IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

2026 NLSC 140 (CanLII)

Citation: *Butt v. Kiewit Canada Group Inc.*, 2026 NLSC 140
Date: October 22, 2026
Docket: 201501G4282

BETWEEN:

FRANK BUTT & ROSS MERCER

PLAINTIFFS

AND:

KIEWIT CANADA GROUP INC.

DEFENDANT

Brought under the *Class Actions Act*, SNL 2001, c. C-18.1

Before: Justice Sandra R. Chaytor

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: April 29, 2026 and June 18, 2026

Summary:

The Defendant brought an application to dismiss a proposed class proceeding for want of prosecution.

Held: The Application was dismissed.

The Court found that while there had been inordinate and inexcusable delay, it was not satisfied that the delay was likely to cause prejudice to the Defendant's right to a fair trial.

The Court also considered the impact of the suspended limitation period. If the action were dismissed for want of prosecution, other putative class members could commence a new proceeding.

A certification hearing was already scheduled and filings complete. Rather than dismiss the action and risk new proceedings being initiated, the more efficient and better course of action to achieve effective and economical use of the judicial system was to continue with this action to the upcoming certification hearing.

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Appearances:

Robert W. Buckingham and Daniel W. Simmons	Appearing on behalf of the Plaintiff
Neil Rabinovitch, Chloe Snider and Sarah G. Fitzgerald	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: *Hryniak v. Mauldin*, 2014 SCC 7; *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473; *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (NL CA); *Fennelly v. Lloyd's Underwriters*, 2016 NLTD(G) 1; *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160; *Penney v. L.B.*, 2022 NLSC 160; *Bugden v. St. John's (City),* 2026 NLSC 26; *Allen v. Sit Alfred McAlpine & Sons Ltd.* [1968], 1 All E.R. 543, 2 QB 229 (Eng. C.A.); *Birkett v. James*, 1978 A.C. 297 (H.L.); *Dawe v. Brown*, (1994), 120 Nfld. & P.E.I.R. 40, 373 A.P.R. 40 (Nfld. T.D.); *North Atlantic Refining Limited v. Royal Garage Limited*, 2023 NLSC 61; *R. v. Sullivan*, 2022 SCC 19; *Huard v. The Winnipeg Combination Inc.*, 2022 SKCA 130; *Collier v. Nova Fish Farms Inc.*, 2025 NLSC 66; *Kilfoy v. Shanahan's Investigation and Security Limited*, 2010 CarswellNfld 486 (S.C.); *Smith v. Armstrong*, 2018 ONSC 2435; *Godden Estate v. House* (1989), 77 Nfld & P.E.I.R. 94, 1989 CarswellNfld 18; *Allison v. Janssen-Ortho Inc.*, 2023 SKKB 283

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

CHAYTOR, J.:

INTRODUCTION

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[1] This is an interlocutory application (the "Application") brought by the Defendant ("Kiewit") in a proposed class action brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (the "*Act*").

[2] In bringing the Application, Kiewit asks the Court to dismiss the action for want of prosecution pursuant to Rule 40.11 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the "*Rules*").

[3] The Plaintiffs are the Representative Plaintiffs in the proposed class action. They are employees or former employees of Kiewit.

[4] If the action is certified as a class action, the Plaintiffs propose to represent all persons who received a letter dated April 24, 2015, from Michael Geary, a Vice-President of Kiewit (the "Geary Letter"). The Geary Letter advised the recipients that on April 15, 2015, a vehicle rented by a Kiewit employee was burglarized in Montreal and that a company-issued laptop was stolen that likely contained the recipients' personal information of the type found on a T-4. The letter was sent to 15,792 individuals.

[5] The proposed action is based on several causes of action related to the alleged disclosure of the personal information of the putative class members. The causes of action include breach of fiduciary duty, negligence, breach of confidence, breach of contract and warranty, breach of privacy, and intrusion upon seclusion.

[6] In bringing this Application, Kiewit asserts that there has been inordinate and inexcusable delay in pursuing this action by the Plaintiffs and that delay has prejudiced its ability to defend the claim.

[7] The Plaintiffs contest the Application. They contend that: (1) although the delay is in the range that could be considered inordinate, the delay is excusable; and (2) Kiewit has not established actual or inferred prejudice to trial fairness because of the delay.

[8] The Plaintiffs further submit that once this action was commenced pursuant to section 39 of the *Act*, the limitation period was suspended for all putative class members including the Plaintiffs. Therefore, they submit if this action is dismissed the Plaintiffs and putative class members could commence a new proceeding. Such an outcome, the Plaintiffs submit, would result in further delay in adjudicating the issues at play in this litigation.

[9] This is my decision on the Application.

BACKGROUND/PROCEDURAL HISTORY

[10] The background and procedural history of the proceeding which is of relevance to this Application is as follows:

- The proposed class action concerns a cause of action that arose in April 2015;
- On August 14, 2015, the Statement of Claim was issued;
- On March 16, 2018, the Plaintiffs filed an Interlocutory Application for Class Certification and their Certification Brief;
- On June 1, 2018, Kiewit filed a response to the Certification Brief;

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- On June 13, 2018, pursuant to a Consent Order an Amended Statement of Claim was issued and Amended Interlocutory Application for Class Certification was filed along with an Amended Certification Brief, Litigation Plan and supporting affidavits of the proposed representative Plaintiffs.

- On August 14, 2018, the Plaintiffs filed a Reply Brief to Kiewit's response to certification;

- The certification hearing was set to be heard on September 10, 2018, but subsequently postponed to October 16, 2018, due to a conflict in the Court docket;

- On September 11, 2018, at the request of Kiewit, an Order was granted adjourning the certification hearing *sine die* and leave was granted to Kiewit to file an Interlocutory Application to set aside the Amended Statement of Claim and/or stay the proceeding on jurisdictional grounds;

- On September 21, 2018, Kiewit filed the Interlocutory Application seeking an Order to set aside the Amended Statement of Claim and/or stay the proceeding ("Stay Application");

- The Stay Application was heard on April 17, 2019, and dismissed by way of decision filed June 7, 2019;

- On September 19, 2024, the Plaintiffs filed a Notice of Intention to Proceed and wrote to Kiewit counsel advising that this step was being taken;

- On October 18, 2024, following the expiry of the requisite 30 days, the Plaintiffs filed a request for a case management meeting;

- A case management meeting was scheduled for January 3, 2025, but did not proceed as the presiding judge was sitting on another matter immediately prior

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to the scheduled time for the case management and that matter extended into the time set for the case management to commence. Counsel for the parties were no longer available when the judge concluded the other matter nor any time later that same day to hold the case management meeting;

- The Court offered other dates in January and February 2025 for the case management meeting. None of the dates offered were convenient to both parties;

- On April 25, 2025, the Plaintiffs requested the rescheduling of the case management meeting;

- On June 19, 2025, a case management conference was held. Kiewit advised it would be bringing a Rule 40.11 Application to dismiss the action for want of prosecution;

- Deadlines were set for Kiewit to file its proposed application and related filings. The Application was scheduled to be heard April 29, 2026, and the certification hearing was scheduled to be heard November 24 and 25, 2026 (if Kiewit decided not to file the Application or the Application was dismissed);

- Kiewit filed the Application and it was heard on April 29, 2026, and continued on June 18, 2026, after the parties made additional filings;

- The certification hearing remains scheduled to be heard on November 24 and 25, 2026 and the parties have filed their briefs and related filings.

EVIDENCE ON THE APPLICATION

[11] The Application is not supported by an affidavit from a corporate representative of Kiewit. Rather it is supported by affidavits of a law clerk of the firm representing Kiewit.

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[12] The supporting affidavits of the law clerk recount procedural steps that have been taken in the proceeding to date and attach as exhibits various communications between the parties as well as the Geary Letter.

[13] Affidavits of the Plaintiffs were also not filed in response to the Application. Rather the response is supported by an affidavit of the Plaintiffs' counsel, Robert Buckingham.

[14] Buckingham attests to the reasons for the delay and takes accountability for it.

[15] Buckingham also attests that there are over 8200 potential class members in this province and 15,765 people nationally.

[16] Buckingham further attests that "our" intention is to move the matter forward. They have retained expert counsel on privacy breaches.

[17] The Plaintiffs further rely upon affidavits filed prior to the Application. This includes their affidavits filed in support of the Certification Application and an affidavit by David O'Dell dated May 25, 2018, which was filed in the Stay Application. At the time of swearing the affidavit, O'Dell was the Executive Director of the parent company of Kiewit.

[18] O'Dell confirms in his affidavit investigative steps taken by Kiewit when the laptop theft was discovered. It also confirms the number of potential class members as referenced in Buckingham's affidavit.

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ISSUE

[19] The issue for determination is whether the proposed class action should be dismissed for want of prosecution.

DISPOSITION

[20] The Application is dismissed.

[21] Although the Court found inordinate and inexcusable delay, the Court was unable to find prejudice to Kiewit due to the delay.

[22] The Court also considered that as the limitation period was suspended for putative class members, other than the Plaintiffs, another action could be commenced if this one were dismissed. As this action is scheduled for a certification hearing in the near future, the efficient course of action was to continue with this action.

ANALYSIS

[23] It has been widely acknowledged by courts that delay is a chronic problem in the civil justice system. The harm inflicted by such delay has been said to extend beyond the interests of the parties involved in the specific case.

[24] In *Hryniak v. Mauldin,* 2014 SCC 7, the Supreme Court of Canada noted that delay can undermine the rule of law as "... when court costs and delays become too great, people look for alternatives or simply give up on justice."

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[25] Similarly, in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, at paragraph 56, the British Columbia Court of Appeal noted that delay can impede the efficient and effective uses of court resources and ultimately undermine the rule of law by eroding confidence in the justice system.

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[26] In this jurisdiction, the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the "*Rules*") regulate civil proceedings. Along with the Court's inherent jurisdiction to manage its own processes, the *Rules* aim to promote efficiency in the conduct of civil proceedings.

[27] Rule 40.11 of the *Rules* permits a defendant to make an application to the Court to dismiss the action for want of prosecution.

[28] Rule 40.11 states:

> **Dismissal for want of prosecution**
>
> Where a plaintiff does not apply to set a proceeding down for trial, the defendant may apply to set it down for trial or apply to the Court to dismiss the proceeding for want of prosecution, and the Court may order the proceeding to be dismissed or make an order that is just.

[29] Rule 7A governs class action proceedings. Rule 7A.01(3) states that the *Rules* and the general practice and procedure of the Court shall apply to class proceedings unless they are inconsistent with the *Act* or Rule 7A.

[30] The Rules are to be interpreted and applied to achieve the objects of the Act. This includes promoting the effective and economical use of the judicial system and ensuring the parties responding to a class proceeding can present their case fairly.

[31] Rule 7A.01(4) of the *Rules* states:

> The rules of court, including Rule 7A, and the procedures to be followed with respect to class proceedings shall be interpreted and applied to achieve the objects of the Act, and in particular
>
> (a) to promote the effective and economical use of the judicial system;
> (b) to make the court system more accessible to the public; and
> (c) to ensure that parties responding to a class proceeding are able to present their case fairly to the court.

[32] The dismissal of a proceeding for want of prosecution is a discretionary decision. The analytical framework to be applied in determining whether the Court should exercise its discretion is well-understood. It is set out in *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.), the leading case in this province on an application to dismiss for want of prosecution.

[33] *Penney v. Lush* has been frequently cited in this Court including in *Fennelly v.* Lloyd's *Underwriters*, 2016 NLTD(G) 1 ("*2016 Fennelly*"); *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160 ("*2021 Fennelly*"); *Penney v. L.B.*, 2022 NLSC 160 and recently in *Bugden v. St. John's (City)*, 2026 NLSC 26.

[34] In *Penney v. Lush*, the Court of Appeal adopted the factors set out by Lord Salmon in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 2 QB 229 (Eng. C.A.) (later endorsed by the House of Lords in *Birkett v. James*, [1978] A.C. 297 (H.L.). To succeed in striking a claim, the Applicant must show:

> (1) there has been an inordinate delay in the prosecution of the action;
> (2) that the inordinate delay is inexcusable; and
> (3) that it is likely to be seriously prejudiced by the delay.

[35] In *Bugden* the Court noted that civil litigation has changed significantly since the *Allen* test was developed. The Court, however, acknowledged, at paragraph 20, that *Allen* remains the law in this province.

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[36] Although *Penny v. Lush* and the cases in this jurisdiction that have subsequently followed the Allen framework were not class action proceedings, I am satisfied that the same analytical framework should be applied to the consideration of whether to dismiss a class action pursuant to Rule 40.11.

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[37] I will now apply the *Allen* framework to the circumstances of the Application to determine if the proposed class action should be dismissed for want of prosecution.

Has there been inordinate delay?

[38] I am satisfied that Kiewit has shown inordinate delay by the Plaintiffs in the prosecution of this action.

[39] Unlike in some other provinces, the *Rules* do not contain a benchmark against which to measure delay for the purpose of a Rule 40.11 application.

[40] In *Bugden*, the Court reviewed the jurisprudence and noted that case law in this jurisdiction suggests that there is a common law benchmark for inordinate delay as being five years cumulative delay from the commencement of the action to setting the matter down for trial.

[41] In so finding, the Court in *Bugden* cited *Dawe v. Brown* (1994), 120 Nfld. & P.E.I.R. 40, 373 A.P.R. 40 (Nfld. T.D.) in which Hickman, C.J. stated that he had no difficulty in concluding that a delay of five years was inordinate and one which "under ordinary circumstances" should not be tolerated.

[42] The Plaintiffs submit, however, that *Bugden* does not mean it is a "hard stop" at five years to find inordinate delay in every case. They contend that as Rule 40.11

involves a discretionary decision of the Court, the circumstances and nature of the case must be considered in determining each element of the *Allen* analytic framework.

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[43] In making this submission the Plaintiffs point to other decisions of the Court where although more than five years from the initiation of the action had passed, the Court had not found inordinate delay.

[44] For example, in *North Atlantic Refining Limited v. Royal Garage Limited*, 2023 NLSC 61, eight years had passed since the cause of action arose and six years since the action was commenced but the Court did not find inordinate delay. In that case, in not finding inordinate delay the Court considered how the matter had progressed during the time that had passed.

[45] Bugden and *North Atlantic* are both decisions of the same level of court within this province. Therefore, the doctrine of horizontal *stare decisis* applies to the Court in its consideration of those cases in its analysis on the Application (*R. v. Sullivan*, 2022 SCC 19).

[46] It is important therefore to be clear as to whether *Bugden* sets a definitive five-year delay from the initiation of an action to trial as constituting inordinate delay regardless of the circumstances or the nature of the litigation involved.

[47] In my view, the five years articulated in *Bugden* is exactly what it is stated to be – a benchmark. It sets a baseline for evaluation of how long it should ordinarily take a proceeding to move from its initiation to setting it down for trial. It is not a rigid line that, if crossed, regardless of the complexity or nature of the litigation, inordinate delay will be established. If it were, the Court would be deprived of exercising any discretion in the first prong of the three-part analysis once the five-year mark was reached.

[48] Neither *Bugden* nor *Dawe* involved complex litigation or class proceedings (in fact, *Dawe* predates the *Act* and Rule 7A).

[49] Generally speaking, class actions are more complicated than other civil litigation and given the additional procedural steps involved can be expected to take longer to progress to trial if certified.

[50] *Barberio v. Pollack*, 2024 ONCA 904 dealt with a dismissal application in the context of a class proceeding. The civil proceedings rules in Ontario specify that the registrar *shall* dismiss an action for delay where it is not set down for trial by the fifth anniversary of the commencement of the action. At paragraph 22, the court referenced the rule and stated if an action has not been set down for trial within those five years, the action crosses the line and *begins to move* into the realm of inordinate delay. The appellate court had no difficulty agreeing with the applications judge that inordinate delay had occurred in that case stating that it had "strayed deep into the dark wood of inordinate delay." The case had not been set down for trial for 21 years after it was commenced.

[51] *Huard v. The Winnipeg Combination Inc*, 2022 SKCA 130 also involved an application to dismiss a class action. The test to be applied in that jurisdiction also involves determining whether there has been inordinate delay. At paragraph 53, the court noted that in addressing delay in the prosecution of a proposed class action, attention should be paid to what is required to move an action ahead in that context, which includes assessing what must be done for the action to reach the certification hearing.

[52] I agree with the court in *Huard*. In assessing whether there has been inordinate delay, consideration should be given to the additional procedural steps that are required to be taken in class proceedings.

[53] Utilizing the five-year benchmark set out in *Bugden* and taking into consideration that this is a class proceeding, I am satisfied that the delay in this matter is inordinate.

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[54] The Plaintiffs commenced this action in a timely manner and moved it along to the certification hearing stage within three years. The certification hearing was postponed not because of any delay on the Plaintiffs' part but because Kiewit brought an application to dismiss for lack of jurisdiction.

[55] Having said that, over nine years passed from the commencement of the action in August 2015 to September 2024 when the Plaintiffs filed the Notice of Intention to proceed. If the Court were to deduct from the calculation of time the ten months consumed by the filing, hearing and deciding of the Stay Application (as Kiewit suggested in its submission), it is still in excess of eight years since the action was commenced until the Plaintiffs took a step to get the action back on track.

[56] In particular, the Court notes that the Plaintiffs took no steps to advance the action for over five years from the dismissal of the Stay Application in June 2019 until they filed a Notice of Intention to Proceed.

[57] I have no evidence to show that getting this matter back on track was due to the circumstance of it being a class action.

[58] A certification hearing is now set for November 2026, but it will obviously be more than ten years from the initiation of the action until trial (if the action is to proceed).

[59] The Plaintiffs acknowledge that the time from when the action was started until the present falls within the range of other cases in this jurisdiction where inordinate delay has been found. The Plaintiffs concede that the delay is sufficient to trigger the Court to inquire whether the delay is excusable and whether Kiewit has shown prejudice to it in the fairness of the trial as a result of the delay.

[60] I find Kiewit has established that there has been inordinate delay by the Plaintiffs in the prosecution of the proposed class action.

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[61] I will now consider whether that delay is excusable.

If there has been inordinate delay, is the delay inexcusable?

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[62] As a rule, until a credible excuse is made out by the Plaintiffs, the inference is that inordinate delay is inexcusable (*Penney v. Lush*, para. 12).

[63] I find that the inordinate delay is inexcusable.

[64] Buckingham explained the reasons for the delay in his affidavit. No delay is directly attributable to the Plaintiffs. Rather Buckingham takes full responsibility for the inactivity to this matter.

[65] Buckingham attests to three reasons for the delay following the decision on the Stay Application. The reasons provided are:

1. The impact of the Covid-19 pandemic on his office administration;

2. Other complex matters being handled in his office at the same time; and

3. Monitoring the development of the relevant case law to assess the merits of the matter given some of the law was leaning against their position.

[66] Primarily the delay was due to the busy schedule of Buckingham and his office's ability to deal with the volume of litigation it was handling, particularly during the pandemic.

[67] The Court is not unsympathetic to the situation in which Buckingham found himself. Having said this, the Court cannot excuse the delay on this basis. Lawyers and their firms should know the volume of work that they can handle in an efficient manner and govern their practices accordingly. When unexpected circumstances are thrust upon them, there must be a plan to pivot and manage each client's case effectively and efficiently.

[68] Further, I do not accept waiting to see how the law develops and whether it will be more favourable to a party's position to be a credible excuse for inordinate delay in prosecuting a claim. In fact, the Court strongly discourages this as a litigation strategy.

[69] In saying this, I note that while there was a degree of intentional delay due to the Plaintiffs' counsel taking a wait and see approach on the development of the jurisprudence, this was only a portion of the delay, and I cannot find that it rose to the level of abuse of process.

[70] Before an action is commenced, it should be assessed as to its feasibility and viability. That assessment should continue if there are developments in the law that impact the initial assessment. Having commenced an action, a party may not sit back and delay its prosecution because it does not believe the law is in favour of its position.

[71] There are limited circumstances when such an approach might be acceptable. For example, when the law is in a state of flux and the parties are awaiting a key decision from the Supreme Court of Canada or the appellate court of a jurisdiction. In such a situation the parties often agree that it is prudent to await the outcome of that case before proceeding with the litigation.

[72] As stated in *Bugden*, at paragraph 12, for courts to automatically accept a solicitor's dilatory handling of a file as full excuse for delay would amount to the courts tolerating professional negligence and then transferring the costs of that negligence to the defendants.

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[73] I find the reasons provided for the inordinate delay to be inexcusable.

[74] I will now consider whether Kiewit has established that it is likely to be seriously prejudiced at trial as a result of the inordinate and inexcusable delay.

If the delay is inordinate and inexcusable, is Kiewit likely to be seriously prejudiced by the delay?

[75] The onus remains with Kiewit to demonstrate that its right to a fair trial has been prejudiced by the delay (*Penny v. Lush*, para. 3).

[76] This branch of the analysis involves determining whether the delay is likely to cause prejudice to the Applicant's right to a fair trial.

[77] I am unable to find that Kiewit is likely to be seriously prejudiced by the delay. I will explain why.

[78] Prejudice can be proven directly, or it can be inferred (*2021 Fennelly*, para. 28).

[79] The test to establish direct prejudice on an application to dismiss for want of prosecution is high. It involves an applicant adducing evidence on things such as witness availability, the destruction of evidence or the inability of witnesses to recall past events.

[80] Kiewit has not alleged direct prejudice nor adduced any evidence as to witness unavailability or destruction of evidence because of the delay. In fact, no affidavit evidence was adduced from a representative of the company to support its position on any aspect of the Application.

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[81] I find no direct prejudice in this case.

[82] Even though Kiewit has not established direct prejudice, it has asked the Court to infer prejudice based on the passage of time.

[83] In making this submission, Kiewit points to the early stage of the proceeding and the lengthy period from when the underlying events occurred until the matter could get to trial. For example, Kiewit submits there have been no discoveries to preserve testimony, and it is uncertain whether witnesses, including those who no longer work for Kiewit, may be available for a common issues trial.

[84] It has been more than ten years since the cause of action arose. If the class proceeding is certified, it will, of course, be longer to get to trial.

[85] Prejudice may be inferred from the passage of time. However, as articulated in *Penney v. Lush* at paragraph 15, whether any of the principles enunciated in *Allen* are relevant depends completely on the facts of any particular case. The surrounding facts must always be carefully considered.

[86] With respect to the passage of time, it is common sense that the longer the delay, the more likelihood of prejudice. In *Penney v. L. B.* at paragraph 93, the court noted that there is a significant and increasing risk that prejudice will arise the longer the period of cumulative and ongoing delay. It is reasonable to infer that people's memories will fade over time and do not improve with advancing age.

[87] Similarly in Penney *v, Lush*, the Court citing with approval *Allen* at paragraph 12 stated that, as a rule, the longer the delay, the greater the likelihood of serious prejudice at trial.

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[88] There are several cases in this jurisdiction where no direct prejudice was established but the Court inferred prejudice.

[89] In *Fennelly 2016*, the Court found although there had been an inordinate and inexcusable delay of nine and a half years, the defendant had not met the prejudice element of the test. When the second application to dismiss was taken in *Fennelly 2021*, the Court inferred prejudice. By then there had been a 13-year delay and since the last application the Plaintiff had not taken any steps to advance the litigation.

[90] In *Bugden*, the application to dismiss was heard 24 years after the cause of action arose and 20 years after the action was commenced. There was a nine-year period in which nothing transpired in the litigation. Two defence witnesses had died and other employees of the defendant had retired. The Court did not find direct prejudice as the affidavit evidence was insufficient to establish the role these witnesses would play at trial and how the loss of their testimony would result in an unfair trial. The Court did however find that the delay was sufficient to infer prejudice. In so doing, the Court noted the nature of the evidence and that the issues to be adjudicated were largely fact driven.

[91] The delay in this case is not of the magnitude of that in *Fennelly* or *Bugden*.

[92] It is however, the same range as that of *Collier v. Nova Fish Farms Inc.*, 2025 NLSC 66 and *Kilfoy v. Shanahan's Investigation and Security Limited*, 2010 CarswellNfld 486 (S.C.).

[93] In *Collier*, the Court inferred prejudice after a period of 11 years had passed since the cause of action arose and nine years had lapsed from the time the action was commenced. Although the timelines in that case are similar to the case before me, it is noted that in *Collier* the Plaintiff failed to appear on the application to dismiss. Furthermore, even though timelines had been set for the filing of the Plaintiff's response to the application, nothing was filed to oppose the application.

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[94] In my view, the Plaintiffs' lack of interest in the litigation in *Collier* is a relevant distinguishing factor from the case before me. In this case, the Plaintiffs have vigorously responded to the Application and demonstrated an interest in preserving the action and moving it forward.

[95] In *Kilfoy*, at the time of the application to dismiss eight years had passed from the events giving rise to the action and the action remained at a very preliminary stage. One of the factors the court referenced in finding prejudice was that three years had passed after the events before the defendants were even notified. The Court stated at that point it would have been difficult for the defendant to deal with the matter in a positive way.

[96] The circumstances in *Kilfoy* are distinguishable from those of the case before me. This is not a situation where the Plaintiffs have done nothing to prosecute this claim. In fact, their certification application and supporting brief was filed in less than three years after the cause of action arose.

[97] Furthermore, the action in this case was started within four months of the cause of action arising and Kiewit knew at an early stage the action was commenced. The concerns expressed by the Court in *Kilfoy* (that the defendants were prejudiced from delay in notification and may have lost the opportunity to take timely measures to preserve evidence or investigate the circumstances giving rise to the cause of action) do not exist in this case.

[98] The evidence in this case suggests the contrary. Kiewit took active steps early in the process to investigate the cause of action.

[99] The Geary Letter was sent within days of the laptop theft. It notified the Plaintiffs and other putative class members of the theft and stated that "Kiewit initiated an investigation, which is ongoing".

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[100] Included with the Geary Letter, Kiewit provided the Plaintiffs and other putative class members with a document that provided guidance regarding how to protect against the potential misuse of their personal information. It also advised that Kiewit had notified local law enforcement of the situation and would be notifying the privacy commissioner in British Columbia, Alberta and Quebec.

[101] Although a defendant has no obligation to preserve evidence, I find it difficult to accept that in the circumstances of this case, knowing at an early stage that litigation was commenced, that Kiewit would not have done so.

[102] The O'Dell affidavit which was filed by Kiewit in support of the Stay Application details proactive steps taken by Kiewit in the aftermath of the laptop theft. O'Dell attests that Kiewit immediately undertook an investigation to determine the contents of the laptop, had consultations with its IT team, and discussion with the employee involved in the loss of the laptop. These proactive steps would reasonably be expected to result in the preservation of evidence.

[103] In the circumstances, I am unable to conclude that prejudice should be inferred at this stage of the proceeding.

[104] It is on the basis of the failure of Kiewit to establish the third prong of the test that I dismiss the Application.

[105] Although it is not necessary to deal with the limitation period issue to dispose of the Application, I will comment upon it. Since the limitation period has not expired for putative class members (other than the Plaintiffs), in my view, the promotion of the effective and economic use of the judicial system weighs in favour of continuing with this action.

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Limitation Period Issue

[106] The Plaintiffs submit that the causes of action alleged are subject to limitation periods of at least six years and that the limitation period was suspended pursuant to section 39 of the *Class Action Act* when the action was commenced. Therefore, there are over five and a half years left to run on the limitation.

[107] Given this, the Plaintiffs submit that it would be inefficient to dismiss the action when they, or other putative class members, could initiate a new action.

[108] In making this submission, the Plaintiffs rely upon *Birkett* and *Godden Estate v. House*, 1989 CarswellNfld 18 (T.D.), which relied upon the reasoning in *Birkett*.

[109] In response, Kiewit submits that if the Court were to accept the Plaintiffs' argument, it will effectively create a category of cases – class action proceedings – that could never be dismissed for delay.

[110] Kiewit further submits that *Birkett* is no longer good law in the UK and therefore should not be relied upon by the Court.

[111] Let me first address the Plaintiffs' assertion that section 39 of the *Act* suspends the limitation period for the Plaintiffs *and* other putative class members.

[112] I find the limitation period is suspended for other putative class members – not the Plaintiffs.

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[113] Section 39 of the *Class Actions Act* provides as follows:

> **Limitation periods**
>
> **39.** (1) A limitation period that applies to a cause of action asserted in an action
>
> (a) is suspended in favour of a person if another action is commenced and it is reasonable for the person to assume that he or she is a class member for the purposes of that action; and
>
> (b) resumes running against the person when one of paragraphs (2)(a) to (g) applies to the person as though he or she was the member referred to in those paragraphs.
>
> (2) A limitation period that applies to a cause of action asserted in an action that is certified as a class action under this Act is suspended in favour of a class member on the commencement of the action and resumes running against the class member when
>
> …
>
> (e) the class action is dismissed without an adjudication on the merits;
>
> …
>
> (3) Where there is a right of appeal in respect of an event described in paragraphs (2)(a) to (g), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced, or as soon as an appeal has been finally disposed of.

[114] Class proceedings are creatures of statute. The scheme of the *Act* is similar to that of Ontario.

[115] In *Smith v. Armstrong*, 2018 ONSC 2435, the court dismissed a proposed class proceeding for want of prosecution but did not preclude subsequent class proceedings being brought by another representative. At paragraph 30 the court wrote:

> For the reasons which follow, it is my view that dismissal for delay does not preclude a subsequent class proceeding by another representative. To begin with, the Act does not create a cause of action. It creates a procedural regime by which a representative plaintiff is allowed to assert a cause of action on behalf of others with similar interests. It makes little sense to suspend the limitation period relating to the cause of action but impose a limitation period on the procedure by which that action may proceed. Second, prohibiting a subsequent class proceeding may hinder access to justice and promotion of judicial economy, two of the main public policy

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> objectives behind the Act. Third, it would be unfair to take this potentially beneficial procedural regime from a putative class member who has not previously been present before the court and has not had any ability to determine the course of the earlier litigation.
>
> [Emphasis added]

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[116] The purpose of section 39 of the *Class Actions Act* is to protect class members from the operation of limitation periods until it has been determined whether class members may obtain access to justice through membership in a class proceeding as an alternative to obtaining access to justice by pursuing a multitude of individual actions.

[117] The wording of section 39 of the *Act* is that the limitation period is suspended for a person if it is reasonable for the person "to assume" that he or she is a class member. Obviously representative plaintiffs would not need to assume they are members. By virtue of bringing the action, they are asserting that they are. Therefore, I find the wording of section 39 applies to putative members of the class other than the representative plaintiffs.

[118] The limitation period is therefore suspended for putative members of the class. It resumes when one of a number of events occurs, including when the class action is dismissed without an adjudication on its merits such as through a section 40.11 application.

[119] A certification hearing has not yet been held. Therefore, the Application concerns only the individual claims of the Plaintiffs. If Kiewit were successful in the Application, the action could be dismissed against the Plaintiffs but not against other putative class members.

[120] The limitation period would have then resumed for the other putative class members (or continue to be suspended if there were an appeal of the dismissal). They would not be precluded by way of the limitation period from commencing another action.

[121] I will now turn to the submissions regarding the applicability of *Birkett*.

[122] *Birkett* concerns (among other things) the appropriateness of a court dismissing a proceeding where the applicable limitation period applicable had yet to expire.

[123] *Birkett* states, in effect, that if a limitation period has not expired at the time of striking the proceeding, there is nothing preventing the plaintiff from refiling the action (short of a finding of an abuse of process). The *Birkett* reasoning is concerned with the overall efficiency in the final disposition of the dispute. Where striking a proceeding would not achieve this goal, then the proceeding ought not be struck.

[124] This aspect of *Birkett* was adopted by the Court in *Godden* in its consideration of a Rule 40.11 application. In that case, after determining that the requisite prejudice had not been made out, the Court stated, in paragraph 21, in the alternative:

> If I am wrong in my conclusion above, I find the argument advanced by counsel for the plaintiff to be very persuasive and determinative of this matter. He relied to a great extent on the judgment of the House of Lords in *Birkett v. James*, [1977] 2 All E.R. 801 in relation to the non-expiry of the limitation period for maintaining this action. He maintained that the currency of the limitation period is an overriding factor in applications such as this, not merely one factor to be taken into account with other factors as was advocated by counsel for the defendants. Counsel for the plaintiff argued that the action was taken upon a specialty, the indemnity agreement, for which s. 2 of the *Limitation of Actions (Personal) Guarantees Act*, provides a limitation period of 20 years from the date the cause of action arose.
> …
>
> See also the judgment of Lord Edmund-Davies to the same effect on the relevance of non-expiry of a limitation period: pp. 815-818. Obviously it is a factor of utmost importance.
>
> In this matter, if this action was dismissed on this application there would be nothing to prevent the plaintiff from commencing a fresh action against the defendants thereby adding to the delay, extra effort and cost.
>
> [Emphasis added]

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[125] In *Sullivan*, in giving direction on horizontal *stare decisis*, the Supreme Court of Canada, at paragraph 75, stated that trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances. The first of those three circumstances is relevant to the parties' submissions on *Birkett*. That circumstance concerns the rationale of an earlier decision having been undermined by subsequent appellate decisions.

[126] Therefore, the key question to be examined in this case is *not* whether the *Birkett* analysis regarding the effect of active limitation periods remains good law in the UK. Rather, the issue is whether the reasoning of *Birkett* has been supplanted in the jurisprudence in this province.

[127] The Plaintiffs submit that *Birkett's* reasoning has not been undermined, but rather the amendments brought into effect by revised civil procedure rules in the UK changed the approach to case management throughout proceedings.

[128] I accept that it was the introduction of new civil procedure rules in the UK which permitted the courts in that jurisdiction to be more "activist," and this resulted in the diminished importance of the *Birkett* decision. As the Plaintiffs point out, there has been no corresponding large scale rule revision in this jurisdiction.

[129] However, as Kiewit rightly points out, no rule change is required for the Court to have regard to the overarching principles of *Hryniak* regarding the principles of proportionality, the broader interests of justice, and the impact of delay on the Court system.

[130] *Hryniak* and the principle of proportionality applies to all civil proceedings. The reasoning in *Birkett* is also concerned with the efficient and proportional use of resources. *Birkett* stands, in part, for the principle that it is inappropriate to strike proceedings for want of prosecution where a limitation period has not expired precisely because it is inefficient to do so. In my view, the principles of *Birkett* are largely consistent with the principle of proportionality as expressed in *Hryniak.*

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[131] *Birkett* and *Godden*, however, were not class proceedings and therefore did not deal with the effect of a suspended limitation period and what that could mean for proportionality and efficiency in proceedings.

[132] Given the suspension of the limitation period in class proceedings there could potentially always be an unexpired limitation period at play. If an unexpired limitation period in this context were a determinative overriding factor, then it would often be effectively impossible to dismiss class proceedings for want of prosecution.

[133] Allowing potential litigants to perpetually sit on their rights in this context would run afoul of the logic animating *Birkett*, which is grounded in efficiency in court proceedings.

[134] In my view, the analytical framework set out in *Allen* and in particular the remarks of Lord Diplock guard against this possibility.

[135] Plaintiffs in a proposed class action who deliberately delay and simply rely upon the suspension of the limitation period would risk the defendant being able to meet the first condition laid out by Lord Diplock in *Allen*. That is, the action could be struck for being an abuse of process.

[136] I now turn to the question of what, in any, impact this analysis on the limitation period question should have on the outcome of the Application.

[137] I have found that the limitation period is not suspended for the Plaintiffs and therefore there is no issue of any inefficiency arising from an unexpired limitation period with respect to the Plaintiffs if the action were dismissed.

[138] However, the limitation period is suspended for other putative class members, and they would be able to commence a new action if this action were dismissed.

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[139] Cases in other jurisdictions in dealing with this issue have considered a relevant factor to be the likelihood of another prospective class member initiating a new action (*Allision v. Janssen-Ortho*, 2023 SKKB 283; *Barberio*).

[140] No affidavit evidence was filed from any putative class member indicating a willingness to initiate a new action in the event of the dismissal of the present action.

[141] There is affidavit evidence, however, of Plaintiffs' counsel that they intend to pursue this matter and that they have retained expert counsel on privacy breaches.

[142] There is also affidavit evidence that the number of potential class members is 15,765 and that 8,241 of them are from this province.

[143] I am satisfied that, in this context, it is likely that another putative class member would commence an action if this one were dismissed.

[144] Kiewit submits that this matter is at an early stage of these proceedings. No discoveries have yet been conducted, so there would be no significant issue of inefficiency if other class members started a new proceeding.

[145] I am not satisfied that Kiewit adequately explained how dismissing the action at this stage aligns with the principle of proportionality.

[146] There have been pre-trial proceedings. A pre-certification application on jurisdiction has been held which consumed a significant period of time. Furthermore, the matter is ready for certification hearing in November. Two days have been set aside in the Court's calendar, and the parties have filed extensive briefs and documentation.

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[147] If this action were to be dismissed and other putative members of the class chose to seek to commence a new action, there would be significant delay in getting the matter to new certification hearing dates – back to where it currently stands.

[148] Therefore, I am not satisfied that dismissing this matter would be consistent with the efficiency in civil court proceedings that *Hryniak* instructs us to strive to achieve nor with the objective of the *Act* to promote the effective and economical use of the judicial system.

[149] The more efficient and better course of action to achieve effective and economical use of the judicial system is to continue with this action to the certification hearing set for November.

CONCLUSION AND DISPOSITION

[150] The Application is dismissed.

[151] Unless there is further order of the Court, the certification hearing shall proceed as scheduled.

SANDRA R. CHAYTOR
Justice

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