SUPREME COURT OF NOVA SCOTIA
Citation: *Christakos v. Adlington*, 2025 NSSC 351

Date: 20251106
Docket: Hfx No. 412117
Registry: Halifax

Between:

Peter Christakos and Oceana Pictures Incorporated

Plaintiffs

v.

Raymond Adlington and McInnes Cooper

Defendants

Judge: The Honourable Justice D. Timothy Gabriel

Heard: October 2, 2025, in Halifax, Nova Scotia

Counsel: Barry J. Mason, K.C., for the Plaintiffs
Colin D. Piercey, K.C. and Kaitlyn Clarke, for the Defendants

By the Court:

[1] The Defendants, Raymond Adlington and McInnis Cooper, move for dismissal of the Plaintiffs' claim for want of prosecution. The motion is brought pursuant to *Civil Procedure Rule* ("CPR") 82.18. In addition to the parties' briefs, I am in receipt of a solicitor's affidavit of Colin D. Piercy, K.C., filed on September 10, 2025, that of Barry Mason, K.C., filed on September 26, 2025, a rebuttal affidavit filed by Mr. Piercy, also on September 26, 2025, and an affidavit of the Plaintiff Mr. Christakos filed (unsworn) on September 26, 2025, with a sworn copy having been provided to the Court on the day the motion was heard. I will refer to them as "the Piercy Affidavit", "the Piercy Rebuttal Affidavit", "the Mason Affidavit" and "the Christakos Affidavit", respectively.

Background

[2] The Plaintiffs' Notice of Action and Statement of Claim was filed on February 8, 2013. It contains allegations of negligence, breach of contract, and breach of fiduciary duty arising from legal services provided to the Plaintiffs by the Defendants commencing in 1999 and ending in 2006. The Plaintiffs were self-represented when the Action was commenced. This changed when the Plaintiffs filed a Notice of New Counsel on August 14, 2014, which noted that Mr. Mason was representing them as of that date.

[3] Meanwhile, the Defendants had served a Demand for Particulars upon the (then) unrepresented Plaintiffs on March 8, 2013. It appears that Answers to the Demands were provided to the Defendants on April 29, 2016 and July 2, 2016 (*Plaintiffs' Brief*, para. 11).

[4] The Defendants filed their Statement of Defence on August 16, 2016. They have nonetheless indicated that on two occasions, May 5 and June 6, 2016, the Defendants had, by correspondence, requested clarification of certain allegations in the Statement of Claim, and received no written response (*Piercy Affidavit*, Ex. F).

[5] After receipt of the Defence, the Plaintiffs corresponded on September 22, 2016, advising the Defendants of their availability for discovery examinations, that they were seeking to discover Mr. Adlington, and requesting that the Defendants provide their availability for discoveries (*Mason Affidavit*, para. 13 & Ex. E).

[6] On March 1, 2017, Plaintiffs' counsel once again wrote to counsel for the Defendants and stated, *inter alia*, "We look forward to receipt of your Affidavit

Disclosing Documents" and "Please get back to me as soon as possible so we can arrange discoveries in this matter" (*Mason Affidavit*, Tab F).

[7] The Defendants' reply was provided on January 5, 2018:

> With respect to potential discovery dates in March, I confirm we are prepared to schedule discoveries on a tentative basis pending the identification of mutually convenient dates, the availability of our client and receipt of the proper disclosure, including disclosure of the previously requested criminal file. I am not yet in a position to comment on the March timeframe yet, I will follow up with our client in that regard.
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> (*Mason Affidavit*, Ex. G)

[8] The Defendants provided their Affidavit Disclosing Documents on June 22, 2018. Discovery examinations were conducted on November 20 and 21, 2018, February 20, 2019 and July 24, 2019. The Plaintiffs contend that while they provided a partial response to their undertakings on January 19, 2019, they have not received a response to Mr. Adlington's undertaking to review and provide copies of certain "Manitoba Law Firms'" files as had been requested by the Plaintiffs. The Defendants, for their part, contend that they have not been provided with the files relating to Mr. Christakos' criminal defence arising out of the alleged negligent advice received from the Defendants.

[9] Following Mr. Adlington's Discovery on July 24, 2019, it does not appear that further steps have been taken by anyone to move this proceeding forward. The Defendants now bring this motion.

Issue

[10] The single issue for consideration in this matter is whether the Plaintiffs' claim should be dismissed for want of prosecution. In order to determine this issue, I will have to answer four sequential questions, upon which I will expand below.

The Applicable Principles

[11] CPR 82.18 provides that "A judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time."

[12] The factors which drive such an analysis were discussed by the Court of Appeal in *Fagan v. Savoie*, 1998 NSCA 41. After having canvassed the authorities, the Court noted:

12 In *Martell v. Robert McAlpine Ltd.* (1978), 25 N.S.R. (2d) 540 (N.S. C.A.) Cooper, J.A. wrote at p.545:

> I now direct my attention to the principles which should govern the exercise of a judge's discretion in deciding whether or not an application for dismissal of an action for want of prosecution should be granted. *There must first have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and, secondly*, as put by Russell L.J., in *William C. Parker Ltd. v. Ham & Son Ltd.*, [1972] 3 All E.R. 1051, at p. 1052:
>
> > ... that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants...
>
> — and see the *Supreme Court Practice 1976*, p. 425. I refer also to *Allen v. Sir Alfred McAlpine & Sons Ltd*, [1968] 2 Q.B. 229, [1968] 1 All E.R. 543, where Lord Denning, M.R., said at p. 547:
>
> > The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight.
>
> These words were referred to in *Austin Securities Ltd. v. Northgate & English Stores Ltd.*, [1969] 2 All E.R. 753, by Edmund Davies, L.J., at p. 756 — and see *Paxton v. Allsopp*, [1971] 3 All E.R. 370, at p. 378. (Emphasis added)

13 In that same case, McKeigan, J.A., concurring with Cooper, J.A. said at p. 542:

> The law is clear that when a plaintiff has delayed so long, here nearly ten years, he cannot successfully resist an application to have the action dismissed for want of prosecution unless he can satisfy the court, and the onus is on him to do so, that the defendant has not been seriously prejudiced by witnesses becoming unavailable or their recollections becoming "eroded" (Gale C.J.O., in *Farrar v. McMullen*, [1971] 1 O.R. 709 (Ont. CA.)), or by documents having been lost.
>
> Bearing in mind the onus on the plaintiff I can find nothing in the affidavits filed on his behalf to show such lack of prejudice to the defendant. They contain nothing to show, for example, that all key witnesses could probably be produced, that blasting and other records were kept and are still available. No attempt was made to check such matters or to prove that Mr. John M. Davison, Q.C., counsel for the defendant, was wrong in his sworn belief that memories of witnesses had been impaired and that many records would no longer be available.

(Emphasis added)

[13] The applicable principles were also discussed extensively in the later case of *Young v. Merrill Lynch Canada Inc.*, 2013 NSSC 225 by Bourgeois, J. (as she then was) in the following manner:

> 25 The considerations on a motion for dismissal for want of prosecution are summarized in Braithwaite, supra [*Braithwaite v. Bacich*, 2011 NSSC 176], as follows:
>
> > 7 In my view, the factors to be considered in relation to such a motion, are well established, and not controversial. As stated by Hamilton, J.A. in *MacMillan v. Children's Aid Society of Cape Breton*, 2006 NSCA 13:
> >
> > > [5] The test for dismissal of an action for want of prosecution is well established. It is summarized in *Clarke v. Sherman et al*. (2002), 205 N.S.R. (2d) 112, 643 A.P.R. 112 (C.A.):
> > >
> > > > [8] Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance — in other words, do justice between the parties.
> >
> > 8 It is clear that in addressing such a motion, the Court must consider not only all three of the enunciated factors, but must also undertake a balancing of justice between the parties, most notably, considering the plaintiff's position (See *Brogan v. RBC Dominion Securities Inc.*, 2009 NSSC 351). It is equally clear that each case must be determined on the basis of its own particular circumstances.
> >
> > 9 The Defendants have asserted however, that in some circumstances, the third factor as outlined above, may be presumed, resulting in a plaintiff carrying the burden of establishing there has been no serious prejudice. This approach has clearly been adopted, in appropriate circumstances (see *Martell v. McAlpine Ltd*. (1978), 25 N.S.R. (2d) 540), and recently re-articulated by the Court of Appeal in *MacMillan*, *supra*, as follows:
> >
> > > [19] The case law indicates prejudice may be presumed in some circumstances. The judge referred to this case law and found that in the circumstances of this case they should presume serious prejudice rather than require the respondents to prove it:

> [23] Mr. Justice Chipman of our Court of Appeal in *Saulnier v. Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425, ... confirmed the Cooper test in Martell on the question of onus at page 430 ... I quote:
>
> > All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case.'
> >
> > [emphasis added]

[14] These cases are, of course, not nearly exhaustive. The cumulative effect of the authorities, however, is uncontroversial. In order for the Defendants' motion to be successful, it must be established that:

(a) an inordinate delay exists;

(b) the Plaintiffs are to blame for it;

(c) the inordinate delay is inexcusable; and

(d) either that,

i) the Defendants are likely to be seriously prejudiced because of the Plaintiffs' inordinate and inexcusable delay; or

ii) the inordinate and inexcusable delay is such an "extreme case", that the Court should presume serious prejudice to the Defendants, and cast the onus upon the Plaintiffs to rebut it.

[15] If the above criteria are established, the Court must still balance the prejudice to be sustained by the Defendants if the claim were allowed to proceed, as compared to that which will be sustained by on the Plaintiffs upon dismissal of their claim. The Court's overall objective, as it examines and balances these factors, is to do justice between the parties in the specific circumstances of this case (*Clarke v. Ismaily*, 2002 NSCA 64, at para. 8).

(a) Is the delay inordinate?

[16] The parties agree that there is no fixed point in time at which a delay automatically becomes inordinate. They do, however, differ both with respect to the length of the delay itself, and whether it is inordinate in these circumstances. I will examine each of these sub-issues.

i) What is the length of the delay?

[17] Some authorities have taken the position that an action ought not to be dismissed for want of prosecution before the expiry of the relevant limitation period. For example, in an authority cited by the Plaintiffs, *W.R. Scott Equipment (1977) Ltd. v. Algas Resources Ltd.*, [1984] A.J. No. 125, the following reasoning of the House of Lords in *Birkett v. James*, [1978] A.C. 297 was adopted. In the latter case, Lord Diplock stated:

> Crucial to the question whether an action ought to be dismissed for want of prosecution before the expiry of the limitation period is the answer to a question that lies beyond it, viz., whether a plaintiff whose action has been so dismissed may issue a fresh writ for the same cause of action. If he does so within the limitation period, the effect of dismissing the previous action can only be to prolong the time which must elapse before the trial can take place beyond the date when it could have been held if the previous action had remained on foot …
>
> …
>
> ... time elapsed before issue of the writ which does not extend beyond the limitation period cannot be treated as inordinate delay …
>
> …
>
> For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved …
>
> [emphasis added]
> (*Birkett*, pp. 320-322)

[18] On this basis, the court in *W.R. Scott* pointed out:

> 26. The action has not proceeded past the discovery stage. As an alternative to this application the Plaintiff could have discontinued the action, under Rule 225(1), paid the penalty in costs, and commenced a new action. The approach in *Birkett* is appropriate. All that would be accomplished in the is the incurrence of further legal

> costs and a set-back in time. More time would be lost. Nothing useful would be accomplished by forcing plaintiffs to go this route, where the limitation period has not expired …
>
> [emphasis added]

[19] Counsel for the Plaintiffs extrapolates from this:

> 28. The Plaintiffs claim that the Defendants breached their fiduciary duty owed to the Plaintiff. Prior to the current *Limitations of Actions Act*, R.S.N.S. 2014, c. 35, claims involving a breach of fiduciary duty were not subject to a limitation period. This was confirmed by Justice Wood (as he then was) in *Andrews v Duncan*, 2016 NSSC 103, paragraph 9, were [*sic*] it was held that breach of fiduciary duty are [*sic*] an "equitable claim and not subject to the provisions of the Limitation of Actions Act".
>
> 29. Under the [current] *Limitations of Actions Act*, at paragraph 23(3)(a), the limitation period for the Plaintiffs' claims of breach of fiduciary duty expired on September 1, 2017. Given that the limitation period for one of the causes of action plead by the Plaintiffs did not expire until September 1, 2017, it would be inappropriate to use any earlier date as a starting point for calculating the delay.
>
> (*Plaintiffs' Brief*)

[20] I am not persuaded by the Plaintiffs' argument, given that the authorities to which counsel has referred do not deal with situations in which the impugned delay begins within the limitation period, and then continues well beyond its expiration.

[21] Section 23 of the LAA, to which the Plaintiffs have referred, contains the current iteration of the legislation, which now applies to a fiduciary claim, and which came into force on September 1, 2015. It reads as follows:

> **23 (1)** In this Section,
>
> (a) "effective date" means the day on which this Act comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.
>
> **(2)** Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> **(3)** Where a claim was discovered before the effective date, the claim may not be brought after the earlier of

> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.
>
> **(4)** A claimant may bring a claim referred to in Section 11 at any time, regardless of whether the former limitation period expired before the effective date. 2014, c. 35, s. 23; 2015, c. 22, s. 4.

[22] It is beyond dispute that this motion has been brought after the limitation period (within which the Action itself could have been started) has expired. Therefore, the concern expressed in cases like *W.R. Scott* and *Birkett* (i.e., that the plaintiff could simply recommence his claim in the event that it was dismissed for want of prosecution, and the concomitant waste of court resources which would ensue in such an event) is not a possibility at this point.

[23] With the above having been said, and as I consider the chronology recounted above, I am similarly unable to agree with the Defendants that the delay should be construed to have commenced in 2017. For one thing, by that time, the Defendants themselves had not yet filed their Affidavit Disclosing Documents. This is despite the efforts made by the Plaintiffs to get discoveries underway. The last of these discoveries (to date) was held in 2019.

[24] It is certainly true that, as of the date of the discovery examination of Mr. Adlington, the case had progressed slowly. But both parties had a measure of responsibility for that slow pace. Despite the lethargic progress, events were occurring which, had they continued to progress, even at that rate, would have permitted this matter to have been set down for trial years ago. Instead, as has been seen, nothing discernible has taken place since the discoveries of Mr. Adlington, which were concluded in July of 2019.

[25] I consider the delay in this case to have commenced when these discoveries were completed, in other words, on July 24, 2019.

ii) Is the delay inordinate?

[26] In *Young*, Justice Bourgeois explained:

> [73] In my view, there is not, nor should there be, a hard and fast rule as to when the Court must consider the clock begins ticking on the issue of delay, either for a determination of whether it is "inordinate", or whether it is of sufficient duration to trigger a presumption of serious prejudice. Nova Scotia cases disclose that the Courts often reference both time frames as relevant considerations. The

> circumstances of each case will dictate when the "delay clock" begins to tick. Parties should not presume it is when the cause of action arises, nor when the action is commenced, but rather a time found appropriate by the Court based upon the particular circumstances before it.
>
> [emphasis added]

[27] The Defendants have pointed to numerous outstanding undertakings, as a result of which discoveries are said to remain incomplete (*Defendants' Brief*, para. 29). The Plaintiffs (in oral argument) countered that the main undertaking alleged to be incomplete on their part (which concerns the Plaintiff's criminal files) had long since been the topic of discussion between counsel, and the Plaintiffs had advised in 2019 that they were asserting solicitor-client privilege with respect to those files. The Defendants have done nothing since that time to challenge that assertion.

[28] Indeed, this appears to have been addressed in correspondence from counsel for the Plaintiffs to that of the Defendants dated January 14, 2019, in which the former indicated:

> We acknowledge your correspondence dated December 7, 2018 wherein your client seeks production of Mr. Christakos' "criminal and defence" files. You provided correspondence between Mr. Christakos's defence counsel and Mr. Christakos. We believe that we have provided all documentation that was produced through the Manitoba Securities investigation and charges. To be clear, the communication between Mr. Christakos and his counsel during that timeframe is clearly solicitor/client privilege [*sic*] and will not be disclosed.
>
> (*Mason Affidavit*, Tab I)

[29] Moreover, the Plaintiffs have stressed that the Defendants themselves have failed to fulfil some of the undertakings which they provided on July 24, 2019, the very day that "progress for both parties slowed in the file" (*Plaintiffs' Brief*, para. 32; *Mason Affidavit*, para. 20).

[30] The parties have cited various authorities relating to the determination of whether a given delay, in a particular set of circumstances, is inordinate. For example, in *Atlantic Canada Opportunities Agency v. Ferme D'Acadie*, 2008 NSSC 334 ("*ACOA*"), Leblanc, J., as he was then, concluded:

> [29] There is no fixed amount of time that automatically renders a delay inordinate. The plaintiff's conduct is a relevant consideration: *Buxton v. Sable Offshore Energy Inc.*, 2007 NSSC 105, at para. 12. The plaintiff concedes that 1.4

> months of the delay is inexcusable, but maintains that the entirety of the delay is not inordinate. He mentions procedural difficulties with the case, although these were resolved prior to the beginning of the period of delay. So far as the proceedings are concerned, and the defendants are concerned, the plaintiff was simply inactive. In the circumstances, I am satisfied that the delay of 2.75 years is inordinate.

[31] The Defendants argue that the above is also consistent with the result in *Moir v. Landry*, 104 N.S.R. (2d) 281 (C.A.), in which a three year delay was considered to be an inordinate one.

[32] On the other hand, in *Hurley v. Co-operators General Insurance Co.* (1998), 169 N.S.R. (2d) 22 (C.A.), Flinn, J.A. (as he was then) found the Chambers judge's ruling (that a delay of three years was inordinate) to have been incorrect:

> [33] There is no question that there has been delay in this proceeding; and, to a great extent, that delay has been inexcusable. There has been delay caused by the appellant in not communicating with his counsel, and delay caused by the appellant's counsel not communicating with the insurer's counsel, and in seeing that matters required to be attended to were done. I would not be prepared to say, however, that, considering the fact that at the time of the application only three years had passed from the commencement of the action, that the delay was inordinate.
>
> [34] Even if the delay was inordinate and inexcusable, in order for the application to succeed, it is necessary that the insurer show that the delay caused prejudice to its defence of the action.
>
> [35] In the affidavit which counsel for the insurer filed in support of this application before the Chambers judge, no evidence was offered - nor submission made - that the delay in this particular case caused any specific prejudice to the conduct of the insurer's defence. The fact that documentation is not available to support the appellant's claim; and the fact that a witness (Ms. King), who would, no doubt, be a material witness, is not available, seems to me to be factors which would cause concern as to the merits of the appellant's claim, rather than factors which cause prejudice to the insurer's defence.

[33] In *Creswell v. Murphy*, 2018 NSSC 11, the Court was faced with a delay of 18 years since the accident which had spawned the subject matter of the litigation, 13 years since the commencement of the action, and six years since the last communication from the plaintiff. The Court did not mince words:

> [11] Prior to this motion, the defendants had not even heard from the plaintiffs or their counsel for 6 years. That's 6 full years of silence. The defendants are not obliged to come back periodically to remind the plaintiffs that they have sued them

> and haven't done anything about it. Of course, defendants should not be allowed to pounce on delay in a case where there has been no discussion about that issue. Here, if the plaintiffs, or at least their counsel were aware of the concern about delay after the Prothonotary's motion and after Chief Justice Kennedy's admonition that after 10 years they were getting their last renewal.
>
> [emphasis added]

[34] The Defendants argue that the same considerations as in *Creswell* apply here. The events which underlie these proceedings are now between 19 and 26 years old. As noted in the Statement of Claim, the Plaintiff Christakos was introduced to Mr. Adlington in October 1999 and "From 1999 to and including 2006, Christakos sought all necessary legal advice and all necessary legal services from Adlington and his law firms…" (*Statement of Claim*, para. 9).

[35] The Defendants argue, in sum, that the events which give rise to the Plaintiffs' Action occurred over a timespan which covers 1999 to 2006. The Action itself was not commenced until 2013. On top of that, we are now dealing with a delay which I have found to have commenced in July 2019. It continued until the Defendants served notice of this motion upon the Plaintiffs, which is a period of inactivity that I will round to six years in these circumstances.

[36] I agree that this is also a factor, in these circumstances, which must enter the calculus. It exacerbates the delay. I conclude that the delay in this case was an inordinate one.

(b) Are the Plaintiffs to blame for it; and

(c) Is the delay excusable?

[37] It is convenient to deal with these two sub-issues as one.

[38] I am to presume that an inordinate delay is inexcusable unless and until the Plaintiffs have provided a credible excuse to rebut that inference (see for example, *Clarke*, para. 7). No one factor, in and of itself, is definitive or conclusive. In some circumstances a change of counsel has been held to explain delay, and of course, there was the impact of the COVID-19 shutdown during the first portion of the period which I have found constitutes the delay.

[39] There is also the fact that the Defendants, themselves, did nothing during that period to move the matter along. Obviously, they do not bear an onus or obligation to advance the Plaintiffs' litigation, as some authorities have pointed out

(see, for example, *Creswell*, at para. 11). However, complete inactivity on the part of the Defendants may also be considered when questions of fault and/or whether the delay is excusable are examined.

[40] To put a finer point upon it, even though defendants are not obligated to maintain an identifiable quantum of momentum in litigation, the steps taken or not taken by defendants may be relevant to a determination as to whether they effectively acquiesced in the pace at which the litigation was being conducted.

[41] This was implicit in a case referenced by the Plaintiffs, *Sears v. Melling*, 2021 NSSC 224. In *Sears*, the Court dismissed the plaintiff's action. Some of the reasons for this dismissal arose from the repeated warnings provided by the defendants with respect to Sears' failure to move the litigation along, as well as orders requiring the fulfilment of certain outstanding undertakings by the Plaintiffs which had not been fulfilled.

[42] It was, however, explicitly referenced in the earlier *ACOA* case, where the Court cited *Canada (Attorney General)* v. *Foundation Co. of Canada* (1990), 99 N.S.R. (2d) 327 (CA), to the following effect:

> [23] The Court of Appeal has stated that "[t]here is no duty on a defendant to actually take positive steps to move the matter forward or to send out warnings and exhortations to the plaintiff to proceed. However, the presence or absence of these actions may be relevant in determining whether the defence acquiesced in the slow tempo of litigation".

[43] A Notice of New Counsel was filed by Mr. Piercey on behalf of the Defendants (replacing former counsel Robert MacKeigan, K.C.), which was dated December 13, 2024. It cannot be determined, on the basis of the Notice itself, or the covering letter which was provided to this Court, whether a copy of the Notice was sent to Mr. Christakos at that time, or to counsel on his behalf. There is no reference on either document that a copy was thus provided.

[44] So, the fact remains that neither party can point to a single "step" moving this matter forward, or an attempt to do so, after July 24, 2019. This only changed when the Defendants filed their Notice and supporting documents with respect to this Motion. Only after this had occurred, were the letters of June 12, 2025 and July 4, 2025 from Defence counsel (*Piercey Affidavit*, Tabs L & M) sent on behalf of the Defendants, inquiring about the status of the 2019 undertakings, and requesting some new disclosure.

[45] In the latter piece of correspondence, it was noted:

> Additionally, we confirm that our follow-up on the outstanding undertakings and updated financial information is without prejudice to the motion to dismiss for want of prosecution scheduled for October 2, 2025.

[46] In his Affidavit, sworn on October 1, 2025, Mr. Christakos explained a portion of the overall delay in the following manner:

> 5. In the summer of 2022, I retained Jonathan Hooper of Cox and Palmer for an unrelated legal matter. In order to consolidate my matters, I retained Mr. Hooper to represent me in this matter. I told Mr. Mason that I wanted Mr. Hooper, subject to a conflict search, to take over carriage of this case and I advised Mr. Mason to transfer the file to Mr. Hooper.
>
> 6. A short time after Mr. Hooper received the file, he informed me that he had a conflict and would not be able to represent me in this action. My recollection is that Mr. Hooper advised Mr. Mason that he had a conflict and the file was returned to Mr. Mason.
>
> 7. I assumed that Mr. Mason would continue to represent me in this matter.
>
> 8. I did not have regular communication with Mr. Mason from 2022 until we received notice of this Motion.
>
> 9. I have recently spoken to Mr. Mason who has agreed to resume representation. I have instructed Mr. Mason to obtain trial date.
>
> (*Christakos Affidavit)*

[47] Plaintiffs' counsel says:

> 21. In August of 2022, I was informed by the Plaintiff, Mr. Christakos, that he was working with Jonathan Hooper with respect to an unrelated estate matter. For the purposes of consolidating his legal matters, the Plaintiff, Mr. Christakos, asked that we transfer the file for this litigation matter to Mr. Hooper. I understood that upon transferring the file our firm would no longer be assisting Mr. Christakos with this matter. A copy of our letter to Mr. Hooper dated August 25, 2022 was attached hereto as Exhibit "J".
>
> 22. I understand that Mr. Hooper was unable to advance the Plaintiffs' claim due to a conflict.
>
> 23. I did not have any communication with Mr. Christakos following the transfer of the file. I understand, based on recent discussions with the Plaintiff, Mr. Christakos, that he understood I would resume carriage of his file.

> 24. I have discussed this matter with the Plaintiff … and have agreed to file a request for date assignment conference on his behalf so this matter can proceed to trial.
>
> (*Mason Affidavit*)

[48] It is immediately apparent that the explanation of Mr. Christakos and his counsel, which I accept (as far as it goes) only accounts for roughly one-half of the delay encountered in this proceeding. The period from July 24, 2019, when the discoveries of Mr. Adlington concluded, to August, 2022, when Mr. Mason was asked by his client to transfer the file to Mr. Hooper, is a period of three years. This earlier portion remains completely unexplained.

[49] With that said, it is well-known that this (earlier) portion of the delay coincided, in part, with the COVID-19 outbreak. It is accepted that the shutdown did have an effect on the pace at which litigation could be advanced (access to the Courts and the availability of trial dates for civil matters were significantly impacted, at the very least). However, the Court has nothing beyond this institutional knowledge with which to determine how the Plaintiffs were specifically affected by this.

[50] The fact remains that it took the filing of this Motion by the Defendants in 2025, for the Plaintiffs to contact anyone about the status of this litigation. It seems apparent that this motion spurred the Plaintiffs' activity in this regard.

[51] The corollary of this observation is that, had the Defendants done anything at all during the intervening delay, it would likely have provoked an earlier response on the part of the Plaintiffs. Recall that it cannot even be determined, whether the Notice of New Counsel, filed with the Court by counsel for the Defendants, late in 2024, was ever provided to Mr. Christakos and/or counsel on his behalf.

[52] Either way, I conclude, like LeBlanc, J. did in *Brogan v. RBC Dominion Securities Inc.*, 2009 NSSC 351:

> [42] I am satisfied that the parties shared responsibility for the delay. While the plaintiff's delay, viewed in isolation, can be described as inexcusable, [the Defendant's] own contribution to the reasons for delay was not irrelevant.

(d) *i) Have the Defendants established that they are likely to be seriously prejudiced by the inordinate and inexcusable delay?*

[53] They have not. They do not assert, for example, that Mr. Adlington, or any other necessary witness, is no longer available to give evidence. They do not assert that relevant documentation has been lost or is now otherwise unavailable. Indeed, given that many, if not all, of the necessary documents would be in the hands of law firms well acquainted with the follies of disposing of documents while ongoing (albeit dormant) litigation is extant, one would not expect that to be an issue in any event.

[54] The Defendants, instead, argue that this is an "extreme case" of delay, one in which the likelihood of serious prejudice to the Defendants should be presumed.

ii) Is the inordinate and inexcusable delay such an "extreme case" that the likelihood of serious prejudice to the Defendants ought to be presumed?

[55] I remind myself of the words of Hallett, J.A., in *Moir*, where he said, at p. 284:

> A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.

[56] Whether or not a matter is an "extreme case", for the purpose of invoking such a presumption must, like every other factor which is pertinent to this analysis, be determined having regard to all of the circumstances. What I have determined to be a six-year delay, was tempered by the fact that a portion of the period was consumed by COVID-19 delay, and a portion of it arose due to a misunderstanding on the part of Mr. Christakos. As to outstanding production, much of that is accounted for by the fact that the Defendants have long since received the Plaintiffs' claim of privilege with respect to these materials (the "criminal and defence files") and there is the Defendants' own significant inaction which has contributed to the delay.

[57] The delay in this case has been both inordinate and inexcusable. However, I am not prepared to hold that the delay, in these circumstances, was sufficient to trigger a presumption of the likelihood of serious prejudice to the Defendants, nor

has a corresponding onus been thrust upon the Plaintiffs to rebut it. The Defendants retained the onus to demonstrate the likelihood of actual serious prejudice, and have not done so.

Balancing

[58] The balancing or weighing exercise, in all of these circumstances, including those discussed in the analysis of issue (d)(ii), would have led me to the conclusion the proceeding should be preserved, in any event.

[59] Strictly speaking, however, the absence of a demonstration of the likelihood of serious prejudice to the Defendants is sufficient to dispose of this motion. The Defendants have not established one of the prerequisites to such an exercise.

Conclusion

[60] The Defendants' motion is dismissed.

[61] The outstanding disclosure which each party claims that they have not yet received does not preclude this matter being set down for trial. Indeed, it is not uncommon for matters to proceed to a Date Assignment Conference with some undertakings as yet unfulfilled, as well as without expert reports having (yet) been filed.

[62] The matter will proceed within strict timelines. The Plaintiffs have indicated that the matter is ready to proceed to a Date Assignment conference. They will file their Request and Memorandum within 30 days from the date of this decision.

[63] The Defendants shall file their own Memorandum within 15 days after that. No later than 45 days prior to the Date Assignment Conference, the parties shall provide each other with their respective positions on the undertakings and disclosure which is still outstanding. No later than 30 days in advance of the Date Assignment Conference which is assigned, the parties shall exchange item by item responses to the outstanding undertakings.

[64] If any party remains dissatisfied with the response(s) received, they shall identify with the Date Assignment Justice that a motion to obtain a Court ordered remedy is a step which that party plans to take before trial and, no later than 90 days before the Finish Date. Any further discoveries or interrogatories necessitated

by the outstanding undertakings (if any) shall be completed on or before the Finish Date.

[65] As to costs, I decline to award any. While the Defendants were unsuccessful, the Plaintiffs must bear their own measure of responsibility for the events (or, non-events) giving rise to this motion.

Gabriel, J.