

The Ticking Deadline: A Case Study on the Application of Rule 4.33
Mulholland v Rensonnet, 2023 ABCA 175

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In *Mulholland v Rensonnet*, 2023 ABCA 175, the Alberta Court of Appeal clarified three instances in which Rule 4.33 of the Alberta *Rules of Court* does not apply. The Court was also presented with an opportunity to assess a situation of alleged obstructive litigation tactics. All parties were unrepresented.

Background

In September 2013, the plaintiff filed a statement of claim. In the following years, there were cross-applications for partial summary judgment and summary dismissal, but the case did not significantly progress. In January 2022, the defendant filed an application to dismiss the application for long delay under Rule 4.33.

Trial

The defendant's application was heard in February 2022. The chambers judge delivered an oral decision and granted the defendant's application to have the claim struck for delay under Rule 4.33.

Appeal

The plaintiff and third-party defendant appealed the chamber judge's decision on the grounds the judge (1) committed procedural errors by not adjourning to a special hearing and allowing them to be fully heard; (2) failed to apply the correct legal test; (3) overlooked evidence; and (4) drew incorrect conclusions. It is unclear why the third-party defendant joined the appeal and the Court questioned this decision.

The Court of Appeal disagreed with all the plaintiff and third-party's arguments. First, the decision to adjourn a hearing is discretionary and since the evidence on the application was quite straightforward and the chambers judge had already reviewed the affidavits, it was reasonable to continue in morning chambers. The chambers judge also permitted both defendants the opportunity to be heard through both written and oral submissions.

The most important analysis from this case is whether three actions taken by the plaintiff and third-party defendant constituted significant advances in litigation such that Rule 4.33 could not apply and the claim could not be struck.

The first alleged advance was a change in the case management judge and discontinuation of case management in November 2019. The third-party defendant alleged that the case management judge was biased against him as this judge was involved in other actions involving him and the defendant. After his persistent calls for recusal, the judge ultimately did step aside but there was no evidence of bias such that this action progressed the action forward

The second event was an *ex parte* order allowing service by email. The third-party defendant claimed the obtaining of the service order removed a barrier to litigation as the defendant refused to accept notice of service by email. Since the defendant insisted upon receiving notice of service according to the *Rules of Court*, there was no barrier to overcome. Importantly, the Court of Appeal held that the removal of a non-existent barrier is no advance of an action.

The third alleged advance of the case was the filing of a notice to admit and response. The chambers judge accepted that these actions can constitute significant advances in litigation and may narrow issues, but did not here. The facts that were admitted were already established and did not narrow issues or clarify discrepancies. The chambers judge applied the functional test from *Weaver v Cherniaswky*, 2016 ABCA 152, which requires the judge to determine how the step advanced the action. Even a notice to admit facts will not automatically be treated as a step that advances the action. The step must clearly advance the action in a meaningful way. The chambers judge also concluded that any attempt to have the matter managed or mediated did not constitute a significant advance since none of these procedures materialized.

Alternatively, the plaintiff and third-party defendant alleged that if there was unreasonable delay, it was because the defendant was engaging in obstructive litigation. They insisted this arose from the defendant's substantive position in the litigation and her insistence to be served according to the *Rules*. The Court of Appeal held that this did not constitute obstructive litigation.

Take-Away

In order to avoid dismissal of an action for long delay, it is important to demonstrate significant advances in the action during the relevant period. Mere procedural steps or actions that do not substantially advance the case may not be considered as significant advances under Rule 4.33.

The Court of Appeal has clarified that a change in case management judge and discontinuance of case management without bias does not constitute a significant advance. Nor does the removal of a non-existent barrier or introducing information or evidence that has already been established.