Court of King's Bench of Alberta

Citation: Griffith v BP Canada Energy Group ULC, 2025 ABKB 539

Date: 20250918
Docket: 1803 20775; 2103 08156
Registry: Edmonton

2025 ABKB 539 (CanLII)

Docket: 1803 20775

Between:

Martin Griffith

Plaintiff

- and -

BP Canada Energy Group ULC

Defendant

Docket: 2103 08156

And Between:

Martin Griffith

Plaintiff

- and -

BP Canada Energy Group ULC

Defendant

Memorandum of Decision
of the
Honourable Applications Judge B.W. Summers

Introduction

[1] The Plaintiff employee commenced two actions against the Defendant employer: an action commenced in 2018 for wrongful dismissal ("Employment Action") and an action commenced in 2021 for defamation ("Defamation Action").

[2] In this Special Chambers hearing the Defendant applies for dismissal of the Employment Action for long delay under r 4.33 ("Long Delay Application") and for dismissal of the Defamation Action on the basis that this Court should not take jurisdiction ("Jurisdiction Application").

[3] In a prior application the Court ordered that the Long Delay Application and the Jurisdiction Application be heard consecutively and the Long Delay Application be heard first.

Overview

[4] The Plaintiff commenced employment with the Defendant in February of 2012 as a well test supervisor. In or about June of that year the Plaintiff accepted a three-year assignment with the Defendant in Angola. The contract provided that the Plaintiff remained as an employee of the Defendant; their contract was governed by the laws of Canada; and the parties agreed to submit to the exclusive jurisdiction of the Canadian Courts.

[5] Towards the end of that assignment a number of allegations were made against the Plaintiff that he had submitted expense claims for which he was not entitled. The Defendant terminated the Plaintiff's employment effective December 31, 2015.

Long Delay Application

[6] The Plaintiff commenced the Employment Action on October 19, 2018.

[7] The Defendant defended and filed a Counterclaim. The Plaintiff filed a Statement of Defence to Counterclaim.

[8] The last step taken in the Employment Action which the parties agree constituted a significant advance of that action was that the Defendant sent its producible documents to the Plaintiff's counsel on July 13, 2019.

[9] The Defendant filed the Long Delay Application on December 13, 2022.

[10] The parties agree that the so-called "drop dead date" with respect to this application is September 25, 2022. This date is three years and 75 days after July 13, 2019. The addition of 75 days is pursuant to Ministerial Order 27/2020.

[11] The issue for determination with respect to the Long Delay Application is whether there was a significant advance of the Employment Action between July 13, 2019 and September 25, 2022.

[12] The Plaintiff contends that there were two significant advances in this period of time: firstly, settlement correspondence between the parties between November of 2020 and December of 2022; and secondly, the filing of the Statement of Claim in the Defamation Action on June 30, 2021.

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[13] In this application the burden is on the Defendant to establish on a balance of probabilities that neither of these were significant advances of the Employment Action.

Settlement Correspondence

[14] Counsel for the Defendant sent a without prejudice letter to counsel for the Plaintiff on November 25, 2020. After setting out the Defendant's position on the legal issues in the Employment Action and its intent to vigorously defend the claim, the Defendant extended an offer of settlement in the amount of $25,000.00. The Plaintiff did not respond to this letter.

[15] Counsel for the Defendant sent a second without prejudice letter to counsel for the Plaintiff on March 28, 2022. This letter set out why the Defamation Action (which had been commenced on June 30, 2021) should not have been commenced in Alberta and why it would be struck by the Court for want of jurisdiction. Again, the Defendant offered to settle by payment of $25,000.00 to the Plaintiff. This time, the offer was made to settle both actions (the two letters from the Defendant shall be referred to as "the Defendant's Offer Letters").

[16] Counsel for the Plaintiff sent a without prejudice letter to counsel for the Defendant on December 7, 2022 ("Plaintiff's Offer Letter"). It was stated to be in response to the letter from counsel for the Defendant dated March 28, 2022. After setting out the Plaintiff's position on the legal issues in the Employment Action and the Defamation Action and providing two new affidavits of former employees of the Defendant, an offer of settlement was extended in the amount of $500,000.00. That offer was open for acceptance until December 23, 2022.

[17] The Defendant did not respond to the Plaintiff's Offer Letter but rather filed and served the Jurisdiction Application on December 13, 2022.

[18] Firstly, it should be noted that the Court may consider without prejudice communications when determining if there was a significant advance: ***Paquin v Whirlpool Canada LP,*** 2016 ABQB 147 ("***Paquin***").

[19] The Plaintiff referred to the following passage from ***Jacobs v McElhanney Land Surveys Ltd,*** 2019 ABCA 220 ("***Jacobs***") as to the functional analysis that a court should employ in determining if there was a significant advance (at paragraph 86):

> To determine whether there is a significant advance – important or notable progress – a court must assess at the start and end points of the applicable period the degree to which the factual and legal issues dividing the parties have been identified and the progress made in ascertaining the relevant facts and law that will affect the ultimate resolution of the action. Has anything that happened in the applicable period 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?

[20] The Plaintiff also referred to the case of ***Brace v McKen,*** 2019 ABCA 135 and in particular to the following passage (from paragraph 20):

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> Progress towards settlement may, in some cases, constitute a significant advance in an action. The determination of whether there has been a significant advance towards resolution of an action requires a consideration of the context. Steps that serve to narrow the issues, complete discovery of documents and information, or clarify the positions of the parties might well significantly advance the action....

[21] The Plaintiff contends that three offer letters exchanged by counsel indicate that there was progress in narrowing the issues in dispute.

[22] However, the Plaintiff's Offer Letter was sent after the drop-dead date of September 25, 2022. The Plaintiff contends that the Court should still consider his letter after the drop-dead date to properly carry out the functional and pragmatic assessment directed by the Court of Appeal in ***Jacobs***. I do not accept this argument. This would effectively extend the three-year period set out in r 4.33. If the Defendant had responded to the Plaintiff's Offer Letter and continued settlement discussions, I might have considered whether r 4.33(2)(b) applied as an exception to the three-year period set out in the rule (ie on the basis that the Defendant's continued participation warranted not striking the action). However, since the Defendant did not continue settlement discussions, I need not consider this.

[23] In the alternative, the Plaintiff contends that the Defendant's Offer Letters sent before the drop-dead date constituted a significant advance.

[24] It is difficult to conceive how letters from one side, not responded to by the other side, could constitute a significant advance. However, even if that were possible, I find that the Defendant's Offer Letters did not significantly advance the Employment Action. Those letters did not put the parties in a better position to resolve the action, either by litigation or by settlement. The Defendant's Offer Letters were quite strident and made no concessions. The amounts offered were so small that the Plaintiff did not even respond to them.

Issuance of the Statement of Claim in the Defamation Action

[25] In written briefs, the parties considered the application of a four-part test as to whether steps taken in a separate action may significantly advance the action in question on the basis that the two actions are "inextricably linked". That test, was stated in ***Angevine v Blue Range Resource Corporation,*** 2007 ABQB 443 as follows (at paragraph 41):

> To determine if a related action is "inextricably linked" to the primary action, the following factors are to be considered.
>
> (1) Are the two actions inextricably linked in the sense that the result in the related action would be "legally or factually determinative" of the issues in the primary action?
>
> (2) Will the issue determined in the related action be "relevant and binding" in the primary action?
>
> (3) Does the related action materially advance the primary action?
>
> (4) Could the decision in the related action be a "barrier in law" to the Court's adjudicating the primary action?

[26] In setting out this four part test the Court referred to and relied upon the case of ***Calgary (City) v Chisan*****,** 2000 ABCA 313 ("***Chisan***")**.**

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[27] There is no doubt that the Employment Action and the Defamation Action are linked through the common question in both actions as to whether the complaints against the Plaintiff that he claimed expense statements to which he was not entitled is common to both.

[28] However, at this Special Chambers hearing counsel for the Defendant provided recent authority from the Court of Appeal which adopted a different analysis than ***Chisan***. In ***Round Hill Consulting Ltd v Parkview Consulting,*** 2025 ABCA 195 the Court of Appeal stated the following (at paragraph 14):

> [14] Two observations can be made about the decision in ***Chisan***:
>
> (a) Firstly, this was a brief oral decision given from the bench. It is unlikely that the Court would define a legal test in this format.
>
> (b) Secondly, this decision was decided under an earlier version of the drop dead rule, when the focus was on "things", specifically "things done in an action". The modern test, based on different wording, applies a functional approach which is not driven by "steps", "things" or "links".
>
> On a proper interpretation, the reference to proceedings being inextricably linked was merely a factual description of the two actions in ***Chisan***, driven by the specific wording of the rule at the time, not a statement of a legal test. The proper present test is a functional examination of whether there has been a "significant advance" in the action which is the subject of the application for dismissal, not a formalistic search for "an inextricable link".

[29] Whether the Employment Action and the Defamation Action are inextricably linked is not the question to be answered. The question remains whether the commencement of the Defamation Action was a significant advance of the Employment Action. That question must be posed using a functional analysis.

[30] In conducting a functional analysis with respect to the Employment Action, I do not see how the Plaintiff commencing a different cause of action advanced the Employment Action. Filing the Statement of Claim in the Defamation Action did not move the parties closer to resolution of the Employment Action. It only identified a different class of wrongful conduct for which the Plaintiff was seeking damages from the Defendant.

[31] Counsel for the Plaintiff asked that if the Court dismissed the Employment Action, the Defendant's Counterclaim also be dismissed. Counsel for the Defendant did not oppose that request and admitted that if the Plaintiff's claim had not been significantly advanced, then it was logical that the Defendant's Counterclaim had also not been significantly advanced.

[32] In the result, I dismiss the Employment Action, including the Counterclaim.

Jurisdiction Application

[33] The Defendant asserts that the Plaintiff should not have commenced the Defamation Action in Alberta as the following facts indicate that it should have been commenced elsewhere:

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(1) the Plaintiff does not reside or work in Alberta and consequently he does not have a personal or professional reputation in this province that could be damaged; and

(2) the Defendant has identified 21 possible witnesses who received or sent the alleged defamatory material and only one of them is in this province.

[34] There is a two-step analysis to determine if an action should be stayed on the basis that the chosen forum is not the appropriate jurisdiction.

[35] Firstly, the court considers whether there is jurisdiction *simpliciter.* Do the courts of the chosen forum have jurisdiction to hear the case? If jurisdiction *simpliciter* is established, the question turns to whether the chosen jurisdiction is *forum non conveniens.* That is, the court of the chosen forum considers whether it should decline to take jurisdiction because there is a clearly more favourable jurisdiction for the case to be heard. See the case of ***Haaretz.com v Goldhar,*** 2018 SCC 28**.**

[36] The Defendant concedes that jurisdiction *simpliciter* for Alberta to consider the Defamation Action has been presumptively established in this case. The Supreme Court of Canada stated in ***Club Resorts Ltd v Van Breda*,** 2012 SCC 17 that presumptive jurisdiction has been established when there is a connecting factor grounding the court's jurisdiction. The connecting factors include (a) the defendant is domiciled or resident in the province (or, in the case of a legal person, the location of its head office); (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province. The Defendant concedes factors (a) and (b) and that an alleged defamatory statement was received by a recipient in Alberta.

[37] However, the Defendant contends that Alberta is *forum non conveniens* for the Defamation Action as the relationship between the Plaintiff's cause of action and this jurisdiction is weak. More specifically, the Defendant asserts that because the evidence shows that the Plaintiff does not have a personal or professional reputation in this province the Defamation Action should not have been brought in this province.

[38] The Plaintiff replies that it is his reputation within the Defendant BP Canada that has been harmed by the alleged defamatory statements and as its head office and significant place of business is this province, there is a strong connection between the Defamation Action and the province of Alberta.

[39] I disagree with the Defendant that the relationship between the Defamation Action and the province of Alberta is weak. In fact, I find it not surprising that a terminated employee of this Defendant, who claims to have been defamed in the course of his termination wants the case to be heard in the jurisdiction of the Defendant.

[40] The Defendant admits that Alberta is the proper jurisdiction for the Employment Action (in large part pursuant to the contract of employment) but states that this does not support or bolster Alberta being the proper jurisdiction for the Defamation Action. I disagree. All of the alleged defamatory material was issued with respect to the Plaintiff's employment with the Defendant. The contract of employment between the Defendant and the Plaintiff is not ancillary to the alleged defamatory statements but rather is a very important part of it.

[41] The Defendant says that because only one of the distributors or recipients of the alleged defamatory material was in Alberta, this jurisdiction is *forum non conveniens.* Most of the other

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distributors or recipients of the defamatory material were/are in the United Kingdom and Angola. The Defendant suggests that the United Kingdom would be a more convenient forum as many of the witnesses are within that jurisdiction.

[42] The locale of witnesses is certainly an important consideration when determining the most appropriate forum. But in this day and age where remote questioning is commonplace, I do not see it as a determining factor. Furthermore, it appears that a number of the potential witnesses are in a number of different countries—not just the United Kingdom.

[43] In my view, the Defendant has not met its burden to show that the United Kingdom would be a more convenient forum for consideration of the Defamation Action.

Heard on the 24th day of July, 2025.
Dated at the City of Edmonton, Alberta this 18th day of September, 2025.

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

Appearances:

Taylor Kemp
Borden Ladner Gervais LLP
for the Plaintiff

Andrew Skeith and Brad Smith
Reynolds Mirth Richards & Farmer LLP
for the Defendant

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