IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Osprey Park Operations Mid-Island Ltd. v. British Columbia,* 2023 BCSC 1811

Date: 20231016
Docket: S093086
Registry: Vancouver

Between:

Osprey Park Operations Mid-Island Ltd. and Osprey Park Operations North Island Ltd.

Plaintiffs

And

His Majesty the King in right of the Province of British Columbia

Defendant

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiffs:	J.G. Dives, K.C.
Counsel for the Defendant:	T. Bant A. Lewis
Place and Date of Hearing:	Victoria, B.C. September 7, 2023
Place and Date of Judgment:	Vancouver, B.C. October 16, 2023

Introduction

[1] In 2003, the plaintiffs contracted with the Province to operate and maintain provincial parks on Vancouver Island. There were two contracts, each covering a "bundle" of parks. The plaintiffs undertook the work and received payment pursuant to terms that were to be renegotiated after three years. They say that they lost money under the contracts and the Province refused to take their experience into account in the renegotiations. They say that the Province dealt with them in bad faith. Following the parties' failure to come to terms, the Province cancelled the contracts in March 2006.

[2] In April 2009, the plaintiffs commenced this action claiming damages for breach of contract, misrepresentations, and breach of a duty of good faith. Then the plaintiffs did nothing of substance to move the action forward for more than 14 years. Finally, following receipt of a notice of an intention to proceed in January 2023, the Province brought this application. It seeks to have the action discontinued for want of prosecution.

[3] The plaintiffs' former lawyer takes responsibility for the plaintiffs' extraordinary lassitude. He says that the plaintiffs' principal, Mr. Witt, repeatedly and frequently pressed him to proceed with the action, and he assured Mr. Witt that he would do so. He attributes his inaction to a mental block he developed about this file. Plaintiffs' counsel on this application, Mr. Dives, K.C., acknowledges that the plaintiffs cannot place responsibility for the delay entirely at the feet of their former, lawyer, but submits that the plaintiffs should not be prejudiced by his failings.

[4] In the language of the cases, the plaintiffs' delay in proceeding has been inordinate and inexcusable. The lawyer's delay is an explanation, but not an excuse. It does not necessarily follow that the action must be dismissed. The questions of substance raised by this application are, first, whether the delay gives rise to serious prejudice suffered by the Province in defending the action and, fundamentally, whether justice requires dismissal of the action in consequence of the delay.

History of the litigation

[5] The plaintiffs commenced the action by filing a writ of summons and statement of claim on April 24, 2009. They served them by registered letter dated July 14, 2009.

[6] The Province filed an appearance on July 21, 2009. On August 25, 2009, counsel for the Province delivered a demand for particulars of the statement of claim, advising that he required the particulars sought for the preparation of a statement of defence. Counsel for the plaintiff agreed that the Province need not file its defence until a response to the demand for particulars was provided.

[7] In September 2009, in an email exchange between counsel, plaintiffs' counsel advised that he would not be in a position to reply to the demand for particulars for another week, and the Province's counsel advised that a preliminary inventory of the Province's documents had been undertaken, and they were voluminous. The Province's counsel confirmed that he would continue to await particulars before attempting to draft a statement of defence.

[8] No further steps were taken in the litigation for five years. Finally, on January 29, 2015, the plaintiffs' counsel delivered a notice of intention to proceed. By letter dated February 4, 2015, the Province's counsel noted that the delay in proceeding was unexplained and asked for an explanation as to why the plaintiffs had chosen to revive the actions, and an indication of what steps they now proposed to take. The plaintiffs' counsel did not reply to this letter.

[9] On November 26, 2015, the plaintiffs filed and subsequently served an amended notice of civil claim. It reiterated the allegations in the original statement of claim in the form now required by the Supreme Court Civil Rules, following their amendment in 2010.

[10] The plaintiffs took no further steps until January 27, 2023, when counsel delivered a notice of intention to proceed. There is no evidence of any further steps

taken in the litigation before the Province filed its notice of application, seeking dismissal for want of prosecution, on April 6, 2023.

[11] On August 25, 2023, while this application was pending, the plaintiffs filed a notice of trial scheduling the trial to begin on July 22, 2024, for 14 days.

Legal framework

[12] Applications to dismiss for want of prosecution are brought pursuant to Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. It provides:

> If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[13] The decision is a discretionary one, and there is no dispute as to the considerations to be taken into account in the exercise of my discretion. The parties are agreed that I must consider the following cumulative requirements:

1. Whether there has been inordinate delay;

2. If so, whether it is inexcusable;

3. If so, whether the delay has caused or is likely to cause serious prejudice to the defendant; and

4. If so, whether in light of these conclusions the balance of justice requires that the action be dismissed;

Azeri v. Esmati-Seifabad, 2009 BCCA 133, at paras. 8 and 16; *PMC Builders & Developers Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 (sub nom *0690860 Manitoba Ltd. v. Country West Construction Ltd.*) at para. 27.

[14] Delay must be considered holistically, not piecemeal; *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation,* 2014 BCCA 52 at para. 38. What matters is the delay in prosecuting the action once it has been commenced, not the delay that

preceded it; *Ed Bulley* at para. 38; *Pacific Hunter Resources Inc. v. Moss Management Inc.,* 2004 BCCA 40 at para. 36.

Analysis

Was the delay inordinate?

[15] It cannot be doubted that there was inordinate delay in this case. To this point, the delay exceeds 14 years, running from the commencement of the action in April 2009. It will exceed 15 years by the time of trial, if the trial proceeds as now scheduled.

[16] An inordinate delay is one that is uncontrolled, immoderate or excessive; *Azeri* at para. 9. In *Canadian Star Development Corp. v. 0712276 B.C. Ltd.,* 2018 BCSC 871 at para. 95, Fitzpatrick J. referred to a delay of almost 10 years as "extremely inordinate".

[17] Responsibility for the delay has rested on the plaintiffs throughout. In determining whether there has been inordinate delay, the Court may consider that, while a response to civil claim remains unfiled, it is the defendant's turn to move; *Hanna's Construction Services Ltd. v. Blue River III, Inc.,* 2006 BCCA 142 at paras. 26-27. In this case, the Province's demand for particulars, coupled with the plaintiffs' agreement that a defence need not be filed until particulars were provided, meant that it was the plaintiffs' turn to move, and they never did.

Was the delay inexcusable?

[18] An example of an inexcusable delay is deliberate delay as a means of gaining tactical advantage; *Irving v. Irving* (1982), 38 B.C.L.R. 318 (C.A.) at para. 11. Conversely, in another case, delay in which the defendants acquiesced in order to await the outcome of related litigation was viewed as excusable delay; *Tundra Helicopters Ltd. v. Allison Gas Turbine,* 2002 BCCA 145 at paras. 20-24. What is required from the plaintiff is an explanation for inordinate delay that has occurred that is acceptable in the circumstances. Speaking for the Court in *Irving*, Seaton J.A. stated at para. 11:

> None of the questions that arise on an application such as this can be considered in isolation. That which would make a short delay excusable might not be sufficieopnt to make a long delay excusable. Some delays may be so long and the prejudice to the defendant so great that no reason would excuse the delay. The question is whether this delay is excusable in the light of the reason for it and the other circumstances.

[19] The plaintiffs have offered an explanation for their failure to prosecute their claim. It was the fault of their former lawyer. He states, in an affidavit:

> 20. I have not responded to the defendant's Demand for Particulars. I repeatedly advised Mr. Witt that I needed to provide those particulars but failed to carry through with producing them. Over the course of time I developed a "mental block" about this file.
>
> …
>
> 22. From the outset the principal of the plaintiffs, Greg Witt, repeatedly and frequently pressed me to proceed with the Action and I assured him I would do so. The delay in moving the matter forward is entirely my responsibility.
>
> 23. Mr. Witt never asked me to delay or stall proceedings or suggested in any way that he did not want to move the litigation forward expeditiously.
>
> 24. Delay in proceeding with this matter was not made to gain any tactical or other advantage.

[20] Mr. Witt has sworn an affidavit to the same effect. He states:

> 50. At all times it has been the intention of the plaintiffs to proceed with the Action and the plaintiffs relied on counsel to proceed.
>
> 51. I frequently and repeatedly asked counsel to proceed with the lawsuit and did not ask that the lawsuit be delayed. Whenever I raised the issue of the case being pushed forward, I was assured that it would be. The plaintiffs did not seek to obtain any tactical advantage by delay.

[21] In my view, the explanation that former counsel was negligent softens but does not excuse the delay; *Wiegert v. Rogers,* 2019 BCCA 334 at para. 33. At some point well before a decade had passed, Mr. Witt should have refused to accept his former lawyer's excuses and assurances, and insisted that action proceed or he would change lawyers. While I accept that the delay was not tactically motivated, it was nonetheless unacceptable and inexcusable.

Has the delay caused or is it likely to cause serious prejudice to the Province?

[22] Where there has been inordinate and inexcusable delay, a rebuttable presumption of prejudice arises; *Busse v. Chertkow,* 1999 BCCA 313 at para. 18; *Ed Bulley* at paras. 51-55. In *Busse,* Goldie J.A., speaking for the Court, stated the following principle:

> [18] In my view, it is open to this Court to adopt the principle that once a defendant has established the delay complained of has been inordinate and is inexcusable a rebuttable presumption of prejudice arises. To continue imposing the evidentiary burden of proving prejudice after establishing inordinate and inexcusable delay is contrary to the object expressed in sub-rule (5) of Rule 1 of the Rules of Court:
>
> **Object of rules**
>
> (5) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> …

[23] The rebuttable presumption of prejudice identified in *Busse* is explained and qualified in subsequent jurisprudence. In *Tundra Helicopters* at paras. 35-37*,* Justice Esson, speaking for the Court of Appeal, held that it is not a presumption of law, only a presumption of fact signifying an inference of prejudice that may but need not necessarily be drawn. He reasoned that the absence or weakness of evidence of specific prejudice tendered by defendants, who were the only persons in a position to offer evidence of prejudice, could support an inference that actual prejudice was absent (at paras. 29-33, and especially para. 30). This reasoning is challenging because it turns the ordinary understanding of a presumption on its head: an absence of evidence is found to inure to the benefit of the party bearing the burden of the presumption. However, it is reasoning cited with approval in *PMC Builders* at paras. 42-46.

[24] In the light of *Tundra Helicopters* and *PMC Builders*, the presumption of prejudice might better be described as a common sense inference that inordinate and inexcusable delay prejudices the defendant, because memories fade with the passage of time, and witnesses die or are otherwise lost to the parties. But the strength of the inference of prejudice varies with the circumstances: the nature of the

case and the factual issues, the length of the delay, the existence of contemporaneous records, and so on. In some circumstances, such as those described in *Tundra Helicopters,* the inference may carry so little weight that it is overwhelmed by considerations such as the absence of evidence of specific prejudice from the defendant, where the defendant is the only person in a position to provide such evidence.

[25] Other propositions relating to prejudice are more straight-forward. The court should only take account of prejudice that was caused by the plaintiff's material delay, not by other events; *PMC Builders* at para. 19. Prejudice may result from the death of a material witness, if it post-dates the period in which the case would have gone to trial in the ordinary course; *PMC Builders* at para. 34. Where that has occurred, it does not detract from the prejudice that another witness to the same events may be available; *Ed Bulley* at para. 56, citing *Rangi v. Lloyd's Underwriters*, 2012 BCSC 354 at para. 28.

[26] Turning to the case at hand, the Province emphasizes the length of the delay, scope and nature of the claim, and the potential loss of witnesses. The plaintiffs emphasize the extent to which one may assume that the dealings between the parties have been documented, and the absence of evidence of specific prejudice from the Province. I will address these points in turn.

[27] Taken alone, a 14-year delay, which is unusual even in the context of an application for dismissal for want of prosecution, strongly supports an inference of prejudice from fading memories and the potential loss of witnesses.

[28] I accept the Province's submission that the potential prejudice is exacerbated by the nature and scope of the claim. It is not simply a claim based on written contracts and dealings that will have been fully documented. The plaintiffs' allegations engage an investigation of the intentions and motivations of public servants employed by the Province. The amended notice of civil claim includes the following allegations:

a) the Province made misrepresentations for the purpose of inducing the plaintiffs to submit favourable bids for the provision of park services (para. 31);

b) the plaintiffs tendered bids and entered into contracts with the Province in reliance on the misrepresentations (para. 32);

c) the Province owed the plaintiffs a duty of good faith with respect to the renegotiation of terms after three years required under the contracts (para. 43);

d) the Province imposed upon the plaintiffs' operational and maintenance standards that were unreasonable and far more stringent than it applied to park operators anywhere else in the province (para. 55);

e) the Province imposed a regime of onerous inspections in excess of those carried out in respect of other park operators to provide a bogus rationale for the issuance of warning letters and to force the plaintiffs to meet the unreasonably stringent standards (paras. 58-60); and

f) the Province breached its duty of good faith in the contract renegotiations, including by taking positions inconsistent with those taken in negotiations with every other park operator (paras. 75-77).

[29] The plaintiffs claim general damages based on increased costs, lost profits and lost opportunities, and punitive damages.

[30] The plaintiffs' central claim that the Province breached a duty of good faith engages an inquiry into the honesty and intentions of the public servants who dealt with the plaintiffs. The jurisprudence on good faith performance among contracting parties is evolving. An inquiry into good faith has both objective and subjective components. Objectively, the court asks whether a contractual discretion was exercised reasonably, having regard to the purposes for which discretion was conferred; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage*

District, 2021 SCC 7 at paras. 57-63, aff'g 2019 BCCA 66. Subjectively, the court asks whether the discretion was exercised honestly, arbitrarily, capriciously, or recklessly; *Wastech* at paras. 54 and 88 *Wastech CA* at para. 71.

[31] In addition to the claim that the Province dealt with the plaintiffs in bad faith, the claim that the Province sought to develop "a bogus rationale" for its actions and the claim for punitive damages engage a potentially searching inquiry into the intentions and purposes of the public servants who dealt with the plaintiffs. These are the kind of claims that often succeed or fail on cross-examination. Fading memories resulting from lengthy delay make the cross-examination difficult for the witness.

[32] As to the loss of witnesses, the Province points to evidence that public servants who dealt with the plaintiffs retired in 2004, 2006, 2009, 2011, 2014 and 2016. This is not convincing evidence that the plaintiffs' inordinate delay has prejudiced the Province. Many of these retirements would have occurred before the action would have been tried, even had it been pursued with reasonable diligence, and cannot found an argument that the plaintiffs' inordinate delay gives rise to prejudice. The same is true of the one example of a public servant who died shortly after retiring in 2009. In the case of the later retirements, there is no evidence that the individuals in question cannot be procured to testify on discovery or at trial.

[33] While it is clear that the case is not one that can be tried on a documentary record, the existence of such a record is important. It narrows and focuses potential factual issues, and provides material the witnesses can use to refresh their memories in preparing for and giving evidence, and that counsel can use in cross-examination. There is extensive documentation of the dealings between the parties, including a full record of two important meetings. It is clear that counsel for the Province took immediate steps in 2009 to secure relevant documentation in its possession. The Province does not suggest that any documents have been lost.

[34] Weighing all these considerations, I conclude that there is a real likelihood of serious prejudice to the Province resulting from the plaintiffs' inordinate and

inexcusable delay in prosecuting their case. The likelihood is that, even with the assistance of a full documentary record, the Province's witnesses will find it significantly harder to explain and justify the decisions they made and the steps they took in their dealings with the plaintiffs than would have been the case had the case been tried eight or ten years ago, as could easily have occurred. In contrast to *Tundra Helicopters,* in this case I am not persuaded that the absence of evidence of specific prejudice, that might have been provided by the Province but was not, overcomes the inference of general prejudice resulting from "extremely inordinate" delay in a case that may well turn on the recollections and explanations of former public servants.

Does justice require dismissal of the action in consequence of the delay?

[35] This is the ultimate question, to be considered having regard to the answers to the first three questions; *Irving* at para. 22. My findings of inordinate and inexcusable delay resulting in a likelihood of serious prejudice to the Province are not the end of the matter.

[36] In *Busse* at para. 27, Goldie J.A. stated a formula that was applied by Esson J.A. in *Tundra Helicopters* at paras. 36-37:

> has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action?

This formula is helpful because it underscores that it is the plaintiffs who bear the burden of persuasion at this stage of the analysis.

[37] It must borne in mind that dismissal of a possibly meritorious action is a draconian order that should not lightly be made; *Irving,* at para. 7; *Tundra Helicopters* at para. 37, both citing *Allen v. Sir Alfred McAlpine & Sons Ltd.,* [1968] 2 QB 229 (C.A.) at 259.

[38] The ultimate question requires consideration of the interests of justice in all the circumstances of the case. The circumstances include, in this case, that the

delay is a consequence of the plaintiffs' former lawyer's negligence, and, as in *Arctic Tundra* and *PMC Builders,* the absence of cogent evidence of specific prejudice suffered by the plaintiffs. These circumstances mitigate, though they do not eliminate, the inexcusability of the delay and the weight of the prejudice suffered by the Province.

[39] Taking everything into account, justice does not require dismissal of this action. To the contrary, I am persuaded that it would be unjust to dismiss this possibly meritorious action on the ground of the plaintiffs' delay in prosecuting it. Though the trial will be difficult, I find that the case can be justly tried and decided. The court not infrequently hears and decides cases, both civil and criminal, involving disputed events that took place long ago. Judges make allowance for the difficulties of recollection, and these cases are justly decided.

[40] I think that the case is close to the line. Further delay by the plaintiffs or a development giving rise to specific prejudice, such as the death of a material witness, could well push it over the line.

Disposition

[41] The application is dismissed, without prejudice to the Province's right to renew the application on the basis of a change in circumstances.

[42] The application was reasonably brought in the light of the plaintiffs' inordinate and excessive delay. The Province is entitled to costs of the application in any event of the cause.

"Gomery, J."