



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Bugden v. St. John's (City)*, 2026 NLSC 26

Date: March 4, 2026

Docket: 200501T8110

BETWEEN:

DONALD W. BUGDEN

PLAINTIFF

AND:

THE CITY OF ST. JOHN'S

FIRST DEFENDANT

AND:

**INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 1075**

SECOND DEFENDANT

Before: Justice Justin S.C. Mellor

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

December 12, 2025

Summary:

The Plaintiff alleges that in 2001 he was the victim of a workplace assault by a co-worker which caused him to suffer from post-traumatic stress disorder. In 2005, he commenced action against his employer claiming that he was not properly accommodated in the workplace and that he was constructively dismissed. He also claimed that his union failed to meet its duty of fair representation. The Plaintiff's claim progressed slowly, and no steps were taken to advance the claim between 2015 and 2024.

On 14 March 2024, the Plaintiff's former lawyer was disbarred for misleading other clients on the status of their claims.

The Defendants have filed applications to dismiss the Plaintiff's claim for want of prosecution.

Held: The claim is dismissed for want of prosecution. The delay is inordinate because the period of cumulative delay exceeds five years. While the inordinate delay was largely caused by the Plaintiff's counsel, the Plaintiff was a sophisticated litigant, and the Defendants should not bear the burden of his choice of counsel. Due to the extreme length of the delay, prejudice to the Defendants is inferred.

Appearances:

John F.E. Drover	Appearing on behalf of the Plaintiff
Christopher E. King, K.C.	Appearing on behalf of the First Defendant
Ian S. Patey, K.C. & Duncan Thomas Wallace	Appearing on behalf of the Second Defendant

Authorities Cited:

CASES CONSIDERED: *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473; *Hryniak v. Mauldin*, 2014 SCC 7; *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. S.C.(C.A.)); *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 2 QB 229 (Eng. C.A.); *Birkett v. James*, [1978] A.C. 297 (H.L.); *Westminster City Council v. Clifford Culpin & Partners* (18 June 1987), Transcript No. 592 of 1987 (Eng. C.A.); *Department of Transport v. Chris Smaller Transport Ltd.*, [1989] A.C. 1197 (H.L.); *International Capital Corp. v. Schafer*, 2010 SKCA 48; *Barbiero v. Pollack*, 2024 ONCA 904; *Kirwan v. Connors & Ors*, [2025] IESC 21; *Dawe v. Brown* (1994), 120 Nfld. & P.E.I.R. 40, 373 A.P.R. 40 (Nfld. S.C. (T.D.)); *Fennelly v. Lloyd's Underwriters*, 2016 NLTD(G) 1; *Pittman v. Brinson*, 2012 NLTD(G) 92; *Collier v. Nova Fish Farms Inc.*, 2025 NLSC 66; *Penney v. L.B.*, 2022 NLSC 160; *Leblanc v. MacMillan*, 2015

ONSC 1477; *Osprey Park Operations Mid-Island Ltd. v. British Columbia*, 2023 BCSC 1811; *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160

STATUTES CONSIDERED: *Limitations Act*, S.N.L. 1995, c. L-16.1

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D; *Alberta Rules of Court*, Alta. Reg. 124/2010; *Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009

TEXTS CONSIDERED: Justice David Brown, *Red Block, Yellow Block, Orange Block, Blue: With so Much Competition, What do We do?* (London: Middlesex Law Association, 2019)

REASONS FOR JUDGMENT

MELLOR, J.:

INTRODUCTION

[1] This is an application to dismiss an action for want of prosecution under Rule 40.11 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “*Rules*”). The events giving rise to the claim happened more than 24 years ago, and the statement of claim was filed over 20 years ago. Prior to 2024, the last procedural action taken by the Plaintiff was in 2015. Two witnesses in this matter are dead, and others have retired from the First Defendant’s employ.

[2] Donald Bugden, the Plaintiff, asserts that he was misled by his lawyer as to the status of his claim. He believed that the matter was advancing when it was not. He is not alone in this regard. His former lawyer was disbarred in 2024 because of similar complaints from other clients. The Law Society Disciplinary Tribunal found that the lawyer misled clients about the progress of their claims and had engaged in a “web of willful deceit” to conceal his failings.

[3] In January 2024, Mr. Bugden retained new counsel (Mr. Drover) who attempted to resuscitate his claim. Despite these recent efforts, I find that there has been an inordinate and inexcusable delay and that due to the long period of inactivity, prejudice to the Defendants should be inferred. As a result, Mr. Bugden's claim is dismissed for want of prosecution.

BACKGROUND

[4] Mr. Bugden was a firefighter with the St. John's Regional Fire Department. He claims that in March 2001 he was assaulted by a co-worker which caused him to suffer from post-traumatic stress disorder. This incident necessitated him taking an extended leave of absence from work. On his return, he asserts that the accommodation provided by the City of St. John's (the "City") was unsuccessful. Despite the difficulties at work, he was promoted to Fire Lieutenant in 2004 and retired on 31 January 2005.

[5] On 14 July 2005, Mr. Bugden's lawyer filed a statement of claim against the City, alleging amongst other things, that it negligently subjected him to an unsafe work environment, recklessly inflicted mental suffering and constructively dismissed him. He also claimed that the Second Defendant, the International Association of Firefighters Local 1075 (the "Union"), failed to meet its duty of fair representation.

[6] In February 2012, three witnesses were discovered. After that, there was no further action taken until January 2015 when Mr. Bugden's former lawyer filed a Notice of Intention to Proceed and served a Supplementary List of Documents containing a medical report. After that, nothing happened until new counsel was appointed in 2024.

[7] Mr. Bugden had frequent contact with his former lawyer between 2015 and 2019, and he was repeatedly reassured that his matter was progressing. Due to illness in Mr. Bugden's family and the COVID-19 pandemic, Mr. Bugden had less contact

with his lawyer after 2019. At some point after 2022, his lawyer suggested that he retain new counsel.

[8] In April 2024, Mr. Bugden's new counsel attempted to file the Trial Record and sent the Defendants a Certificate of Readiness. No application was filed to set the matter down for trial.

[9] On 26 November 2024, the City filed an application to dismiss Mr. Bugden's claim for want of prosecution, and the Union did the same on 3 January 2025.

ISSUE

[10] Should Mr. Bugden's claim be dismissed for want of prosecution?

ANALYSIS

Law

[11] Delay is a chronic problem in the civil justice system. It harms both the interests of individual litigants and the larger public interest. At the individual level, the passage of time results in prejudice, as records are lost, witnesses die and memories fade. With every passing year, the ability of the parties to prosecute or defend a claim is diminished.

[12] Delay inflicts not only private, but also public costs by impeding efficient and effective uses of court resources. Too often, judicial resources are spent on

applications to compel a party to file its list of documents, to proceed with discoveries, or to renew a statement of claim. Delay not only wastes public resources, but it also undermines the rule of law by eroding confidence in the justice system. (*Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, at para. 56) As the Supreme Court of Canada stated in *Hryniak v. Mauldin*, 2014 SCC 7, “... when court costs and delays become too great, people look for alternatives or simply give up on justice.” To tolerate delay is to tolerate the diminishment of the rule of law.

[13] Rule 40.11 is a remedy for delay in a civil matter. It allows a party to bring an application to strike a claim for want of prosecution. The leading authority in this province is *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. S.C.(C.A.)).

[14] In that case, Gushue, J.A. adopted the factors set out by Lord Salmon in the 1968 English Court of Appeal case of *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, 2 QB 229 (Eng. C.A.), (later endorsed by the House of Lords in *Birkett v. James*, [1978] A.C. 297 (H.L.)). To succeed in striking a claim, a party must show an inordinate delay, that the inordinate delay is inexcusable, and that the defendant will be seriously prejudiced if the matter proceeds.

[15] Long before our Court of Appeal adopted the *Allen* test, English courts were condemning it as an ineffective mechanism to combat persistent delay in civil litigation. The unreported 1987 decision of *Westminster City Council v. Clifford Culpin & Partners* (18 June 1987), Transcript No. 592 of 1987 (Eng. C.A.), Kerr, L.J. of the English Court of Appeal stated:

The principles laid down in *Birkett v. James* are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover they then breed excessive further delays and costs in their application. The long line of decisions concerned with striking out applications, both reported and unreported, demonstrates that the regime of *Birkett v. James* should be replaced by a system of rules which are much stricter, more effective and simple to apply.

[16] In *Department of Transport v. Chris Smaller Transport Ltd.*, [1989] A.C. 1197 (H.L.), Lord Griffiths of the House of Lords stated at pages 1203-1204:

It was hoped that the initiative taken by the Court of Appeal in *Allen v. Sir Alfred McAlpine and Sons Ltd.* to strike out actions for want of prosecution and the endorsement of those principles by this House in *Birkett v. James* would be a sufficient deterrent to ensure that all plaintiffs' solicitors would in future pursue litigation with reasonable despatch rather than face an action against them by their clients when the action was struck out. Unfortunately, this has not proved to be the case.

[17] While the House of Lords declined to change the test in *Department of Transport*, Lord Griffiths writing for a unanimous court, commented at page 1207:

I believe that a far more radical approach is required to tackle the problems of delay in the litigation process than driving an individual plaintiff away from the courts when his culpable delay has caused no injustice to his opponent. I, for my part, recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a time table as prescribed by Rules of Court or as modified by a judge ...

[18] The *Allen* test was developed more than 50 years ago to specifically address the needs of the English civil courts, and despite that fact, many Canadian jurisdictions, including Newfoundland and Labrador have persisted in applying it. However, courts in several provinces have taken a new approach to striking claims for want of prosecution. (*International Capital Corp. v. Schafer*, 2010 SKCA 48) Most recently, the British Columbia Court of Appeal modified that province's test to "... account for the public interest in this broader sense." (*Giacomini*, at para. 56) In *Giacomini*, at paras. 70 and 72, the Court kept the first two branches of the *Allen* test, but changed the third branch by requiring courts to ask: "Is it in the interests of justice for the action to proceed despite the existence of inordinate and excusable delay?" The Court reduced prejudice from being a discrete element of the test to just a factor to be considered along with several others in determining the interests of justice. The result is that prejudice "... is not a pre-requisite to an order dismissing a claim for want of prosecution".

[19] Overall, common law jurisdictions are either moving away from narrow tests focused on prejudice to broader multi-factor tests, or alternatively they are simply setting fixed benchmarks after which there is a presumption in favour of dismissal unless there are compelling circumstances. (*Barbiero v. Pollack*, 2024 ONCA 904; *Kirwan v. Connors & Ors*, [2025] IESC 21)

[20] Civil litigation has changed considerably since the *Allen* test was developed; however, *Allen* remains the law in this province. I have applied it to Mr. Bugden’s case, but I have done so considering some of the recent common law developments.

Inordinate Delay

[21] In applying the *Allen* test, the first step is to determine if the length of time taken to advance Mr. Bugden’s case amounts to an “inordinate delay”. How is such a determination made? Lord Salmon suggested that it is determined by “the facts of each particular case” and that these vary infinitely from “case to case”. He added that “it should not be too difficult to recognize inordinate delay when it occurs.”

[22] Suggesting that a judge will know inordinate delay when they see it is of little assistance. While examining the facts of a case is helpful, determining inordinate delay is a comparative exercise and requires a fixed reference point against which the delay is measured. How else can delay be determined?

[23] Not imposing fixed timelines for delay is at odds with the policy that underpins the *Limitations Act*, S.N.L. 1995, c. L-16.1. Through the *Act*, the Legislature has determined that public interest is served through the prompt settlement of legal disputes and ensuring that plaintiffs do not sit on their rights. For a plaintiff to file a claim within the limitation period only to drag it out for decades, defeats the purpose of the *Act*.

[24] In *Allen*, Lord Salmon described the fixed timeline approach as “highly undesirable and indeed impossible”. In *Barbiero*, at paras. 20-22, the Ontario Court of Appeal achieved the impossible and established five years as the appropriate benchmark for inordinate delay. Brown, J.A. stated:

To be "inordinate" a delay must be unusually large or excessive. In the context of applying r.24.01, that assumes the existence of a benchmark that sets out the ordinary or normal amount of time that it should take a civil proceeding to move from its initiation to its setting down for trial.

Such a benchmark exists in the *Rules of Civil Procedure*.

Rule 48.14(1)1 provides that the registrar shall dismiss an action for delay where it has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action. Consequently, if an action has not been set down for trial within those five years, the action crosses the line and begins to move into the realm of "inordinate" delay. An action that has not been set down for trial 21 years after it was started has strayed deep into the dark wood of "inordinate" delay.

[25] Other provinces also have benchmarks against which delay is measured. In Alberta, Rule 4.33(2) of *Alberta Rules of Court*, Alta. Reg. 124/2010, specifies that if three or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless certain criteria can be met.

[26] In Nova Scotia, Rule 4.22 of *Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009, provides that the prothonotary is obligated to make a motion to dismiss defended unexpired actions five years from the day after which the notice of action is filed if no trial date is set. Benchmarks are necessary in civil litigation because as Justice Brown of the Ontario Court of Appeal has commented, “Real change will only come when, at the start of the litigation process, you fix the “drop dead” date for the case.” (Justice David Brown, *Red Block, Yellow Block, Orange Block, Blue: With so Much Competition, What do We do?* (London: Middlesex Law Association, 2019))

[27] Unlike Ontario, Alberta and Nova Scotia, our *Rules* do not contain a benchmark against which to measure delay. However, our case law suggests that there is a common law benchmark of five years. Decisions of this Court on delay frequently refer to Chief Justice Hickman’s decision in *Dawe v. Brown* (1994), 120 Nfld. & P.E.I.R. 40, 373 A.P.R. 40 (Nfld. S.C. (T.D.)). (e.g., *Fennelly v. Lloyd’s Underwriters*, 2016 NLTD(G) 1; *Pittman v. Brinson*, 2012 NLTD(G) 92; *Collier v. Nova Fish Farms Inc.*, 2025 NLSC 66; *Penney v. L.B.*, 2022 NLSC 160) In *Dawe*, at para. 8, Hickman, C.J. stated:

I have no difficulty in concluding that a delay of five years is inordinate and one which under ordinary circumstances should not be tolerated. Litigants are entitled to have disputes settled quickly by courts and inordinate delays often prove costly to those who seek access to the Courts and unless appropriate practices are imposed, will bring the administration of justice into disrepute.

[28] The rule of law requires that the law be clear, intelligible and predictable. Providing a fixed timeframe fulfills that requirement. It allows a plaintiff to gauge if the slow progression of their case is putting their cause in jeopardy. It also assists in overcoming what the Supreme Court of Canada has referred to as a culture of complacency when it comes to delay.

[29] I agree with Hickman, C.J., that a cumulative delay of five years is inordinate. Five years is a long time for a barrister to do nothing to advance a client’s case. In common law jurisdictions there is a high degree of consensus that delay beyond five years should only be tolerated in exceptional circumstances. In *Kirwan*, at para. 54, the Irish Supreme Court created a sliding scale for dismissal from two to five years and held that after five years a court should only allow a matter to proceed unless “... there is a pressing exigency of justice ...” such as serious misconduct by the defendant.

[30] In Mr. Bugden’s case, his claim was filed on 14 July 2005. Using *Dawe* as the common law five-year benchmark, his claim should have been set down for trial before 2010. During the hearing, Mr. Bugden’s counsel conceded that the delay in his client’s case is inordinate, however, he asserted that it was excusable due to the circumstances of the case.

Inexcusable Delay

[31] Once a defendant has proven inordinate delay, the onus then shifts to the plaintiff to establish a valid excuse. The excuse must be both credible and sufficient. As Gordon J. explained in *Leblanc v. MacMillan*, 2015 ONSC 1477, at para. 18:

Determining whether a delay is inexcusable requires an assessment of the reasons for the delay and whether those reasons provide an adequate explanation for the entire delay. Explanations that are reasonable and cogent or sensible and persuasive may serve to excuse delay. In assessing the explanations offered, the Court is to consider the credibility of those explanations, the explanation offered for individual parts of the delay, and the effect of those explanations as a whole.

[32] The primary excuse for the delay in this matter is the professional misconduct by Mr. Bugden's former lawyer. The fact that the lawyer was disbarred for treating other clients in a similar manner makes Mr. Bugden's explanation of the delay highly credible.

[33] Dismissing Mr. Bugden's claim because of the conduct of his former lawyer may appear unjust - that I am visiting the sins of counsel upon the client, but it is well established that misfeasance by counsel only "softens but does not excuse the delay". (*Osprey Park Operations Mid-Island Ltd. v. British Columbia*, 2023 BCSC 1811, at para. 21) The Saskatchewan Court of Appeal in *International Capital Corp.*, explained why misfeasance by counsel should not be given undue weight in considering whether to dismiss for want of prosecution. Justice Richards expounded at paragraph 45:

There is a comment in *Carey v. Twohig* to the effect it might be unjust to deprive a plaintiff of the chance of recovering damages in circumstances where the plaintiff himself or herself is blameless in relation to the delay and his or her lawyer is fully responsible for it. See: *Carey v. Twohig*, *supra*, at p. 388; *Humboldt Flour Mills Co. Ltd. v. Ewen*, *supra*, at para. 4. This is a legitimate consideration when assessing the justice of allowing litigation to continue after inexcusable delay. Depending on the circumstances, there might well be a measure of unfairness in visiting the consequences of a lawyer's lack of diligence on his or her client. However, this

consideration should not be overstated or given undue weight. The reason for this is straightforward. Plaintiffs select and instruct their counsel. If a litigant engages a lawyer and the lawyer then fails to move matters forward expeditiously, the litigant should bear the burden of his or her choice of counsel and should not expect to have that burden shifted wholly to a defendant who played no role in retaining or instructing the lawyer. This is perhaps particularly so in the case of sophisticated clients familiar with the ins and outs of litigation. Care must be taken to ensure that plaintiffs' lawyers are not allowed to defeat applications to strike for want of prosecution by the simple expedient of assuming the blame for not moving the file forward.

[34] For courts to automatically accept a solicitor's dilatory handling of a file as full excuse for delay, would amount to the courts tolerating professional negligence and then transferring the costs of that negligence to the defendants.

[35] It must be pointed out that Mr. Bugden was not a novice to the world of litigation, having commenced actions in the past. A reasonable person would not have tolerated multi-decade delays in resolving a claim. It was certainly within his power to replace his counsel an earlier date, but he did not.

[36] In civil litigation, it is the plaintiff who commences an action and has the concomitant obligation of moving the matter to final disposition. There is no evidence that the City or the Union were dilatory or resisted the advancement of the claim. It is unfortunate that Mr. Bugden's lawyer may have been negligent, but as I explain below, it would be unjust to now allow the matter to proceed.

Direct Prejudice

[37] In an application to dismiss for want of prosecution, prejudice can be proven directly, or it can be inferred. (*Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160, at para. 28) Claiming direct prejudice requires an applicant to adduce evidence on things such as witness availability, the destruction of evidence or the inability of witnesses to recall past events. For example, in *Fennelly* (2021), the applicant

submitted answers to interrogatories to establish that a key witness had no recollection of important events that had transpired 11 years before.

[38] Requiring a defendant to prove prejudice is yet another weakness of the *Allen* test. At the interlocutory stage, it puts a defendant in the undesirable position of adducing evidence that its own witnesses have failing memories, or indicating how important records have been lost. It requires evidence and explanation of how time has weakened the defendant's case. Should the application be dismissed and the claim proceed, it is likely that a plaintiff will use the evidence from the interlocutory application in cross-examination.

[39] In this case, Mr. Bugden's counsel argues that both the City and the Union have failed to provide "specific evidence that the delay has impaired their ability to defend the action or that any record essential to their defence has been lost." I agree.

[40] The City and the Union both argue that their right to a fair trial has been compromised because of the deaths of Guy Annable and Elizabeth Rideout. The death of a witness does not automatically equate to prejudice sufficient to dismiss a claim. Not all witnesses are of equal importance to the outcome of a trial. While both the Union and the City claim that these two witnesses were essential, no affidavit evidence was presented indicating the precise roles that these individuals played in the events leading to the alleged failure to accommodate Mr. Bugden or in his constructive dismissal. I have no idea of what the nature of their testimony might have been or its relevance to issues at trial. Without such evidence, I cannot determine if the loss of their testimony would result in an unfair trial.

[41] In claiming direct prejudice, the City also points out that some witnesses have retired. However, the retirement of a witness does not automatically amount to prejudice. (*Osprey*, at para. 32) I cannot assume that because a witness has retired, they cannot be located or are somehow unable to give testimony. There was no affidavit evidence indicating that the City had tried unsuccessfully to locate these witnesses.

[42] I must conclude that neither the City nor the Union have proven direct prejudice.

Inferred Prejudice

[43] Even if an applicant fails to establish direct prejudice, it is still open to a court to infer prejudice due to the passage of time. (*Fennelly* (2016 and 2021); *Penney v. Lush*, at paras. 14 and 15; *Barbiero*, at para. 15) The longer the delay, the more appropriate it is for the court to make such an inference.

[44] This is an appropriate case to infer prejudice because of the nature of the evidence. The issues in this case are largely fact driven. Much of the City and the Union's evidence will come from witnesses recalling events from 25 years ago. The human memory is not a digital recording. It is well accepted that it does not always provide an accurate representation of the events experienced, and this certainly does not improve with the passage of time.

[45] In *Fennelly* (2021), at para. 31, Justice Burrage held that with a delay of 13 years "... we are now well past the point where prejudice ... can be inferred." In this case, almost 25 years have passed since the incident giving rise to the action occurred, and it has been 20 years since the filing of the claim. As a result, I am prepared to infer prejudice from the passage of time.

DISPOSITION

[46] The Plaintiff's claim is dismissed for want of prosecution for the reasons above.

COSTS

[47] The City and the Union shall have their costs in this Application in accordance with Column 3 of the Scale of Costs in the Appendix of Rule 55 of the *Rules*.

JUSTIN S.C. MELLOR
Justice