Court of King's Bench of Alberta

Citation: Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc, 2025 ABKB 367

Date: 20250616
Docket: 1503 06113
Registry: Edmonton

Between:

Baron Real Estate Investments Ltd

Plaintiff/Respondent

- and -

Tri-Arrow Industrial Recovery Inc, Stericycle ULC, Stericycle Inc, 474588 Alberta Ltd Operating as Riteway Vacuum Service and Alberta Production Machining Ltd

Defendants

- and -

Nichols Environmental (Canada) Ltd

Third Party Defendant

- and -

Tri-Arrow Industrial Recovery Inc, Stericycle ULC, Stericycle Inc, 474588 Alberta Ltd Operating as Riteway Vacuum Service

Appellants

Reasons for Decision
of the
Honourable Justice Kelsey L. Becker Brookes

Appeal Record of 474588 Alberta Ltd Operating as Riteway Vacuum Service
from the Decision by
The Honourable Applications Judge B. W. Summers

Dated the 20th day of September, 2023
(2023 ABKB 531, Docket: 1503 06113)

Appeal Record of Tri-Arrow Industrial Recovery Inc,
Stericycle ULC, and Stericycle Inc
from the Decision by
The Honourable Applications Judge B. W. Summers

Dated the 20th day of September, 2023
(2023 ABKB 531, Docket: 1503 06113)

I. Introduction

[1] This is an appeal by the Defendants/Appellants from an Order by Applications Judge B. W. Summers dated September 20, 2023, dismissing an application by the Defendants to dismiss the Action for long delay under *Rule* 4.33 of the *Alberta Rules of Court* (the "Dismissal Order").

[2] The reasons for the Dismissal Order are set out in ***Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc***, 2023 ABKB 531.

II. Background

[3] Pursuant to a Lease Agreement, dated December 6, 2011, the Plaintiff/Respondent, Baron Real Estate Investments Ltd. (the "Plaintiff"), leased land to the Defendant, Tri-Arrow Industrial Recovery Inc ("Tri-Arrow"). The lease was for a term of five years commencing February 1, 2012 (the "Lease").

[4] In February of 2013, Tri-Arrow was bought by the Defendant, Stericycle ULC. The interests of Tri-Arrow and the Defendants, Stericycle ULC, and Stericycle Inc are essentially the same. Thus, Tri-Arrow Industrial Recovery Inc., Stericycle ULC, and Stericycle Inc. will be referred to herein collectively as "Stericycle".

[5] Stericycle was in the business of hazardous and non-hazardous waste disposal and treatment. The permitted uses under the Lease included tote-cleaning and hazardous waste

processing. Among other things, the Lease required Stericycle to remediate the lands for any damage brought about by its operations.

[6] The Defendant, 474588 Alberta Ltd. operating as Riteway Vacuum Service ("Riteway"), provided vacuum truck services to Stericycle on the lands.

[7] The Plaintiff alleges Stericycle caused damage to the lands, including contamination, and claims damages of almost $15 million. The Plaintiff's claim against Riteway alleges a spill of waste on the lands involving a vacuum truck.

[8] Stericycle alleges they were continually harassed by the Plaintiff with respect to the operation of their business on the lands, including receiving numerous notices of default from the Plaintiff alleging non-compliance with environmental laws.

[9] On April 24, 2014, the Plaintiff terminated the Lease, re-entered the lands, locking out Stericycle and seizing certain vehicles. On July 7, 2014, Stericycle applied for and obtained a Court Order that provided the Plaintiff's security agreement under the Lease was terminated and the seizure was released. Costs were to be spoken to in "anticipated subsequent proceedings".

III. Litigation Background

[10] The Plaintiff filed its original Statement of Claim in April 2015, amended it in August 2015, and filed a further amended version in April 2016. The first pleading served on the Defendants was the Amended Amended Statement of Claim in April 2016.

[11] Riteway filed its Statement of Defence in May 2016, followed by Stericycle in June 2016. The Plaintiff served its Affidavit of Records in December 2016, followed by Riteway in January 2017, and Stericycle on March 23, 2018.

[12] No further steps were taken until questioning was scheduled for September 2020. On August 6, 2020, Plaintiff's counsel advised that questioning would be postponed due to ongoing document review and preparation of a Supplemental Affidavit of Records.

[13] The Plaintiff served its Supplemental Affidavit of Records on March 22, 2021, producing over 7,000 new records (the "Supplemental Records") and requested new questioning dates. On April 1, 2021, Stericycle's counsel acknowledged receipt and indicated they were reviewing the new records.

[14] The next communication was the service of Stericycle and Riteway's applications for dismissal for long delay under *Rule* 4.33, filed on August 3, 2021. Opposing affidavits were filed, and cross-examinations on those affidavits were conducted.

IV. Dismissal Application

[15] The Applications Judge concluded that while the Supplemental Records do not help determine the nature or extent of contamination of the lands or the cost of remediation, they do have a potentially significant bearing on what the Plaintiff alleges and the Defendants deny with respect to the business being conducted on the lands, as framed by the pleadings: ***Baron*** at paras 34 to 37.

[16] The Applications Judge found the Supplemental Affidavit of Records was not simply a matter of housekeeping or done at the eleventh hour as a pretext just to keep the Action alive:

Baron at paras 38 to 44. He accepted the explanation given by the Plaintiff's witness, Aaron Slawsky, for the delay and declined to find the records could have been produced earlier.

[17] The Applications Judge declined to follow the authorities which have held that a supplemental affidavit of records that produces records that could have been produced earlier does not materially advance an action: ***Baron*** at paras 38 to 44.

V. Positions of the Parties

a. Defendants/Appellants

[18] Riteway and Stericycle argue that the central factual dispute is whether the lands were contaminated by them prior to the Plaintiff's termination of the Lease on April 24, 2014, and, if so, the extent of the contamination and resulting remediation damages. They argue that the Supplemental Records are neither relevant nor material to these issues and do not significantly advance the Action under a functional analysis.

[19] Alternatively, they assert that any relevant and material documents within the Supplemental Records were already in the Plaintiff's possession prior to the initial Affidavit of Records and that the Plaintiff has not shown why they could not have been included at that time. As such, the service of the Supplemental Affidavit of Records does not constitute a significant advance in the Action.

[20] Riteway and Stericycle rely on the following cases for the proposition that a supplemental affidavit of records that produces records that could have been produced earlier is not a step that materially advances an action: ***Altex International Heat Exchanger Ltd v Foster Wheeler Limited***, 2018 ABQB 620 at paras 111 to 119; ***Déjà Vu Holdings Ltd v Securex Master Limited Partnership***, 2018 ABQB 597 at paras 33 to 34 and 38 to 39; ***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 at paras 14 and 17.

b. Plaintiff/Respondent

[21] The Plaintiff submits that its Supplemental Affidavit of Records, served on March 22, 2021, significantly advanced the Action. Specifically, the Plaintiff asserts the Supplemental Records are relevant and material to key issues, including whether Stericycle breached environmental laws, whether its use and occupancy of the lands violated the Lease, and the extent to which the activities of Stericycle and Riteway contributed to the contamination.

VI. Grounds of Appeal

[22] Riteway and Stericycle assert the following grounds of appeal:

(a) The Applications Judge erred by failing to place the burden of proof on the Plaintiff to show that service of the Supplemental Affidavit of Records significantly advanced the Action.

(b) The Applications Judge erred by failing to properly apply the functional analysis required under *Rule* 4.33.

(c) The Applications Judge erred in accepting the Plaintiff's explanation for the late disclosure of the Supplemental Records as adequate.

VII. Standard of Review and the Record

[23] An appeal from an Applications Judge is a hearing *de novo*: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11. The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

[24] *Rule* 6.14(3) provides that an appeal from an Applications Judge's judgment or order is "an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material."

[25] This appeal proceeded based on the record of proceedings before the Applications Judge.

VIII. Issues

[26] The only issue is whether the Supplemental Affidavit of Records served by the Plaintiff upon the Defendants on March 22, 2021, significantly advanced the Action. If the Supplemental Affidavit of Records did not significantly advance the Action, the Action must be dismissed pursuant to *Rule* 4.33.

IX. Analysis

a. Law

[27] *Rule* 4.33(2) provides as follows:

> (2) If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> > (a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or
> >
> > (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

[28] The relevant period of delay is determined starting with the last uncontroversial significant advance up to the date the dismissal application was filed (as opposed to the date it was heard): ***Rahmani v 959630 Alberta Ltd***, 2021 ABCA 110 at paras 16 and 17; ***Vanmaele Estate (Re)***, 2023 ABKB 456 at para 21; ***Babiuk v Heap***, 2023 ABKB 410 at para 48.

[29] The fundamental question to be asked is: "Was there a three year period between these dates without any significant advance in the action?": ***Rahmani*** at para 17.

[30] If the relevant period of delay includes March 17, 2020 to June 1, 2020, then Ministerial Order 27/2020, which suspended the operation of time limits under the *Rules* for 75 days from March 17, 2020 to June 1, 2020, adds 75 days, subject to the Court's discretion: ***Coble v Atkin***, 2023 ABKB 10 at para 28.

[31] It is not disputed the relevant period in this case is 3 years and 75 days.

[32] Whether a step significantly advances the action is determined by a functional, context-sensitive, substance-over-form approach: ***Rahmani*** at paras 14 and 22; ***Flock v Flock Estate***,

2017 ABCA 67 at paras 17-1 and 17-2; ***Patil v Cenovus Energy Inc***, 2020 ABCA 385 at para 7; ***Abou Shaaban v Baljak***, 2024 ABKB 28 at para 62.

[33] This functional approach was described by the Court of Appeal in ***Ursa Ventures Ltd v Edmonton (City),*** 2016 ABCA 135 as follows:

> [19] Under the delay *Rules* the functional approach inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the particular lawsuit. The focus is on substance and effect, not form: ***St Jean Estate v Edmonton (City)***, 2014 ABQB 47 at para 19, 585 AR 81.

[34] Even a step mandated by the *Rules* requires the Court to analyze that step using the functional approach to determine whether that step significantly advances the action: ***Ursa Ventures*** at para 35.

[35] A significant advance is one that moves the action forward in an essential or meaningful way, reflecting important or notable progress towards the resolution of an action: ***Loncikova v Goldstein***, 2023 ABCA 358 at para 9; ***Patil*** at para 7; ***Rahmani*** at para 14; ***Abou Shaaban*** at para 63. This is assessed by viewing the whole picture of what transpired during the relevant period, framed by the real issues in dispute, and viewed through a lens trained on qualitative assessment: ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc.***, 2016 ABCA 123 at para 21.

[36] Assessing whether a particular step is a significant advance requires asking the following questions:

> 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?
>
> ***Jacobs v McElhanney Land Surveys Ltd***, 2019 ABCA 220 at para 86.

[37] As a result, steps that narrow issues, clarify positions, complete discovery, or determine relevant facts or law, may significantly advance an action, but the outcome itself should not be overemphasized: ***Ro-Dar*** at para 20; ***Stylecraft Developments (1984) Ltd v Carscallen LLP***, 2023 ABKB 504 at para 13; ***Abou Shaaban*** at para 65.

[38] In ***Abou Shaaban*** at para 67, Marion J clarified which party bears the burden of proof on a long delay application. This approach was reiterated in ***Oleksyn v Hi Line Farm Equipment Ltd***, 2024 ABKB 584 as follows:

> [33] The onus is on the party making the dismissal application to lead evidence that no significant advance has occurred within the three year Drop-Dead period: ***Taschuk*** at paras 37-40; ***Nahal v Gottlieb***, 2019 ABQB 650 at para 11. However, while the overall legal or persuasive burden is on the applicant, if the party resisting the application relies on specific matters as significantly

> advancing an action, they may have an evidential burden to demonstrate or prove how they do so: see, for example, ***Taschuk*** at paras 38-40.
>
> [34] The general rule is that a party who asserts a proposition of fact has the burden of proving it: ***Emeric Holdings Inc. v Edmonton (City)***, 2009 ABCA 65 (per Slatter JA, in dissent) at para 43, citing ***Robins v National Trust Co***, 1927 CanLII 469 (UK JCPC), [1927] AC 515 at p 520 (JCPC, Ont).

[39] The Applications Judge did not have the benefit of the thorough analyses in ***Abou Shaaban*** and ***Oleksyn*** when he heard and decided the application for dismissal for long delay.

b. Application of the Law

1) Burden of Proof

[40] Riteway and Stericycle bear the burden of proving that no significant advance has occurred within the applicable 3 year and 75-day period. The last non-contentious step took place on March 23, 2018. Since March 23, 2018, the only step which *could* significantly advance the Action was service of the Supplemental Affidavit of Records on March 22, 2021.

[41] The applications for dismissal for long delay under *Rule* 4.33 were filed with the Court on August 3, 2021. Therefore, the relevant window of time in this case is March 23, 2018, to August 3, 2021, a period which exceeds 3 years and 75 days. Riteway and Stericycle have discharged their burden.

[42] The burden then shifts to the Plaintiff, as the party resisting the application and relying on service of the Supplemental Affidavit of Records as an event significantly advancing the Action, to demonstrate how the Supplemental Affidavit of Records significantly advances this Action. The Plaintiff's burden is an evidential one.

[43] Therefore, the Plaintiff's evidence is central to assessing whether the Supplemental Affidavit of Records significantly advances this Action.

2) Nature of the Supplemental Records and their Importance to the Action

[44] Whether service of the Supplemental Affidavit of Records significantly advances the Action is determined using a functional approach. A significant advance is one that moves the action forward in an essential or meaningful way, reflecting important or notable progress towards the resolution of the action: ***Abou Shaaban*** at para 63.

[45] In determining if the advance is functionally significant, I must consider the nature, value, importance and quality of the advance, as well as the genuineness and timing of the advance: ***Ursa Ventures*** at para 19.

[46] The Plaintiff argues that service of the Supplemental Affidavit of Records significantly advanced the Action because it included relevant and material records not previously disclosed by the Plaintiff. The Supplemental Records are mainly Stericycle records, and include communications between employees, incident reports, spill reports, photographs, inventories and tracking spreadsheets for waste, including hazardous waste and hazardous recyclables, and documents relating to the generation, consignment, transportation and receipt of hazardous waste and hazardous recyclables.

[47] The Supplemental Records can be summarized as follows:

(a) **Documents 7095–7328:** Primarily emails involving former Tri-Arrow manager, Darrin Starchuk, provided to Mr. Slawsky via USB, hard copy, and email between late 2016 and late 2019.

(b) **Documents 7329–7330:** Transcriptions of voicemail messages between Mr. Starchuk and Tri-Arrow.

(c) **Documents 7331–7678:** Photographs taken between 2011 and 2013, mostly provided by Mr. Starchuk to Mr. Slawsky.

(d) **Documents 7679–10625:** Tri-Arrow business records (e.g., packing slips, bills of lading), received by McLennan Ross LLP from the Plaintiff in February and March 2021.

(e) **Documents 10626–14461:** Photographs taken by the Plaintiff's representatives, primarily at the time of Lease termination and repossession of the lands.

(f) **Document 14462:** An aerial photograph of the lands taken by the City of Edmonton.

[48] Riteway and Stericycle argue that the Supplemental Records do not significantly advance the Action under a functional analysis because the central issue between the parties is the extent of the contamination and resulting remediation damages.

[49] Steps that narrow issues, clarify positions, complete discovery, or determine relevant facts or law, may significantly advance an action. But the question is whether the disclosure of *these* Supplemental Records significantly advances *this* Action.

[50] The Plaintiff's claim is very broad. The Applications Judge reproduced specific paragraphs from the Amended Amended Statement of Claim and Stericycle's Statement of Defence which he relied upon to frame the functional analysis: ***Baron*** at para 35.

[51] The Plaintiff claims damages for breach of contract, negligence, nuisance, trespass, breach of duty of honest performance, fraudulent misrepresentation or negligent misrepresentation, and diminution in value of the lands due to contamination. Both the Stericycle and the Riteway Statements of Defence contain a blanket denial, as well as more specific defences.

[52] The pleadings are certainly central to particularizing the claim and defences and provide necessary guidance on what evidence is material and relevant for the purposes of document and oral discovery. Relevance is determined by the pleadings of all parties in an action. By comparison, the pleadings are only one factor to be considered in the functional analysis under *Rule* 4.33 because the analysis is context sensitive.

[53] I agree the Supplemental Records are relevant and material to the issues disclosed in the pleadings and their disclosure is a mandatory step under the *Rules*. However, the assessment to be made is not whether the Supplemental Records are relevant and material, but whether the records significantly advance the Action at the time they were disclosed.

[54] Riteway and Stericycle argue that the Supplemental Records pertain to undisputed facts - namely, that Stericycle operated a hazardous and non-hazardous waste disposal and treatment facility on the lands. The Plaintiff contends the Supplemental Records are relevant and material

to determining what activities occurred on the lands and whether Stericycle breached environmental laws or the Lease.

[55] In my view, the mere potential for the Supplemental Records to shed light on issues raised in the pleadings does not mean they significantly advance the Action. The records do not address the key issues of whether the lands were contaminated at the start or end of the Lease, nor do they speak to remediation costs.

[56] Although the Defendants' Statements of Defence include broad denials, as well as Stericycle's specific denial of any obligation to remediate due to the termination of the Lease, ***Ro-Dar*** requires a functional analysis as opposed to a formulistic one. Legal drafting conventions, such as the use of blanket denials, should not obscure the substantive issues in dispute.

[57] I find the Supplemental Records do not help narrow the substantive issues in dispute or remove issues from the table because the records address matters which are either undisputed or relatively inconsequential from the perspective of resolution.

[58] At the point in time when the Supplemental Affidavit of Records was served, the main outstanding issue was the type and degree of contamination attributable to Stericycle (and, to a lesser extent, Riteway) and the associated cost to remediate the lands. Determining how the contamination got there, i.e., because of a breach of the Lease or non-compliance with the applicable environmental legislation, will not move the Action towards resolution, whether through settlement or adjudication, in any meaningful way.

[59] I come to this conclusion for three reasons.

[60] First, when the Supplemental Affidavit of Records was served, the Action was in the early stages of litigation. The parties had exchanged Affidavits of Records, but questioning had not taken place. Often in the early stages of an action, the issues have not been narrowed to any significant degree. But that cannot mean the production of any relevant and material document will necessarily significantly advance an action.

[61] In this Action, the correspondence between counsel for the parties provides some insight into the heart of the matters in dispute:

(a) On June 10, 2016, counsel for the Plaintiff wrote indicating that "… our client continues to perform remedial work. The next steps in our client's remediation efforts may involve substantial demolition and removal of the land and building elements from your clients' former leased premises." and "We note your clients were advised of such damages and the need for repair and remediation work on numerous prior occasions over the course of years."

(b) On June 23, 2016, counsel for Stericycle wrote asking for "the results of all investigations undertaken with respect to the lands and buildings pertaining to the matters alleged in the Statement of Claim."

(c) On September 28, 2020, counsel for the Plaintiff wrote indicating that "… in order to begin the remediation process, Baron is planning for the demolition of much of the subject premises necessary to restore it." and "Kindly advise whether or not your client wishes to inspect the premises…".

(d) On October 1, 2020, counsel for Stericycle wrote asking when demolition was scheduled for.

(e) On October 5, 2020, counsel for Stericycle wrote again asking for all further records pertaining to environmental testing and remediation plans for the property.

(f) On October 9, 2020, counsel for the Plaintiff wrote indicating "As your client is aware, there is serious environmental damage done to the premises. Your client has been provided with multiple environmental reports documenting some of this damage."

[62] The parties were focused on the issues of contamination and the cost to remediate, and Stericycle was specifically seeking additional information and documentation related to these issues. In other litigation concerning the lands, the question had arisen whether the Plaintiff had any real intention to remediate the lands. By the time the Supplemental Records were disclosed, the damage to the lands alleged to have been caused by Stericycle and Riteway and the cost to remediate the lands had emerged as the central issues to be resolved.

[63] Second, the ability of the parties to rationally assess the merits of their respective positions and move to either settle or adjudicate the Action must be increased by a measurable degree by the event relied upon to significantly advance the Action: ***Jacobs*** at para 86. Records related to what was happening on the lands during the term of the Lease would not provide Stericycle or Riteway with any meaningful information which would permit them to better evaluate the strength of each parties' position. Stericycle and Riteway knew what was happening on the lands and needed the Plaintiff's evidence as to contamination and the cost of remediation to make an informed decision on next steps.

[64] Similarly, photographs taken at the time of Lease termination and repossession of the lands and the aerial photograph of the lands taken by the City of Edmonton provided little in the way of valuable information to address the issues of contamination and remediation.

[65] Third, from a practical standpoint, whether Stericycle is liable under the Lease for remediation costs due to contamination during the Lease term, or for damages arising from a breach of contract, the outcome is the same: Stericycle would be responsible for those costs. The Lease had already been found to have been terminated in 2014. The core issue was the existence and extent of contamination, and the associated cost of remediation.

[66] The Plaintiff terminated the Lease on April 24, 2014. As of March 22, 2021, records concerning contamination, remediation and damages were essential to advancing the resolution of this matter.

[67] The Plaintiff relies on para 19 of Stericycle's Statement of Defence to show the importance of the Plaintiff proving that Stericycle breached the Lease. Paragraph 19 reads as follows:

> Further, the Plaintiff's losses were not occasioned by any conduct of the Defendant Tri-Arrow, but rather were occasioned by the Plaintiff's early termination of the Lease, as a result of which the Plaintiff excused Tri-Arrow from its remediation obligation.

[68] However, I remain of the view a context sensitive analysis means the pleadings cannot be read in isolation, much less one specific paragraph in a pleading. For example, Stericycle's Statement of Defence also includes para 14, which reads as follows:

> Alternatively, to the extent that any environmental contamination or building damage occurred as a result of Tri-Arrow's occupation of the lands, which is not admitted but denied, the said contamination or damage was minor, localized, and capable of easy remediation at the conclusion of the Lease Term. Pursuant to clause 26 of the Lease, the parties agreed, and Tri-Arrow's reasonable expectation was, that such remediation would be undertaken at the conclusion of the Lease Term. The Defendant, Tri-Arrow, was at all times prior to April 24, 2014, ready, willing and able to comply with the said remediation obligation at the conclusion of the Lease Term.

[69] When the pleadings are read, as a whole, in the context of the litigation at the point in time when the Supplemental Affidavit of Records was served, the central issue to be determined was the extent of the contamination from Stericycle's operations on the lands prior to April 2024 and the cost to remediate.

[70] Where actions are not proceeding apace, there is an obligation on the parties to not just do something but to do something significant to move the matter along. *Rule* 4.33 and the need for the occurrence of an event that significantly advances the action ensures something substantial and essential happens at least every three years.

3) Timing of Service of the Supplemental Affidavit of Records

[71] Riteway and Stericycle argue that because the Supplemental Records ought to have been included in the Plaintiff's original Affidavit of Records, the production of these records does not significantly advance the Action.

[72] Mr. Slawsky for the Plaintiff does not dispute that most of the Supplemental Records produced in the Supplemental Affidavit of Records predated his original Affidavit of Records. He claims he was not able to produce these Supplemental Records because he received them from Mr. Starchuk from July 2016 to late 2019.

[73] Mr. Slawsky was asked to provide further information on which records were received from Mr. Starchuk and when they were received by way of an undertaking.

[74] His answer to Undertaking #7 was as follows:

> Mr. Slawsky advises that he received the records produced as BAR007095 to BAR010625 in his supplemental affidavit of records from Mr. Starchuk incrementally between July 2016 and December 2019. Mr. Slawsky used best efforts to review his books and records and was unable to locate any further information to further particularize when each record was received from Mr. Starchuk beyond this timeline other than what is self-evident from the documents produced pursuant to Undertaking #2.

[75] Undertaking #2 disclosed that at least some of the Supplemental Records that Mr. Slawsky relies on as being relevant and material are ones he had before he swore his original Affidavit of Records.

[76] The Plaintiff's original Affidavit of Records was served on December 6, 2016. Therefore, a significant number of the Supplemental Records were in the Plaintiff's possession before service of the original Affidavit of Records.

[77] I agree with the conclusion reached by the Applications Judge that service of the Supplemental Affidavit of Records cannot be characterized as mere housekeeping because the Supplemental Records had not been previously disclosed, as in ***Berlinic v Peace Hills General Insurance Company***, 2016 ABQB 104 at para 12.

[78] And I also am not convinced the step was taken at the last minute to keep the Action alive, as discussed in ***Altex International*** at para 110. New counsel for the Plaintiff identified the document issue just before questioning was scheduled to proceed and the Plaintiff served the Supplemental Affidavit of Records two and a half months before the *Rule* 4.33 deadline.

[79] However, I do not agree that Mr. Slawsky's explanation on the timing of production of the Supplemental Records was adequate. Not only did Mr. Slawsky fail to provide an explanation for the late disclosure except to say the records were disorganized and needed to be sorted through, but he was also unable to particularize when many of the records were received from Mr. Starchuk.

[80] ***Abou Shaaban*** and ***Oleksyn*** provide important guidance on who bears the onus of proving a specific event significantly advances an action, confirming Riteway and Stericycle are not required to prove a negative (i.e., that the Supplemental Affidavit of Records did not significantly advance the Action).

[81] Many of the Supplemental Records were in the Plaintiff's possession when the original Affidavit of Records was sworn. The onus is on the Plaintiff to show how the Supplemental Affidavit of Records significantly advances the Action: ***Abou Shaaban*** at para 67 and ***Oleksyn*** at paras 33 and 34.

[82] A functional assessment requires considering the timing of the step taken in the context of the Action. The Supplemental Records ought to have been produced earlier if the Plaintiff is of the view they are material and relevant to the issues in the Action and the failure to do so suggests a certain indifference on the part of the Plaintiff in pursuing the Action.

[83] In my view, the timing of service of the Supplemental Affidavit of Records, and the nature of the Supplemental Records themselves, are more in line with the facts in ***XS Technologies*** at para 17 where the Supplemental Affidavit contained documents which existed, for the most part, prior to the original affidavit of records and did not significantly advance the action. Or the facts in ***Déjà Vue Holdings*** at paras 33 to 39, where the supplemental affidavit of records contained some records which ought to have been included in the original affidavit of records and some records which were not sufficiently relevant and material to significantly advance the action.

[84] In the circumstances, I am not persuaded by the Plaintiff that the Supplemental Affidavit of Records significantly advanced the Action because it contained records which were in the Plaintiff's position, for the most part, prior to the original Affidavit of Records, and which did not significantly advance the Action.

X. Conclusion

[85] Applying the functional analysis to the Supplemental Affidavit of Records and examining the nature of the records produced and their relevance and importance to the central issues in this Action, I find that service of the Supplemental Affidavit of Records did not significantly advance the Action.

[86] The Supplemental Records were, at best, relevant to peripheral issues in the Action and were not valuable to the parties in assessing their respective positions on the central issues. It cannot be said the parties were any closer to resolution, whether through settlement or adjudication, after service of the Supplemental Affidavit of Records than they were before.

[87] In addition, many of the Supplemental Records ought to have been included in the Plaintiff's original Affidavit of Records. The Plaintiff did not discharge its evidentiary burden to prove the Supplemental Records, many of which had been in the Plaintiff's possession when the original Affidavit of Records was filed, significantly advanced the Action.

[88] Having concluded the Supplemental Affidavit of Records served by the Plaintiff upon the Defendants on March 22, 2021, did not significantly advance the Action, the Appeal is allowed.

[89] The Action is dismissed pursuant to *Rule* 4.33.

Heard on the 7th day of May, 2025.
Dated at the City of Edmonton, Alberta this 16th day of June, 2025.

Kelsey L. Becker Brookes
J.C.K.B.A.

Appearances:

Louis Belzil, K.C.
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