Court of Queen's Bench of Alberta

Citation: Zachry Energy International Inc v Sinopec Shanghai Engineering Co Ltd, 2021 ABQB 969[1]

Date: 20211207
Docket: 0701 12846
Registry: Calgary

Between:

Zachry Energy International Inc. and Zachry T & E Canada Inc.

Plaintiffs

- and -

Sinopec Shanghai Engineering Co. Ltd., Ssec Canada Ltd.[2] **and Canadian Natural Resources Limited as Managing Partner for Canadian Natural Resources, a Partnership, and Canadian Natural Resources Limited**

Defendants

Canadian Natural Resources Limited

Plaintiff by Counterclaim

- and -

Luke Chan, Sinopec Shanghai Engineering Co. Ltd, SSEC Canada Ltd., SinoCanada Petroleum Corporation, Zachry Energy International Inc.

Defendants by Counterclaim

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[1] This is a broadened citation because the issue in this decision relates to the application of Sinopec Shanghai Engineering Co. Ltd. (Sinopec) to dismiss the Counterclaim of Canadian Natural Resources Limited (CNRL). None of Luke Chan, SSEC Canada Ltd., SinoCanada Petroleum Corporation or Zachry Energy International Inc. and Zachry T & E Canada Inc. (collectively, Zachry) any longer have any direct material interest in this decision.

[2] Sinopec Shanghai Engineering Co. Ltd. is the majority shareholder of SSEC Canada. Ltd., and it appears that the only contract with CNRL was with the latter (TR 14/5-15),

Memorandum of Decision
of the
Associate Chief Justice
J.D. Rooke

Introduction

[1] This is an application by Sinopec Shanghai Engineering Co. Ltd. ("Sinopec", or "Si"), filed May 24, 2019[3], to dismiss the Counterclaim of CNRL filed on May 27, 2008 against Si (and others), for inordinate delay under Rule 4.33[4], or, in the alternative, under Rule 4.31. For the reasons that follow, the application to dismiss the CNRL Counterclaim is granted, with costs.

Summary of Reasons

[2] The reasons why Si's application is granted are largely those factual and legal submissions set out in the Brief of Si, filed March 13, 2020 (Si Brief, or "SB"), and the Rebuttal Brief of Si, filed April 2, 2020 (Si Rebuttal Brief, or "SRB"), with some exceptions. It follows that the submissions to the contrary in CNRL's Brief, filed March 26, 2020 (CNRL Response Brief or "CNRL RB") are largely rejected, where they differ substantially from the SB and SRB, although there are some arguments between them that are non-conclusive. In any event, I will elaborate on all of this below.

Brief Background

[3] Zachry commenced an action against Sinopec and CNRL *et al* on December 11, 2007, claiming recovery of project management and engineering services fees allegedly owed by some or all of the Defendants, and to enforce builders' liens against the property that is the subject of the Action. CNRL claims, at para 4 of the CNRL RB, that the "underlying event giving rise to the Action was the collapse of a storage tank under construction at an oil sands extraction facility in Fort McMurray on April 24, 2007 ... [where] ... two workers were killed and two others were seriously injured...". (the Incident). Si denies this as the underlying event (para 4 of the SRB), noting that it is not even mentioned in pleadings. The significance, if any, of this disagreement is unknown to the Court, Si merely stating (paras 5 and 6 of the SRB) that CNRL obtained a report of the collapse, and that it is irrelevant to the issue before the Court. CNRL filed a Statement of Defence and Counterclaim[5] against, *inter alia*, Si, on May 27, 2008, seeking damages with respect to the cleanup and rebuilding work on the K-041 Project as a result of the Incident. The

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[3] Ironically, the hearing of this application was adjourned to April 14, 2021, to complete pre-hearing steps and thereafter an approximate 1-year delay primarily due to Covid 19, which is not part of the delay raised in the application (TR 44/18-23).

[4] At para. 2 of the CNRL Response Brief, CNRL takes the position that Si has "abandoned its primary relief sought … under Rule 4.33, and therefore concentrates on Rule 4.31, which assertion was not challenged by Si, so I will proceed with this decision on that premise.

[5] I use the term "Counterclaim" throughout because it is the specific Counterclaim herein.

details of these claims and defences are not specifically relevant, as this decision relates to the timing of the advancement of the Counterclaim, not its substance.

[4] While I will discuss this below, the parties disagree as to whether the Counterclaim by CNRL increased the complexity of the issues in the whole litigation – CNRL asserting the positive (para 7 of the CNRL RB) and Si the negative (paras 9 & 10 of the SRB).

Issues & Positions

[5] Si expresses the issues herein, in para 2 of the SB, as follows:

(a) Has CNRL failed to advance the Counterclaim to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?

(b) Is the shortfall or differential of such a magnitude to qualify as inordinate?

(c) If the delay is inordinate, has CNRL provided an explanation for the delay? If so, does it justify inordinate delay?

(d) Since Sinopec Shanghai relies on the presumption of significant prejudice created by Rule 4.31(2), has CNRL rebutted the presumption of significant prejudice?

(e) If Sinopec Shanghai has met the criteria for granting relief under Rule 4.31(1), is there a compelling reason not to dismiss the Counterclaim?

[6] CNRL argues that the Counterclaim has proceeded "without inordinate or inexcusable delay", or, in the alternative, that Si has suffered no prejudice.

Law

[7] The law applicable to this decision is not really in dispute between the parties.

[8] Rule 4.31(1) provides that when there is delay in an action, the Court may, on application, dismiss[6] all or any part of a claim, "if the Court determines that the delay has resulted in significant prejudice to a party". Perhaps more importantly, Rule 4.31(2) provides that: "[w]here ... the Court finds that the delay in an action is inordinate and inexcusable, the delay is presumed to have resulted in significant prejudice...". As we will see, this is a rebuttable presumption in law.

[9] The applicable authorities relied upon by Si include: ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd,*** 2019 ABCA 276 at paras 2, 14, 18, 21, 27, 31 & 43; ***Humphreys v Trebilcock***, 2017 ABCA 116 at para 35[7]; ***Trademark Calgary Holdings Inc v Hub Oil Company Ltd***, 2019 ABQB 42 at paras 82 and 84; ***Kuziw v Kucheran Estate***, 2000 ABCA 226 at paras. 30 -1; ***Lethbridge Motors Co v American Motors (Canada) Ltd***, 1987 ABCA 150 at para. 12; ***Duraguard Fence Ltd v Badry***, 2018 ABQB 882 at para 3; ***Vortex Hydro Services v Clear Harbours Energy***, 2019 ABQB 305 at para. 17; ***McCarthy v. Schindeler***, 2017 ABQB 511 at para. 19; ***Song v. Alberta***, 2019 ABQB 789 at para 12; ***330626***

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6 Note that the applicable word is "dismiss", not "strike".

7 CNRL also relied on paras 19 – 22 of ***Transamerica*** and paras 125, 128 & 152 of ***Humphreys***.

Alberta Ltd. v Ho & Laviolette Engineering Ltd, 2018 ABQB 398 at para 84; and ***Xpress Lube and Carwash Ltd v Gill***, 2019 ABQB 898 at para 69.

[10] The principles that Si derives from the Rule and these cases, include (in no particular order):

- The purpose of Rule 4.31 is to resolve claims in a timely and cost-effective manner, to protect the integrity of the civil justice system as a whole, and the public's confidence in it;
- Delay will only result in dismissal, if there is "significant prejudice", for which the moving party has the initial burden of proof[8], and delay must be found to be inordinate and inexcusable (Rule 4.31(1)), before the presumption (which may be rebutted) of "significant prejudice" (Rule 4.31(2)) comes into place – significant prejudice can be found based on the presumption or as a matter of fact;
- The Plaintiff has the primary obligation in moving the litigation forward; generally, a defendant can be recumbent (lie back) in face of plaintiff delay, but a plaintiff may seek to claim defendant actions as excusing delay; although defence delay that has not impacted the progress of the action may be immaterial to plaintiff long delay[9];
- Inordinate delay is that which is much in excess of what was reasonable having regard to the nature of the issues and circumstances in the action[10];
- Inordinate delay is inexcusable, absent a credible legal or factual excuse – see also Si submission at TR 38/28-32;
- Prejudice includes (SB, para 34 (a) & (b)): "the undeniable fact that a person's ability to recall events diminishes with the passage of time", adversely affecting the applicant's witnesses[11];
- Even where a case is largely, or at least partly, a "documents case" (SB, para. 34(d)), after long delay, it is unrealistic to conclude that all matters have been documented enough to refresh memories;
- The 6 recommended steps for analysis (***Humphreys***, paras 151-6) include (in short fashion):

  (a) has the litigation advanced within the time frame that a "litigant acting reasonably would have attained", (see ***Duraguard***, para 3), having regard to: issues of

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8 CNRL relied (CNRL RB, para 86) on ***Arbeau v. Schulz***, 2019 ABCA 204 at para 35 for this point – but, in law, the duty is only initially on Si to show the existence of actual or presumed significant prejudice, which the Supplemental Affidavit of Xie Yujian of November 17, 2019 addresses.

9 Although, on the first point, CNRL argues to the contrary, based on ***Nova Pole*** (*infra*) being more germane than ***Xpress Lube*** - TR 60/13-39. However, as to the final point, I find, that it is not a general lack of complaint by the defendant by counterclaim, in this case, SI, but rather whether the plaintiff by counterclaim, CNRL, has been found to be prejudiced by any lack of action by the defendant or that "the defendants had … participated in these arrangements … [that] played a part in the litigation delay". Herein, I have not so found.

10 CNRL relied on ***Arbeau*** at para 36.

11 Si makes it clear that, even if there is evidence of actual prejudice, in the context of, *inter alia*, fading memories, it is relying primarily upon the presumption of significant prejudice, more than the evidence or fact of prejudice: TR 74/13-76/8, referencing ***Middleton Energy Management Ltd. v. TransCanada Pipelines Limited*** 2017 ABQB 669 at paras 30, 31, and 38-9, and argues that CNRL has not rebutted that presumption.

complexity; number of parties; steps taken and any time limits in the rules; long gaps; the moving party's involvement in the delay; and whether it is a "documents" (contractual interpretation) or "memories" case?;

(b) is the difference in time in (1) inordinate?;

(c) if delay is inordinate, is there an explanation that justifies the inordinate delay?;

(d) if delay is inordinate and inexcusable, has it significantly prejudiced the moving party?;

(e) if the presumption of significant prejudice applies, has the non-moving party rebutted it?; and

(f) if all the criteria are met, noting the discretionary word "may" in the Rule, is there any compelling reason not to dismiss the action?

[11] Further, Si submits that "many decisions have set a presumptive ceiling of ten years beyond which delay will be presumed to be inordinate and unreasonable": SB at paras 40 - 43, relying on numerous cases, containing examples, referenced therein. While the "presumptive ceiling" is a good rule of thumb, and might apply to this case (although the argued delay is only 8 years, says CNRL – see *infra*), I do not rely on it completely, but rather more on the detailed facts.

[12] To the submissions made by Si on the law, CNRL added (CNRL RB, parts of paras 66-116):

- While actual prejudice from delay trumps, otherwise the pace of the progress of the litigation for dismissal must fall within the slowest examples, and must be so slow as to justify dismissal;
- There is no scientific way to conclude what timing a reasonable litigant would have reached;
- There are more stages to complex litigation and these stages may take more time in each stage and totally;
- In weighing inexcusability, the role that the defendant played in litigation and any unnecessary delay on its part is relevant: ***Nova Pole International Inc v Permasteel Construction Ltd***, 2020 ABCA 45 at paras 25-6, 28, & 32-3;
- A defendant's contribution to delay by failing to provide undertakings in a timely fashion can excuse even inordinate delay: ***994552 NWT Ltd v Bowers***, 2019 ABQB 195 at paras 66-72, especially 70; but whether there was actual delay as a result must be determined on the facts before the court: ***Xpress*** at para 69[12];
- Significant prejudice is more than minor or trivial prejudice;

[12] Here, I find that there was no evidence to support that Si's failure to provide timely answers to undertaking caused an actual delay – see SRB, para. 38, and TR 38/38-39/37.

- A lost record or witness before the alleged period of delay[13] is not litigation prejudice (inability to defend itself at trial) due to delay: ***Minshull v LED Sign Supply Inc***, 2019 ABQB 424 at paras 43, 45-6 & 48-9; and ***Tiger Calcium Services Inc v Sazwan***, 2019 ABQB 665 at paras 47-8 & 51.

[13] Si specifically takes no "issue with the law with respect to long-delay... as set out in..." CNRL's RB (SRB para 35). Si asserts, however, that its claim of inordinate delay is made out, based on the facts in light of this law, and that the inordinate delay has "not been adequately explained by CNRL" (addressing some factual issues in para 37, in relation to CNRL's RB, para 80), such, that "the presumption of prejudice has not been rebutted". Thus, this decision does not deal with any dispute as to the law, but rather the application of the facts to the agreed law.

[14] In the result, there is no real dispute in the legal principles applicable to applications under Rule 4.31. Where the parties disagree is in respect of the evidence and resulting findings of fact which may or may not establish the right of dismissal for inordinate and inexcusable delay causing significant prejudice. Sometimes that finding of fact is difficult, especially in regard to the "wide variety in the detail of particular claims, and in the procedural journeys that particular litigation may follow", as to tenability and lack of a scientific method: ***Transamerica***, at para 19, discussed at TR53/22-54/17. The result is that the Court must conduct its analysis and make a judgment call in its findings of fact, as I have done herein.

Evidence, Analysis and Fact Finding

[15] While the result is determined on the facts, in the context of non-controversial law, I will try to avoid a lengthy recall of all of the facts asserted, which are submitted (not all aligned) in the briefs of the parties and can be reviewed there. To the extent that there are differences and disagreements, the facts, I find, are those supported by the submissions of Si, unless noted to the contrary. I will make further comments in respect of some.

[16] As a starting point, the steps taken in the action by CNRL (indicated in italics) are as set out at para 46 of the Affidavit of Mr. Livingstone, sworn January 13, 2020, and broken down by year for ease of reference, as attached as Tab A to the SB[14], with steps taken by others in between as follows:

May 27, 2008	- *CNRL* filed Counterclaim against, *inter alia*, Si
Jan 16, 2009	- Si filed Statement of Defence to Counterclaim
Spring 2009 - Apr 2010	- Standstill Agreement in place between Si and CNRL[15]

[13] At least one witness has passed away in this pre-delay time, without the recording of his memory, the party being content to rely on the documentation, instead – so this does not seem material to the resulting issues of delay and prejudice.

[14] CNRL refers to a number of general steps, in addition to these milestones, in para. 72 of its RB.

[15] Apparently agreed to informally (see TR 55/26-29) so as not to prejudice the OHS proceedings relating to, collapse and injury or death to workers. Si says that CNRL unilaterally ended the Standstill Agreement informally in April 2010, but did not advise Si until October 2010 (para 17 of the CNRL RB, paras 18 & 20 of the SRB and TR 3/20 – 4/12), when CNRL served its AoR (defined *infra*) (TR 45/2-8). CNRL seems to take the view, in essence, that the Standstill Agreement was informal and it could proceed when it wished to do so, which was effective by serving its ADR. I find that the result is that the timing of the Standstill Agreement not particularly relevant to this decision (SRB, paras 20 and 37(a)), except that while it was in effect for 1 – 1 ½ years, there was no delay in law. The buried issue of service of OHS proceedings on Si also does not seem relevant (SRB, paras. 21 & 37(b)).

Oct 8, 2010	- *CNRL* files Affidavit of Records (AoR)[16]
Mar 3, 2011	- Si serves its AoR on CNRL
Jul 2, 2013	- Si files Amended Statement of Defence to Counterclaim[17]
Jul 2 - 5, 2013	- *CNRL* questions Si
Sep 17, 2013	- *CNRL* serves Supplemental AoR on Si
Jun 2 - 4, 2014	- Si questions CNRL
Jun 23 - 25, 2014	- *CNRL* questions SI
Oct 14, 2015	- *CNRL* 50/83 Undertaking Responses to Si[18]
Dec 8, 2015	- *CNRL* 32/83 Undertaking Responses to Si
May 24, 2019	- Si application filed against CNRL for dismissal for delay[19]

[17] As noted (*supra*), but to provide more detail, in the Spring of 2009, the parties to this dispute agreed, by way of a Standstill Agreement, to delay litigation steps in the Counterclaim pending the outcome of OHS Proceedings relating to the collapse, which Si says CNRL unilaterally ended in April 2010, but did not advise Si until October, 2010 (para 17 of the CNRL RB, and paras 18 & 20 of the SRB). Thus, at least, the period from the Spring of 2009 to April or October 2010 (1 – 1 ½ years) was not part of any improper delay – see discussion at TR 3/20-4/12.

[18] While the period of the Standstill Agreement is not part of any improper delay, I find that off-setting allegations of failure to preserve evidence during the Standstill Agreement (CNRL RB, para 8 and SRB, para 39), results in a "draw". The same can be said of both parties' failure to preserve evidence - the Court cannot come to any principled conclusion on this in the context of alleged delay, or excuse for any delay.

[19] Similarly, I cannot resolve the dispute over CNRL's claim that this is a "documents case", v. Si's claim (para 40 of the SRB) that it is a "memories case" or, "at best, a mixture of [both]", other than to conclude that to some extent it is both. Si's assertion (see TR 42/18-20)

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16 Si states (paras 8-10 of the SB) that, on June 16, 2011, and February 3, 2012, Si advised CNRL that the CNRL AoR was deficient. No delay in such a notification by Si is an excuse for the delay of CNRL – see SRB, para 37(c). Moreover, it was not until sometime after the latter date (latter part of 2011 – SRB, paras 22-4) that CNRL advised that the AoR deficiency was due to problems with CNRL's computer server, but that the CNRL employees who were tasked with addressing the server issues were no longer employed by CNRL, such that Si had no information as to what those issues were or when or how they were addressed. From first notice of deficiency (for which I do not find fault with Si, so as to excuse CNRL – CNR RB, para 80(e)), and the promise to rectify it by June 30, 2012, it took 27 months (to September 2013) for CNRL to provide a Supplemental AoR, which was to the prejudice of Si advancing the Counterclaim litigation, requiring Si to file a motion on February 20, 2013 to compel same.

17 CNRL was provided with a draft of the Amended Statement of Defence in February of 2012, at the latest, and CNRL promised on March 22, 2012 to consent to Si's Amended Statement of Defence by June 30, 2012, and on July 13, 2012 (SB, paras 10-13), as soon as possible, but did not do so for another year from the date promised, blaming the failure on his inadvertence and Si failure to remind him, requiring Si to file a motion on February 20, 2013 to compel same. More importantly, the late filing of the Amended Statement, I find was not something that delayed CNRL (see TR 68/39-69/6).

18 16 months from questioning of CNRL on June 23-25, 2014.

19 41 months after last step by CNRL.

that "the likelihood of failing memories is a ... factor to consider"[20] whether "significant" or not, is supported by the failure of CNRL representatives to recall a number of events (SRB, paras 40-42), and is therefore supportive of the proposition that, at least to some extent, the likelihood of failing memories is a factor to consider. The law on this is referenced by Si at TR 72/24-73/35, specifically ***Song v. Alberta*** 2020 ABQB 583 at paras 77 – 80, to the effect that "there is no requirement that a defendant provide proof of failing memories", which the "law recognizes ... weaken over time", and that referencing earlier written records of memories is not sufficient; the result can lead to a finding of significant prejudice due to inexcusable, inordinate delay – as was done there, and I find applies here.

[20] With these opening observations in this analysis, I will follow much of the detailed analysis suggested in ***Humphreys***, paras 151-6.

Time Frame of a Litigant Acting Reasonably

[21] In the Si Application, the grounds for the application include: "6. There has been ...more than three years ... since the last thing was done that significantly advanced the within Action."

[22] Si further argued (SB, para 49) that the Counterclaim is now approaching 14 years of age (13½ years since the Defence to Counterclaim was filed; 11 years since the end of the Standstill Agreement and 11-plus years to Si's application herein in May of 2019), and that "questioning is *still* not completed and the matter will not be ready to set down for trial for at least 2 years" (emphasis in the original) – see also SB, para 79, regarding 8 witnesses yet to be questioned, and discussion at TR22/37-24/16. Moreover, CNRL has still not provided a Damages Brief, which I find to be, effectively, a prerequisite to Si finishing questioning of CNRL (notwithstanding assertions by CNRL to the contrary in the CNRL RB, para 80 (j)), despite demands made by Si for same (SRB, paras. 28 & 37 (d), as explained in detail – TR 69/8-71/3). I find all of this to be grossly beyond the time that a litigant, acting reasonably, would take, and yet CNRL would still need more time.

Complexity

[23] The Counterclaim is, by definition, a standard, not complex case under the Rules, as none of the parties have asserted it to be complex under Rule 4.3(3) (see the CNRL admission at TR 56/7-8). Nor has the Court so declared – see TR 5/30-36; 20/29-30. Thus, we look at complexity as a matter of fact, not an agreement or judicial determination. To the extent that complexity in fact is impacted by the number of parties, in this case, to the Counterclaim, see the next section – Si is the only Defendant by Counterclaim left. Moreover, complexity isn't about the complexity of the project that is the substantive issues in the litigation – TR 57/6-59/37 (especially the last 10 lines thereof); it is about the complexity of the litigation.

Number of Parties

[24] There were only 5 Defendants to the CNRL Counterclaim. Two of these were added parties which CNRL argued made the proceedings "more complex" (SRB, paras 9 & 10), but with questionable, if any, liability to CNRL (SRB, paras 11-14), resulting in the Counterclaim against those two being discontinued a long time ago: June 15, 2011 – SinoCanada; April 21,

[20] Referencing paras 34 & 38 – 40 of the SB.

2015 – Luke Chan[21]; and, even Zachry, on August 12, 2019; leaving only Si as a Defendant to the Counterclaim. Thus, any complexity in adding parties was due to the actions of CNRL, but even that was dissipated by the mostly early discontinuances.

Steps Taken

[25] To my knowledge there are no absolute time limits for any of the steps that were required to have been taken, although there are clearly some where a schedule was set, or suggested, in case management, that was not maintained.

Long Gaps

[26] As noted elsewhere herein, there was a 29-month gap between CNRL's Counterclaim and the filing of its deficient AoR, during which time the CNRL employees responsible for the CNRL server left the employment of CNRL, leaving CNRL unable to respond to a number of undertakings (see also TR 24/20-39).

[27] This was compounded by a 27-month gap between CNRL's deficient AoR, and its Supplemental AoR (see also SB, para 54).

[28] There was over a year between CNRL's promise (March 2012) of consent to allow Si to amend its Statement of Defence to Counterclaim (accomplished by July 2013) and when CNRL filed its Supplemental AoR in September, 2013 (SB, paras 10 and 54). However, the provision of the Supplemental AoR was not a precondition to Si producing an officer for CNRL questioning; indeed, Si had advised CNRL that it was prepared to make its officer available for questioning in March, 2013, without the benefit of CNRL's Supplemental AoR (SRB, para 28).

[29] There was then a gap of 4 years from the completion of the questioning of Si's officer until CNRL's attempted scheduling of Si's employee, Ms. Wang (SB para 50 (c)). CNRL referenced this in the CNRL RB, at paras 39-41, but the explanation (see references, *infra*) for CNRLs delay at the hearing was less than capable of justification – simply that then-Counsel for CNRL had stopped pursuing Ms. Wang ("his attention was diverted" – TR 49/32-50/14; and he "changed directions" – TR 71/3-15). Moreover, Ms. Wang appears not to be under the employment or control of Si, a matter over which there is some dispute – see TR 50/24-52/8 *et seq*, unresolved at the time of filing of the within application – TR 71/20-35.

[30] Moreover, there were absolutely no steps taken by CNRL at all in the years 2012 (March 2011 – March 2013 (over 2 years) – TR 30/11-13), 2016 and 2017 (TR 34/3-4), and no steps in 2015, except CNRL providing answers to undertakings (even then, there was an 18-month delay between June 2014 and December 2015 in CNRL providing its undertaking responses after Si's questioning of CNRL – TR 30/28-35), and no steps in 2018 by CNRL in relation to Si (SB paras 59-60), only CNRL questioning of Mr. Spinola (associated with Zachry) in August 2018 – over 20 months after CNRLs' last previous step (TR 34/6-8).

[31] There was also a 44-month gap in any service of appointments or conduct money or questioning by CNRL between the questioning of Mr. Chan in November 2014 and Mr. Spinola in August 2018 – TR 32/29-33/5.

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[21] Si alleges (TR 20/35-21/35) that all except Zachry, CNRL and Si should never have been parties to the Counterclaim in the first place.

[32] Thus, I find that there were significant gaps in the litigation – both in terms of duration and impact, which lay at the feet of CNRL.

Moving Party's (Si's) Involvement in the Delay - Si Lack of Response to Undertakings

[33] CNRL made a real issue (paras 30 and 80-3 of the CNRL RB & TR 47/6-19) of Si's alleged failures, which CNRL says (CNRL RB, para 84) excuses any delay by CNRL, most significantly Si's failing to provide responses to the undertakings to CNRL from its representative's questioning. Si responded to this (SRB, para 30) by admitting that it did not provide those undertaking responses. However, Si pointed to a number of steps taken by CNRL in the litigation between July 2013 and August 2019, asserting that its failure to provide responses to undertakings "did not contribute to CNRL's delay in prosecuting the Counterclaim", and further asserting that "CNRL took all of these steps without the benefit of [Si's] Undertaking responses". Si also noted (para 32 of the SRB) that CNRL made no requests for Si's Undertaking responses between April 1, 2014 and October 2, 2018 (a period of 4½ years). Moreover, there appears to have been no complaint by CNRL of Si missing the deadline for cross-examination on such undertakings, because Si had not provided them, until after the within application was filed (CNRL RB para 81).

[34] I have dealt with this further below and find that while it might represent a lack of "clean hands" argument against Si, and, indeed, Si might well be embarrassed by its failure to provide responses to undertakings (TR 40/28-41/2), I further find that it does not, on the facts addressed below, or in law, provide a justification for CNRL's delay, as there is no evidence that CNRL was relying on the responses to undertakings before it could take further steps in the action – there was no demand for the answers to undertakings (TR41/23-27).

[35] Additionally, I find that the following further claims of delay by CNRL against Si are not determinative of this application: CNRL RB para 80(a) regarding an alleged 5-month delay as a result of disputing service of the Counterclaim; para. 80(b) regarding the Standstill Agreement; and para 80(c) dispute over service on Si of the OHS claim – which seems to have been determined in Si's favour, in any event (TR 68/25-31). Si concedes that delay time doesn't start running until after the Standstill Agreement ended – TR 67/9-14; therefore, Si argues (TR 39/19-24) that because each of the allegations in CNRL's para 80(a) to (d), pre-date the Standstill Agreement, they are irrelevant. I agree.

Documents or Memories Case

[36] Si argues (TR 5/38-7/17; 12/17-23; & 14/5-18/35) that this is neither solely a documents, nor a memories case – it is a hybrid case, that would require a significant amount of *viva voce* evidence, and therefore is likely to be affected by weakened memories with the passage of time. I tend to agree (as I noted at TR 7/18-30), such that the distinction between the two, as it applies to this case, is not determinative.

[37] To the extent that it is a memories case, I note that 6 years after the commencement of the Counterclaim, in 2014, and even before the alleged period of undue and inexcusable delay, there was evidence that the memories of some witnesses were failing – TR 59/34-60/1. Fading memories are therefore a relevant consideration, in view of the passage of time since then.

Sub-Conclusion

[38] In the result, based on the forgoing and Si's I find the delays by CNRL were inordinate.

Actual Time Inordinate v. Prudent Time: Justification for Inordinate Delay

[39] Counsel of Record for CNRL[22] leading up to the Si filing of this Application raised a number of excuses for not proceeding faster in the litigation.

[40] The first excuse for the deficiency in the CNRL's AoR was CNRL's computer server problem in 2010. However, it was apparently over a year before then-Counsel for CNRL learned of the server problem and several months before he, "embarrassingly", informed Counsel for Si (see SB paras 8-10, 54 & 64-66). This is on top of the 29-month delay between the time CNRL filed its Counterclaim and its deficient AoR, during which time the CNRL employees who were responsible for the CNRL server had left the employment of CNRL. Moreover, as noted above, it took another 27 months for CNRL to provide its Supplemental AoR, documents that are fundamental to questioning, resulting in further down stream delays. To my knowledge, there is no explanation for these long delays, and no reasons provided for the server problem, and thus no justification.

[41] Inadvertence by then-Counsel for CNRL or an expectation that Si would remind then-Counsel for CNRL because he had "a busy practice" (SB, para 12) are not justifications.

[42] Then-Counsel for CNRL's belief that the motions brought by Si to compel the Supplemental AoR and to allow Si to amend its Statement of Defence to Counterclaim (SB, paras 14-16 & 56-7) were a tactic by Si to back out of the March 2013 scheduled questioning bears no credibility and was not, I find, a justification for further delay by CNRL.

[43] CNRL's failure to conduct questioning of Si in March 2013, due to the resignation of CNRL's officer in early 2013 (SB paras 16 & 18; see also SRB, para 27) and in spite of the fact that Si's officer had made travel plans to attend, was a product of CNRL's earlier delay and, I find, not a justification for the further delay in questioning of Si, which was delayed about 4 further months.

[44] There was delay from March 2013 to June 2014 (14 months) for Si to question CNRL's new officer due to delay by CNRL in his appointment (SB, paras 16, 19 and 21; see also SRB, paras 25-6).

[45] There were scheduling issues in CNRL's questioning of Si's employee (or alleged employee), Ms. Wang, in late 2014 and early 2015, that caused unavoidable delay (SB paras 23 & 73). However, I find that there is no support for CNRL's claim that the questioning was delayed by Si not providing the undertakings from the questioning of Si's officer in the 43 months that followed until September 2018 (SB paras 73-5; see also SRB para 31), or that not providing Ms. Wang was the fault of Si (SRB para 37(e)). See also CNRL's then-Counsel's admission in that regard - TR 11/16-12/13 – see also TR 31/7-32/3, 39/41-40/4 & 40/9-20.

[46] While not directly related to the issues between CNRL and Si, there is no apparent justification – indeed, it strains credulity - in CNRLs claim that the 22-plus months delay in completing the questioning of Mr. Spinola, a former employee of Zachry, was due to a difficulty in contacting him to continue the questioning; CNRL had the means to access his email address, his phone number and place of employment – SB paras 24 – 29 & 67-72, TR 33/23-24. Not paying attention or "checking his phone" is not a justification for then-Counsel for CNRL's

[22] Counsel of Record for CNRL is not the Counsel arguing this application for CNRL .- TR 49/34-35. I understand that the latter took over CNRL's response to Si's application in June 2019.

failure to reach Mr. Spinola. Moreover, this delay was not attributable to any fault of Si (SRB para 37(f)). I find that there was no excuse for then-Counsel for CNRL's delay in moving this forward. Indeed, it was rather a clear failure – TR 47/21-48/6. Finally, I find that Si's failure to provide answers to its undertakings on questioning did not affect CNRL's further questioning of Mr. Spinola (TR 40/4-5).

[47] Current Counsel for CNRL raised other matters going on in the background during certain periods of time – awaiting the outcome of the OHS proceedings, attempts to settle, entering the matter for trial – TR 48/8-19 & 35-41. However, I do not find any of these matters provide justification for the delays apparent – those go along with the process leading to trial, but are not excuses for delay. Moreover, it is clear that the matter is still not ready for trial, and would take a number of steps, including the intervention of a case management justice, and more diligence on the part of CNRL than has been seen on this record – TR 49/2-22.

Has Inordinate and Inexcusable Delay Caused Significant Prejudice to Si, as a Matter of Fact?

[48] For the reasons mentioned *infra*, I find that there was significant delay in Si having to wait 27 months for a Supplemental AoR from CNRL.

[49] The failure of CNRL to provide timely consent to Si to amend its Statement of Defence to Counterclaim, and CNRL's failure to file its Supplemental AoR in a remotely timely manner resulted in the cancellation of questioning otherwise agreed to proceed in March 2013 (SB para 13). I find that these constitute significant prejudice to Si.

[50] Si also argues (SB paras 76-9) that it requested to examine 4 former CNRL employees, but that then-Counsel for CNRL had not taken any steps since August 2016 – indeed, ceased to take steps - to locate them. I find that this is factual prejudice to Si relating to potentially failing memories, caused by CNRLs delay and inaction.

Has CNRL Rebutted any Presumption of Significant Prejudice?

[51] I find that there is, in fact, and in law, no such rebuttal, in spite of CNRL's assertion (CNRL RB para 87). In the result, I further find that there is a presumption of prejudice, as argued by Si – TR 41/29-42/16.

If All Criteria are Met, applying Discretion, is there any Compelling Reason not to Dismiss the Action?

[52] With my finding that all relevant criteria for dismissal for delay have been met, I further find no compelling reason – indeed, not any reason - has been given by CNRL not to dismiss the Counterclaim.

Conclusion

[53] While current Counsel for CNRL (appointed September 2019), did an admirable job in arguing the case for CNRL, at the end of the day, the facts of delay, while under the watch of then-CNRL Counsel simply cannot be overcome. As Si concluded its last written submission (para 44 of the SRB):

> The Counterclaim is more than 10 years old[23]. Questioning is not complete and the matter is otherwise nowhere near ready to be set down for trial. As such ... the Counterclaim should be [dismissed].

I agree with the substance (the actual delay being subject of debate), and so find, on the basis that, under Rule 4.31, the delay by CNRL is inordinate and inexcusable, and the evidence and presumption of significant prejudice has not been displaced by CNRL.

[54] More expressly, I find that there has been inordinate and inexcusable delay, such that the presumption of prejudice arises, which has been unrebutted, and additional prejudice is present in fact, such that all the criteria for dismissal of the Counterclaim by CNRL against Si have been met, and there is no reason for me not to exercise my discretion to do so. Thus, the CNRL Counterclaim is dismissed, as against, Si, for delay under Rule 4.31.

[55] In the result, the Counterclaim is dismissed in its entirety and Si is entitled to its costs as may be agreed to between the parties or assessed by the Assessment Officer, returning to the Court on costs only to the extent that any dispute is beyond the jurisdiction of the Assessment Officer.

Heard on the 14th day of April, 2021.
Dated at the City of Calgary, Alberta this 7th day of December, 2021.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

Beth Younggren for Zachry T & E Canada Inc.
for the Plaintiff (watching brief only)

[23] CNRL asserts that the dates in question for analysis for delay are not from the filing of the Counterclaim (November 2008), but are from March 2011 to May 2019, a period of 8 years (TR 45/8-16), and that there is no "10-year tariff" – TR 54/26-55/9, relying on *Royal Bank v. Levy* 2020 ABQB 500, at para. 40. In any event of that debate, I find that 8+ years is quite overwhelmingly – quite significant, in the context of the circumstances and delays in this case, as SI argues at SI RB, para. 40, relating to failing memories - "particularly when dealing with the recall of events dating to 2006 and 2007".

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for Sinopec Shanghai Engineering Co. Ltd.
for the Defendants

Carsten G. Jensen, Q.C. and Cassandra Sutter
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