In the Court of Appeal of Alberta

Citation: Municipal District of Foothills No. 31 v Alston, 2023 ABCA 46

Date: 20230207
Docket: 2101-0237AC
Registry: Calgary

Between:

Ellen Alston, Leslie Vecsey and E.L. Alston & Associates Ltd.

Respondents
(Plaintiffs)

- and -

The Municipal District of Foothills No. 31

Appellant
(Defendant)

The Court:

The Honourable Justice Patricia Rowbotham
The Honourable Justice Thomas W. Wakeling
The Honourable Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice M.H. Hollins
Dated the 28th day of July, 2021
Filed on the 9th day of December, 2021
(2021 ABQB 592, Docket: 1001-10269)

Memorandum of Judgment

The Court:

[1] The Municipal District of Foothills No. 31 appeals Justice Hollins' decision[1] dismissing its application under rule 4.31[2] to dismiss for delay the claim that Ellen Alston, Leslie Vecsey and E.L. Alston & Associates Ltd. commenced against it in 2010.

[2] We allow the appeal and dismiss the claim.

[3] Ms. Alston and Mr. Vecsey's primary position in opposing this appeal is that the Court ought to make allowances for their status as self-represented litigants,[3] as they have been since the fall 2016.[4] They argued that they have not failed to advance the action to a point on the litigation spectrum that a comparator *self-represented* litigant would have attained. But this is not the law. As this Court has said time and again, all litigants – including those who represent themselves –

[1] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592.

[2] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 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").

[3] Respondents' Factum ¶ 1 ("The Plaintiffs (Respondents), Ellen Alston (Alston) and Leslie Vecsey (Vecsey) are self-represented litigants and not lawyers") & ¶ 36 ("The Respondents are self-representatives not a law [*sic*] with unlimited resources. The Respondents respectfully call attention to *Pintea v. Johns* ... . This case was unanimous by the Supreme Court of Canada to strike down a ruling by a Court of Appeal of Alberta Panel. The decision was in favor of the ... self-represented litigant, who had limited knowledge of the justice system. In this decision, the Supreme Court of Canada endorsed the *Principles on Self-Represented Litigants and Accused Persons* published by the Canadian Judicial Council in 2006. That is the Respondents' situation"). During oral submissions, Ms. Alston reinforced this position as follows: "First and most importantly, we're self-representatives. Case closed. We're trying to get educated along the way. ... [T]his is a challenge. We're not a law firm ... [W]e had to become self-representatives in the fall of 2016 and I do not apologize for the learning curve and trying to read up on the files that came from our lawyer".

[4] Respondents' Factum ¶ 34(c).

must conduct themselves in accordance with the *Alberta Rules of Court*.[5] Ms. Alston and Mr. Vecsey know this – they have been told so more than once.[6]

[4] Resources are available to assist self-represented litigants navigate the courts,[7] but they must make an effort.

[5] This Court, in *Humphreys v. Trebilcock*,[8] opined that '[l]itigation delay harms those who are directly and indirectly involved in an action tainted by inaction, the civil justice system as a whole and the greater community" and warned "[c]laimants who fail to proceed with appropriate expedition ... [that t]hey may lose their right to prosecute their actions".

[6] Rule 4.31 of the *Alberta Rules of Court*[9] contains one of the norms used to identify actions that "fail to proceed with appropriate expedition".

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[5] *Ouellette v. Law Society of Alberta*, 2021 ABCA 99, ¶ 99 (chambers) per Wakeling, J.A. ("The fact that Mr. Ouellette is a self-represented litigant does not assist him. Rule 1.1(2) of the *Alberta Rules of Court* states that '[t]hese rules ... govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer'") & *Skrobar v. Oiring*, 2021 ABCA 12, ¶ 10 (chambers) per Antonio, J.A. ("While I empathize with the difficulty the applicant faces in trying to navigate the legal system on his own, I do not agree that it would be just to offer him a second chance to make his case. Justice cannot be found by considering the interests of one party in isolation. The parties scheduled a hearing with the expectation that these issues would be decided. It would not be just to put the respondent to the expense of running the same application again. When the court allocates time for a particular purpose, it is entitled to expect that the parties will use that time to accomplish that purpose. The unfortunate fact is that the courts have limited time. If I give the applicant a second chance to make his case in the absence of any legal reason to do so, I will be condemning other litigants to wait longer for their first chance").

[6] Justice Hollins has also addressed the reliance of Ms. Alston and Mr. Vecsey on their self-represented status in another application. *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 951, ¶ 29 ("While I appreciate very well the fact that the Plaintiffs are self-represented – which is why I hoped to avoid making such an Order back in 2017 – they have demonstrated a complete and purposeful disregard for the directions of this Court"). As did Justice Eamon in an appeal of an order dismissing another action they commenced for delay. *Alston v. Haywood Securities Inc.*, 2020 ABQB 107, ¶ 114 ("Ms Alston submits she is a self-represented litigant who is not familiar with litigation and was unaware of Rules 4.31 and 4.33. That is not an answer to the delay in this case. She was represented by counsel for significant periods in which the Plaintiffs delayed. When she became self-represented, she often represented to defence counsel that she was taking legal advice from lawyers who were not on the record as counsel in the action. She has not withdrawn these representations, so they are an admission against her interests on this aspect of her explanations. Further, the Rules apply to all parties").

[7] *Dousselaere v. Baba*, 2019 ABCA 474, ¶ 14 ("Self -represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case ... . In Alberta, online, in person and written materials are available to assist self-represented litigants in family disputes ... . Duty counsel projects are also available in many judicial centers and the volunteer lawyers make their presence known. Duty counsel was in fact present in chambers on the date of the applications and had offered to assist any self-represented litigants. It is always a good idea for self-represented litigants to avail themselves of their assistance").

[8] 2017 ABCA 116, ¶¶ 90 & 96; [2017] 7 W.W.R. 343, 368 & 371, leave to appeal ref'd, [2017] S.C.C.A. No. 228.

[9] Alta. Reg. 124/2010.

[7] *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd.*[10] reminded litigants that the goal of rule 4.31 "is to determine whether the delay is inordinate, inexcusable, or otherwise ... [and] has caused significant prejudice to the defendant. ... 'Significant prejudice' remains the ultimate consideration."

[8] We are satisfied that Ms. Alston and Mr. Vecsey have prosecuted their action in such a dilatory fashion[11] that it can only be said that "delay" has occurred, that the delay is "inordinate and inexcusable" and that this "inordinate and inexcusable" delay has resulted in significant prejudice to The Municipal District of Foothills No. 31. No other conclusion is possible.

[9] Ms. Alston indicated at the hearing that she and Mr. Vecsey did not know about rule 4.31. This admission does not assist the respondents. Self-represented litigants are expected to familiarize themselves with the rules governing proceedings before the court from which they seek assistance.[12]

[10] Ms. Alston and Mr. Vecsey also spoke at length and in some detail about the merits of their position. This did not assist them either. It is irrelevant to whether their claim ought to be dismissed for delay in its prosecution.

[11] In July 2010, Ms. Alston and Mr. Vecsey sued the municipality for $8 million general and punitive damages, plus special damages, for alleged contamination of the groundwater on their property from a nearby riding club.[13] They say that the municipality approved construction of housing and a roadway without providing for water drainage, with the result that its land and water supply were polluted by horse manure.[14]

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[10] 2019 ABCA 276, ¶ 21; 92 Alta. L.R. 6th 41, 49.

[11] L. Abrams & K. McGuinness, Canadian Civil Procedure Law 637 (2d ed. 2010) ("Courts have dismissed for delay where the plaintiff has delayed for five, six or seven years") & *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 27 ("The parties have been in litigation for 11 years already and will not likely secure trial dates until 2023, roughly 13 years from the filing of the claim. The claim has not changed in its nature or its scope in that time. There is nothing particular odd or unmanageable about this type of claim that would make 11 years of litigation to get to this point 'reasonable'. Many negligence actions of this type have undoubtedly been commenced and completed within this same time frame").

[12] *Kuzik v. Hagel*, 2021 ABCA 241, ¶ 14 (chambers) per Schutz, J.A. ("Self-represented litigants are required to know the rules under which litigation is conducted ... . The *Alberta Rules of Court* are not new, novel, obscure or doubtful in Alberta").

[13] Statement of Claim filed July 13, 2010, at 8. Appeal Record 13.

[14] Id. ¶¶ 8-10 ("The Defendant permitted development and construction of housing on, at or near the natural flow of water without any or adequate provision for drainage. In addition, the Defendant approved construction of the roadway in or about 1991. The roadway was built across the natural flow of water drainage and was built without any or adequate provision for the drainage of the natural flow of water. The result of the foregoing is that Alston's land, water supply and aquifer are polluted and Alston's land has become a putrid, foul smelling slough, as the water collected

[12] Pleadings closed in August 2010.[15]

[13] By March 2014, the parties exchanged affidavits of records, questioned party representatives, exchanged undertaking responses and questioned on undertaking responses.[16]

[14] Between August 2013 and 2015, they were in discussions related to the municipality accessing the property to test the water well.[17] In 2014, the municipality applied for and later obtained access.[18] Ms. Alston and Mr. Vecsey initially appealed that order but abandoned the appeal. [19] Before the municipality could complete the testing, the mortgagee – Manulife – foreclosed and poured sodium hypochlorite down the well.[20]

[15] Between 2016 and mid-2017, the parties continued their efforts to complete document production and undertaking responses.[21] Ms. Alston and Mr. Vecsey filed their expert reports.[22]

[16] In 2017, Ms. Alston and Mr. Vecsey, now self-represented, applied to set the matter down for trial. Justice Brooker sent it to case management.[23] Justice Hollins undertook this task. At the first case management conference in 2017, the respondents resisted scheduling pre-trial matters.

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south of the roadway mixes with horse feces during periods of run off over and from the Riding Club property and escapes onto Alston's land"). Appeal Record 7.

[15] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 13. See Amended Statement of Defence filed August 11, 2010. Appeal Record 15.

[16] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 13.

[17] Id. ¶¶ 14-16.

[18] Id. ¶ 14 & Order of Master Robertson filed May 7, 2015. Affidavit of ... Harry Riva-Cambrin sworn on May 12, 2021 and filed May 13, 2021, exhibit H. Extracts of Key Evidence of the Appellant 120.

[19] *Alston v. Municipal District of Foothills No. 31*, 2021 ABQB 592, ¶ 14.

[20] Id. ¶ 17 & Letter from Hugh Ham to David Pick dated July 3, 2015, Affidavit of ... Harry Riva-Cambrin sworn on May 12, 2021 and filed May 13, 2021, exhibit Q. Extracts of Key Evidence of the Appellant 166.

[21] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 18.

[22] Respondents' Factum ¶ 9 ("On July 27, 2017, the Respondents filed four expert reports, from: i) Dr. David Manz Ph.D., P.Eng., P.Ag.; ii) Kevin McGeough, MBA, PMP; iii) Shawn Halter, BSC, MSC, P.Ag.; and iv) Chris Bolton B.A. (Hons.), LL.B. All four expert reports confirmed the contamination of the Property, with the source being the land owned by the Appellant"). It appears that the municipality had been in possession of these reports as of October 2014. Affidavit of ... Harry Riva-Cambrin Sworn on May 12, 2021 and filed May 13, 2021, ¶ 24 ("I am advised by Brownlee and do believe that Brownlee received four expert reports from the Plaintiffs on or about October 10, 2014"). Extract of Key Evidence of the Appellant 48. The plaintiffs also say they provided the municipality "five years of water tests from Alberta Health, Alberta Environment and five private laboratories" that "confirmed the contamination and the source" starting in 2009. Respondents' Factum ¶ 8.

[23] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 19.

They did not attend the second conference in 2018.[24] They informed Justice Hollins that they would no longer participate in case management or communicate with the Court.[25]

[17] Ms. Alston and Mr. Vecsey did nothing until May 2020 when they filed a summary judgment motion.[26] In July 2020 they also moved forward their earlier application to hold the municipal district in contempt for breaching the order granting access for testing, procedural issues in respect of which made its way to this court.[27] The municipality's own contempt motion was successful.[28]

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[24] Id. ¶¶ 20-21 ("Our first Case Management Conference was on October 4, 2017. It was apparent to me ... that the matter was not ready for trial and a number of things needed to be dealt with in order to secure trial dates. Among other things, the Defendant had not yet provided its expert reports or committed to proceeding to trial without its own expert evidence. For their part, the Plaintiffs had filed contempt motion in July of 2017 relating to the actions of Manulife. Following this initial Case Management Conference, the Plaintiffs and Ms. Alston in particular, resisted attempts to reconvene to actually deal with scheduling of these outstanding pre-trial matters. In April of 2018, a second Case Management Conference was held, but the Plaintiffs did not attend. I explained that the Plaintiffs were not obligated to advance their Action, but if they wished to do so, they would need to schedule any further court appearances through the Case Management process and my office. They opted to do nothing until May of 2020, when the Plaintiffs filed a summary judgment motion and renewed their push to have their contempt motion heard").

[25] Letter dated May 9, 2018, from Ms. Alston and Mr. Vecsey to Justice Hollins ("Justice Hollins, there is something very wrong. We are in the process of reviewing the case management process to date and will have a letter to you by early next week. In the interim we are writing to put on record that our health is now an issue. The case management hearing of October 4, 2018 severely affected our health and ability to function fully on a day to day basis. The recent events surrounding the scheduling and proceeding with the case management hearing of April 3, 2018, that we clearly had cancelled, is a continuation of inappropriate conduct, abusive and detrimental to our health. We have clinically compromised immune systems caused by living on a polluted property for years. Our recovery has been and is now being compromised due to stress from unprofessional and unconscionable conduct by the defendants, their counsel and now this court. At the age of 64 and 71, it is to stop now. Our medical team has advised that we take action to protect our health. We are in the process of doing so. Please do not contact us again. Your communications are not logical. We are no longer willing to be party to these actions"). Affidavit of ... Harry Riva-Cambrin Sworn on May 12, 2021 and filed May 13, 2021, exhibit AA. Extract of Key Evidence of the Appellant 202 & Letter dated May 11, 2018 from Ms. Alston and Mr. Vecsey to Justice Hollins ("We are in receipt of your letter dated April 25, 2018 and your follow up communications. You have requested that we commit to a date for a case management hearing. ... Given all of the disturbing actions to date surrounding the case management process we are no longer willing to communicate with you on a direct basis. We have taken the matter to the Chief Justice of Alberta for a full Judicial review under the Judiciary Act"). Affidavit of Ellen L. Alston and Leslie Vecsey sworn May 8, 2020 and filed May 15, 2020, Exhibit 165. 2 Extract of Key Evidence of the Respondents 205.

[26] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶¶ 21-22 & Summary Judgment Application filed May 15, 2020, Affidavit of ... Harry Riva-Cambrin sworn on May 12, 2021 and filed May 13, 2021, exhibit BB. Extracts of Key Evidence of the Appellant 215.

[27] *Alston v. Mun. Dist. of Foothills No. 31*, 2022 ABCA 231.

[28] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 951, ¶¶ 38-41, aff'd 2022 ABCA 408 ("The Plaintiffs have repeatedly allowed the strength of their conviction regarding their claim to obstruct their path to trial. That is unfortunate. However, it is time that they commit to respect for the processes of this court *or risk losing their right of action entirely*. In addition to contacting people they knew they were not allowed to contact, the language that Ms.

[18] On May 13, 2021, Foothills No. 31[29] applied to dismiss the claim for long delay under rule 4.31.

[19] Justice Hollins found that the overall delay of eleven years is inordinate,[30] but excusable. She declined to fault Ms. Alston and Mr. Vecsey for resisting the motion to access their property for water testing.[31] She noted that they generally "pushed the matter along, not with rigour, but with relative consistency" prior to case management,[32] and lack of progress during case management is partly attributed to them but COVID also slowed down civil actions.[33]

[20] Justice Hollins also found that Foothills No. 31 did not suffer significant prejudice – the sheer passage of time is already accounted for in the delay analysis and not a stand-alone basis for prejudice,[34] and being unable to test the water has been a factor since 2015 when the plaintiffs' mortgagee poured a chemical down the well, which was not the fault of Ms. Alston and Mr. Vecsey.[35]

Alston has used in her communications with Messrs. Pick and Wilson is unacceptable. She has also been cautioned about this before, to no effect. The Plaintiffs' Affidavit for these motions, like virtually all correspondence from the Plaintiffs, again accuses Mr. Pick of 'criminal actions', including fraud, destruction of evidence and criminal negligence. The October 13, 2021 email to the partners at Brownlee LLP ... advised them of an RCMP investigation into Brownlee LLP and the Law Society of Alberta. Most egregiously, the Plaintiffs demanded that Brownlee remove Messrs. Pick and Wilson from the file and abandon their appeal of one of my interlocutory rulings in favour of the Plaintiffs or risk 'further embarrassment'. This outrageous behaviour must stop. If the Plaintiffs were represented by counsel and that lawyer, even without a court-ordered prohibition, continued to contact opposing counsel's partners or clients or to speak to and about counsel the way that Ms. Alston has, that lawyer would no doubt be the subject of the disciplinary investigation, if not sanction, by the Law Society of Alberta") (italics added).

[29] Application filed May 13, 2021 ("the Municipal District of Foothills No. 31 ... seeks ... An Order dismissing the Plaintiff's Statement of Claim for long delay pursuant to Rule 4.31 of the *Alberta Rules of Court*"). Appeal Record 26. The application refers to "long delay" – governed by rule 4.33 – but relies on rule 4.31. See *Alston v. Municipal District of Foothills No. 31*, 2021 ABQB 592, ¶ 12 ("The Defendant has not applied under that Rule [4.33(2)] because, despite the longevity of this lawsuit, there is no 3-year period in which nothing has happened").

[30] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 27 ("I agree with the Defendant that the overall delay in this action is inordinate. The parties have been in litigation for 11 years already and will not likely secure trial dates until 2023, roughly 13 years from the filing of the claim. The claim has not changed in its nature or its scope in that time. There is nothing particular odd or unmanageable about this type of claim that would make 11 years of litigation to get to this point 'reasonable'. Many negligence actions of this type have undoubtedly been commenced and completed within this same time frame").

[31] Id. ¶ 29.

[32] Id. ¶ 30.

[33] Id. ¶ 31.

[34] Id. ¶¶ 33-34.

[35] Id. ¶¶ 34-35.

[21] Foothills No. 31 argues that Justice Hollins' determinations that the delay was excusable and that it did not cause it significant prejudice were clearly wrong.

[22] It submits that Justice Hollins should have found that the respondents' resistance to its motion to access the property to test the water, that caused the action to stand still from August 2013 to June 2015, was meritless and based on suspicion and distrust; the steps that the respondents took in the action after this and before case management – the application to set trial dates in 2017 and the summary judgment application in 2020 – were premature and did not advance the action; and the COVID pandemic started only in 2020, ten years after the plaintiffs commenced their action.

[23] Foothills No. 31 adds that it suffered litigation prejudice and nonlitigation prejudice. It says that Justice Hollins was wrong not to place some fault on the respondents for its inability to test the well before Manulife intervened, as the respondents allowed their property to become subject to foreclosure while their action was underway. It also points to fading witness memories, as the claim relates to a roadway the municipal district approved in 1991. For nonlitigation prejudice, it submits that the serious and scathing allegations that attracted media attention damage its reputation.

[24] We wholeheartedly agree with Justice Hollins that the delay of eleven years since Ms. Alston and Mr. Vecsey filed their claim in 2010 to the date the application before her was heard was inordinate.[36]

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[36] Id. ¶ 27 ("I agree with the Defendant that the overall delay in this action is inordinate. The parties have been in litigation for 11 years already and will not likely secure trial dates until 2023, roughly 13 years from the filing of the claim. The claim has not changed in its nature or its scope in that time. There is nothing particular odd or unmanageable about this type of claim that would make 11 years of litigation to get to this point 'reasonable'. Many negligence actions of this type have undoubtedly been commenced and completed within this same time frame") & ¶ 12 ("As mentioned, this Action was commenced in 2010, 11 years ago. While there is no hard and fast global time limit for getting civil actions to trial, that is undeniably a long time").

[25] But we cannot agree with Justice Hollins that the eleven-year delay is excusable[37] or that it did not significantly prejudice the municipality.[38] This is not a conclusion that could be made on this record.

[26] With regard to the delay between 2013 and 2015, we are unable to accept that some of the blame for this rests with the municipality. We reject Justice Hollins' suggestion that Foothills No. 31 could have applied for access at the outset of the litigation.[39] A litigant cannot be faulted for failing to bring an application that it probably thought would be unnecessary. That would be a foolish use of its resources and introduce delays in direct contravention of rule 1.2(2)(b) of the *Alberta Rules of Court* – a party must "facilitate the quickest means of resolving a claim at the least expense".

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[37] We note that the application judge found this to be the case for reasons of her own making, when it was the plaintiffs' obligation to provide them. *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 28 ("although the delay is inordinate, I find it excusable for a number of reasons, albeit none of those cited by the Plaintiffs") & *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276, ¶ 43; 92 Alta. L.R. 6th 41, 56 ("The initial burden of proving prejudice is on the defendant who is applying to strike out the action. However, if the defendant can establish 'inordinate and inexcusable' delay, then significant prejudice is presumed: R. 4.31(2). In that event, however, the presumption is still rebuttable ... . It is still open to the plaintiff to show that, despite the presumption, there is insufficient prejudice to warrant striking out the action").

[38] *Royal Bank of Canada v. Levy*, 2020 ABCA 338, ¶¶ 11-12 ("Whether an action should be dismissed for delay engages a certain element of discretion. Unless the exercise of that discretion is based on an error in principle, or is clearly unreasonable, deference is warranted on appeal ... . A case management judge, who would have a detailed knowledge of the progress of the action, is well positioned to measure the reasons for and effects of delay. There is no fixed methodology or line of analysis that must be followed in delay applications ... . The thoroughness of the analysis, and the level of detail in the reasons, seldom generate stand-alone reviewable errors. Whether there has been delay in the prosecution of an action, whether the delay is 'inordinate and inexcusable', and whether there has been 'significant prejudice' are largely questions of fact. The decision of a chambers judge on such factual issues, and the ultimate question of whether the action should be dismissed for delay, will not be disturbed on appeal unless it discloses palpable and overriding error"); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 157; [2017] 7 W.W.R. 343, 393, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("An appeal court uses the correctness standard to evaluate an original court's disposition of a legal question and the plainly wrong standard – palpable and overriding error – to evaluate fact findings and the application of legal standards to facts"); *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276, ¶ 41; 92 Alta. L.R. 6th 41, 56 ("Whether the plaintiff has provided a satisfactory explanation or 'excuse' for any delay is largely a question of fact. The conclusion of the trial court on justification for any delay is entitled to deference, unless it is based on an error of law or principle"); *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 11; 400 D.L.R. 4th 512, 518 ("The interpretation of the Rules of Court raises questions of law which are reviewed for correctness. The application of the Rules to a fixed set of facts is in most instances a mixed question of fact and law, to which some deference is owed. Whether an action has been 'significantly advanced' involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the Rules of Court. The chambers judge's conclusion on that issue is entitled to deference") & *Alderson v. Wawanesa Life Ins. Co.*, 2020 ABCA 243, ¶ 11 ("The same principles [set out in *Ro-dar* at ¶ 11] apply to a chambers judge's decision on an application to dismiss an action pursuant to Rule 4.31").

[39] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 29.

[27] Similarly amiss, in relation to delay after 2017, is Justice Hollins' focus on the fact that Ms. Alston and Mr. Vecsey took steps in the action – particularly their applications to set trial dates and for summary judgment – without closer scrutiny of the effect those steps had on moving the litigation forward.[40] The mere taking of steps is no guard against a finding of inexcusable delay if those steps accomplish little to advance the proceeding. The parties – especially plaintiffs – must do more than participate.[41] Neither applying to schedule a trial[42] nor for summary judgment, by themselves, necessarily advance an action.

[28] In this case, it is not clear to us how either application "arguably" advanced the action.[43]

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[40] Id. ¶¶ 12 & 30 ("Our Rules provide that a plaintiff must take a material step every 3 years at a minimum or risk dismissal of her claim; Rule 4.33(2). The Defendant has not applied under that Rule because, despite the longevity of this lawsuit, there is no 3-year period in which nothing has happened. .... In general, the Plaintiffs have pushed the matter along, not with rigour, but with relative consistency, at least until they landed in Case Management. The problem for the Defendant on this motion is that the Plaintiffs have been taking intermittent steps in the Action, including bringing their motion to set trial dates and alternatively, for summary judgment. While some of their motions have not advanced the action, some arguably have").

[41] *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 1.2(1) ("The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way") & 1.2(3) ("To achieve the purpose and intention of these rules the parties must, jointly and individually during an action, (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense, (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court, (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and (d) when using publicly funded Court resources, use them effectively"); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 96; [2017] 7 W.W.R. 343, 371, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("Claimants who fail to proceed with appropriate expedition may be subject to harsh consequences. They may lose their right to prosecute their actions"); *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276, ¶ 27; 92 Alta. L.R. 6th 41, 51 ("It is correct to say that the plaintiff has the primary obligation in moving the litigation forward. The *Rules of Court* give the plaintiff many tools to ensure that happens. It does not follow, however, that a defendant has no obligation with respect to the pace of litigation. ... There is a significant difference between a defendant 'doing nothing' in the face of inactivity by the plaintiff, and the defendant failing to discharge its procedural obligations").

[42] *Delver v. Gladue*, 2019 ABCA 54, ¶ 15 ("We reach a similar conclusion with respect to the unsuccessful proposal to schedule a trial of an issue to determine whether the vehicle was driven with consent. This court has found that unsuccessful steps taken to schedule a JDR did not significantly advance an action ... . Likewise, the unsuccessful proposal to schedule a trial of an issue did not advance this action").

[43] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 30.

[29] That Ms. Alston and Mr. Vecsey's 2017 application to set trial dates "indicated a genuine intention ... to pursue their claim to trial" is of limited assistance when "the matter was not ready for trial" and, after the matter proceeded to case management instead, the plaintiffs "resisted attempts to reconvene to actually deal with scheduling of these outstanding pre-trial matters"[44] and then failed to attend a subsequent case conference.[45] These are not the actions of litigants who are diligently pursuing their claim.[46]

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[44] Id. ¶¶ 19-20 ("In May of 2017, the Plaintiffs became self-represented parties and shortly thereafter, filed an application to set the matter for trial. The Justice hearing that application, Justice Brooker, sent the matter to Case Management. This filing, in my view, indicated a genuine intention by the Plaintiffs to pursue their claim to trial and to be responsible for doing so. Our first Case Management Conference was on October 4, 2017. It was apparent to me, as it had been to Brooker, J, that the matter was not ready for trial and a number of things needed to be dealt with in order to secure trial dates. Among other things, the Defendant had not yet provided its expert reports or committed to proceeding to trial without its own expert evidence. For their part, the Plaintiffs had filed contempt motion in July of 2017 relating to the actions of Manulife. Following this initial Case Management Conference, the Plaintiffs and Ms. Alston in particular, resisted attempts to reconvene to actually deal with scheduling of these outstanding pre-trial matters"). See also Factum of the Appellant, ¶ 29 ("The Respondents went silent between October 2017 and May 2020, aside from the Respondents' odd correspondences addressed to the Court, in which they stated their opposition to future Case Management Conferences").

[45] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 21 ("In April of 2018, a second Case Management Conference was held, but the Plaintiffs did not attend. I explained that the Plaintiffs were not obligated to advance their Action, but if they wished to do so, they would need to schedule any further court appearances through the Case Management process and my office").

[46] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 115; [2017] 7 W.W.R. 343, 377, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("'Delay is a relative concept'. It is the product of a comparison between the point on the litigation spectrum that the nonmoving party has advanced an action as of a certain time and that point a reasonable litigant acting in a reasonably diligent manner and taking into account the nature of the action and stipulated timelines in the rules of court would have reached in the same time frame. One measures progress in a specific action and compares it against the progress made by the comparator — the reasonable litigant advancing the same claim under comparable conditions"); *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276, ¶¶ 15-16; 92 Alta. L.R. 6th 41, 47-48 ("There are numerous decisions of this Court on the interpretation and application of the delay rules. The core source of the legal principles, however, remains in the *Rules of Court* themselves. While general principles have been established governing delay, each action is slightly different. The application of the rules to the particular facts will always engage an element of judicial discretion, reflected in the word 'may' found in R. 4.31(1). There are many different ways that a Master or chambers judge can analyze a delay application; there is no universal mandatory formula. For example, *Humphreys v. Trebilcock* ... proposed a six step analysis ... . This approach might be helpful in many cases, but it is not the only way to analyze delay"), ¶¶ 19-20; 92 Alta. L.R. 6th at 49 ("Parts of the test in *Humphreys v. Trebilcock* may be difficult to apply to particular cases. This is particularly true of the first step, whether 'the plaintiff has 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'. There is such a wide variety in the detail of particular claims, and in the procedural journeys that particular litigation may follow, so as to make this test untenably theoretical. At the end of the day, there is no scientific method of determining what 'point on the litigation spectrum' a reasonable litigant would have reached. Delay must always be a matter of degree") & ¶ 21; 92 Alta. L.R. 6th at 49 ("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

[30] And it is not clear what the current status[47] of the summary judgment application that Ms. Alston and Mr. Vecsey filed in 2020 is, beyond having been brought, let alone whether it accomplished anything to advance the action. In any event, at the time of the application before Justice Hollins, it had not yet been heard. It is, as a result, not possible to ascertain what its effect was on the action.[48]

[31] Finally, we have trouble understanding how the COVID-19 pandemic – it started in March 2020 – could provide an excuse for the lack of progress during case management,[49] particularly given the respondents' obstructive conduct, noted above. In any event, the pandemic commenced almost ten years after Ms. Alston and Mr. Vecsey filed their claim. And the pandemic did not present much of an obstacle for Ms. Alston and Mr. Vecsey in furthering their contempt application against Foothills No. 31 and their related appeal.[50]

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expectation of progress for the purpose of striking out an action for delay, regard must be had to all categories. Delay is not fatal just because the litigation has not progressed to the point that the 'fastest' or even the 'average' proceeding of that type would have reached. In order to be struck, the action must generally fall within the slowest examples of that type of 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") & *Arbeau v. Schulz*, 2019 ABCA 204, ¶ 23; 87 Alta. L.R. 6th 103, 111 ("The questions identified in *Humphreys*, while not a code that must be followed in a specific order in all cases, provide direction on the considerations to be taken into account on an application pursuant to rule 4.31 that can be adapted to the circumstances of a particular case").

[47] At the time of the delay application before Justice Hollins, it was scheduled for December 3, 2021. *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 22. It appears both this and the municipality's cross application were later set for March 15-16, 2022. *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 951, note 1 ("Currently, these parties have 2 days of hearings scheduled March 15-16, 2022. The Plaintiffs are applying for summary judgment and the Defendant is cross-applying for summary judgment. If the Plaintiffs fail to make the payments required by this Order, their motion will be stayed and will be rescheduled when and if those payments are made. The Defendant's motion may proceed if they wish").

[48] *Jacobs v. McElhanney Land Surveys Ltd.*, 2019 ABCA 220, ¶¶ 104-07 & 113; [2019] 12 W.W.R. 19, 57-58, leave to appeal ref'd, [2019] S.C.C.A. No. 436 per Wakeling & Feehan, JJ.A. ("It is difficult to conceive of a fact pattern in which an unheard summary judgment application could be characterised as a significant advance in an action. A summary judgment application usually is based on allegations that are contained in a statement of claim and legal principles that are expressly or implicitly embedded in a statement of claim. They present nothing new. A supporting affidavit generally documents a version of facts more or less reflective of factual allegations advanced in the statement of claim. It may provide some elaboration. The fact that the plaintiff has devoted resources to filing an application for summary judgment and produces a product that identifies with more precision the important facts on which it relies is of minimal value until it is tested by a court hearing. .... We fundamentally disagree with the concept that the potential of an unheard application is a marker of the advancement of an action").

[49] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶ 31.

[50] See *Alston v. Mun. Dist. of Foothills No. 31*, 2022 ABCA 231.

[32] Insofar as prejudice to the municipality, it appears that Justice Hollins did not have the benefit of a complete explanation as to how the eleven-year delay since Ms. Alston and Mr. Vecsey brought their claim would prejudice the municipality's ability to defend against it.[51]

[33] Placing blame for the fact that the municipality is deprived of the opportunity to test the water well on the property of Ms. Alston and Mr. Vecsey because of the mortgagee's application of chemicals to it in 2015 is of little assistance. The real problem is that witnesses are likely to have serious difficulty recalling events going as far back as the approval to construct a road in 1991 that the plaintiffs claim interfered with natural water drainage. Ms. Alston and Mr. Vecsey have not persuaded us that this case is sufficiently reliant on documents to obviate this serious

[51] *Alston v. Mun. Dist. of Foothills No. 31*, 2021 ABQB 592, ¶¶ 33-34 ("It argues that it has suffered significant prejudice in two respects; the sheer passage of time and its inability to test the well on the subject Property. I sympathize with the frustrations of the Defendant, who is attempting to defend itself regarding events from many years ago, some as far back as 1991 by its telling. However, as discussed above, the sheer passage of time is part of the analysis under inordinate and inexcusable delay. It does not, at least not here, function as a stand-alone non-descript category of significant prejudice. The Plaintiffs say that this claim is completely reliant on documents, but that was not explained. I expect that there will also be *viva voce* testimony needed at trial from witnesses who can speak to the actions of the Municipality and the effects on the Plaintiffs themselves. *I have heard nothing about the unavailability of witnesses or any particular difficulty in preparing for trial*") (emphasis added).

concern.[52] We have no trouble accepting this as significant prejudice to Foothills No. 31,[53] without a need to resolve this issue based on the presumption of prejudice that arises from the delay[54] that we cannot accept is excusable.

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[52] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 182; [2017] 7 W.W.R. 343, 398, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("the ability of persons to recall events accurately diminishes with the passage of time. This is true even for persons with above-average recall skills"); *Transamerica Life Canada v. Oakwood Assoc. Ltd.*, 2019 ABCA 276, ¶ 46; 92 Alta. L.R. 6th 41, 56-57 ("The appellants argue that the memories of witnesses will tend to fade over time. This is a common concern, and one of the reasons that the delay rules exist"); *Town of Cochrane v. Austech Holdings Inc.*, 2022 ABCA 377, ¶¶ 19 & 39-40 ("The case management judge found that ... this is not a documents case and witness memories will be relevant. ... The case management judge concluded that the appellants had not rebutted the presumption of significant litigation prejudice and found that the respondents had established actual litigation prejudice. ... The findings of the case management judge were available on the record before her and the appellants have not established that the case management judge committed palpable and overriding errors"); *4075447 Canada Inc. v. WM Fares & Assoc. Inc.*, 2020 ABCA 150, ¶¶ 8 & 21 ("The Master found no evidence to rebut the presumption of prejudice and found actual prejudice as many witnesses could not be located, memories had faded, documents had been lost, and one party had gone into bankruptcy. .... [N]either the Master nor the chambers judge erred in finding presumed and actual prejudice"); *The Queen v. Jordan*, 2016 SCC 27, ¶ 20; [2016] 1 S.C.R. 631, 649 per Moldaver, Karakatsanis & Brown, JJ. ("Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence"); *Roebuck v. Mungovin*, [1994] 2 A.C. 224, 234 (H.L.) per Lord Browne-Wilkinson ("In the ordinary case the prejudice suffered by a defendant caused by the plaintiff's delay is the dimming of witnesses' memories. ... I have no doubt that [specific evidence] ... is not necessary and that a judge can infer that any substantial delay ... leads to a further loss of recollection"); *Brisbane South Regional Health Auth. v. Taylor*, [1996] HCA 25, ¶ 4; 186 C.L.R. 541, 551 (Austl. High Ct.) per McHugh, J. ("sometimes, perhaps more often than we realise, the deterioration in quality [of justice] is not recognisable even by the parties. Prejudice may exist [on account of the passage of time] without the parties or anybody else realising that it exists. ... The longer the delay ..., the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose"); *Lovie v. Medical Assurance Soc'y NZ Ltd*., [1992] 2 N.Z.L.R. 244, 254 (High Ct.) per Eichelbaum, C.J. ("One needs to guard ... against the danger of discounting the arguments based on the dimming of memories simply because often they cannot be adequately demonstrated"); *Spitfire Nominees Pty Ltd. v. Hall & Thompson*, [2001] VSCA 245, ¶ 40 per Charles, J.A. ("[the lower court] could be well satisfied that the defendants and their witnesses would be placed at a distinct disadvantage by the plaintiffs' having allowed 11 years to elapse before evidence could be given at trial") & *Barker v. Wingo*, 407 U.S. 514, 532 (1972) per Powell, J. ("Loss of memory ... is not always reflected in the record because what has been forgotten can rarely be shown"). See also L. Abrams & K. Mc Guinness, Canadian Civil Procedure Law 637 (2d ed. 2010) ("Once the moving party has proven, on a balance of probabilities, that there has been an inordinate delay, and that the delay is inexcusable, there is a presumption of prejudice. The anticipated prejudice in such a case is multifold, and includes the possibility that a witness is likely to become unavailable over time, and that the recollection of every witness is likely to diminish with the passage of time").

[53] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶¶ 35 & 130; [2017] 7 W.W.R. 343, 356 & 383, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("The appellants have also made out a case of litigation prejudice. This is largely attributable to the undeniable fact that a person's ability to recall events diminishes with the passage of time. Degraded memories will undoubtedly adversely affect the appellants' witnesses. As this action will most likely not be tried before 2020, their witnesses will be questioned about events that occurred between 2003 and 2006 – fourteen to seventeen years ago. .... There is no doubt that the passage of time may impair a moving party's ability to defend its interests at the trial of an action. 'Delay may compromise the fairness of a trial'. The unavailability of crucial witnesses – death,

[34] The delay in Ms. Alston and Mr. Vecsey's claim against Foothills No.31 is inexcusable and prejudicial.

[35] We would add one comment about Ms. Alston and Mr. Vecsey's repeated allegations, both in their written materials[55] and the oral submissions before us, that the conduct of Foothills No. 31 and its counsel was criminal, fraudulent, and unprofessional. They refer to this appeal as a "Fraudulent Appeal Application of delay by the Appellant".[56] Their position is that the municipality is the one that really caused delays and has "projected"[57] those delays on them through "misrepresentations, omissions and lies".[58] They say "[t]he Appellant's actions to deceive

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impairment or disappearance – may diminish the strength of the moving party's case. The passage of time may also have impaired a prospective witness' ability to access stored data. A potential witness' mental health may have declined and place the person in a position where he or she no longer can retrieve material in a memory bank. Or a party may have lost exhibits. This may be attributable to disastrous fires or floods or mistakes made by movers or document managers").

[54] Id. at ¶ 149; [2017] 7 W.W.R. at 391-392, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("inordinate and inexcusable delay on a balance of probabilities — the presumed fact — significant prejudice — must be found to exist unless the nonmoving party has proven on a balance of probabilities that the moving party has not suffered significant prejudice. This conclusion adequately recognizes the seriousness of the consequences litigation delay presents in our community without depriving the nonmoving party of a reasonable opportunity to challenge this conclusion") & ¶¶ 154-55; [2017] 7 W.W.R. at 392 ("Fourth, if the delay is inordinate and inexcusable, has this delay 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? Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?") & *Transamerica Life Canada v. Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276, ¶¶ 42-43; 92 Alta. L.R. 6th 41, 56 ("While there has clearly been delay in the prosecution of this action, R. 4.31 requires 'significant prejudice' arising from delay before an action will be struck. The text of the rule makes it clear that prejudice is the most important factor in the analysis. The initial burden of proving prejudice is on the defendant who is applying to strike out the action. However, if the defendant can establish 'inordinate and inexcusable' delay, then significant prejudice is presumed: R. 4.31(2). In that event, however, the presumption is still rebuttable ... . It is still open to the plaintiff to show that, despite the presumption, there is insufficient prejudice to warrant striking out the action") & ¶ 46; 92 Alta. L.R. 6th at 56-57 ("The appellants argue that the memories of witnesses will tend to fade over time. This is a common concern, and one of the reasons that the delay rules exist").

[55] Respondents' Factum ¶ 13 ("This file is no longer about the Respondents' allegations of guilt of contamination of their land, it is about deliberate cover up of well-documented contamination in a public watershed, Fraud by lying to the court and criminal negligence. Upon recommendation of the then acting Attorney General/Justice Minister, Kaycee Madu, the Appellant and their lawyers have been reported to the RCMP for investigation").

[56] Id. ¶ 17.

[57] Id. ¶ 20 ("The Appellant has projected their delays onto the Respondents in the form of lies to the Court of Queen's Bench of Alberta and in their filings for this Court of Appeal Hearing ... . Lying to a court of law is fraud").

[58] Id. ¶¶ 21-22 ("The Appellant in their filings for this Appeal Application quotes delays from the Respondents in relationship to: i) The environmental testing by the Appellant; ii) Delays in Case Management; and iii) Prejudice for the Appellant. These statements are misrepresentations, omissions and lies. Fraud vitiates everything. The Appeal Application by the Appellant must be dismissed simply on the merits that the statements made by the Appellant are false").

the Court are thus deliberate and premeditated".[59] They go on to identify a number of purported omissions and misrepresentations in the municipality's materials,[60] whose factum they characterize as "nothing but misrepresentations, omissions and lies".[61] They ask that the municipality's counsel, Messrs. Pick and Wilson, be disbarred.[62]

[36] Alleging criminal and fraudulent conduct on the part of an adversary or an adversary's counsel is an extremely serious matter. Fraud is not a word to be used casually in the course of

[59] Id. ¶ 22.

[60] Id. ¶¶ 26-36.

[61] Id. ¶ 40.

[62] Id. ¶ 44 ("The Respondents respectfully request this Honourable Court ... Recommend that David Pick and Drew Wilson be disbarred for deliberate premediated lying to the Court of Appeal of Alberta").

court proceedings.[63] It matters not that self-represented persons make this serious allegation.[64] Doing so without a foundation has consequences.[65] Nothing before us gives us cause for concern

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[63] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 123; [2017] 7 W.W.R. 343, 381-382, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("some allegations made by a nonmoving party may be of such a harmful nature to a moving party that they are qualitatively different from other allegations and merit unique treatment when considering r. 4.31(1). Fraud may be such an allegation. A litigant who alleges fraud may be under an obligation to advance the action with reasonable expedition, that is at a faster pace than that expected of a reasonable litigant pursuing a claim that does not allege fraud or a comparable wrong. This means that any delay may not escape being characterized as inordinate delay if the nonmoving party advances a fraud claim. In other words, a nonmoving party who claims that the moving party has committed fraud or a comparably egregious form of misconduct runs a greater risk that delay attributable to the nonmoving party may be characterized as being inordinate than does a plaintiff in other actions not alleging fraud"); *Jacobs v. McElhanney Land Surveys Ltd.*, 2019 ABCA 220, ¶ 98; [2019] 12 W.W.R. 19, 56, leave to appeal ref'd, [2019] S.C.C.A. No. 436 per Wakeling & Feehan, JJ.A. ("a professional whose integrity or competence is challenged, may experience a dramatic revenue loss that cannot be reversed until the action is resolved"); *Int'l Capital Corp. v. Robinson Twigg & Ketilson*, 2010 SKCA 48, ¶ 45; 319 D.L.R. 4th 155, 172 ("The Court should be sensitive to the impact of claims which put in question the professional, business or personal reputation of the defendant, which put the livelihood of the defendant at risk or which involve significant or ongoing negative publicity for the defendant"); *Hancock Family Memorial Foundation Ltd. v. Fieldhouse*, [2005] WASCA 93, ¶ 148 (W. Austr. Sup. Ct.) per Stetyler, P. & Owen, J.A. ("There is inevitable prejudice in a professional person having unresolved allegations of negligence in the conduct of his profession extant against him"); *Bishopsgate Ins. Australia Ltd. v. Deloitte Haskins & Sells*, [1999] 3 V.R. 863, 887 (Vic. Sup. Ct. App. Div. 1994) per Tadgell & Ormiston, JJ. ("Again, there is no direct evidence but the inference of additional prejudice caused by the plaintiff's delays is one which may be drawn as a matter of common sense from the circumstances of this particular claim. ... [T]he nature of the claim and the potentiality for prejudice must be looked at in the light of the claims made. Where a claim is made against individuals relating to their probity or their competence, especially their professional competence, and the claim is for many millions of dollars, then it is not hard to infer that defendants against whom such allegations are made are under a heavy burden. When that burden is not merely deferred but then unjustifiably drawn out over many years, it is easier still to infer serious prejudice of the relevant kind to a defendant. ... This is particularly the case in claims alleging professional negligence, although such a description is not to be confined merely to the negligence of accountants, solicitors, doctors and the like for it is relevant to any person in respect of whom an unfavourable finding will be likely to place at risk his or her capacity to earn a living") & *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 552 (C.A.) per Lord Denning, M.R. ("It is . . . a grave injustice to professional men to have a [fraud] charge ... outstanding for so long"). See also *2651171 Ontario Inc. v. Brey*, 2022 ONCA 205, ¶ 12 ("Regardless at what stage in the proceedings they are raised, unfounded allegations of fraud may attract serious cost consequences as a form of chastisement and a mark of the court's disapproval because of their extraordinarily serious nature that go directly to the heart of a person's very integrity") & *Piedmontese Breeding Co-op Ltd. v. Madill*, [1985] 5 W.W.R. 289, 291-92 (Sask. C.A.) ("The law has long regarded an allegation of fraud as a grave matter since it calls into question the integrity of the person against whom it is made, and such allegations are neither made nor taken lightly").

[64] *Ram v. Cheta*, 2017 BCCA 190, ¶¶ 9-10 ("Today, in court, Ms. Cheta alleges that the insurance policy was never in place. As the Court indicated to her, if she is making an allegation of fraud against Mr. Ram, that is something that could be pursued in the court below. I would note, however, Ms. Cheta, that if you are considering pursuit of any such allegation, you should take advice, either from an organization like Access Pro Bono or from a private lawyer. It is a very serious allegation, and I caution you that it should not be made lightly").

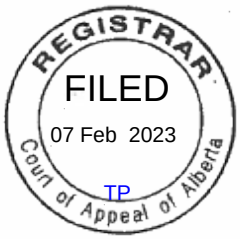
[65] *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19; 96 C.P.C. 7th 1 (the Court upheld the trial judge's award of full-indemnity costs in favor of the plaintiff against defendants who alleged fraud on the part of the plaintiff). See also id. at ¶ 130; 96 C.P.C. 7th at 50 ("Costs awards that are the function of blameworthy litigation misconduct deliver a message to lawyers who engage in litigation and are primarily responsible for litigation strategy

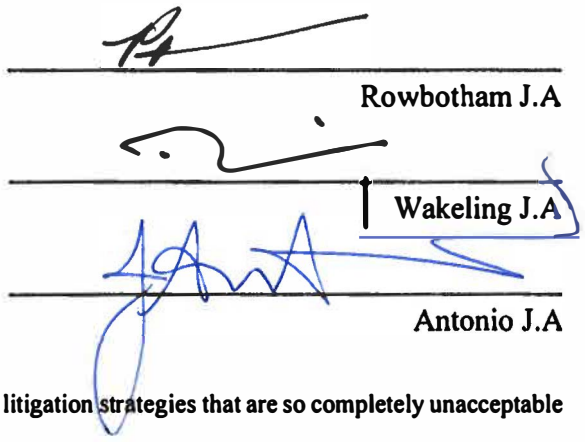
about the conduct of the municipality's counsel. Characterizing differences of opinion as to the implications of various facts to a legal position as "omissions, misrepresentations and lies" is misguided. While counsel owe a duty of candor to the Court, they also have a duty to their client to present the strongest possible case.[66] Messrs. Pick and Wilson have done no more than that.

[37] We allow the appeal and dismiss the claim.

Appeal heard on November 10, 2022

Memorandum filed at Calgary, Alberta
this 7th day of February, 2023





Rowbotham J.A

Wakeling J.A

Antonio J.A

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and its execution. They forewarn barristers that there are some litigation strategies that are so completely unacceptable that they will attract severe cost consequences").

[66] *Statesman Master Builders Inc. v. Bennett Jones LLP*, 2015 ABCA 142, ¶¶ 17-18; 600 A.R. 118, 124-25, leave to appeal ref'd, [2015] S.C.C.A. No. 251 ("Courts have long imposed a duty of loyalty on lawyers and law firms in relation to their clients. ... The duty of loyalty owed by law firms to their clients includes three main components: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour"); *The Queen v. Mitchell*, 1994 ABCA 369, ¶ 19; 162 A.R. 109, 114 ("It is counsel's duty to look for and find and cite to the Court all relevant authority, particularly binding authority, whether it is for him or against him, as has been well known for 70 years"); *Virk v. Law Society of Alberta*, 2022 ABCA 2, ¶¶ 20-21 ("Citation #15 alleged that the appellant 'failed to be candid with the Court'. All agree that intentionally making an inaccurate statement, or the legal equivalent of being willfully blind to the accuracy of a statement, would suffice. Further, recklessness would be sufficient; if a lawyer made an inaccurate statement to the court when indifferent to the statement's accuracy or inaccuracy, that would meet the test. The duty of candour, however, will be informed by its context, here the duty of a lawyer (as an officer of the court) when making submissions to that court. In that situation there is a positive duty on the lawyer to turn his or her mind to the accuracy of statements that are being made. In order to be 'candid', the Law Society is entitled to expect that the lawyer was confident that the statement being made was accurate, which would imply some duty to establish the truth of the statement before making it. From the opposite perspective, to be candid a lawyer must acknowledge when he or she does not know a fact, or does not know whether a statement is true. It is not unreasonable to hold a professional who is making representations to a court to a standard of reasonable diligence as to self-informing, coupled with frankness about limitations of his or her state of knowledge, and forthrightness about the extent of what is believed to be accurate"). See also The Law Society of Alberta, Code of Conduct, r. 2.1-1 ("A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity") & r. 5.1-1 ("When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect").

Appearances:

D.J. Wilson
D.M. Pick (no appearance)
for the Appellant

Ellen Alston and Leslie Vecsey, Respondents