Don't Get Killed By the Drop Dead Rule
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Case Management, Litigation Plans, and the “Drop Dead” Rule

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INTRODUCTION

Rule 4.33 of the Alberta Rules of Court governs applications for want of prosecution, commonly known as "drop dead applications." Rule 4.33 provides that if two or more years have passed after the last thing done that has significantly advanced the action, the Court must (subject to limited exceptions) dismiss the action. Rule 4.33 marks a significant shift from the previous rule governing applications for want of prosecution, Rule 244.1, which set out a five year period before such an application could be brought. Because of this significant shift, when the new Rules of Court were introduced on November 1, 2010, the application of Rule 4.33 was suspended for two years pursuant to the Rule 15.4(1) bridging provision, which maintained the previous five year period. Rule 15.4 will be replaced by Rule 4.33 on November 1, 2012.

This paper will review the jurisprudence dealing with the drop dead rule. In particular, we will consider the significance of the transition to the new Rules and the jurisprudence dealing with what constitutes a "thing" that "mutually advances" an action within the meaning of the drop dead rule (and the significance of that jurisprudence in the context of the new Rules, which refer to a thing that "significantly" advances the action). We will also consider the application of the drop dead rule in the context of multiparty actions, separate, but related actions and briefly look at Rule 4.31, which enables the Court to dismiss an action on the basis of "delay" that results in "significant prejudice." Finally, we will conclude by setting out practice tips for litigators to consider in preparing for the coming into force of Rule 4.33.

APPLICABLE RULES

Rule 4.33 of the Alberta Rules of Court (which comes into force on November 1, 2012) provides:

4.33(1) If 2 or more years has passed after the last thing done that significantly advanced an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the parties to the application expressly agreed to the delay,

(b) the action has been stayed or adjourned by order, an order has extended the time for doing the next thing in the action, or the delay is provided for in a litigation plan,

(c) the applicant did not respond to a written proposal by the respondent that the next thing in the action not occur until more than 2 years after the last thing done that significantly advanced 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.

(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) Rule 13.5 does not apply to this rule. [Rule 13.5 deals with variation of time periods pursuant to agreement between the parties or as ordered by the Court].

Rule 4.33 replaces Rule 244.1 of the old Rules which provided:

244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

Between the introduction of the new Rules on November 1, 2010 and the coming into force of Rule 4.33 on November 1, 2012, drop dead applications have been governed by a "bridging provision" contained in the transitional section of the new Rules. Rules 15.4(1) and 15.15(1) provide:

15.4(1) Unless subrule (2) applies, the Court, on application, must dismiss the action as against the applicant if

(a) after the coming into force of this rule, 2 years has elapsed since the last thing done to significantly advance the action, or

(b) 5 years has elapsed since the last thing done to significantly advance the action, whichever comes first.

(2) The Court must not dismiss the action if

(a) the parties to the application agreed to the delay,

(b) the action has been stayed or adjourned by order or an order has extended the time for doing the next thing in the action, or