

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 75**

Date: **2024 04 30**
Docket: KBG-MF-00050-2023
Judicial Centre: Melfort

BETWEEN:

ERIN FABISH

PLAINTIFF

- and -

MACKENZIE INVESTMENTS

DEFENDANT

Appearances:

Erin Fabish
C. Dexter Bricker
Investments

appearing on her own behalf
appearing for Mackenzie

FIAT
April 30, 2024

ELSON J.

Introduction

[1] In this matter, the self-represented plaintiff served and filed a statement of claim alleging a possible mishandling of private information. After the defendant served her with an application to strike the claim, the plaintiff filed a notice of

discontinuance before the application's return date. Despite the discontinuance, the defendant contends that the Court should hear and decide its application on its merits.

[2] This contention took on greater vigour after the plaintiff, during oral submissions, made it clear that she plans to pursue her complaint against the defendant in some other proceeding. These comments moved the defendant to argue that the Court should set aside or disregard the discontinuance, possibly as an abuse of process of the Court.

[3] This fiat approaches this rather unusual circumstance by attempting to answer three questions. They are:

- a. Should the discontinuance be set aside or disregarded?
- b. If the discontinuance is valid, does this Court have the jurisdiction to hear and decide the defendant's application to strike the statement of claim?
- c. If the Court does have jurisdiction to hear and decide the defendant's application to strike the statement of claim, should it decline to exercise such jurisdiction?

[4] For the reasons set out in this fiat, my answer to both the first and second questions is "No". As such, it is not necessary to address the third question. Even so, I am compelled to say that, if my answer to the second question is found to be wrong, my answer to the third question would be "Yes".

Background

[5] The plaintiff issued her statement of claim on August 1, 2023. The issued pleading is quite short. It contains four typewritten paragraphs within a standard

stationer's form for the pleading. The central allegations, worded in a somewhat less-than-scrutable way, assert that the defendant mishandled, or may have mishandled, private information belonging to the plaintiff and/or her family. These allegations appear in paras. 3 and 4 of the claim. In their uncorrected form, they read as follows:

3. *MacKenzie Investments has been operating there business under details that are close or exact to information in which is found in health card, land details, social insurance numbers. They have been contacted in regards to privacy and have failed to respond, rectify or meet with me in regards to my complaint.*

4. *set out each remedy sought and indicate against which defendants that remedy is sought.]*

1. I want all Mackenzie/Mckenzie information in regards to myself, family members to be removed from there business, as well as all Mackenzie/Mckenzie representation to be removed from there business__

2. I want a meeting with them immediately and an injunction imposed until the situation is rectified__

3. financial remediation to be determined__

[6] The defendant filed its statement of defence on October 20, 2023. It essentially denied the material facts which the plaintiff either pleaded or implied in her statement of claim. The defendant also pleaded that the statement of claim did not disclose a cause of action.

[7] Slightly more than two months later, the defendant brought its application to strike the claim, in its entirety, pursuant to both Rules 7-9(2)(a) and (e) of *The King's Bench Rules*. The application, returnable in chambers on February 27, 2024, purports to be grounded on the assertions that the plaintiff's claim did not disclose a reasonable cause of action and/or that it amounted to an abuse of the process of the Court.

[8] Eight days after she received the application, the plaintiff filed a discontinuance of her claim on January 10, 2024. The plaintiff did not serve the

defendant with the discontinuance, nor did she obtain the defendant's consent to discontinue her action without costs.

[9] Despite the discontinuance, the defendant persisted with the application to strike. On its return date, the defendant's counsel contended that, because the discontinuance was not "with prejudice", the plaintiff could simply withdraw it and then continue to pursue her action. In counsel's view, this circumstance afforded the Court jurisdiction to hear the application and strike the claim.

[10] Meanwhile, the plaintiff candidly told the Court that, despite the discontinuance, she remains convinced that the defendant may be liable for the complaint described in her claim. In this regard, she advised that she had made inquiries of local law firms, seeking counsel to represent her but without success. In answer to a specific question from the Court, the plaintiff said she was unaware of any class proceedings that may have been launched pertaining to the complaints in her claim. That said, she acknowledged that she might be interested if this avenue became available to her.

[11] I also questioned defence counsel about whether this Court has jurisdiction to hear and consider an application to strike a claim that has been discontinued before the return date of the application. As counsel was unaware of any jurisprudence on this point, he was granted leave to serve and file an additional written brief. I now have the benefit of that brief.

[12] Counsel's additional brief raised a concern about the discontinuance, itself. Through this brief, the defendant posited that, because the plaintiff still wishes to pursue a claim of some sort against it, her discontinuance amounted to an abuse of process of the Court or is otherwise improper. As I read the brief, the defendant now

invites the Court to set the discontinuance aside and then consider the application to strike on its merits.

Rule 4-49 of *The King's Bench Rules*

[13] At the outset, it must be noted that the discontinuance of a claim is governed by Rule 4-49 of *The King's Bench Rules*. The portions of Rule 4-49 that pertain to the present matter are Rules 4-49(1) to (3), which read as follows:

4-49(1) At any time before receipt of the statement of defence of any defendant, or after the receipt of the statement of defence and before taking any other proceeding in the action other than an interlocutory application, the plaintiff may wholly discontinue the plaintiff's action against the defendant or withdraw any part of the action by serving and filing a notice in Form 4-49.

(2) If the plaintiff serves and files a notice in accordance with subrule (1), the defendant is entitled to:

- (a) if the action is wholly discontinued, the costs of the action; or
- (b) if the action is not wholly discontinued, the costs occasioned by the part of the action that has been withdrawn.

(3) If the action is wholly discontinued, the costs to which the defendant is entitled pursuant to subrule (2) may be assessed on production of the notice served, and if not paid within 30 days after assessment, the defendant may issue an enforcement instruction with respect to those costs.

...

Should the discontinuance be set aside or disregarded?

[14] There is no specific rule that addresses the circumstances under which a discontinuance can be set aside. That said, and as the defendant's additional brief notes, there is jurisprudence suggesting that such a remedy can be directed as part of a superior court's inherent jurisdiction to govern its procedure.

[15] Two authorities cited by the defendant in this regard are *De Shazo v Nations Energy Co.*, 2005 CarswellAlta 2149 (WL) (QB), aff'd at 2006 ABCA 400, 276 DLR (4th) 559 [*De Shazo*], and *Poffenroth Agri Ltd. v Brown*, 2020 SKQB 31, 53 CPC (8th) 174, aff'd 2020 SKCA 121, 65 CPC (8th) 348 [*Poffenroth*]. Both cases involved findings that a discontinuance had been filed for improper purposes.

[16] In *De Shazo*, the defendants were related energy operations. The plaintiff brought an action in Alberta alleging fraud and oppressive conduct on the part of the defendants. He brought simultaneous claims against the same defendants in Texas. After two defendants persuaded the Court in Alberta to dismiss the action against them on the grounds of an expired limitation period, the remaining defendants also applied for summary dismissal. Before the application could be heard, the plaintiff filed a discontinuance of his Alberta action and expressed his intention to litigate the issues in Texas. When the dismissal application came before the chambers judge at first instance, the plaintiff argued that the court lacked jurisdiction to consider it. In advancing this proposition, the plaintiff noted that the defendant had not applied to set aside the discontinuance and the wording of the applicable Alberta rule (Rule 225 of the *Alberta Rules of Court*) was absolute in nature. It followed, according to the plaintiff, that the right to a discontinuance was unbridled.

[17] In an oral decision, appearing in the published transcript of the proceeding before her, the chambers judge, Martin J. (as she then was), rejected the plaintiff's submission. Relying on a superior court's inherent jurisdiction, she held that the relevant rule could be construed in a manner that allowed the Court to control its own process. From this perspective, she went on, at para. 47 of the chambers judge's decision, to claim jurisdiction despite the discontinuance. In doing so, Martin J. said that, while a discontinuance was a plaintiff's right, the Court's inherent jurisdiction to govern its own process obliged it to police the exercise of that right to ensure that "it is

subject to an overarching fairness to all parties concerned”. She then claimed jurisdiction, considered the application for summary dismissal, and found for the defendants.

[18] The decision was affirmed on appeal in a *per curiam* judgment of the Alberta Court of Appeal. There, the Court concluded that, given the circumstances under which the discontinuance was filed, the chambers judge was justified in claiming jurisdiction to address summary dismissal. To this point, the Court of Appeal wrote the following at paras. 13-14:

13 The *Rules of Court* are designed to enable the fair, economical and efficient adjudication of a civil claim. Where the Rules are used in an obstructive, abusive or unfair manner, the court has the inherent jurisdiction to intervene, especially where the ability of the court to adjudicate on the merits is involved. While the appellant might have a wide ranging right to discontinue the action, the defendants have an equal right to bring an application for summary dismissal. Just as there are no conditions listed in R. 225 on the right to discontinue, there are no conditions listed in R. 159(2) on the right to seek summary dismissal. Rule 225(1) merely provides that the ability of a plaintiff to discontinue an action before trial is not conditional on the approval of a judge: compare R. 225(3). Rule 225 is not an absolute rule in isolation from other rules providing for adjudications by the Court of Queen’s Bench, and does not provide that a discontinued action shall immediately be treated as if it never existed.

14 The appellant notes that no application was brought to set aside the discontinuance. While such a formal application might have been desirable, there can be no suggestion that the appellant was taken by surprise, or that any prejudice resulted from the procedure followed. It could equally be argued that the appellant took no steps to set aside the applications for summary dismissal.

[Emphasis added]

[19] A similar situation arose in *Poffenroth*. In that case, the plaintiff commenced near identical actions against the defendant in both Saskatchewan and Alberta. The defendant served and filed defences to both actions. He also successfully applied for a stay of the Alberta action, pending a jurisdictional determination by this Court. The judge in Alberta expressly granted the stay on the understanding that the

parties would return to Saskatchewan for a decision as to which jurisdiction was the most convenient and appropriate forum. Before this Court could hear submissions on the point, the plaintiff discontinued the Saskatchewan claim. The defendant followed with an application to set aside the discontinuance. The plaintiff resisted the application, arguing that Rule 4-49(1) provided an absolute right to discontinue the claim.

[20] The chambers judge disagreed. Relying on the Court's inherent jurisdiction, as recognized in Rule 1-4(3), Robertson J. concluded that the Court had jurisdiction to consider the application on its merits. Moreover, in addressing those merits, he found that the discontinuance of the Saskatchewan action reflected an effort to evade the terms of the order made in Alberta. Robertson J. reasoned that, in effect, the defendant was seeking to pre-empt the determination to which the Alberta court had deferred. On this basis, the discontinuance was set aside. On appeal, the Saskatchewan Court of Appeal found no reversible error in this analysis.

[21] As affirmed by the Court of Appeal, it is obvious that I am bound by the decision in *Poffenroth*. Even so, I can say, without reservation, that even if not bound, I would adopt my colleague's analysis and apply it to circumstances like those described in his fiat. In my view, the analysis articulated in both *Poffenroth* and *De Shazo* has much to commend it. I particularly agree with the observation by the Alberta Court of Appeal that a court can either set aside or ignore a discontinuance where it has been filed for an obstructive, unfair or otherwise improper purpose, even without an application to do so.

[22] Having said all this, I find the circumstances in the matter before me are easily distinguished from those in *De Shazo* and *Poffenroth*. The distinction is apparent in two respects. First, the plaintiff here has not brought a similar action against the defendant in another jurisdiction. As such, this is not a case of the plaintiff improperly

seeking to pre-empt or evade a summary ruling on a substantive issue or jurisdictional determination.

[23] Secondly, I do not discern any improper motive on the part of the plaintiff. In saying this, I acknowledge the plaintiff's comment that she is not done with this defendant. At the same time as she said this, however, she told the Court about her difficulty retaining counsel to pursue her complaint. This led her to draft and file her own claim – warts and all. In this context, I gained the sense that the plaintiff later felt awkward about her pleading and the defendant's application to strike it. As such, I find that the discontinuance was filed more out of embarrassment than a desire to improperly thwart the defendant. While the discontinuance may have the effect of depriving the defendant of the opportunity to pursue this application, I cannot conclude that it rises to the level of impropriety or abuse of process.

[24] Thirdly, unlike the circumstances in *De Shazo* and *Poffenroth*, the discontinuance here presented very little, if any, prejudice for the defendant. It must be remembered that the issues at stake in the two cases cited by the defendant were considerably more determinative and pressing than the issues in the present case. In *De Shazo*, the remaining defendants were pursuing summary dismissal, while the defendant in *Poffenroth* was seeking to address the jurisdictional issue relating to where the plaintiff's allegations would be tried. The discontinuances, if allowed to stand with full force and effect, would deny the respective defendants an opportunity to pursue the crucial remedies they were seeking.

[25] This is starkly different from the circumstances here. If the defendant persuades the Court to set aside the discontinuance and strike the statement of claim, the practical outcome would be the same as if the plaintiff filed a valid and fully effective discontinuance. Neither outcome would be “with prejudice”. In each instance,

the defendant would no longer face an active claim by the plaintiff, and the plaintiff would still be able to pursue her complaint in another way, such as in a class proceeding.

[26] It follows that, while I accept that this Court has the jurisdiction either to set aside the discontinuance or to disregard its effect, this is not an appropriate case for me to do either. My answer to the first question is “No”.

If the discontinuance is valid, does this Court have the jurisdiction to hear and decide the defendant’s application to strike the statement of claim?

[27] Having regard to the wording of Rule 4-49(1), I am satisfied that, where a plaintiff files a discontinuance that substantially complies with the requirements stipulated in the Rule, the discontinuance, unless set aside or withdrawn, will effectively terminate the action and close the court file. It would necessarily follow that, except for any cost issues arising from the discontinuance, no further proceedings could be pursued. This would include an application to strike the discontinued claim.

[28] Although I could not uncover any specific Saskatchewan jurisprudence that addresses the effect of a valid discontinuance, guidance can be drawn from authorities in other courts. I found two judgments of the Federal Court of Canada that provide such guidance. They are *Chrétien v Canada (Attorney General)*, 2005 FC 925, 29 Admin LR (4th) 206 [*Chrétien*], and *Purcell Systems Inc. v Argus Technologies Ltd.*, 2008 FC 1210, 69 CPR (4th) 366 [*Purcell*].

[29] In *Chrétien*, the applicant, a former Prime Minister, brought an application for judicial review of the federal government’s decision to appoint the Commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities. The application was grounded, *inter alia*, on the assertion that a reasonable apprehension of bias existed on the part of the Commissioner. More than a

month before the application was to be heard on an expedited basis, the Court granted the Commissioner intervenor status on a limited basis.

[30] One week before the hearing date, the applicant discontinued his application pursuant to Rule 165 of the *Federal Court Rules*, SOR/98-106. The Commissioner expressed concern about this turn of events. He asked the Attorney General to take steps either to set aside the discontinuance or to ask the applicant to declare that his allegations be permanently withdrawn. The Attorney General declined the request, prompting the Commissioner to apply for standing to argue that the discontinuance amounted to an abuse of process and should be set aside. A central feature of the Commissioner's argument was that it would be open for the applicant to renew his challenge after the inquiry was conducted. He posited that the applicant's allegations of bias would best be determined beforehand.

[31] The Commissioner's motion was dismissed. Aside from deciding against enlargement of the Commissioner's intervenor status, the Court expressly addressed the effect of a discontinuance of a proceeding under Rule 165. At para. 50 of the judgment, Prothonotary Aronovitch wrote:

50 As a matter of law, a discontinuance is neither an adjournment nor a suspension of the proceeding. It effectively terminates the proceeding and closes the Court file. The discontinuance in this instance cannot be characterized as an attempt to suspend or put over the judicial review, because at law, it has the effect of entirely abandoning or bringing this application for judicial review to an end.

[Emphasis added]

[32] Prothonotary Aronovitch also rejected the Commissioner's argument that the filing of a discontinuance, while maintaining the possibility of renewing the proceeding, invoked the doctrine of abuse of process. In doing so, she accepted the definition of the doctrine adopted by the Supreme Court of Canada in *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77. Roughly paraphrased, that

definition focuses on the goal of preventing the misuse of a court's procedure where it would be manifestly unfair to a party or would bring the administration of justice into disrepute. Prothonotary Aronovitch later went on to conclude that the Commissioner's argument did not engage this doctrine. She specifically addressed the point at paras. 55-56:

55 More to the point, the filing of the Applicant's notice of discontinuance, even when coupled with an intention to initiate a new judicial review application upon release of the Commissioner's report, can not at this juncture be grounds to determine that the discontinuance itself is an abuse of process, particularly when it is at least arguable that the application is premature.

56 Moreover, any determination of whether a discontinuance and filing of a second application amounts to an abuse of process takes place at the time of the filing of the second application. In the cases cited by the Commissioner, it was the second application or action that was alleged to be an abuse of process, not the previous discontinuance. Abuse of process, in my view, has no application at this juncture and is improperly raised as a ground for impugning the notice of discontinuance.

[33] The foregoing analysis from *Chrétien* was followed by Mandamin J. in *Purcell* at paras 31-32. It should be noted that the discontinued proceeding in *Purcell* was an action, as opposed to an application, which was the situation in *Chrétien*.

[34] In my view, the analysis from *Chrétien*, which was followed in *Purcell*, applies to Rule 4-49(1). Subject to the prospect of being set aside for impropriety or withdrawn on application to the court, a discontinuance that wholly discontinues an action brings the plaintiff's claim to an end and terminates the proceeding (unless the defendant has commenced a counterclaim). It follows that the court cannot entertain any motion to strike or dismiss a discontinued claim.

[35] In making the above comment, I acknowledged the prospect that a plaintiff might apply to withdraw a discontinuance. This acknowledgement, however, comes with the recognition that the success of such an application depends on proof of

special circumstances. Examples of special circumstances may include inadvertence, mistake, or misapprehension of procedural aspects. Whatever the circumstances, they will be applied to a greater or lesser degree depending on whether a statutory limitation has expired or something of value was given in exchange for the discontinuance. See *Hunt v Mutual Life Assurance Co. of Canada*, 2004 SKQB 89 at paras 11-13, 247 Sask R 131, and the authorities cited therein.

[36] In the present case, the plaintiff substantially complied with Rule 4-49(1). While she did not serve the document on defence counsel, I understand the deputy registrar, at my direction, informed counsel of the discontinuance a few days before chambers. Under these circumstances, I deem the defendant to have been served. Barring any steps by the plaintiff to withdraw the discontinuance – which I believe very unlikely – it follows that the discontinuance is valid. Accordingly, the action is at an end and the Court is without jurisdiction to hear and consider the defendant’s application. My answer to the second question is “No”.

If the Court does have jurisdiction to hear and decide the defendant’s application to strike the statement of claim, should it decline to exercise such jurisdiction?

[37] Given my answer to the jurisdictional issue, the question posed in this heading is moot. Nevertheless, accepting that I may be wrong in my conclusion on jurisdiction, I think this question deserves an answer.

[38] In my view, if jurisdiction to hear the defendant’s application exists, the Court should decline to exercise it. As I have already pointed out in answering the first question, success in the defendant’s application would largely serve as an empty victory. It would not prevent the plaintiff from pursuing her complaint in some other proceeding. It necessarily follows that the defendant will suffer no prejudice if the Court declines to exercise the suggested jurisdiction. My answer to the third question would be “Yes”.

Conclusion

[39] In the result, and based on the answers to the three questions, the plaintiff's discontinuance is valid. Accordingly, the Court is found not to have jurisdiction to hear and decide the defendant's application to strike the now discontinued statement of claim.

[40] The defendant is entitled to its costs of the action pursuant to Rule 4-49(2). Such costs should be assessed under Column 1 of the Tariff of Costs. Further, to the extent the defendant is entitled to costs in respect of its application to strike, such costs shall be assessed at half of the amount allowed for an uncontested matter. Given all the circumstances, including my finding that the Court lacked jurisdiction to deal with the application, I am satisfied that such an assessment is fair.

[41] I direct the defendant to prepare an order in relation to this fiat. Under the circumstances, Rule 10-4 of *The King's Bench Rules* is waived. That said, it will be necessary for me to review the order before it is issued.

[42] Finally, I should note that, while this matter was on reserve, it came to my attention that certain Canadian law firms, including one Saskatchewan firm, have commenced national class actions relating to a claim that bears a similarity to the plaintiff's complaint. While it is not for the Court to advise anyone on what they should do, I do not think it inappropriate for me to share this observation.

J.
R.W. ELSON