

In the Court of Appeal of Alberta

Citation: Willier (Willier & Company) v Francoeur, 2026 ABCA 211

Date: 20260624

Docket: 2501-0273AC

Registry: Calgary

Between:

Wilfred Lorne Willier operating as Willier & Company

Respondent

- and -

Raymond Lee Francoeur

Appellant

The Court:

**The Honourable Justice William T. de Wit
The Honourable Justice Jane Fagnan
The Honourable Justice April Grosse**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice J.T. Eamon
Dated the 9th day of September, 2025
Filed on the 22nd day of October, 2025
(Docket: 0901-05424)

Memorandum of Judgment

The Court:

[1] The appellant appeals a chambers justice's refusal to dismiss the respondent's action under Rule 4.33 or Rule 4.31.

[2] The parties are two lawyers who shared space and clients and split fees in a small law firm from 2004 to 2007. The dispute relates to the oral agreement governing their work relationship during that time.

[3] The Statement of Claim was filed in 2009. Questioning was completed in 2012. In 2013, the respondent applied to schedule the matter for trial, representing that the matter was ready for trial. That application was adjourned when it came before the court in the spring of 2013. The parties then engaged in an unsuccessful judicial dispute resolution (JDR) in 2016, following which the respondent promptly tendered a second Form 37 in July 2016. The parties eventually participated in a second unsuccessful JDR in December 2018. The respondent tendered a further Form 37 in June 2019, indicating readiness for trial in September 2019. The appellant responded, suggesting early 2020 as being more realistic. The respondent tendered a further Form 37 in December 2020. In February 2021, the respondent's counsel's legal assistant followed up regarding the Form 37. In June 2021, the respondent applied to set a trial date. In August 2021, the appellant filed applications to dismiss under Rules 4.31 and 4.33.

[4] In considering Rule 4.33, the chambers justice found neither the failed December 2018 JDR nor the communications about the 2019 Form 37 significantly advanced the action before the expiry of three years from the last significant advance.

[5] However, he found the appellant, through the communication in response to the 2019 Form 37, had participated in proceedings so as to warrant the action continuing. Specifically, by responding he would be prepared to represent to the Court that he would be ready for trial by early 2020, the appellant "evinced an intention that they were prepared to continue toward trial", and in doing so the appellant waived his objection to the delay within the meaning of Rule 4.33(2)(b).

[6] Applying Rule 4.33 to a set of facts is a question of mixed fact and law to which some deference is owed: *Takacs v International Union of Operating Engineers*, 2025 ABCA 6 at para 7. Failure to consider relevant evidence or information can constitute reviewable error: *Takacs* at para 7.

[7] The appellant argues the letter in response to the 2019 Form 37 was equivocal, as the appellant did not have enough information about the proposed expert to certify readiness for trial at that time.

[8] The appellant further submits the chambers justice erred as the appellant's communication did not meet the three-part common law test for a waiver. The appellant says he did not have full knowledge of his rights, nor had he unequivocally and consciously expressed an intention to waive his rights as the respondent misrepresented that he had an expert ready for trial. Further, any waiver was conditional; the appellant would have retracted any waiver as the respondent still had not provided his expert report by the time the application to dismiss was heard.

[9] This Court held in *CWC Well Services Corp v Option Industries Inc*, 2019 ABCA 331 that Rule 4.33(2)(b) is not to be interpreted by reference to similar common law tests nor through a technical dissection of the terms contained therein:

7 ...The rule ...does not adopt the common law test for estoppel, which was urged on us by the appellants. The rule must be interpreted on its present wording, not by reference to similar common law tests, or previous cases interpreting rules with different wording, like *Trout Lake*.

8 The exception in R. 4.33(2)(b) should be interpreted holistically. Its purpose was described in *Flock v Flock Estate*, 2017 ABCA 67 at para. 17.10, 49 Alta LR (6th) 41 as being “to enshrine in the rules the ability of the Court to dismiss drop dead applications where defendants have actively participated in an action to an extent and degree that could lead a plaintiff to fairly assume that the defendant has waived the delay”. The interpretation of the rule is not necessarily driven by a technical dissection of terms like “proceeding”, “for a purpose”, “to the extent that”, and “participate”: *Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.*, 2016 ABCA 123 at paras. 15-6, 37 Alta LR (6th) 258.

[10] Regarding interpretation of the appellant's response to the 2019 Form 37, the relevant perspective was that of the respondent. What could the respondent fairly assume? The chambers justice's finding regarding the import of the appellant's response is entitled to deference.

[11] The justice was required under Rule 4.33(2)(b) to determine, in his opinion, whether the appellant's participation warranted the action continuing. The word “waive” or “waiver” does not appear in that Rule. The courts are not to interpret the Rule by reference to common law tests, despite the fact that various courts have referred to “waiver” of delay in this context.

[12] The justice expressly acknowledged there was no evidence that an expert report from the expert named in the June 2019 response was ever provided. He did not misapprehend any facts in that regard. His opinion that the appellant's communication could lead the respondent to fairly assume he had "waived" the delay in all the circumstances is entitled to deference.

[13] As for Rule 4.31, the justice reviewed the full chronology of the litigation. While he did find overall delay, he found some of that delay was mitigated by the Covid-19 pandemic and, in the result, it was not inordinate.

[14] The justice concluded the delay would not cause significant prejudice in terms of fading memories of the two parties who were disputing an oral agreement over the terms and conditions governing their work together as lawyers. He held that even if the delay was inordinate, any prejudice was so speculative that the presumption of prejudice should not apply.

[15] A discretionary decision under Rule 4.31 is entitled to deference unless it is based on an error in principle or is clearly unreasonable: *1199096 Alberta Inc v Imperial Oil Ltd*, 2025 ABCA 303 at para 18. Whether there is significant prejudice is a question of fact reviewed for palpable and overriding error: at para 19.

[16] The appellant argues the justice erred in breaking the timeline into litigation and dispute resolution segments, leading him to improperly focus on the 18-month period following the failed December 2018 JDR.

[17] The justice did review the history of the litigation as a whole. He recognized there had already been a lot of delay, finding both parties seemed willing to tolerate the delay, and referred to what he interpreted as the acknowledgment by the appellant in 2019 that he would be ready for trial in early 2020.

[18] The appellant submits the chambers justice disregarded prejudice arising from the periods of delay. He had argued before the chambers justice that some witnesses had passed away. He points to his own responses in questioning stating that three elders from Siksika Nation who would have been witnesses were deceased.

[19] The chambers justice took into account the nature of the litigation, being a dispute between two lawyers regarding an oral agreement between them governing their work together as lawyers during a three-year period.

[20] The appellant has not established that it was unreasonable for the justice to infer, given the nature and history of the litigation and communications, that the parties had not been concerned about prejudice in terms of fading memories, nor to find that no significant prejudice had arisen from the deaths of the elders, especially given the sparse information provided in that regard.

[21] The appellant has not established an error in principle, a palpable and overriding error of fact or mixed fact and law, or an unreasonable exercise of discretion.

[22] The appeal is dismissed.

Appeal heard on June 15, 2026

Memorandum filed at Calgary, Alberta
this 24th day of June, 2026

de Wit J.A.

Fagnan J.A.

Grosse J.A.

Appearances:

B.W. Nelson
for the Respondent

P. Clark
J. Trybuch
for the Appellant