Court of Appeal for Saskatchewan **Citation: *Mosiuk v Black*, 2025 SKCA 39**
Docket: CACV4298 **Date: 2025-04-09**

Between:

Eddy Larry Mosiuk and Patricia Skrapek

Appellants
(Plaintiffs)

And

Brent Alan Black

Respondent
(Defendant)

Before:	Tholl, McCreary and Drennan JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Court
On appeal from:	2023 SKKB 251, Yorkton
Appeal heard:	April 9, 2025
Counsel:	Jason M. Clayards for the Appellants Adam T. Ailsby for the Respondent

The Court

I. INTRODUCTION

[1] The appellants appeal from a November 27, 2023 decision of Layh J. of the Court of King's Bench, sitting in Chambers (*Mosiuk v Black*, 2023 SKKB 251 [*Chambers Decision*]), in which he struck the appellants' claim under Rule 4-44(a) of *The King's Bench Rules* for delay of prosecution.

[2] The appeal was heard by this Court on April 9, 2025, and the appeal was dismissed after the hearing, with a promise of short reasons to follow. These are our reasons.

II. BACKGROUND

[3] Briefly, the relevant facts are that in the spring of 2016, the appellants hired the respondent to custom seed a portion of farmland. The crops allegedly did not grow as expected, so the appellants sued the respondent. The statement of claim was issued on June 5, 2018. After requesting particulars several times, and finally receiving an order for particulars on September 9, 2020, the respondent served his statement of defence on October 8, 2020.

[4] After that point, the appellants did very little to advance the claim. As a result, on February 24, 2022, the respondent brought his first application to dismiss the claim for delay.

[5] This first application to dismiss for delay was decided on April 4, 2022, by Clackson J. He determined that the delay since the close of pleadings was both inordinate and inexcusable, but after reviewing the factors in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48, 319 DLR (4th) 155 [*ICC*], he determined it was in the interests of justice for the matter to proceed, noting: "Mr. Mosiuk now says he is ready, indeed anxious, to move forward". As such, the application was dismissed.

[6] Thereafter, a date was set for mediation on September 28, 2022, but it was unsuccessful. In October of 2022, the respondent requested document production and provided a formal offer to settle. Respondent's legal counsel again asked for disclosure on December 15, 2022, and January 16, 2023. Counsel for the appellants replied that he expected to be able to respond soon, but he did

not respond at all. Approximately nine months later, the respondent served the second notice of application to strike for delay.

[7] The second application to strike was scheduled to be heard in Chambers on October 31, 2023. Counsel for the respondent attended, but neither counsel for the appellants nor the appellants attended. The court telephoned counsel for the appellants but was unable to reach him. In these circumstances, the chambers judge adjourned the application to November 14, 2023. In the meantime, there was no communication between counsel for the parties.

[8] On November 13, 2023, counsel for the appellants filed a civil chambers appearance memo, and the application was argued on November 14, 2023, with counsel for both parties present.

[9] On November 27, 2023, Layh J. allowed the application and dismissed the appellants' claim. He determined that the delay was inordinate and inexcusable, and that it was no longer in the interests of justice to allow the claim to proceed.

III. ISSUES AND STANDARD OF REVIEW

[10] The appellants argue that Layh J. erred in several ways when he dismissed their Claim. We have reframed these alleged errors as follows:

(a) By proceeding with the hearing even though the appellants had not filed evidence, thereby constituting a breach of procedural fairness;

(b) By misapprehending, ignoring and/or overruling facts found by the first judge in the first application to strike because of delay of prosecution; and

(c) By improperly assessing whether the interest of justice supported striking the Claim.

[11] A judge's decision to dismiss a claim for inordinate and inexcusable delay is discretionary and is reviewable by this Court on the standards set out in *Arkell v Komodowski*, 2023 SKCA 79 at para 44, 37 CCLI (6th) 33, and the cases cited therein.

IV. ANALYSIS

[12] Turning to the first alleged error, the appellants assert that the hearing was procedurally unfair because it proceeded even though the appellants had not filed evidence.

[13] When an appellate court considers allegations of breach of procedural fairness, the standard of review is correctness: *Canada (Citizen and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Feng v Saskatchewan (Economy)*, 2020 SKCA 6 at para 43, 70 Admin LR (6th) 237; *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality)*, 2016 SKCA 20 at paras 21–26, 395 DLR (4th) 24; and *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9 at paras 63–64, 437 DLR (4th) 681.

[14] We do not agree that there was a breach of procedural fairness in the conduct of the November 14, 2023 hearing. The appellants had an opportunity to file evidence in advance of the hearing but did not. The appellants did file a Chambers appearance memo, but in that memo they did not seek to late file evidence, took no issue with the state of the evidentiary record, and did not request an adjournment. While the appellants argue that Layh J. should have considered that the Chambers memo provided some information respecting why the delay continued, and therefore should have entered the fray and suggested that the appellants file evidence, or that an adjournment be granted, the Chambers memo did not suggest that it was seeking any procedural remedy in respect of the hearing of the second application to dismiss for delay. It follows that there was no reason for Layh J., on his own motion, to entertain an adjournment of the matter, or to encourage the appellants to file additional affidavits that addressed the scant information contained in the Chambers appearance memo. As such, this ground of appeal must fail.

[15] The second ground of appeal alleges that Layh J. misapprehended, ignored and/or overruled facts found by Clackson J. in the first application to dismiss for delay. The appellants say that this ground of appeal concerns a misapprehension of the evidence and is therefore reviewable on a correctness standard. The respondents contend that what the appellants really take issue with is Layh J.'s application of the law to the facts found by Clackson J., which is only reviewable for palpable and overriding error.

[16] We have concluded that it is unnecessary for us to decide what standard of review should be applied, because even if the correctness standard is applied, we are not persuaded that Layh J. erred in the manner the appellants allege.

[17] Justice Layh acknowledged and referenced Clackson J.'s findings in relation to the first two questions of the *ICC* test – whether the delay was (1) inordinate and (2) inexcusable. He accepted Clackson J.'s finding that the delay was inordinate up to the time of his decision. Justice Layh then added that little had been done *since that time* (a year and a half) such that the delay remained inordinate. We do not see a misapprehension of the record here.

[18] Further, Layh J. acknowledged that Clackson J. found the delay was inexcusable up to the point in time Clackson J. heard the application. He called this a "clear finding" (*Chambers Decision* at para 12). Justice Layh then outlined the events since the Clackson J. decision and added that the appellants showed "remarkable disregard" for the delay to date, and that their conduct continued to be inexcusable (*Chambers Decision* at para 13). He found that since the first delay application, the appellants had disregarded their own intention provided in court, had continued their past conduct by not participating in the proceedings, and had done extraordinarily little to respond between the adjournment of the second delay application and the hearing of that application. On these bases, he concluded that the appellants' delay continued to be inexcusable.

[19] Justice Layh's reasons demonstrate that he did not err when considered the facts found by Clackson J. respecting inordinate or inexcusable delay. He followed those findings and then made independent determinations that the delay continued to be inordinate and inexcusable based on his view of what had occurred since Clackson J.'s decision, as he was entitled to do.

[20] While the appellants argue that Layh J. was not entitled to consider the whole period of delay when considering whether it was inordinate or inexcusable, and rather was only entitled to consider the delay that had occurred since the first delay application, we are not persuaded by this argument. The consideration of delay in a proceeding must be a cumulative consideration. The clock was not re-set simply by successfully defending the first application to dismiss for delay, or by taking a single step in the proceeding and then, once again, doing nothing. Making a determination as to the character of the delay requires a consideration of the entire period of the

litigation. Justice Layh appropriately reviewed the entirety of the proceedings in his consideration of the character of the delay. It follows that this ground of appeal must also be dismissed.

[21] On the final ground of appeal, whether Layh J. erred in his assessment of whether the interests of justice supported allowing the claim to continue, despite the inordinate and inexcusable delay, we see no basis to intervene.

[22] A determination of whether the interests of justice supported allowing the claim to continue required Layh J. to apply the law, mainly as set out in *ICC*, to the facts. His conclusion based on his application of the law to the facts is reviewable only for palpable and overriding error.

[23] We are not persuaded that Layh J.'s decision on this point constituted a "collateral attack" on Clackson J.'s findings or his conclusion under the third part of the *ICC* test. On the contrary, when Layh J. differed in his conclusions on the eight factors set out in *ICC*, his reasons were drawn from events that had transpired since the first application was decided, in combination with a consideration of the conduct of the litigation as a whole. Again, the dismissal of the first application did not wipe the slate clean. Justice Layh was entitled to consider the whole of the proceedings.

[24] For example, while Clackson J. determined that there was no prejudice to the respondent caused by the delay, Layh J. concluded that the passage of time made evidence-gathering more difficult and therefore prejudiced the respondent. The appellants argue that Layh J. erred in this conclusion on two bases. The first is that he made a palpable and overriding error when he failed to recognize that three agrologist reports had been exchanged between the parties. The appellants say that the fact of the existence of the agrologist reports mean that Layh J. could not find that the passage of time made it difficult to gather the necessary evidence to defend the claim. The second is that Layh J. erred by finding that prejudice was caused by the length of the time over which the proceedings had advanced, not whether the delay itself was prejudicial.

[25] We are not persuaded that Layh J. erred in either of these two ways.

[26] First, the mere fact of the existence of agrologists reports, without more, does not demonstrate that the respondent could not be prejudiced in his gathering of evidence by the delay. Justice Layh was entitled to consider the whole of the record before him in order to determine what steps of the proceeding had been completed as against the total period of delay. The record

included the pleadings and the fact that document disclosure had not been accomplished, but it did not include any evidence of the content of any agrologist report. Justice Layh calculated the total period of delay as being over seven years, finding that the fact that five years had passed without document disclosure since the claim had been filed made "evidence-gathering of historical data and records difficult and challenging" (at para 19). In our view, the fact that agrologists had been retained and had produced several reports does not, in and of itself, negate a finding that a delay in disclosing documents hindered evidence-gathering and, consequently, prejudiced the respondent's defence.

[27] Second, the contention that prejudice must be caused purely by "delay" and cannot be based on the impact of the length of the proceedings is a false distinction. The time that passes from the date of service and filing of a claim without progress being made in a proceeding *is* delay and is *a* factor that a judge is entitled to consider in weighing whether prejudice exists due to the time that has passed in the litigation without progress.

[28] Similarly, while Clackson J. found that there was no evidence of the impact of delay on the respondent's reputation, Layh J. determined that the ongoing proceedings, including the fact that the proceedings had continued without progress since the first application to dismiss, had, by the fact of their existence, a negative impact on the respondent's reputation in the rural communities that might hire him. This is a different determination than that made by Clackson J., but it also considers that the litigation had not progressed in the period since Clackson J. had assessed it. Again, Layh J. did not err by considering the fact of the ongoing and unresolved litigation in coming to this assessment. Although the appellants contend that he erred in making this finding in the absence of evidence, we do not agree that this was an error. Justice Layh was entitled to consider the existence of the proceedings and the fact that they were ongoing without progress as one factor which influenced whether the respondent was prejudiced by the delay. This is a finding that can be made by inference, without direct evidence.

[29] In sum, Layh J. correctly noted that the eight factors set out in *ICC* are not exhaustive and that the weight they are given depends on the circumstances of each case. He expressly stated that his conclusion that it was not in the interests of justice to allow the claim to proceed was based on "evidence respecting another 18 months of delay and further occasion to reconsider whether the

interests of justice lie in the plaintiffs' favour" (at para 18). In other words, his view was different than that of Clackson J.'s given the evidence of additional delay, taking into consideration the conduct of the litigation as a whole. We are not persuaded that Layh J. erred in this approach, or in his subsequent conclusions.

[30] Finally, even if Layh J.'s divergent findings respecting prejudice in evidence-gathering and to the respondent's reputation were made in error, it is our view that they do not constitute overriding errors. Given that the factors to be considered when determining the interest of justice are not exhaustive, Layh J.'s two findings on these points are not so significant that they become material to the foundation of his decision respecting the interests of justice. On the contrary, they are but two factors in a larger matrix of considerations which played into his assessment. It is clear that Layh J. placed primary emphasis on his finding that while the appellants had represented to Clackson J. that they were "ready, indeed anxious, to move forward", they did nothing of substance to advance the litigation thereafter. The appellants' failure to honour their own stated intention following the first application weighed heavily in favour of his determination that it was not in the interests of justice to allow the Claim to continue. Once again, we see no error in that determination.

[31] Thus, the final ground of appeal also fails.

V. CONCLUSION

[32] The appeal is therefore dismissed, with costs to the respondent for the appeal and the application to perfect, calculated in the usual manner.