# Court of King's Bench of Alberta

**Citation: H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd, 2024 ABKB 428**

**Date:** 20240715
**Docket:** 2101 03737
**Registry:** Calgary

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Between:

**H2 Canmore Apartments LP, Hokanson Capital Inc. and 2158318 Alberta Ltd.**

Plaintiffs

- and -

**Cormode & Dickson Construction Edmonton Ltd., Berend Pieter Elzen also known as Ben Elzen, Michael R. Deacon, Martin Bohm, Bruce Miller, Frank Haas, Beck Vale Architects & Planners Inc., Greg Beck, SNC-Lavalin Inc., Sebastian Roman, Wanhong Zhang, TWS Engineering Ltd., Marshall Price, PDN Construction Ltd., Amen Construction Ltd., Design 19 Painter Ltd., Walker Plant J.V. Ltd., H Group Inc., Reza Aghazadeh and McCool Construction YYC Inc.**

Defendants

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**Reasons for Decision**
**of the**
**Honourable Justice M.A. Marion**

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## I. Introduction

[1] This case-managed action (**Action**) involves the construction of an apartment building (**Project**) in Canmore, Alberta.

[2] In this application (**Application**), Cormode & Dickson Construction Edmonton Ltd (**Cormode**) applies for permission to file a third party claim (**Proposed Claim**) against Cascade Mechanical Ltd (**Cascade**) approximately 21 months after the expiry of the 6-month deadline in rule 3.45(c) in the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*). Cascade opposes the Application.

[3] For the reasons set out below, the Application is dismissed.

## II. Procedural Background

[4] On March 15, 2021, the plaintiffs, H2 Canmore Apartments LP (**H2**), Hokanson Capital Inc (**HCI**) and 2158318 Alberta Ltd (collectively the **Plaintiffs** or **Owner**[1]), commenced this Action against 20 defendants related to their involvement in the Project for one or more of breach of contract, negligence, negligent misrepresentation, deceit, conspiracy, and breach of fiduciary. The Plaintiffs claim delay and increased Project costs, and seek $9 million in damages, plus punitive damages, an accounting and disgorgement of profits, interest, and costs, together with other relief. The Plaintiffs did not claim against Cascade.

[5] On June 9, 2021, Cormode filed its Statement of Defence and a Notice of Claim Against Co-Defendants under rule 3.43 against 14 other defendants in the Action.

[6] On January 7, 2022, Master Prowse (as he was then called) ordered this Action and other related actions to proceed together and that all interlocutory applications were to be filed in the Action (and shall be deemed to have been filed in the related actions).

[7] By February 2022, numerous parties had filed their statements of defences, notice to co-defendants and third party claims in the Action and the related actions. To my knowledge, nobody made any claim of any kind against Cascade.

[8] On February 9, 2023, I was appointed Case Management Justice over the Action and the related actions.

[9] At the June 22, 2023 initial case management meeting, the potential for a third party claim against Cascade was raised, but Cormode had not decided whether it was going to pursue it. I directed all parties to notify me of any additional third party claims they intended to bring before the next case management meeting.

[10] At the July 28, 2023 case management meeting, Cormode confirmed its intention to seek leave to bring the Proposed Claim against Cascade.

[11] On September 18, 2023, Cormode served Cascade with its Application and a copy of the Statement of Claim.

[12] At the October 4, 2023 case management meeting, Cascade agreed to provide its position by October 13, 2023, which it later confirmed was to oppose the Application. Cormode and Cascade subsequently agreed to a schedule for cross-examinations, reply affidavits and undertakings, which contemplated the evidence portion of the application to be completed by end of April 2024.

[13] On June 6, 2024, I heard the Application.

[1] The Plaintiffs are referred to collectively as Owner for ease of reference only.

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## III. The Record

[14] The record before me on the Application includes:

(a) the September 12, 2023 (filed September 18, 2023) affidavit (**Elzen Affidavit**) of Berend Elzen (**Elzen**), the November 23, 2023 (filed December 15, 2023) transcript of questioning on that affidavit, and Elzen's filed responses to undertakings from that questioning. Elzen was Cormode's president at all material times; and

(b) the February 28, 2024 affidavit of Dustin Taylor (**Taylor**), the March 22, 2024 transcript of questioning on that affidavit, and Taylor's filed responses to undertakings from that questioning. Taylor was Cascade's president at all material times.

[15] There were no objections to the evidence.

## IV. Issue

[16] The issue on this Application is whether the Court should extend the third party claim deadline under rule 3.45 to permit Cormode to file the Proposed Claim late.

## V. Analysis

### A. Legal Framework for Extending Time to Permit Late-Filed Third Party Claims

[17] Rule 3.45(c)(i) requires that third party claims must be filed and served on the plaintiff and the third party defendant within 6 months after the date on which the defendant filed a statement of defence or demand for notice.

[18] The Court has the discretion to extend the time period under rule 3.45(c)(i) regardless of whether the time has expired: rule 13.5(2) and (3); ***Nelson & Nelson v Condominium Corporation No 0013187***, 2019 ABQB 426 at para 49; ***Tole v Lucki***, 2015 ABQB 231 at para 1; ***Condominium Plan 9812082 v Battistella Developments Inc***, 2014 ABQB 644 at paras 9, 15 [***Battistella***]; ***Pagnucco v Sears Canada Inc***, 2011 ABQB 810 at paras 9-11 (Master).

[19] Over decades, dating back to at least the 1970s under previous iterations of Alberta's Rules of Court, this Court has developed a framework to assess time extension applications for late third party notices in the exercise of the Court's discretion.

[20] The framework is reflected in numerous cases of our Court since the *Rules* were enacted in 2010. Although the specifics of the factors are sometimes described in different ways, the key factors are: (1) delay length; (2) the reason for the delay; and (3) prejudice: ***Kapeluck v Two Girls And A Hammer Inc***, 2022 ABQB 467 at paras 3, 36; ***Piikani Nation v McMullen***, 2020 ABQB 89 at para 29; ***Nelson*** at para 49; ***Stefanyk v Stevens***, 2017 ABQB 402 at para 34; ***TRDMS Services Inc v Condo Corp 0425913 (the New Cambridge Lofts)***, 2016 ABQB 527 at paras 25-28; ***Battistella*** at para 15; ***Canadian Natural Resources Limited v Arcelormittal Tubular Products***

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***Roman SA (Mittal Steel Roman SA)***, 2012 ABQB 679 at para 497 [***Arcelormittal***], var'd on other grounds 2013 ABCA 279, refused leave to appeal to SCC, 2014 CanLII 4542.

[21] Each factor is considered concurrently rather than sequentially: ***Condominium Corporation No 9813678 v Statesman Corporation***, 2008 ABQB 495 at para 45 [***Statesman***]; ***Dean v Kociniak***, 2001 ABQB 412 at para 66; ***Flight v Dillon***, 2001 ABQB 211 at paras 26-28.

[22] Although these three key factors are sometimes described as giving rise to a specific "test", in my view they have never been described or intended to be exhaustive considerations. Courts will consider other factors which are either embedded within the key factors or as separate considerations.

[23] For example, whether considered a distinct inquiry or part of the prejudice analysis, the Court will consider the merits of the proposed third party claim: ***Kapeluck*** at para 7; ***Stefanyk*** at para 34; ***Arcelormittal*** at para 500; ***TRDMS*** at paras 38-40; ***Bodnar Capital Corporation (301831 Alberta Ltd) v Synergy Projects Ltd***, 2019 ABQB 528 at para 10 (Master); ***Condominium Corporation No 0425636 v Amyotte's Plumbing Ltd***, 2015 ABQB 801 at para 30 [***Amyotte's Plumbing***]; ***Kwik-Kopy Printing Canada Corp v Skoreiko***, 2002 ABQB 835 at para 37 (Master); ***Alliance Pipeline Limited Partnership v CE Franklin Ltd***, 2007 ABQB 582 at para 12.

[24] The merits threshold is low and has been described as only requiring that the claim have an "air of reality", or a triable issue alleging facts that, if proved, would constitute a viable action: ***Arcelormittal*** at para 500; ***LaBell v Jo (R)***, 1990 ABCA 147 at para 4; ***Kapeluck*** at para 27; ***Van Troyen Holdings Ltd v Hunt Oil Company of Canada Inc***, 2005 ABQB 626 at para 11; ***Primrose Drilling Ventures Ltd v Hitchner***, 2005 ABQB 84 at para 28; ***Statesman*** at paras 46-49.

[25] The Court will also consider the stage, status and pace of the underlying action, which can provide important context for the assessment of the key factors: ***Kapeluck*** at para 37; ***Battistella*** at paras 25-26; ***Nelson*** at para 57; ***Stefanyk*** at para 34; ***Arcelormittal*** at para 500; ***Spartek Systems Inc v Brown***, 2009 ABQB 705 at para 14; ***Whitecourt Power Limited Partnership v Interpro Technical Services Ltd***, 2014 ABQB 135 at para 15 (Master); ***Nova Pole International Inc v Trans America Group Ltd***, 2010 ABQB 4 at para 41; ***Hein v Barrett***, 2008 ABQB 548 at paras 17-23; ***Condominium Plan 9512180 v Prairie Land Corporation***, 2008 ABQB 269 at para 29 [***Prairie Land***]; ***Van Troyen*** at para 13. For example, if the action has been moving slowly it may provide context for the reason for the delay and support an extension. If the litigation is in its early stages, there may be less prejudice to the proposed third party. On the other hand, if the litigation has been advancing quickly and the proposed third party has significant catch-up to do, or the matter is ready for trial, it may be evidence of prejudice.

[26] The requirement to explain delay is mandatory; the onus is on the party moving for the time extension to lead evidence to explain the delay: ***Arcelormittal*** at para 498; ***Flight*** at para 11; ***Lister v Calgary (City)***, 1997 CanLII 24562 (AB CA) at para 14; ***ESM Transport Ltd v Western Mack Truck (Edmonton) Ltd***, 1988 ABCA 157 at para 3.

[27] Characterizing the delay length depends on the circumstances of the case. There is no magic formula or automatic result based on a specific delay length. Clearly, a longer delay weighs more against extending time than a shorter delay, and a shorter delay weighs more in favour of

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extending time. Courts have also recognized a relationship between delay length and the weight given to the other two key factors. When the delay is relatively short, more weight is given to the existence of prejudice resulting from the delay and, as the delay becomes longer, more weight is given to the reason, explanation or excuse for the delay: ***Nelson*** at para 51; ***Arcelormittal*** at para 499; ***Battistella*** at para 17; ***Piikani*** at para 38; ***TRMDS*** at para 37; ***Stefanyk*** at para 38; ***Amyotte's Plumbing*** at para 20; ***Spartek*** at para 14; ***Flight*** at para 12.

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[28] For example, on one end of the spectrum, delays in the range of 10-14 months or less have been described as "relatively short", "not unreasonable", "not excessive", "not substantial", not long, or "not inordinate": ***Arcelormittal*** at paras 499-519; ***Stefanyk*** at para 35; ***Alliance Pipeline*** at para 11; ***Lam v Bockman***, 2006 ABQB 101; ***Amyotte's Plumbing*** at paras 17-19; ***Prairie Land*** at para 30. In shorter delay cases, the explanation or excuse for the delay is less important to support an extension and the existence of prejudice is more important to resist it. If there is no prejudice, permission to file late is typically granted.

[29] On the other end of the spectrum, delays over 50 months have consistently been considered inordinate, significant, or long: ***Piikani*** at para 30; ***Battistella*** at paras 16-17; ***Amoco Canada Petroleum Co Ltd v Propak Systems Ltd***, 1999 ABQB 716 at paras 22-23. In these cases, proof of prejudice becomes less important, or may not even need to be materially considered if the delay cannot be justified, because prejudice may be "more or less" presumed, assumed or inferred: ***Battistella*** at para 26; ***Flight*** at para 13; ***Bow Valley Insurance Services (1992) Limited v Shah***, 2005 ABCA 304 (also known as ***Calgary Mack Sales Ltd v Shah***) at para 24, leave to appeal to SCC refused; ***Dean*** at para 66. Leave will generally be denied where there is delay of this nature and there is no or insufficient evidence to reasonably explain or excuse it: ***Arcelormittal*** at para 499.

[30] Many cases fall between these two extremes. They can be more difficult to assess, requiring a more nuanced balancing between the relative strength and weight of the key factors in all the circumstances of the case.

[31] While care must be taken in relying on previous authorities due to the fact-specific nature of time extension decisions, past decisions do provide some helpful examples that courts and litigants can consider when assessing these applications. Some examples, listed in order from shortest to longest delay (calculated from the expiry of the 6-month deadline in rule 3.45 or the 6-month plus 30-day deadline under former rule 66 of the former *Alberta Rules of Court*, Alta Reg 390/1968), are summarized below:

(a) in ***TRDMS***, the Court found that an 11-month delay was inordinate where the proposed third party defendant's role was "always known" by the proposed third party plaintiff and there was no reasonable excuse for the delay. The Court also considered that there would be prejudice to the plaintiff, but that this prejudice was not a significant factor (para 37);

(b) in ***Whitecourt***, the Court held that a 16-month delay was not inordinate and extended the time as the delay was adequately excused and there was no prejudice. The slow pace of the action supported the extension (para 15);

(c) in ***Spartek***, the Court extended time notwithstanding a "slightly less" than 24-month delay, to allow third party plaintiffs to bring a third party claim against other former defendants who, without notice to the third party plaintiffs, had been released from the action pursuant to a settlement with the plaintiff. A strong excuse for the delay outweighed the prejudice the former defendants may have suffered by being brought back into the claim or missing discoveries that took place while they were not parties (para 22);

(d) in ***Bow Valley Insurance***, the Court of Appeal described a delay of about 24-months as "not commendable, but it is not gross". The delay was forgivable because the action was not active during the delay, there was "some explanation" (even if not full diligence), and there was an absence of prejudice (para 24);

(e) in ***Dean***, the Court granted a time extension notwithstanding a 24-month delay. The Court held that "the mere fact that there is no satisfactory explanation for some or all of the delay is not fatal to the application" (para 66). The Court noted that the proposed third party plaintiff was aware of the potential design issue with a wheelchair ramp that supported the third party claim, at least by their third party filing deadline, it was not the main focus of the plaintiff's claim, the proposed third party plaintiff did not have an expert report until shortly before the application was filed, and it was not a case where the identity of the potential third party defendant was known and a deliberate tactical decision was made not to claim against them (paras 6, 68). The Court held the proposed third party plaintiffs were responsible for a significant period of the delay, and noted the delay adding the claim would cause, but granted the extension after balancing the delay explanation against the leisurely pace of the litigation and lack of prejudice to the plaintiff and the proposed third party defendant (paras 72-77);

(f) in ***Stefanyk***, the Court denied an *ex parte* application where the delay was 25-months because there was no reason given for the failure to file a third party notice and there was prejudice given the proposed third party defendant had not participated in the action (para 38). However, the applicant was given leave to reapply on notice where more evidence could be considered;

(g) in ***Nelson***, at para 53, the Court held that delays of 12-28 months were "not so long as to obviate any discussion of prejudice but neither so short as to obviate any requirement of reasonable explanation therefor". The third party defendant's application to strike late-filed third party notices was dismissed. The third party plaintiffs' explanation for delay (that they had not reviewed produced records or put the pieces together until well into the discovery process) was given "only limited reception", but was considered "somewhat more substantive" than a clerical error (paras 54-55). The Court found that this explanation sufficed to explain a delay of 1-2 years in the context of the "breadth and complexity of these multiple actions" (para 55). The third party defendants' evidence of lost records and memory was "not particularly robust" and the documentary evidence available was preserved in a timely manner (para 56). The third party claims were allowed to remain notwithstanding questioning had "plodded on rather slowly" (para 57);

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(h) in ***Kapeluck***, in assessing a 25-month delay, the Court stated the delay was "not short" and "there must be a reasonable excuse" (para 42). The proposed third party plaintiff did not learn the identity of the proposed third party defendant until 12 months after the deadline, and also argued it was not aware of the problems with its supplied concrete until it received an expert report some 22 months after the deadline. The Court granted the time extension because this was a reasonable excuse for the delay and there was no prejudice because the litigation was in "its infancy" (para 55);

(i) in ***Condominium Plan No 7920829 v Academy Contractors Inc***, 2017 ABQB 583 (Master) [***Academy Contractors***], the Court granted an extension where a delay of roughly 30 months was explained by the fact that the formal issue did not emerge until questioning and there was no evidence of actual prejudice (para 13). The extension was granted even though the third party plaintiff "should have acted with greater dispatch" (para 14);

(j) in ***Van Troyen***, a time extension was granted notwithstanding a 30-month delay after the deadline for filing the third party claim. The Court held that the proposed third party plaintiff should not be faulted for not suing before it had evidence to confirm its suspicions, and it filed its application in a timely manner after key documents were produced (para 12). The Court held that no prejudice would result from the delay notwithstanding the fact that matter was reasonably advanced and might be ready to be set down for trial (para 13). The fact the matter was "not really urgent" and had been conducted at a leisurely pace supported the extension (para 13); and

(k) in ***Statesman***, a time extension was not granted for a delay described as being over three years since the Statement of Defence was filed (or over 30-months from the deadline to file the third party notice).[2] The Court described the delay as "significant" and held that the proposed third party plaintiff had no reasonable excuse for the delay when the identity of the proposed third party was discoverable at the time the defence was filed and "could have been brought" on time (paras 76, 85). The Court refused the time extension notwithstanding that the relative prejudice favoured the third party plaintiff, noting that this was not an unjust result where "a party fails to advance a claim within a reasonable period, without excuse" (para 86). The matter was set for trial, which would have had to be adjourned if the application was granted.

[32] With respect to prejudice, the main focus will typically be prejudice to the proposed third party defendant and sometimes descriptions of the key factors only expressly reference prejudice "to the third-party": ***Kapeluck*** at paras 3 and 36; ***Arcelormittal*** at para 497. However, in none of those cases did the court suggest that other prejudice is irrelevant and the cases they rely on confirm the significant authority that other prejudice may also be relevant.

[2] Based on the fact the application was heard in May 2008, the delay was between 30 months and 37 months from the third party claim filing deadline.

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[33] For example, the assessment of prejudice includes the relative prejudice to the proposed third party plaintiff (for example, the lost opportunity to seek contribution and indemnity), but that cannot be used to trump the other factors: ***Battistella*** at paras 15, 24; ***Bodnar*** at para 9; ***Academy Contractors*** at para 12; ***TRDMS*** at para 28; ***Hein*** at para 18; ***Piikani*** at para 38; ***Nova Pole*** at paras 41-44; ***Statesman*** at para 86; ***Dean*** at paras 72-76.

[34] Further, the Court may consider prejudice to the plaintiff or other parties to the action, including whether the proposed third party claim can appropriately be tried together with the action or whether it may cause delay and increased costs in the existing action: ***Kwik-Kopy*** at paras 47-74; ***Primrose Drilling*** at paras 14-17; ***ESM Transport*** at paras 10-11; ***Dean*** at paras 66-75.

[35] In light of these principle, I assess Cormode's application below.

### B. Assessment of Cormode's Application

[36] The 21-month delay from the deadline for Cormode does not fall within the extremes of short delay, where evidence of prejudice is the most important factor, or the range of excessive delay cases where evidence of a reasonable excuse is the most important factor. A nuanced weighing of factors is required.

[37] As noted above, this Action relates to the construction of the Project, an 89-unit residential apartment building. The Plaintiffs claim that, effective November 9, 2018, Cormode entered into a Design-Build Contract (**Cormode Contract**) with HCI (which was later assigned to H2) to perform the design, construction and related services (**Work**) for the Project.

[38] In December 2018, Cormode (expressed as signing as agent for HCI)[3] signed a contract with Cascade to provide certain "**Mechanical Work**" on the Project (**Cascade Contract**). To Cormode's knowledge throughout the Project, Cascade was the sole contractor responsible for Mechanical Work on the Project. The Mechanical Work in the Cascade Contract included, among other things, HVAC (heating, ventilation, and air conditioning), plumbing, heating, gas fitting and firestopping services.

[39] In May 2020, the Owner terminated Cormode's Contract (but not the Cascade Contract). Cascade completed the Mechanical Work for the Project in January 2021. The Plaintiffs commenced the Action about two months later, in March 2021.

[40] The Statement of Claim makes numerous allegations against Cormode, and several other entities and individuals involved in the Project, including the Project architect, professional engineers, exterior finishers, drywallers, painters, concrete form workers and framers. Cascade was not included as a defendant or third party defendant in the Action.

[41] While Cascade was not named as a party, the Statement of Claim made allegations against Cormode and the other defendants that squarely raised allegations of defects, costs and delays related to Cascade's Mechanical Work and related mechanical engineering services (performed by other defendants). Paragraph 21 alleges that the Cormode Contract obligated Cormode to perform

[3] Whether Cormode was authorized to sign on HCI's behalf is an issue in the Action.

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the "total construction" of the Project. Paragraph 35 of the Statement of Claim alleges (emphasis added):

> Following termination of the [Cormode Contract], the Plaintiffs discovered extensive design errors and omissions, construction defects and deficiencies, deliberate damage to the Project, and efforts to conceal same, affecting, without limitation, **the mechanical and electrical systems, [...], firestopping**, [...]. Such errors, omissions, defects and deficiencies rendered the Project dangerous to life and safety and unsuitable for its' intended use.

[42] Paragraph 36 of the Statement of Claim alleges that, as a consequence of such errors, omissions, defects and deficiencies, the Plaintiffs performed extensive and costly investigation, mitigation, repair, replacement and remediation, prior to completion of the Work. Paragraph 37 of the Statement of Claim alleges that, based on the alleged defaults, breaches and negligence of Cormode and other defendants as alleged in the Statement of Claim, substantial completion of the Work was delayed over a year and the Plaintiffs incurred losses, costs and damages.

[43] In the Proposed Claim, and in the Elzen Affidavit, Cormode alleges issues with or potential claims about (1) Cascade's assessment of costs for the Mechanical Work (**Costs Assessment Claim**); (2) Cascade's delayed performance causing Project delay (**Delay Claim**); and (3) the quality of Cascade's performance (**Defect Claim**).

[44] In the filed Application, Cormode states that its excuse for the delay is that "it was not a party to the completion and remediation of the [Project], so didn't recognize the possible extent of potential deficiencies in the Mechanical Work until questioning had progressed, with related review of production records". The Elzen Affidavit makes similar statements.

[45] Cormode's asserted explanation or excuse for its delay does not stand up to scrutiny.

[46] Cormode's excuse based on not having sufficient knowledge until after its termination in May 2020, and after questioning and reviewing produced records in the course of discovery, on its face is, at best, only an explanation of the delay related to the Defect Claim, not the Assessment Claim or the Delay Claim. Further, the alleged facts underlying the Assessment Claim and the Delay Claim occurred, and were known to Cormode, *before* Cormode's termination in May 2020, while Cormode was actively involved in the Project.

[47] For example, the email Cormode relies on to support the Assessment Claim was provided to Cormode (and Elzen specifically) in 2019.

[48] The emails Cormode relies on to support the Delay Claim (based on Cascade's refusal to submit drawings) were sent to Cormode in April 2020. Other records to support the Delay Claim were from October 2019 and March 2020 and were provided to, or appeared to involve, Cormode. Elzen acknowledged in cross-examination that Cormode was aware of Cascade's delayed delivery of shop drawings, and limiting Cascade's on-site staff, by April 2020.

[49] The point is that the Assessment Claim and the Delay Claim relate to matters before Cormode's termination of which Cormode was aware. Cormode has not provided a reasonable explanation or excuse for its delay in respect of these claims.

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[50] With respect to the Defect Claim, Cormode does rely on some documents that post-date its May 2020 termination. However, shortly after its termination, in July 2020, Cormode received a letter from HCI detailing the "extensive construction defects" related to the Project. That letter attached a 9-page "Major Defect Tracking Log", dated July 20, 2020 (**Defect Log**) from Clark Builders (Cormode's replacement on the Project). The Defect Log included some major defects with or directly related to the Mechanical Work (including parkade exhaust termination, mechanical ventilation on envelope, tubs, plumbing pipe through main floor slab, mechanical rough-in over garage doors, 5th floor (attic) mechanical, janitor closet drain and mechanical room heating).

[51] In cross-examination, Elzen admitted that when this deficiency list came out, "and they specifically targeted some of Cascade's work, that's when I realized that Cascade was probably required to be a third party to this claim".

[52] In the Elzen Affidavit, Elzen stated "I (and Cormode generally) did not recognize the extent that the Mechanical Work may have been deficient, and that a Third Party Claim was warranted, until production occurred, and some questioning in the action progressed". On cross-examination, Elzen could not remember or point out what questioning he was referring to or when it took place.

[53] In the Elzen Affidavit, Elzen appends several documents relating to the Defect Claim (Exhibits H to N), presumably to support the asserted late discovery of specific defects allegedly attributable to or involving Cascade, to support the explanation for delay. I have carefully reviewed these documents. Elzen does not explain when these documents were received, how they fit into Cormode's Proposed Claim, how they fit into Elzen's evidence of learning "the extent that the Mechanical Work may have been deficient", or how long after receiving those documents Cormode took steps to seek the time extension to file the third party claim.

[54] In particular:

(a) Exhibit H to the Elzen Affidavit is a Clark Builders May 29, 2020 walkthrough document. Elzen does not explain when this document was provided to Cormode, and it contains much the same information as the later Defect Log that was provided to Cormode in July 2020. Exhibit H does not provide a reasonable excuse or explanation for Cormode's delay;

(b) Exhibit I includes a June 2020 email from Clark Builders advising HCI that rim board is not fire caulking in all locations. This pre-dated the Defect Log, which referenced at least some caulking-related fireproofing issues. Elzen does not explain when Cormode received Exhibit I. Given the Defect Log and the broad claims made related to Mechanical Work (and firestopping in particular) in the Statement of Claim, Exhibit I does not provide a reasonable explanation or excuse for Cormode's delay;

(c) Exhibits J, K and L relate to fan coil freezing issues with the in-suite ventilation system. Elzen says that these issues arose "in later stages of the Project", but did not provide further specifics, such as when Cormode became aware of the issue, or the exhibits. The exhibits suggest that Cascade made recommendations relating to

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the fan coils in 2018, and issues relating to in-suite furnace/HRV combo were discussed with Cormode in 2019. The Defect Log received by Cormode in July 2020 indicates a major defect with mechanical room heating ("Heater in mechanical closet appears to not be sufficient to prevent freezeup [sic] in the winter"). Exhibit L is a detailed report about the issue from March 2021, but Elzen does not explain when Cormode became aware of this report. In light of the Defect Log and the broad claims made related to Mechanical Work in the Statement of Claim, Cormode has not satisfied me that this evidence provides a reasonable explanation or excuse for Cormode's delay;

(d) Exhibit M is an updated Clark Builders Major Defect Tracking Log from August 2020. Neither Elzen or Cormode explained when this was received or what new information in it (if any) caused Cormode to recognize the extent that the Mechanical Work may have been deficient. Again, Cormode has not satisfied me that this evidence provides a reasonable explanation or excuse for Cormode's delay; and

(e) Exhibit N is dated June 2022 and appears to relate to a potential issue with a make-up-air unit that may have been improperly installed that was discovered by a mechanical service company in June 2022. It required three hours of work to fix through the installation of an ambient control on the condensing unit. The materiality of this issue is questionable and has not been established. In any event, Elzen did not even attempt to quantify this issue or establish how or if it relates to the Proposed Claim against Cascade or the Statement of Claim (which was filed 18-months earlier, related to claims existing at that point in time, alleged substantial completion of the Project was achieved in February 2021). Cormode has not satisfied me that this unquantified single work order provides a reasonable explanation or excuse for Cormode's delay.

[55] If Cormode is relying on later-discovered information as the reason for its delay, given its extensive involvement in records production and oral questioning in the Action, I would have expected Cormode to have clearly articulated the late-discovered information and why or how learning about it caused Cormode to believe it was then time to advance the Proposed Claim. It did not do that.

[56] Even if it is assumed that Cormode learned more details of potential defects in Cascade's work after Cormode was terminated, or after the litigation was commenced, the relevant assessment is not necessarily when Cormode learned *all* details of *all* potential Cascade defects. Based on the Defect Log and the broadly pleaded Statement of Claim, Cormode was amply put on notice of major alleged defects with Cascade's Mechanical Work long before its deadline for filing a third party claim. Those major defects are included in the Proposed Claim. Cormode does not say in its evidence that learning specific details about some specific defects (as per Exhibits H-N of the Elzen Affidavit or otherwise) after Cormode was terminated *was the reason* for its delay in commencing, or seeking to commence, third party proceedings against Cascade. Without more, merely learning more about the extent of known or other potential problems attributable to a contractor does not explain the delay in filing third party proceedings against that contractor for already known major defects in construction.

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[57] Construction disputes like this often involve numerous parties and many interrelated alleged construction defects and delay claims. There has been voluminous records production and many days of questioning. Such matters cannot efficiently proceed if parties clearly known to be potentially responsible for some of those issues are not brought into the litigation as early as reasonably possible. This is not a situation where Cascade's involvement in the Project, or the potential implication of the Cascade Mechanical Work as being involved in the Plaintiffs' claim, should have been a surprise to anyone, let alone Cormode.

[58] Based on this record, I find that Elzen and Cormode knew by July 2020, a year before it filed its Statement of Defence, and 18-months before the deadline to file a third party claim, about the need to file a third party claim against Cascade. On balance, I find that it has not provided a reasonable excuse for failing to do so at the time it filed its defence, let alone why it did not do so by December 2021, or thereafter. Further, Cormode appears to have recognized the potential for third party claims in paragraph 16 of its Statement of Defence, which alleges that the alleged deficiencies in the Statement of Claim "arose from the negligence, breach of duty, breach of contract, or breach of warranty of the Co-Defendants **and/or another Third Party**" (emphasis added).

[59] Cormode has not provided a sufficient explanation or reasonable excuse why it waited until September 2023 to seek to file a third party claim against Cascade, all the while knowing the Action was progressing with significant records production and oral questioning.

[60] With respect to relative prejudice, Cascade has been aware of the Project litigation since at least April 2021 and had been requested to provide records to be produced in the Action by others. However, it does not appear Cormode (or, perhaps, anyone else) ever put Cascade on formal notice that a claim may be made against it.

[61] I am satisfied, on the balance of probabilities, that Cascade has established the likely loss of some records. Not being party to the litigation, or given notice of claims against it, Cascade did not take steps to preserve records. It is likely at least some relevant and material records have been lost through ordinary processes over the past several years. Further, issues with lost text messages, much as seen by Cormode's failure to preserve its own text messages (see ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2024 ABKB 424 at section V.B.2 [***H2 Canmore – Production***], likely exist for Cascade too. Cascade's evidence is that instructions from Cormode on the Project were often sent by text, including to Cascade's former employees.

[62] Cascade has established the prospect of some prejudice due to the loss of available witnesses, as several individuals are no longer employed by Cascade (including a journeyman foreman with site supervisor and project manager duties for the Project, and both first and second lead hands). At least one of those individuals may have left Alberta, however, Cascade has not finalized any specific attempts to contact or locate these individuals to canvass their availability. I note that the former employees likely would have left Cascade regardless of whether the Proposed Claim was advanced sooner, but Cascade may have lost the opportunity to memorialize their evidence while they were in Cascade's control.

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[63] It is over three years since the Statement of Claim was filed. However, the Action has not been sitting idly or languishing. The numerous parties have produced many thousands of records and there were 25.5 days of questioning prior to September 2023 (and another 10.5 days since). Cascade was not aware of this questioning and did not participate in it. Cascade would suffer some prejudice because it missed having a representative at that questioning and will have to catch-up in this Action. Having said that, this prejudice argument is not as strong as it asserts. It is unlikely it will have to catch-up under an unreasonable time frame because the need for further Cormode records production (as per ***H2 Canmore – Production***) means that the existing litigation plan will likely need to be amended. Further, the defendants in the Action have not yet questioned each other or the Plaintiffs, so Cascade has not missed that opportunity to question anyone.

[64] It is also relevant that no other party in the Action objected to Cormode's application, so it does not appear any existing party feels particularly prejudiced by adding another defendant even if it means delay.

[65] Further, some of the prejudice caused by Cascade having to catch-up could be addressed through a costs order.

[66] Based on the evidence, I find that Cormode has met the low standard of showing the Proposed Claim has an "air of reality" and/or presents triable issues. Therefore, Cormode may lose its ability to seek contribution from Cascade and this would be prejudicial to Cormode. However, I find the comments of former Associate Chief Justice Wittmann, at para 86 of ***Statesman***, to be apt:

> I appreciate that the City may lose its opportunity to seek contribution from Condo Corp. 001 because the extension to issue the Third Party Notice is denied. Unquestionably, such a result will always cause serious prejudice to the moving party. However, when a party fails to advance a claim within a reasonable period, without excuse, this result is not unjust. Otherwise, the potential loss of an opportunity to claim contribution would almost always trump any prejudice visited upon the proposed defendant and would become the only real test in applications for extensions of time within which to issue a Third Party Notice.

[67] Comparing this case to other cases noted earlier, this case is distinguishable from ***Whitecourt***, ***Spartek***, ***Bow Valley Insurance***, ***Nelson***, ***Kapeluck***, ***Academy Contractors*** and ***Van Troyen*** because in those cases at least some basis for a reasonable excuse was provided. It is distinguishable from ***Dean***, where the action was proceeding at a leisurely pace and there was no evidence of prejudice—this Action has proceeded at a more robust pace and there is at least some prejudice to Cascade. This case shares more characteristics with ***TRDMS***, ***Stefanyk*** and ***Statesman***, which all involved a lack of reasonable excuse in the context of both shorter and longer delay periods that Cormode's delay.

[68] On balance, and considering all the factors, Cormode has not satisfied me that it is appropriate to extend the time to file a third party claim against Cascade and I do not give it permission to do so.

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## VI. Conclusion

[69] Cormode's Application is dismissed.

[70] If the parties cannot agree on costs of the Application within 30 days of this decision, then the following process shall apply:

(a) within four weeks of this decision, Cascade shall file and serve on Cormode and submit to my office a written cost submission setting out their costs position;

(b) within six weeks of this decision, Cormode shall file and serve on Cascade its response submission to Cormode's cost submission; and

(c) each party's costs submission shall provide: (a) their position with respect to the factors set out in rule 10.33; (b) any pre-decision formal offer or other settlement offer they wish considered; (c) a draft proposed bill of costs pursuant to Schedule C of the *Rules*; (d) a summary of their proposed reasonable and proper costs that the party incurred in respect of the action. These submissions will be a maximum of 3 pages in letter format, single spaced (excluding authorities, offers, or proposed bills of costs).

Heard on the 6th day of June, 2024.
Dated at the City of Calgary, Alberta this 15th day of July, 2024.

**M.A. Marion**
**J.C.K.B.A.**

**Appearances:**

Paul Beke
for Cormode & Dickson Construction Edmonton Ltd.

Michael J. Whiting and Michael A. Custer
for Cascade Mechanical Ltd.

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