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UPDATE ON THE 3 YEAR LONG DELAY RULE IN ALBERTA

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ISSUE: If a party does a "thing" after the three-year period of delay, does this restart the clock or is the defendant still entitled to bring an application for dismissal for long delay?

I. Short Answer

Based on the wording of the Rule and the case law set out below, doing a "thing" or "step" after the period of delay should not restart the clock so long as the defendant does not participate or acquiesce.

Editor's Note: this remains an arguable question in Alberta and each case will need to be considered on its unique facts. However, as the research below suggests, it is our view that the Court is not likely to read the rule as creating a race to file.

II. Analysis

The relevant Rule is Rule 4.33:

> **Dismissal for Long Delay**
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> **4.33(1) If 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless**
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> (a) the parties to the application expressly agreed to the delay,
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> (b) the action has been stayed or adjourned by order, an order has extended the time for advancing the action, or the delay is provided for in a litigation plan,
>
> (c) the applicant did not provide a substantive response within 2 months after receiving a written proposal by the respondent that the action not be advanced until more than 3 years after the last significant advance in the action, or
>
> **(d) 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. [Emphasis added]**

(2) If the Court refuses an application to dismiss an action for delay, the Court may still make whatever procedural order it considers appropriate.

(3) The following periods of time must not be considered in computing periods of time under subrule (1):

(a) a period of time, not exceeding one year, between service of a statement of claim on an applicant and service of the applicant's statement of defence;

(b) a period of time, not exceeding one year, between provision of a written proposal referred to in subrule (1)(c) and provision of a substantive response referred to in that subrule.

(4) Rule 13.5 does not apply to this rule.

The wording of the Rule suggests that **only** when an application or 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, will an action by a party act to "restart the clock".

Stevenson and Cote note the following about the drop-dead rule:

> Rule 4.33 is triggered only if 2 [now 3] years elapse with nothing significant done, before the defendant's application (notice of motion) to dismiss is filed. It is not enough that 2 years elapse before the court decides the motion. But can the defendant just cure his problem with a new notice of motion? However, the 2 [now 3] years cannot be unilaterally extended by new activity without the other side's consent or acquiescence. The "drop-dead" Rule was originally designed to add teeth and certainty. Expiry of 2 years should not merely launch a race to see which party can file a notice of motion first: Stevenson & Cote, *Alberta Civil Procedure Handbook 2012* (Edmonton: Juriliber, 2012) at 4-55.

Stevenson and Cote then note the following, in reference to the case of *Laboucan v Red Road Healing* Society, 2011 ABQB 377 (M):

> More than 5 years' inaction elapsed in a suit, then the plaintiff tried to redeem the situation by serving a broad notice to admit. The defendant did not reply, partly because he did not want to be seen to condone continuing the suit. As the suit was not automatically over (without motion or order) after 5 years, the lack of a reply had some effect, but there was no real acquiescence by the defendant, and even without delay the court would have allowed a late withdrawal of the deemed admissions, and an express refusal to admit would have been reasonable, especially given the breadth of the matters in the notice to admit. Any prejudice from withdrawing the admissions would be trivial. **The plaintiff should not be able after 5 years to pull himself up by his bootstraps**: at 4-55.

In the *Laboucan* case the Master cites with approval from the Alberta Court of Appeal case of *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259. There, the

Court of Appeal set out the proper approach to take in applications under Rule 244.1 [the old delay Rule], at paragraph 33:

> [33] In summary, I believe the appropriate approach on a 244.1 application to dismiss is as follows:
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> 1. The proceedings should be examined as at the date of the application to dismiss for want of prosecution pursuant to Rule 244.1.
> 2. If at any time in the action there has been a gap of five years or more where no "thing" has been done to materially advance the action, the judge shall examine what has occurred since that five-year gap.
> 3. If the delaying party has not done a thing to materially advance the action since the five-year gap, the action shall be dismissed, absent agreement to the delay.
> 4. **If the delaying party has done a thing to materially advance the action after the five-year gap, and the other party objected and applied for a dismissal the action shall be dismissed, absent any agreement to the delay.**
> 5. If the delaying party has done a thing to materially advance the action after the five-year gap, and the applicant has participated in that thing, continued to participate in the action, or otherwise acquiesced in the delay, the action shall continue, and the application for dismissal refused.
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> These steps will avoid the foot race to the courthouse and it will encourage the party seeking to process its claim to proceed in an expeditious manner throughout. At the same time, it will encourage the non-delaying party to act in a timely basis and, at a minimum, to object to any further action taken by the delaying party at the first opportunity.