



GAVIN PRICE



CHARLOTTE
STOKES

RULE 4.31 AND 4.33 IN A WORLD OF SUSPENDED LIMITATIONS

On March 30, 2020, the Minister of Justice issued a Ministerial Order (the “Order”) which suspends a number of limitations periods contained in several enactments:

“Any period of time within which any step must be taken in any proceeding... is suspended subject to the discretion of the Court, tribunal, or other decision maker from March 17, 2020 to June 1, 2020,”

and further:

“For clarity, the limitation period or period of time resumes running on June 1, 2020 and the temporary suspension period shall not be counted.”

The intention of the Order appears to be to “push pause” on litigation given existing Court access restrictions and other restrictions imposed on parties due to the COVID-19 pandemic. The Order captures steps that are required to be taken pursuant to the *Alberta Rules of Court*, AR 124/2010, specifically by the wording “Any period of time within which any step must be taken in any proceeding...” The Order also suspends the deadlines for litigation steps that are to be taken pursuant to the *Rules of Court* that contain deadlines, such as the filing and serving of a Statement of Defence (Rule 3.31(3)) or the serving an Affidavit of Records (Rule 5.5).

On its plain wording, the suspension period in the Order does not apply to litigation steps that are to be taken pursuant to the *Rules of Court* that do not contain specified deadlines, such as Questioning (Rule 5.20) or scheduling a matter for Trial (Rules 8.4 and 8.5).

The majority of litigation steps that are to be taken pursuant to the *Rules of Court* do not contain specified deadlines by which they must be completed: the *Rules of Court* encourages parties to resolve claims themselves - by agreement, with or without assistance - as early in the litigation process as practicable (Rule 1.2(2)(c)).

The “delay Rules” (Rule 4.31 and 4.33) give recourse to defendants in the event that the litigation brought against them does not move forward or resolve in a timely manner.

Rule 4.33 provides that on application, if three or more years have passed without a significant advance in the action, then the Court must dismiss the action as against the applicant. In the unlikely event that a defendant were to file and serve a Rule 4.33 delay application before the completion of litigation steps that must be taken within a certain time (for example, the service of an Affidavit of Records), then those steps are very likely captured by the Order and the three year period set out in Rule 4.33 would be extended by this Order, thereby defeating the Rule 4.33 delay application.

However, the practical reality is that most Rule 4.33 delay applications are brought well after the time when litigation steps with mandatory deadlines under the *Rules of Court* are completed. If all steps with mandatory deadlines imposed by the *Rules of Court* have been taken in the litigation, then it is arguable that the three year period set out in Rule 4.33 is not affected by the Order. In all likelihood, in an analysis of delay in an application brought under Rule 4.33, the Court would carve out the suspension period set out in the Order (and any amendments and extensions).

Rule 4.33 provides that the only time suspension periods that may have an effect on the Rule are those agreed to by the parties (i.e. Rule 4.33 does not take into account the suspension period set out in something like the Order), but the interaction between Rule 4.33 and something akin to the Order is unprecedented.

It is somewhat more unpredictable how the Court might scrutinize a delay application brought pursuant to Rule 4.31. The Court has more discretion when deciding a Rule 4.31 application than it does when deciding a Rule 4.33 application: Rule 4.31 provides that on application, the Court *may* dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party (as opposed to the “*must* dismiss” direction in Rule 4.33). If the Court finds that the delay in the action is inordinate and inexcusable, then the delay is presumed to have resulted in prejudice to the applying party.

Because Rule 4.31 does not specify a period of time that will lead to a finding of delay, it is difficult to ascertain if the Court would then determine that the suspension period set out in the Order should be considered in an application brought under Rule 4.31. There would presumably be some litigation in which the period of suspended steps would make little difference to a delay analysis: if the Court would have determined that the period of delay has been inordinate and inexcusable without taking into account the suspension period, then the Court would hold the delay to be inordinate and inexcusable regardless of the suspension period set out in the Order. Conversely, there will conceivably be situations in which the Court determines it entirely reasonable that the litigation had not moved forward because of the COVID-19 pandemic and finds that the delay is therefore excusable.

There are no guarantees as to how the Court will view the suspension of time legislated by the Order in an analysis of delay under Rules 4.31 or 4.33. The Court has not yet had the opportunity to consider the delay Rules as they relate to the Order, but the Court will almost certainly have the opportunity to deal with these matters after June 1, 2020, when the suspension of limitations and time periods is currently scheduled to end. It is also possible, and perhaps likely, that the suspension of limitation and

time periods set out in the Order will be lengthened by an extension of the Order, or by the issuing of a new Ministerial Order before June 1, 2020.

Although we cannot be sure, it is likely that in determining a delay application brought under Rules 4.31 and/or 4.33, the Court would carve out (or at least consider) the suspension period set out in the Order in its analysis of delay. As stated above, the intention of the Order appears to be to put a hold on litigation due to the COVID-19 pandemic.

Defendants should be wary of making delay applications pursuant to Rule 4.31 and 4.33 without taking into account the suspension period in the Order (or any extended suspension period), as the Court would likely be cautious to include in its analysis the time that the plaintiff could not take steps in the litigation due to the COVID-19 pandemic.

If you have questions about your litigation, either as a plaintiff or a defendant, in the face of the COVID-19 pandemic, we encourage you to contact the lawyers at JSS Barristers. The information provided in this article is not intended to replace the need for legal advice that takes into account the circumstances of your litigation. JSS Barristers is a highly experienced litigation firm that prides itself in its knowledge of the *Rules of Court* and the Courts' consideration of the *Rules of Court*. We would be pleased to provide answers to your questions during this critical and rapidly changing time.

JSS Barristers is also pleased to provide summaries of recent Court decisions which consider the *Rules of Court* and commentary related to the *Rules of Court*, issued quarterly. Click [here](#) if you would like to receive electronic issues of future JSS BARRISTERS RULES via email.

Gavin Price is a partner at JSS Barristers. Click [here](#) for Gavin's bio.

Charlotte Stokes is an associate at JSS Barristers. Click [here](#) for Charlotte's bio.