

# Court of King's Bench of Alberta

**Citation: Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc, 2023  
ABKB 531**

**Date:** 20230920  
**Docket:** 1503 06113  
**Registry:** Edmonton

Between:

**Baron Real Estate Investments Ltd**

Plaintiff

- and -

**Tri-Arrow Industrial Recovery Inc, Stericycle, ULC, Stericycle Inc, 474588 Alberta Ltd  
operating as Riteway Vacuum Service and Alberta Production Machining Ltd**

Defendants

- and -

**Nichols Environmental (Canada) Ltd**

Third Party

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**Memorandum of Decision  
of the  
Honourable Applications Judge Brian W. Summers**

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## Introduction

[1] All of the Defendants except Alberta Production Machining Ltd apply for an order dismissing the action against them for long delay under r 4.33.<sup>1</sup>

[2] The sole issue for the Court's consideration is whether the Supplemental Affidavit of Records served by the Plaintiff upon the Defendants is a significant advance of the action.

## Facts

[3] In late 2011 the Plaintiff agreed to lease land (the "Lands") to the Defendant Tri-Arrow Industrial Recovery Inc ("Tri-Arrow"). The lease was for a term of five years commencing February 1, 2012 (the "Lease"). Tri-Arrow was in the business of hazardous and non-hazardous waste disposal and treatment. Among other things, the Lease required Tri-Arrow to remediate the Lands for any damage brought about by its operations.

[4] In February 2013 Tri-Arrow was bought by the Defendant Stericycle, ULC. The interests of Tri-Arrow and the two Stericycle Defendants are essentially the same and these Defendants will be collectively called "the Stericycle Defendants".

[5] The Stericycle Defendants say that they were continually harassed by the Plaintiff with respect to the operation of their business on the Lands including receiving numerous notices of default from the Plaintiff alleging non-compliance with environmental laws.

[6] On April 24, 2014 the Plaintiff terminated the Lease, re-entered the Lands, locked out the Stericycle Defendants and seized vehicles. The Stericycle Defendants applied for and obtained a court order that provided that the Plaintiff's security agreement under the Lease was terminated and the seizure was released.

## Litigation Background

[7] The Plaintiff commenced this action in April of 2015 and amended its Statement of Claim in August of 2015 and further amended the Amended Statement of Claim in April of 2016. The first pleading served upon the Defendants was the Amended Amended Statement of Claim in April of 2016. In addition to naming the Stericycle Defendants, the Plaintiff also named as a Defendant 474588 Alberta Ltd operating as Riteway Vacuum Service ("Riteway") claiming damages with respect to a spill of waste on the Lands involving a Riteway truck.

[8] A Statement of Defense was filed by Riteway in May of 2016 and by the Stericycle Defendants in June of 2016.

[9] Affidavits of Records were provided by the Plaintiff in December 2016, by Riteway in January 2017 and by the Stericycle Defendants on March 23, 2018.

[10] Nothing further occurred in this action until the parties scheduled questioning for September of 2020. However, on August 6, 2020 counsel for the Plaintiff wrote to opposing counsel to advise that questioning would have to be postponed as "We are in the process of

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<sup>1</sup> The Defendant Alberta Production Machining Ltd and the Third Party Defendant Nichols Environmental (Canada) Ltd took no part in this application.

visiting a significant batch of document production and require additional time to prepare our client's Supplemental Affidavit of Records".

[11] The Plaintiff served its Supplemental Affidavit of Records on March 22, 2021, including over 7000 new records ("Supplemental Records") and requested further questioning dates from counsel for the Defendants. Counsel for the Stericycle Defendants replied on April 1, 2021 stating: "We confirm that we are in the process of uploading and reviewing the new production materials and that we will advise in due course."

[12] The next communication between the parties came from the Stericycle Defendants and Riteway serving these applications for dismissal for long delay under r 4.33 which were filed with the Court on August 3, 2021.

[13] Opposing affidavits were filed and cross examination on affidavits conducted with respect to these applications.

### Issue

[14] Counsel for the Stericycle Defendants poses the single issue before the Court as follows:

Did service of the Supplemental Affidavit of Records of the Plaintiff on March 22, 2021 significantly advance the within action such that the 3 year 'drop dead' clock was reset, or did it merely produce records which ought to have been produced at an earlier date, or were functionally insignificant to the issues between the parties?

### Discussion

#### Burden of Proof

[15] On a preliminary point the parties disagree as to who has the burden of proof on these applications. Counsel for the Stericycle Defendants states in his Brief: "Under the Rule, the onus of proving a significant advance in an action lies on the Plaintiff". Counsel for Riteway provided the case of *Taschuk v Taschuk*, 2022 ABKB 786 in support of that proposition. In that case Justice Loparco did not specifically deal with the burden of proof but set out the following as guiding principles on this type of application (which I set out as being a very useful summary for these applications before me):

#### Rule 4.33's Guiding Principles

[10] Rule 4.33(2) provides as follows:

4.33(2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless

(a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or

(b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

[11] Many of the guiding principles for the application of Rule 4.33 are succinctly summarized in *AE v Alberta (Director of Child Youth and Family Enhancement)*, 2016 ABQB 591 at paras 11 – 18. The relevant principles are:

- A functional approach to Rule 4.33 “inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the particular lawsuit. The focus is on substance and effect, not form” (*Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at para 19, [emphasis added by Justice Loparco]) (*Ursa CA*)
- A step that “significantly advances” an action must move the parties closer to resolution (*Weaver v Cherniawsky*, 2016 ABCA 152 at para 26)
- The outcomes or consequences of the litigants’ actions are relevant to whether there has been a significant advance in the action (*Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 21) (*Ro-Dar*)
- A step required by the Rules is not necessarily a significant step (*Ro-Dar* at para 14)
- Prejudice is not considered under Rule 4.33. The court has no discretion to allow the action to continue if the requirements of the rule are met (*Ursa CA* at para 10)
- The plaintiff bears the ultimate responsibility for prosecuting its claim (*XS Technologies Inc v Veritas DGC Land Ltd*, 2016 ABCA 165 at para 7).

[12] In *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 (*Jacobs*), the Court restated the indicators of a “significant advance”:

- At paragraph 86, the Court asked: “[h]as anything that happened... increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties’ positions and either settle or adjudicate the action? Are the parties at the end of the applicable period much closer to resolution than they were at the start date?”
- At paragraphs 88-96, the Court reviewed hypotheticals and asked if the facts, law, and positions of the parties relative to each other are the same as they were before the supposed advance.

[13] In *Rahmani v 959630 Alberta Ltd*, 2021 ABCA 110 at paras 16-17, the Court specified how to assess if there has been a three-year period with no significant advance in the action: you count forward from the date of the “last uncontroversial significant advance” to the date on which the Rule 4.33

application was filed, and then you look for a three-year period in that window with no significant advance in the action.

[16] Conversely, counsel for the Plaintiff provided the case of *Nahal v Gottlieb*, 2019 ABQB 650, where Master Prowse, as he then was, specifically stated (at paragraph 11) that the applicant defendants had the burden of proving there was no significant advance in the action during the three-year period prior to the filing date of the application. However, that statement was made without further discussion as it did not seem to be a point with which the defendants took issue.

[17] In my view, unless a statute or rule states otherwise, the burden of proof on an application lies with the applicant, to prove its application on a balance of probabilities. In this case the Stericycle Defendants and Riteway have the burden of showing that there was no significant advance of the action in the period three years and 75 days<sup>2</sup> prior to the filing of their applications. Using language from precedent decisions, the Applicants have the burden of showing that upon employing a functional approach, the activity in the lawsuit in the period of three years and 75 days prior to the application filed August 3, 2021 did not move the lawsuit forward in an essential way considering its nature, value, importance, quality, genuineness and timing; and that it did not bring the parties closer to resolution. In a sense, the Applicants are required to prove a negative.

[18] In this case the Plaintiff has acknowledged that there is only one thing in that period of time that may constitute a significant advance of the action: that is, the Plaintiff serving its Supplemental Affidavit of Records upon the Defendants.

#### **The Supplemental Records--Documents 7095-14462**

[19] In questioning the Plaintiff's witness Aaron Slawsky on his affidavit, counsel for the Stericycle Defendants divided the Supplemental Records into six categories, which I find quite useful. Those categories and the description of the documents in each, are as follows (from the questioning transcript):

#### **Documents 7095-7328**

[20] Documents 7095-7328 are documents that Mr. Slawsky received from the former Tri-Arrow manager, Darrin Starchuk, who was terminated by the Stericycle Defendants in June of 2013. Mr. Slawsky testified that he received them on many USB sticks, hard copies and conveyed by email over an extended period of time from late 2016 or early 2017 to late 2019. This particular category of documents are apparently primarily emails between or among Mr. Starchuk and others at Tri-Arrow.

#### **Documents 7329-7330**

[21] These two documents appear to be transcriptions of voicemail messages involving Mr. Starchuk and Tri-Arrow.

#### **Documents 7331-7678**

[22] This category of documents contains photos taken between 2011 and 2013 and were provided by Mr. Starchuk to Mr. Slawsky (for the most part, as far as Mr. Slawsky can recall).

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<sup>2</sup> The extra 75 days is pursuant to Ministerial Order 27/2020 and there is no dispute between the parties with respect to its application in this case.

### **Documents 7679-10623**

[23] Documents 7679-10623 are Tri-Arrow business records such as packing slips, bills of lading and documents of that nature. By answer to undertaking, the Plaintiff advised that these documents were received by their lawyers McLennan Ross LLP, from the Plaintiff, in February and March of 2021.

### **Documents 10626-14461**

[24] This fifth batch of documents consist of photographs that the Plaintiff's representatives took, primarily when it terminated the Lease and retook possession of the Lands.

### **Document 14462**

[25] This document is an aerial photograph of the Lands taken by the City of Edmonton.

[26] It was Mr. Slawsky's testimony that documents 7095-10625 ("Starchuk Supplied Records") were all provided by Mr. Starchuk between July 2016 and December of 2019, but he could not be more specific than that. He also said that there were several batches provided from time to time; that they were not organized in any particular fashion; many non-relevant documents were mixed in with relevant documents; and that reviewing them and sorting them was necessary.

### **The Plaintiff's Characterization of the Supplemental Records**

[27] The Plaintiff states that the Starchuk Supplied Records "...include communications between employees, incident reports, spill reports, photographs, inventories and tracking spreadsheets for waste, including hazardous waste, and hazardous recyclables, and documents relating to the generation, consignment, transportation and receipt of same". The Plaintiff further states that Supplementary Records (including the Starchuk Supplied Records) are "highly relevant and material to the issues in this litigation" as to whether the Stericycle Defendants breached the Lease and whether they handled all waste materials as required by law (*ie* the *Environmental Protection and Enhancement Act* ("*EPEA*") and its regulations).

[28] In its Brief the Plaintiff provides several examples as to how the Supplementary Records help show how the Stericycle Defendants breached *EPEA* regulations and attempted to conceal it.

[29] In oral argument, counsel for the Plaintiff noted that if the Plaintiff provides expert evidence of a particular contamination of the Lands, such as arsenic, or hydrochloric acid, it would be incumbent upon the Plaintiff to provide evidence that the Defendants handled such substances and that such handling was not done as required under the Lease.

### **The Defendants' Characterization of the Supplemental Records**

[30] The characterization of the Supplemental Records by the Applicants is that these records are "insignificant factually" as they "consist mostly of transaction records that show nothing more than that Tri-Arrow was in the business of waste handling..." (which the Applicants note is not in dispute). They say that "what is factually in dispute between the parties is whether the premises were contaminated by Tri-Arrow before the landlord terminated the lease on April 24, 2014, if so what is the extent of the contamination, and what damages flow from the cost of remediation." They say that the Supplemental Records do not address these issues.

[31] The Applicants also go on to say that other litigation involving the Plaintiff places the dispute between the parties in proper context. They say that the Plaintiff has done nothing to assess or remediate alleged contamination of the Lands and this is reflected in that other litigation.

[32] In that other litigation the Plaintiff unsuccessfully appealed to the Court of Queen’s Bench and to the Court of Appeal a decision of the Subdivision and Development Appeal Board regarding a property tax assessment where it was noted that the Plaintiff had done nothing to remediate the Lands and due to value of the Lands it was unlikely the Plaintiff would do so. The Applicants say that: “These previous findings help in framing the ‘functional analysis’ required in an application of this nature and determining whether or not the supplemental documents ‘significantly advance’ the action in the context of the dispute between the parties”.

[33] It is also important to note that the Applicants point out that whether the Plaintiff had grounds to terminate the Lease is irrelevant since the Stericycle Defendants accepted that termination as a repudiation of the contract.

### **The Court’s Characterization of the Supplemental Records**

[34] The Supplemental Records do not help determine the nature or extent of contamination of the Lands, or the cost of remediation. That will be testimony for an expert to provide.

[35] But I do not accept that the other litigation involving the Plaintiff with respect to the Lands should be used to frame the functional analysis. Rather, I think that it is the pleadings in this action that frames the functional analysis to be employed by the Court. Specific pleadings that I am considering in employing the functional analysis include the following:

#### From the Plaintiff

13. The Lease expressly or impliedly provided that any of the permitted uses of the Leased Premises could be only undertaken if all required regulatory approvals were in place and regulatory requirements satisfied...

...

15. Additionally, the Lease expressly or impliedly provided the following...

(d) The tenant is liable for and shall indemnify the Landlord for any losses suffered by reason of a breach, violation or non-performance by the tenant of any covenant, term or provision of the Lease....

...

(f) The tenant shall conduct all activities, including but not limited to the handling, storage, disposal and use of any Hazardous Materials in strict compliance with all “**Environmental Laws**”...

16. Tri-Arrow represented to Baron... that it was submitting an application to government regulators...to become an approved hazardous waste management facility....

...

20. Tri-Arrow, and subsequently Stericycle, repeatedly represented throughout the material times that the non-regulated waste they were handling could not cause contamination of the Lands as the waste was “non-hazardous”.... The Plaintiff relied on Tri-Arrow’s and Stericycle’s representations but still required Tri-Arrow and Stericycle to complete and maintain the Environmental Protection Measures...

21. Tri-Arrow, and subsequently Stericycle, represented to the Landlord and AESRD throughout the material times that they did not store any hazardous wastes or hazardous recyclables...

...

43. The Stericycle Defendants breached the Lease, Forbearance Agreement and Environmental Law by intentionally or recklessly conducting hazardous and unauthorized activities, without the required environmental Protection Measures, specified procedures and government approvals... and the Plaintiff suffered losses as a result.

...

60. The Stericycle Defendants fraudulently, deliberately, recklessly, or in the alternative, negligently made the representations described herein. The Stericycle Defendants were in a special relationship with the Plaintiff where the Stericycle Defendants owed the Plaintiff a duty of care. The Stericycle Defendants’ representations described herein were untrue, inaccurate or misleading.... In breach of their representations, the Stericycle Defendants, and each of them fraudulently, deliberately recklessly or, in the alternative, negligently:

(a) conducted operations in contravention of Environmental Laws...;

(b) Implemented unapproved operations without Environmental and Wear Protection Measures;

...

(d) Contaminated the Lands;

(e) Failed to report spills;

(f) stored hazardous wastes or hazardous recyclables...on the Leased Premises...;

...

(h) Misled the Plaintiff...;

61. Further, the Stericycle Defendants intentionally concealed the true nature of their activities from the Landlord and AESRD....

...

72. As a result of the Stericycle Defendants’ operations, breaches of the Lease and Forbearance Agreement, negligence, nuisance, trespass, breach of the duty of honest performance, fraudulent misrepresentation or alternatively negligent misrepresentation...the Plaintiff has suffered losses and damages...



From the Stericycle Defendants

2. In answer to the whole of the Amended Amended Statement of Claim, these Defendants state that at all times they have conducted their business operations in the utmost good faith and in a forthright and businesslike manner. These Defendants specifically deny all allegations in the Amended Amended Statement of Claim of fraud, misrepresentation, concealment, deceit, recklessness and other alleged misconduct, and will seek costs on a solicitor client basis....

...

9. At all material times Tri-Arrow endeavoured to handle all hazardous materials in accordance with Environmental Laws.... At all material times hereto, Tri-Arrow did handle all waste materials as required by law.

...

11. Tri-Arrow denies that it breached any covenant of the Lease....

[36] Considering the nature of the Supplemental Records and the issues identified in the pleadings, I am unable to agree with the Applicants that the Supplemental Records are factually insignificant to those issues. The Supplemental Records do have a potentially significant bearing on what the Plaintiff alleges and what the Stericycle Defendants and Riteway deny.

[37] Counsel for the Plaintiff argued that the only way it could prove its allegations at trial was to explore what Tri-Arrow's business records show Tri-Arrow doing on the Lands as "Tri-Arrow produced only 8 documents that relate to shipping of materials, documentation of the quantity of hazardous waste on the leased premises, or the documentation of what was stored on trailers located on leased premises...". Furthermore, the Plaintiff noted that Supplemental Records regarding the conduct of business were of the same nature as the 8 documents produced by Tri-Arrow so it could not be said that documents of this nature are irrelevant.

**Could the Supplemental Records have been produced earlier?**

[38] The Applicants assert that the Supplemental Records could have been produced earlier (with the Plaintiff's original Affidavit of Records) and consequently the production of these Supplemental Records does not significantly advance the action. They state that there are several prior decisions of Alberta Courts that hold that a supplemental affidavit of records that produces records that could have been produced earlier does not materially advance an action. Those cases include *Altex International Heat Exchanger Ltd v Foster Wheeler Limited*, 2018 ABQB 620; *Déjà vu Holdings Ltd v Securex Master Limited Partnership*, 2018 ABQB 597; *XS Technologies Inc v Veritas DGC Land Ltd*, 2016 ABQA 165; and *Berlinic v Peace Hills General Insurance Company*, 2016 ABQB 104.

[39] It was Mr. Slawsky's testimony that he received the Starchuk Supplied Records (7095-10625), incrementally, between July 2016 and December 2019. Despite best efforts in reviewing his books and records, he could not be more definitive as to when the Starchuk Supplied Records were received.

[40] The Plaintiff's original Affidavit of Records was served on December 6, 2016. Therefore, some of the Starchuk Supplied Records were in the Plaintiff's possession before service of the original Affidavit of Records.

[41] The Applicants argue that in a situation such as this, it is incumbent upon the party producing supplemental records, which are apparently not new records and which were apparently in existence at the time of the original affidavit of records to provide an adequate explanation for the late production; and that the Plaintiff has failed to do so. They say that Mr. Slawsky testifying that the Starchuk Supplied Records were received over a two and one-half year period does not suffice. The Applicants further argue that the Plaintiff has an evidentiary burden in this respect since the Plaintiff has the information and the Applicants do not.

[42] I have carefully considered the nature, extent and potential importance of the Supplemental Records. I have also carefully considered the evidence given by Mr. Slawsky on the timing of providing the Supplemental Records and the reason for the delay. I have also carefully considered the precedent cases referenced by counsel for the Applicants.

[43] In my view, the situation here is vastly different from any of the precedent cases cited by the Applicants. Here, the Plaintiff's Supplemental Affidavit of Records was not just a matter of housekeeping. It was not done at the eleventh hour as a pretext just to keep the action alive. New counsel for the Plaintiff, identified the document issue just before questioning which was scheduled to proceed. The Plaintiff provided the Supplemental Affidavit of Records two and one-half months before the r 4.33 deadline. It contained thousands of documents, approximately half of which were apparently Starchuk Supplied Records.

[44] I find that provision of the Supplemental Affidavit of Records was a genuine step taken by the Plaintiff to advance the action. Adopting a functional analysis, I find that the nature, value, quality and importance of production of the Supplemental Records is such that there was a significant advance in the lawsuit. I find that Mr. Slawsky's explanation on the timing in production of the Supplemental Records, and in particular the Starchuk Supplied Records to be adequate.

### **Conclusion**

[45] The Applicants' application to dismiss this action against them pursuant to r 4.33 is dismissed.

[46] If the parties cannot agree on costs, they may be spoken to in morning chambers.

Heard on the 25<sup>th</sup> day of August, 2023.

**Dated** at the City of Edmonton, Alberta this 20<sup>th</sup> day of September, 2023.

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**Brian W. Summers**  
**A.J.C.K.B.A.**

**Appearances:**

Louis M. H. Belzil, KC, Q.Arb  
Louis M. H. Professional Corporation  
for the Stericycle Defendants

Peter D. Gibson  
Field LLP  
for the Defendant Riteway

Mathieu J. LaFleche  
Bennett Jones LLP  
for the Plaintiff