Court of King's Bench of Alberta

Citation: Galloway v Masterfeeds GP Inc, 2026 ABKB 807

Date: 20261117
Docket: 1601 10277
Registry: Calgary

2026 ABKB 807 (CanLII)

Between:

David Galloway

Plaintiff/Respondent

- and -

Masterfeeds GP Inc.

Defendant/Appellant

Reasons for Decision
of the
Honourable Justice C.D. Simard

I. Overview

[1] The Plaintiff David Galloway is a professional chuckwagon driver. During the 2015 Calgary Stampede Rangeland Derby, a number of his horses suffered colic and were unable to compete. One subsequently died. Mr. Galloway alleges that this happened because his horses ate feed that was contaminated with fungicide when he purchased it. The Defendant Masterfeeds GP Inc. sold him that feed.

[2] Mr. Galloway sued Masterfeeds, commencing this action on August 4, 2016.

[3] On January 13, 2026, Farrington AJ heard Masterfeed's application to dismiss the action for long delay, pursuant to Rules 4.31 and 4.33 of the *Alberta Rules of Court* (the ***Rules***). Farrington AJ dismissed the application, allowing the action to continue.

[4] Masterfeed appealed the Farrington AJ's decision and I heard its appeal on October 30, 2026.

II. Issues

[5] The issues for me to decide are whether Farrington AJ erred:

(a) in not dismissing the action pursuant to Rule 4.33; and

(b) in not dismissing the action pursuant to Rule 4.31.

III. Analysis

A. Standard of Review

[6] The parties agree that the standard of review in this case is correctness, because neither of them filed any new evidence after Farrington AJ's decision.

B. Did Farrington AJ Err in not Dismissing the Action under Rule 4.33?

[7] For the reasons that follow, I dismiss the Defendant's appeal of Farrington AJ's decision under Rule 4.33.

1. Rule 4.33

[8] Rule 4.33 provides that if three or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, subject only to a few exceptions. The only potentially applicable exception in this case is the one in Rule 4.33(2)(b), which covers the situation where:

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

2. The Proper Approach to Rule 4.33, Generally

[9] The parties agree on the principles that apply to my decision about whether there has been a "significant advance" in an action under Rule 4.33. I summarize those principles as follows.

[10] The time period I must consider is from the date of the last uncontroverted significant advance, to the date on which the dismissal application was filed. The relevant time period is not disputed in this case. The parties agree that the last uncontested significant advance occurred on November 13, 2019, when the Defendant delivered its answers to written interrogatories. The Defendant filed its dismissal application on February 12, 2024.

[11] Because this period of potential delay includes March 17, 2020 to June 1, 2020, I exercise my discretion to add 75 days to the three year test, as a result of Ministerial Order 27/2020, which temporarily suspended the operation of time limits under the *Rules* during the COVID-19 pandemic: ***Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc***, 2025 ABKB 367 at paras 28 – 30.

[12] Therefore, the question I must ask is whether, between November 13, 2019 and February 12, 2024, there was a period of three years and 75 days in which no significant advance occurred in this action.

[13] The parties focused their arguments on a single event that could potentially constitute a significant advance during the relevant time period: the Plaintiff's delivery to the Defendant, on November 9, 2022, of his Supplemental Affidavit of Records. If that was a significant advance, then the Defendant's appeal under Rule 4.33 fails. If it was not, the appeal succeeds.

[14] To decide whether this step constituted a significant advance:

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- I am to take a "functional" approach. That means I have to inquire "whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the particular lawsuit. The focus is on substance and effect, not form";
- a step that "significantly advances" an action must move the parties closer to resolution;
- the indicators of a "significant advance" also include whether:
    - the step has increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action? Are the parties at the end of the applicable period much closer to resolution than they were at the start date?; and
    - are the facts, law, and positions of the parties relative to each other are the same as they were before the supposed advance?
- prejudice is not considered under Rule 4.33. The court has no discretion to allow the action to continue if the requirements of the rule are met; and
- steps that narrow issues, clarify positions, complete discovery or determine relevant facts or law may significantly advance an action but the outcome itself should not be overemphasized

(***Baron*** at paras 32 – 37; ***Taschuk v Tashchuk*****, 2022 ABKB 786** at paras 11 – 13).

3. The Procedural History of this Action

[15] To undertake the functional approach, and to understand the context of this action during the relevant time period, it is necessary to review its procedural history. There are no real factual disputes about what happened or when those things happened. I summarize the relevant procedural events in the following table.

Date	Step
August 4, 2016	• The Plaintiff's original counsel, Stephen Hope, filed his Statement of Claim.
October 12, 2016	• The Defendant's counsel filed its Statement of Defence.
November 1, 2016	• The Plaintiff swore his original Affidavit of Records.
March 30, 2017	• The Defendant affirmed its Affidavit of Records.
November 13, 2019	• The Defendant served its interrogatory responses to the Plaintiff (the Plaintiff had elected to provide written interrogatories to the Defendant rather than question the Defendant for discovery). As noted, both parties agree this was a significant advance in the action.

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February 20, 2021	• Mr. Hope sent a "without prejudice" settlement offer to Peter Morrison, the Defendant's counsel. Both parties have entered evidence confirming that this offer was made, so I am satisfied that they have both waived any privilege over the fact that settlement discussions took place. Neither party has entered any evidence about the contents of the offer. That information remains privileged.
May 13, 2021	• Mr. Hope sent a follow-up email to Mr. Morrison, asking for a response to the settlement offer. • Mr. Morrison replied that he did not recall seeing the offer and asking Mr. Hope to re-send it, so that he could review and report on it, to seek instructions from the Defendant.
May 15, 2021	• Mr. Hope re-sent the settlement offer to Mr. Morrison.
October, 2021	• Mr. Hope passed away.
January 3, 2022	• The Plaintiff's new counsel, Vanessa Hope (Mr. Hope's daughter) wrote to Mr. Morrison, advising of Mr. Hope's passing, that she would be taking over the file, and asking for a response to the February 2021 settlement offer at Mr. Morrison's "first opportunity."
January 24, 2022	• Mr. Morrison replied to Ms. Hope, expressing his condolences and stating that he would seek instructions and get back to her "as soon as possible" and that he would "get the ball rolling on this file after that." • The parties agree that the Defendant never replied to the settlement offer.
October 14, 2022	• Ms. Hope had a telephone call with Dr. Barry Blakley, in which they discussed what records would be required for the preparation of an expert toxicology report.
October 18, 2022	• In a call between Dr. Blakley and Ms. Hope, Dr. Blakley requested blood test records for the affected horses (the **Blood Test Records**).
November 1, 2022	• The Plaintiff received the Blood Test Records from Moore Equine, the veterinarians who had treated his horses at the time of the alleged incident during the 2015 Calgary Stampede (**Moore**). I infer from the evidence that, before this date, the Plaintiff did not have possession of these records.
November 3, 2022	• Ms. Hope emailed the records received from Moore to Dr. Blakely. In her email she advised that "in speaking with Victor we determined that some blood panels were done on the horses within days after the poisoning..."
November 4, 2022	• Ms. Hope and Dr. Blakley exchanged additional emails in which he noted that the Moore records she had sent dealt with treatments given to the horses, but what he required were the "biochemical results from blood samples and perhaps the responses to treatments." • Ms. Hope then sent a subsequent email to Dr. Blakley with the Blood Test Records.

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November 4, 2022	• Ms. Hope and Dr. Blakley had a call in which Dr. Blakley agreed to prepare an expert report on toxicology.
November 9, 2022	• Ms. Hope served the Plaintiff's Supplemental Affidavit of Records on Mr. Morrison. The Supplemental Affidavit of Records contained the records recently received from Moore, including the Blood Test Records. • Ms. Hope also sent a letter to Mr. Morrison, advising that the Plaintiff had retained Dr. Blakley as an expert regarding the effects on the horses of chemical exposure, and attaching his *curriculum vitae*.
November 9, 2023	• Ms. Hope served Dr. Blakley's expert report on Mr. Morrison, and she also sent him a proposed Litigation Plan.
November 29, 2023	• Mr. Morrison sent an email to Ms. Hope, apologizing for the delay in responding, and advising that he would reply shortly.
November 29, 2023	• Ms. Hope sent a reply email to Mr. Morrison, asking if he would like to schedule a call.
December 7, 2023	• Ms. Hope sent another email to Mr. Morrison, offering some times for a call.
December 14, 2023	• Ms. Hope sent another email to Mr. Morrison, asking for a call and advising that she would bring an application to have the Litigation Plan ordered by the Court, if the Defendant did not respond.
January 4, 2024	• Ms. Hope filed the Plaintiff's application to have the Litigation Plan approved, making it returnable on January 23, 2024
January 15, 2024	• Mr. Morrison sent an email to Ms. Hope, advising that he had been out of the country and asking that she adjourn the Plaintiff's application to one of a number of dates in late January or early February. He also advised that he would seek instructions on the Litigation Plan and reply.
January 15, 2024	• Ms. Hope sent a reply email to Mr. Morrison, proposing an adjournment to February 6 and proposing a lengthier adjournment if the Defendant might agree to the Litigation Plan.
January 15, 2024	• Mr. Morrison sent a reply email to Ms. Hope, advising that the Defendant would likely be agreeable to the Litigation Plan, with slightly revised dates, and that an application would likely not be necessary. He proposed further dates in late February for the adjourned application.
January 16, 2024	• Ms. Hope sent an email to Mr. Morrison, advising that the Court had adjourned the Plaintiff's application to February 13.
January 16, 2024	• Mr. Morrison sent a reply email to Ms. Hope, advising that he was available on February 13 and that he would be in touch once he had received instructions.
January 24, 2024	• Ms. Hope sent an email to Mr. Morrison, asking if he had instructions on the Litigation Plan, and if he wanted to schedule a call to discuss.
February 6, 2024	• Mr. Morrison sent a reply email to Ms. Hope, advising that he was going to have a call with the Defendant on Thursday, February 8 and

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	that he would reach out to her after that. He said he expected they would be able to deal with the Litigation Plan by consent. • Ms. Hope sent a reply email to Mr. Morrison, asking if he could reply by Thursday or Friday, February 8 or 9, in consideration of the online adjournment deadline for the application. • Mr. Morrison sent a reply email to Ms. Hope, advising that he would do his best to get instructions before the end of the day on Thursday, February 8, so as to avoid missing the online adjournment deadline.
February 9, 2024	• Ms. Hope sent an email to Mr. Morrison, asking for an update.
February 12, 2024	• Ms. Hope sent another email to Mr. Morrison, asking for an update that morning.
February 12, 2024	• At 4:15 p.m. Mr. Morrison served the Defendant's dismissal application on Ms. Hope, and asked that the Plaintiff adjourn its Litigation Plan application *sine die*, to allow the dismissal application to be heard first. The dismissal application was made returnable on February 29, 2024.
February 13, 2024	• Ms. Hope advised Mr. Morrison that she would be attending Court that morning to seek approval of the Litigation Plan, as scheduled.
February 13, 2024	• Mason AJ granted an order approving the Litigation Plan.

4. Farrington AJ's Decision under Rule 4.33

[16] Farrington AJ dismissed the Defendant's application under Rule 4.33 because he concluded that the delivery of the Plaintiff's Supplemental Affidavit of Records was a significant advance.

[17] He noted that Affidavits of Records are often "not perfect at the outset," and that it was not unusual to see records produced in stages or "along the way" in lawsuits. He gave two examples of when that happens: when additional records are produced in response to undertaking requests; and when records are "evergreened" or brought up to the date of a subsequent Affidavit of Records (I infer that he was referring to the types of records that continue to get created or updated even after a lawsuit starts, such as records about a plaintiff's ongoing losses).

[18] Farrington AJ acknowledged that the Plaintiff could have produced the documents in his Supplemental Affidavit of Records earlier. However, he noted that the Plaintiff had produced the Blood Test Records when it became clear that there was a purpose in doing so. In combination with certain records about the Plaintiff's claimed financial losses that were also included in the Supplemental Affidavit of Records, Farrington AJ concluded that this step was significant enough to constitute a significant advance in the action.

5. Grounds of Appeal / the Parties' Positions on Rule 4.33

[19] The Defendant argues that Farrington AJ erred, because all the records in the Supplemental Affidavit of Records were "stale": they either existed or could have been created or obtained at the time the Plaintiff swore his original Affidavit of Records. They were all in the control of the Plaintiff at that time, although not in his possession. They were all relevant and material to the issues that had already been raised in the pleadings. Therefore, the Plaintiff had an obligation to produce them in his original Affidavit of Records. At that time, he knew that

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Moore had done blood work on the horses. Other records in his original Affidavit of Records (Moore invoices and letters from a Moore veterinarian) referred to the blood testing having been done.

[20] Because the Plaintiff could have and should have produced these records in October 2016 but did not, his original Affidavit of Records was deficient, and his subsequent act of correcting those deficiencies in November 2022 could not have constituted a significant advance.

[21] The Plaintiff disagrees. He says that Farrington AJ reached the correct conclusion, taking into account the context of the action and what had occurred in the litigation by November 9, 2022. Because the Defendant had not engaged meaningfully in the settlement discussions that the Plaintiff had initiated, and had not conducted any questioning, the Plaintiff was "left guessing" about what specific approach the Defendant would take at trial. Liability and causation were not being conceded, so the Plaintiff had to tender expert evidence. Ms. Hope's discussions with Dr. Blakley in October and November 2022 led to the understanding that, in addition to the horse treatment records the Plaintiff had previously produced, the Blood Test Records were also relevant and material and would also be needed. Those Blood Test Records were requested from Moore, provided to the expert Dr. Blakley, and then promptly produced to the Defendant in the Supplemental Affidavit of Records.

6. My Analysis and Decision on Rule 4.33

[22] The Plaintiff's Supplemental Affidavit of Records included all the records he had previously listed in his original Affidavit of Records (totalling 65 pages), plus the addition of 41 new pages, organized under 15 tabs.

[23] Of the new records, there were two significant groups of additions. The first were "horse profiles": they contained, for each affected horse, some images, their lifetime career earnings as racehorses (before they began running as chuckwagon horses), the date on which Mr. Galloway purchased them, and the price he paid for them. The second group of new records contained detailed treatment records for the horses, including the Blood Test Records. In his original Affidavit of Records, Mr. Galloway had included invoices for Moore's treatment of the horses, and "Animal Care Logs" which are printed forms with handwriting that described the care that Moore had provided, but at quite a high level. The new treatment records contained, in addition to the Blood Test Records, far more detail about the care that Moore had provided to the affected horses.

[24] I make the following findings of fact about the new records, based on the evidence.

[25] Mr. Galloway had access to all of the information contained in the horse profiles at the time he swore his original Affidavit of Records. However, he only gathered that information and used it to create the horse profiles sometime after that. The information in the horse profiles is potentially relevant and material to his damages claim, which he knew the Defendant was contesting when he swore his original Affidavit of Records.

[26] Mr. Galloway did not have possession of the additional records from Moore that he added to his Supplemental Affidavit of Records (including the Blood Test Records) until he or his lawyer Ms. Hope obtained them from Moore in early November, 2022. However, he could have obtained them prior to swearing his original Affidavit of Records in 2016 because Moore possessed them at that time and would have provided them if he had asked. Mr. Galloway knew at that time that Moore had performed blood analysis on the affected horses and also that the

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Defendant denied his allegation that its feed had caused his horses' adverse health effects. However, prior to the discussions between Ms. Hope and Dr. Blakley in late October 2022, neither Mr. Galloway nor his lawyer Ms. Hope appreciated that the Blood Test Records were relevant and material, nor that they would be required for an expert to opine on whether the Defendant's feed had caused harm to Mr. Galloway's horses.

[27] Where do these findings lead?

[28] In addition to the caselaw setting out the general principles that apply to Rule 4.33 that I have cited above, the parties also drew my attention to a number of cases in which Alberta courts have considered whether additional document production or supplemental affidavits of records constitute significant advances in actions. Given the fact-specific and contextual nature of the inquiry, none of these cases provide ironclad rules that can determine the outcome in this case. However, they are helpful because they illustrate how courts have applied the functional approach to Rule 4.33 and how they have considered contextual matters that seem to recur in this category of cases.

[29] I note the following specific principles stated in these cases about subsequent document production:

- the manner in which the subsequent document production was instigated may be relevant: did the party applying for dismissal request them, such that the other party was fulfilling that request when it produced them? (***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 at paras 14 and 17);
- the length of time that it took the party to produce the records is a relevant consideration, including the time that has passed since the records were requested (***XS Technologies*** at paras 12 and 17);
- the genuineness of the subsequent production, including whether it occurred on the eve of a "drop-dead" deadline, is a relevant consideration (***XS Technologies*** at paras 13 and 17);
- the creation of a supplemental affidavit of records merely as a "housekeeping item" that formalizes a previous production of records, or just lists documents that were already well-known, will probably not constitute a significant advance (***Déjà Vu Holdings Ltd v Securex Master Limited Partnership***, 2018 ABQB 597 at paras 33 – 34; ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 at para 9);
- if documents should have been but were not included in a party's original affidavit of records, and are only produced much later, their subsequent production may not be a significant advance (***Déjà Vu*** at para 38). This may just be the "correction" of what was deficient original production (***Edinburgh Tower Development Ltd v Curtis***, 2021 ABQB 239 at para 63);
- the production of records that do not provide new information, but only repackage or reformat information that was already contained in previously-produced documents, may not constitute a significant advance (***Edinburgh Tower*** at para 59); and

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- generally, the "evergreening" of production with truly new information and providing documents in undertaking responses will constitute significant advances. However, that may not be the case if undertaking responses are merely perfunctory, or nothing hinges on the response (***Edinburgh Tower*** at para 60).

[30] None of these factors are in and of themselves determinative in any particular case. The key question is always to ask whether, given the nature and importance of the newly-produced documents to the issues in dispute, did their production significantly advance the action? (***Déjà Vu*** at para 38; ***Ro-Dar*** at para 22).

[31] Taking a functional approach and considering the entire context of what had happened prior to November 9, 2022, I conclude that the Plaintiff delivering the Blood Test Records in his Supplemental of Records constituted a significant advance in the action.

[32] The Plaintiff, through his counsel, learned for the first time in late October 2022 that the Blood Test Records would be necessary for his expert to provide a report on whether the alleged tainted feed caused his horses to become ill. Once he learned that, he then promptly obtained those documents from Moore, provided them to his expert and produced them to the Defendant.

[33] The Blood Test Records were important to advancing the action. The evidence that Dr. Blakley needed them to produce his expert report is uncontradicted. From that, I infer that the Blood Test Records were just as important to the Defendant as they were to the Plaintiff. They allowed both sides to better assess their respective positions on the disputed issue of causation. The disclosure of the Blood Test Records therefore moved the parties closer to resolution.

[34] It is certainly likely that Ms. Hope's discussions with Dr. Blakley in late October 2022 were at least partially motivated by her awareness that three years were soon going to pass without a significant advance in the action. However, the evidence does not support a conclusion that the provision of the Supplemental Affidavit of Records was not "genuine." There is no evidence that the omission of the Blood Test Records from Mr. Galloway's original Affidavit of Records was in any way intentional. He had obviously obtained some records from Moore at that time, and he listed those records in his original Affidavit of Records. His later realization that the Blood Test Records were also relevant and material and would also be required is the kind of thing that commonly occurs in lawsuits as they advance.

[35] This is also not a case where the Plaintiff stirred from a long-standing lethargy in November 2022, took a step to try to tactically keep the lawsuit alive, then once again fell into a period of inactivity. The Plaintiff, through his original lawyer Mr. Hope, had attempted to settle the action in early 2021, which was just over a year after receiving the Defendant's interrogatory responses. The lack of progress from May 2021 to October 2022 is at least partially explained by Mr. Hope's death, and the transition of the file to Ms. Hope. And, importantly, after November 2022, the Plaintiff continued to take meaningful steps to advance the case. He delivered Dr. Blakley's expert report in November 2023 and obtained court approval of the Litigation Plan in February 2024, after the Defendant had essentially ignored it for three months.

[36] The Litigation Plan was reasonably ambitious, but not unrealistic. It essentially obliged the Defendant to take only the basic obligatory steps (questioning, an expert report and attending alternative dispute resolution) by the end of 2024, which would have made the action ready for trial. The Plaintiff had largely already done everything he needed to do to be ready for trial, and

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it is possible that he may not have had to take any further steps at all under the Litigation Plan, other than attending his own questioning and an alternative dispute resolution meeting.

[37] I do not find that the provision of the horse profiles in the Supplemental Affidavit of Records, by itself, would have constituted a significant advance. While those documents provided some additional information that could be relevant to Mr. Galloway's damages claim, they were not nearly as important to the action as the Blood Test Records.

[38] I also wish to clarify that I do not accept the Plaintiff's argument that, because of the Defendant's inactivity up to November, 2022, part of the relevant context at the time is that the Plaintiff was "left guessing" about the Defendant's approach. A plaintiff bears the ultimate responsibility of prosecuting its claim: ***Taschuk*** at para 11. That remains so even in the face of a defendant's inactivity.

7. Did the Defendant Participate in Proceedings after the Delay, for a Purpose and to the Extent that Warrants the Action Continuing Pursuant to Rule 4.33(2)(b)?

[39] Because of my conclusion that the Supplemental Affidavit of Records constituted a significant advance, I do not need to answer this question. However I will do so briefly, for the sake of completeness.

[40] To answer this question, I must consider all the circumstances and decide whether the Defendant's post-delay conduct was "unequivocal," such that it caused the Plaintiff to fairly assume that the Defendant had waived or acquiesced in the delay: ***Secan Association Inc and FP Genetics Inc***, 2025 ABKB 38 at paras 14 – 21.

[41] I have described all the relevant conduct of the Defendant above in the table in para 15 of this Decision. After the Plaintiff delivered his Supplemental Affidavit of Records on November 9, 2022, the only thing the Defendant did was to send correspondence by its lawyer Mr. Morrison. While Mr. Morrison held out the possibility in that correspondence that the Defendant might agree to the Litigation Plan, it is clear that all of his statements about that were conditional on him actually receiving those instructions from the Defendant. Obviously, he never got those instructions. Instead, the Defendant instructed him to file the dismissal application, which he did on February 12, 2024. I have no transcript from the parties' appearance before Mason AJ on February 13, 2024 but it is clear from the following term in her Order granted that day that the Defendant was not acquiescing to any delay:

> The Defendant's participation in this application and the issuance of this Order is without prejudice to the Defendant's pending application to dismiss the action for long delay or prejudicial delay pursuant to Rule 4.31 and Rule 4.33 of the *Alberta Rules of Court.*

[42] Considering all the circumstances, if I had found that the Supplemental Affidavit of Records did not constitute a significant advance in the action, I would not have concluded that the Defendant's participation after that date would warrant the action continuing.

C. Did Farrington AJ Err in not Dismissing the Action under Rule 4.31?

[43] For the reasons that follow, I dismiss the Defendant's appeal of Farrington AJ's decision under Rule 4.31.

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1. Rule 4.31

[44] Rule 4.31 states:

> 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, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> (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.

2. The Proper Approach to Rule 4.31

[45] In ***Humphreys v Trebilcock***, 2017 ABCA 116 (***Humphreys***), our Court of Appeal proposed six questions to be asked in assessing applications under section 4.31:

- has the non-moving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
- is the shortfall or differential of such a magnitude to qualify as inordinate?
- if the delay is inordinate, is there an explanation for the delay? If so, does this explanation justify the inordinate delay?
- if the delay is inordinate **and** inexcusable, has it been significantly prejudicial to the moving party to justify dismissal?
- if the moving party relies on the presumption of significant prejudice created in Rule 4.31(2), has the non-moving party rebutted the presumption?
- if the moving party has satisfied all the conditions under Rule 4.31 for dismissal, is there any compelling reason **not** to dismiss the action?

[46] The Court of Appeal revisited these issues in ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276. It noted that the six-step analysis set out in ***Humphreys*** might be helpful in some cases, but that it is not mandatory, and is sometimes difficult to apply. The Court re-emphasized that the basic test for dismissal for long delay is that set out in Rule 4.31:

> The objective of the exercise must be remembered. It is to determine whether the delay is inordinate, inexcusable, or otherwise, has caused significant prejudice to the defendant. Any particular class of proceedings will include some that proceed quickly, some that proceed slowly, and a great many in the middle. In determining the reasonable expectation of progress for the purpose of striking out an action for delay, regard must be had to all categories… In order to be struck, the action must generally fall within the slowest examples of that type of

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> proceeding, and it must be so slow that the delay justifies striking out the claim. Further, even very short delays can be grounds for striking the action if significant prejudice has resulted. "Significant prejudice" remains the ultimate consideration.

[47] Despite the different formulations of the applicable test by the courts, the requirements set out in Rule 4.31 always govern, and they necessitate that the following issues be considered:

- applicants in a delay application have the onus to prove, on a balance of probabilities, that the delay has resulted in significant prejudice;
- if an applicant establishes that the delay is inordinate and inexcusable, the delay is presumed to have resulted in significant prejudice;
- the respondent can attempt to rebut the presumption of significant prejudice;
- however, in the end, the decision whether to dismiss for delay remains within the Court's discretion.

3. Farrington AJ's Decision under Rule 4.31

[48] Farrington AJ dismissed the Defendant's application under Rule 4.31 because he concluded that the Defendant had done everything in its power not to engage on the merits of the case. He relied on the fact that no steps had been taken under the Litigation Plan ordered by Mason AJ on February 13, 2024. The first step in that court-ordered Litigation Plan mandated the Defendant to complete questioning of the Plaintiff no later than May 15, 2024. Mattis AJ granted an Order on March 6, 2025, in which the parties had agreed to extend the deadlines in the Litigation Plan. That Order changed the mandatory date for the Defendant's questioning to "no later than May 30, 2025." Despite those mandatory directions, the Defendant has not questioned the Plaintiff.

[49] Farrington AJ asked the Defendant's counsel during oral argument on January 13, 2026 why the Defendant had not completed the steps it had been ordered to take under the Litigation Plan. Counsel explained that the Defendant had been willing to conduct the questioning, but that if it was successful it its dismissal application, it would seek solicitor-and-client reimbursement for the costs of the questioning. Farrington AJ concluded that the Defendant ignored the mandatory deadlines in the Litigation Plan and attempted to impose conditions on its compliance with Mason AJ's and Mattis AJ's orders. He concluded that this alone was sufficient to deny the Defendant's Rule 4.31 application, because the "ball had been in the Defendant's court" for a significant period of time to move the action forward, and it had refused to engage.

4. Grounds of Appeal / the Parties' Positions on Rule 4.31

[50] The Defendant argues that Farrington AJ erred because the Plaintiff caused inordinate and inexcusable delay, giving rise to the presumption of significant prejudice to the Defendant. The Plaintiff has failed to rebut this presumption.

[51] The Plaintiff points to the procedural history of this action and says that while there was delay, it was not inordinate. It was also excusable because the Defendant materially contributed to it. In any event, the Defendant has not provided any evidence that it has suffered prejudice as a result of delay.

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5. Analysis and Decision on Rule 4.31

a. Has There Been Inordinate Delay?

[52] Delay is "inordinate" if the differential between the norm and the actual progress in the subject action is "so large as to be unreasonable or unjustifiable": ***Humphreys*** at para 120. The relevant time period is from the commencement of the action to the date on which the delay application was filed: ***Condominium Corporation 052 0580 (o/a The Tradition at Southbrook) v Carrington Holdings Ltd***, 2022 ABKB 623 at para 112.

[53] The Plaintiff commenced this action on August 4, 2016. The Defendant filed its dismissal application on February 12, 2024. Therefore, the period of delay was seven years and six months.

[54] I agree with the Defendant that this is a relatively simple and straightforward lawsuit, with only a small number of discrete disputed issues.

[55] During the relevant 7.5 year time period, the Plaintiff had conducted its questioning (through interrogatories) and filed its expert report. Other than completing a mandatory alternative dispute resolution process, the Plaintiff was ready for trial. It had proposed, and then filed an application to obtain court approval of, a Litigation Plan. The Litigation Plan would see the parties complete all remaining steps to have the matter ready for trial by December 31, 2024. As I have stated above, that Litigation Plan was reasonably ambitious, but not unrealistic.

[56] The delay in advancing the action between August 4, 2016 and February 12, 2024 was more than "trivial or minor" (***Humphreys*** at para 168). I therefore conclude that it was inordinate, although only by a small degree.

b. Was the Delay Inexcusable?

[57] As noted by Mandziuk J in ***Carrington*** (at para 133, citations omitted):

> If inordinate delay has been established, the Court must consider whether the "nonmoving party [has] provided an explanation for the delay that justifies its dilatory prosecution of its action": .... If no credible excuse is given for the inordinate delay, the natural inference is that the inordinate delay is inexcusable ...

[58] The Plaintiff suggests two explanations for the delay in advancing this case: the fact that his original lawyer Mr. Hope died in October 2022; and the almost total lack of activity by the Defendant.

[59] I agree that Mr. Hope's passing reasonably explains some delay in the Plaintiff advancing the action. It was an unfortunate event that was completely outside Mr. Galloway's control. Mr. Hope had been running the file for about five years and Ms. Hope had to get up to speed on the matter, which would have taken some time.

[60] With respect to the argument that the Defendant contributed to the delay, the law is clear that defendants, as well as plaintiffs, have an obligation to advance civil actions. The Court of Appeal in ***Transamerica*** (at paras 27 – 31) discussed the issue of defence delay extensively, holding that:

- the plaintiff has the primary obligation in moving an action forward, and the *Rules* give the plaintiff many tools to ensure that happens;

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- 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.

[61] I agree with the Plaintiff that the Defendant unreasonably contributed to delay in this case, in a number of ways.

[62] In May 2021, when Mr. Morrison asked Mr. Hope to resend the Plaintiff's settlement offer, he said that he would review it and seek instructions. He never got back to Mr. Hope. In January 2022 when Ms. Hope advised him that she was taking over the file, Mr. Morrison advised her that he would get back to her as soon as possible to get the file moving. There is no record that he ever contacted her again prior to the lawyers' correspondence about the Litigation Plan in late 2023.

[63] The Defendant's representations, through its lawyer, that it would reply to the settlement offer and also reply more generally to get the matter moving, were followed by silence. The Plaintiff waited for responses and then followed up when no responses were forthcoming. Ultimately, it was the Plaintiff's obligation to advance its action, even in the face of the Defendant's silence. And he ultimately did so, as I have explained above. However, the Defendant's repeated statements that it would engage and reply, and then its failure to do so, undoubtedly contributed to the overall delay.

[64] The Defendant also took no steps whatsoever to question the Plaintiff. It received the Plaintiff's Affidavit of Records on November 1, 2016. It took zero steps in the following seven

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years and three months, to seek to question the Plaintiff, or to formally waive its right to question. In fact, when Farrington AJ asked the Defendant's counsel in oral argument on January 13, 2026 whether the Defendant was waiving its right to question, Mr. Morrison confirmed that it was not.

[65] Again, the Plaintiff had the primary obligation to advance this lawsuit. He did so. He produced additional records when he realized they were relevant and material and required by his expert. He delivered an expert report. He essentially took all the unilateral steps he could to be ready for trial. After doing all these things, when it must have become clear that the Defendant would do nothing without being compelled to, the Plaintiff proposed a Litigation Plan. The Defendant's lawyer then followed the same pattern observed previously: apologizing for delay in responding, suggesting that he would reply substantively within a reasonable time, but then not doing so. This occurred from late November 2023 right up to the eve of the Plaintiff's application to approve the Litigation Plan, on February 12, 2024.

[66] Considering all of these delays by the Defendant together, I am satisfied that their combined effect was to make the inordinate delay in this case excusable.

c. Has the Defendant Suffered Significant Prejudice?

[67] Because I have found that the delay in this case was excusable, the Defendant has the onus of proving that it has suffered significant prejudice as a result of the delay. It has tendered no evidence at all on the issue of prejudice, so it has failed to discharge its onus.

[68] If I am wrong about this and if the presumption of significant prejudice had arisen in this case, I would have concluded that the Plaintiff successfully rebutted it. This is largely a documents case and the Defendant has not suffered any significant prejudice as a result of the delay.

d. Conclusion on Rule 4.31

[69] For the reasons stated above, I dismiss the Defendant's appeal of Farrington AJ's decision under Rule 4.31.

IV. Conclusion

[70] The appeal is dismissed. If the parties are unable to agree on the costs of the appeal within 45 days, they can submit written submissions on that issue to me. Those submissions must not exceed five pages, excluding attachments.

Heard on October 30, 2026.
Dated at the City of Calgary, Alberta this 17th day of November, 2026.

C.D. Simard
J.C.K.B.A.

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Appearances:

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Coralie Mohr
for the Respondent/Plaintiff Stephen Galloway

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