

Court of King's Bench of Alberta

Citation: Woodbridge Homes Inc v Randle, 2023 ABKB 731

Date: 20231221
Docket: 0903 10559
Registry: Edmonton

Between:

Woodbridge Homes Inc

Plaintiff (Respondent)

- and -

Leagh Randle, Village of Wabamun, and His Majesty the King in Right of Alberta

Defendants (Applicants)

**Reasons for Decision
of the
Honourable Applications Judge L.A. Smart**

I. Introduction

[1] The Plaintiff, Woodbridge Homes Inc (**Woodbridge**), commenced this Action in 2009. The underlying claim alleges that the Defendants, Leagh Randle (former Chief Administrator of the Village of Wabamun), the Village of Wabamun (**Wabamun**), and His Majesty the King in Right of Alberta (**Alberta**), wrongfully diverted water onto Woodbridge's property.

[2] The Defendants apply to have the Action dismissed for delay under r 4.31 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[3] I grant the Defendants' Application. Woodbridge's Action against Mr. Randle, Wabamun and Alberta is dismissed.

II. Preliminary Evidentiary Issue

[4] Woodbridge raised a preliminary evidentiary issue with the Defendants' affidavits arising from the personal knowledge requirement prescribed by r 13.18(3).

[5] Rule 13.18(3) states:

If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

[6] Mr. Randle and Wabamun rely on the affidavit of Robert McGowan, General Manager of Operation Services for Parkland County. Alberta filed the affidavits of Greg Smith, Regulatory Assurance Manager for Alberta Environment and Parks and Nazila Azizi, a legal assistant for Alberta's Civil Litigation Team. Ms. Azizi's affidavit contains references to Mr. McGowan's affidavit. All three individuals were questioned on their affidavits by Woodbridge.

[7] Mr. Smith's affidavit provides evidence of his inquiries into whether Alberta still employs certain employees and whether there are any individuals currently employed by Alberta who have personal knowledge of the allegations raised by Woodbridge. Mr. Smith's affidavit does not violate r 13.18(3) because nothing in this Application turns on Mr. Smith's affidavit.

[8] Mr. McGowan and Ms. Azizi's affidavits relate primarily to the litigation timeline and the steps taken by the parties. Neither affiant has personal knowledge of the events as they have not been involved in the Action. The contents of their affidavits are based on information and belief and their review of the relevant documentation.

[9] The purpose of r 13.18(3) is to prevent reliance on hearsay affidavits when the very existence of a legal action is at stake: *Gammage v Costco Wholesale Canada Ltd*, 2021 ABQB 514 at para 6 [*Gammage*]. However, some flexibility is required in interpreting this rule: *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at para 33 [*Goodswimmer*]; *Saito v Lester Estate*, 2021 ABCA 179 at para 12. An overly restrictive interpretation would preclude applications in the case of large organizations or when the matter concerns historical claims; *Goodswimmer* at para 33. Our Court of Appeal stated in *Goodswimmer* at para 33:

Thus, litigants are allowed to rely on affidavits in support of final relief where the personal information in the affidavit is obtained from reviewing relevant and reliable documents [...] A key consideration is whether the underlying source of the information is reliable, and would be admissible at trial. The proximity of the affiant to the original events and the documents themselves is an important consideration in the weight that will be given to such affidavits.

[10] An application for delay is procedural in nature. The Court is not concerned with the merits of the claim but rather the pace at which the claim has progressed. Naturally, much of the critical evidence will relate to correspondence between the parties and their attempts at moving the action forward. The dangers associated with hearsay evidence are alleviated when the affidavit is prepared by reviewing the relevant correspondence and documents, and the affiant has appended the same as exhibits for the Court's review. This is precisely what Mr. McGowan and Ms. Azizi have done. The reliability of the underlying source of information can be assessed by examining the exhibits. Furthermore, given the passage of time since the Action first arose, it is not surprising or unreasonable that the Defendants rely on affiants who do not have personal knowledge of the Action.

[11] Woodbridge's objection to the Defendants' affidavits is not a bar to this Application.

III. Timeline of Events

[12] The parties have not submitted an agreed-upon timeline of events. My understanding of the yearly progress of the Action is based on the affidavits of Mr. McGowan, Ms. Azizi, and Woodbridge officer Mr. Gary McPeak.

[13] The events leading up to the Action are straightforward. In July 2007, Woodbridge purchased a property in Wabamun. Woodbridge alleges that in April 2009, it discovered water being wrongfully diverted onto its property from neighbouring lands. Woodbridge contends that Wabamun and Alberta own the neighbouring lands and that the diversion was caused by one or more of the Defendants installing culverts from their land onto Woodbridge's property. Woodbridge asserts that the wrongful diversion constituted nuisance and trespass and was due to the Defendants' negligence. It claims that the water diversion has prevented the property's development, use, and enjoyment.

i. Action Against Mr. Randle and Wabamun (collectively referred to as "Wabamun" below)

2009

[14] The Statement of Claim was filed on July 9. There is no evidence as to when it was served on Wabamun.

2010

[15] Wabamun filed its Statement of Defence on April 27.

[16] On June 28, Woodbridge's counsel ceased to act due to illness.

[17] On or about September 3, Woodbridge retained Heil & Groh Barristers and Solicitors. Woodbridge proposed a standstill agreement until the spring of 2011 due to Mr. McPeak's health issues. There is no evidence that Wabamun agreed to a standstill.

[18] Wabamun served its initial Affidavit of Records on December 8.

2011

[19] On January 11, Shores Jardine LLP informed Wabamun that it had been retained by Woodbridge. Counsel indicated that Woodbridge's Affidavit of Records was being prepared. He noted that he was on vacation until January 31.

[20] On February 18, Woodbridge's counsel notified Wabamun that he was leaving the office for a month and that his colleagues would take over the file. It is unclear whether Wabamun received this message as there was a typographical error in the spelling of Wabamun's counsel's e-mail address.

[21] Wabamun and Shores Jardine lawyers communicated on March 20 about proceeding with settlement discussions. Wabamun agreed to waive the requirement for Woodbridge's Affidavit of Records on the assumption that the parties were going to engage "in some good faith efforts to resolve this matter shortly." Wabamun indicated it would provide 60 days' notice when it required Woodbridge's Affidavit of Records. Wabamun also asked Woodbridge to provide any

documents that may shed light on Woodbridge's alleged causes of action or damages to help inform the settlement discussions.

[22] On May 6 and June 10, Wabamun followed up on the parties' March 20 correspondence and inquired about Woodbridge's interest in pursuing settlement discussions.

[23] Woodbridge changed counsel on June 28 to Durocher Simpson Koehli & Erler LLP because its previous counsel became ill and could not continue to act.

[24] On June 30, the parties agreed to a standstill of the Action until the end of July 2011.

[25] On July 21, Woodbridge's counsel asked Wabamun for additional time to prepare its Affidavit of Records. The parties agreed to a September 9 deadline. Wabamun expressed interest in moving the matter to resolution sooner rather than later.

[26] Woodbridge served its Affidavit of Records on September 29 but did not provide copies of the producible records.

[27] On October 3 and October 27, Wabamun requested copies of Woodbridge's producible records and offered to pay the photocopying costs.

2012

[28] On January 5, Wabamun again requested copies of Woodbridge's producible records and offered to pay the costs of photocopying.

[29] After receiving no response to its requests, Wabamun inquired with Woodbridge on February 1 concerning its intentions with respect to the litigation.

[30] Over five months after providing Woodbridge's Affidavit of Records, Woodbridge's counsel acknowledged Wabamun's letters on March 2. Counsel indicated that he wanted to obtain an expert report before Questioning. He noted that he believed he could procure the report by May 15. Woodbridge's counsel did not respond to Wabamun's request for copies of Woodbridge's producible records.

[31] Woodbridge changed counsel to Kennedy Agrios LLP on August 22.

[32] On September 20, after a meeting with Woodbridge's counsel, Wabamun inquired whether Woodbridge was prepared to discontinue the Action against Mr. Randle. Additionally, Wabamun mentioned the copies of Woodbridge's producible documents and scheduling Questioning.

[33] On October 9, Woodbridge's counsel indicated that she had Woodbridge's records in her office but needed to organize them before providing copies. She asked Wabamun to provide Woodbridge with maps and an expert report addressing drainage issues. Woodbridge's counsel sent Wabamun an opinion letter from Durance Projects. The opinion letter discussed "the effects of development by the Village on the drainage patterns on [Woodbridge's] land, what steps are required to restore the drainage conditions on [Woodbridge's] land and the estimated cost to restore the drainage conditions on [Woodbridge's] land."

[34] Wabamun again requested copies of Woodbridge's producible documents on December 12.

2013

[35] Over 1.25 years after serving its Affidavit of Records, Woodbridge provided copies of its producible documents on January 3.

[36] Mr. Randle was questioned on March 5, 6, and 7.

[37] On June 11 and September 3, Woodbridge requested Wabamun to produce documents referred to by Mr. Randle during his Questioning.

[38] Woodbridge provided copies of additional producible documents from its Affidavit of Records on September 12.

[39] On November 18 and December 9, Woodbridge again asked Wabamun to provide the outstanding records requested on June 11. On December 9, Woodbridge asked Wabamun to provide the availability of Wabamun's counsel and witnesses for Questioning.

2014

[40] In 2014, the only activity in the Action was a change in Woodbridge's counsel. Kennedy Agrios LLP withdrew on July 16, and Kirwin LLP was retained on September 24.

2015

[41] On January 21, Woodbridge applied for a Procedural Order to compel Wabamun to serve a further and better Affidavit of Records which included the documents requested by Woodbridge and to direct the parties to comply with a litigation timeline.

[42] Wabamun proposed a litigation timeline on February 12.

[43] A Consent Procedural Order was granted by Applications Judge Schlosser on March 5, requiring the parties to abide by the following deadlines:

- i. Wabamun to provide a further and better Affidavit of Records by April 30, 2015;
- ii. Questioning of Mr. Randle and Wabamun officer to be completed by June 30, 2015;
- iii. Questioning of Mr. McPeak to be completed by August 31, 2015;
- iv. Responses to Undertakings to be provided by October 15, 2015; and
- v. Questioning on Undertakings to be completed by December 15, 2015.

[44] On April 29, Wabamun served its Supplemental Affidavit of Records and notified Woodbridge that it was copying the documents referred to therein.

[45] Wabamun produced the documents listed in its Supplemental Affidavit of Records on May 13.

[46] On June 17, Woodbridge notified Wabamun that Mr. Randle's Questioning would need to be adjourned. In light of Wabamun's production, Woodbridge wanted time to amend its Statement of Claim and consider further production of related documents. Additionally, Woodbridge requested Wabamun to produce certain relevant documents that had not yet been produced (an engineering report and municipal audit documents).

[47] On June 26, Woodbridge filed applications for a Procedural Order compelling the Questioning of former Village of Wabamun Councillor Joanne McKinnon and the production of

further engineering records by Wabamun. There is no evidence of these applications being heard or a resulting Procedural Order.

[48] Wabamun notified Woodbridge on June 30 that it was looking into the request for additional documents. Wabamun's counsel indicated that he did not know whether the parties could still follow the March 5 Consent Procedural Order timeline, especially considering Woodbridge's desire to amend its Statement of Claim.

[49] On September 15, Wabamun's counsel informed Woodbridge that he was still making inquiries about the additional documentation requested by Woodbridge. Counsel indicated that he needed to view Woodbridge's proposed amendments to its Statement of Claim before agreeing to a new schedule for pre-trial litigation steps.

[50] On October 25 and December 22, Wabamun requested Woodbridge's proposed Amended Statement of Claim.

2016

[51] Woodbridge provided its proposed Amended Statement of Claim on February 5.

[52] On March 14, Woodbridge applied for a Procedural Order setting a revised litigation timeline and permitting Woodbridge to amend its Statement of Claim.

[53] On April 7, Wabamun questioned Mr. McPeak on his Affidavit regarding the proposed amendments to Woodbridge's Statement of Claim.

[54] On April 13, Wabamun inquired about Woodbridge's position on the questions taken under advisement during Mr. McPeak's questioning. Wabamun's counsel indicated he would schedule an application if Mr. McPeak did not want to answer the questions. Additionally, counsel proposed that Woodbridge's application be adjourned to a Special Chambers Application as it would not be realistic to have the matter heard in regular chambers on April 28.

[55] On April 25, Wabamun again requested Woodbridge's position on the questions taken under advisement during Mr. McPeak's April 7 questioning, as well as adjourning the application to a Special Chambers hearing.

[56] Applications Judge Schlosser granted a Procedural Order on May 19 setting out a revised litigation timeline as follows:

- i. Wabamun to provide a further and better Affidavit of Records by June 30, 2016, and make reasonable efforts to locate and disclose documents described in the March 5, 2015 Consent Procedural Order, including the engineering documents;
- ii. Questioning of Mr. Randle and Wabamun officer to commence by July 30, 2016;
- iii. Questioning of Mr. McPeak to commence by August 30, 2016;
- iv. Responses to Undertakings to be completed by November 30, 2016; and
- v. Questioning on Undertakings and any further Questioning arising out of any amendments to the pleadings to take place by April 27, 2017.

[57] On May 25, Wabamun requested Woodbridge's counsel's availability for Questioning and again asked for Woodbridge's position on questions taken under advisement or undertaken during Mr. McPeak's April 7 Questioning. Counsel indicated that if Mr. McPeak did not answer the questions, he would apply to compel the same.

[58] On June 10, Wabamun provided counsel and witnesses' availability for Questioning and requested Woodbridge's responses to the Undertakings from Mr. McPeak's April 7 Questioning.

[59] Wabamun again notified Woodbridge on August 5 that it was awaiting Woodbridge's responses to the Undertakings arising from Mr. McPeak's April 7 Questioning.

[60] Mr. Randle was questioned on August 10.

[61] Wabamun officer Mr. Shawn Patience, was questioned on August 24.

[62] Mr. McPeak's Questioning was held on August 29 and August 30.

[63] On September 13, Wabamun requested Woodbridge's responses to the Undertakings from Mr. McPeak's April 7 Questioning. Counsel indicated that if Mr. McPeak was unwilling or unable to respond, counsel would schedule an application to obtain an Order to compel responses.

[64] On October 19, Woodbridge provided answers to Mr. McPeak's Undertakings given at the April 7 Questioning.

[65] On November 8, Associate Chief Justice Rooke (as he then was) granted an Order allowing some, but not all, of Woodbridge's requested amendments to its Statement of Claim.

[66] On December 7, Woodbridge filed a Civil Notice of Appeal of Associate Chief Justice Rooke's November 8th Order.

2017

[67] The Alberta Court of Appeal dismissed Woodbridge's appeal on May 4, with a minor revision to Associate Chief Justice Rooke's November 8 Order.

[68] Woodbridge filed its Amended Statement of Claim on May 9.

[69] The only other activity in the Action during this year was a change in Woodbridge's counsel. Kiwrin Law LLP withdrew on June 28, and Ackroyd Law LLP was retained on September 25.

2018

[70] On January 3 and March 8, Woodbridge noted that the parties' answers to Undertakings were still outstanding. Counsel expressed the need for a further Procedural Order to set a timeline for outstanding pre-trial steps.

[71] On April 27, almost 1.75 years after Mr. Randle's August 10, 2016 Questioning, Wabamun served responses to Undertakings.

[72] On April 30, almost 1.75 years after Mr. McPeak's August 29-30, 2016 Questioning, Woodbridge served responses to Undertakings.

[73] Woodbridge filed its Amended Amended Statement of Claim on May 23.

[74] On May 28, over 1.75 years after Mr. Patience's August 24, 2016 Questioning, Wabamun served responses to some of the Undertakings. Counsel noted that other Undertakings were outstanding and were being investigated.

[75] On July 19, Wabamun served the balance of the responses to the Undertakings arising from Mr. Patience's August 24, 2016 Questioning.

[76] Due to Mr. McPeak's health, the parties agreed to a six-month standstill on September 6.

2019

[77] Wabamun changed counsel on February 28.

[78] On June 4, Wabamun advised that it agreed with the litigation timeline proposed by Woodbridge. There is no clear evidence of the proposed timeline or whether the parties reached a formal agreement to adhere to the timeline.

[79] On June 6, all parties attended the Woodbridge property for a site visit.

[80] Mr. McPeak was questioned on October 17, including Questioning on his Undertakings.

[81] Mr. Patience was questioned on his Undertakings on October 18.

2020

[82] Wabamun suggested a revised informal litigation plan on January 31.

[83] On February 14, Woodbridge suggested revisions to Wabamun's litigation plan.

[84] On March 16, Wabamun agreed to Woodbridge's revised informal litigation plan but suggested written interrogatories on Mr. Randle's Undertakings.

[85] Woodbridge suggested further changes to the litigation plan on April 21. Counsel indicated that he had been instructed to proceed with an in-person Questioning of Mr. Randle on his Undertakings.

[86] On May 13, Woodbridge served partial answers to the Undertakings arising from Mr. McPeak's October 17, 2019 Questioning.

[87] On May 15, Wabamun proposed that Questioning on Mr. Randle's Undertakings proceed via videoconference.

[88] On June 2, Wabamun provided partial responses to the Undertakings arising from Mr. Patience's October 18, 2019 questioning.

[89] On June 22, Wabamun provided the remainder of the responses to Mr. Patience's October 18, 2019 Undertakings.

[90] On June 23, Wabamun refused Woodbridge's request to conduct an in-person Questioning of Mr. Randle.

[91] Woodbridge's counsel indicated on June 25 that he was seeking instructions to compel in-person Questioning of Mr. Randle. There is no evidence that this Application was ever made.

[92] On July 22, Wabamun requested access to the Woodbridge property for expert assessment.

[93] On July 28, Woodbridge stipulated restrictions on the site visit.

[94] On July 31, Wabamun provided Woodbridge with a draft "purpose agenda" for the site visit and proposed revised restrictions.

[95] Woodbridge's counsel, Ackroyd Law, withdrew from the record on August 10.

[96] On August 24, Mr. McPeak refused to allow Wabamun access to the Woodbridge property for the expert site visit.

[97] Stillman LLP informed Wabamun on October 19 that it had been retained by Woodbridge.

[98] On October 27, Applications Judge Birkett granted an Order to allow site attendance by Wabamun's expert, Nichols Environmental.

[99] Nichols Environmental conducted a site visit on November 5, accompanied by counsel for all parties and Woodbridge's expert.

2021

[100] The only activity in the Action in 2021 was a change in Woodbridge's counsel. Stillman LLP withdrew from the record on October 4.

2022

[101] On January 6, Mr. McGowan's affidavit was filed in support of Wabamun's r 4.31 Application. The Application itself was filed on April 13.

[102] Woodbridge retained Kenny Law on May 12. Prowse Chowne LLP now represents Woodbridge.

ii. Action Against Alberta

2010

[103] On June 7, Woodbridge served its Statement of Claim on Alberta, almost 11 months after filing it with the Court.

[104] Alberta requested particulars of the claim on August 26 and asked Woodbridge to consider a discontinuance against Alberta.

[105] On November 2, Alberta asked Woodbridge to respond to the August 26th correspondence.

2011

[106] On November 9, Alberta requested Woodbridge to respond to the August 26, 2010 correspondence, noting that no Statement of Defence had been required. Alberta again asked Woodbridge for a discontinuance.

[107] No other steps were taken in the Action by either party this year.

2013

[108] On March 4, Alberta asked Woodbridge to respond to the August 26, 2010 correspondence, again noting that no Statement of Defence had been required. Counsel also advised that Mr. Randle's Questioning was scheduled without notice to Alberta and that Alberta would not be able to participate in the Questioning on the scheduled date.

[109] On March 18, Woodbridge's counsel indicated that she would inform Alberta when Mr. McPeak's Questioning was scheduled. Additionally, counsel noted that she would obtain instructions with respect to whether Woodbridge was willing to discontinue the Action against Alberta.

2014

[110] The only activity in the Action this year occurred on January 8 when Alberta asked Woodbridge if it would discontinue the Action against Alberta. Woodbridge's counsel notified Alberta on January 22 that the Action would not be discontinued at this time. Counsel did not provide particulars of the claim against Alberta.

2016

[111] On March 22, Woodbridge served notice of an Application for Procedural Order setting a case litigation timeline, but no timelines were sought in relation to Alberta.

[112] Alberta advised Woodbridge on April 12 that it would take no position in relation to the Application for Procedural Order. Counsel again confirmed that Alberta had not been required to file a Statement of Defence. Counsel requested a reply to the August 26, 2010 correspondence and asked Woodbridge to consider discontinuing its Action against Alberta. Alberta did not receive Application Judge Schlosser's May 19 Order.

[113] Over 6.25 years after being served with the Statement of Claim, Alberta filed and served a Request for Particulars/Advance Information on October 17.

[114] On November 4, Woodbridge acknowledged receipt of the Request, and counsel stated that he expects to send the Reply to Demand for Particulars within 14 days.

2017

[115] On January 16, Alberta asked Woodbridge to respond to the Request for Particulars by January 31, failing which, it would bring an application for an Order compelling a response.

[116] Alberta filed and served an Application to Compel Particulars on February 7.

[117] On February 27, Master Schulz granted a Consent Order requiring Woodbridge to provide the particulars sought in Alberta's Request by March 27.

[118] Woodbridge provided its Reply on March 27.

[119] Neither party took any other steps in the Action this year.

2018

[120] Woodbridge served Alberta with a copy of its Amended Statement of Claim on March 9.

[121] On May 7, Alberta filed its Statement of Defence and Notice of Claim Against Co-Defendants, Mr. Randle and Wabamun.

2019:

[122] The only step taken in the Action in 2019 was Alberta's service of its Affidavit of Records on the parties on September 11.

2020

[123] On January 27, Alberta swore a Supplemental Affidavit of Records and Alberta officer Todd Smith was questioned.

[124] On June 5, Alberta responded to Undertakings arising from Mr. Smith's January 27 Questioning.

[125] The parties communicated on December 17 regarding Woodbridge providing further expert reports.

2021

[126] On June 24, Alberta served the remaining responses to the Undertakings arising from Mr. Smith's January 27, 2020, Questioning.

[127] Until July 23, the parties had ongoing communications regarding Woodbridge providing further expert reports.

2022

[128] On June 6, Alberta obtained an Order from Applications Judge Birkett to file and serve an application for summary dismissal and for Wabamun and Alberta's applications to be heard together.

[129] On June 30, Alberta filed its r 4.31 Application to dismiss the Action. Mr. Smith and Ms. Azizi's affidavits were filed in support of the Application.

[130] On August 25, Alberta employee Robert Huston was questioned.

2023

[131] On February 13, Alberta produced the remainder of the Undertakings arising from Mr. Huston's August 25, 2022, Questioning.

iii. Steps Remaining

[132] Mr. Randle has yet to be questioned on his Undertakings.

[133] Woodbridge's failure to produce an expert report usable at trial is the most significant bar to trial preparedness. Once Woodbridge furnishes a report, rebuttal and surrebuttal reports will likely become necessary.

[134] The parties need to exchange expert reports on damages before trial.

[135] Mandatory Alternative Dispute Resolution, as required by r 4.16, must be completed.

IV. Issues

- i. Has there been a delay?
- ii. Is the delay inordinate?
- iii. Is the delay inexcusable?
- iv. Has Woodbridge rebutted the presumption of significant prejudice?
- v. Should the Court exercise its discretion not to dismiss the Action?

V. Legal Principles

[136] The parties agree on the governing legal principles relevant to this application.

[137] The purpose of the *Alberta Rules of Court* 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": r 1.2(1). It is widely recognized that litigation delay harms the parties involved, the justice system, and the greater community as a whole: *Humphreys v Trebilcock*, 2017 ABCA 116 at para 90

[*Humphreys*]. The importance of mitigating litigation delay can be gleaned from r 1.2(2), which repeatedly encourages timeliness in the carriage of an action:

In particular, these rules are intended to be used

- (a) to identify the real issues in dispute,
- (b) to facilitate the quickest means of resolving a claim at the least expense,
- (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
- (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.

[emphasis added]

[138] The harms associated with litigation delay, namely stress, expense, uncertainty, and loss of confidence in the administration of justice, are the reason why we have limitation periods for commencing claims and rules such as r 4.31 and r 4.33 granting the Court discretion to dismiss actions for delay: *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 at para 14 [*Transamerica*]. The critical objective of timely litigation in r 1.2 must be kept in mind when interpreting and applying r 4.3.

[139] Rule 4.31 states:

4.31(1) 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.

(3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

[140] The rule distinguishes between “delay” (r 4.31(1)(a)) and delay that is “inordinate and inexcusable” (r 4.31(2)). In the case of delay, the Applicant has the onus of establishing that it suffered significant prejudice. In the case of delay that is “inordinate and inexcusable”, r 4.31(2) creates a rebuttable presumption that significant prejudice was suffered “unless the nonmoving party has proven on a balance of probabilities that the moving party has not suffered significant prejudice”: *Humphreys* at para 149. Notably, the rule is permissive, not mandatory; the Court can exercise its discretion not to dismiss an action even if the Defendant has suffered significant prejudice.

[141] No “universal mandatory formula” exists for analyzing a delay application:

Transamerica at paras 15. Over time, various tests have surfaced to assist the Court in its analysis. One example is the oft-cited framework found in *Humphreys* at para 20, 150-156, which asks six questions:

1. Has the Plaintiff failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
2. Is the shortfall or differential of such a magnitude to qualify as inordinate?
3. If the delay is inordinate, has the Plaintiff explained the delay? If so, does it justify the inordinate delay?
4. If the delay is inordinate and inexcusable, has it impaired a sufficiently important interest of the Defendant to justify overriding the Plaintiff's interest in having its action adjudicated by the court? Has the Defendant demonstrated significant prejudice?
5. If the Defendant relies on the presumption of significant prejudice created by r. 4.31(2), has the Plaintiff rebutted the presumption of significant prejudice?
6. With regard to the verb "may" in r. 4.31(1), is there a compelling reason not to dismiss the Plaintiff's action?

[142] Not all these questions are applicable or relevant to every delay application. While general principles have been established, each action will engage an element of judicial discretion in applying the general rules to particular facts: *Transamerica* at para 15. What is clear, however, is that the basic test for dismissal for delay is found in the text of r 4.31 and significant prejudice remains the "ultimate consideration": *Transamerica* at paras 21, 23.

[143] Woodbridge has the primary obligation to move the litigation forward. However, it does not follow that the Defendants have no role to play in the timely resolution of a dispute: *Arbeau v Schulz*, 2019 ABCA 204 at para 37 [*Arbeau*]; *Transamerica* at paras 27, 31. Defence delay is relevant and can be examined at various stages of the r 4.31 analysis: *Transamerica* at para 28. The Defendants may, within limits, be entitled to be recumbent in the face of Woodbridge's delay or inactivity. Still, they cannot fail to comply with their own positive procedural obligations and then rely on the resulting delay in their Application for dismissal: *Transamerica* at paras 30-31. Notably, the *Rules* expressly impose obligations on all parties to advance an action: see r 1.2(2)(2); r 1.2(3)(a); r 4.1; r 4.2.

VI. Analysis

i. Positions of the Parties

[144] Wabamun and Alberta assert that the delay in prosecuting this Action is inordinate and inexcusable. Accordingly, the presumption of significant prejudice is engaged and has not been rebutted by Woodbridge. Both Defendants also argue that there is evidence of actual prejudice. Alberta further contends that the specific prejudice suffered by Wabamun also creates significant prejudice to Alberta's ability to defend itself and seek contribution and indemnity.

[145] Woodbridge argues that neither of the Defendants have suffered prejudice due to the alleged delay. Furthermore, Woodbridge submits that any delay is excusable, and the Defendants participated in or contributed to the delay.

ii. Application of r 4.31

1. *Has there been a delay?*

[146] The first question to be addressed is whether Woodbridge has failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have

attained within the time frame under review. The parties have not offered a comparator timeline, but they are not required to do so. The Court can assess the Action's progress based on the nature of the Action and the court record: *Arbeau* at para 26. This aspect of the *Humphreys* analysis requires reviewing the entire Action, not segments: *Arbeau* at para 27.

[147] The underlying Action is not overly complicated; only three parties are involved, and the subject matter relates to alleged torts resulting from water diversion onto a singular property. Yet, 13 years have lapsed between the filing of the Statement of Claim and this Application. The Action is not yet ready for trial, and it is unlikely to reach that stage for a few years because the parties have yet to complete significant steps, most notably, exchanging expert reports.

[148] According to Woodbridge's own evidence, the key issues in this Action will turn upon documentary evidence and expert reports. A delay of over 13 years to move a tort action predicated upon documentary and expert evidence to trial is unreasonable. I find that the Defendants have established that Woodbridge has failed to advance the Action to the point on the litigation spectrum that a litigant acting reasonably would have attained over this time period.

2. *Is the delay inordinate?*

[149] Every application for delay must be situated in the specific context in which it is brought: *Royal Bank of Canada v Levy*, 2020 ABCA 338 at para 14 [*RBC*]. Inordinate delay is that which is "much in excess of what was reasonable having regard to the nature of the issues in the action the circumstances of the case": *Arbeau* at para 36, citing *Kuziw v Kucheran Estate*, 2000 ABCA 226 at para 31. Both the overall delay and gaps between steps are relevant in assessing whether the delay is inordinate and whether it is excusable: *RBC* at para 14. "Significant prejudice" resulting from delay can arise anytime during the litigation: *RBC* at para 14.

Action against Wabamun

[150] Wabamun attributes 81 months or 6.75 years of delay to Woodbridge. It cites the following periods as extensive gaps during which Woodbridge did not substantively advance the Action:

- April 27, 2010 to December 8, 2010 (~7 months)
- December 8, 2010 to June 30, 2011 (~7 months)
- September 29, 2011 to October 9, 2012 (~12 months)
- March 7, 2013 to September 12, 2013 (~ 6 months)
- September 12, 2013 to January 21, 2015 (~16 months)
- June 26, 2015 to February 5, 2016 (~7 months)
- March 9, 2017 to April 27, 2018 (~14 months)
- June 24, 2020 to November 5, 2020 (~ 4 months)
- November 5, 2020 to June 24, 2021 (~ 8 months)

[151] Additionally, Wabamun points to Woodbridge's repeated changes of counsel and attributes the following nine months of delay to Woodbridge:

- June 28 to September 3, 2010 (2 months);

- July 16 to September 24, 2014 (2 months);
- June 28 to September 25, 2017 (3 months); and
- August 10 to October 19, 2020 (2 months)

[152] Keeping in mind that Woodbridge has the onus of progressing the Action, I consider the following gaps as crucial in determining whether Woodbridge caused inordinate delay:

- a) Woodbridge did not provide copies of its producible records for over 1.25 years after serving its Affidavit of Records.
- b) In 2014, Woodbridge took no steps in the Action aside from changing counsel.
- c) Woodbridge took over seven months to provide Wabamun with its proposed Amended Statement of Claim.
- d) In 2017, Woodbridge did not take any steps in relation to the Action aside from filing its Amended Statement of Claim and changing counsel.
- e) Mr. Randle's Questioning did not occur until almost 3.75 years into the litigation, and Wabamun's officer, Mr. Patience, was not questioned until over seven years into the litigation.
- f) Notwithstanding a standstill agreement that ended in March 2019, no significant action was taken by Woodbridge this year. Woodbridge attended a site visit in June and participated in Questioning in October.
- g) Woodbridge's refusal to grant Wabamun access to the property for expert assessment forced Wabamun to seek a Procedural Order allowing site attendance by Wabamun's expert.
- h) Mr. Randle has yet to be questioned on his Undertakings due to Woodbridge's insistence on an in-person Questioning.
- i) Woodbridge has not taken any steps in the Action against Wabamun since November 5, 2020.
- j) Woodbridge has not provided the Defendants with an expert report usable at trial despite discussing the subject with the Defendants and indicating that key issues will turn on expert evidence.

[153] The overall delay and the gaps in the steps constitute inordinate delay in Woodbridge's Action against Wabamun. The Action is punctured with significant periods of inactivity by Woodbridge, compounded by Woodbridge's failure to communicate with Wabamun promptly on numerous occasions. The most notable aspect of Woodbridge's non-prosecution is the absence of a usable expert report 13 years into the lawsuit.

[154] Woodbridge has not conducted this Action efficiently. The delay is well in excess of what is reasonable, having regard to the issues in the Action and the circumstances of the case.

Action against Alberta

[155] Alberta argues that over 13 years into the litigation, it is still faced with a vague claim. It alleges that the cumulative time in which Woodbridge took no significant steps in advancing its claim against Alberta is 10.25 years.

[156] Alberta divides the progress of the Action into two time periods. The first, between 2009 and 2017, is a period during which Woodbridge took various steps in relation to the claim against Wabamun but did not take any significant steps in the claim against Alberta. During these eight years, Alberta was left out of the correspondence and activity between Woodbridge and Wabamun. This period is marked by Alberta trying to engage Woodbridge to determine the particulars of the claim, to confirm that no defence was required, and to request a discontinuance. Woodbridge mostly ignored the correspondence until March 2017, when Alberta finally brought an Application to compel particulars.

[157] In the second period, between 2017 and 2022, Alberta participated in the litigation but faced ongoing delays by Woodbridge. Woodbridge did not question Alberta's officer until January 2020, almost 1.75 years after Alberta filed its Statement of Defence. In particular, Alberta notes that Woodbridge has yet to provide an expert report that can be relied on during trial, despite advising in 2020 and 2021 that a report was underway. Alberta argues that in a case where expert evidence is allegedly central, providing only one preliminary expert report in 13 years constitutes inordinate delay. I agree.

[158] The difference between the norm and the actual progress of Woodbridge's Action against Alberta is so significant that it is unreasonable. Despite compelling further particulars in 2017, Alberta still defends an undefined claim with cursory allegations concerning a broad time frame. The materials disclosed thus far do not allow Alberta to make consequential determinations regarding the witnesses or expert evidence that will need to be called during trial. The few steps Woodbridge took amount to the absolute bare minimum expected of a litigant in the circumstances of this case. The absence of meaningful activity evinces a severe lack of interest on Woodbridge's part in prosecuting its claim against Alberta, especially because Woodbridge's engagement with Alberta pales compared to its engagement with Wabamun during the same period. The delay is not minor or trivial; it meets the standard of inordinate delay.

3. *Is the delay inexcusable?*

[159] If inordinate delay has been established, the Court must consider whether the "non moving property [has] provided an explanation for the delay that justified its dilatory prosecution of its action": *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 at para 76 [*Jacobs*]. If no credible excuse is given for the inordinate delay, the Court may infer that the inordinate delay is inexcusable: *Arbeau* at para 36.

[160] Excusable delay falls into several categories, the most common being defence or third-party delay, defence acquiescence, or health issues: *Fode v Paragon Gaming EC Company*, 2020 ABQB 266 at para 20 [*Fode*]. Applications Judge Schlosser noted the following about excusable delay:

...For the most part, an acceptable excuse for delay is caused by events outside of the control of the plaintiff. But that is not the end of the story. We are also obliged to examine the plaintiff's response to an unexpected, or unanticipated delaying event. In the case of a loss of counsel, for example, we have to examine the efforts to find a replacement. In the case of defence delay, we are also obliged to examine whether the plaintiff's response was appropriate, or whether they should perhaps have taken steps to compel the defendant to do the thing that provided the obstacle.

Fode at para 21.

[161] Woodbridge argues that any purported delay is excusable because the Defendants participated in and contributed to the delay. It also argues that each instance of change in counsel should excuse the resulting passage of time lapsed in the Action because Woodbridge was forced to expend that time to retain and instruct new counsel and for counsel to become informed and prepared to carry on the Action.

[162] Illness encountered by counsel is a reasonable excuse for delay: *Ivkovic v Tingle Merrett LLP*, 2018 ABQB 308 at para 26. I accept that Woodbridge's first and second counsel had to withdraw from the record due to illness, which may have caused unavoidable delay. However, Woodbridge has not provided evidence of its efforts to find replacement counsel or its process for retaining and instructing new counsel. While I cannot assess the reasonableness of the gaps caused by Woodbridge's frequent changes in counsel, the repeated pattern exacerbated the delay in this litigation.

Action against Wabamun

[163] Woodbridge alleges that Wabamun protracted the litigation in the following instances:

- a) Wabamun failed to provide a Statement of Defence for nine months after the Statement of Claim was filed. Neither party has adduced evidence of when the Statement of Claim was served on Wabamun.
- b) Wabamun refused or neglected to provide certain documents referred to by Mr. Randle in his March 2013 Questioning, resulting in Woodbridge being forced to seek a Procedural Order directing the production of the records. Only some of the requested documents were produced in May 2015.
- c) Wabamun did not try to question Woodbridge's representative between September 2013 and January 2015.
- d) Wabamun did not answer Mr. Randle and Mr. Patience's Undertakings for almost 1.75 to two years after their respective Questionings.

[164] A defendant does not have a duty to hurry up the plaintiff, however, there is a "significant difference between a defendant 'doing nothing' in the face of inactivity by the plaintiff, and the defendant failing to discharge its procedural obligations.": *Transamerica* at para 27; *Owners: Condominium Plan Calgary 8110301 v KJM Developments Ltd*, 1991 ABCA 120 at para 3.

[165] As I have no evidence regarding when Wabamun was served with the Statement of Claim, I cannot attribute those nine months of delay to either party.

[166] Notwithstanding the withdrawal of Woodbridge's first and second counsel and a brief standstill in 2011, Woodbridge has no excuse for the delay in the initial years of the lawsuit. The responsibility shifted to Wabamun in 2013 once Woodbridge requested the production of documents referred to by Mr. Randle during his Questioning. Both parties dwindled away most of 2013 and all of 2014. Wabamun did not produce the requested records or schedule Questioning of Woodbridge's officer, but Woodbridge also took no steps to compel production until January 2015.

[167] Most of 2015 and 2016 were spent dealing with Woodbridge's application to amend its Statement of Claim. The Court of Appeal resolved this matter in May 2017, but Woodbridge took no steps to move the claim forward this year (aside from filing its Amended Statement of Claim). After the August 2016 Questioning of Mr. Randle, Mr. Patience, and Mr. McPeak, both

parties had outstanding Undertakings. While I appreciate that the parties were occupied with the amendment application, this does not excuse either party from failing to provide Undertaking responses until 2018, approximately 1.75 years after the Questioning took place.

[168] From 2018 onwards, the parties mainly played catch-up on outstanding items, primarily regarding responses to Undertakings and further Questioning on Undertakings. Notwithstanding a six-month standstill in 2018 due to Mr. McPeak's health, much of the activity in the litigation in the last six years has done little to advance the matter toward resolution.

[169] I find that Wabamun failed to discharge its procedural obligations and contributed to the delay when it failed to produce the documents referred to by Mr. Randle during his March 2013 Questioning until May 2015, after Woodbridge applied for a Procedural Order. Wabamun also contributed to the delay by failing to question Mr. McPeak until August 2016. I do not attribute the delay in responding to Undertakings to Wabamun because Woodbridge was similarly delayed in providing responses to Mr. McPeak's Undertakings. Keeping in mind that there is no duty on Wabamun to force Woodbridge to prosecute the claim, I view any other inactivity by Wabamun as a response to Woodbridge's lack of activity.

[170] I consider it significant that Woodbridge has yet to produce an expert report. By the end of 2018, Woodbridge had amended its Statement of Claim, and most of the parties' Undertaking responses had been produced. At that stage, it was within Woodbridge's control to engage an expert and prepare a report to move the matter to trial. Woodbridge has not pointed to any fault on the Defendants' part precluding the preparation of an expert report.

[171] Barring the above examples of Wabamun's contribution to the delay, Woodbridge has not explained the inordinate delay in this litigation. Accordingly, the delay is inexcusable.

Action against Alberta

[172] Woodbridge asserts that Alberta's failure to file a Statement of Defence for almost eight years after being served with the Statement of Claim precludes Alberta from being critical of Woodbridge's delay. Woodbridge argues that Alberta was apprised in 2010 of the nature of the claim and had sufficient information to make inquiries and file a Statement of Defence.

[173] In response, Alberta relies on its various attempts to make inquiries of Woodbridge and obtain enough particulars to identify its defence. Alberta alleges that it was not in a position to file any substantive defence beyond a bare denial, which would be contrary to its obligations under r 1.2 and r 4.1 to identify the real issues in dispute.

[174] I agree with Alberta that a defendant is not expected to chase the plaintiff or beg the plaintiff to pursue its claim. I further agree with Alberta that it would not have taken much for Woodbridge to respond to Alberta's several communications and confirm the particulars of the claim. However, r 3.31(3)(a) requires defendants to file a Statement of Defence within 20 days of being served with the Statement of Claim. Even foregoing this strict requirement, it was unreasonable for Alberta to wait almost 6.75 years to bring an Application to Compel Particulars. The evidence indicates that Woodbridge barely took any steps in relation to Alberta between 2009 and 2018. Alberta nonetheless needed to fulfill its procedural obligation to file a Statement of Defence within a reasonable time frame. Waiting 6.75 years to bring an Application to Compel Particulars was not reasonable in this case; Alberta cannot rely on this period of delay against Woodbridge.

[175] After serving its Statement of Defence in 2018, Alberta actively participated in the Action. From that point onwards, Woodbridge has no justification for the delay in advancing the litigation. It is clear that Woodbridge did not engage Alberta to the same degree that it engaged Wabamun. As I have already noted, Woodbridge's failure to furnish an expert report at this stage in the litigation continues to hinder the parties' trial readiness significantly. Despite Alberta's failure to file a Statement of Defence until 2018, I find that Woodbridge's subsequent delay in prosecuting the Action against Alberta is inexcusable.

4. *Has Woodbridge rebutted the presumption of significant prejudice?*

[176] Significant prejudice is a precondition to dismissal for delay under r 4.31: **RBC** at para 13. The defendant bears the initial burden of proving prejudice. If the defendant can establish "inordinate and inexcusable delay", significant prejudice is presumed, although the plaintiff can rebut this presumption: **Transamerica** at para 43.

[177] In the context of a r 4.31 application, prejudice means "injury or damage suffered by the moving party as a result of the nonmoving party's dilatory prosecution of its action": **Humphreys** at para 125. Significant prejudice refers to prejudice that is "more than minor or trivial" and "important enough to justify the attachment of a serious consequence adverse to the interests of the nonmoving party": **Humphreys** at para 128. On a r 4.31 application, prejudice includes litigation and non-litigation prejudice: **Humphreys** at para 28, 126. Litigation prejudice refers to damage to a party's ability to defend itself at trial, such as witness unavailability due to death or disappearance, impairment to memory due to the passage of time, and loss of evidence: **Humphreys** at para 130. Non-litigation prejudice includes stress, reputational damage, and the inability to earn a livelihood and meet financial obligations: **Humphreys** at para 31, 134. Rule 4.31 makes it clear that the significant prejudice must be attributed to the delay to justify dismissal of the claim: **Tiger Calcium Services Inc v Sazwan**, 2019 ABQB 665 at para 48. Significant prejudice is a type "that cannot be cured with costs, a provision about interest, or a procedural order.": **Casman Building Ltd v Weir-Jones**, 2021 ABQB 761 at para 34.

[178] I have found the delay in this case to be inordinate and inexcusable. This gives rise to a presumption of significant prejudice unless Woodbridge proves, on a balance of probabilities, that the Defendants have not suffered significant prejudice.

[179] Wabamun and Alberta argue that they have suffered actual significant prejudice. Both Defendants indicate that Woodbridge's delay has caused litigation prejudice and resulted in the potential loss of memories, witnesses, and documents. They note that most of the staff and personnel involved in or with personal knowledge of the key events are no longer employed with the Village or Alberta.

[180] Wabamun argues that locating documents or information is even more challenging given that the Village of Wabamun no longer exists independently as it was dissolved in 2020 and is now a hamlet within Parkland County. Wabamun also submits that it has suffered non-litigation prejudice. Mr. Randle retired from his employment with the former Village of Wabamun in 2011. He has been forced to re-engage with this litigation over the last decade, which has caused him considerable stress, anxiety, and frustration, particularly considering that a trial may not be heard for several years.

[181] Alberta asserts that the specific prejudice suffered by Wabamun also creates significant prejudice for Alberta for two reasons. First, the claim against Wabamun is intricately connected

with the claim against Alberta. Alberta will need to rely on evidence from Wabamun to confirm what alleged damage resulted from Wabamun's alleged actions as opposed to Alberta's actions. Second, Alberta has filed a notice of claim for contribution or indemnity against Wabamun. If the Action is dismissed against Wabamun and not Alberta, Alberta cannot effectively seek contribution and indemnity.

[182] Woodbridge submits it has "led unchallenged evidence" that none of the Defendants have suffered prejudice because of any alleged delay. Woodbridge argues that fading memories will not have any material impact on the litigation because of the primary role of documentary and expert evidence. According to Woodbridge, this case does not turn on eyewitness evidence. Woodbridge argues that Alberta has not provided any evidence for its claim of significant prejudice. Regarding Wabamun, Woodbridge asserts that Wabamun has adduced no evidence of records or documents being lost nor identified any documents no longer being in its possession that could prejudice its case. Woodbridge adds that Wabamun has not provided any evidence to suggest that *viva voce* evidence is necessary to defend itself or that, if necessary, it is not available.

[183] I am not satisfied on a balance of probabilities that the Defendants have suffered actual significant prejudice, however, the presumption of significant prejudice still arises. I find that Woodbridge has not, on a balance of probabilities, rebutted the presumption of significant prejudice. Woodbridge has repeatedly contended that it has led "unchallenged evidence" that the Defendants have not suffered prejudice. However, none of Woodbridge's tendered materials support this argument. Woodbridge relies heavily on its submission that the key issues in this Action will turn upon particular questions of fact and documentary and expert evidence. Yet, Woodbridge has failed to furnish an expert report that will assist the Defendants in understanding the nature and strength of Woodbridge's claim, assessing what evidence needs to be adduced, which experts need to be retained, and which witnesses are necessary.

[184] I cannot agree with Woodbridge's assessment that this claim, with the underlying events allegedly beginning to occur over 14 years ago, can be resolved by reference to documentary evidence only. This case will turn on disputed facts, the meaning of documents, and the credibility and conclusions of experts who must form their conclusions by relying on facts. Furthermore, memories will inevitably affect evidence. Woodbridge has not rebutted the presumption of significant prejudice.

5. *Should the Court exercise its discretion to not dismiss the Action?*

[185] Rule 4.31 authorizes a court to dismiss an action for delay, but it does not compel a court to do so: *Jacobs* at para 78. Woodbridge requests that this Application be dismissed and a procedural order be imposed to complete all steps needed to advance this Action to trial. As Alberta notes, there have been several Procedural Orders and litigation plans to date that have not brought the Action any closer to trial. I am not satisfied that imposing a Procedural Order will avoid further delay. There is no compelling reason to not dismiss Woodbridge's Action.

VII. Conclusion

[186] The right of access to the courts is not absolute in nature: *Humphreys* at para 100. Plaintiffs who fail to proceed with appropriate diligence and expedition do so at the risk of losing the right to prosecute their action. This is one such case.

[187] The pace at which Woodbridge has prosecuted this Action amounts to a delay. The delay is inordinate and inexcusable. Per r 4.31(2), the presumption of significant prejudice arises. Woodbridge has not rebutted the presumption, and there is no compelling reason for the Court to exercise its discretion not to dismiss the Action. Woodbridge's Action against Mr. Randle, Wabamun, and Alberta is hereby dismissed.

[188] Each party is entitled to their costs according to the appropriate column in Schedule C of the *Alberta Rules of Court* unless other relevant considerations have not been brought to my attention.

Heard on the 30th day of May, 2023.

Dated at the City of Edmonton, Alberta this 21st day of December, 2023.

L.A. Smart
A.J.C.K.B.A.

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