

In the Court of Appeal of Alberta

Citation: EMM Energy Inc v Canadian Natural Resources Limited, 2026 ABCA 181

Date: 20260601

Docket: 2501-0337AC

Registry: Calgary

Between:

EMM Energy Inc. and Ener T Corporation

Respondents
(Plaintiffs)

- and -

Canadian Natural Resources Limited

Appellant
(Defendant)

The Court:

**The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Jolaine Antonio
The Honourable Justice Jane Fagnan**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.D. Simard
Dated the 28th day of October, 2025
Filed on the 19th day of November, 2025
(2025 ABKB 620, Docket: 0901-02460)

Memorandum of Judgment

The Court:

Overview

[1] This is an appeal from the dismissal by a chambers judge of an application to strike a claim for delay pursuant to Rule 4.31 of the *Rules of Court: EMM Energy Inc v Canadian Natural Resources Limited*, 2025 ABKB 620.

[2] The action was commenced in 2009, and arises out of investments made by the respondent in an oil and gas producing zone (the Sparky K Formation) located in east central Alberta dating back to 2004. The respondent alleges that the appellant caused damage by injecting water into the Sparky K Formation and that the injection was not authorized by the applicable regulator, now known as the Alberta Energy Regulator (AER). The appellant denies liability and claims that it had been authorized to inject water into the Sparky K Formation since 1993, that its water injection did not cause any damage and that the Sparky K Formation was mostly depleted by 2004.

[3] The respondent applied on February 17, 2022 for permission to amend its pleadings and to compel the appellant to attend alternate dispute resolution. The appellant cross-applied on March 31, 2022 to strike the action for long delay pursuant to Rule 4.31. The applications judge struck the claim on January 3, 2023 and indicated that he would have dismissed the amendment application had it been necessary to consider that issue.

[4] The chambers judge agreed with the applications judge and the parties that the delay was inordinate. However, he allowed the appeal as he found the delay was “excusable, because it was significantly contributed to and caused” by the appellant who “has not suffered significant prejudice”. He also allowed the amendments.

[5] On appeal to this Court the appellant submits that the chambers judge erred by reversing the onus to excuse inordinate delay, by failing to consider the plaintiff’s responsibility for delay, and by misapprehending evidence of actual prejudice sustained by the appellant.

[6] The appellant seeks to adduce new evidence on appeal, saying the evidence will show it has suffered prejudice as a result of the delay. According to the proposed evidence, one of its intended experts sadly passed away in February 2025, before the chambers judge heard the application. The appellant only learned of the death after the chambers judge issued his decision.

[7] The application to adduce new evidence and the appeal are both dismissed for the reasons that follow.

Analysis

Rule 4.31

[8] Rule 4.31 states in part:

4.31(1) If delay occurs in an action, on application the Court may

(a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party...

...

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

(3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

[9] The objective of the exercise on a Rule 4.31 application is “to determine whether the delay is inordinate, inexcusable, or otherwise, has caused significant prejudice to the defendant.” *Transamerica Life Canada v Oakwood Associated Advisory Group Ltd*, 2019 ABCA 276 at para 21.

The chambers judge did not err in his interpretation of Rule 4.31 or in finding that the delay was excusable

[10] The interpretation of Rule 4.31 is a question of law reviewed for correctness: *The Owners: Condominium Plan No 982 6403 v CPI Crown Properties International Corporation*, 2018 ABCA 232 at para 17. “Whether the plaintiff has provided a satisfactory explanation or ‘excuse’ for any delay is largely a question of fact. The conclusion of the trial court on justification for any delay is entitled to deference, unless it is based on an error of law or principle.”: *Transamerica* at para 41.

[11] The appellant claims that the chambers judge erred in his interpretation of Rule 4.31 by focusing on delay caused by the defendant rather than the plaintiffs, thereby reversing the onus to excuse inordinate delay. We disagree.

[12] It is not surprising that the chambers judge carefully addressed the appellant’s conduct in relation to the delay in the action as Rule 4.31(3) requires the court to “consider whether the party that brought the application participated in or contributed to the delay” when determining whether

the delay was inexcusable. In any event, the chambers judge did not ignore the respondents' conduct.

[13] The applications judge, the chambers judge and the parties all agreed the delay was inordinate. The first live issue was whether it was inexcusable and thereby triggered the presumption of significant prejudice. The respondents submitted that the inordinate delay was excusable because much of it had been caused by the appellant.

[14] At para 23 of his reasons, the chambers judge summarized the law regarding defence delay under Rule 4.31, citing *Transamerica* at paras 27-31:

- the plaintiff has the primary obligation in moving an action forward, and the *Rules* give the plaintiff many tools to ensure that happens;
- it does not follow, however, that a defendant has no obligation with respect to the pace of litigation;
- there is a significant difference between a defendant “doing nothing” in the face of inactivity by the plaintiff, and the defendant failing to discharge its procedural obligations;
- the *Rules* expressly impose obligations on all parties to advance an action;
- examples of specific duties that the *Rules* impose on defendants include:
 - filing a statement of defence, presumptively within 20 days of service;
 - filing an affidavit of records within the fixed time period;
 - if the plaintiff indicates an intention to question, providing reasonable and realistic dates without delay, and without the plaintiff having to repeat the request;
 - if a defendant undertakes during questioning to provide further information, doing so without further demand and within a reasonable time; and
 - responding in a timely way to correspondence from the plaintiff inquiring about or suggesting the procedure to be followed in resolving the claim; and

- it follows that, within limits, a defendant may be entitled to be recumbent in the face of plaintiff delay or inactivity. It does not follow that a defendant has no responsibility for the timely resolution of the dispute, or that the plaintiff cannot rely on the actions of the defendant as “excusing” delay.

[15] The chambers judge undertook a detailed review of the delays caused or contributed to by the appellant.

- a. He considered that the appellant had failed to commence any questioning of the respondent until March 2018, more than nine years after the action was commenced. The chambers judge rejected the proposition that a defendant is not expected to commence its own questioning until after the plaintiff has completely finished its questioning and produced all of their records. We agree that there is no rule to that effect, and that proceeding in that fashion often encourages unnecessary delay. As the chambers judge noted at para 30:

In many cases, the questioning of both parties is scheduled to occur consecutively, in a single block of time. That practice should generally be encouraged whenever it is appropriate. It has many benefits and efficiencies. All the lawyers and parties will prepare concurrently. Things that they learn in each others’ questionings will be more meaningful to them if they are fully briefed on both sides of the case. Opportunities for potential settlement will arise more readily. Potential duplication of effort will be reduced, because lawyers and clients will not have to “re-learn” what happened in the other side’s prior questioning when they prepare for their own. Discovery will be completed more quickly.

The chambers judge reviewed four phases of the litigation between the commencement of the action in 2009 and the first questioning by the appellant in March 2018. He concluded that the appellant was responsible for much of the delay from January 2009 to January 2013, and from March 2016 to March 2018. However, the respondents were responsible for the delay between January 2013 and October 2015 due to delays in producing documents requested by the appellant. Neither party was responsible for the delay from October 2015 to March 2016 when both parties were working together to move the matter forward reasonably promptly.

- b. The chambers judge found that the appellant delayed responding to the undertakings given by its officer in December 2012 until January 2016, which the appellant had an obligation to answer “in a reasonable period of time, regardless of how the [respondent] were advancing the action”.

- c. The chambers judge found that the appellant delayed in seeking third party reports, despite knowing in March 2018 that those records were in the possession of third parties beyond the control of the appellant and the respondents and waiting until January 2021 to bring an application to compel production.
- d. The chambers judge found the appellant delayed between April and October 2017 in responding to the respondents' request to agree to a new litigation plan.

[16] The chambers judge recognized that the respondents were also responsible for delay, including:

- a. Between December 2009 when Affidavits of Documents were exchanged and August 2011 when they commenced questioning;
- b. Between January 2013 and October 2015 when they failed to produce requested records.

[17] The chambers judge found "both parties contributed significantly to the delay in this action" and that "[c]onsidering the entire circumstances of delay in this case ... the overall delay in this action, while inordinate, was excusable".

[18] The appellant has failed to demonstrate that the chambers judge erred either in his interpretation of Rule 4.31 or that his finding that the delay was excusable reflects a palpable and overriding error.

The chambers judge's finding that the appellant did not establish that it suffered significant prejudice is entitled to deference

[19] The chambers judge recognized that the appellant bore the onus of proving that it suffered significant prejudice as a result of the delay. He concluded that the appellant had not satisfied the onus. The allegations were "operational in nature ... not allegations of moral turpitude or dishonesty". While two of the appellant's anticipated witnesses were no longer employees and the remaining three no longer work on the assets involved in the case, that did not constitute significant prejudice as the action was "largely a 'documents' case". These findings are entitled to appellate deference and do not disclose reviewable error.

The proposed new evidence does not satisfy the Palmer test

[20] The appellant has applied to adduce new evidence on appeal. The evidence relates to the death in February 2025 of Ken Schuldhaus, one of its planned expert witnesses and a former employee of the Energy Resources Conservation Board. The appellant learned of Mr. Schuldhaus' death in November 2025, after release of the chambers judge's decision.

[21] The criteria considered on an application to introduce new evidence on appeal are based on the factors identified in *R v Palmer*, [1980] 1 SCR 759 at 775. The applicant must satisfy the following criteria:

- (i) the evidence could not, by the exercise of due diligence, have been obtained earlier,
- (ii) the evidence is relevant to a decisive or potentially decisive issue;
- (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
- (iv) the evidence is such that, if believed, it could reasonably be expected to have affected the result.

[22] “Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.”: *Barendregt v Grebliunas*, 2022 SCC 22 (CanLII), [2022] 1 SCR 517 at para 3.

[23] The only evidence submitted in support of the application was an affidavit from a legal assistant which:

- a. attached excerpts from an email exchange in November 2025 where the appellant’s counsel sent an email to Ken Schuldhaus to arrange to finalize his opinion into a more formal report and was advised that he had passed away in February 2025;
- b. attached an excerpt from an ERCB report entitled Alberta’s Energy Reserves 2007 and Supply/Demand Outlook 2008-2017 in which Mr Schuldhaus was identified as one of eleven principal authors; and
- c. advised that legal counsel had advised that the appellant has not yet retained a replacement for Mr Schuldhaus.

[24] This evidence fails to satisfy the *Palmer* test. In particular, without further information about the nature of the evidence that it was contemplated Mr Schuldhaus would provide and what other sources of similar evidence might be available, it is not possible to determine whether his evidence was potentially relevant to a decisive issue, whether it could have been expected to affect the result or whether the appellant was significantly prejudiced by his death.

Conclusion

[25] The application to adduce new evidence and the appeal are dismissed.

Appeal heard on May 11, 2026

Memorandum filed at Calgary, Alberta
this 1st day of June, 2026.

Strekaf J.A.

Antonio J.A.

Fagnan J.A.

Appearances:

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