Citation: Blaze v Rooke, 2025 MBCA 90
Date: 20251014
Docket: AI24-30-10136

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N:

TONY BLAZE and BERKSHIRE AGRIPOWER LTD.	)	
(Plaintiffs) Appellants	)	
- and -	)	
DANIEL ROOKE, PENNY ROOKE, operating as D & P ROOKE FARMS, GEORGE ROOKE and the said D & P ROOKE FARMS	)	***M. Weinstein*** *for the Appellants*
(Defendants) Respondents	)	***K. Murkin*** *for the Respondents*
A N D B E T W E E N:	)	
DANIEL ROOKE, PENNY ROOKE, operating as D & P ROOKE FARMS, GEORGE ROOKE and the said D & P ROOKE FARMS	)	*Appeal heard:* ***May 27, 2025***
(Plaintiffs by Counterclaim) Respondents	)	*Judgment delivered:* ***October 14, 2025***
- and -	)	
TONY BLAZE and BERKSHIRE AGRIPOWER LTD.	)	
(Defendants by Counterclaim) Appellants	)	

On appeal from *Blaze v Rooke*, 2024 MBKB 119 [*motion decision*]

SIMONSEN JA

[1] The plaintiffs appeal an order dismissing their action (the action) for delay under rule 24.02(1) of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*] and, alternatively, also under rule 24.01(1). Having dismissed the action, the motion judge also, without objection, dismissed the defendants' counterclaim (the counterclaim) for delay. On appeal, the parties agree that this Court's decision regarding dismissal of the action should lead to the same result for the counterclaim.

[2] For the reasons that follow, I would allow the appeal and set aside the order dismissing both the action and the counterclaim.

The Rules

[3] Rules 24.01 and 24.02 provide two pathways for dismissal of an action for delay. Rule 24.01 allows for dismissal where there has been delay that has resulted in significant prejudice to a party. There is a rebuttable presumption of significant prejudice where the delay is inordinate and inexcusable. Rule 24.02 provides for dismissal of an action where there has been three or more years without a significant advance.

[4] Rule 24.01 and the relevant part of rule 24.02 state:

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	**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

and that delay has resulted in significant prejudice to a party.

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.

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.

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

(a) all parties have expressly agreed to the delay[.]

retard ayant causé un préjudice important à une partie.

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.

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.

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) toutes les parties ont expressément accepté le retard[.]

The Issues

[5] The plaintiffs raise the following issues regarding dismissal of the action:

- Under rule 24.02:

    1. Did the motion judge err in failing to consider the relevant three-year period immediately before the filing of the notice of motion to dismiss for delay (the delay motion)? (Issue 1)

    2. Did the motion judge err in concluding that the parties had not expressly agreed to the delay (see rule 24.02(1)(a))? (Issue 2)

    3. Did the motion judge err in determining that there had not been any significant advance in the action for a period of three or more years? (Issue 3)

- Under rule 24.01:

    4. Did the motion judge err in failing to apply the correct legal test? (Issue 4)

    5. Did the motion judge make palpable and overriding errors of fact and mixed fact and law? (Issue 5)

The Chronology

[6] On July 24, 2020, the plaintiffs, who are residents of the United Kingdom, filed a statement of claim, alleging that the defendants, who are residents of the Town of Alexander, in Manitoba, breached a partnership or, in the alternative, a joint venture agreement (the agreement) whereby the

parties would operate a custom forage harvesting business in or around Alexander. The plaintiffs also alleged unjust enrichment and conversion. Pursuant to the agreement, the plaintiffs shipped large equipment from the United Kingdom to Manitoba to support the enterprise.

[7] On November 20, 2020, the defendants filed and served their statement of defence and counterclaim, in which they alleged that the plaintiffs owed them monies under a separate agreement related to the maintenance and shipping costs regarding the equipment shipped to Manitoba.

[8] On November 25, 2020, counsel for the plaintiffs requested of counsel for the defendants an extension of time for filing a reply and defence to counterclaim, asking that the defendants not note default without providing reasonable notice. That same day, counsel for the defendants responded that he would agree to an extension of time. It was known to the plaintiffs that the defendants were bringing a motion for security for costs.

[9] On December 2, 2020, the defendants filed their notice of motion for security for costs. The motion was adjourned several times, and the record suggests that a resolution of that issue was reached just over four months later. A memorandum of settlement regarding security for costs (the memorandum of settlement) was drafted by counsel for the defendants and sent to counsel for the plaintiffs in April 2021. The motion was adjourned *sine die* on May 17, 2021. However, the memorandum of settlement was never signed.

[10] During the period from November 7, 2022 to February 8, 2023, and again in early June 2023, counsel exchanged some emails. Counsel for the plaintiffs indicated that he wanted to move the matter forward, starting with

finalization of the memorandum of settlement. On June 8, 2023, counsel spoke by telephone about execution of the memorandum of settlement.

[11] On July 27, 2023, the defendants filed the delay motion and they served it on July 31, 2023. Before doing so, counsel for the defendants had not requested that the plaintiffs file a reply and defence to counterclaim, nor had the plaintiffs done so.

[12] On August 1, 2023, the plaintiffs filed their pre-trial conference brief.

[13] The delay motion, which was returnable on August 14, 2023, was adjourned to August 28, 2023, when it was then adjourned *sine die*. By that time, four different lawyers from the law firm representing the plaintiffs had been involved in this matter.

[14] On November 27, 2023, the defendants requisitioned the delay motion back onto the civil motions list (the date of requisition). That same day, the plaintiffs filed their reply and defence to counterclaim, served their pre-trial conference brief and requested a pre-trial conference date.

[15] On January 24, 2024, the plaintiffs served on the defendants an unsworn affidavit of documents and copies of documents listed in Schedule A of that affidavit.

[16] On March 19, 2024, a pre-trial conference was held. Counsel for the defendants was initially opposed to the pre-trial conference, but ultimately agreed to attend to avoid an unnecessary dispute. Trial dates were set for September 2025.

[17] On April 19, 2024, the delay motion was heard.

[18] On August 6, 2024, the motion judge issued the *motion decision*, dismissing the action and the counterclaim. He cancelled the trial dates.

The Motion Judge's Reasons for Decision

[19] With respect to rule 24.02, the motion judge conducted his analysis as to whether there had been three or more years of delay since the last significant advance not by using the date the delay motion was filed (July 27, 2023) but, rather, the date of requisition (November 27, 2023). He found that, as of the date of requisition, more than three years had passed—namely, three years and seven days—since the last significant advance in the action, being the service of the statement of defence and counterclaim (November 20, 2020).

[20] The motion judge did not accept that steps taken in relation to the motion for security for costs or the plaintiffs filing their pre-trial conference brief constituted significant advances. He also did not accept that counsel for the plaintiffs' request for an extension of time to file a reply and defence to the counterclaim, together with the response from counsel for the defendants, constituted an express agreement to the delay under rule 24.02(1)(a).

[21] Therefore, he dismissed the action under rule 24.02(1).

[22] In the alternative, the motion judge addressed rule 24.01. He found that the delay in prosecuting the action was "inordinate and inexcusable" (*motion decision* at para 50), and he also dismissed the action under rule 24.01(1).

The Standard of Review

[23] The standard of review applicable to a decision made under rule 24.02 is well established. Questions of law are reviewed on the correctness standard. Questions of fact or 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 (see *Parkinson v Winnipeg Regional Health Authority*, 2025 MBCA 82 at para 182 [*Parkinson*]; *Buhr v Buhr*, 2021 MBCA 63 at para 30 [*Buhr*]; *Housen v Nikolaisen*, 2002 SCC 33).

[24] Whether there is an express agreement to the delay under rule 24.02(1)(a) is a question of fact reviewable on a standard of palpable and overriding error (see *WRE Development Ltd v Lafarge Canada Inc*, 2022 MBCA 11 at para 28 [*WRE*]).

[25] As for what constitutes a readily extricable legal principle, this Court, in *Parkinson* at para 63, stated:

> 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).

[26] A decision to dismiss an action under rule 24.01(1) is discretionary. It will not be interfered with absent a misdirection or where the decision is so clearly wrong as to amount to an injustice. Whether there was a misdirection with respect to a question of law is assessed on a standard of correctness. For errors of fact or mixed fact and law, the standard of review is palpable and

overriding error, unless there is a readily extricable legal principle, which is reviewed on the standard of correctness (see *Parkinson* at paras 54-55).

[27] Whether there was delay and whether the delay was inordinate and inexcusable are questions of mixed fact and law. Whether a plaintiff has provided a satisfactory explanation for any delay is largely a question of fact, unless it is based on an error of law or principle (see *Parkinson* at para 55; *Forsythe v Johnson*, 2024 MBCA 104 at paras 16-18 [*Forsythe*]; *The Workers Compensation Board v Ali*, 2020 MBCA 122 at para 20 [*WCB*]).

Discussion and Conclusion

Rule 24.02 of the KB Rules

[28] As mentioned, the motion judge found more than three years of delay without a significant advance in the action—from the date the statement of defence and counterclaim was served (November 20, 2020) until the date of requisition (November 27, 2023).

[29] The parties agree that service of the statement of defence and counterclaim was a significant advance; they disagree as to whether any steps taken thereafter, but before the date of requisition, constitute such an advance.

[30] As I will explain, even assuming (without deciding) that the motion judge did not err in connection with Issues 1 and 3 and that there were more than three years of delay without a significant advance, I would allow the appeal in relation to rule 24.02(1) on Issue 2. That is, under the exception in rule 24.02(1)(a), the parties made an express agreement to delay until reasonable notice had been given of the need for the plaintiffs to file a reply

and defence to counterclaim. That standstill agreement was still in effect when the delay motion was filed, such that the action should not have been dismissed.

[31] More specifically, in my view, what determines this appeal as it relates to rule 24.02(1) is the following email exchange between counsel on November 25, 2020, regarding the extension of time to file a reply and defence to counterclaim:

> [Counsel for the plaintiffs]: I assume that I will have a reasonable extension of time for the purpose of filing our client's Reply and Defence to Counterclaim, and that in any event you will not note default without reasonable notice to us. That said, I hope to file the Defence to Counterclaim prior to the Christmas break.
> . . .
> [Counsel for the defendants]: You can certainly have an extension for filing your client's Reply.
>
> I can advise that earlier today I did send my client's notice of motion for security for costs to the Courthouse for filing, and it is scheduled to appear on December 7th. Should you require an adjournment, please advise.

[32] The motion judge found that this exchange was insufficiently precise to constitute an agreement, under rule 24.02(1)(a), to the delay that ensued. He did so relying on *Krasulja v Manaigre*, 2021 MBQB 131 [*Krasulja*]; *Knight v Daraden Investments Ltd*, 2021 MBQB 279 [*Knight*] (leave to appeal to MBCA refused, 2022 MBCA 69); and *River Ridge 2 Facility Inc v Manshield Construction LP*, 2023 MBKB 61 [*River Ridge 2*]. He noted that agreements to the delay had been found in all of those cases but, unlike the situation before him, they involved agreements that either pre-dated or were made shortly after the coming into force of rule 24.02 on

January 1, 2018 (see MB, *Court of Queen's Bench Rules, amendment*, Man Reg 130/2017, s 9). The motion judge stated that those cases had "beg[u]n to warn parties that courts would soon begin to *require* . . . express, clear and explicit agreements not to invoke delay rules" (*motion decision* at para 65) [emphasis added]. He went on to state that, in those decisions, the courts had told counsel that "they *must* adjust their practices to the new reality of the new delay Rules, but that they would have a short grace period or transition period" (*ibid* at para 66) [emphasis added].

[33] The motion judge determined that the promise not to note default in this case, made almost three years after rule 24.02 came into effect, "was obviously not an express, clear and explicit promise not to invoke [rule 24.02] until further notice" (*ibid* at para 68). The motion judge also commented that, even assuming a generous approach of allowing a grace period of two full years after rule 24.02 came into effect, the promise in this case was insufficient.

[34] In my view, the motion judge made a readily extricable error of law by applying an incorrect legal standard that was not prescribed by rule 24.02(1)(a) or the authorities he relied upon—or the subsequent decision of this Court in *WRE* that addressed whether an agreement pursuant to rule 24.02(1)(a) had been made.

[35] Although the authorities referred to by the motion judge make clear that "[i]t would be prudent in the future for counsel to turn their minds to [rule 24.02] and specifically address it in any agreement to delay proceedings" (*Krasulja* at para 35; see also *River Ridge 2* at para 22; *Knight* at para 24), they do not stipulate a requirement for any such agreement to include specific

reference to the rule. Rather, as similarly cautioned in *WRE*, it is best practice to do so in order to avoid costly and protracted litigation, as has occurred here, regarding whether there was an agreement to the delay. In *WRE* at para 38, Spivak JA for this Court stated:

> I pause to offer a comment about prudent practice going forward. While no specific form for an express agreement under r 24.02(1)(a) is required, the best course of action is for parties to turn their minds to this rule and, in circumstances where an express agreement to the delay is intended, to specifically address that agreement and its terms with reference to the rule (see *Conway* at para 32; and *Krasulja* at para 33).

[36] I am persuaded that the motion judge, although referring to the "prudent" approach suggested in the authorities he canvassed, ultimately applied a higher standard that required "express, clear and explicit agreements not to invoke delay rules" (*motion decision* at para 65). He determined that, in order to establish an agreement under rule 24.02(1)(a) in cases where the alleged agreement was made a significant period of time after rule 24.02 came into force, there must be explicit reference to the delay rules.

[37] Furthermore, the motion judge did not consider that the judicial guidance contained in the authorities he relied upon had not been provided when the email exchange occurred in this case (see *Mathias Colomb Cree Nation v Saskatchewan Power Corporation*, 2024 MBKB 54 at para 20; *River Ridge 2* at para 22).

[38] I add that the motion judge did not consider whether the alleged agreement could have been an agreement to the delay only until the parties had resolved the issue of security for costs or, alternatively, until the 2020

Christmas break, being when counsel for the plaintiffs indicated, in his email, that he hoped to have his reply and defence to counterclaim filed. If there was a standstill agreement in effect until one of those events occurred, which stopped the clock for that period of time, there would not have been three or more years of delay without a significant advance by the date of requisition (see *Bugg v Beau Canada Exploration Ltd*, 2006 ABCA 201 at paras 19-20). A comment made by the motion judge in *obiter* suggests that he may have been of the view that any agreement to delay had to be for the entire period of delay; he stated, in further support of his conclusion, that if he had erred and there was an agreement to delay, it was terminated when the delay motion was served.

[39] The motion judge's misdirection as to the applicable legal standard was clearly not trivial. It tainted his factual determination that an agreement to the delay had not been proven—such that the exception in rule 24.02(1)(a) was not applicable and the action should be dismissed under rule 24.02(1). As a consequence, his decision under rule 24.02(1) cannot stand and it falls to this Court to determine whether an express agreement to the delay was made.

[40] As outlined in *WRE*, "[d]etermining if . . . an agreement [to the delay] exists and its nature depends on the facts and circumstances of the case" (at para 28). An agreement to delay must be express and clear, and not left to inference. It can be written or oral, so long as it is express and not based on intent or inference (see *ibid* at para 31). As further explained in *WRE* at para 33:

> As well, in *Flock*, the Court stated that an agreement to excuse time may be oral, but it cannot be implied and, under the rule, must be express; so conduct alone will not suffice. An exchange of

> correspondence will suffice if it is clear and precise enough (i.e., parties, start of period and essential terms) (see para 17(11)).

[41] In *Krasulja* and *River Ridge 2*, two of the cases relied upon by the motion judge, the courts found agreements to delay in circumstances virtually identical to the case at bar. In both *Krasulja* and *River Ridge 2*, as in the present case, it was the defendants who agreed to an extension of time to file a reply and defence to counterclaim and not to note default on the counterclaim without providing reasonable notice—rather than the plaintiffs granting the extension of time for filing. As found by Greenberg J in *Krasulja*, and also applicable here, "[i]t would be reasonable for the plaintiff to assume that the proceedings were at a standstill, that is to say, to assume not only that the defendant would not note default without further notice but that she would not seek to dismiss for delay without further notice" (at para 34).

[42] Therefore, in the particular circumstances of this case, I would conclude that there was an express agreement to delay such that the exception in rule 24.02(1)(a) applies. The parties were operating under an agreement to delay until the defendants gave reasonable notice that they required the plaintiffs to file a reply and defence to counterclaim, which notice was never given. Furthermore, even if the agreement to delay was only operative for so long as it took to deal with the motion for security for costs, or, alternatively, just until the 2020 Christmas break, I would conclude that there were not three or more years of delay without a significant advance, and I would therefore not dismiss the action under rule 24.02(1).

[43] For the above reasons, I would allow the appeal as it relates to rule 24.02(1).

[44] It follows from this conclusion that I need not decide the other issues raised with respect to rule 24.02. However, I will comment briefly on Issue 1, namely, the motion judge's use of the date of requisition, rather than the date of filing the delay motion, to determine that more than three years had passed. Had he used the date of filing, clearly there would not have been three or more years without a significant advance.

[45] The jurisprudence provides that the date to be used is the date a delay motion is filed (see *Buhr* at paras 53, 55). That is, a court must determine when the last significant advance occurred and count forward until, at the latest, the date a delay motion is filed; the time between the motion being filed and heard does not count against a respondent to the motion (see *ibid* at para 55). The defendants acknowledge, and the motion judge recognized, this principle.

[46] However, the defendants argued before the motion judge—and he accepted—that, in the unique circumstances of this case, it was nonetheless appropriate for him to use the date of requisition for his analysis. That is because the parties agreed to adjourn the delay motion to a date outside the three-year period, rather than have the defendants abandon their motion and file another notice of motion once three years had passed. The defendants contended that requiring them to file another notice of motion would have been contrary to the principle of proportionality (see the *KB Rules*, r 1.04(1.1)). The defendants note that, importantly, the plaintiffs took no steps to advance the action after the delay motion was filed and before the date of requisition, despite assurances by their counsel that they would do so.

[47] The plaintiffs submit that there was contradictory evidence as to whether there was an agreement to adjourn the delay motion to a date three or more years after the statement of defence and counterclaim was filed—and the motion judge made no explicit finding of such an agreement. In any event, they say that to consider, for the purpose of rule 24.02, time after the filing of a motion to dismiss for delay ignores clear and binding direction from this Court (see *Buhr* at para 55).

[48] Leaving for another day the question of whether the motion judge was entitled, in these particular circumstances, to consider time passed to the date of requisition instead of to the date of filing the delay motion, I would strongly discourage, as a practice, filing a notice of motion for dismissal under rule 24.02(1) before three years have elapsed since the last admitted significant advance. First, it is irregular to bring a motion before the grounds upon which it is brought exist. As well, filing a notice of motion before three years have elapsed will likely involve unnecessary time and expense because it will typically act as a warning to a plaintiff, who will then take steps to advance the action within the three-year period.

[49] Additionally, as has occurred in this case, the time and expense involved in litigating this issue are disproportionate to abandoning a notice of motion filed prematurely and re-filing it on a date three or more years after the last acknowledged significant advance. During the appeal hearing, counsel for the defendants acknowledged as much, with the benefit of hindsight.

Rule 24.01 of the KB Rules

[50] The applicable law with respect to rule 24.01 was neatly

summarized by this Court in *Forsythe* at paras 19-20:

> In *Ali*, this Court outlined the approach to motions to dismiss for delay pursuant to r 24.01. The two issues for determination are whether there has been delay and whether the delay has resulted in significant prejudice (see *ibid* at para 39). *Ali* states: "When assessing the issue of delay, the court must decide whether it has been inordinate and inexcusable" (at para 40) (emphasis in original). It is the moving party's burden to establish both requirements (see *ibid*). Deciding whether delay is inordinate and inexcusable involves a determination of whether the delay is in excess of what is reasonable, having regard to the nature of the issues in the action and the particular circumstances (see *ibid* at para 41; the *KB Rules*, r 24.01(3)). This includes a consideration of the factors identified in *Law Society (Manitoba) v Eadie*, 1988 CanLII 206 (MBCA) [*Eadie*]; namely, the subject matter of the litigation, the complexity of the issues between the parties, the length of the delay and the explanation for the delay, as well as any other relevant circumstances, including the current status of the litigation in comparison to a reasonable comparator and the role of each party in the overall delay (see *Ali* at para 41).
>
> Upon inordinate delay being established, the moving party's onus to establish inexcusable delay will essentially be met and the plaintiff will be called upon to justify the delay. The issue is then whether the nature and quality of the evidence provides the judge with a clear and meaningful explanation for the delay in the particular circumstances of the case (see *Ali* at para 42). If the delay is found to be inordinate and inexcusable, there is a rebuttable presumption of significant prejudice. Further, even if the delay is not inordinate and inexcusable, the court may dismiss the action if the delay has resulted in significant prejudice. Finally, in exceptional circumstances, where there is a clearly articulated, compelling reason, the court may refuse to dismiss the action even where it finds delay and significant prejudice (see *ibid* at paras 45-46).
>
> [emphasis in original]

[51] Thus, the issues to be determined under rule 24.01 are whether there has been delay and whether the delay is inordinate and inexcusable. The

relevant period of time is from the date the statement of claim was filed to the date the delay motion was brought (see *Forsythe* at para 23; *WCB* at para 68).

[52] The motion judge found that the plaintiffs' delay in this case was inordinate and inexcusable. He noted that "the parties had not yet exchanged crucial information about the merits of the litigation" (*motion decision* at para 84); there had not been examinations for discovery; and "[t]he parties had not yet reached the point at which meaningful settlement discussions could occur" (*ibid*).

[53] He went on to state that there were "no unusual circumstances that might justify this state of affairs (e.g. a series of deaths or illnesses). In simple terms, the situation is unreasonable" (*ibid* at para 84). He added that the delay was "too long and for no good reason" (*ibid* at para 85). He concluded the delay was "unreasonable" and that "[t]he snail's pace in this litigation is more than sufficient to invoke [rule 24.01]" (*ibid*).

[54] There is no doubt that the length of the delay in this case was very considerable. The motion judge appropriately expressed concern that key steps in the action had not been taken for many years.

[55] However, the motion judge made an extricable error of law when he reached his conclusion about the delay being inordinate and inexcusable without applying the governing principles (see Issue 4). He made no mention of the *Eadie* factors (see *Law Society of Manitoba v Eadie* (1988), 54 Man R (2d) 1, 1988 CanLII 206 (MBCA)), nor did he do a comparison of the status of this action with a reasonable comparator. I appreciate that he is presumed to know the law (see *R v REM*, 2008 SCC 51 at para 45) and that he canvassed

many of the relevant considerations. However, he did not conduct his analysis within the proper framework or consider some key factors.

[56] When dealing with rule 24.01, the motion judge did not consider time spent dealing with the motion for security for costs (although, in the context of rule 24.02, he found it to be an advance in the action, albeit not a significant one).

[57] Furthermore, and importantly, because the motion judge did not find that the email exchange considered in my analysis regarding rule 24.02(1) was an agreement to delay, he failed to take that relevant factor into account in his analysis regarding whether the delay was inexcusable (see *Ostrowski v Dubois*, 2022 MBQB 95 at para 41; *Knight* at para 34).

[58] Even if the agreement to delay could be interpreted as being only until the issue of security for costs was resolved, the motion judge made no specific finding as to whether or when that occurred. The record is not clear as to why the memorandum of settlement was not signed.

[59] The affidavits filed on the delay motion were sworn by the defendant, Daniel Rooke (Mr. Rooke), and a legal assistant employed by the firm representing the plaintiffs. Both affidavits were largely based on a review of the file and, to some extent, information provided by the lawyers who had conduct of the case. First-hand evidence from counsel would have been helpful regarding the status of the issue of security for costs and the memorandum of settlement (as well as the discussions regarding adjournment of the motion until a date three or more years after service of the statement of defence and counterclaim) (see *Parkinson* at paras 68-72).

[60] Submissions made by the defendants on the appeal about the memorandum of settlement suggest that the matter of security for costs may not have been fully finalized and that the terms of the settlement were nuanced. Counsel for the defendants indicated that the memorandum of settlement, as drafted, left the issue of costs on the security for costs motion outstanding and also provided that security for costs would not actually be paid by the plaintiffs, but rather, the issue would be resolved by the defendants offsetting the security for costs against an amount they acknowledged in their statement of defence was owing to the plaintiffs.

[61] The motion judge also erred in principle by failing to take into account as a relevant factor the conduct of the defendants in deciding whether the delay was inordinate or excusable, or in the exercise of his ultimate discretion (see *Hradowy v Magellan Aerospace Limited*, 2025 MBCA 9 at para 7; *Forsythe* at para 53). While it is unquestionably the responsibility of a plaintiff to move an action along, a defendant's conduct, especially in the context of rule 24.01, remains relevant (see *Parkinson* at paras 45-47).

[62] The defendants moved for dismissal for delay despite having: agreed to extend the time for filing a reply and defence to counterclaim and to not note default without providing reasonable notice; not subsequently requested that a reply and defence to counterclaim be filed; and not taken steps to pursue their motion for security for costs once it became apparent that the memorandum of settlement was not being signed.

[63] For the reasons outlined above, I am persuaded that the motion judge misdirected himself in concluding that the delay was inordinate *and* inexcusable. This error was clearly material, indeed critical, on the issue of

whether the delay was inexcusable, and led to a palpable and overriding error of mixed fact and law in that regard (see Issue 5) and a miscarriage of justice. Therefore, I would set aside the motion judge's order under rule 24.01(1).

[64] The foregoing analysis also explains why I am of the view that the delay in this case was not inexcusable. As a consequence, the presumption of significant prejudice under rule 24.01(2) where there is "inordinate *and* inexcusable" [emphasis added] delay is not applicable. The defendants, having nonetheless established delay, indeed lengthy delay, may still succeed under rule 24.01(1) if they can prove, on a balance of probabilities, significant prejudice resulting from the delay (see *Parkinson* at para 31).

[65] The motion judge, after concluding that the delay was inordinate and inexcusable, conducted no analysis under rule 24.01(2) as to whether the presumption of significant prejudice was rebutted. And, given his conclusion that the delay was inordinate and inexcusable, it was not relevant for him to consider whether the defendants had proven significant prejudice. In the absence of analysis by him, it is for this Court to determine whether significant prejudice has been established by the defendants.

[66] As explained in *Parkinson* at paras 151-52, there can be either litigation prejudice or non-litigation prejudice:

> 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.
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> . . .
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> 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).

(See also *Delwar v Beausejour (Town of)*, 2025 MBCA 84 at paras 43-55).

[67] As for litigation prejudice, the motion judge made certain relevant findings, albeit (inappropriately) in the context of whether there was inordinate and inexcusable delay. He stated that there was "no evidence of any unique prejudice because of the delay in this case. For example, there is no evidence that any specific witnesses have died or become unavailable, or that any specific documents have been lost or destroyed" (*motion decision* at para 78). I agree, and am satisfied that litigation prejudice has not been proven. A fair trial remains available.

[68] The defendants have also not met their burden of establishing non-litigation prejudice on a balance of probabilities. Mr. Rooke, in his affidavit, asserted that there was prejudice to the defendants' business in that the delay affected their ability to obtain financing or funding for their farming operations and made it "difficult to restructure [their] corporate assets for succession planning." However, on cross-examination, he provided few

details and no documents about these assertions, resulting in the assertions being of limited weight.

[69] Although the defendants have suffered non-litigation prejudice by having this matter outstanding against them for many years, I am not persuaded that this factor is significant when considered together with the other aspects of prejudice, particularly the availability of a fair trial.

[70] In all of the circumstances, I would conclude that rule 24.01(1) is not satisfied. Although the delay in this case was lengthy, it was not inexcusable. While there was clearly delay, significant litigation or non-litigation prejudice has not been established. Essential justice requires that the action not be dismissed and that the plaintiffs be allowed their day in court.

[71] For the above reasons, I would also allow the appeal as it relates to rule 24.01(1).

Costs

[72] Both parties seek costs in the event of success on appeal.

[73] Costs are a matter of the Court's discretion. The general rule is that costs should follow the event unless there is good cause. As noted in *Parkinson* at para 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*).

[74] The plaintiffs clearly have not prosecuted the action with dispatch. This Court has emphasized that "there is a strong public interest in promoting the timely resolution of disputes in our civil justice system" (*WCB* at para 86).

[75] As explained in *Parkinson*, "[t]he 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" (at para 205). That being said, as I have explained, the defendants bear some responsibility for delay here.

[76] Unlike the situation in *Parkinson* (see para 210), the delay motion was not appropriate given all of the circumstances. Although there was lengthy delay on the part of the plaintiffs, the defendants could have demanded a pleading or moved their own motion for security for costs along once it became apparent that the matter was unduly delayed.

[77] In the exercise of my discretion, bearing in mind the considerations in rule 57.01(1) of the *KB Rules*, I would conclude that it is fair and reasonable that neither the plaintiffs nor the defendants receive an award of costs.

Disposition

[78] For the foregoing reasons, I would allow the appeal and set aside the order dismissing both the action and the counterclaim. The parties shall bear their own costs in both this Court and the Court below.

_____ JA

I agree: _____ JA

I agree: _____ JA