the presumption of significant litigation prejudice and indeed, the Applicants have established actual prejudice.

[212] There is also non-litigation prejudice here. These Applicants are professional engineering firms, engineers and construction contractors who have lived under the shadow of a pending lawsuit for more than eight years. As an example, the Defendant Johnston deposed specifically that although he was not involved with the Gabion Walls, these public allegations against him

alleging misrepresentation, to which he takes great personal umbrage, have caused him continuous stress and upset.

[213] Further, when litigation does not proceed at a reasonable pace and if our judicial system permits a lawsuit to be tried more than 20 years after the event, "parties' confidence and public confidence in the administration of justice may be impaired": ***Alston*** at para 132.

[214] In the result, I find that the Plaintiffs have failed to rebut the presumption of significant prejudice arising from my finding that there has been inordinate and inexcusable delay. I further find that there has been actual prejudice to the Applicants in this case. As Justice Eamon concluded in ***Alston*** at para 134 where, in this case, more than 20 years will have passed since the events in question, "the litigation prejudice from fading memories cannot be adequately remedied… other than by dismissing the action."

[215] Given my conclusions on delay and prejudice, there is no need to address the Applicants' arguments regarding false and misleading evidence, limitation of actions and abuse of process.

F. Is there a Compelling Reason to Not Dismiss the Actions?

[216] Having found that the Plaintiffs have failed to rebut the presumption of significant prejudice and finding that the Applicants have suffered actual prejudice as a result of the delay in prosecuting the Actions, I must consider whether there is a compelling reason for me to exercise my discretion and not dismiss the Actions for delay.

[217] Homeowners' counsel indicated that he continued to view ADR as the best solution to pursue. While that may be the case, it appears the Plaintiffs no longer have Defendants willing to participate in an ADR process. The Applicants have stated that they no longer consider ADR an option given recently unearthed facts that suggest to them the Plaintiffs have not made full disclosure, have provided false and misleading disclosure, have kept them in the dark about material facts and their concern that they now have facts that suggest there may be a limitation issue with the Actions.

[218] Given my assessment of the delay and the steps remaining to be completed before the Actions can be set down for trial, the most likely result of exercising my discretion to not dismiss the Actions will be further interlocutory applications, more delay, worsening prejudice and causing more harm to the administration of justice.

[219] The factual circumstances of the events are so old, I do not see how there can be a fair trial. Witnesses are highly unlikely to have clear recollections of their involvement in the events. There will be missing witnesses, missing documents and missing parties. As noted by the courts on many occasions, stale evidence impedes all parties' abilities to conduct their case and makes for bad trials and poor decisions: ***Middleton*** at para 38.

[220] For these reasons, and in the particular circumstances of the Actions, which are not near ready for trial, I conclude there are no compelling reasons not to dismiss the Actions for delay. Accordingly, the Town Action and the Homeowners' Action are dismissed as against these Applicants.

[221] The parties are encouraged to agree to costs.

Heard on the 5th day of November, 2020 to the 6th day of November, 2020 and the 8th day of April, 2021 to the 9th day of April, 2021 and written submissions received on the 7th day of April, 2021 and on the 29th day of April, 2021.
Dated at the City of Calgary, Alberta this 20th day of August, 2021.

G.A. Campbell
J.C.Q.B.A.

Appearances:

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Schedule A

Chronology of the Litigation Steps Taken in the Actions

2011	
April 8	Statement of Claim filed by the Town.
July 7	Statement of Claim filed by the Homeowners.
July 14	Amended Statement of Claim filed by the Homeowners.
August	Town engaged Coffey Geotechnics Inc. ("Coffey") to propose a new remediation plan for the Gabion Walls.
August 12	Town obtained four court orders to revive four Defendant corporations.
August 16	Amended Statement of Claim filed by the Town.
September 14	Whissell Defendants served with the Town's Amended Statement of Claim.
September 16	RCPL Defendants served with the Town's Amended Statement of Claim.
September 19	Austech Defendants and Mr. Saunders served with the Town's Amended Statement of Claim.
October 11	Statement of Defence filed by Lincolnberg Homes.
December 5	Mr. Stepanek had notice of the Town's Amended Statement of Claim.
December 8	Town proposed first litigation plan Town wrote to Defendants demanding defences be served by January 31, 2012.
December 14	620208 Alberta Ltd. is noted in default.
Sept-Oct	Homeowners' Affidavits of Records provided to Defendants; sixteen of these Affidavits of Records remain unsworn as of the date of the Dismissal Applications; Applicants say the Affidavits of Records are incomplete.

December	Town's Amended Statement of Claim served on all of the Applicants, with the exception of the KTA Third Party Defendants who had yet to be named as a Third Party Defendant.
2012	
February 8	Statements of Defence filed by the Whissell Defendants and Haroon & Sons Ltd.
February 14	Statements of Defence filed by Reid Built Homes and Kingsmith Homes.
February 15	Rule 3.68 application to strike the Town Action filed by Defendant Almor Testing, returnable February 28, 2012, heard July 10, 2012.
February 15	Statements of Defence and Notices of Claim to Co-Defendant filed by Hearthstone Properties, Mr. Stepanek, Geo Engineering, Mr. Montgomery, McIntosh Lalani Defendants, Braemyn Developments.
February 16	Statements of Defence and Notices of Claim to Co-Defendants filed by Bay-Cor Developments, the RCPL Defendants and Mr. Saunders.
February 17	Statement of Defence filed by the Austech Defendants.
February 24	Rule 3.68 application to strike the Town Action filed by the Defendant Almor Engineering, returnable March 21, 2012, heard July 10, 2012.
March 6	Statement of Defence filed by 934957 Alberta Ltd.
March 22	Affidavit of Records of the Town sworn and served.
March 30	Affidavit of Records of the Whissell Defendants sworn.
April 16	Application to Amend Statement of Claim set for May 3, 2012, heard July 10, 2012.
April 26	Town provided its producible records listed in its Affidavit of Records to all existing parties.
April 27	Affidavit of Records of RCPL Defendants sworn and served.
April 27	Town proposed second litigation plan.
May 7	Affidavit of Records filed by Reid Built Homes.

May 8	Town proposed third litigation plan.
May 14	Demand for Particulars filed by Bay-Cor Development Inc in the Town Action.
June 26	Statement of Defence filed by Henning/Godrey in the Homeowners' Action.
June 27	Statement of Defence filed by Fortin in the Homeowners' Action.
July 3	Statement of Defence filed by Reid Built Homes in the Homeowners' Action.
July 10	Statement of Defence filed by Baker/Graham in the Homeowners' Action.
July 10	Almor Testing's Rule 3.68 application heard and dismissed; total of three applications heard (amend claim – granted; strike Town action – dismissed; dismiss claim – dismissed).
July 26	Amended Amended Statement of Claim filed by the Town.
July 27	Statement of Defence filed by Timko in Town Action.
July 30	Statement of Defence filed by Town in Homeowners' Action.
August 1	Almor Engineering's Rule 3.68 application is dismissed; Town's application to revive Almor Engineering and have it continue as a defendant in the Town Action is granted. Town also made efforts to revive Lincolnberg Homes and Hilltop Developments.
August 7/16	Whissell & Austech Co-Defendants each filed respective third party claims in the Town Action.
August 13	Third Party Statements of Defence filed in the Town Action.
August 15	Statement of Defence filed by McIntosh Lalani Defendants in Homeowners' Action.
September 13	Statement of Defence filed by Whissell Group in Homeowners' Action.
Sept 26/27	Affidavits of Records of Russell Coulter and the Whissell Defendants sworn in Homeowners' Action.
October 10	Statements of Defence filed by Lowe/Williams-Lowe and Kingsmith Homes/324600 Alberta Ltd. in Homeowners' Action.

October 29	Summary dismissal application together with Supporting Affidavit of Allan Boswell filed by Whissell Defendants seeking to have the Actions against them dismissed as being brought outside the provisions of the *Limitations Act*; other Defendants in the Actions held their similar summary dismissal applications in abeyance pending the outcome of the Whissell Defendants' application.
December 5	Whissell Defendants filed a Third Party Claim against the RCPL Defendants in the Homeowner Action.
December 12	the Town received Coffey Report which proposed options and calculated costs for partial remediation of the Gabion Walls with the cost of these options ranging between $655,000 to $2.1 million; the Town shared the Coffey Report with the Homeowners, who initially expressed support for the recommended partial remediation solution.
December 19	Actions placed into Case Management.
2013	
January 9	Affidavit of Records of the Defendant Geo-Engineering (MST) sworn and served.
January 17	Statement of Defence filed by BayCor Developments in the Homeowners' Action.
January 25	Affidavit of Records of Russell Coulter, one of the two homeowners acting as representative for the Homeowners, sworn and served.
January 25	Affidavit of Stacey Loe, manager of Legislative Services for the Town, sworn in opposition to the Whissell Defendants' application for summary dismissal.
January 28/29	First and Second Affidavits of Allan Boswell sworn for Whissell Defendants' summary dismissal application.
Feb 5/ Mar 5 & 12	Town sent three demands to various Defendants to provide their Affidavits of Records.
March 8	Affidavit of Records of the Austech Defendants sworn and served.
March 20	Homeowners serve their Affidavits of Records on the Defendants.

March 21	First Case Management conference: The Town proposed a settlement meeting for all parties based on the Coffey Report. The Case Management Justice conveyed her expectation that counsel, in fulfilling their obligations under the *Rules*, would attempt to resolve the disputes outside the court process and so time was given for the parties to meet, share the report and seek possible resolution. The parties were requested to consider timelines for exchange of records, schedules for questioning and the use of questioning if it appeared there was no real prospect for resolution.
March 21	Amended Statement of Defence of Lowe/Williams-Lowe in Homeowners' Action.
March 23	Affidavit of Records of Timko Developments Ltd. sworn.
March 25	Plaintiffs provide Coffey Report to the Defendants and schedule without prejudice meeting.
March 26	Affidavit of Records sworn and Statements of Defence filed for Geo Defendant and the Saunders/Stepanek Defendants.
March 28	Cross-examinations of Russell Coulter, Stacey Loe, and Allan Boswell on their affidavits filed in the Whissell summary dismissal application.
April 8	Statement of Defence filed by Lane, Connell-Lane, Hughes and Larribeau in the Homeowners' Action.
April 9	Third Party Claim filed in Homeowners' Action.
April 17	Statements of Defence filed by Sargent and Batchelor in the Homeowners' Action
April 22	Settlement meeting between the Plaintiffs with some Defendants; nothing was resolved.
April 26	Amended Statement of Defence filed by Almor Defendants in Town Action.
April 30	Amended Third Party Claim filed by Almor Defendants naming KTA Third Party Defendants and RCPL Defendants as Third Party defendants in the Town Action.
May	Counsel for Town passed away unexpectedly and new counsel assumed carriage of the Town Action.
May 7	Whissell summary dismissal application heard.

May 30	Second Case Management conference: all parties in attendance agreed that the Actions should proceed concurrently, with evidence in either Action being admissible in the other; the parties discussed their without prejudice April meeting; the parties expressed their hope that given the amount of the costs set out in the Coffey Report discussed at their April meeting, the numbers were such that given the number of parties involved, on a purely economic basis, that an ADR process early on would make sense and thereby avoid costly litigation; the Case Management Justice acknowledged that it appeared to her that some progress had been made at the parties' April meeting. She commented that it sounds as if an early attempt at resolution is the best procedure and is approved by all. She said she was hesitant to set timelines about document production at this point when this early attempt at ADR might succeed, so none were set.
August 9	Oral Decision dismissing the Whissell summary dismissal application.
August 13	Stantec Report is provided to the Defendants.
August 17	Statements of Defence filed by Harrison/Lymburner, Krebes/Jelic in the Homeowners' Action.
September 24	Third Case Management Conference: case management justice confirmed that all parties agreed mediation was the appropriate way for moving forward and a Mediator acceptable to all parties was confirmed (the "Mediator"); Town confirmed that it was seeking the parties' approval to retain another third-party engineer to review and evaluate the adequacy of the repair options and associated costs recommended in the Coffey Report.
October 3	Statement of Defence filed by Powell/Callaghan in the Homeowners' Action.
October 22	Mediator confirmed a preliminary mediation meeting would take place in January 2014; Mediator advised that given the unique complexity of the Actions and the number of parties involved, mediation would not commence on that date but rather the objective would be to discuss the parameters of the intended mediation for the Actions.
November 13	Demand for Particulars filed in the Homeowners' Action.
December 13	Wade Report provided to Plaintiffs.

December 18	Wade Report disclosed to all parties for the specific purpose of informing the January 2014 mediation.
December 20	Partial Discontinuance of Action filed as against Dan-Can Construction in the Homeowners' Action.
2014	
January 7	Third-Party Statement of Defence and Notice of Claim Against Co-Defendants filed by the KTA Third Party Defendants.
January 9	First "very general" mediation meeting took place: nearly all parties to the Actions were present; parties present discussed their Affidavits of Records and agreed that document production would be placed on hold, subject to the right of any party to request documents from another party; concern was expressed that the Homeowners appeared to be backing away from the partial remediation solution for the Gabion Walls proposed in the Coffey/Wade Reports; Homeowners advised they would obtain their own engineering report if they did not accept the Coffey/Wade Report recommended partial fix solution.
Feb to May	Mediator met with individual parties and attempted to schedule meetings with other Defendants to narrow the issues and streamline the mediation process; mediation process revealed significant issues with the existing expert reports as each one recommended significantly different remediation solutions with substantially different estimated costs of repairs; Mediator made efforts to "win the defendant group over to the idea of the entire length of the wall being remediated".
February 24	Discontinuance of Third Party Claim by Lowe/Williams/Dan-Can Construction in Homeowners' Action.
February 26	Partial Discontinuance of Action filed as against Dan-Can Construction in the Town Action.
March 24	Town disclosed the Remedial Work Orders completed by Stantec in June 2011 to the Defendants for the purpose of advancing the mediation process.
May 9	Update on the mediation progress and request for suggestions for progress from the Mediator to all parties.
May 16	Notice of Change of Representation of legal counsel filed for the Homeowners.

May 27	Partial Discontinuance filed as against Scott in the Homeowners' Action.
June 19	Coulter swore and filed an affidavit in support of intended interim relief application, but it appears the application itself was never filed.
June 26	Fourth Case Management conference: Homeowners advised that they had recently retained a fourth independent engineer Mr. Demitt, as they did not accept the Coffey/Wade Reports' recommended partial remediation solution; Mr. Demitt confirmed Stantec's opinion that the entirety of the Gabion Walls required remediation; the Town advised that litigation should proceed because mediation was dead or mostly dead for now as the parties could not agree on the appropriate fix for the Gabion Walls; The Town advised that it was considering retaining another engineer to provide a new remediation plan and cost to the parties as quickly as possible and then use the numbers to try to mediate to a resolution; the Case Management Justice commented that the process the Town has suggested would be the only thing she thought that could move this forward, perhaps more of a collective process but that absent that, there was a need for the parties to pursue a parallel litigation tract. The KTA Third Party Defendant cautioned the case management justice that there was no appetite on the defence side to proceed to mediation on the basis suggested by the Town. In response, the case management justice said they parties would certainly need a litigation plan. It was agreed that the Plaintiffs would circulate a litigation plan for the first few steps, with the plan to be revisited in the fall.
July	Mediator ceased his involvement in the Actions.
July 7	Third Party Claim filed by the KTA Third Party Defendants as against several homeowners in the Town Action.
July 15	Town proposed fourth litigation plan.
August 5	Homeowners' counsel provided Defendants with a proposal for a mediated settlement that would be based on a remediation plan for the Gabion Walls provided by a jointly retained engineering expert, with all costs being paid for by Defendants.

August 12	Homeowners' counsel sent Defendants proposed litigation plan that only provided for outstanding pleadings to be closed by the end of August and that Plaintiffs would bring an application to determine a more detailed litigation plan; there was no response or further action taken on either of these options by any party.
August 15	Statement of Defence and Notice to Co-Defendants filed by the RCPL Defendants in the Homeowners' Action.
August 22	Third Party Claim filed in the Homeowners' Action.
August 28	Statements of Defence and Third Party Claims filed by Austech Defendants, Almor Defendants and 934957 Alberta Ltd. in the Homeowners' Action.
August 29	RCPL Defendants filed Third Party Claim against the KTA Third Party Defendants and Statement of Defence filed by Montgomery/Almor, all in Homeowners' Action.
Aug 21/ Sept 9	Six applications to add Third Party Defendants filed by Geo Defendants, RCPL Defendants, Austech Defendants, Whissell Defendants, Almor Defendants and 934957 Alberta Ltd seeking to add 38 homeowners as Third-Party Defendants in the Actions on the basis that their landscaping rendered them contributorily negligent.
September 9	Applications to add Third Party Defendants heard and adjourned *sine die*; these applications remain adjourned *sine die*.
October 2	Settlement discussions began between Plaintiffs and Almor Defendants.
October 7	Third Party Statements of Defence and Notice of Claim against Co-Third Party Defendants filed in the Actions by the KTA Third Party Defendants.
2015	
January 23	Statement of Defence filed by Barth in the Homeowners' Action.
February 2	Noting in Default of 620208 Alberta Ltd in the Town Action.
February 17	Third Party Claim filed by 934957 Alberta Ltd as against Bouchal and Bohemia Group in the Homeowners' Action.
March 16	Third Party Statement of Defence filed by Lowe/Williams-Lowe/Reid Built Homes in the Homeowners' Action.

April 13	Several individual Defendant Homeowners who owed properties within the vicinity of the Development but were not Plaintiffs in the Homeowners' Action (the Summary Dismissal Defendants) file summary dismissal applications.
April 13	McIntosh Lalani Defendants filed summary dismissal applications.
April 13	Third Party Statement of Defence filed in the Homeowners' Action.
May 4	Homeowners changed their counsel and retained present counsel.
May 26	Geo Defendant through its successor 646756 NB Inc. assigned itself into bankruptcy where it remains; as a result, the Actions were stayed against it.
June 2	Third Party Statement of Defence filed in the Homeowners Action regarding Almor Defendants.
June 2	Partial Discontinuance of Action filed as against Janzen/Reuvers/Schuett/Kilmury in the Homeowners' Action.
June 2	Order issued dismissing claim against Powell, Callaghan, Lan, Connell-Lan, Barth, Lowell et al.
August 25	Standstill Agreement between Town and Homeowners to facilitate settlement with Almor Defendants and pursue joint engineering opinion; none of the Defendants are advised of the Standstill Agreement.
October 1	Settlement Agreement reached with the Almor Defendants.
October 29	Partial Discontinuances of Claim filed against the Summary Dismissal Homeowner Defendants in the Homeowners' Action.
November	Town and Homeowners jointly settled on Tetra Tech, but no retainer signed.
November 30	Plaintiffs received a proposed settlement to remove some of the homeowners who had been named as Third Party Defendants by some of the Defendants in the Actions.
December 21	Application and supporting materials to approve the proportionate share settlement agreement ("Almor Perringer Settlement") with Almor Defendants filed in the Actions and served on other Defendants; issues raised by Defendants discussed and mostly resolved.

2016	
February 2	Case Management meeting: Almor Perringer Settlement approved by case management justice; Almor Settlement resulted in Town and Homeowners filing amended statements of claim to remove Almor Defendants and permitted other Defendants to question the Almor Defendants' corporate representative.
February 5	Third Party Statement of Defence filed by the Almor Defendants in the Homeowners' Action.
March 2	Amended Amended Amended Statement of Claim removing Almor Defendants from Homeowners' Action.
March 7	Partial Discontinuance filed as against Almor Defendants in the Homeowners' Action.
March 10	Affidavit of Records sworn by Almor Defendants.
March 15	Amended Amended Amended Statement of Claim and Partial Discontinuance filed by Town removing Almor Defendants from Town Action.
March/April	Amended Statements of Defence filed by Austech Defendants in the Actions.
April 4	Third Party Statement of Defence filed by RCPL Defendants in the Homeowners' Action.
April 28	Cross-examination of Town representative on Affidavit filed in the McIntosh Lalani summary dismissal application.
May	Plaintiffs resolve unexpected conflicts of interest issues and insurance issues that delayed the Plaintiffs' formal retainer of Tetra Tech.
June 13	McIntosh Lalani Defendants' summary dismissal application heard.
June 22	Oral decision granting summary dismissal of Actions as against McIntosh Lalani Defendants.
Summer	Plaintiffs agreed to take steps to formally retain Tetra Tech to act as the new joint expert.

Sept 7-9	Questioning of Almor Defendants' representative, including questioning by four of the Applicants (RCPL Defendants, Austech Defendants, Whissell Defendants and KTA Defendants).
October 11	Undertaking Responses provided by Almor Defendants.
December 20	Discontinuances of Third Party Claims.
December 22	Plaintiffs formally retained Tetra Tech.
2017	
June 7	Meeting with Tetra Tech regarding possible remediation solutions.
July	Tetra Tech advised Plaintiffs that the Gabion Wall repair, exclusive of landscaping costs, will range from $3.2 to $4 million.
August 20	Tetra Tech provided Plaintiffs with two possible remediation solutions, which had varying impacts on the homeowners situated above and below the Gabion Walls.
September	Homeowners vote on Tetra Tech recommendations.
October	Homeowners confirmed they wished to proceed with the "anchor wall option"; Tetra Tech then completed design drawings and specifications; Tetra Tech determined it was necessary to obtain further assistance from a cost consultant and subsequently retained BTY Cost Consultants ("BTY Consultants").
November 30	Case Management Meeting: initial court approval of settlement agreement with various homeowners named as Third-Party Defendants by the Defendants; settlement agreements resulted in Plaintiffs filing Amended Amended Amended Statements of Claims removing most of the homeowners as Third-Party Defendants and permitting the affected Defendants to plead contributory negligence by the Plaintiff Homeowners in their Statements of Defence; no such Statements of Defence have been served on the Plaintiffs.
2018	
February 14	Revised settlement agreement approval re Third Party Homeowners granted.
March 22	Amended Amended Amended Statement of Claim filed in the Homeowners' Action.

June	A number of Defendant Home Builders indicated their intention to bring summary dismissal applications in the Actions or alternatively offers of settlement.
June 21	Summary Dismissal Application filed by Clark Wilson in the Town Action.
August 15	Offer to Settle filed by GWL in the Homeowners' Action.
December 7	Partial Discontinuances filed releasing some of the Defendant Home Builders in the Town Action.
December 7	Tetra Tech issued its report to the Plaintiffs (not provided to the Defendants until April 2019).
December 21	Settlement agreement reached with Braemyn Developments, Harron, Hearthstone and Timko in Town Action.
2019	
January 9	Partial Discontinuances filed by the Town against one of the summary judgment home builders.
April 23	Tetra Tech Report provided to all remaining Defendants.
April 23	Litigation Plan for both Actions provided to all remaining Defendants by the Town with a suggestion for JDR.
April 24	Application to set Litigation Plan filed (set for May 2).
May 1/ June 7	Applicants filed Rule 4.31 Dismissal Applications (set for May 2).