Alberta v. Morasch, 2000 ABCA 24

Date: 20000117
Docket: 98-17953

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MR. JUSTICE SULATYCKY
THE HONOURABLE MADAM JUSTICE FRUMAN

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Appellant
(Defendant)

- and -

STAN MORASCH

Respondent
(Plaintiff)

Appeal from the Order of
THE HONOURABLE MR. JUSTICE SHANNON
Dated the 6th day of August, A.D. 1998
Filed the 3rd day of September, A.D. 1998

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE FRUMAN
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE McFADYEN
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE SULATYCKY

S. Morasch, Respondent
On his own behalf

COUNSEL:

J. E. Oliver
For the Appellant

REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE FRUMAN

[1] Stan Morasch was not diligent about pursuing the wrongful dismissal action he launched in 1989 against the government of Alberta, his former employer. By 1993, progress had slowed considerably. During the next five years Morasch did nothing more than write one letter to the government inquiring about trial dates. In July 1998, the government applied to dismiss Morasch's action under Rule 244.1 of the *Alberta Rules of Court*, the five-year "drop-dead rule". The chambers judge dismissed the government's application, resulting in this appeal.

[2] I would allow the appeal. As there still seems to be some uncertainty about R. 244.1, I will attempt to provide some guidelines for its interpretation and application.

RULE 244.1

[3] Rule 244.1(1) reads as follows:

> Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

Rule 244.2 deals with cross actions, counterclaims and pleas of set-off, which are not relevant to this case.

[4] The following principles emerge from the wording of R. 244.1 and the case law in which it has been considered.

R. 244.1 is mandatory and permits no discretion.

[5] The rule is written in absolute terms and is mandatory: ***Petersen* v. *Kupnicki*** (1996), 44 Alta. L.R. (3d) 68 at 70 (C.A.). Once it is established that a "thing" has not been done in five years to materially advance the action, the court "shall" dismiss the action. The absence or presence of prejudice to another party is not a consideration: ***Volk* v. *331323 Alta. Ltd.*** (1998), 212 A.R. 64; 168 W.A.C. 64 at 65 (C.A.). Similarly, the sterling reputation of the litigant, the strength of his action or defence, and the justification for the delay are all irrelevant to a R. 244.1 application. Of course, although mandatory, a R. 244.1 dismissal is not automatic. A party must apply to the court to trigger the dismissal.

A procedural step required by the Rules of Court will always be a thing which materially advances the trial.

[6] If the *Rules of Court* require that a step be taken, the completion of that step, in and of itself, materially advances the action: ***Bishop* v. *Grotrian*** (1998), 228 A.R. 73 at 78 (C.A.). Because the *Rules* require that the step be taken, it is considered a step which is necessary to advance an action and its completion is deemed to materially advance the action. The court need not inquire whether the step actually caused the action to advance. The completion of the required step is sufficient, in and of itself, to restart the five-year clock.

[7] The step must be completed, however, not just commenced. Consider, for example, a plaintiff who prepares a draft certificate of readiness and forwards it to the defendant. R. 236 requires that the certificate of readiness be filed in order to obtain a trial date. Forwarding a draft certificate of readiness to the other side does not, in and of itself, materially advance an action, because actual filing must occur before the procedural step is completed: ***Bentley* v. *Stringer***, [1999] A.J. No. 659 (Q.L.) (Master).

[8] Any step by either party will be taken into account in deciding whether a thing has been done in five years to materially advance the action. The *Rule* does not exclude consideration of things done by the complaining party: ***Volk***, *supra*, at 69.

Procedural steps contemplated by the Rules, although not required by the Rules, may also be enough, in and of themselves, to materially advance an action.

[9] A procedural step contemplated by the *Rules*, although not required by the *Rules*, may be a step which materially advances an action. In each case, the step must be examined in light of the purpose of R. 244.1.

[10] A procedural step which replaces a step required by the *Rules* will qualify. For example, suppose the *Rules* prohibit taking any step without leave of the court, but the parties enter into a consent order permitting further steps to be taken. The consent order, in and of itself, materially advances the action, because it supplants an otherwise required procedural step, obtaining leave: ***Bishop***, *supra*, at 77. As such a step is deemed to materially advance the action, the court need not inquire whether it, in fact, caused the action to advance.

[11] Acts which satisfy prior commitments, such as delivering documents one has previously promised to supply, are often not things which, in and of themselves, materially advance an action. The spirit of R. 244.1 would be circumvented if one party delayed completion of an agreement or undertaking and thereby restarted the five-year clock at a later date. See ***Smith* v. *Alberta*** (1996), 49 C.P.C. (3d) 94 (Master) in which complying with an undertaking in one's own lawsuit did not materially advance an action.

An action may be materially advanced by other things, even though they are not procedural steps.

[12] Rule 244.1 refers to “things”, not steps, which broadens the scope of activities that might materially advance an action: ***Bishop***, *supra*, at 76-77. It is therefore open to the court to decide, looking back, that a thing materially advanced an action and restarted the five-year clock.

[13] Most “things” will be grounded in the *Rules*, even if they are not actual procedural steps. The thing must “move the law suit closer to trial . . . in a meaningful way”: ***Co-Operators Life Insurance* v. *Rolheiser***, [1998] A.J. No. 1151 at para. 6 (Q.L.) (Q.B.). Advancing the action is not sufficient; the action must be materially advanced. For example, an agreement to limit discovery of documents or examinations for discovery, which the parties acted upon, might well qualify as such a “thing”. Setting a date for an examination for discovery, by itself, probably would not. In ***Appleyard* v. *Reed*** (1997), 55 Alta. L.R. (3d) 279 (Q.B.) the exchange of expert reports in advance of the minimum time set out in R. 218.1, in a complex commercial dispute, was a thing which materially advanced the action. This was so even though the agreement and exchange were not procedural steps contemplated or required by the *Rules*.

[14] Unlike procedural steps, the five-year clock will not restart unless the thing done, in fact, caused the action to materially advance. Clearly a court must look back to make this determination.

Parties may exclude the application of R. 244.1 by express agreement.

[15] Rule 244.1 has serious consequences. While inaction will result in dismissal of an action, the *Rules* contain mechanisms to deal with delay. Rule 243.1 permits parties who anticipate long delays in prosecuting an action to avoid the consequences of R. 244.1 by an express agreement. Written notice of the agreement must be given to all other parties to the action: R. 243.1(2). Parties can also make proposals affecting the pace or timing of the action by following the procedures set out in R. 243.2.

The calculation of the five-year time period includes periods of time both before and after the date that R. 244.1 came into effect.

[16] Rule 244.1 replaced an earlier rule requiring litigants to obtain leave of the court if steps had not been taken for a year. In calculating the five-year period, a court considers delay which occurred before and after September 1, 1994, the date that R. 244.1 was implemented: ***Hnatiuk* v. *Shaw*** (1996), 46 Alta. L.R. (3d) 13 (C.A.).

APPLICATION

[17] The issue in this case is whether anything that materially advanced the action was done in the five years preceding the government's R. 244.1 application.

[18] The chronology of events is as follows:

> May 23, 1989 - Morasch filed an amended statement of claim.
> May 1, 1990 - Morasch served a demand for discovery and notice to produce.
> April 24, 1991 - The government served an affidavit of documents and notice to produce
> May 31, 1991 - Morasch served an affidavit of documents.
> May 25, 1993 - Morasch served a second affidavit of documents.
> June 9, 1993 - The government requested copies of documents from Morasch.
> June 24, 1993 - Morasch forwarded copies of documents to the government.
> May 24, 1994 - Morasch sent a letter which read as follows:
>
> > Given the situation with me being so familiar with the various proceedings and related documentation, I would like to proceed directly to trial. Please notify me accordingly regarding your preference as to the date so that I can prepare the Certificate of Readiness and book the trial.
>
> July 29, 1998 - The government applied to dismiss the action under R. 244.1.

[19] Morasch claimed in oral argument that he made follow-up telephone calls to the May 24, 1994 letter. However, he did not swear to that in his affidavit. The government said that they had no record of receiving the letter but were prepared to concede that it had been sent.

[20] The May 24, 1994 letter was the only thing done in more than five years preceding the government's R. 244.1 application. The letter was not a procedural step required or even contemplated by the *Rules*; it was a mere snapshot of Morasch's position at the time. While it could be a thing, it would only restart the five-year clock if, looking back, it could be said that the letter caused the action to materially advance. Even if telephone calls were made, in fact, absolutely nothing transpired. Either obtaining an order requiring the matter to be entered for trial or filing a certificate of readiness would have materially advanced the action. Making preliminary inquiries about possible trial dates did not.

SUMMARY

[21] More than five years have expired since the last thing was done that materially advanced this action. I would allow the appeal and dismiss Morasch's action against the government of Alberta.

APPEAL HEARD on November 12, 1999

REASONS FILED at Calgary, Alberta,
this 17th day of January, 2000

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FRUMAN J.A.

I concur: _____
McFADYEN J.A.

I concur: _____
SULATYCKY J.A.