

# **The Walking Dead: Recent Treatment of Rule 4.33 and Rule 4.31 of the Rules of Court, Alta Reg 124/2010**

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**THE WALKING DEAD: RECENT TREATMENT OF RULE 4.33 AND RULE 4.31 OF THE RULES OF COURT,  
ALTA REG 124/2010<sup>1</sup>**

**"This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means [...] but [it] still drags its dreary length before the court, perennially hopeless".**

**Bleak House, Charles Dickens**

## **INTRODUCTION**

Rule 4.33 and Rule 4.31 of the *Rules of Court*, known colloquially as the "drop dead" and "chronic delay" rules, have been the recent subject of some amendments and significant judicial examination.<sup>2</sup>

This paper is an overview of the developing law as it relates to the requirements for an application to dismiss an action for delay under these Rules. Recent court treatment of these rules will impact how plaintiffs, defendants, and their counsel will govern lingering actions and the applications to dismiss them.

## **RULE 4.33 – "DROP DEAD" RULE**

### **Overview of Rule 4.33**

The "drop dead" rule requires a court to dismiss an action if 3 or more years have passed without a "significant advance". What amounts to a significant advance for the purposes of this rule has been the subject of considerable judicial scrutiny.

Rule 4.33 provides that:

**4.33 (2)** If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or

(b) 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.

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<sup>1</sup> Written by Darren J. Reed and Amanda Manasterski, Student-at-Law

<sup>2</sup> *Rules of Court*, Alta Reg 124/2010 [Rules].

A court may also refuse to dismiss an action for delay:

**4.33(3)** If the Court refuses an application to dismiss an action for delay, the Court may make whatever procedural order it considers appropriate.

Due to amendments instituted recently, the computation of time for the 3 year period does not include the time between service of a statement of claim on an applicant and the service of the applicant's statement of defense or one year after service of the statement of claim on the applicant (whichever is earlier):

**4.33(4)** The period of time referred to in subrule (2) does not include the following, whichever ends earlier:

- (a) the period of time between the service of a statement of claim on an applicant and the service of the applicant's statement of defense;
- (b) the period of one year after the date of service of a statement of claim on an applicant.

As of June 16, 2016, Rule 4.33 was amended to include a "suspension period" wherein parties may enter into an agreement, or apply to the court for an order, which states that a specific period of time will not be included in the computation of the 3 year time period:

**4.33(5)** If a respondent and an applicant agree in writing to a suspension period, the period of time under subrule (2) does not include the suspension period agreed to.

**4.33(6)** A respondent, whether or not the respondent has sought agreement under subrule (5), may serve an applicant with a written proposal setting out a suspension period and requesting that the suspension period not be included in computing the period of time under subrule (2).

**4.33(7)** An applicant who receives a proposal referred to in subrule (6) must respond within 2 months, and within that time

- (a) if the applicant agrees with the proposal, then the period of time under subrule (2) does not include the suspension period agreed to, or
- (b) if the applicant disagrees with the proposal or does not respond to the proposal, then the respondent may apply for an order under subrule (9).

**4.33(8)** If a suspension period is agreed to under subrule (5) or (7)(a), the respondent must give all other parties to the action written notice setting forth what the suspension period is, when it was agreed to and by whom.