Citation: Hradowy v Magellan Aerospace Limited, 2025 MBCA 9
Date: 20250130
Docket: AI24-30-10080

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***K. R. Kirby***
	)	*for the Appellant*
KEVIN HRADOWY	)	
	)	***T. J. Kochanski*** *and*
(Plaintiff) Appellant	)	***A. L. Moar***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
MAGELLAN AEROSPACE LIMITED	)	***December 13, 2024***
	)	
(Defendant) Respondent	)	*Judgment delivered:*
	)	***January 30, 2025***

SIMONSEN JA

[1] The plaintiff appeals an order of the motion judge allowing the defendant's appeal from an order of the senior associate judge and dismissing the plaintiff's claim under the long delay rule (see MB, *King's Bench Rules*, Man Reg 553/88, r 24.02(1) [the *Rule*]). In his statement of claim, the plaintiff sought damages arising from the alleged constructive dismissal of his employment with the defendant.

[2] The *Rule* stipulates that an action must be dismissed for delay if there has not been a significant advance in the action for three or more years, provided that none of the prescribed exceptions apply.

[3] The senior associate judge concluded that the provision of answers to undertakings by both the plaintiff and the defendant constituted significant advances within the relevant three-year period, whereas the motion judge found that there was no significant advance during that timeframe.

Background

[4] By the time the defendant's motion for dismissal for delay was filed on November 24, 2022, more than three years had passed since examinations for discovery of both parties were conducted in November 2019 (with the last day being November 22, 2019). Answers to undertakings of the plaintiff and the defendant were provided in February 2022 and March 2022 respectively. When the motion for dismissal for delay was filed, the plaintiff had not taken the next step of setting a pre-trial conference, although it is undisputed that he had begun preparation of a pre-trial conference brief.

[5] After receipt of the defendant's answers to undertakings, the plaintiff sought reconsideration by the Workers Compensation Board (the WCB) of its denial of his claim for benefits for an alleged workplace injury arising from the constructive dismissal of his employment. During the period between the provision of the defendant's answers to undertakings and the filing of the motion for dismissal for delay, both parties participated in the plaintiff's request for reconsideration by the WCB. On September 23, 2022, the WCB denied the request.

Analysis and Decision

[6] In making his determination as to whether there had been a significant advance, the motion judge correctly identified the applicable

functional test. That test provides for a broad-based inquiry into whether a step moves the litigation forward in a meaningful way considering "various factors, including the nature, value and quality, genuineness and timing of the step at issue" (*WRE Development Ltd v Lafarge Canada Inc*, 2022 MBCA 11 at para 19 [*WRE*]; see also *Buhr v Buhr*, 2021 MBCA 63 at para 71). However, I am of the view that, when applying the functional test, the motion judge made two reversible errors.

[7] First, with respect to the plaintiff's answers to undertakings, the motion judge erred by failing to consider a relevant and significant factor, namely, the conduct of the defendant (see *ibid* at para 82). Specifically, his reasons make no mention of a letter from counsel for the defendant to counsel for the plaintiff dated March 11, 2022 (the letter), providing the defendant's answers to undertakings and stating, "[w]e are in receipt of your client's Answers to Undertakings and will advise if we require any additional information"—and then the defendant moving for dismissal for delay more than eight months later without requesting further information.

[8] Second, the motion judge erred by failing to give any consideration to whether production of the defendant's answers to undertakings constituted a significant advance. Upon receipt of those answers, counsel for the plaintiff raised no concern about their quality or completeness. At the appeal hearing, he indicated that there was no issue with the defendant's answers and that they were satisfactory. The motion judge erred by not addressing whether the provision of the defendant's answers was a significant advance, that is, whether the answers moved the lawsuit forward in a meaningful way in the context of the action—with the focus being on their substance and their effect on the litigation rather than their form (see *WRE* at paras 16-27).

[9] The motion judge's failure to consider these relevant factors, in any way, in my view, gives rise to readily extricable legal errors that justify appellate intervention (see *Housen v Nikolaisen*, 2002 SCC 33 at para 36).

[10] I also note that, in his reasons, the motion judge stated that he had conducted an "appeal *de novo*" from the decision of the senior associate judge. He otherwise made no reference to her analysis or conclusions.

[11] While a judge hearing an appeal from an associate judge does not apply an appellate standard of review, the exercise of their independent discretion requires careful consideration of the decision of an associate judge (see *Re Parkinson Estate*, 2024 MBCA 52 [*Parkinson*]). As stated in *Parkinson* at para 73:

> Proper respect for the decision of an associate judge, who is a judicial officer who has significant expertise and experience with the machinery of civil litigation (including estate litigation), tasks the judge hearing the appeal to carefully consider the associate judge's reasons in light of the record, both on appeal and before the associate judge, the significance of any error(s) committed by the associate judge and any other relevant matter.
>
> [citation omitted]

[12] Although the motion judge's legal errors require his order to be set aside, I need not conduct a detailed fresh analysis because the senior associate judge provided thorough and thoughtful reasons that I would endorse and adopt. She considered both the letter and whether the defendant's answers to undertakings constituted a significant advance. As I have said, she determined that the provision of both sets of answers to undertakings constituted significant advances and concluded that the action should, therefore, not be

dismissed. I have not been persuaded that I should come to a different conclusion than the senior associate judge.

[13] For the foregoing reasons, I would allow the appeal, set aside the motion judge's order and dismiss the defendant's motion for dismissal for delay. The plaintiff shall have his costs in both this Court and the Court below.

_____ JA

I agree: _____ JA

I agree: _____ JA