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ALBERTA'S NEW 3 YEAR LONG DELAY RULE –

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We have been keeping our clients posted on this Rule. You may recall that it was set to come into effect on November 1, 2012, and was going to provide that a long delay application to strike the claim would be warranted after a delay of 2 or more years since the last thing done to significantly advance the action towards trial. However, before it came into effect, the Legislature suspended the coming into effect date for a year to November 1, 2013, but left the 2 year delay portion of the rule in place.

The Legislature has now amended the Rule once more. As of November 1, 2013, the new long delay rule will take effect and will provide that "the Court, on application (and subject to certain exceptions), must dismiss the action as against the applicant if 3 or more years has passed without a significant advance in the action".

The delay rules have further been amended in 2 other significant ways:

1) To provide a deadline of 2 months for a defendant to provide a substantive response to a written proposal from the plaintiff for a stand-still agreement. Should the Defendant fail to reply to such a proposal and then apply to strike for long delay, the amendments state that the application will fail. The amendments do not make clear what will constitute a "substantive reply" and whether a simple "no" will suffice but we suspect that a yes or no answer is really all the substance required for such a proposal.

2) To remove the time it takes for the defendant to file their statement of defence and the time it takes for a defendant to provide a written response to a standstill proposal from the calculation of the total time passed for purposes of triggering of the drop dead rule. [For example, if it takes 3 months for a defendant to file a statement of defence after the statement of claim is filed and a month to reply to a written proposal for a stand-still agreement, that 4 months will not be included in the calculation and a long delay application will not be viable until 3 years and 4 months after the statement of claim was served.

The removal of the time it takes to file a defence is a meaningless amendment in our view as the old rule and the case law established thereunder would have counted the filing and service of the Statement of Defence as a step that advanced the action and thereby restarted the clock in any event.

The removal of the time it takes for a Defendant to reply substantively to a stand-still agreement may buy a Plaintiff facing the 3 year anniversary a few extra days to advance the action while they wait for a reply.

In summary, the new drop dead rule is that, barring special reason, a claim will be struck on application 3 years from the date of the last thing done to significantly advance the action. That rule comes into force on November 1, 2013 and the 2 year rule will never come into force so, until this November, we are operating under the old 5 year rule. By way of a couple quick examples:

1. Cases that have not been significantly advanced since November 1, 2008 will not be vulnerable for striking under the old or new rule until November 1, 2013;
2. If the last time a file was significantly advanced was October 31, 2008 or earlier, the 5 year anniversary will trigger the old 5 year drop dead rule;
3. If the last time a case was significantly advanced was on or after November 1, 2010, they will be vulnerable to striking under the new 3 year rule on the 3 year anniversary.

Mark your stagnant files accordingly. For those of you who had applications planned for this November under the 2 year rule that never made it into effect, you will have to reconsider your timing and may have to wait as much as another full year before applying to strike.