Court of King's Bench of Alberta

Citation: Whalen v Callihoo, 2050787 Alberta Ltd, Kreutzer, Kreutzer and Bates, 2024 ABKB 402

Date: 20240702
Docket: 1813 00600
Registry: Fort McMurray

Between:

Samantha Whalen

Plaintiff

- and -

Bradley Callihoo, 2050787 Alberta Ltd., Ronald Alfred Kreutzer, Ronald Allen Kreutzer and Byron Bates

Defendants

Memorandum of Decision
of the
Honourable Applications Judge M. R. Park

Introduction:

[1] This is an application by the Defendants to dismiss this action for long delay pursuant to rule 4.33 (2).

Background:

a. The within action:

[2] The Plaintiff, Samantha Whalen, is an elected councillor of the Fort McMurray 458 First Nation ("**FMFN**").

[3] At times material to these proceedings, the defendant Bradley Callihoo was FMFN's Chief Executive Officer, while the other individual defendants were elected FMFN councillors. The corporate defendant is a numbered company incorporated and controlled by Mr. Callihoo.

[4] Ms. Whalen claims that following her election in June, 2018, she uncovered financial irregularities in respect of FMFM. Specifically, Ms. Whalen says that she discovered that Mr. Callihoo, through the corporate defendant, received a payment of $600,000.00 in relation to a settlement received by FMFN. Whalen confronted Mr. Callihoo about this payment, the situation escalated, and this lawsuit was commenced by way of Statement of Claim filed on August 23, 2018. Various financial and other improprieties are claimed as against each defendant.

[5] The Defendants retained counsel to defend the allegations made against them. On September 18, 2018, defence counsel served Ms. Whalen's counsel with a Request for Particulars. A Reply to Request for Particulars followed on November 5, 2018.

[6] An **unfiled** copy of the Defendants' Statement of Defence was delivered by email to Ms. Whalen's counsel on November 22, 2018, with an indication that the filed copy would be served in due course.

[7] The Defendants filed their Statement of Defence on November 26, 2018. There is no evidence that a filed copy was ever served.

[8] On December 18, 2018, an Amended Statement of Claim was filed. Outside of this application, which was filed on September 6, 2022, the filing of that pleading was the last formal step in this action.

b. The Injunction Action:

[9] In early 2019, FMFN band members staged a protest at the FNFM offices. Ms. Whalen says this protest pertained to the alleged $600,000.00 payment mentioned above, along with other issues related to this action.

[10] The individual defendants considered the protest to be a "blockade" of the FMFN offices. Accordingly, they caused FMFN to file a Statement of Claim in Court of Queen's Bench of Alberta action number 1913-00020 against Ms. Whalen and others seeking, *inter alia,* injunctive relief (the "**Injunction Action**").

[11] On January 9, 2019, FMFN obtained an *ex parte* interim injunction requiring the clearance of the purported blockade.

[12] On January 17, 2019, the interim injunction order was set aside. It is unclear to me what happened next and if the Injunction Action remains extant.

c. The Judicial Review Proceedings:

[13] At around the time the Injunction Action was filed, the individual defendants purported to pass a band resolution suspending Ms. Whalen from her council duties. Ms. Whalen sought judicial review of this resolution in Federal Court and, on May 24, 2019, that court granted an order allowing her application, concluding that the individual defendants lacked the authority/jurisdiction to suspend Ms. Whalen.

[14] As part of its May 24, 2019 decision, the court directed additional submissions on costs.

[15] On August 30, 2019, the court released its costs decision, which directed FMFN to pay costs to Ms. Whalen in the amount of $40,000.00.

Issue:

[16] Should this action be dismissed for long delay pursuant to rule 4.33 (2) of the *Alberta Rules of Court?*

Analysis:

a. General principles regarding dismissal for long delay:

[17] If three or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant: **rule 4.33 (2).** This requirement is subject to certain exceptions[1], none of which apply here.

[18] The three-year period set out in rule 4.33 (2) does not include the following, whichever ends earlier:

a) the period of time between the service of the Statement of Claim on an applicant and the service of the applicant's Statement of Defence; and

b) the period of one year after the date of service of a Statement of Claim on the applicant: **rule 4.33 (4).**

[19] In ***Rahmani v. 959630 Alberta Ltd.*, 2021 ABCA 110**, the Court addressed the rules for calculating time on a rule 4.33 application:

> [16] …When counting time, one counts forward from the date of the last uncontroversial significant advance, not backward from the date on which the r 4.33 application was filed. This is clear from the wording of r 4.33(2); "if three or more years have *passed* without a significant advance in an action" (emphasis added). The time has to be measured from a date and so must be measured from the last significant advance: *Trout Lake Store Inc v Canadian Bank of Imperial Commerce*, 2003 ABCA 259 at paras 25–33; *Barath v Schloss*, 2015 ABQB 332 at para 9…
>
> [17] When counting time following a significant advance, the count stops on the date the r 4.33 application was filed, not the date that the application was heard. The time between the application being filed and the application being heard does not count against the respondent: *Flock v Flock Estate*, 2017 ABCA 67 at para 17(8); *Ma v Kwan*, 2018 ABQB 852 at paras 11–14…

[20] In ***Patil v. Cenovus Energy Inc.*, 2020 ABCA 385**, our Court of Appeal summarized the legal principles governing rule 4.33 applications:

> [7] Several legal principles can be discerned from decisions of this Court interpreting r 4.33:

[1] See rules 4.33 (2) (a) & (b).

- The rule must be applied within the context of the foundational rule (r 1.2) to resolve claims fairly and justly in a timely and cost-effective way.

- Plaintiffs bear the responsibility of prosecuting their claims in a timely way: *XS Technologies Inc. v. Veritas DGC Land Ltd*., 2016 ABCA 165 (Alta. C.A.) at para 7.

- Defendants are obliged (pursuant to r 1.2) to not obstruct, stall or delay an action that the plaintiff is advancing: *Janstar Homes Ltd. v. Elbow Valley West Ltd*., 2016 ABCA 417 (Alta. C.A.) at para 26.

- A functional, as opposed to a formalistic, approach is appropriate to determine if a step constitutes a significant advance: *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (Alta. C.A.) at para 19.

- The functional approach to r 4.33 is context-sensitive: "Cases that have considered a particular advance in an action will be useful precedents, but they are not determinative": *Ursa Ventures* at paras 19, 23.

- A significant advance is one that moves the action forward in an essential way, having regard to the nature, quality, genuineness and timing of the advancing action: *Ursa Ventures* at para 19; *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc*., 2016 ABCA 123 (Alta. C.A.) at para 21.

- Rule 4.33 functions like a limitations period. It only requires one significant advance within the three-year period, not "continuous significant advancement". Rule 4.33 is not designed to determine what a "reasonably diligent litigant" would do over the course of the three-year period: *Ursa Ventures* at para 11.

- Whether an agreement between counsel constitutes a significant advance is context-dependent. Rule 4.33 was not designed to encourage an "ambush" by one side after the parties had agreed to take a particular step: *Turek v. Oliver*, 2014 ABCA 327 (Alta. C.A.) at para 6.

- Courts assessing whether an action is a significant advance under r 4.33 should focus on substance, not form. As an example, agreement to participate in a judicial dispute resolution process may not constitute a significant advance if it was merely an agreement to schedule a JDR, which was not carried out: *Weaver v. Cherniawsky*, 2016 ABCA 152 (Alta. C.A.) at paras 20-21.

[8] Importantly, r 4.33 is "not designed to regulate the efficient prosecution of actions, but rather to prune out actions that have truly died": *Ursa Ventures* at para 10.

[21] As Applications Judge Schlosser noted in ***Alghazawi v. Alberta*, 2019 ABQB 208**, the court is to view the whole picture in the three-year period before the motion and ask whether the action has advanced or, whether during that time, it has truly died. The emphasis is on the development of the lawsuit during the three years. In most cases, this involves an analysis of a single event. However, in some cases, a series of events, even though they may individually fall short of constituting a significant advance, can be assessed cumulatively. Where there is more than one event during the three-year period, the approach is more holistic, and it is not just a question of applying a binary choice to discrete events[2].

[2] *Alghazawi v. Alberta*, 2019 ABQB 208 at para. 12.

b. The application of rule 4.33 (4):

[22] Given the lack of evidence concerning service of a **filed** copy of the Statement of Defence, a fair amount of argument was devoted to the question of whether the "adjuster's year" provided for by rule 4.33 (4) applies here. If it does, the application would need to be dismissed, having been filed prematurely. Ultimately, it is not necessary for me to decide this question, as I have determined that there were significant advances in the action between December 18, 2018 and September 6, 2022.

c. Advances in "related" actions:

[23] In certain circumstances, an advance in one action can constitute a significant advance in a different action for purposes of a drop-dead application.

[24] The relevant principles regarding related proceedings were set out by Master Smart (as he then was) in ***TRG Developments Corp. v. Allan Beach Resort (2013) Ltd.*, 2018 ABQB 304:**

> [10] Under rule 4.33(2), if one of the parties has not significantly advanced an action for three years, then the Court must dismiss the action unless certain exceptions are met. In this case, the relevant exception is that a significant advance in a separate action may be inextricably linked to the current action, thereby constituting a significant advance in the action at issue: *Calgary (City) v. Chisan*, 2000 ABCA 313 (Alta. C.A.) at para 3. The primary consideration is whether the two actions are inextricably linked. The factors to consider were laid out in Angevine v. Blue Range Resource Corp., 2007 ABQB 443 (Alta. Q.B.) at para 41. Those factors are:
>
> (1) Are the two actions inextricably linked in the sense that the result in the related action would be "legally or factually determinative" of the issues in the primary action?
>
> (2) Will the issue determined in the related action be "relevant and binding" in the primary action?
>
> (3) Does the related action materially advance the primary action?
>
> (4) Could the decision in the related action be a "barrier in law" to the Court's adjudicating the primary action?

[25] Ms. Whalen attempts to characterize this action as part of a larger "governance dispute" with FMFN, which she says led to other litigation (i.e. the Injunction Action and the Judicial Review Proceedings) that overlaps with this action.

[26] While I agree with Ms. Whalen that there is some underlying commonality among the proceedings, it would be a stretch to characterize them as being "inextricably linked".

[27] As the Defendants note, each proceeding involves different legal issues and, to a certain extent, different parties.

[28] Further, the relief sought in each proceeding is different.

[29] In this action, the Plaintiff is Ms. Whalen. She seeks relief against the former CEO and leadership of FMFN regarding alleged breaches of fiduciary duties owed to FMFN. The defendants

are Brad Callihoo, 2050787 Alberta Ltd., Ronald Alfred Kreutzer, Ronald Allen Kreutzer, and Byron Bates.

[30] In the Injunction Action, the Plaintiffs are FMFN and Christina River Enterprises ("**CRE**"). The Defendants are Ms. Whalen and various others alleged to have blockaded FMFN's administration offices and essential services. The primary purpose of the Injunction Action was to put an end to the blockade FMFN and CRE claimed was crippling FNFM and putting its members at risk. None of the defendants in this action were parties to the Injunction Action.

[31] Finally, in the Judicial Review Action, Ms. Whalen was the Applicant. The only Respondent was FMFN. The application in these proceedings was for judicial review of Ms. Whalen's suspension from council due to her alleged participation in the "blockade" and concerned an interpretation of FMFN's election regulations.

[32] In my view, this action, the Injunction Action and the Judicial Review action are not inextricably linked in the required sense. Ms. Whalen cannot rely on advances in those actions to significantly advance this action.

d. Settlement discussions:

[33] The parties were cognizant of the fact that they needed to be able to work together to address the needs of their constituents and recognized that their legal disputes were impeding that work. To that end, there was much discussion among them in 2019 and early 2020 aimed at resolving all matters in dispute. As per Mr. Callihoo's evidence, during this time, numerous meetings were held and there were "many, many conversations about settling".

[34] As noted by this court in ***525812 Alberta Ltd. v. Purewal,* 2004 ABQB 938 ("*Purewal*")**, settlement discussions, in and of themselves, do not generally constitute a significant advance in an action. If the discussions are successful, the result is a resolution of the proceedings. If they are unsuccessful, they accomplish nothing and therefore do not constitute an advance, significant or otherwise[3].

[35] With that said, *progress* toward settlement may, in some cases, constitute a significant advance in the action for the purposes of rule 4.33 (2): ***Sutherland v.* Brown, 2018 ABCA 123 at para. 14**. For example, settlement discussions that do not resolve the entirety of the ligation may still have the effect of narrowing the issues in dispute and that narrowing may be viewed as a significant advance: ***Purewal* at para 16**. Ms. Whalen says that is what happened here. I agree.

[36] In my view, at the outset of this litigation, one of the primary points of contention had to do with the payment to the parties of various Christmas bonuses. Ms. Whalen contended that these bonuses, which amounted to hundreds of thousands of dollars in the aggregate, were paid out unlawfully.

[37] The Christmas bonuses were among the issues considered by the parties during their settlement discussions. On December 18, 2019, FMFN Council passed a resolution approving the

[3] *Purewal* at para. 16.

bonuses. That resolution is signed by Ms. Whalen and the Kreutzer defendants and had the effect of resolving this litigation as it pertains to the bonus payments. From my perspective, the fact that this resolution passed while the parties were actively engaged in settlement negotiations, which included the issue of the bonuses, is not coincidental.

[38] On November 21, 2022, Ms. Whalen swore an affidavit in opposition to the relief sought on this motion. To my knowledge, she was not questioned on that affidavit.

[39] At paragraph 11 of her affidavit, Ms. Whalen references a "Meeting of Chief and Council" that took place on April 17, 2020. According to Ms. Whalen, at this meeting, the individual defendants put forward a settlement offer that contained various compromises from the positions taken in their Statement of Defence, including an offer to pay severance to certain of Ms. Whalen's relatives. In her pleadings filed in these proceedings, Ms. Whalen alleges that these relatives were terminated by the individual defendants in retaliation for her pursuing this litigation.

[40] At paragraph 11 (f) of her affidavit, Ms. Whalen says that the offered severance was in fact paid to her relatives, including her husband.

[41] Mr. Callihoo swore an affidavit on January 10, 2023, which is responsive to the evidence in Ms. Whalen's affidavit. He does not challenge the assertion that an offer was made to pay severance to Ms. Whalen's family members, nor does he dispute that severance was in fact paid as proposed. Rather, he simply states that Ms. Whalen's relatives did not advance formal wrongful termination proceedings and that the claims of those who did were dismissed.

[42] In my view, the settlement offer made at the April 17, 2020 meeting, and the subsequent payment of the severance offered, had the effect of resolving the allegations made by Ms. Whalen in her pleadings concerning the purported "revenge firings", thus further narrowing the matters at issue in this litigation.

[43] Further, although the negotiations here did not result in the conclusion of these proceedings, the evidence, including but not limited to the evidence concerning the Christmas bonuses and severance payments, points to the parties' positions becoming more congruent as settlement discussions progressed.

[44] On December 11, 2019, email correspondence was circulated by the defendant Byron Bates to Ms. Whalen and the other individual defendants. Although the specific circumstances giving rise to this email are murky, it seems to be a draft of communication Mr. Bates proposed to circulate to persons beyond those directly involved in this litigation. It appears that Mr. Bates purpose in forwarding the draft was to seek the input of the other parties prior to finalizing the communication.

[45] The preamble to the email references the parties' many meetings and confirms that the parties "have come to an agreement on a settlement of the Samantha Whalen v. Bradley Callihoo et al law suit [sic]". Mr. Bates goes on to write that "Councilor [sic] Whalen will be reimbursed for the money she spent in Samantha Whalen vs. Fort McMurray No. 468 First Nation…" and that "Samantha Whalen v. Bradley Callihoo et al will be dropped".

[46] Ms. Whalen sent email correspondence to Mr. Bates providing the feedback he requested. Ms. Whalen took no exception to the statement that this action was to be discontinued. However, she communicated her understanding that all litigation between the various parties was to come to an end. Additionally, Ms. Whalen took no exception to the statement that she was to be reimbursed for her legal costs. She did propose some revisions to the way in which that portion of the draft communication should be worded.

[47] The facts of this matter bear some similarity to those in ***Paquin v. Whirlpool Canada Ltd.*, 2016 ABQB 147.**

[48] In that case, Applications Judge Farrington found that the exchange of settlement offers over the course of several months constituted a sufficient advancement of the action for the purposes of responding to a rule 4.33 application. In doing so, he concluded:

> [21] …While the settlement offers were global offers, they analysed individual aspects of the claim. They clearly show the parties becoming closer on particular issues as the settlement discussion process unfolded and even agreement on some issues, bearing in mind that none of those agreements were in themselves binding. While there were no formal admissions on specific terms, the differences on many items became insignificant. The parties also made progress in identifying the true issues in dispute, whether formally or otherwise.

[49] Mr. Bates email communication clearly shows the parties becoming closer on various issues. For example, there appears to have been a consensus that, at the very least, this action would be discontinued. Further, the parties appear to have agreed that Ms. Whalen was entitled to be reimbursed for her legal costs. Ms. Whalen's proposed revisions to the portion of the draft communication pertaining to payment of those costs were purely semantic in nature.

[50] In summary, I find that the negotiations engaged in by the parties, while not having the effect of resolving these proceedings in their entirety, did result in a narrowing of the issues in dispute, specifically those related to the bonus payments and the purported retaliatory dismissals.

[51] Further, the December, 2019 email correspondence very clearly demonstrates increasing alignment of the parties' positions as the negotiation process progressed. The evidence in fact establishes agreement on certain issues, including the discontinuance of this action and the reimbursement of Ms. Whalen's legal costs even though, to use Application Judge Farrington's words, neither of those agreement in themselves were binding.

[52] In light of the foregoing, I find the settlement discussions engaged in by the parties significantly advanced this action.

Conclusion:

[53] Given the timing of the settlement negotiations, the Defendants have failed to establish the passage of at least three years without a significant advance in this action. Accordingly, the application is dismissed.

[54] Pursuant to rule 4.33 (3), if the Court refuses an application to dismiss for long delay, it may make whatever procedural order it considers appropriate. Within 30 days from the date of these reasons, the parties are to attempt to reach a consensus as to the terms of a procedural order. If the parties cannot come to terms on all elements of that order, they are to appear before me in morning Chambers for a resolution of any outstanding issues.

[55] If the parties cannot agree as to costs, they are to contact my judicial assistant to arrange for an appearance before me to make submissions on that point.

Heard on the 6th day of December, 2023.
Dated at the City of Fort McMurray, Alberta this 2nd day of July, 2024.

M. R. Park
A.J.C.K.B.A.

Appearances:

Evan C. Duffy, Bailey Wadden & Duffy LLP
for the Plaintiff

Aaron Christoff, Cochrane Saxberg LLP
for the Defendants