

PUBLICATION

Dismissal of an action if delayed too long: The end of the road

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On November 1, 2010, the Alberta Rules of Court, Alta Reg 124/2010 (the “Rules”) amended Rule 4.33, whereby an action commenced in the Court of Queen’s Bench of Alberta (and arguably the Provincial Court of Alberta (Civil)) must be dismissed if two (2) or more years have passed without “significant advance” in the action.

On November 1, 2013, Rule 4.33 was amended to lengthen the timeframe to three (3) years. In short, an action may come to an abrupt end if the parties involved do not take a material step to significantly advance the action.

It is critical that both lawyers and litigants are aware of Rule 4.33. Three (3) years is not necessarily a long period of time for some actions, especially for complicated multi-party or personal injury matters and it is all too easy to let certain actions sit idle.

A key phrase found in Rule 4.33 is what “significantly advances” an action and understanding the meaning of that phrase is crucial. There are certain “things” that have been judicially considered that constitute doing a “thing”, such as attending and participating in Questioning; however, merely setting a date for a Questioning is not considered a “thing”. There are also items that may or not be considered a “thing”, such as responding to undertakings or gathering medical records and preparing damage assessments. It is important to realize that Rule 4.33, and the “things” that may or may not have been done, are judged (for the most part) on a case-by-case basis and will depend on the particular circumstances of each matter. However, it is unwise to push any action close to the new three (3) year rule.

There are certain steps that can be taken to suspend the three (3) year drop-dead rule. The most common is an explicit Standstill Agreement, whereby all parties to the action agree to suspend the matter, and therefore, Rule 4.33 is not triggered. However, most Standstill Agreements will permit one party to terminate the Standstill Agreement on proper notice to the other party, and subject to any other language in the Standstill Agreement, the action would then fall back into the realm of the three year drop-dead provisions in Rule 4.33.

All participants of an action, whether guided by legal counsel or not, must be aware of Rule 4.33. Ignorance is not an acceptable defense; failure to understand and follow Rule 4.33 will have irreparable consequences on an

action.

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