# Court of King's Bench of Alberta

**Citation: Moman v Bradley, 2024 ABKB 416**

**Date:** 20240708
**Docket:** 1001 16318
**Registry:** Calgary



Between:

**ANNE MOMAN and KEVIN PHILLIPS as Representative Plaintiffs**

Respondents/Plaintiffs

- and -

**WILLIAM BRADLEY and COLIN BECKER**

Applicants/Defendants

- and -

**BRIDGEGATE FINANCIAL CORPORATION, BRIDGECREEK DEVELOPMENT CORPORATION, and BRIDGEGATE MORTGAGE CORPORATION**

Defendants

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**Reasons for Decision**
**of the**
**Honourable Justice Colin C.J. Feasby**

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## I. Introduction

[1] On June 17, 2024, I issued a decision in this matter: ***Moman v Bradley***, 2024 ABKB 351 (the "Application Decision"). At paragraphs 30 and 31 pursuant to Rule 4.33(3) I required the parties to provide me a litigation plan that would have this matter ready for trial within one year. I said that if the parties could not agree on a litigation plan, they were each to provide me a litigation plan that met the requirement of trial readiness within one year. I explained that I

would choose the plan that I considered to be most appropriate. These Reasons explain why I have chosen the Plaintiffs' litigation plan.

## II. How to Choose a Litigation Plan

[2] The approach to determining the litigation plan that I prescribed is analogous to what is sometimes called "final offer arbitration," "pendulum arbitration," or "baseball arbitration." I will refer to this approach as "FOA" for convenience. Under FOA, parties typically negotiate and then, if they cannot agree, provide their final position to an arbitrator. The arbitrator then chooses the position that is closest to what the arbitrator would have decided. For a discussion of the game theory behind FOA, see M. Yildiz, "Nash Meets Rubinstein in Final-Offer Arbitration" (2011) 110(3) *Economics Letters*, 226-30.

[3] FOA forces parties to bargain in good faith with one another and to make compromises. Where parties are unable to agree, the logic of FOA pushes parties to make reasonable final offers for consideration by the decision-maker. Litigants and their counsel should assume that a decision-maker in an FOA process is unlikely to accept a radical proposal. Professor Sundahl explained, "[t]he beauty of final offer arbitration lies not only in its efficiency, but also in the simple manner in which it coaxes the parties into proposing reasonable awards, which translates into the issuance of a fair award by the tribunal": Mark J. Sundahl, "Baseball Arbitration, Game Theory and the Execution of Socrates," Cleveland State University Research Paper 10-202, December 2010 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723176) at 2.

[4] Too much time is wasted in Court fussing over the fine points of parties' litigation plans. How much time do the parties need to produce records given the size of the case? When should questioning happen? How many witnesses will be questioned? What about counsel's holiday plans? What applications will be made and when? These are all things that the parties know better than the Court and should be able to resolve amongst themselves if given the right incentive. The *Rules of Court* rightly place primary responsibility on parties, not the Court, "for managing their dispute and for planning its resolution in a timely and cost-effective way": Rule 4.1.

[5] FOA is not the normal approach used by Courts to decide substantive issues. And that is as it should be. However, for straightforward procedural matters like litigation plans where the parties have the best understanding of the needs of a case and the Court system and parties are best served by a negotiated outcome, FOA can be a good solution. FOA forces parties to take responsibility for litigation planning and is an economical use of Court resources because it only asks the judge to choose the best of the alternatives offered. FOA decision-makers typically provide no reasons or terse reasons for decision. This is because the FOA decision-maker's job is to choose between options presented by the parties, not to craft an independent solution that must be explained and justified.

[6] FOA will not always be the best way to settle a dispute over a litigation plan. Sometimes litigation will be sufficiently complex that it requires the Court to make separate decisions concerning individual components of a litigation plan rather than choosing between plans presented by the parties. Rule 4.6 concerning settling disputes about complex case litigation plans can accommodate both approaches.

[7] Given that there is no Practice Note or guidance from the Court of Appeal that permits me to dispense with reasons, in the following section, I provide a brief explanation why I prefer

the Plaintiffs' litigation plan. I also provide comments on some of the discrepancies between the plans to assist the parties going forward.

## III. The Litigation Plans

### A. The Plaintiffs' Litigation Plan

[8] The Plaintiffs' litigation plan provides all the relevant pre-trial steps with specific calendar date deadlines. Given the delay in this proceeding thusfar, having fixed dates for the completion of tasks is essential. Fixed dates provide certainty to the parties and allow for easy enforcement by the Court.

[9] The Plaintiffs' litigation plan provides for the hearing of the previously filed partial summary judgment application by February 28, 2025, subject to the availability of the case management judge. I accept this step as part of the Plaintiffs' litigation plan, but emphasize that neither the partial summary judgment application nor any other application is to obstruct this matter from being ready for trial within one year.

[10] The Plaintiffs' application for production of records that the Defendants obtained as part of the Crown's disclosure in the parallel criminal proceedings is not required to be heard by the case management judge. Requiring that the application be heard by the case management judge over the summer when she may not be available is a recipe for further delay. Comments made by counsel during the hearing on June 11, 2024, suggest that the application will not be complicated and may be heard in morning chambers. If the parties believe that the matter will take more than the 20 minutes permitted in morning chambers, I will hear the application on July 26, 2024. If I am to hear the application, the parties may contact my assistant to make the necessary arrangements.

### B. The Defendants' Litigation Plan

[11] The Defendants' litigation plan indicates their intention to appeal the Application Decision and their intention to bring a Rule 4.31 application for dismissal for inexcusable delay. Only after the appeal and the Rule 4.31 application have been decided, is the first step in the Defendants' litigation plan triggered. This is unacceptable and contrary to my direction in the Application Decision to have this matter ready for trial within a year.

[12] The proposed appeal is unlikely to be heard until early 2025 and then a decision may take months more to be rendered. A Rule 4.31 application is likely to proceed on a similar timeline but there is the additional possibility of an appeal of that decision. The one-year litigation plan proposed by the Defendants is not likely to start until mid-2025 and perhaps later which means that it is really a two-year litigation plan.

[13] Under normal conditions, it might be appropriate to pause pre-trial steps for a potentially dispositive application or appeal to be completed. However, the parties to the present litigation, have forfeited the privilege to control the pace of their own litigation. Applications and appeals may take place in tandem with the pre-trial steps in the litigation plan, but they are not to obstruct or delay those pre-trial steps. To the extent that this causes inefficiency or additional expenses, the parties may address that in costs submissions before the trial judge or before any judge that presides over a dispositive application or appeal.

[14] The Defendants' litigation plan prefers to leave scheduling largely in the hands of the case management judge rather than specifying specific deadlines for specific tasks. This approach will only meet my condition of trial readiness within one year if the case management judge is available to resolve the parties' issues as they arise. The reality that we face at the moment is that Court resources are stretched thin, and it is unlikely that a case management judge will be available to decide each point quickly enough to ensure that the pre-trial steps are completed within one year. The steps can be scheduled now, as the Plaintiffs' litigation plan shows, so there is no need to plan for repeated recourse to the case management judge and the inevitable delay that such an approach will entail.

## IV. Conclusion

[15] I choose the Plaintiffs' litigation plan. The parties should take the deadlines in the litigation plan seriously and should expect consequences for failure to adhere to the deadlines.

**Dated** at the City of Calgary, Alberta this 8th day of July, 2024.

**Colin C.J. Feasby**
**J.C.K.B.A.**

**Appearances:**

Michael Aasen and Christopher Hinchcliffe, McLennan Ross LLP
for the Applicants

Myles Fish and Michael Munro, Borden Ladner Gervais LLP
for the Respondents