Citation: Parkinson v Winnipeg Regional Health Authority, 2025 MBCA 82
Date: 20250919
Docket: AI24-30-10117

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Mr. Justice James G. Edmond
Mr. Justice David J. Kroft

B E T W E E N:

GARY RUMMERY, BRIAN WEATHERBY and MAURICE RUTHERFORD, as Executors of the ESTATE OF DALE ALWYN GEORGE PARKINSON, and the said ESTATE OF DALE ALWYN GEORGE PARKINSON		
Plaintiffs		***E. B. Eva*** *for the Appellants*
- and -		
THE WINNIPEG REGIONAL HEALTH AUTHORITY and DR. ERIK R. SMITH		***K. L. Dixon*** *for the Respondent The Winnipeg Regional Health Authority*
Defendants		
(by original action)		***J. B. Martens*** *and* ***A. J. Meyers*** *for the Respondent Dr. Erik R. Smith*
A N D B E T W E E N:		
JANE PARKINSON and BRETT PARKINSON		*Appeal heard:* ***March 12, 2025***
(Plaintiffs) Appellants		*Judgment delivered:* ***September 19, 2025***
- and -		
THE WINNIPEG REGIONAL HEALTH AUTHORITY and DR. ERIK R. SMITH		
(Defendants) Respondents		
(by order dated December 13, 2022)		

On appeal from *Rummery v The Winnipeg Regional Health Authority and Dr Erik R Smith*, 2024 MBKB 98 [the *decision*]

MAINELLA JA

Introduction

[1] This is another case about the law's delay.

[2] The plaintiffs, Jane Parkinson (Parkinson) and Brett Parkinson (together, the plaintiffs) appeal an order dismissing their medical malpractice action (the action) for delay under both rules 24.01(1) and 24.02(1) of the MB, *King's Bench Rules*, Man Reg 553/88 [*KB Rules*].

[3] The most controversial feature of this case is that the discovery stage of the litigation proceeded at a glacial pace; it took more than thirteen years to be substantially completed (from 2009 to 2022).

[4] After the litigation moved into pre-trial in late 2022, both defendants raised the issue of delay for the first time with the pre-trial judge (the judge). In 2024, the judge permitted the defendants to file their motions for delay and, after a hearing, he dismissed the action.

[5] While, for some, dismissing an action for undue delay is seen as a "Draconian order", which often arises not due to the merits of a claim but the failure of counsel to diligently prosecute it, there comes a point where intolerable delays "turn justice sour" (*Allen v McAlpine (Sir Alfred) & Sons Ltd*, [1968] 1 All ER 543 at 546, 556 (CAUK) [*Allen*]).

[6] Since the creation of the Court of King's Bench of Manitoba, the power to dismiss an action for undue delay has been recognized (see *Davis v*

Wright (1914), 24 Man R 205, 1914 CanLII 391 (MBCA)). However, as MacInnes JA eruditely observed in *Dubois v Manitoba Lotteries Corporation*, 2009 MBCA 108 [*Dubois*]: "Motions to dismiss for delay are numerous, but the judicial outcomes are greatly mixed. That is because the legal principles which govern their disposition, while clear enough in their enunciation, are difficult in their application because their application is highly fact-driven" (at para 18).

[7] In 2017, the existing delay rule—rule 24.01 of the *KB Rules*—was modernized and a new companion rule, rule 24.02, was enacted to reflect the necessary "culture shift . . . to create an environment promoting timely and affordable access to the civil justice system" (*Hryniak v Mauldin*, 2014 SCC 7 at para 2; see also MB, *Court of Queen's Bench Rules, amendment*, Man Reg 130/2017, s 9). As Simonsen JA explained in *Buhr v Buhr*, 2021 MBCA 63 [*Buhr*], these reforms, which came into force on January 1, 2018, were "intended to expedite and bring finality to civil proceedings" (at para 33).

[8] Rule 24.01 of the *KB Rules* is the general delay rule. It recognizes the Court's historic discretion to dismiss an action where inordinate and inexcusable delay has resulted in significant prejudice to a party. The focus of rule 24.01 is the reasonableness of the "overall delay" looking at the litigation "as a whole" (*Buhr* at para 33). The accepted approach in applying the current version of rule 24.01 was discussed by this Court in *The Workers Compensation Board v Ali*, 2020 MBCA 122 at paras 39-46 [*Ali*] (see also *Forsythe v Johnson*, 2024 MBCA 104 [*Forsythe*]).

[9] Rule 24.02 of the *KB Rules*, often described as the "long-delay rule" or "drop-dead rule" (*Buhr* at paras 33, 35), is a more specialized and novel

remedy than rule 24.01 borrowed from a similarly worded rule in Alberta (see *Alberta Rules of Court*, Alta Reg 124/2010, vol 1, r 4.33 [the *AB Rules*]). Rule 24.02 of the *KB Rules* addresses the discrete concern of long "gaps" in litigation (*Buhr* at para 33). If a period of three or more years elapses during litigation without a significant advance and none of the prescribed exceptions (see *KB Rules*, rr 24.02(1)(a)-(e)) apply, the action must be dismissed for delay. Such a long gap is a hard ceiling. In *Buhr*, this Court confirmed that there is no judicial discretion other than to dismiss the claim for delay if the requirements of rule 24.02 are established. The purpose of this rule is to "weed out inactive cases" and to discourage complacency in civil litigation (*Buhr* at para 33).

[10] The numerous grounds of appeal set out in the notice of appeal can be synthesized into three issues:

i) In determining whether the delay was "inordinate and inexcusable" within the meaning of rule 24.01(3) of the *KB Rules*, did the judge err in his consideration of the role and responsibilities of the defendants with respect to the overall delay?

ii) Did the judge misdirect himself on rule 24.01(2) of the *KB Rules* with respect to the "evidence to the contrary" necessary to rebut the presumption of significant prejudice to the defendants because of inordinate and inexcusable delay?

iii) Did the judge err in determining for the purposes of rule 24.02(1) of the *KB Rules* that more than three years had passed without a significant advance in the litigation?

[11] For the following reasons, I would allow the appeal. My reasoning in allowing the appeal gives rise to a fourth issue as to whether costs should follow the successful appeal or whether there is a good cause to make an exceptional award as to costs against the plaintiffs (see *KB Rules*, r 57.01(2); *Cooper v Whittingham*, [1880] 15 Ch D 501 at 504 (Ch D UK) [*Cooper*]).

Background

[12] On the morning of November 27, 2006, Dale Parkinson (the deceased), aged sixty-five, attended the emergency department of a Winnipeg hospital complaining of severe chest pain and worsening nausea. During his triage, inquiries were made, diagnostic testing was performed and medication was provided.

[13] That afternoon, an emergency physician, Dr. Erik Smith (Dr. Smith), met with the deceased and diagnosed his symptoms as being gastrointestinal and not cardiac in nature. Medication was prescribed and the deceased was instructed to follow up with his family physician. After being in the hospital for about three hours, the deceased returned home. Later that evening, he went into cardiac arrest and died. An autopsy found the cause of death to be acute myocardial infarction (commonly known as a heart attack) and that the deceased had undiagnosed coronary artery disease.

[14] On November 12, 2008, the plaintiffs commenced an action against the defendants, the Winnipeg Regional Health Authority (WRHA), who operated the hospital where the deceased was treated, and Dr. Smith, on behalf of the deceased's estate and for the benefit of members of the deceased's family entitled under *The Fatal Accidents Act*, CCSM c F50 [the *FAA*].

[15] An important feature of the action is one aspect of the damages claimed. The deceased had a lengthy career as a successful investment executive. At the time of his death, he was collecting a significant pension, he possessed a multi-million-dollar investment portfolio, he had other significant real and personal property, and he was still earning other income by consulting in the financial services industry. In their statement of claim, the plaintiffs asserted that, because of the deceased's "premature death", his estate suffered damages which "include[d] diminution in the value of his estate" (the estate damages).

[16] Both defendants filed statements of defence in 2009; each denying liability.

[17] In the *decision*, the judge decided that inordinate and inexcusable delay had been established and the presumption of significant prejudice had not been rebutted (see *KB Rules*, rr 24.01(2)-(3)). He said that there was no principled reason for him to not exercise his discretion and dismiss the action for delay pursuant to rule 24.01(1). To do so, he believed, would be contrary to the Court's direction in *Ali* at para 86 that there must be a "culture shift" (*decision* at para 47) in attitudes about delay by both the courts and counsel. The judge stated: "I am aware of the plaintiffs' claim and the sense of loss [the deceased's] family must feel. The length of the delay in this case is too significant for me to ignore, given the culture change in moving civil cases to trial in a timely manner" (*ibid* at para 49).

[18] Central to the judge's decision to also dismiss the action under rule 24.02(1) of the *KB Rules* was the delay in the plaintiffs answering the

undertakings given at the examination for discovery of their representative, Parkinson, held on January 16, 2014.

[19] The judge accepted the submission of the WRHA that the "partial answers to undertakings" provided by the plaintiffs in the spring of 2017 were only "a modest advance [of the litigation] not a significant advance" (*decision* at para 31). He said that it was only on September 24, 2019, when the plaintiffs disclosed to the defendants an expert report (the Martyszenko report) from an accountant, Alan Martyszenko (Martyszenko), that quantified the estate damages to be $4,260,762 (exclusive of other losses claimed relating to the administration of the deceased's estate), that there was a "significant advance" in the litigation (*ibid* at para 51).

[20] The judge said that none of the exceptions in rules 24.02(1)(a)-(e) of the *KB Rules* applied. Accordingly, as he put it, because "more than three years passed without a significant advance" in the litigation (*decision* at para 51), he was required to dismiss the action for delay pursuant to rule 24.02(1).

Discussion

The Parameters of Appellate Review

[21] Given the nature of the issues that arise in this appeal, it is useful to start with a brief commentary on the parameters of appellate review.

[22] At the outset, it needs to be reiterated that the role of this Court in conducting an appeal is not to retry the merits of the case and substitute its view of the evidence for that of the lower court (see *Housen v Nikolaisen*,

2002 SCC 33 at para 3 [*Housen*]). There is a narrow scope to appellate review of factual matters (see *ibid* at para 46; *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 71). Subject to an error in law, the findings of the lower court should be deferred to, absent of a palpable and overriding error. This is a highly deferential standard of review. Such errors are "obvious," as they "can be plainly identified in [the *decision*]" and are of such importance as to be "determinative of the outcome of the case" (*Albo v The Winnipeg Free Press*, 2020 MBCA 50 at para 19).

[23] Another aspect of the narrow scope of appellate review as to the merits of a case is that the reviewing court is not to "finely parse" a lower court's reasons "in a search for error" (*R v GF*, 2021 SCC 20 at para 69). Reasons must be read as a whole and in the context of the entire record and the positions of the parties. Appellate deference mandates that the lower court should be given the benefit of the doubt if parts of a decision are uncertain and open to interpretation. As was explained in *Interlake Reserves Tribal Council Inc v Government of Manitoba*, 2021 MBCA 17: "Ambiguities in reasons should be resolved by an appellate court in a manner consistent with the judge's presumed knowledge of the law as opposed to one suggesting error" (at para 17).

[24] With these relevant principles in mind, I would regrettably observe that, in my respectful view, the *decision* contains several obvious factual and legal errors. Also noteworthy is that important conclusions on the judge's application of rules 24.01 and 24.02 of the *KB Rules* are entirely conclusory. The cumulative effect of this unfortunate situation is that the authority and integrity of the decision reached are undermined. This reality was not seriously contested by the defendants on the appeal.

[25] Appropriately, the defendants made the submission that a successful appeal requires far more than merely demonstrating the original decision maker erred; it must also be shown that any error was material in the sense that it impacts the result reached. I agree.

[26] As was explained in *Papasotiriou-Lanteigne v Tsitsos*, 2023 MBCA 66 at para 17 [*Tsitsos*]:

> Notwithstanding the demonstration of error, a civil appeal may be dismissed where the result is inevitable or the error is harmless as it can be confidently said that it had no real impact on a decision; in other words, the wrong is not a substantial one or a miscarriage of justice.
>
> [citations omitted]

[27] The defendants underscore that, at the end of the day, regardless of the shortcomings of the judge's reasoning, the plaintiffs failed in advancing their action in a timely manner contrary to rules 24.01 and 24.02 of the *KB Rules* and/or, therefore, the result of the action being dismissed for delay should not be disturbed by this Court.

[28] In conclusion, given this Court's limited role on appellate review, it is not necessary for me to comment on every error made by the judge, save where it is necessary to provide context or where the error could be a material one. I will begin with a discussion of the first two issues on this appeal that relate to rule 24.01 of the *KB Rules*.

Rule 24.01 of the KB Rules

[29] Rule 24.01 of the *KB Rules* provides as follows:

Dismissal for delay **24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.	**Rejet pour cause de retard** **24.01(1)** Le tribunal peut, sur motion, rejeter une action, en tout ou en partie, s'il estime qu'elle a fait l'objet d'un retard ayant causé un préjudice important à une partie.
Presumption of significant prejudice **24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.	**Présomption de préjudice important** **24.01(2)** Lorsque le tribunal estime que le retard dont une action fait l'objet est inhabituel et inacceptable, ce retard est présumé, en l'absence de preuve contraire, avoir causé un préjudice important à la partie ayant présenté la motion.
What constitutes inordinate and inexcusable delay **24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.	**Retard inhabituel et inacceptable** **24.01(3)** Pour l'application de la présente règle, tout retard est inhabituel et inacceptable lorsqu'il excède ce qui est raisonnable compte tenu des circonstances et de la nature des questions du litige.

[30] In *Ali*, the Court reviewed rule 24.01 of the *KB Rules* in light of its text and the rule's historical development. It was explained that rule 24.01 creates two pathways for an action to be dismissed for delay (see also *Ian Dmytriw v Jonah NK Odim*, 2020 MBCA 112 at paras 27-28 [*Dmytriw*]).

[31] The first pathway focuses solely on rule 24.01(1) of the *KB Rules.* This route involves litigation delay that falls short of inordinate and inexcusable delay (see *ibid*, r 24.01(3)) but the delay has nevertheless

occasioned significant prejudice to the moving party. In this scenario, the moving party bears the onus of establishing that the delay has resulted in significant prejudice to it on a balance of probabilities (see *Ali* at para 45). As the case at bar is not this scenario, it is unnecessary to consider this pathway.

[32] The other pathway involves the combined effect of rules 24.01(1)-(3) of the *KB Rules*. This avenue involves delay that is proven to be inordinate and inexcusable which, thus, gives rise to the rebuttable presumption of significant prejudice in favour of the moving party (see *Ali* at para 43). In *Ali*, Burnett JA explained the three questions to be decided under this scenario:

i) Has there been delay?—rule 24.01(3) (see paras 39-42)

ii) Has the delay resulted in significant prejudice?—rule 24.01(2) (see paras 39, 43-45)

iii) Is there an exceptional circumstance to not dismiss an action where there has been delay resulting in significant prejudice?—rule 24.01(1) (see para 46)

[33] As this appeal raises the first two questions only, it is unnecessary to discuss the residual discretion to not dismiss an action despite there being delay that has resulted in significant prejudice.

Issue 1: Has There Been Delay?—Rule 24.01(3) of the *KB Rules*

The Relevant Principles

[34] Because of the wording of the rule, the moving party has the burden of establishing that the delay is both "inordinate and inexcusable" (*Ali* at

para 40) [emphasis in original] to satisfy the requirements of rule 24.01(3) of the *KB Rules*. According to the language of rule 24.01(3), such delay is that which "is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case." Accordingly, the delay analysis must be holistic, looking at a multitude of considerations (see *Forsythe* at para 58).

[35] It is important to appreciate that, unlike in criminal law, in the assessment of litigation delay under rule 24.01 of the *KB Rules*, there is no presumptive ceiling as to what is and what is not unreasonable delay (see *R v Jordan*, 2016 SCC 27 at paras 46-59). While "there is a strong public interest in promoting the timely resolution of [civil] disputes" (*Ali* at para 86), the viewpoint on assessing delay is different in criminal law versus civil law because of section 11(b) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[36] As Burnett JA explained in *Ali* at para 12, the proper approach to address the reasonableness standard set out in rule 24.01(3) of the *KB Rules* is to look at several factors together:

i) The complexity of the litigation.

ii) The subject matter or nature of the issues in the action.

iii) The length of the delay.

iv) The explanation given for the delay.

v) Any other relevant circumstances that would include a consideration of the current status of the litigation in comparison to a reasonable comparator and the role of each party in the overall delay.

[37] The first four of these factors mirror the approach of this Court under the prior version of rule 24.01, as discussed in *Hughes v Simpson-Sears Ltd*, 1988 CanLII 1373 (MBCA) [*Hughes*]; *Law Society of Manitoba v Eadie*, [1988] 6 WWR 354, 1988 CanLII 206 [*Eadie*] (see *Ali* at paras 27, 41).

[38] While the issues of delay being inordinate and inexcusable are distinct, once the delay is established to be inordinate, the defendant will typically have met its legal onus under rule 24.01(3) of the *KB Rules*. An evidential burden will fall upon the plaintiff to adequately explain the delay based on satisfactory evidence (see *Ali* at para 42).

[39] The contentious legal issue in dispute in this appeal is the question of how the conduct of a defendant should be considered for the purposes of applying rule 24.01(3) of the *KB Rules*. Put another way, when does the conduct of a defendant excuse what would otherwise be inordinate delay?

[40] The starting point is trite but important. When discussing delay under rule 24.01 of the *KB Rules*, the issue is delay caused by a plaintiff. If a defendant is "responsible for any unnecessary delay, [they] obviously cannot rely on it" (*Allen* at 556).

[41] Lord Justice Diplock explained in *Allen* that the common law civil justice system is "an adversary system" (at 555). The architecture of the rules

of civil procedure (in Manitoba, the *KB Rules*) "give[s] to the plaintiff the initiative in bringing [their] action on for trial" (*Allen* at 554; see also *Forsythe* at para 52). These rules provide obligations and timelines for the completion of the various steps in the litigation by the parties to an action, as well as machinery to enforce compliance should a party be in default. Accordingly, the *KB Rules* provide an effective mechanism against "unreasonable delay by the defendant" (*Allen* at 554).

[42] When a plaintiff is not diligent in prosecuting their action, the *KB Rules* provide options to a defendant to address delay. A defendant can apply to the Court to press on with the action by forcing a plaintiff to comply with their obligations (see *Allen* at 554; see also *Dubois* at para 37). However, a defendant also has the option of employing the strategy of "wait and see". As was explained in *Allen*, a "defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until [they] can successfully apply to the court to dismiss the plaintiff's action for [delay]" (at 555).

[43] In *Forsythe*, it was explained that the strategy of wait and see does have parameters. It is improper for a defendant to fail to discharge their duties under the *KB Rules* in the litigation or for their counsel to not promptly communicate with opposing counsel during the litigation (see *Forsythe* at paras 53-54). As was noted in *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 [*Transamerica*]: "There is a significant difference between a defendant 'doing nothing' in the face of inactivity by the plaintiff, and the defendant failing to discharge its procedural obligations" (at para 27).

[44] In *Dubois*, it was observed that the strategy of wait and see creates a risk for a defendant on a motion to dismiss for delay; that once a holistic assessment is taken of the delay, the plaintiff's action may nevertheless be entitled to proceed despite lengthy delay (see paras 23, 37). This is a prime example of the difference in the approach to litigation delay between civil law and criminal law, and between rules 24.01 and 24.02 of the *KB Rules*.

[45] In terms of the discretion to dismiss an action for delay, authorities such as *Forsythe* (see para 53); *City Sheet Metal Co Ltd v Euramax Canada Inc*, 2021 MBQB 118 (see paras 36-37, 39, 47) [*City Sheet Metal*]; *Transamerica* (see para 27); *Allen* (see 556), all accept that the conduct of a defendant in the action may be a relevant factor to consider in the exercise of discretion under rule 24.01 of the *KB Rules*.

[46] It is important to highlight that the inquiry as to defence conduct under rule 24.01 of the *KB Rules* is broader than the applicable standard for examining defence conduct under rule 24.02. In *Buhr*, it was explained that the lens to examine defence conduct under rule 24.02 is quite discrete. While a defendant "need not move a plaintiff's action along", deliberate acts by a defendant that "intentionally obstruct, stall or delay an action" (*Buhr* at para 82) may be relevant to a determination as to whether a step in the litigation is a significant advance.

[47] In contrast, a different and broader lens applies to the question of analyzing defence conduct under rule 24.01 of the *KB Rules*. As Spivak JA noted in *WRE Development Ltd v Lafarge Canada Inc*, 2022 MBCA 11 [*WRE*], there are different "considerations of defence delay in the context of

the discretionary delay rule under r 24.01" (at para 40). Defence conduct can be relevant under the analysis of rule 24.01 even where it is not coloured by some controversy. This difference in approach is largely a function of the fact that dismissal of an action under rule 24.01 is always a discretionary matter, while dismissal of an action under rule 24.02 is mandatory if the prerequisites of the rule are established.

[48] A thorny problem in assessing the relevance of a defendant's conduct under rule 24.01 of the *KB Rules* is the claim by a plaintiff that a defendant has, by their conduct, "waived or acquiesced in the delay on which they found their application" (*Allen* at 563). This problem arose in *Forsythe* (see paras 47-58).

[49] In *Allen* at 556, Diplock LJ explained this question as follows:

> [I]f after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise [their] right to proceed to trial notwithstanding the plaintiff's delay, [they] cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay.

[50] Lord Justice Salmon added the following observation in *Allen* at 563-64:

> [N]o defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay.
>
> Mere inaction on the part of the defendant cannot in my view amount to waiver or acquiescence. Positive action, however, by which he intimates that he agrees that the action may proceed, is a different matter. If, for example, he intimates that he is willing for

> the action to proceed and thereby induces the plaintiff's solicitors to do further work and incur further expense in the prosecution of the action, he will be precluded from relying on the previous delay by itself as a ground for dismissing the action. Should there, however, be further serious delays on the part of the plaintiff after the defendant's acquiescence in or waiver of the earlier delay, the whole history of the case may be taken into account in deciding whether or not the action ought to be dismissed.

[51] There is no bright-line rule as to when the conduct of a defendant will bar their ability to move for delay under rule 24.01 of the *KB Rules*. As Kroft J commented in *Indurent Ltd v Canadian Indemnity Company* (1983), 22 Man R (2d) 51 at para 26, 1983 CanLII 3759 (MBQB):

> There are cases in which courts have commented unfavourably about defendants who have lulled plaintiffs into a false sense of security by waiting without complaint until the moment was ripe for a motion of dismissal. It is, however, the general rule, and a rule which I would apply in this case, that a defendant cannot always be compelled to spur the plaintiff on or lose his right to successfully apply for dismissal of the action for want of prosecution.
>
> [citation omitted]

[52] I also agree with the Alberta Court of Appeal's commentary in *Young v A Dei-Baning Professional Corporation*, 1996 ABCA 213 [*Young*], where the Court stated that, although "a defendant will be precluded from relying on delay to seek dismissal where his own action intimates agreement that the action may proceed. But, one should not be too quick to criticize a defendant who tries to move a case along" (at para 10).

[53] Ultimately, determining whether the conduct of a defendant amounts to a waiver or acquiescence of a plaintiff's delay for the purposes of

rule 24.01 of the *KB Rules* is an exercise of judicial discretion based on the circumstances. The comments of Browne-Wilkinson LJ in *Roebuck v Mungovin*, [1994] 2 AC 224 at 236-37 (HLUK) [*Roebuck*] provide helpful guidance and can be looked at when examining a submission that a defendant has, by their conduct, waived or acquiesced to a plaintiff's delay in a motion under rule 24.01 of the *KB Rules*:

> Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking-out order. Such conduct of the defendant is, of course, a relevant factor to be taken into account by the judge exercising [their] discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case. At one extreme, there will be cases like the present where the defendant's actions are minor (as compared with inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure: in such a case a judge exercising [their] discretion will be likely to attach only slight weight to the defendant's actions. At the other extreme one can conceive of a case where, the plaintiff having been guilty of inordinate delay, the defendant has for years thereafter continued with the action thereby leading the plaintiff to incur substantial legal costs: in such a case the judge may attach considerable weight to the defendant's activities. But it is for the judge in each case in exercising [their] discretion to decide what weight to attach in all of the circumstances of the case.

See also *Forsythe* at paras 57-58.

The Standard of Review—Rule 24.01 of the KB Rules

[54] A decision whether to dismiss an action for delay under rule 24.01(1) of the *KB Rules* is a discretionary decision (see *Dubois* at

para 16). As Sharpe JA noted in *1196158 Ontario Inc v 6274013 Canada Limited*, 2012 ONCA 544 at para 20, the challenge in exercising this discretion

> is to find the right balance between, on the one hand, the need to ensure that the rules are enforced to ensure timely and efficient justice and, on the other, the need to ensure sufficient flexibility to allow parties able to provide a reasonable explanation for failing to comply with the rules to have their disputes decided on the merits.

This type of judicial discretion rarely gives rise to a "right" or "wrong" result (*Perth Services Ltd v Quinton*, 2009 MBCA 81 at para 28).

[55] A decision whether to dismiss an action for delay under rule 24.01(1) of the *KB Rules* will not be interfered with on appeal absent a misdirection or where the "decision is so clearly wrong as to amount to an injustice" (*Forsythe* at para 16; *Ali* at para 20). On questions of law, the standard of review is correctness. On questions of fact, the standard of review is palpable and overriding error. On questions of mixed fact and law, the standard of review is palpable and overriding error unless there is a readily extricable legal principle; the standard of review in that case is correctness (see *Housen* at paras 8, 10, 37).

[56] The question of whether delay is inordinate and inexcusable under rule 24.01(3) of the *KB Rules* is a question of mixed fact and law (see *Forsythe* at para 17).

Analysis

[57] The record before the judge on the action was based primarily on three affidavits: two from legal assistants in the case of the defendants and one from Parkinson for the plaintiffs, which included dozens of communications that counsel exchanged about the course of the litigation over the years. Dr. Smith did not file a personal affidavit as to any prejudice the litigation has caused him. The situation is the same for the WRHA other than the supporting affidavit says that "nurses who were identified as having had some involvement in the matters giving rise to [the] action are no longer employed by the defendant hospital." The position of the plaintiffs on this record is that:

i) As plaintiffs, they had the primary obligation to move the litigation forward and there were periods of delay on their part.

ii) There were periods where the defendants were responsible for the delay.

iii) There were periods where the defendants were in breach of their obligations under the *KB Rules*.

iv) There were periods where the defendants waived or acquiesced to the plaintiffs' delay.

[58] At the appeal, counsel for the plaintiffs appropriately conceded that the prosecution of the action was not a "model" but argued that the length of delay attributable to the plaintiffs is nowhere near what the judge decided.

[59] In the *decision*, the judge acknowledged that, in his determination of whether the delay was inordinate and inexcusable pursuant to rule 24.01(3) of the *KB Rules*, he was required to consider "the explanation for the delay" and "the role of each party in the overall delay" (*decision* at paras 15, 24, 25, 42). Accordingly, consideration of the defendants' conduct was an issue squarely before him given the relevant legal principles and the circumstances of this case.

[60] Dr. Smith appropriately conceded that the *decision* lacks any findings as to "what periods of inactivity he considered to reach his conclusion that there was delay in the action".

[61] In a short and conclusory statement, the judge assigned all the fault for delay at the feet of the plaintiffs. He stated (*decision* at para 35):

> I find the plaintiffs established, on the clearest of terms, the delay is both inordinate and inexcusable. A delay of 15 years from the filing of the Statement of Claim is well beyond the steps a reasonable litigant would be expected to have taken to bring this straightforward medical negligence claim to trial. The delay is in excess of the delay where the courts in which ***Ali*** and ***Dmytriw*** considered the delay inordinate and inexcusable. I agree this is also a case where inordinate and inexcusable delay has been proven by the defendants.

[62] During his assessment of whether the plaintiffs had rebutted the presumption of significant prejudice (see *KB Rules*, r 24.01(2)), the judge stated: "The plaintiffs' position may be summarized as the defendants failed to take steps which contributed to the delay. The position the defendants need to advance the litigation is an incorrect statement of law. This is the plaintiffs' action to advance" (*decision* at para 43).

[63] In *Housen*, the Supreme Court of Canada explained that readily extricable legal principles that can arise from a question of mixed fact and law include the application of an incorrect legal standard, a failure to consider a required element of a legal test, or the mischaracterization or misapplication of a legal standard (see paras 33, 36-37).

[64] In my respectful view, the judge made two readily extricable legal errors as to the analysis of whether there had been inordinate and inexcusable delay (see *KB Rules*, r 24.01(3)).

[65] First, although the judge properly instructed himself that he was required to consider defence conduct as to whether the delay was inordinate and inexcusable pursuant to rule 24.01(3) of the *KB Rules*, he failed to consider that factor in reaching his decision.

[66] Second, he looked at the issue of defence conduct, which he called "excuses" (*decision* at para 46), on a different aspect of the analysis under rule 24.01 of the *KB Rules*—the question of whether the presumption of significant prejudice was rebutted (see r 24.01(2)). This was the misapplication of a legal standard because a compelling excuse can make what would otherwise be inordinate delay reasonable under rule 24.01(3) (see *Ali* at para 34; see also *WestJet v ELS Marketing Inc*, 2025 ABCA 115 at para 16 [*WestJet*]). Before turning to the presumption of significant prejudice (see *KB Rules*, r 24.01(2)), the law required the judge to first consider the issue of the conduct of the defendants as to whether the delay was inordinate and inexcusable for the purposes of rule 24.01(3) of the *KB Rules*.

[67] I am not satisfied that these errors of law can be disregarded as being harmless. The failure to properly apply the correct test under rule 24.01(3) of

the *KB Rules* in two important ways is material and, thus, this Court is required to examine the record afresh in light of the relevant principles, as previously explained, and give the judgment that ought to have been pronounced (see *The Court of Appeal Act*, CCSM c C240, s 26(1)).

[68] On this fresh review of the record, a cautionary note needs to be made. While Parkinson does have personal knowledge of events relating to the litigation, her assertions as to the conduct of the action have a significant element of reliance on information and belief based on the communications of counsel as to why some of the delays occurred. While the record explaining delay here is not entirely unhelpful, as was the situation in *City Sheet Metal*, or uncertain due to important gaps, as was the case in *Ali*, to some degree, this Court is unfortunately left with the task of reading between the lines of counsel's correspondence "to infer what has transpired and why" (*Ali* at para 78).

[69] In *Ali* at para 73, this Court highlighted the pitfalls of not putting forward the witness(es) as to delay who can best explain what happened with direct evidence:

> In some cases, a simple chronology of the activity on the file, by someone with first-hand knowledge, may be enough to establish that the delay in question was justified by that activity. Ultimately, however, the issue is whether the nature and quality of the evidence provides the judge with a satisfactory explanation or excuse for the delay. In order to be placed in the best position, it clearly would be prudent for a plaintiff, or someone else with first-hand knowledge, such as the plaintiff's lawyer during the relevant period, to provide a sworn affidavit containing a clear and meaningful explanation of the reasons for the delay.

[70] The point made in *Ali* is that not all relevant evidence on a delay motion is reduced to writing and written communications often require context from a witness to be fully appreciated. The upshot is that it is entirely foreseeable in delay cases under the *KB Rules* that counsel will need to provide first-hand evidence as to the delay narrative, which may give rise to issues of credibility, based on their discussions and interaction with opposing counsel on the file to satisfy the expected quality of evidence mentioned in *Ali*.

[71] I do not make this observation lightly. A lawyer giving evidence and opening themselves up to cross-examination is disruptive to litigation and has significant implications, for example, a different lawyer may need to be retained by a party as a result. However, leaving aside the ethical issues that arise in this situation, the common law is clear that a lawyer cannot be a witness and advocate in the same cause (see *Oliver, Derksen, Arkin v Fulmyk*, 1995 CanLII 11052 at paras 11-13 (MBCA)).

[72] In summary, while an affidavit from counsel is not required in all delay cases (if the record is otherwise satisfactory), it should come as no surprise to a litigant participating in a delay motion that questions may be asked by the Court as to what counsel said and believed during the course of the litigation and the answers to such inquiries often can only come from counsel, and not a legal assistant, a junior lawyer on the file or a litigant relying on information and belief (see *Ali*).

[73] The plaintiffs are critical of the judge in their factum, referring to the affidavits filed by the defendants as “seriously deficient and grossly misrepresented the steps in the action” because they are incomplete accounts

of the communications between the parties. In reaching my decision, I reviewed the entire record that was before the judge and considered it as a whole in light of the submissions of the parties. In the appendix attached to these reasons, there is a timeline of key events of the discovery phase of this litigation from 2009 to 2022.

[74] In terms of the first two factors mentioned in *Eadie* and *Ali*—the complexity of the litigation and the subject matter or nature of the issues in the action—I accept, as the judge found, that the action is not complicated in terms of liability. The deceased's interaction with the medical care system on November 27, 2006, was brief and well-documented. Other than the day in question, Dr. Smith had no professional relationship with the deceased. There are only a small number of medical records in this case from the hospital and an autopsy report. The contentious factual issues are whether sufficient diagnostic testing of the deceased was done at the hospital before the alleged misdiagnosis occurred and whether the deceased was allowed to leave the hospital too soon despite his chest discomfort. In short, the plaintiffs' case on liability turns on a contest of experts as to whether Dr. Smith's conduct fell below the applicable standard of care for an emergency physician.

[75] I do have difficulty with the judge's description of the plaintiffs' claim for damages as being, like the question of liability, "straightforward" (*decision* at para 48). The plaintiffs' damages claim involves several types of damages. In my respectful view, the judge "misconceived the evidence in a way that affected his conclusion" (*Van de Perre v Edwards*, 2001 SCC 60 at para 15 [*Van de Perre*]) when he said that the nature of the plaintiffs' damages claim was simply for "prescribed benefits under [the *FAA*]" (*decision* at para 48).

[76] After the Martyszenko report was disclosed, the parties exchanged legal opinions in 2019 and 2020 as to whether the estate damages for a tort claim are recoverable in law because of the interplay of the *FAA* and *The Trustee Act*, CCSM c T160 [the *TA*]. This legal debate turns on a question of statutory interpretation of dated provincial legislation, the *FAA* and the *TA*, and a series of dated authorities from outside of Manitoba. No modern Manitoba authority was before the judge on this important question to cast light on whether the plaintiffs' multi-million-dollar claim for the estate damages is reasonably arguable or not.

[77] Additionally, during the pre-trial process, Dr. Smith suggested that, because of the contentious nature of the estate damages issue, the most proportionate format of the trial was the rare practice of bifurcating the trial and having the damages issue decided prior to the liability issue. The fact that Dr. Smith suggested that unusual procedure, which was opposed by the plaintiffs, highlights that the claim for the estate damages issue is anything but straightforward.

[78] In terms of the current status of the litigation in comparison to like cases and the total length of delay in this case, there is no question that the delay here appears at first blush to be inordinate. As was explained in *Ali* (see para 67), the Court, using its own experience and judgment, can make that assessment considering the record and the submissions of the parties.

[79] A medical malpractice action, even with a novel damages issue, should not take as long as this case has taken. I agree with the judge that, when reasonable comparables, such as *Ali* and *Dmytriw* (which are extreme examples to begin with), are used as a measuring stick, the circumstances of

the delay here cry out for an adequate explanation based on proper evidence as required by *Ali*.

[80] It is necessary to analyze the delay and assess responsibility for it. In my view, the key issue to resolve in this case for the purposes of rule 24.01(3) of the *KB Rules* relates to the roles of each of the parties and whether that properly explains the lengthy delay.

[81] To begin, I conclude that the delays that resulted until the close of pleadings in 2009 are entirely attributable to the defendants. The action was filed prior to the expiry of the limitation period. The defendants sought extensions of time to file their statements of defence, to which the plaintiffs consented.

[82] I am also persuaded by the Parkinson affidavit that the delays in relation to when the case moved into pre-trial management in December 2022 have been adequately explained. Noteworthy is, after more than a decade of litigation, Dr. Smith raised for the first time the admissibility of the expert opinion of the plaintiffs' primary witness on liability, Dr. John Rabson (Dr. Rabson), because he is a cardiologist as opposed to an emergency physician. The judge set a deadline for the plaintiffs to produce an expert report from a different expert witness. The plaintiffs did not meet that deadline because of the small pool of emergency physicians in Manitoba who do not work for the WRHA and the difficulties in contacting these busy professionals. In my view, this is a satisfactory explanation to explain delays in the pre-trial management phase of the litigation.

[83] In terms of the bulk of the delay in this case, between the close of pleadings on August 31, 2009 and the first pre-trial conference on

December 15, 2022, I would start by rejecting the plaintiffs' submission that the pace in which they advanced the litigation should be excused due to the complexity of the deceased's estate and the difficulties in administering it until completion in July 2011.

[84] According to the record, at the time of his death, the deceased was in the process of establishing a new estate plan to address his separation from his wife and his cohabitation with a new partner. The legal issues involved in dealing with an unexecuted new will and negotiating settlements with the wife and new partner were complex. As a result, the executors retained a different law firm to handle negotiations and court proceedings in relation to these estate issues. Significant expenses in professional fees were incurred to resolve these matters and those costs form part of the estate damages.

[85] While I accept the timing of the deceased's death created complexities as to the administration of his estate, I see little relevance of this fact to any delays in the prosecution of the action against the defendants. The deceased's estate had significant resources; the executors are mature and knowledgeable individuals and the plaintiffs were represented by experienced counsel.

[86] There is nothing in the record to suggest any reason why all legal matters arising from the deceased's death could not be conducted at the same time. Moreover, by the summer of 2011, several years before the examinations for discovery in this litigation took place, the administration of the deceased's estate was complete. In my view, no weight should be attached to the complexity of the deceased's estate and the difficulties in administering it as an excuse for delay of the action.

[87] Dr. Smith submits that, despite the conclusory nature of the judge's reasoning on rule 24.01(3) of the *KB Rules*, the record sets out "ample evidence" of delay to support the conclusion he reached. While several examples of potential unreasonable delay by the plaintiffs are highlighted by Dr. Smith, in my view, only three of the arguments merit comment.

[88] The first concern relates to the plaintiffs' delay in providing their expert reports from Dr. Rabson as to liability to the defendants until February 4, 2012.

[89] The Parkinson affidavit makes clear that, before the plaintiffs decided to commence the action, they knew that "expert evidence is normally necessary to prove negligence" (*Laing v Sekundiak*, 2015 MBCA 72 at para 69). This led to Dr. Rabson being retained before the statement of claim was filed.

[90] It is noteworthy that three reports from Dr. Rabson (two of which were prepared in 2008 and the other in 2011) were not provided to the defendants until well after counsel for Dr. Smith advised the plaintiffs, on July 20, 2010, that Dr. Merril Pauls (Dr. Pauls) and Dr. David Pinchuk (Dr. Pinchuk) were satisfied with the standard of care that the deceased had received in the emergency department, together with a report to that effect from Dr. Pauls. As noted in the attached appendix, on six occasions from March 21, 2011 to January 9, 2012, the expert report(s) of Dr. Rabson were requested by Dr. Smith but not provided.

[91] Prior to examinations for discovery, it is entirely appropriate for a party to hold back disclosure of an expert report where, for instance, it is

uncertain if the expert will be necessary in light of the facts and issues in dispute.

[92] However, here, it was always the plaintiffs' intention to call Dr. Rabson as an expert witness on the standard of care. There is at least one year in the chronology of events where the three reports of Dr. Rabson were withheld without any good reason, thus delaying, in part, the timing of the examinations of discovery. As I will explain momentarily, just because the *KB Rules* allow a party to hold back an expert report for some time, that does not make that the most proportionate practice or a factor that cannot be considered on a motion for delay.

[93] My next concern relates to the delay by the plaintiffs in producing their expert report on the estate damages claim—the Martyszenko report.

[94] A lengthy delay in obtaining an expert report can be a major contributing factor in the delay of the action (see *Nova Pole International Inc v Permasteel Construction Ltd*, 2020 ABCA 45 at para 39; *SIASI v Teplitsky*, 2018 ONSC 1107 at para 68).

[95] It took Martyszenko just over eighteen months in 2018-2019 to prepare his expert report on the estate damages. The Parkinson affidavit details that there was considerable financial data relating to various aspects of the deceased's affairs that had to be reviewed with Martyszenko and discussed with the plaintiffs and their counsel. I have no concerns as to the time it took for the report to be prepared after he was retained. The challenge of preparing the Martyszenko report, given the complexity of the deceased's affairs at the time of his death, is adequately explained by the Parkinson affidavit.

[96] The difficulty I have is more fundamental.

[97] The plaintiffs claimed the estate damages in the statement of claim filed in 2008 but then did not take the necessary steps to quantify those damages until well after the discoveries in 2014. This is not a minor issue in the case; this is the core loss being litigated.

[98] The plaintiffs' argument that the defendants delayed too long in challenging the claim for the estate damages is not persuasive.

[99] The averment to the estate damages in the statement of claim is obscure, to put it mildly. No reasonable reader of the pleading would have any idea that the estate damages would be an allegation of several million dollars. Understandably, the defendants could not discover Parkinson on the topic in 2014. It was only in 2019, after disclosure of the Martyszenko report, that a serious debate about these damages occurred between the parties.

[100] The plaintiffs' submission is also at odds with rule 25.07(7) of the *KB Rules*, which states that:

Damages	**Dommages-intérêts**
25.07(7) In an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted.	**25.07(7)** Dans une action en dommages-intérêts, le montant de ceux-ci est réputé contesté, à moins d'être admis spécifiquement.

[101] Rule 25.07(7) of the *KB Rules* reflects the common law that[1]:

[1] WB Williston & RJ Rolls, *The Law of Civil Procedure*, vol 2 (Toronto: Butterworths, 1970) at 685, citing with approval *Wilby v Elston*, [1849] 137 ER 462 (CPUK); *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London*, [1916–17] All ER Rep 898 (CAUK).

> No denial or defence is necessary as to damages claimed or their amounts; they are deemed to be put in issue unless expressly admitted. This applies to damages of all kinds, whether general or special and where the alleged damage is an essential part of the cause of action or not.

In any event, in their statements of defence, both Dr. Smith and the WRHA put the claim for the estate damages into issue.

[102] Given the pleadings and the implications of rule 25.07(7) of the *KB Rules*, I reject the idea that the defendants should be responsible for not complaining about the estate damages prior to disclosure of the Martyszenko report.

[103] According to the Parkinson affidavit, the plaintiffs had discussions with Allan Thordarson (Thordarson), an accountant who was providing accounting and tax services in relation to the administration of the estate, about the estate damages prior to the administration of the deceased's estate being completed in July 2011. An exact date as to when those conversations began is not identified in the record.

[104] Discussion as to the estate damages continued with Thordarson from 2012 to 2017, but at no time was Thordarson retained to provide a formal expert report for litigation purposes. A reason for that not occurring is not provided. In December 2017, Thordarson advised he was retiring and someone else should be retained, which resulted in Martyszenko being retained.

[105] Sometimes, delaying obtaining the opinion of an expert can be a reasonable decision when facts are not reasonably ascertainable at that point

in the litigation, for example, where damage suffered is not yet "reasonably assessable" (*Frank v Alpert*, 1970 CanLII 198 at 642 (SCC)). In other situations, the failure to retain an expert in a timely fashion can amount to unreasonable delay (see *Laing v Sekundiak*, 2013 MBQB 17 at para 108; see also *Premium Properties Limited v Aird & Berlis*, 2015 ONSC 5067 at para 35).

[106] This is not a situation where some tolerance could be shown to a plaintiff whose limited financial constraints explain delay in retaining an expert (see *Carioca's Import & Export Inc v Canadian Pacific Railway Limited*, 2015 ONCA 592 at para 71). Parkinson deposed that, at the time of the motions for delay, the plaintiffs had paid over $130,000 towards legal expenses for the litigation and a further $36,952.60 towards expert fees. Parkinson further stated that the plaintiffs faced additional legal expenses at the time that had not yet been billed. The only reasonable inference on this record is that the plaintiffs had the means to retain an expert on the estate damages far earlier than occurred.

[107] Thordarson's decision to retire also does not assist the plaintiffs. There really is no proper explanation in the Parkinson affidavit as to why steps were not taken to quantify the estate damages well before commencing the examinations for discovery in 2014. The issue became problematic when the discovery of Parkinson was not completed in 2014 because no expert report on damages had even been commissioned by that time and, so, the defendants deferred their questioning on damages. Again, as made clear in *Ali*, the evidential burden of adequately explaining the delay in retaining a damages expert lies solely with the plaintiffs.

[108] The timeliness of obtaining and exchanging expert reports by the parties to an action is important to securing "the just, most expeditious and least expensive determination of every civil proceeding on its merits" (*KB Rules*, r 1.04(1)). It is unreasonable that, although the estate damages were claimed in 2008 when the action was commenced and formed most of the plaintiffs' damages, no concrete steps to secure an expert report for those damages were taken until many years after holding the examinations for discovery in 2014. This lengthy delay has not been adequately explained by the plaintiffs given the centrality of that expert evidence to their damages claim (see *Ali* at para 74). In my view, much of the delay in this case is directly attributable to the significant delay in commissioning the preparation of the expert report on the estate damages.

[109] My final concern is the plaintiffs' delay, between February 11, 2020 and September 23, 2022 (thirty-one months), in scheduling a pre-trial conference (see *KB Rules*, r 50.02(1)). After the defendants confirmed their position to the plaintiffs on February 11, 2020—that, if liability were proven, the plaintiffs would not be able to recover the estate damages at law—the issues were sufficiently focused for pre-trial conferencing of the action to commence. That is exactly what Dr. Smith invited the plaintiffs to do in his counsel's communication of February 11, 2020—and then, thirty-one months passed.

[110] As was explained in *Giacomini Consulting Canada Inc v The Owners, Strata Plan EPS 3173*, 2023 BCCA 473: "Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it" (at para 74).

[111] In the Parkison affidavit, this thirty-one-month delay is justified by reference to the COVID-19 pandemic, personal challenges and amendments to the Martyszenko report. In my view, these explanations are not adequate to excuse the delay (see *Ali* at paras 73-74).

[112] The numerous notices and practice directions of the Court of King's Bench from 2020 to 2022 in relation to the COVID-19 pandemic confirmed that, while the business of the Court adapted to the global public health risk, the work of the Court did not cease. A litigant wishing to justify delay based on the COVID-19 pandemic must adduce "specific evidence" beyond the mere existence of the pandemic, showing that the pandemic "directly prevented" compliance with court procedure (*Maung v Canada (Attorney General)*, 2021 FCA 116 at para 9).

[113] The Parkinson affidavit says she was "largely confined" to her house due to the pandemic for health reasons. Given that she had counsel representing her in this litigation at all times and that counsel could communicate with her by electronic means to obtain instructions, in my view, none of the delay is excused for that reason.

[114] The Parkinson affidavit also indicates, based on information and belief, that due to a breakout of COVID-19 in her counsel's office in the spring of 2021, her counsel could not, for a period of "about 6 weeks", access the physical file due to a lockout.

[115] With respect, it strikes me as odd that, for six weeks during the COVID-19 pandemic, a major law firm was sealed such that no one could step into the office under controlled conditions to obtain a physical file so that they could work on it elsewhere. The "nature and quality of the evidence" on this

explanation is not sufficient in my view (*Ali* at para 73). Without direct evidence from counsel or a memo from the management of the law firm as to the protocols that were followed during the COVID-19 lockout at the law office, I am not persuaded by this explanation. Those comments aside, it should be noted that this COVID-19 outbreak at the law firm did not occur until one year after the case was ready to move to the scheduling of a pre-trial conference. Also, at best, this six-week lockout at the law firm, if accepted, would only explain a small portion of the thirty-one-month delay.

[116] Parkinson also deposed that, during this thirty-one-month period, unfortunately, her mother became ill and died. Also, she spent time finding historical tax information for the deceased, providing investment advice for his estate and discussing financial matters with Martyszenko that may be relevant to his expert opinion. While I accept all of this occurred, I fail to see any relevance of any of these events to the plaintiffs not getting on with their claim once the defendants told them to do so in February 2020. The initiative at all times lay with the plaintiffs to pursue their lawsuit in a timely fashion.

[117] The plaintiffs' initial pre-trial conference brief was sixteen pages in length. In the concise statement of the factual and legal issues in the lawsuit, the plaintiffs described the evidence and issues relating to liability as being "straightforward" and "complex" in relation to the damages claim. In my view, in the absence of evidence, this pre-trial brief is the type of routine legal filing that counsel familiar with the file could draft within one month. Once the pre-trial conference brief was filed, the litigation could advance to the scheduling of a pre-trial conference (see *KB Rules*, r 50.02(3)).

[118] In my view, given the relatively modest amount of work required to move the litigation from the discovery stage to the pre-trial conference stage, the explanations that have been provided for the thirty-one-month delay for that occurring are not adequate to excuse that delay.

[119] What about the conduct of the defendants during this same period of time?

[120] I agree with the plaintiffs that the entire delay of over thirteen years that this case sat at the discovery stage of the litigation cannot all be attributed to the plaintiffs. For example, the WRHA took four years to answer their undertakings. In the case of Dr. Smith, an undertaking on a minor issue remained outstanding right until the motions for delay were heard and decided.

[121] The plaintiffs are also critical of Dr. Smith holding back disclosure of expert reports until November 30, 2022 from Dr. Pinchuk (dated October 21, 2010) and Dr. Pauls (a second report dated March 10, 2012) for several years after the examinations for discovery in 2014.

[122] The parties took opposite positions on Dr. Smith's decision to hold back disclosure of the expert reports of Drs. Pauls and Pinchuk. The plaintiffs say they were misled at the examination for discovery of Dr. Smith due to this holdback. Dr. Smith disagrees. His position is that, at the examination for discovery, the plaintiffs understood expert opinions had been solicited from both Drs. Pauls and Pinchuk, and one report from Dr. Pauls had already been produced. Counsel for Dr. Smith advised as to the substance of the opinions of Drs. Pauls and Pinchuk as required by rule 31.06(3) of the *KB Rules*.

Dr. Smith says that rule 53.03(1) the *KB Rules* did not require the disclosure of the other two reports "until the pre-trial stage."

[123] On the basis of the common law, if prepared for the dominant purpose of litigation, an expert report is covered by litigation privilege. However, rule 31.06(3) of the *KB Rules* requires certain fact disclosure in relation to an expert (subject to prescribed exceptions) (see *Manitoba (Hydro Electric Board) v John Inglis Co Ltd*, 2001 MBQB 289 at paras 22-26 [*John Inglis*]). In addition, rule 53.03(1) of the *KB Rules* requires pre-trial production of an expert report as a precondition to the expert testifying. Justice MacInnes explained, in *John Inglis*, that rules 31.06(3) and 53.03(1) serve "distinct" purposes (at para 22).

[124] This is a case about delay, not whether the conduct of the defendants was or was not in conformity with their discovery obligations arising from rules 31.06(3) and 53.03(1) of the *KB Rules*. The point to keep in mind is that a defendant's conduct, even if in conformity with the *KB Rules*, may still be relevant for the assessment of delay under rule 24.01.

[125] The practical point made in *Clarke v Hassan*, 2011 ONSC 467, is that the most efficient and proportionate way for a party to meet its obligations under rule 31.06(3) of the *KB Rules*, in order to facilitate an efficient and complete discovery, is to produce expert reports in a timely way (where the decision to rely on that expert in the litigation has been made). By doing so, a party also complies with their obligations under rule 53.03(1). The benefit of this approach is that the litigation proceeds more efficiently.

[126] In my view, the holding back of the expert reports of Drs. Pauls and Pinchuk by Dr. Smith, after the examinations for discovery, contributed to the delays in this case.

[127] It is difficult to put a precise figure on how much of the more than thirteen years of delay in the discovery stage was as a result of the defendants' conduct alone. Complicating matters is there is merit to the plaintiffs' assertion that, by their conduct, the defendants waived or acquiesced to the plaintiffs' delay.

[128] The correspondence of counsel, which is summarized in the timeline in the attached appendix, satisfies me that the defendants were prepared to accept a degree of delay by the plaintiffs in moving the litigation along. The record is replete with all parties having a casual attitude to other parties disclosing their documents, scheduling discoveries and providing undertakings.

[129] In the case of the defendants, reminder letters were sent to the plaintiffs, often on multiple occasions. It was on August 8, 2016, that the plaintiffs were threatened with a motion to enforce compliance with their disclosure obligations under the *KB Rules.* That motion was not filed until May 12, 2017.

[130] Keeping in mind the comments in cases such as *Young*, while I am not critical of the defendants sending constant reminders to the plaintiffs to get on with their case, it is an undisputed fact that it was seven years into discovery before the defendants ever threatened the plaintiffs with a motion to adhere to the requirements of the *KB Rules* and, when that happened, the litigation threatened was not a motion to dismiss the action for delay. On

balance, I am satisfied that, to some degree, the defendants tolerated the plaintiffs' delay in advancing their action through the discovery stage.

[131] I have considered the comments of Browne-Wilkinson LJ, in *Roebuck*, as to the weight to attach to the defendants' conduct on the spectrum he discussed. The record confirms that the defendants had no reason to believe the plaintiffs had grown tired of the litigation and had reached the point where they were not serious. According to Parkinson, the plaintiffs spent significant legal costs to prepare the litigation for trial prior to the defendants advising for the first time thirteen years later that they were moving to dismiss the action for delay. That said, even with the defendants' tolerance, the plaintiffs took an unreasonable amount of time to produce the reports of Dr. Rabson and commission an expert report on the most contentious issue in this litigation—the estate damages. Once the case was ready for pre-trial conferencing, the defendants clearly had had enough of the plaintiffs' delays. While significant weight should be paid to the defendants' conduct, this is not a situation that precludes them in any way from challenging the three aspects of the plaintiffs' delay that I have highlighted as being unreasonable.

[132] In my view, the conduct of the defendants excuses approximately fifty per cent of the overall thirteen-year delay that occurred before the litigation moved out of the discovery phase. The delay attributable to the plaintiffs in relation to the discovery stage of the litigation is, in my view, somewhere between six and a half and seven and a half years.

[133] Had the plaintiffs moved the action along in a more timely fashion, the discovery phase of this litigation would reasonably have been concluded in less than three years given the nature of the issues in the action and the

circumstances of this case. When I consider the relevant considerations set out in *Eadie* and *Ali* cumulatively, in my view, a delay that is more than double that three-year period is inordinate and inexcusable for the purposes of rule 24.01(3) of the *KB Rules*.

Conclusion: Issue 1

[134] While I have a different analysis than the judge, I have reached the same result he did—that the defendants established "inordinate and inexcusable delay" (*decision* at para 35) by the plaintiffs in the prosecution of the action.

[135] Although, in my respectful view, the judge did err in his consideration of the role and responsibilities of the defendants with respect to the overall delay in this case, that does not assist the plaintiffs in their appeal. When the relevant principles under rule 24.01(3) of the *KB Rules* are properly applied to the record as a whole, the appeal should not be allowed on this first issue (see *Tsitsos* at para 17).

Issue 2: Whether the Delay Has Resulted in Significant Prejudice?—Rule 24.01(2) of the *KB Rules*

The Relevant Principles

[136] Justice Huband explained in *Pankhurst v Matz*, 1991 CanLII 2712 (MBCA) [*Pankhurst*] that, "so long as there can be a fair trial, inordinate unexplained delay, by itself, is not enough to deny a plaintiff the right to proceed" (at 6).

[137] One of the features of litigation under rule 24.01 of the *KB Rules*, prior to the 2017 reform of the *KB Rules*, which undermined the rule being an effective sanction against delay, was the need for a defendant to prove prejudice as a result of litigation delay. The jurisprudence is rife with commentary about whether prejudice arising from litigation delay was "inherent" or "actual" and, in either case, "significant" or "minimal" (*Dubois* at paras 14, 22; *Pankhurst* at 6-7).

[138] As Burnett JA explained in *Ali*, the creation of a rebuttal presumption of significant prejudice in rule 24.01(2), once delay has been found to be inordinate and inexcusable, was designed "to avoid further litigation" as to "the issue of inherent prejudice and its strength in a given case" (at para 44).

[139] Two questions are important when rebutting the presumption that arises by operation of rule 24.01(2) of the *KB Rules*. The first is, what is the relevant standard of proof to rebut the presumption?

[140] Rule 24.01(2) of the *KB Rules* is a rebuttable statutory presumption that compels the Court to reach the conclusion that inordinate and inexcusable delay has resulted in significant prejudice to the moving party in the absence of evidence to the contrary (see Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at paras 4.32-4.33).

[141] Interestingly, the parties both advanced the position, based on jurisprudence from Alberta, that the presumption of significant prejudice could be rebutted simply by a defendant raising "a legitimate doubt about the existence" of significant prejudice arising from the delay (*Primrose Drilling*

Ventures Ltd v Carter, 2009 ABCA 259 at para 2; *Ravvin Holdings Ltd v Ghitter*, 2008 ABCA 208 at para 37 [*Ravvin*]; *Sutherland v Cook*, 2007 ABCA 345 at para 10; *Kuziw v Kucheran Estate*, 2000 ABCA 226 at para 54).

[142] These Alberta authorities were decided under a different wording of the *AB Rules* than the current wording of rule 4.31(2) of the *AB Rules* (see *Alberta Rules of Court*, Alta Reg 390/68, s 244(4)). When the wording of the rules changed in Alberta, the Alberta Court of Appeal explained that the onus to prove the existence or non-existence of the presumption is on the balance of probabilities (see *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 at para 77; *Humphreys v Trebilcock*, 2017 ABCA 116 at para 149 [*Humphreys*]).

[143] To complicate matters further, recently, in the *WestJet* decision, the Alberta Court of Appeal cited the standard from *Ravvin*, as opposed to cases such as *Humphreys*, to say that the onus for a defendant to rebut the presumption arising from rule 4.31(2) of the *AB Rules* is the raising of "a legitimate doubt about the existence of that prejudice that can be attributed to the delay" (*WestJet* at para 20, quoting *Ravvin* at para 37).

[144] Whether there is an inconsistency in approach in the Alberta cases or these authorities are saying the same thing in different ways is of no moment to my decision. It is for the Alberta Court of Appeal to give guidance on the meaning of the *AB Rules*. In my view, the correct onus to rebut the presumption that arises under rule 24.01(2) of the *KB Rules* can be addressed without reference to these Alberta authorities.

[145] In *FH v McDougall*, 2008 SCC 53 [*FH*], Rothstein J made the observation "that there is only one civil standard of proof at common law and

that is proof on a balance of probabilities" (at para 40). I do not see anything particularly important or novel about cases for delay that would depart from the logic and predictability of *FH* and require some kind of *sui generis* rule as to rebutting the presumption created by rule 24.01(2) of the *KB Rules*.

[146] Moreover, with respect, the interpretation advanced by the parties runs contrary to the intention of the drafters of the *KB Rules*, as noted in *Ali*. A key insight made in *Ali* is that the purpose of the creation of the presumption in rule 24.01(2) of the *KB Rules* in 2017 was to improve the effectiveness of the Court's power to strike out proceedings as a sanction against delay without a need to demonstrate prejudice through evidence. The Court further commented on the "strong public interest in promoting the timely resolution of disputes in our civil justice system" (*Ali* at para 86). In my respectful view, a standard of proof less than the balance of probabilities to rebut the presumption in rule 24.01(2) would water down the impact of the presumption and increase litigation about the effect of inordinate and inexcusable delay. Such reasoning would undermine public confidence in the timely administration of civil justice and, thus, should be avoided.

[147] In summary, once a moving party establishes that delay is inordinate and inexcusable (see *KB Rules*, r 24.01(3)), there is a rebuttable presumption that the delay has resulted in significant prejudice to the moving party (see *ibid*, r 24.01(2)). The standard for a defendant to rebut this presumption is the balance of probabilities.

[148] The second question is what is the correct analytical lens for a motion judge to use to decide if the presumption in rule 24.01(2) of the *KB Rules* has been rebutted?

[149] The historical Manitoba jurisprudence of looking at prejudice as being either inherent or specific was formulated in an era when there was different architecture to rule 24.01 of the *KB Rules*; in particular, there was no presumption of significant prejudice once inordinate and inexcusable delay were established. Because the design of rule 24.01(2) was heavily influenced by the experience in Alberta, it is helpful to consider the Alberta practice. The concerns expressed in the pre-January 1, 2018 Manitoba jurisprudence as to inherent or specific prejudice are still well-founded but, for application of rule 24.01(2), it is best to categorize those concerns in a manner like the Alberta practice.

[150] In *Humphreys*, the Alberta Court of Appeal divided the assessment of significant prejudice caused by inordinate and inexcusable delay into two broad categories: "litigation and nonlitigation prejudice" (at para 4).

[151] Litigation prejudice refers to the delay damaging a defendant's ability to have a fair trial. There are numerous manifestations of this, such as key witness unavailability, fading memories or the loss of real evidence. In *Humphreys* at para 130, the Court stated:

> There is no doubt that the passage of time may impair a moving party's ability to defend its interests at the trial of an action. "Delay may compromise the fairness of a trial." The unavailability of crucial witnesses – death, impairment or disappearance – may diminish the strength of the moving party's case. The passage of time may also have impaired a prospective witness' ability to access stored data. A potential witness' mental health may have declined and place the person in a position where he or she no longer can retrieve material in a memory bank. Or a party may have lost exhibits. This may be attributable to disastrous fires or floods or mistakes made by movers or document managers.
>
> [footnotes omitted]

[152] Non-litigation prejudice refers to the delay damaging a defendant's reputation, livelihood or their right, at a certain point, to have peace of mind and closure in relation to the allegation (see *Morrison v Galvanic Applied Sciences Inc*, 2019 ABCA 207 at para 31; *Humphreys* at paras 31, 134).

[153] In terms of either of these forms of prejudice, what is important is for the Court to take a functional approach to the record before them on the motion, mindful that significant prejudice is presumed by operation of rule 24.01(2) of the *KB Rules*.

[154] In terms of litigation prejudice, the key consideration is the quality of the current state of the evidence that is going to be the focus of liability and/or damages if the action is allowed to proceed to trial. In this functional analysis, the Court should look at the issues in dispute and the evidence each of the parties is relying upon based on their theory of the case. Based on this assessment, the Court must be satisfied that the plaintiff has established that a fair trial is still possible.

[155] The presumption of significant prejudice is unlikely to be rebutted where, based on the functional assessment, a case turns on key witnesses or important evidence that is unavailable, or the recollection and credibility of vital witnesses have suffered the inevitable deterioration of memory over time. To borrow from Diplock LJ in *Allen*, these situations give rise to a "substantial risk that a fair trial will not be possible" on the issues in dispute (at 557).

[156] Care must be taken by the Court when addressing the submission that the presumption of significant prejudice is rebutted because the action is a "documents case." In the modern era, such a comment is not particularly

helpful standing alone. Most civil litigation has a document component. The fact that a plaintiff is relying on documentary evidence that is available for a trial to establish liability or damages is not conclusive to rebutting the presumption of significant prejudice under rule 24.01(2) of the *KB Rules*. Such a submission will engage further inquiries as to the completeness of the documentary evidence in relation to the facts in issue and to what degree the recollection of witnesses is important in the case despite the existence of documentary evidence (or other real evidence). The Court must be mindful of the difference between the important evidence being the document itself or a witness testimony using the document as an aid. The former situation is more of the true meaning of a documents case.

[157] In the case of non-litigation prejudice, it has long been the law in Manitoba that all defendants face prejudice in the form of having litigation hanging over their heads for a lengthy period of time and that there comes a point in time when a defendant is entitled to have peace of mind and closure in relation to the allegation (see *Hughes* at 14). However, such non-litigation prejudice "is not enough in every case to deny a plaintiff the right to proceed" (*Hansen v Manitoba*, 1993 CanLII 9358 at para 22 (MBCA)).

[158] Other forms of non-litigation prejudice focus on the nature of the burden(s) the litigation has occasioned on a particular defendant, beyond the negative consequences of having litigation hanging over their head for a lengthy period (see *Jacobson Estate v Freed* (1994), 97 Man R (2d) 197 at para 10, 1994 CanLII 16823 (MBCA)). Examples in the jurisprudence include reputational damage and compromising of career or business prospects (see *Transamerica* at para 44).

[159] In terms of appellate review, the question of whether the presumption in rule 24.01(2) of the *KB Rules* has been rebutted is a question of mixed fact and law, as it involves the application of a legal standard to a set of facts (see *Edinburgh Tower Development Ltd v Curtis*, 2022 ABCA 419 at para 8; *Alderson v Wawanesa Life Insurance Company*, 2020 ABCA 243 at para 25; *Housen* at para 26).

Analysis

[160] In my respectful view, the judge misdirected himself on rule 24.01(2) of the *KB Rules* as to whether the presumption of significant prejudice was rebutted in two different and significant ways.

[161] As previously mentioned, he misapplied a legal standard by looking at the issue of defence conduct as to whether the presumption of significant prejudice was rebutted (see *KB Rules*, r 24.01(2)) as opposed to where it should be considered on the question of whether the delay was inordinate and inexcusable (see *ibid*, r 24.01(3); see also *Housen* at paras 33, 36-37).

[162] The other legal error of the judge was his conclusion that the plaintiffs had failed to adduce any evidence to rebut the presumption of significant prejudice other than "excuses" (*decision* at para 46). A failure to consider all of the evidence relevant to a legal test—in this case, the question of rebutting the presumption of significant prejudice under rule 24.01(2) of the *KB Rules*—is an error in law (see *Van de Perre* at para 15; see also *Housen* at paras 27, 39). In actuality, there was a significant amount of relevant evidence before the judge so as to rebut the presumption of significant prejudice.

[163] Considering the judge's legal errors, it is necessary for this Court to consider the matter afresh. I will start with litigation prejudice.

[164] In terms of liability, as noted earlier, the deceased's interaction with the defendants was brief and well-documented. Neither the general narrative of events nor causation is in dispute. Dr. Smith was discovered in 2014 and is available for the trial to testify as to his diagnosis of the deceased, such that there is no prejudice to either his defence or that of the WRHA (see *Lawson v Chang Estate and Victoria General Hospital* (1991), 76 Man R (2d) 319, 1991 CanLII 11822 (MBCA)).

[165] The conflicting theories of the parties on liability turn on the issue of the standard of care expected from an emergency physician when a patient presents with the symptoms which, it is undisputed, that the deceased had on the day he died. As previously mentioned, liability will turn on a conflicting duel of expert opinions on an uncontested set of facts. I see nothing in the record as to important evidence being lost or deteriorated to the point that a trial would be unfair.

[166] The nature of the principal dispute as to damages at present is entirely a legal question as to the entitlement to the estate damages. The remainder of the damages claimed under the *FAA* do not seem to be in issue if liability is established. In terms of entitlement to the estate damages, the debate about the effects of old legislation considering old case law has not changed with the delays in this action.

[167] If the defendants decide to challenge the evidence of Martyszenko, at best, that would be an issue of conflicting opinion evidence that will not be affected by the delays in this case, as the issue of the quantum of the estate

damages turns on actuarial figures and financial documents that will not deteriorate over time. This is a situation of a true documents case. In summary, as is the case with liability, I see nothing in the record that would raise concerns that a fair trial as to the issue of damages cannot occur due to the unreasonable delay.

[168] Finally, while I accept that Dr. Smith has suffered non-litigation prejudice by having this lawsuit outstanding against him for many years, measured against the fact there is no litigation prejudice, non-litigation prejudice is a factor in this case only to a relatively minor degree.

[169] In the case of the WRHA, while some of the staff at the hospital who were part of the care of the deceased have retired, there is no suggestion they are unavailable for trial. Moreover, here, the key evidence in relation to the WRHA is what data was gathered during the diagnostic testing of the deceased and notes made on the hospital chart while he was in the emergency department as opposed to the observations of any WRHA employee. As in the case of Dr. Smith, I do not have a concern that the WRHA can have a fair trial on the question of liability and damages.

[170] As is the case of Dr. Smith, while non-litigation prejudice is a factor in a limited way for the WRHA, as it is entitled at some point to closure over this allegation, in my view, it is not a significant factor.

[171] Looking at the record, in light of the positions of the parties, I am persuaded, on balance, that the plaintiffs have satisfied their onus to rebut the presumption of significant prejudice under rule 24.01(2) of the *KB Rules*.

[172] I would caution readers of my decision to not embrace the logic that a near-complete documentary record inexorably leads to the conclusion of very little litigation prejudice. That is not what I have decided.

[173] Many civil claims, often in medical malpractice or construction litigation, have a significant documentary component. However, that does not mean that the presumption of significant prejudice because of inordinate and inexcusable delay is easily rebutted if nearly all the documents still exist at the time of the motion for delay. What is always controlling is whether a fair trial is at risk based on the current state of the evidentiary record. Answering that question will require a court to look to the deeper question of the nature and quality of the evidence that exists that each litigant is relying upon to make its case based on an appreciation of the issues in dispute, both as to liability and damages, and the parties' theories of their case on disputed issues.

Conclusion: Issue 2

[174] In my respectful view, the judge misdirected himself on rule 24.01(2) of the *KB Rules* as to whether the presumption of significant prejudice was rebutted. On a proper application of the relevant principles under rule 24.01(2) of the *KB Rules* to the record as a whole, the plaintiffs have rebutted the presumption of significant prejudice on the balance of probabilities.

[175] Due to the action being dismissed on the basis of both rules 24.01(1) and 24.02(1) of the *KB Rules*, the fact that the judge erred in his application of rule 24.01 is insufficient to allow the appeal. Inquiry as to his decision under rule 24.02 is still required because, if one of the two bases on which he

dismissed the action is untainted by error, the appeal should be dismissed (see *Tsitsos* at para 17).

Issue 3: Whether Answers to Undertakings Were a Significant Advance?—Rule 24.02(1) of the *KB Rules*

The Relevant Principles

[176] Rule 24.02 of the *KB Rules* provides as follows:

Dismissal for long delay **24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless	**Rejet pour cause de long retard** **24.02(1)** Lorsqu'au moins trois ans s'écoulent sans que des progrès importants n'aient lieu dans le cadre d'une action, le tribunal la rejette sur motion, sauf dans l'un des cas suivants :
(a) all parties have expressly agreed to the delay;	a) toutes les parties ont expressément accepté le retard;
(b) the action has been stayed or adjourned pursuant to an order;	b) il a été sursis à l'action ou l'action a été ajournée en conformité avec une ordonnance;
(c) an order has been made extending the time for a significant advance in the action to occur;	c) une ordonnance prolongeant le délai pouvant s'écouler avant que des progrès importants n'aient lieu dans le cadre de l'action a été rendue;
(d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or	d) le retard découle d'une conférence de cause ou de gestion de cause ou d'une
(e) a motion or other proceeding has been taken since the delay and the moving party has	

participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.

conférence préparatoire au procès;

e) une motion a été présentée ou une autre instance a été entreprise depuis le retard et la partie ayant présenté la motion ou entrepris l'instance y a participé à des fins ou dans une mesure justifiant la poursuite de l'action.

Excluded time
24.02(2) A period of time, not exceeding one year, between service of a statement of claim and service of a statement of defence is not to be included when calculating time under subrule (1).

Période exclue
24.02(2) La période de temps écoulée entre la signification d'une déclaration et celle de la défense, jusqu'à concurrence d'un an, est exclue du calcul de la période prévue au paragraphe (1).

Excluded time — period under disability
24.02(3) Any period of time when a person is under disability is not to be included when calculating time under subrule (1).

Exclusion — période pendant laquelle une personne est incapable
24.02(3) Le calcul de la période prévue au paragraphe (1) exclut toute période pendant laquelle une personne est incapable.

Transitional — no application to motions before January 1, 2019
24.02(4) The court may only apply subrule (1) in a motion to dismiss an action for delay that has been brought after January 1, 2019.

Disposition transitoire — application après le 1er janvier 2019
24.02(4) Le tribunal ne peut appliquer le paragraphe (1) que si la motion visant le rejet d'une action est présentée après le 1er janvier 2019.

[177] The proper approach to decide whether a step taken during litigation is a "significant advance" for the purposes of rule 24.02(1) of the *KB Rules* is "functional" (*Buhr* at para 71). This is a "broad-based inquiry" (*ibid* at para 78) looking at the significance of what has occurred in light of "the context of the litigation as a whole" (*ibid* at para 90).

[178] As Spivak JA explained in *WRE* at para 17:

> A significant advance exists if, in the applicable timeframe, something has been done that increased, by a measurable degree, the likelihood that either the parties or the court would have sufficient information to rationally assess the parties' positions and be in a better position to either settle or adjudicate the action. A significant advance means important or notable progress towards the resolution of an action.
>
> [citations omitted]

See also *Buhr* at para 71.

[179] The step constituting a significant advance in the litigation can come from any party to the litigation, including the party or parties seeking to dismiss the action for delay (see *WRE* at para 18).

[180] In *Buhr*, this Court rejected the view that the provision of answers to undertakings should usually be recognized on a preliminary basis as a significant advance in an action for the purposes of rule 24.02(1) (see *Buhr* at paras 78-80). Rather, the quality and completeness of the answers to undertakings must be assessed within the context of the particular litigation (see *Hradowy v Magellan Aerospace Limited*, 2025 MBCA 9 at para 8 [*Hradowy*]). There is no hard and fast rule as to whether the provision of answers to undertakings is a significant advance.

[181] As mentioned before, the lens to assess a defendant's conduct under rule 24.02 of the *KB Rules* is narrower than in comparison to rule 24.01 and, therefore, care must be taken before drawing inferences from a defendant's conduct for the purposes of rule 24.02 (see *WRE* at paras 40-47; *Buhr* at para 82).

The Standard of Review: Rule 24.02 of the KB Rules

[182] As was noted in *Buhr* (see para 30), because dismissal of an action for delay under rule 24.02(1) of the *KB Rules* is mandatory, as opposed to discretionary, if the prerequisites are met, the standard of review is based on the principles articulated in *Housen.* Questions of law are reviewed on a standard of correctness, questions of fact are reviewed on a standard of palpable and overriding error and questions of mixed fact and law are reviewed on a standard of palpable and overriding error absent a readily extricable legal principle, in which case the standard of review is correctness.

[183] In particular, whether there has been a "significant advance" of an action within the meaning of rule 24.02(1) is a question of mixed fact and law as it "involves the application of a legal standard to a set of facts" (*Housen* at para 27). As was explained in *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123, deference is owed because the inquiry of the lower court "involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the [*KB Rules*]" (at para 11).

Analysis

[184] Given that much of the conduct in the action occurred before rule 24.02 of the *KB Rules* came into existence on January 1, 2018, the relevant timeline according to *Buhr* was whether there was "any continuous three-year period of delay, some of which may have elapsed prior to January 1, 2018, provided that the one year between January 1, 2018 and January 1, 2019 is included in the three-year period" (at para 67). Put another way, the issue raised here is whether there was a significant advance in the litigation in the three-year period between January 2, 2016 and January 1, 2019?

[185] The judge's decision dismissing the action under rule 24.02(1) of the *KB Rules* is entirely conclusory save and except that he reviewed, in detail and endorsed, the submission of the WRHA that the action should be dismissed because Parkinson provided answers to undertakings in 2017 only because of the demands of Dr. Smith and the answers provided were, like in *Buhr*, only "partial" (*decision* at para 31) and "partial answers were only considered a modest advance not a significant advance" (*ibid*).

[186] Despite the conclusory nature of the judge's rule 24.02 reasons, the reasons are adequate as they provide an "intelligible pathway to the result" considering the specific context of the case (*R v Ramos*, 2020 MBCA 111 at para 47, aff'd 2021 SCC 15). Based on a functional review of the *decision* as a whole in light of the record, I am satisfied that the judge adopted, in its entirety, the submission of the WRHA that there was no significant advance in the action between when the discoveries occurred on January 15 and 16,

2014 and the provision of the Martyszenko report on the estate damages by the plaintiffs to the defendants on September 24, 2019.

[187] In my respectful view, the judge made two errors in law.

[188] First, there is a reasoned belief to conclude that the judge forgot, ignored or misconceived the evidence in a way that affected his conclusion (see *Housen* at para 39; *Van de Perre* at para 15).

[189] In my respectful view, one of the shortcomings of the submission of the WRHA, which the judge accepted in its entirety, is that it looked at the question of significant advance entirely in relation to the estate damages without paying any attention to the answers provided in the undertakings as to the issue of liability and the position of the defendants on damages. This is contrary to the functional approach that must be followed under rule 24.02 of the *KB Rules*.

[190] According to the record before the judge, while it is true that the answers provided by the plaintiffs in 2017 on the issue of the estate damages were partial and not complete until the provision of the Martyszenko report in 2019, the same cannot be said in terms of liability and the *FAA* damages the plaintiffs claimed.

[191] The plaintiffs answered twenty-seven undertakings as to liability on May 19, May 23 and June 12, 2017. These answers provided the defendants with sufficient information to rationally assess the liability issues in dispute (see *WRE* at para 17). According to the record, it is noteworthy that discussions between counsel after the plaintiffs answered their undertakings were not about what occurred on November 27, 2006 at the hospital but about

whether Dr. Smith did or did not meet the relevant standard of care considering the expert reports that had been exchanged. This evidentiary record is clearly a significant advance, as the parties were aware of what had happened and had moved their discussions to a debate about the legal effect of the facts.

[192] Also important is that no complaint was raised by the defendants as to the quality or completeness of the 2017 answers provided by the plaintiffs as to liability (see *Hradowy* at para 8). This takes on importance for the purposes of the rule 24.02 analysis because the position of the defendants has always been that the Martyszenko report is entirely irrelevant because all that the plaintiffs could claim, if liability were established, was damages pursuant to the *FAA*. Dr. Smith's factum provides insight into the defendants' position:

> In assessing the genuineness and timing of answers to undertakings, the answers were only provided because Dr. Smith filed a motion to compel production. The majority of the answers were quantifying alleged damages. In an action under the [*FAA*], damages are prescribed and are limited to an award for loss of care, guidance and companionship. *Therefore, the information on damages was really without consequence, and irrelevant to the issues for trial.*
>
> [emphasis added]

[193] The answers of the plaintiffs to undertakings in 2017 with respect to damages, while incomplete as to the estate damages, were complete as to the *FAA* damages claimed.

[194] The difficulty with the judge's functional analysis is that both defendants took the position that the information provided on the estate damages was irrelevant because they submit that such damages are not

recoverable at law regardless of the quantum. Therefore, the judge's attention should have focused on whether more than three years passed in the litigation, mindful of the relevant timeframes mentioned in *Buhr* (see paras 58-68), without a significant advance on the question of liability and the *FAA* damages.

[195] The second legal error here is that the judge entirely overlooked the effect of the WRHA providing answers to its undertakings on February 21, 2018. This is a failure to consider a required element of a legal test (see *Housen* at para 36). As mentioned before, a significant advance in the litigation can come from any party (see *WRE* at para 18). There is no analysis from the judge as to what the answers of the WRHA to undertakings mean as to the state of the case on liability. This is not a situation where an omission by the judge to discuss a legal principle in the *decision* can be overlooked because it is clear from the *decision*, when read in context, that he simply adopted the position of the WRHA on rule 24.02 of the *KB Rules*, which was incomplete, as it failed to address the fact that the WRHA provided answers to undertakings within the three-year period in question.

[196] The only reasonable inference on the evidence from the WRHA's answers to its undertakings is that they confirm that the plaintiffs' 2017 answers, in terms of liability, were complete.

[197] In my view, it is unnecessary to get into the discussion as to whether the plaintiffs' answers to their undertakings in 2017 on the question of the estate damages were sufficient or can be considered to be insufficient answers, as was the situation in *Buhr*. Here, the answers in relation to liability and damages claimed under the *FAA* were complete and, on a functional basis,

those were the important outstanding discovery matters that the defendants needed in order to have sufficient information to rationally assess their position and that of the plaintiffs.

[198] In light of the record and the positions of the parties, there is no question that the provision by the plaintiffs of all of their undertakings in May and June 2017 from the 2014 discovery of Parkinson on the question of liability and the *FAA* damages was a significant advance of the action in the time period of January 2, 2016 to January 1, 2019.

Conclusion: Issue 3

[199] In my respectful view, the judge erred in law in applying the functional approach. He ignored the fact that, in the spring of 2017, the plaintiffs provided complete answers to their undertakings on liability and on damages under the *FAA*. This was important on a functional analysis because both defendants took the position that the estate damages being claimed were not recoverable at law. Moreover, in 2018, the WRHA provided its answers to undertakings, which could be a significant advance in itself, and also confirmed the completeness of the 2017 answers provided by the plaintiffs as to liability. Either of these reasons precluded the judge from dismissing the action pursuant to rule 24.02(1) of the *KB Rules*, as there was not a three-year period in the action without a significant advance between the period January 2, 2016 and January 1, 2019.

Conclusion on Appeal

[200] The plaintiffs have established a material error as to the judge dismissing the action under both rules 24.01(1) and 24.02(1) of the *KB Rules*

and that the correct application of the relevant principles to the record should result in the motions for delay being dismissed. In my view, the appeal must be allowed, the order dismissing the action should be set aside and the delay motions of the defendants should be dismissed.

Issue 4: Costs

[201] Costs are a matter of the Court's discretion (see *The Court of King's Bench Act*, CCSM c C280, s 96; *KB Rules*, r 57.01). However, as was noted in *Ducharme v Borden*, 2014 MBCA 5: "Although a judge enjoys wide discretion in imposing costs, that discretion must be exercised judicially (i.e., not arbitrarily or capriciously)" (at para 24). The general rule is that costs should follow the event unless there is a good cause.

[202] Historically, "good cause" has been some feature of the case to base a departure from the general costs rule, "such as the misconduct of the parties, miscarriage in the procedure, or oppressive and vexatious conduct of the proceedings" (Mark M Orkin, *Orkin on the Law of Costs*, 2nd ed by Robert G Schipper (Toronto: Thomson Reuters, 2025) (loose-leaf updated 2025, release 4) vol 1, ch 2, ss 2:33-34; *Cooper*).

[203] Had this delay case simply been about rule 24.02 of the *KB Rules*, in my view, the plaintiffs should have received costs in this Court and the Court below. However, the situation relating to proceedings pursuant to rule 24.01 is exceptional. I am mindful that, ultimately, "a costs award must be fair and reasonable" in light of the given circumstances (*Tregobov v Paradis*, 2017 MBCA 60 at para 28). The litigation conduct of all parties must be considered. Here, the mere fact that the plaintiffs have prevailed on this aspect of the litigation does not tell the full story. The delay of this litigation

was entirely avoidable had the plaintiffs prosecuted the action with more dispatch.

[204] As was explained in *Barbiero v Pollack*, 2024 ONCA 904, a "tolerant attitude toward delay is out of step" with the fundamental objectives of the *KB Rules* (at para 15). As noted in *Ali*, "there is a strong public interest in promoting the timely resolution of disputes in our civil justice system" (at para 86).

[205] The failure to proceed promptly with a proceeding is a form of litigation misconduct that has long been considered to be a relevant consideration in determining costs (see Schipper, s 2:34; see also *Ballam Insurance Services Limited v Fundy Computer Services Ltd*, 2022 NSSC 373 at paras 14-17; *Ingalls v Dr Steeves*, 2009 NBQB 163 at para 28; *McCormack Estates, Re* (1986), 59 Nfld & PEIR 215 at para 51, 1986 CanLII 6431 (PESCTD)).

[206] Additionally, rule 57.01(2) of the *KB Rule*s recognizes that costs may be awarded against a successful party in a "proper case":

Costs against successful party **57.01(2)** The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.	**Condamnation aux dépens d'une partie qui obtient gain de cause** **57.01(2)** Le fait qu'une partie obtienne gain de cause dans une instance ou dans une mesure dans l'instance n'empêche pas le tribunal de la condamner aux dépens, le cas échéant.

[207] In my view, an order of costs against the plaintiffs, despite their success, is necessary to do justice between the parties. The situation here is

far removed from the "most expeditious" determination of the action on its merits (*KB Rules*, r 1.04(1)).

[208] While I would not endorse costs against a plaintiff in every case where they are able to rebut the presumption of significant prejudice under rule 24.01(2) of the *KB Rules*, a delay of the discovery process that is more than twice than what would be reasonable for the purposes of rule 24.01(3) is litigation misconduct that must be discouraged even if the action is not dismissed.

[209] The plaintiffs make the submission that the delay is partly the fault of the defendants. I accept that submission. However, the legal consequences of the defendants' conduct in terms of delay have been entirely addressed in terms of the degree to which the inordinate delay can be excused under rule 24.01(3) of the *KB Rules*. The total delay in this case was reduced in half due to the conduct of the defendants. I do not see costs as another area to address the conduct of the defendants.

Conclusion: Issue 4

[210] The defendants' motions for delay under rule 24.01 of the *KB Rules* were appropriate given the circumstances; it is not in the interests of either the parties or the administration of justice for the action to have languished as long as it did. In my view, the plaintiffs' litigation misconduct, by unreasonably delaying the discovery process, is sufficiently blameworthy so as to attract an extraordinary costs award against them despite their success on the delay motions. In summary, bearing in mind the considerations set out in rule 57.01 and the circumstances of this litigation, it is fair and reasonable

that the defendants should have their costs in this Court and the Court below, in any event of the cause.

Disposition

[211] In the result, I would allow the appeal, set aside the order dismissing the action for delay, and dismiss the defendants' motions to dismiss the action for delay.

[212] I would also award each defendant tariff costs of the delay motions in this Court and the Court below, in any event of the cause.

Mainella JA

I agree: Edmond JA

I agree: Kroft JA

APPENDIX
Discovery Timeline

August 31, 2009 – close of pleadings.

February 17, 2010 – Dr. Smith's counsel requests dates for scheduling of examinations for discovery.

July 20, 2010 – Dr. Smith's counsel advises that two emergency physicians, Dr. Pauls and Dr. Pinchuk, have reviewed Dr. Smith's treatment and management of the deceased and a report from Dr. Pauls was provided.

December 17, 2010 – Plaintiffs notify the defendants that they have a contrary expert to Dr. Pauls from a cardiologist, Dr. Rabson, and that it will be forthcoming. Defendants' affidavit of documents is requested.

March 21, 2011 – Dr. Smith's counsel requests Dr. Rabson's report as well as the plaintiffs' affidavit of documents. Dr. Smith's counsel followed up on five occasions between July 26, 2011 and January 9, 2012 requesting Dr. Rabson's report.

August 29, 2011 – Counsel for Dr. Smith provides a draft affidavit of documents and requests dates for scheduling examinations for discovery.

February 4, 2012 – Plaintiffs provide three expert opinion letters from Dr. Rabson in response to the report of Dr. Pauls. An update was provided on the state of the plaintiffs' affidavit of documents. Affidavit of documents from WRHA was requested. Dates for examinations for discovery were suggested for May 2012.

March 19, 2012 – WRHA provides its affidavit of documents.

April 4, 2012 – Plaintiffs provide their affidavit of documents and request dates for examinations in May or June 2012.

July 4, 2012 to March 15, 2013 – Dr. Smith's counsel writes to the plaintiffs on five occasions requesting dates for examinations for discovery.

March 19, 2013 – Plaintiffs provide copies of their documents, request documents from the defendants and provide availability for scheduling dates for examinations for discovery.

March 27, 2013 – Dr. Smith's counsel provides documents requested by the plaintiffs on March 19, 2013.

April 23, 2013 to November 4, 2013 – Counsel for the parties communicate on dates for the examinations for discovery, which were ultimately scheduled for January 15-16, 2014.

January 2, 2014 – WRHA discloses its policy as to the standardized care for patients with symptoms suggestive of an acute coronary syndrome event (ACS standard guideline).

January 15-16, 2014 – Examinations for discovery take place of Dr. Smith, Parkinson (for the plaintiffs) and Wendy Rudnick (for the WRHA). All parties gave undertakings. Defendants defer questioning on Parkinson as to damages until particulars are provided.

January 17, 2014 to May 16, 2017 – Plaintiffs prepare answers to undertakings and the bulk of time is spent on the estate damages claim.

September 28, 2015 – Dr. Smith's counsel requests answers to undertakings and follows up on requests from November 9, 2015 and February 10, 2016.

August 8, 2016 – Dr. Smith's counsel advises that he has not heard from the plaintiffs and, if there is no response, a motion to compel answers will be brought.

October 6, 2016 and November 7, 2016 – Plaintiffs' counsel provide a telephone update to Dr. Smith's counsel regarding answers to undertakings.

December 14, 2016 – Dr. Smith's counsel advises that he has not heard from the plaintiffs and wants to get the file moving along and will bring a motion to compel answers as the "next step".

December 14, 2016 – Plaintiffs' counsel advises answers to undertakings will be provided "very early in the New Year".

March 8, 2017 – Dr. Smith's counsel advises there has been no response and a motion to compel answers will be forthcoming.

May 15, 2017 – Dr. Smith's counsel files the motion to compel the plaintiffs' undertakings.

May 19, 2017 to June 12, 2017 – In three batches, the plaintiffs provide answers to undertakings that were complete save for one head of damages that was awaiting an outstanding expert report as to quantification.

January 23, 2018 – The plaintiffs retain Martyszenko to prepare an expert report on the estate damages.

February 21, 2018 – WRHA provides its answers to undertakings.

July 26, 2019 – Martyszenko provides his draft damages report to plaintiffs' counsel.

August 13, 2019 – Martyszenko provides his revised draft damages report to plaintiffs' counsel.

September 24, 2019 – The plaintiffs provide the Martyszenko report to the defendants, which quantifies the estate damages as $4,260,762 (exclusive of other costs relating to the administration of the estate), as well as updated answers to other undertakings.

November 29, 2019 – Dr. Smith's counsel advises that damages beyond "claims for loss of care, guidance and companionship and funeral expenses" are not recoverable at law by virtue of section 53(1) of the *TA*.

November 29, 2019 – WRHA agrees with the damages position of Dr. Smith's counsel.

December 10, 2019 – The plaintiffs advise that they disagree with the defendants' position on damages and will provide a more detailed response.

January 17, 2020 – The plaintiffs provide the defendants with the legal basis on which damages claimed are recoverable.

February 7, 2020 – The plaintiffs inquire about the position of the defendants on damages or other matters, as they want to move the action forward to schedule a pre-trial conference.

February 11, 2020 – Dr. Smith's counsel says his position has not changed and that the plaintiffs should "go ahead and take the next step".

February 11, 2020 –WRHA agrees with the position of Dr. Smith's counsel.

June 1, 2020 – Dr. Smith's counsel provides an expert report from Dr. Gula, a cardiologist, as to the medical management of the deceased.

September 23, 2022 – The plaintiffs file their pre-trial brief and a pre-trial was subsequently scheduled for December 15, 2022.

November 18, 2022 – WRHA files its pre-trial brief.

November 29, 2022 – Dr. Smith's counsel files their pre-trial brief, which included a further expert report from Dr. Pauls and an opinion letter from another emergency physician, Dr. Pinchuk.

December 12, 2022 – The plaintiffs file a supplementary pre-trial brief to address Dr. Smith's objection to the admissibility of Dr. Rabson's evidence, issues arising from the recent disclosure of expert reports from Drs. Pauls and Pinchuk, the suggestion of Dr. Smith that the issue of the estate damages be determined before trial, and Dr. Smith's request to bring a motion for delay and, if unsuccessful, reconvene the examination of Parkinson as to damages and possibly obtain an expert report.

December 15, 2022 – Pre-trial conference #1 was held.