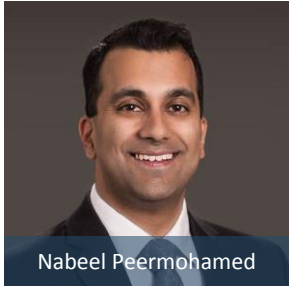




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## ABCA OUTLINES TEST FOR LONG DELAY

### UNDER RULE 4.31



Nabeel Peermohamed

In *Humphreys v. Tebilcock*, 2017 ABCA 116, the Court of Appeal allowed the applications dismissing the Plaintiffs' claims for long delay, reversing the chambers decision of the justice below. In *Humphreys*, the Plaintiffs entered into a contract with the Defendants for food management services. They alleged the Defendants breached that contract and commenced an action in 2006. The Defendants filed their defences between 2007 and 2009. Documents were exchanged between 2007 and 2010. The Plaintiffs examined the various Defendants between 2008 and 2012.

The action was under case management in 2011. In March 2015, the case management judge ordered Questioning to be completed by September 2015. Unfortunately, while the Plaintiffs continued to examine the Defendants in May and July of 2015, they did not produce their representatives for Questioning by the September 2015 deadline.

In March 2016, the Plaintiffs changed their lawyer. They then filed an application to vary the timelines in the case management order. Several Defendants brought applications to have the claims dismissed for long delay under Rule 4.31. The chambers judge dismissed the applications because the Defendants had not established sufficient delay or prejudice.

The Court of Appeal found the chambers judge had made four errors:

1. He failed to address whether delay was a 'feature' of the litigation;
2. He failed to ask the right questions regarding the delay (i.e. how much delay was there, was it inordinate, was there an explanation, and was it excusable);
3. He did not address the Defendants' alleged prejudice; and
4. He failed to consider the record established clear delay that was inordinate, inexcusable, and the cause of significant prejudice.

In the beginning of its decision, the Court of Appeal indicated that no previous court had turned its mind to the definition of "delay" or "significant prejudice" in the context of Rule 4.31 which provides:

(1) *If delay occurs in an action, on application of 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 (emphasis added).*



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The Court of Appeal found “delay” depended on the allegation and the nature of the action (i.e. whether it was complex). The Court also found significant prejudice was broad enough to capture litigation and nonlitigation prejudice. Litigation prejudice resulted from the death or unavailability of witnesses, or the loss of memory or documents due to the passage of time. Nonlitigation prejudice included the implications of a law suit on a defendant’s livelihood.

Accordingly, the Court of Appeal developed a six-part test for addressing applications under Rule 4.31:

1. Has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
2. Is the shortfall or differential of such magnitude to qualify as inordinate?
3. If the delay is inordinate, has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
4. If the delay is inordinate and inexcusable, has this delay impaired or sufficiently impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party’s interest in having its action adjudged by the court? Has the moving party demonstrated *significant prejudice*?
5. If the moving party relies on the presumption of significant prejudice created by Rule 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?
6. If the moving party has met the criteria for granting relief under rule 4.31, is there a compelling reason not to dismiss the nonmoving party’s action?

The Court found there had been unreasonable delay by the Plaintiffs, that the delay was inordinate, and that while an explanation was offered, it did not justify the delay such that the delay was inexcusable. The Court also found the Defendants had suffered significant prejudice. Several witnesses had died, could not be found, or had suffered significant lapses in their memories due to old age. Several documents were also unavailable. Given the allegations of fraud, the Defendants’ business reputation had been severely harmed for over ten years.

Rule 4.31(2) provides a presumption that if there is inordinate or inexcusable delay, the delay is presumed to have resulted in significant prejudice. Notwithstanding the Court found there was delay, the Plaintiffs offered no evidence to rebut the presumption. Finally, the Court found no reason, and certainly no compelling reason, to not grant the relief requested by the Defendants. The Court dismissed the action for long delay under Rule 4.31.

*Humphreys* is important because of the newly compiled six-part test for assessing applications made under Rule 4.31 and the ruling from the Court of Appeal that the courts below need to follow the analysis on a step-by-step basis to avoid their decisions being overturned on appeal.

If you have any questions with respect to this bulletin, please contact the writer, Nabeel Peermohamed, by [email](#) or by phone at: 403-260-5301.

**CALGARY**

7th Floor, 396 – 11th Avenue  
S.W.  
Calgary, AB T2R 0C5  
T: (403) 232-8300  
F: (403) 232-8408

**EDMONTON**

2200 Commerce Place  
10155 – 102 Street  
Edmonton, AB T5J 4G8  
T: (780) 497-4800  
F: (780) 424-3254

Toll Free: 1-800-661-9069

[www.brownleelaw.com](http://www.brownleelaw.com)