
Court of Appeal for Saskatchewan
Docket: CACV4282

Citation: *Enviro-Gun Ltd. v Sherwood*
(*Rural Municipality*), 2025 SKCA 47

Date: 2025-05-07

Between:

Enviro-Gun Ltd., Special Recycling Control Corporation, 101053945 Saskatchewan Ltd., Clint A. Kimery and Roderick Robbins

Appellants
(Plaintiffs/Respondents)

And

Rural Municipality of Sherwood No. 159

Respondent
(Defendant/Applicant)

Before: Jackson, McCreary and Kilback JJ.A.

Disposition: Appeal dismissed (orally)

Written reasons by: The Honourable Justice Keith D. Kilback
In concurrence: The Honourable Justice Georgina R. Jackson
The Honourable Justice Meghan R. McCreary

On appeal from: 2023 SKKB 224, Regina
Appeal heard: May 7, 2025

Counsel: Robert I.L. MacKay for the Appellants
Michael P. Morris, K.C. and Adryan J. Toth for the Respondent

Kilback J.A.

I. INTRODUCTION

[1] The appellants commenced an action against the Rural Municipality of Sherwood No. 159 on September 2, 2010. Aside from filing a notice of intention to proceed in 2013, they took no substantive steps to move the action forward for nearly 12 years. On October 26, 2023, a judge of the Court of King's Bench sitting in Chambers dismissed the action for delay under Rule 4-44 of *The King's Bench Rules (Enviro-Gun Ltd. v Rural Municipality of Sherwood No. 159, 2023 SKKB 224 [Decision])*.

[2] The appellants appeal from the *Decision*. They acknowledge the Chambers judge correctly identified the three-part test for determining whether an action should be dismissed for delay set out in *International Capital Corporation v Robinson Twigg & Ketilson, 2010 SKCA 48, 319 DLR (4th) 155 [ICC]*. They also concede the delay was inordinate and inexcusable, such that the first two elements of that test are met. However, the appellants contend the judge misapplied the third element of the *ICC* test and erred in determining that it was not in the interests of justice to allow the case to proceed to trial notwithstanding the inordinate and inexcusable delay.

[3] The appeal was dismissed after the hearing, with reasons to follow. These are those reasons.

II. BACKGROUND

[4] The appellants own or have an interest in property located in the RM. In the underlying action, they allege the RM made several property tax assessment errors that resulted in an unjust increase in the amount they were required to pay.

[5] In October of 2010, approximately one month after the appellants commenced the action, the RM applied to strike the statement of claim on the basis that the Court did not have jurisdiction over certain municipal assessment and taxation issues and that it disclosed no reasonable cause of action. The application was allowed in part in relation to the jurisdictional objection, but the substance of the claim was permitted to proceed (*Sherwood No. 159 (Rural Municipality) v Enviro-Gun Ltd., 2010 SKQB 455, 367 Sask R 133*). In that decision, Zarzeczny J. described the statement

of claim as “prolix and poorly pled” and urged counsel to consider amendments to clarify the pleading (at para 26). No attempt to amend the statement of claim was made, and the appellants’ counsel withdrew on December 18, 2010. The RM filed a statement of defence on January 4, 2011.

[6] On July 13, 2013, approximately two and a half years later, Clint Kimery filed a notice of intention to proceed on behalf of the appellants and began communicating with counsel for the RM about scheduling the mediation session that was then compulsory under *The Queen’s Bench Act, 1998*, Q.-1.01 (Repealed). In a letter to Mr. Kimery dated August 29, 2013, counsel for the RM took the position that the corporate appellants were required under Rule 2-34 of *The Queen’s Bench Rules* (now *The King’s Bench Rules*) to be represented by a lawyer before the mediation session could proceed, and invited Mr. Kimery to advise when counsel had been retained.

[7] The appellants did not retain counsel, the mediation session was never scheduled, and the appellants took no further steps to move the action forward. On November 10, 2022, approximately nine years and four months later, the RM applied to dismiss the claim for delay. The *Decision* is the result of that application.

III. ISSUES AND STANDARD OF REVIEW

[8] The overarching issue raised in this appeal is whether the judge erred in concluding it was not in the interests of justice to allow the case to proceed to trial notwithstanding the inordinate and inexcusable delay. In reaching this conclusion, the appellants argue the judge erred in the following ways:

- (a) giving excessive weight to the potential prejudice the RM would experience if the claim was allowed to proceed;
- (b) failing to give appropriate weight to the context in which the delay arose;
- (c) failing to appreciate that the delay was caused in part by the withdrawal of the appellants’ counsel and their inability to obtain new representation; and
- (d) failing to take equitable considerations into account.

[9] A decision to dismiss an action for delay is discretionary, reviewable on the standards set out in *Arkell v Komodowski*, 2023 SKCA 79 at para 44, 37 CCLI (6th) 33, and the cases cited

therein. The determination of whether it is in the interests of justice to allow the claim to proceed required the judge to apply the law, as mainly set out in *ICC*, to the facts. His conclusion based on the application of the law to the facts is reviewable for palpable and overriding error only. See *Mosiuk v Black*, 2025 SKCA 39 at para 22.

IV. ANALYSIS

[10] The appellants' first argument is that the judge erred by giving excessive weight to the potential prejudice the RM would experience if the claim was allowed to proceed. The judge noted that none of the RM staff or council members who dealt with the appellants at the material time are still with the RM, and held that this fact, along with the duration of the delay, weighed against permitting the action to proceed.

[11] I see no error in this conclusion. The judge recognized that the non-exhaustive list of considerations identified in *ICC* are to be considered contextually, with a view to the “on-the-ground realities of litigation” and with the “objective of achieving a just result” (*Decision* at para 36). After observing that prejudice is not a requirement for an order to dismiss a claim, he found the existence of prejudice was one of “many factors that weigh against permitting this claim to proceed” (at para 41). There is no basis to conclude that this factor was given excessive or undue weight in the judge's analysis.

[12] The second argument is that the judge failed to give appropriate weight to the context in which the delay arose, and in particular, the absence of any pressure by the RM to move the case forward. The appellants say the judge failed to recognize that the RM was content to let the action sit in abeyance, and that this should have weighed in favour of allowing the claim to proceed.

[13] The judge found that the context in which the delay occurred weighed against allowing the claim to proceed. He described the “radio silence” from the appellants and noted that the parties were not, for example, involved in protracted settlement discussions or negotiations during the period when no steps were taken to move the claim forward (*Decision* at para 45). Citing *ICC* at paragraph 49 and other authorities, the judge stated that while it was always open to the RM to apply to compel the appellants to move the action forward, the ultimate responsibility for advancing the action lay with the appellants.

[14] Again, I see no error in this conclusion. There was no evidence that the RM failed to fulfil its litigation responsibilities by not taking next steps or responding to the appellants when required to do, or otherwise signalling it was content to let the action remain dormant. See: *ICC* at para 26; *Huard v The Winning Combination Inc.*, 2022 SKCA 130 at paras 72–73; *Taylor v Moose Jaw Downtown and Soccer/Field House Facilities Inc. (Mosaic Place)*, 2021 SKCA 123 at para 26.

[15] The third argument is that the judge failed to appreciate that the delay was caused in part by the withdrawal of the appellants’ counsel and their inability to obtain new representation. The appellants say they were abandoned by counsel and became unrepresented through no fault of their own, and that this should have weighed in favour of allowing the claim to proceed.

[16] The judge considered and rejected this argument. He noted that while the withdrawal of the appellants’ counsel and their difficulties in finding new representation may have explained a shorter delay, it did not adequately explain a delay of over nine years since the notice of intention to proceed was filed and Mr. Kimery became aware of the requirement under the Rules for the corporate appellants to be represented.

[17] The fourth argument is that the judge erred by failing to consider the public interest in allowing the claim to proceed. I understand the use of the term “public interest” to be a simple misstatement, as the appellants do not argue that this is a case of genuine public importance where the public interest must be considered as those concepts are discussed in *ICC* at paragraph 45(h). Instead, they contend the judge failed to appreciate equitable considerations that they say should have weighed in favour of allowing the claim to proceed.

[18] In particular, the appellants argue that the RM’s previous counsel misled them by suggesting that the mandatory mediation session could not proceed until the corporate appellants were represented by counsel. They submit the judge failed to appreciate this, and that it should have weighed in favour of allowing the claim to proceed because it explained the delay.

[19] I am not persuaded by this argument. The judge considered the evidence of the appellants’ attempts to arrange the mediation session and the RM’s reliance on Rule 2-34. He did not accept the appellants’ effort to place blame on the RM’s lawyer for not arranging mediation, finding that it was the appellants’ responsibility to do so and observing that it was always open to them to apply for an order setting the mediation date. In these circumstances, there is no basis to conclude that

the judge did not consider or that he failed to appreciate this argument when determining whether the claim should be permitted to proceed notwithstanding the inordinate and inexcusable delay.

[20] Finally, the appellants also invite this Court to revise the *ICC* test for determining whether an action should be dismissed for delay. They argue it should be modified to reflect the idea that courts should first look to use other tools for addressing litigation delay that are available under *The King's Bench Rules*, such as case management, before dismissing an action. This argument is grounded in a broader perspective about the need for courts to foster access to justice that was discussed by the Supreme Court of Canada in *Hryniak v Maudlin*, 2014 SCC 7, [2014] 1 SCR 87.

[21] In my respectful view, it would not be appropriate to undertake an analysis of this issue because it was not raised in the notice of appeal or addressed in the parties' written submissions. For the purposes of this appeal, it is sufficient to state that the access to justice concerns identified by the appellants in this case are appropriately considered under the third element of the *ICC* test as presently articulated.

V. CONCLUSION

[22] For all of these reasons, I see no palpable and overriding error in the judge's application of the law to the facts and his determination that it was not in the interests of justice to allow the case to proceed. I would dismiss the appeal with costs to the RM calculated in accordance with Rule 54(1) of *The Court of Appeal Rules*.

"Kilback J.A."

Kilback J.A.

I concur.

"Jackson J.A."

Jackson J.A.

I concur.

"McCreary J.A."

McCreary J.A.