

Date: 20260209
Docket: CI 19-01-22254
(Winnipeg Centre)

Indexed as: R.B.S. Electrical Contractors (1992) Ltd. v. Gateway Construction & Engineering Ltd. et al.

Cited as: 2026 MBKB 24

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

R.B.S. ELECTRICAL CONTRACTORS (1992) LTD.,)	
)	
)	<u>Jordan Armstrong</u>
)	for the plaintiff
plaintiff,)	
)	<u>Jarrod R. Sundmark</u>
- and -)	for the defendant,
)	Gateway Construction
GATEWAY CONSTRUCTION & ENGINEERING LTD. AND MUNICIPALITY OF DELORAINE WINCHESTER,)	
)	
)	<u>Judgment Delivered:</u>
defendants.)	February 9, 2026

TOEWS J.

INTRODUCTION

[1] The defendant Gateway Construction & Engineering Ltd. ("Gateway") has filed a notice of motion seeking, *inter alia*, that:

- a) The action commenced by the plaintiff R.B.S. Contractors (1992) Ltd. ("R.B.S.") be dismissed on account of delay in accordance with Court of King's Bench Rule 24.02, or, in the alternative, Rule 24.01, with prejudice to future actions; and

b) Upon the dismissal of the action, all funds held in trust by Thompson, Dorfman, Sweatman LLP (“TDS LLP”) in connection with the action (inclusive of accrued interest) can be released to Gateway pursuant to the agreement between Gateway and R.B.S. dated October 22, 2020.

[2] The defendant states that there has not been a significant advance made in the action in more than three years and accordingly, the entire action ought to be dismissed for delay.

[3] The defendant municipality, the RM of Deloraine Winchester did not appear as it has no further interest to advance in this action.

THE FACTS

[4] This action relates to the construction of a water treatment plant in the RM of Deloraine Winchester, Manitoba in or about the year 2015 (the “Project”). Gateway was the general contractor for the Project. The Project was owned by the Government of Manitoba (“Manitoba”) and administered for Manitoba by the Manitoba Water Services Board (with Manitoba, collectively referred to as the “Owner”).

[5] Gateway and the Owner entered into a contract for the Project on or about February 24, 2015. The plaintiff filed a statement of claim against the defendant in 2019 alleging it is owed \$260,052.34 in connection with the Project.

[6] On March 11, 2021, the Honourable Master Goldenberg granted then counsel for the plaintiff to withdraw as the lawyer of record for the plaintiff. It appears that there was a breakdown in the solicitor client relationship with the plaintiff. No one appeared on behalf of the plaintiff at the hearing before the Master although Mr. Michael Barnabe,

an officer, director and shareholder of R.B.S., had been served on behalf of the plaintiff with the notice of the hearing.

[7] Subsequently R.B.S. and Gateway set a pre-trial hearing for January 19, 2022, confirming the date in a letter dated October 14, 2021, by Gateway's counsel to the court. At the pre-trial hearing on January 19, 2022, Gateway stated that it had conducted a review of the Project records and states that the sum owed to R.B.S. is \$215,070.41. It refers to this amount as the "Undisputed Amount" in its brief. At that time Gateway sought leave to bring a motion for summary judgment to pay R.B.S. the Undisputed Amount less costs on a solicitor-client basis.

[8] After explaining the summary judgment process to Mr. Barnabe, Mr. Barnabe, on behalf of the plaintiff, agreed to proceed by way of a summary judgment hearing despite the fact that there were some factual disagreements in respect of the amount still in dispute. It was also noted that the defendant Gateway stated that the disputed amount may involve more than the difference between the claim amount filed by the plaintiff and the so-called Undisputed Amount owing to various set offs and claims by Gateway should this matter proceed to a contested hearing.

[9] Following my discussions with the parties and the consent of both parties, I agreed to set this matter for a one-day hearing during which I would determine whether this matter is in fact amenable to a summary judgment proceeding. However, if I determined that the matter was not amenable to a summary judgment hearing, notwithstanding the position of either or both parties, I would set the matter down for a trial with *viva voce* evidence in order to resolve any factual disputes before giving a judgment.

[10] At that hearing Mr. Barnabe, appearing for the plaintiff, advised that he would retain a lawyer for the purposes of the hearing and the various proceedings leading up to the hearing. Both parties appeared anxious that the hearing date be set as quickly as possible, with both parties stating that a motion hearing date in approximately three months would be acceptable. Mr. Barnabe or counsel retained by R.B.S. were to contact counsel for Gateway as quickly as possible once counsel had been retained by R.B.S.

[11] The summary judgment motion hearing date initially set for April 22, 2022, did not proceed on that date. When new counsel for R.B.S. ("Marr Finlayson Pollock LLP") was appointed on March 1, 2022, the April 2022 summary judgment was rescheduled to be heard on June 9, 2022 and subsequently was adjourned *sine die*. On or about June 28, 2022, Gateway and R.B.S. agreed to have the Undisputed Amount paid to R.B.S. from the lien funds. However, by way of motion filed September 22, 2023 and returnable on October 11, 2023, Marr Finlayson Pollock LLP moved to withdraw as counsel of record for R.B.S.

[12] At the October 11, 2023 pre-trial hearing, Marr Finlayson Pollock LLP was allowed to withdraw as lawyer of record for the plaintiff. Counsel from Marr Finlayson Pollock LLP advised that Mr. Barnabe had not been in touch with them for approximately a year. Part way through the hearing Mr. Barnabe joined the teleconference. He stated he had been involved in a serious accident and therefore had been unable to keep in touch with his counsel.

[13] At that time, I discussed the matter with counsel for Gateway and Mr. Barnabe suggesting various steps that either party could take in order to move this matter forward.

This included suggesting to counsel for Gateway that he should consider bringing a motion to release the money being held in trust. I also advised Mr. Barnabe that he could bring a motion to establish R.B.S.'s claim to the trust funds. At that point I expressed the opinion that either Mr. Barnabe (as the representative of R.B.S.) or counsel for Gateway should take steps to resolve this matter by way of settlement or through the commencement of a motion.

[14] In respect of the lien funds, it is noted that these funds were amounts otherwise payable to Gateway from the Owner, but were withheld by the Owner on account of a lien filed by R.B.S. The lien funds were put into trust with TDS LLP pursuant to an agreement between the parties. This agreement provided that the lien funds be held in trust pending the resolution of this action. Of the original \$266,686.37 deposited with TDS LLP, the sum of \$215,070.41 was paid to R.B.S. pursuant to an agreement between the parties. As of November 10, 2025, the balance of \$56,108.19 remains in trust with TDS LLP (inclusive of accrued Interest).

[15] After the defendant brought a motion returnable on December 8, 2025 to dismiss the plaintiff's action for delay, and upon hearing from the parties on that date, I advised the parties by an e-mail dated December 12, 2025 that R.B.S. should be provided with an opportunity to file written submissions in response to the material filed by the defendant Gateway.

[16] The motion to dismiss the action was rescheduled for February 4, 2026. The parties were advised of the filing date for any material to be filed and that oral submissions would also be considered by the court on the hearing date. Although the

plaintiff failed to file its material within the prescribed time, both parties filed additional material.

STATEMENT OF ISSUES

[17] In argument before me on February 4, 2026, counsel for the plaintiff conceded that three years or more have passed without a significant advance in this action. Accordingly, unless the delay falls within the exceptions set out in Court of King's Bench Rule 24.02(1) the court "must, on motion, dismiss the action". While the plaintiff did not advance any of the exceptions specified at Court of King's Bench Rule 24.02(1), it advanced the position that pursuant to Court of King's Bench Rule 24.02(3) any period of "disability" is excluded when calculating time under subrule (1).

[18] The relevant Court of King's Bench Rules provide:

Dismissal for delay

24.01(1) The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.

Presumption of significant prejudice

24.01(2) If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.

What constitutes inordinate and inexcusable delay

24.01(3) For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.

Dismissal for long delay

24.02(1) If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless

- (a) all parties have expressly agreed to the delay;
- (b) the action has been stayed or adjourned pursuant to an order;

- (c) an order has been made extending the time for a significant advance in the action to occur;
- (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
- (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.

...

Excluded time — period under disability

24.02(3) Any period of time when a person is under disability is not to be included when calculating time under subrule (1).

[19] Disability is defined in the King’s Bench Rules at Rule 1.03:

1.03 In these rules, unless the context requires otherwise,

.....

"disability", where used in respect to a person or party, means that the person or party is,
(a) a minor, or
(b) mentally incompetent or incapable of managing his or her affairs, whether or not so declared by a court;

ARGUMENTS

[20] In its initial materials filed in support of the motion to dismiss the action, the defendant relied upon both Court of King’s Bench Rule 24.01 (“significant prejudicial delay”) and 24.02(1) (“delay in excess of three years”). In view of the concession by the plaintiff that (subject to the issue of “disability”), three years or more have passed without a significant advance in this action, the defendant focused its argument on the position of the plaintiff that the “disability” exclusion resulted in a time period of less than three years in which no significant advance in the action has taken place.

[21] Accordingly, if the plaintiff establishes the applicability of the “disability” exclusion in the calculation of the three-year period, the defendant may be unable to rely on Court of King’s Bench Rule 24.02(1) as a ground for a dismissal of the action. Conversely, if the “disability” exclusion is not applicable, the court “must” dismiss the action as the time period during which no significant advance in the action has taken place exceeds three years. Furthermore, it would not then be necessary for the court to consider any “significant prejudicial delay”.

[22] In view of the concession of the plaintiff that more than three years have elapsed since any significant advance in the action has taken place, the “disability” argument and its impact on the calculation of the three-year period is the only substantive issue to be determined in this motion.

THE POSITION OF THE PLAINTIFF

[23] The plaintiff states that while Mr. Barnabe is not mentally incompetent, he has been incapable of managing his affairs and by extension the affairs of the plaintiff. In the affidavit of Mr. Barnabe affirmed January 21, 2026, he affirms that he is the president of the plaintiff and that he and his wife are the “sole directors” of the plaintiff. He also affirms he is “... the person responsible for ensuring that matters such as this litigation are progressed.” He states in the affidavit that his “... wife’s involvement is limited, she is employed as a controller for Miller Environmental, and her involvement with the Plaintiff is limited to occasionally reviewing year end statements.” (See para. 1)

[24] In his affidavit, Mr. Barnabe sets out his involvement in an ATV accident which resulted in him being transported by air ambulance to the Health Sciences Centre in

Winnipeg from a location in rural Manitoba. The affidavit sets out the injuries which he suffered and his continuing medical ailments and treatments. Mr. Barnabe states he is unable to manage even minor responsibilities and his ability to focus is limited. He continues to struggle with physical and mental difficulties.

[25] Counsel submits that rather than dismissing the action for delay, that pursuant to Court of King's Bench Rule 24.04 the court should make a procedural order by setting specific timelines for moving this matter forward.

THE POSITION OF THE DEFENDANT

[26] The defendant argues that the plaintiff in this case is a corporation, not Mr. Barnabe. The defendant states that in defining "disability" under the Rules, the Rules refer to whether a person or party is a "minor" or whether they are incapable of managing "his" or "her" affairs.

[27] The defendant argues that the definition of "disability" in the context of Court of King's Bench Rules 1.03 and 24.02(3), is a term that does not apply to a corporation. It relies on the decision in *Broda v. Busby*, 2024 MBKB 39 (CanLII), where the court held:

[15] The two terms "mentally incompetent" and "incapable of managing his or her affairs" are themselves not defined in the Rules. Their utilization in legislation and in case law within and without the Province of Manitoba often appears inconsistent, and is sometimes conflated with other phrases and descriptions. For example: knows "his specific choices regarding the litigation"; understands "the nature and effect of what he may be called upon to participate in and decide upon"; and whether he is "able to appreciate the reasonably foreseeable consequences of a decision or lack of decision" in a legal proceeding;^[2] is "capable", "mentally incompetent" and has "mental competence" in the context of guardianship and trustee appointment;^[3] is "mentally competent" and has "capacity" to be a proxy for health care decisions;^[4] has "competence" and no "incapacity" in mental health legislation.^[5]

[16] Despite this occasional conflation and periodic interchangeable use of the two terms at issue (along with others), there are the following distinctions I discern:

- the term "mentally competent" is more often used to describe an individual's ability to make decisions related to matters of health care and medical consent, and related to terms such as "incapable" and "capacity", in the sense of whether the individual has mental competence or capacity to comprehend and appreciate the consequences of their decisions;
- the term "incapable of managing his or her affairs" is more often used to describe an individual's inability to make decisions or take actions related to aspects of personal life, including self-care, medical care, financial affairs, and property management; more often their incapacity is due to factors such as age or disease or inability to communicate.

[17] I would go further and also allow that the "threshold" for establishing that an individual is "incapable of managing his or her affairs" may be marginally easier to meet than establishing "mental incompetence". Respondent's counsel very much focused her submissions before me on the former term and not on mental incompetence, perhaps consistent with my observation.

[28] The defendant acknowledges that while Mr. Barnabe is the one mainly responsible for the operation of the corporation, it points out that his wife is also a director, officer and shareholder of the corporation and as such has all the powers to direct the affairs of the corporation.

[29] The defendant argues that there is no evidence that the corporation, due to the condition of Mr. Barnabe, has been unable to manage its affairs, stating by way of example that it continued to file annual returns, and that it responded to another unrelated action by filing a statement of defence. That action was apparently settled.

[30] The defendant argues that the decision of the court in *Al-Mamun v. Perkins*, 2025 MBCA 17 (CanLII), where the plaintiff moved to perfect an appeal of the decision of the lower court, is applicable to the issues here. In that case the court held that while there was a continuous intention to appeal:

[20] Like the motion appeal judge, I do not dismiss or undermine the fact that Mr. Al-Mamun suffers from physical and mental health issues. However, he has given no real explanation for his delay in proceeding with his appeal other than his

mental health issues, which he says cause him to not deal with matters. He offered no solution.

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[25] Finally, and to a lesser extent, I am of the view that Mr. Al-Mamun continues to delay the prosecution of his action, including the delay occasioned when he missed the deadlines for filing of documents in this Court. In my view, the record demonstrates that Mr. Al-Mamun does not take action until his lawsuit is under threat of being dismissed.

[31] The defendant states that similarly in the case at bar, no action was taken in this matter in the last four years, until the action was threatened to be dismissed, and even then, its actions came after the deadline imposed by the court had expired. As a result, the defendant states that it was unable to properly respond to the plaintiff's materials whether by way of cross-examination on Mr. Barnabe's affidavit or otherwise.

[32] In any event, the defendant argues that R.B.S. was not under a period of "disability" which would exclude a period of time in the calculation of the period greater than three years so as to bring it under the three-year period in which no significant advance in the action took place.

DECISION

[33] In my opinion, the position of the plaintiff that it was or is under a "disability" as defined in the Rules is not sound. I accept the position that the term as utilized in the context of Court of King's Bench Rule 24.02(3), and the definition of that term set out in Rule 1, refers to individuals rather than corporate entities. In this respect the decision of the court in *Broda* is analogous and applicable. I agree with the defendant that it is difficult to understand how such considerations could be applied in the context of a corporation. I find that they do not apply.

[34] In the alternative, accepting for the sake of argument that these considerations could apply in the context of a corporation, in this case there is no evidence that Mrs. Barnabe as a director, officer and shareholder was not capable of carrying out the functions of instructing counsel in order to advance this action. In that respect this case is at least distinguishable from the situation where a corporate entity relies entirely and exclusively on only one director or officer.

[35] Without in any way discounting the seriousness of the injury that Mr. Barnabe did suffer, the evidence is not contradicted that corporate returns and the defence of a legal action involving the plaintiff were attended to during the period of time when no significant advance was made by the plaintiff in respect of this action. Mr. Barnabe's application for disability to the Canada Revenue Agency was attended to and completed by both Mr. Barnabe and his spouse.

[36] The medical reports attached to Mr. Barnabe's affidavit, including the report of the physiotherapist dated March 8, 2024, attached as exhibits to his affidavit sets out his medical condition, but does not address the issue of whether he was incapable of attending to the corporate affairs of the plaintiff. The inability of the defendant to cross-examine Mr. Barnabe, or his healthcare providers for that matter, owing to the late filing of his material is not something for which the defendant can be faulted nor should any evidentiary inferences be made against the defendant in this case for a failure to do so.

[37] I find the decision in ***Al-Mamun*** to be instructive here as well. As was the case there, I do not dismiss or undermine the fact that Mr. Barnabe suffers from physical or mental health issues. However, he has given no real explanation for his delay in

proceeding with his action other than his health issues, which he says cause him to not deal with matters. He offered no solution.

[38] In the result however, I base my decision to dismiss the plaintiff's action on account of delay in accordance with Court of King's Bench Rule 24.02, holding that neither the exceptions set out in Court of King's Bench Rule 24.02(1) or the exception to reducing the three-year time period on account of a "disability" as provided by Court King's Bench Rule 24.02(3) are applicable to the plaintiff. Specifically, I find that the calculation of time cannot be reduced by the corporate plaintiff by advancing a claim of "disability" on the part of one of its officers or directors. As to whether a corporate litigant could ever rely on this provision to advance a claim of "disability" is not for me to determine here, but I must say I share the defendant's skepticism when counsel states in the defendant's brief: "How such considerations could even begin to be applied to a corporation is unclear."

[39] The plaintiff also argues that if the action is dismissed on account of delay, the funds being held in trust by the defendant's counsel should not be released. In my opinion, there is no basis to refuse to release the trust funds. The defendant's counsel is entitled to release the funds to his client with the dismissal of this action.

[40] As set out in Exhibit "F" to the November 13, 2025 affidavit of Wes Rist, the president of the corporate defendant, the trust conditions agreed to by the parties are set out in an e-mail dated October 22, 2020, which provides:

The agreed upon trust conditions therefore are as follows:

1. The Province of Manitoba is authorized to immediately release all remaining project funds to Thompson Dorfman Sweatman LLP;

2. Thompson Dorfman Sweatman LLP shall hold the sum of \$266,686.37 in an interest bearing trust account pending the resolution or final judgment of Queen's Bench File No. CI19-01-22254 and no use shall be made of said funds without the prior written consent of counsel for both R.B.S. Electrical Contractors (1992) Ltd. ("RBS") or order of the Court;
3. The holding of the funds shall not be deemed to have prejudiced the rights of Gateway Construction & Engineering Ltd. ("Gateway") to dispute the validity of RBS's claim and entitlement to the funds;
4. the holding of the funds in trust is agreed to without any admission of liability by Gateway.

[41] It is clear that but for the objection of the plaintiff, the funds remaining in trust are payable to the defendant Gateway. With the dismissal of the claim brought by the plaintiff, there is no further impediment to the release of the remaining trust funds by the defendant Gateway's counsel to Gateway. Accordingly, it is the judgment of this court that the defendant Gateway is entitled to the funds remaining in trust including any accrued interest and accordingly by order, I authorize the release of those funds to the defendant Gateway.

[42] The parties advise that of the original \$266,686.37 deposited with TDS LLP, the sum of \$215,070.41 was paid to R.B.S. pursuant to an agreement between the parties. As of November 10, 2025, the balance of \$56,108.19 remains in trust with TDS LLP (inclusive of accrued Interest).

CONCLUSION

[43] In light of the foregoing reasons, it is ordered that:

- a) This action is dismissed on account of delay with prejudice to future actions;

- b) All funds held in trust by TDS LLP in connection with this action (inclusive of accrued interest) may be released to Gateway; and
- c) R.B.S. shall pay tariff costs to Gateway.

_____ J.