Court of Queen's Bench of Alberta

Citation: Trademark Calgary Holdings Inc v Hub Oil Company Ltd, 2019 ABQB 42

Date: 20190121
Docket: 0101 19293
Registry: Calgary

2019 ABQB 42 (CanLII)

Between:

Trademark Calgary Holdings Inc

Plaintiff/Respondent

- and -

Hub Oil Company Ltd

Defendant/Applicant

Reasons for the Oral Decision
of the
Honourable Mr. Justice D.A. Labrenz

The following is a written version of the oral judgment delivered on January 10, 2019. I reserved the ability to edit the transcript, to correct grammar and other technical errors, and to add citations and authorities. This written version replaces the oral judgment as the official judgment of the Court and should be read with the supplemental reasons released on this same date.

Introduction

[1] This is an application under Rule 4.31 of the *Alberta Rules of Court* to dismiss an action, commenced on October 26, 2001 for delay. The current *Alberta Rules of Court* came into force on November 1, 2010 and Rule 4.31(1) reads as follows:

> If delay occurs in an action, on application the Court may
>
> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

[2] Although the *Alberta Rules of Court* have been considered in their entirety, this Court has considered Rule 1.2(1), which provides that the purpose of the rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a *timely and cost-effective way*. Rule 1.2(2) provides the admonition that:

> (2)...these Rules are intended to be used
>
> [...]
>
> (d) to oblige the parties to communicate honestly, openly and in a timely way, and
>
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

[3] Rule 4.1 squarely places the responsibility on the parties for managing their dispute and to plan its resolution in a timely and cost-effective way. Under Rule 4.2:

> The responsibility of the parties to manage their dispute and to plan its resolution requires the parties
>
> (a) to act in a manner that furthers the purpose and intention of these rules described in Rule 1.2;
>
> [...]

[4] The Statement of Claim was amended on November 30, 2001 and it alleges, broadly speaking, that the Plaintiff is the owner of a parcel of land in the City of Calgary, Alberta, and that it owned a parcel of land adjoining the Defendant's land to the south, upon which was operated a used recycling facility. The Plaintiff alleges that the Defendant owed it a duty of reasonable care, broadly speaking, to ensure that the activities on the Defendant's land would not cause damage or contamination to the Plaintiff's land.

[5] The Plaintiff alleges on August 9, 1999, an explosion and fire occurred in the Defendant's facility that resulted in the destruction of the facility and the release of contaminants under the surface of the land, and an influx of contaminated groundwater from the Defendant's land to the Plaintiff's land.

[6] This, according to the Plaintiff, occurred because the Defendant failed to use reasonable care.

[7] As a consequence, the Plaintiff alleges damages for a loss of an ability to subdivide and sell 5.8 acres of the Plaintiff's land, costs for a replacement road and fencing, carrying costs for

2019 ABQB 42 (CanLII)

the land for which subdivision and rezoning has been delayed, and the cost of retaining environmental and other consultants to obtain an acceptable remediation plan in order that the land might be subdivided and rezoned.

[8] The Plaintiff alleges that the Defendant refused or neglected to take steps to protect the Plaintiff from the contaminated ground water, and that the Defendant's conduct is such that the Plaintiff should receive aggravated, exemplary or punitive damages.

[9] The Defendant denies that the Plaintiff's land was contaminated, but says if they were contaminated, it occurred before June 21, 2001 when the land was owned by the Plaintiff's predecessor in title.

[10] The Defendant indicates that the Plaintiff's predecessor in title executed a "Full and Final Release" to the Defendant in exchange for the payment of $87,000.

[11] In the alternative, the Defendant says that the Plaintiff acquired the land with full knowledge of the contamination and the purchase price that it paid reflected the state and condition of the land. The Defendant states the Plaintiff had experts who studied the condition of the land and the ground water under it.

[12] Finally, the Defendant states that the condition of the land is suitable for commercial and industrial use, which is the highest and best use for the land in the area.

The History of the Proceeding

[13] As I have already mentioned, the action commenced on October 26, 2001 and was based upon alleged contamination precipitated by the explosion and fire of August 9, 1999. As of today's date, the fire was 19 years and 5 months ago, and this action was commenced 17 years, 2 months and 14 days earlier. As is obvious, this is an extremely long period of time for an action to continue without a trial date being set.

[14] The procedure card from this action was in evidence before the Court, and it contained the following entries:

- October 26, 2001 – the Statement of Claim filed by the Plaintiff
- November 29, 2001 – an affidavit of Janice Leboeuf filed by the Plaintiff
- November 30, 2001 – the amended Statement of Claim filed by the Plaintiff
- November 30, 2001 – a notation that the Plaintiff obtained a Fiat
- December 14, 2001 – the Statement of Defence filed by the Defendant
- September 21, 2011 – an Application to dismiss the claim for filed by the Defendant
- September 21, 2011 – an affidavit filed by the Defendant

2019 ABQB 42 (CanLII)

- September 21, 2011 – Notice of Change in Representation filed by the Defendant
- October 4, 2011 – an application to dismiss the claim filed by the Defendant
- June 21, 2012 – Notice of Change in Representation filed by the Defendant
- August 10, 2016 – Application to set a trial date by the Plaintiff
- October 30, 2016 – affidavit of Alan J. McConnell by the Plaintiff
- October 30, 2016 – Notice of Withdrawal of Lawyer for the Defendant
- November 6, 2017 - Application to set trial date by the Plaintiff – adjourned by consent
- November 29, 2017 - Application to set a trial date by the Plaintiff
- December 11, 2017 – Application to dismiss the claim by the Defendant
- December 11, 2017 – filed affidavit of Russell Kalmacoff
- December 12, 2017 – Application to set Trial Date – adjourned by consent
- January 31, 2018 – filed affidavit of Gary Grelish by the Plaintiff
- June 27, 2018 - Notice of Change in Representation by the Plaintiff
- October 9, 2018 – Application by the Plaintiff to set a trial date
- October 26, 2018 – Application to set trial date adjourned by Consent, by the Plaintiff
- November 1, 2018 – Application to Dismiss the Claim by the Defendant
- November 5, 2018 - Consent Order entered by the Plaintiff

[15] As the Defendant points out, and the Plaintiff does not dispute, since 2005, the following steps have significantly advanced the Action:

- 2005 – Examination for Discoveries were held
- 2008 – Undertakings were fulfilled
- 2012 – The Plaintiff filed an expert opinion for mediation purposes
- 2013 – The matter proceeded to an unsuccessful mediation

[16] As a matter of further relevance to the history of this matter, the Defendant brought an application in September of 2011 to dismiss the Statement of Claim for long delay, supported by the affidavit of Mr. Russell Kalmacoff, who is the Director and corporate representative of the Defendant. Mr. Kalmacoff indicated that discoveries occurred in September of 2005. Mr. Kalmacoff further deposed that on April 2, 2008, the Plaintiff responded to its undertakings from discoveries conducted on May 24, 2005. No reasons were given for the three long years

2019 ABQB 42 (CanLII)

that it took the Plaintiff to respond to the discovery undertakings. Mr. Kalmacoff perfunctorily swore that the delays that the Defendant has endured have been prejudicial.

[17] The 2011 application of the Defendant to dismiss the Statement of Claim was adjourned *sine die*, although the reasons for the adjournment as between the parties are not in evidence before me. I would note that neither counsel who appeared before me were counsel at the time.

[18] In a further affidavit supporting the present application, Mr. Kalmacoff repeated the generic assertion that the delay is prejudicial to the Defendant. He further indicated that in December of 2012, the Defendant received a copy of a document provided by the Plaintiff. The document was prepared by a Mr. Jeff Pellarin, who purports to be an expert capable of giving opinion evidence with respect to in damage quantification and business valuation. Mr. Pellarin provided an opinion with respect to the damages suffered by the Plaintiff, but the report itself warns that it is not suitable for use at trial, as it was prepared without all of the procedures that would necessarily accompany an opinion produced at trial.

[19] Mr. Pellarin's report indicates that the Plaintiff was able to sell 24 acres of the disputed property on July 5, 2003, and sell the 8 final acres on June 12, 2006 (which was the purchase back of an option that the Plaintiff had to buy back the 8 acres for $1 should it have received permission to subdivide and rezone). The first sale was for $5,240,783 and yielded $1,800,783 after repayment of the $3,440,000 mortgage. The seconded sale, which was the purchase back of the $1 option the Plaintiff had on the 8 acres, yielded $4,025,000 for a total of $5,825,783. The property was acquired by the Plaintiff on March 12, 2001 for $3,827,201, which was financed by two loans.

[20] In addition the remaining remediation costs alleged to have been incurred by the Plaintiff, along with management fees relating to the management of environmental engineers, Mr. Pellarin otherwise assessed damages based upon incremental costs and the loss of money associated with the delay in realizing on the property's value.

[21] According to Mr. Pellarin's report, the Plaintiff planned to subdivide, rezone and sell the Property, a process that the Plaintiff indicates could have been completed by December 2001, but that it could not do so because of environmental contamination. Unable to subdivide the property, the Plaintiff found a purchaser.

[22] In response to a Notice to Admit Facts authored by the Defendant in July of 2013, the Plaintiff admitted that the property that is the subject of this action was approved for re-designation for "light industrial use" on June 18, 2002. The Plaintiff further admitted that the Purchase and Sale Agreement executed on October 2, 2002, wherein it sold the land to Rona for $5,280,000, closed subject to the $1 option, on July 5, 2003. The $1 option subsequently surrendered by the Plaintiff to Rona for $4,025,000 occurred on May 5, 2006.

[23] The Plaintiff acknowledged that its Statement of Claim had not been amended since November 30, 2001, but suggests in response to the Defendant's notice to admits facts that the Defendant has been aware since shortly after it filed the Statement of Defence that the Plaintiff intends to amend its claim to seek damages based on the delay in the development and sales process caused by the allegation that the Defendant contaminated the Plaintiff's land.

2019 ABQB 42 (CanLII)

The Position of the Parties

[24] Mr. Klym, on behalf of the Defendant, pointed out the wording of Rule 4.31 of the *Alberta Rules of Court*, and focussed on Rule 4.31(2) in his submissions before this Court. In doing so, the Court was referred to ***Humphreys v Trebilcock,*** 2017 ABCA 116 at paras 150-156, and more particularly, the six distinct questions our Court of Appeal has indicated that an adjudicator must answer when considering an application under Rule 4.31.

[25] The Defendant further asked the Court to consider paragraphs 90-96 of the ***Humphreys*** decision with respect to the reasons for why delay is harmful to the litigants and society as a whole, in the overall administration of justice. He emphasized the Court of Appeal's recognition that delay is still a problem, and its admonition that it should not be.

[26] In consideration of the six questions posed by the Court of Appeal in ***Humphreys,*** the Defendant forcibly argued that the non-moving party failed to advance the action along the litigation spectrum to the extent that a litigant acting reasonably would have attained, within the time frame from 2001. The Defendant argues that the law suit is not complicated and anything outside of 10 years is wholly unreasonable.

[27] The Defendant also pointed out the potential amendment to the Statement of Claim by the Plaintiff as the current basis for the Plaintiff's damage claim changed after the sale of the property in 2003.

[28] In relation to the second ***Humphreys*** question as to whether the delay is inordinate, the Defendant submits that a delay of over 17 years is clearly inordinate.

[29] In relation to the third question, the Defendant emphasizes that the Plaintiff has given no explanation for the delay. The Defendant argues that it has not acquiesced in the delay, and reminds the Court that the Defendant brought a similar application in 2011 for delay that spawned an unsuccessful mediation process. It would not, in the Defendant's submission, be fair to suggest that the Defendant itself was responsible for the delay.

[30] The Defendant suggests that it cannot be blamed for failing to, in effect, "wake the Plaintiff up from its litigation slumber".

[31] The Defendant does not suggest that it is prejudiced by the loss of evidence, or that Mr. Kalmacoff, as the corporate representative, is suffering from any age-related memory difficulties. But, in the Defendant's submission, the matter might well take another three to four years to get to trial, and Mr. Kalmacoff would then be in his eighties. It is unfair that the Defendant has had to deal with this litigation for so long.

[32] The Defendant relies upon the presumption of prejudice based upon what it says is an inordinate and inexcusable amount of time. The Defendant suggests that 17 years is an extreme length of time for this action, and reminds the Court that memories do fade.

[33] The Defendant, for comparative purposes only, prepared a chart of 23 Alberta cases that applied ***Humphreys v Trebilcock,*** and noted that in the five decisions that consider delays of 15

2019 ABQB 42 (CanLII)

to 19 years decided post-***Humphreys,*** all resulted in the striking of the claim and dismissal of the action.

[34] Additionally, most of the case authorities that considered delay in the range of 10 to 14 years resulted in dismissal as well, with only a couple of exceptions. In ***Fish v Boyd,*** 2018 ABQB 190, the action involved parallel police disciplinary proceedings which delayed the court action. In another case, ***Nova Pole International v Permasteel Construction Ltd,*** 2017 ABQB 521, Master Schlosser seemed to be persuaded not to dismiss the action because it involved expert evidence. The Master described the case as a "documents case", and not a "memory case".

[35] The Plaintiff agreed with the legal framework set out by the Defendant. When the Court asked why the action took so long, the Plaintiff was without answer, and could advance no reason to justify the glacial pace of this litigation or why, for example, a period of seven years passed at one point with nothing being done at all. In short, the Plaintiff offered no explanation for its extreme tardiness.

[36] The affidavit sworn by the corporate representative of the Plaintiff, Mr. Gary Galish, offered no further insight into the reasons for the delay. Mr. Galish asserts that the prosecution of the action will be focussed on documentary evidence, "expert evidence/reports", as opposed to the recollections of individual witnesses.

[37] The Plaintiff directed its arguments to what it suggests are the absence of significant prejudice to the Defendant. The Plaintiff suggests that any prejudice suffered, if at all, is not significant enough to justify an dismissal of this action. The Plaintiff suggests that it has raised a legitimate doubt as to the existence of serious prejudice, citing ***Ravvin Holdings Ltd. v Ghitter,*** 2008 ABCA 208 at para 38, which is all it is required to do in order to defeat this motion.

[38] It should be noted that the Alberta Court of Appeal in ***Ravvin*** considered the predecessor Rule, Rule 244(1), which provided that a finding that the delay was inordinate and inexcusable was *prima facie* evidence of *serious* prejudice, as opposed the present Rule 4.3(2), which presumes *significant* prejudice. I do not believe, for the purposes of my decision, that the differences in wording between the old and new Rule is significant. ***Humphreys,*** at para 129, makes it clear that the use of the adjective "significant" is not a substantial departure from the old test – "serious prejudice".

[39] The Plaintiff urges this Court to consider that "documents" cases are different than "witness memory" referring to ***Nova Pole International*** first mentioned by the Defendant, in addition to ***Goldring v Blue Cross Life Insurance Company of Canada,*** 2017 ABQB 618, as another example of a documents case, while noting that the Master in that case did not dismiss an action with an accompanying nine year delay.

[40] The Plaintiff acknowledged that it did not place specific evidence before the Court as to how it intended to advance its action, however, the Plaintiff provided the Court with a relatively comprehensive overview.

[41] The Plaintiff advised the Court that the explosion at the Defendant's business was not the source of the ground water contamination, and that the contamination was occurring prior to the explosion and was ongoing and continuous after the fire. The cause of action is therefore

2019 ABQB 42 (CanLII)

continual as the contamination is continual, and as with any continued nuisance, the Plaintiff needs to satisfy the Court on balance that the contamination constituted a substantial interference with the Plaintiff's use of the lands, and further that the interference was unreasonable.

[42] The Plaintiff suggests at trial the key issue will be the extent of the contamination, and to what extent the contamination interfered with the Plaintiff's use of the land.

[43] The Plaintiff suggests that its efforts to rezone were delayed and hindered because it needed to satisfy the City of Calgary and relevant regulatory authorities that the contamination was contained, and that it would be appropriate to rezone the land. The Plaintiff argued that the damages to the Plaintiff are due to the delays in selling, and the costs of the environmental consultations and environmental clean-up.

[44] It is on this basis that the Plaintiff suggests the trial is a "documents" case, and argues forcibly that significant prejudice to the Defendant does not arise. The environmental consulting reports have been disclosed. The evidence to be advanced at trial comes from the environmental consultants who performed the work following the explosion in 1999. The Plaintiff suggests that everything relevant would have been recorded, and answers any suggestion that there is significant prejudice to the Defendant by reference to the documents.

[45] The other issue to be focussed upon at trial, the Plaintiff suggests, concerns the extent to which the ground water contamination resulted in delays to the rezoning application, and hindered the Plaintiff's ability to sell the lands. Again, the Plaintiff suggests that there is documentary evidence disclosing what the City of Calgary was waiting for, and detailing what was required from the Plaintiff to meaningfully address the environmental concerns.

[46] The assessment of damages will be based upon expert evidence.

[47] The Plaintiff submits, as a consequence, that it has raised a legitimate doubt as to the existence of significant prejudice in this action by reason of the delays, and that the Plaintiff has rebutted the presumption, and further argues that there is not any significant prejudice.

[48] With respect to the potentiality of non-litigation prejudice, the Plaintiff argues that there is a legitimate doubt as to whether there is significant prejudice to the Defendant. The Plaintiff points to the questioning of Mr. Kalmacoff upon his affidavit, and the answers he gave that could be seen as potentially supporting a finding of non-litigation prejudice.

[49] Mr. Kalmacoff indicated that he would have done more business with respect to urban renewal, "if it hadn't been for the background distraction of this litigation." Mr. Kalmacoff further responded to the Plaintiff's questions by saying that his sisters are shareholders, and that to them "litigation can be very spooky". Finally, Mr. Kalmacoff responded to questions on this point by saying that the ligation "tended to inhibit more aggressive action, more proactive development, say, than we might otherwise have done."

[50] The Plaintiff suggests that all of Mr. Kalmacoff's evidence is speculative and non-specific as no lost business opportunities were identified. Nor did Mr. Kalmacoff specifically claim actual financial harm occasioned by the Plaintiff's outstanding action. In short, the concerns, as articulated, do not rise to the level of significant prejudice.

2019 ABQB 42 (CanLII)

[51] The Plaintiff further suggested to the Court that the Defendant has acquiesced in the delay, and referenced the decision of Master Robertson in ***Goldring*** at para 34, wherein the Master referenced the concept of "waiver" in his discussion of Rule 4.33(2)(b), a Rule that the Master acknowledged does not apply to Rule 4.31. Master Robertson, however, was of the view that in the facts before him the continued participation of the Defendant in moving the case forward constituted waiver.

[52] I do not find the factual circumstances considered by Master Robertson in his decision to be of great assistance to the Court, as they were factually dissimilar. The Master in ***Goldring*** as well placed no small emphasis on the compelling case of the Plaintiff as he pursued long term benefits that were said to be improperly denied.

[53] Nonetheless, as the Plaintiff observes, Master Robertson's comments have been adopted by other courts.

[54] The Plaintiff argues, consequently, that the Defendant has an obligation to actively complain about the delay. The Plaintiff suggests that passive acquiescence by the Defendant is equivalent to waiver, and fatal to the Defendant's application to dismiss.

[55] The Plaintiff further argues that the Defendant as recently as January 26, 2018 appeared to be actively participating in the litigation when a letter was sent from legal counsel acting on behalf of the Defendant to the Plaintiff seeking an Agreed Statement of Facts. The Plaintiff submits that the Court should look at this as an indication that the Defendant wants a trial.

[56] The Plaintiff says that it recently checked with the Trial Coordinator and that a five day trial is available as soon as June of this year. The Plaintiff can convert the Expert Report that it had initially disclosed into one suitable for use at trial within two or three months. The Plaintiff, however, acknowledged that the original estimate of the parties for trial was seven days, and the earliest date for a seven day trial would be April of 2020.

[57] The difficulty with the Plaintiff's estimates as I have heard is that I have no concurrence from the Defendant that five days for trial would be sufficient. I conclude that the proposed trial time could happen as soon as this year, but there is no guarantee until the parties can agree upon the witnesses to be called. The trial conceivably could be next year, or later.

[58] The Defendant suggests that further questioning will be necessary in order to ascertain whether the total delay incurred in subdividing the property was due to the contamination claimed by the Plaintiff. This is because the damages claimed by Amended Statement of Claim were based upon a loss of ability to subdivide and sell 5.8 acres of the land, but with the sale of the land to Rona, the Defendant indicated it would be calling individuals from 2000 and 2001, who were employed by the City of Calgary, to testify about their recollections from those dates. The Defendant does not know about the present whereabouts of these witnesses. Therefore, the Defendant suggests that this is not a simple "documentation" prosecution.

2019 ABQB 42 (CanLII)

Decision

[59] Assuming, without really being convinced, that the trial could possibly proceed in June of this year, the Defendant will have waited 17 years, 5 months, and 6 days, for a short 5 day trial. This cannot be reasonable by any rational or reasonable measure.

[60] In recent years, appellate courts including the Supreme Court of Canada, have strongly signalled that an immediate change in the culture of litigation complacency is required. In the criminal context, which admittedly engages qualitatively different interests, and more particularly liberty interests, the protection of the constitutionally guaranteed right to trial within a reasonable time under s.11(b) of the *Canadian Charter of Rights and Freedoms,* has recently been invigorated with the very strong statements from the Supreme Court of Canada. In *R v Jordan,* 2016 SCC 27, the Supreme Court of Canada addressed litigation complacency by imposing presumptive ceilings beyond which the prosecution of an individual will be stayed by a court under s. 24(1) of the *Charter*.

[61] While it is acknowledged different considerations arise when considering delay in the context of the judicial resolution of non-criminal disputes, this does not mean, and cannot mean, that delays to proper administration of justice are either inconsequential or of slight importance. Recently, Karakatsanis, J., speaking for the seven member panel of the Supreme Court in ***Hryniak v Mauldin,*** 2014 SCC 7 at para 28, spoke to the need for proportionate, timely and affordable access to dispute resolutions:

> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[62] More recently, our Court of Appeal made strong statements concerning litigation complacency in ***Humphreys,*** where the Court spoke about the societal harm occasioned by the condonation by the court of litigation delay, at paras 97-100 (footnotes omitted):

> Courts condone litigation delays because they underestimate the harm delay causes the community and fail to take this into account when cataloguing the benefits associated with a person having the right to seek judicial validation of a position one has taken in a dispute with another.
>
> Just because a prospective plaintiff may have a constitutional right to commence an action does not mean that the court can never withdraw the welcome mat. It can. One of the implicit conditions attached to the right to invoke the litigation process is that the plaintiff not abuse the judicial process and infringe the rights of others.
>
> The court has the jurisdiction to ensure that litigants do not abuse their rights and unjustifiably adversely affect the interests of their adversaries and others who are directly or indirectly affected by unresolved litigation.

2019 ABQB 42 (CanLII)

The right of access to the courts is not absolute in nature.

[63] Indeed, a particular aspect of the culture of complacency manifested itself during oral argument, when the Plaintiff made the suggestion that in civil matters, as opposed to criminal matters, the Plaintiff is permitted to go three full years without doing a single thing such as, for example, telephoning or contacting opposing counsel. The Plaintiff's suggestion was that such activity was unnecessary because of the protection provided by the "drop dead" provision found in Rule 4.33.

[64] This submission, however, fundamentally misconstrues the purpose of Rule 4.33(2). This rule, simply put, requires the court beyond the "drop dead" date to dismiss an action if three or more years have passed without a significant advance in that action, unless certain enumerated conditions have been met.

[65] The Plaintiff's suggestion is contrary to Rule 1.2, which obliges the parties to openly communicate, and seeks to promote the timely and cost effective resolution of claims. It is also an abdication of the responsibility of the parties to manage the dispute in a timely and cost effective way under Rule 4.1, nor does the Plaintiff's suggestion reconcile with Rule 4.2 which requires the parties to act in a manner that furthers the purpose and intention of the rules described in Rule 1.2.

[66] Rule 4.33(2), to be clear, is not an invitation to a party litigant to purposively do nothing to advance the action, with any shred of confidence that the rule will provide immunity or in some way operate to shield a dilatory plaintiff from the failure to advance its action right up to the three years contemplated by the "drop dead rule".

[67] All courts have the common law power to protect their own processes from abuse, and respect for their authority, which includes the power to control and regulate the proceedings before them. A court is empowered to prevent the use of a procedure that is manifestly unfair to a party to the litigation before it would in some other way bring the administration of justice into disrepute: ***Quebec (Director of Criminal and Penal Prosecutions) c Jodoin,*** [2017] 1 SCR 478. However, a court must exercise this power with some restraint, in the clearest of cases, and only where the conduct represents a marked and unacceptable departure from the reasonable conduct expected of a participant in the justice system: ***Jodoin*** at para 27.

[68] The power to control abuse of the court's process for delay in the litigation process has been recognized by other courts. See, for example ***Kuhr v Pearlman,*** (1991), 76 Man R (2d) 67 (Man CA), where the Court noted that the power of a court to dismiss an action for delay does not depend upon the particular wording of the applicable civil rules. This statement was repeated in ***Glenwood Label & Box Mfg Ltd v Brunswick Label Systems Inc,*** 2017 MBQB 177 at para 30.

[69] The power of a court to dismiss for delay in protection of its own processes was explained by Sharpe J.A. in ***Marché d'Alimentation Denis Thérault Ltée v Giant Tiger Stores Ltd,*** 2007 ONCA 695 at para 24:

> Dismissal for delay is not, of course, an invention of case management. Rule 24.01 allows a party to move to dismiss an action for delay where the plaintiff has

2019 ABQB 42 (CanLII)

> failed to prosecute the action in a timely fashion in accordance with the rules. Moreover, courts may dismiss actions for delay even when the relevant rules do not mandate it. A court has inherent jurisdiction to control its own process, which "includes the discretionary power to dismiss an action for delay." *Housser v. Savin Canada Inc.* (2005), 77 O.R. (3d) 251 (Ont. S.C.J.) at para. 9. As the Manitoba Court of Appeal wrote, "The power of a superior court to strike a matter for want of prosecution does not hinge on the niceties of the wording of the rules, but rather flows from the inherent power of the court to prevent an abuse of its own process." *Kuhr v. Pearlman* (1991), 76 Man. R. (2d) 67 (Man. C.A.) at para. 16. In at least two cases, this court has characterized lengthy, unexplained delays as "an abuse of the court's process." In *Susin v. Baker & Baker*, [2004] O.J. No. 723 (Ont. C.A.) at para. 7 the court wrote that "even if the action could not be dismissed under r. 24.01(1), given all of the circumstances, it could properly be dismissed as an abuse of the court's process." See also *Convay v. Marsulex Inc*., [2002] O.J. No. 4655 (Ont. C.A.).

[70] Arguably, the common law power to control abuse is recognized in Rule 1.4(2)(b) of the *Alberta Rules of Court.*

[71] In consideration of the Defendant's application under Rule 4.31 the Court recognizes, at a minimum, should the parties succeed in getting this matter to trial this year, that the overall delay incurred since the filing of the initial Statement of Claim is over 17 years, and likely at least 17 and a half years before this trial, which the Court would describe as being of moderate complexity, might be heard. As the Court of Appeal observed in ***Humphreys,*** the analytical approach to the Defendant's application should not begin with an examination of whether the Defendant has demonstrated that the Plaintiff has caused it prejudice.

[72] Instead, the Court first considers whether the Plaintiff has provided an explanation, let alone any adequate explanation, for the delay. The Plaintiff has provided no explanation, let alone any adequate explanation, for the delay. The Plaintiff suggested instead that the Defendant has tolerated the delay, and in its acquiescence has implicitly waived its right to complain of the delays that have been endured.

[73] With these observations in mind, I will turn to the six questions that the Court of Appeal in ***Humphreys*** directed must be considered in applications of this type.

[74] The first question asks whether the non-moving party has failed to advance the action to the point on the litigation spectrum that a reasonable litigant would have attained within the time frame under review.

[75] The Court answers this question affirmatively. The Plaintiff in its written submissions acknowledges that the litigation had not advanced at a pace comparable to similar lawsuits, and acknowledges that a significant period of time has lapsed. The Court agrees with that assessment, and although delay is a relative concept, there could have been no reasonable suggestion here that a reasonable litigant acting in a reasonable diligent manner, in a similar action, would find itself short of trial after 17 years, where there is no suggestion that there is delay on behalf of the Defendant, or institutional delay.

2019 ABQB 42 (CanLII)

[76] The second question asks if the differential in time is of such a length as to be inordinate.

[77] The Court would answer this question with a "yes". As the Court of Appeal noted, for close to fifty years Alberta courts have used inordinate delay as the standard. Once again, the Plaintiff did not contest that the delays incurred in this litigation are inordinate. The differential between what could be expected and the actual progress of this action are not reasonable or justifiable.

[78] The third question asks if the Plaintiff has provided an explanation for the delay and, if so, does the explanation justify inordinate delay?

[79] In short, the answer to this question is "no". The Plaintiff has provided no explanation for its dilatory efforts. More particularly, there is no suggestion that the Defendant was engaged in acts that delayed or interfered with the pace of the litigation, or that institutional constraints played a role in the overall delay.

[80] The fourth question asks if the inordinate and inexcusable delay has impaired a sufficiently important aspect of the defence so as to justify overriding the Plaintiff's interest in having its action adjudicated by the court. Has the Defendant demonstrated significant prejudice?

[81] This Court is satisfied that the Defendant has made out a case of significant litigation prejudice. The Court also finds that the Plaintiff has not met its onus to rebut the presumption under Rule 4.31(2). Therefore, the rebuttable presumption of law created by Rule 4.31(2) is activated, and it has not been displaced.

[82] Although the Defendant here has not asserted that witnesses have died or disappeared, or that there has otherwise been the loss of documents or other evidence, the Court makes the simple observation that the present litigation is over 17 years old, and it is unrealistic to conclude that the evidence the Court will be called upon to assess and weigh at trial will not be impaired by the passage of time and the failure of memories.

[83] The Plaintiff asserts that any prejudice will be attenuated because the action will proceed largely upon expert opinion evidence, and that the experts have reports or other documentary evidence that will assist in recollecting previous events. In other words, the Plaintiff submits that this is a "documents" case and not a "memory" case.

[84] While this Court accepts the Plaintiff's submission as having merit, and more particularly accepts that such evidence poses fewer dangers than a case depending upon the memory of witness unaided by such documentary evidence, in the Court's view, it is unrealistic after 17 years to conclude that even expert witnesses will have documented everything needed to refresh their collective memories in cross-examination. It is also unrealistic that the Defendant would possibly know, even at this late stage, where the evidentiary gaps in the litigation reside. As the Court of Appeal recognized in ***Humphreys,*** at para 35, the existence of a paper trail does not adequately reduce the prejudice that the Defendants will more than likely experience in defending itself at a trial, that is at best, 17 years later. It is difficult to know after so much time what lacunae might remain unanswered by a trial.

2019 ABQB 42 (CanLII)

[85] All said, it was the Plaintiff's onus to rebut the presumption. The Plaintiff has not raised any doubt that there is significant litigation prejudice that has been incurred by the Defendant. As has been so frequently stated by the courts, justice delayed is effectively justice denied.

[86] It must also be recognized that the litigation has taken a turn since it was commenced, although I do accept that the Defendant had some knowledge of this. When the Plaintiff managed to sell the land to Rona, the focus of the claim evolved from seeking relief for the difficulties in subdividing the land, to some greater concentration on the damages associated with the delay in the sale. While I conclude that the Defendant has likely had notice of this change for some time, it does broaden the scope of the trial inquiry. More particularly, witnesses will be necessary to speak to the timeliness of the Plaintiff's efforts, and this further complicates the Court's concerns with respect to witness memory.

[87] The Court also concludes that the Plaintiff has not rebutted the presumption by demonstrating doubt as to whether there exists significant non-litigation prejudice. The Defendant has had the spectre of this pending lawsuit hanging over its corporate head for over 17 years. I accept the unchallenged and uncontroverted evidence of Mr. Kalmacoff that the Defendant has been impaired in conducting business with respect to urban renewal, and that the Plaintiff's litigation is the cause of that impairment. Mr. Kalmacoff explained, and the Court accepts, that if it had not been for the background distraction of the litigation, the Defendant would have been more aggressive in seeking proactive development. The litigation, as Mr. Kalmacoff explained, has tended to inhibit more aggressive action.

[88] While the Plaintiff argues that the assertions of Mr. Kalmacoff are rather vague, his evidence remains unchallenged and there is no evidence suggesting that the Defendant has not suffered adverse consequences from the outstanding litigation. This is hardly surprising. Seventeen years is a long time for litigation to be hanging over the metaphorical head of the corporate Defendant as it moves forward, with concern about its corporate reputation. This says nothing about the effects of such litigation on the ability of the corporation to do business or obtain financing. However, to be clear I do not place weight on these observations, because of a lack of evidence in that regard.

[89] The Plaintiff further suggests that the Defendant has acquiesced by silence in the protracted litigation as an answer to the sixth question posed by ***Humphreys***. The suggestion is that such implied waiver provides this Court with a compelling reason not to dismiss the Plaintiff's action. This Court does not agree, and does not find evidence of waiver, either express or implied.

[90] I do not accept that in the context of a delay application under Rule 4.31 that mere silence might permit the Court to conclude that the Defendant has impliedly waived its right to complain of delay. Here the Plaintiff makes no suggestion of any explicit wavier.

[91] The Court does accept, however, that the Court may instead look to see whether the delay is "inexcusable", which involves an assessment as to whether the Defendant's actions have contributed to the delay. It is noteworthy that the Court of Appeal in ***Humphreys*** at paras 172 and 175 describes blameworthy defence delay as involving an active contribution to delay by, for

2019 ABQB 42 (CanLII)

example, “failing or refusing appropriately to cooperate” or as another example, engaging in “acts either intended or having the effect of interfering with the ordinary advance of the action”.

[92] Such blameworthy conduct by a defendant as the Court of Appeal described is not remotely equivalent to the suggestion that the Plaintiff makes that a defendant might impliedly waive the right to complain of delay by acquiesce. It should also be noted that the Defendant in this action commenced an application to dismiss in 2011 which, in turn, led to an unsuccessful mediation. In effect, the Defendant placed the Plaintiff on notice as far back as 2011 that it was concerned with the pace of the Plaintiff’s litigation. This is hardly passive acquiescence, and does not permit the Court to infer waiver on behalf of the Defendant for the delay.

[93] Even if waiver can be inferred in some circumstances, there must be something in the evidence which supports such an inference. Agreeing to set a trial date might be one such example. In the Court’s view, silence without more is not enough.

[94] In this regard, the Plaintiff argued that the Defendant’s relatively recent letter requesting an agreed statement of facts in January of 2016 indicated a willingness to go to trial and constitutes a form of implied waiver.

[95] The letter, however, does not demonstrate that the Defendant implicitly waived the right to complain about delay. What the letter demonstrates is that the Defendant hoped to reach an agreement to potentially speed up the pace of the litigation. I do not conclude that the letter is a reason to dismiss the Defendant’s application.

[96] I find some support for my conclusions in the Alberta Court of Appeal’s decision in ***Flock v Flock Estate,*** 2017 ABCA 67, which admittedly examined the “drop dead” rule found in Rule 4.33 of the *Alberta Rules of Court*, which was not relied upon before me.

[97] The Court of Appeal in that case, however, did consider the notion of acquiescence to delay by a defendant, and the failure to expeditiously bring a dismissal application. More particularly, the argument that the plaintiff in that case was “lulled” into believing that time limits would not be enforced because the parties were working towards settlement, mediation, or a trial. The defendant’s application to dismiss was over two years late, and the plaintiff’s application to set a trial date was adjourned from time to time by reason of the Defendant’s requests.

[98] Schutz, J.A., writing for the Court, at para 4, noted that it was ultimately the responsibility of the Plaintiff to prosecute its claim in a timely manner, and that a “defendant, while never required to actively move the plaintiff’s action along, cannot purposively obstruct, stall or delay the action”. Although considering Rule 4.33, at para 24, Schutz, J.A. notes that it is “juridically irrelevant that neither the appellant nor her counsel communicated to the respondent...that they did *not* consent to the delay”, while suggesting that there is no duty to express to an opposing party that any delay is not acquiesced to.

[99] The Plaintiff further suggests that the matter should not be dismissed because it is almost ready for trial. If the Court were to accept this assertion as true, and the evidence gives the Court some pause in that regard, the nearness of a potential trial date that has presumptively caused, without having been rebutted, significant litigation and non-litigation prejudice, would not be a

2019 ABQB 42 (CanLII)

reason to give any judicial countenance to a litigation strategy that has brought the administration of justice into disrepute.

[100] More particularly, Schutz, J.A., observes at para 21 as follows:

> Second, while the appellant's counsel wrote to the respondent's counsel on November 15, 2012 suggesting mediation and that the litigation be put on hold, this is not the same as a standstill agreement. Regardless, the respondent never advised if this offer was accepted and the appellant did not consent to delay beyond those perimeters; mediation discussions ultimately failed by February 2013, with no significant advance in the action.

[101] I conclude that the Defendant's application for dismissal should be granted. I would point out that if I have somehow erred in my analysis, and without limiting the generality of this statement, if I am in error about my findings with respect to the prejudice suffered by the Defendant, I would also have dismissed this action for the reasons provided earlier in relation to what I find to be an abuse of the Court's processes, by reason of the inordinate delay here of 17 years. The Court concludes that this is one of those clearest of cases where the Court is obliged to dismiss this action to curtail an abuse of the Court's process.

[102] The conduct of the Plaintiff, in failing to pursue its lawsuit with any semblance of urgency, demonstrates that the Plaintiff has acted in a manner that markedly and substantially departs from what is expected of a reasonable party litigant, and more particularly, a reasonable plaintiff. The Court cannot permit such abuses, even if no prejudice had been demonstrated, and the furtherance of this action would be manifestly unfair to the Defendant, and unfair to society in the sense that the delay here is contrary to the proper administration of justice. The inefficient and protracted misuse of judicial and administrative resources must not be countenanced, nor should long delays that would only serve to further encourage what has been observed by various appellate courts to be a complacent litigation culture.

2019 ABQB 42 (CanLII)

Heard on the 08th day of January, 2019.
Oral Reasons delivered January 10, 2019
Dated at the City of Calgary, Alberta this 21st day of January, 2019.

D.A. Labrenz
J.C.Q.B.A.

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2019 ABQB 42 (CanLII)