

# COURT OF APPEAL FOR ONTARIO

CITATION: NWG Investments Inc. v. Fronteer Gold Inc., 2024 ONCA 331

DATE: 20240430

DOCKET: COA-23-CV-1014

Brown, Paciocco and Nordheimer JJ.A.

BETWEEN

NWG Investments Inc.

Plaintiff/Responding Party  
(Appellant)

and

Fronteer Gold Inc., Newmont Mining Corporation, Newmont  
Canada Holdings ULC, Newmont FH B.V., and Mark O’Dea

Defendants/Moving Parties  
(Respondents)

Ren Bucholz, Dan Rosenbluth and Mannu Chowdhury, for the appellant

Kent E. Thomson and Anthony M.C. Alexander, for the respondents

Heard: April 29, 2024

On appeal from the order of Justice Jana Steele of the Superior Court of Justice,  
dated August 22, 2023, with reasons reported at 2023 ONSC 4826.

## REASONS FOR DECISION

[1] NWG Investments Inc. appeals from the motion judge’s dismissal for delay of its 2014 action, which asserts claims based on events that took place in 2007 and 2008. NWG’s claims centre on allegations that the respondent, Mark O’Dea,

a former officer of the respondent Fronteer Gold Inc., misrepresented to NWG the ability to extract uranium expeditiously from the ground in Nunatsiavut (Labrador).

[2] The motion judge correctly identified the governing legal test on a motion to dismiss for delay under r. 24.01 of the *Rules of Civil Procedure*: an action should not be dismissed unless the delay is (i) inordinate, (ii) inexcusable, and (iii) prejudicial to the defendants such that it gives rise to a substantial risk that a fair trial of the issues will not be possible: *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1, at para. 12.

[3] NWG does not challenge the motion judge's findings that its delay was inordinate and inexcusable. Instead, NWG contends the motion judge erred in determining that the delay prejudiced the respondents. As well, NWG submits the motion judge's decision would enable abuses of r. 24.01 in future cases.

[4] Before considering NWG's grounds of appeal, it is worth recalling some of the unchallenged findings of the motion judge:

- The events upon which NWG rests its claim took place in 2007 and 2008;
- NWG initially sued the defendants in New York State, but that action was dismissed in 2013;
- NWG commenced its Ontario action in 2014, approximately six years after the key events took place;
- Pleadings closed in April 2015;

- No examinations for discovery have taken place in this proceeding. Consequently, discovery evidence given much closer in time to the events in dispute will not be available for discovered witnesses to refresh their memories with; and,
- “The last substantive step taken in the action by [NWG or its sole shareholder] was the forwarding of a draft discovery plan to the defendants on April 23, 2015”: Reasons, at para. 23.

[5] The respondents moved in November 2022 to dismiss the action for delay. On behalf of NWG, Mr. Safra filed three affidavits. None contained NWG’s proposed plan for its future litigation steps in this action. Accordingly, the record shows that NWG resisted the motion to dismiss without informing the court about how it proposed to bring its proceeding to its “most expeditious” determination in light of NWG’s uncontested inordinate and inexcusable delay: *Rules of Civil Procedure*, r. 1.04(1).

[6] As its first ground of appeal, NWG contends the motion judge’s assessment of the issue of prejudice was infected by reversible error. We see no such error. In our view, at its core this ground of appeal simply reflects NWG’s disagreement with the weight the motion judge placed on the factors of document availability, witness relevance, and witness memory. While NWG may disagree with how the motion judge weighed those factors in the specific circumstances of this case, we see no

palpable and overriding error in her analysis nor do we regard her conclusion as unreasonable in the circumstances.

[7] As its second ground of appeal, NWG contends that the motion judge’s “theory of prejudice” rewards defendants who “lie in the weeds”. We are not persuaded by this submission, especially given the motion judge’s unchallenged findings that NWG’s delay in prosecuting its action was inordinate and inexcusable. It must be recalled that NWG’s action has not gone beyond the pleadings stage and that it was only in 2021 – 7 years after the Ontario action was started and approximately 14 years after the events in question – that NWG, through new counsel, got around to suggesting that the parties should discuss a discovery plan.

[8] By commencing an action in the Ontario courts, NWG was under the obligation to move it along to the “most expeditious” determination on its merits. The motion judge obviously concluded that NWG had failed to discharge that obligation. She did not err in so doing. Her decision to dismiss NWG’s action for delay was a reasonable one in the circumstances.

[9] The appeal is dismissed.

[10] In accordance with the agreement of the parties, the respondents, as the successful parties, are entitled to their costs of appeal from NWG fixed in the amount of \$30,000, inclusive of disbursements and applicable taxes.

“David Brown J.A.”  
“David M. Paciocco J.A.”  
“I.V.B. Nordheimer J.A.”