

In the Court of Appeal of Alberta

Citation: 1199096 Alberta Inc v Imperial Oil Limited, 2024 ABCA 166

Date: 20240522
Docket: 2401-0054AC
Registry: Calgary

Between:

1199096 Alberta Inc.

Applicant

- and -

Imperial Oil Limited

Respondent

**Reasons for Decision of
The Honourable Justice Bernette Ho**

Application to Extend Time to File Notice of Appeal

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[1] The applicant, 1199096 Alberta Inc, seeks an order extending time to file a notice of appeal and if successful, costs of the application.

[2] In 2009, the applicant filed a statement of claim against the respondent, Imperial Oil Limited, and another party alleging they contaminated and failed to remediate certain lands. The claim seeks \$11 million in damages.

[3] On February 17, 2023, Applications Judge Farrington dismissed the action as against the respondent under Rule 4.31 of the *Alberta Rules of Court*, Alta Reg 124/2010. On February 5, 2024, Justice Simard dismissed the applicant's appeal of the Farrington Order. The Simard Order was filed March 5, 2024 and transmitted to the applicant's office.

[4] On March 6, 2024, the applicant attempted to file a notice of appeal of the Simard Order but was advised by the Court of Appeal's Registry Office that the deadline to file was the day prior. Under Rule 14.8(2)(a)(iii), the deadline for filing the notice of appeal was March 5, 2024, being "within one month after the date of the decision". The applicant filed the notice of appeal one day late.

[5] In *Cairns v Cairns*, [1931] 4 DLR 819 at 826-27, [1931] 3 WWR 335 (Alta SC AD), this Court detailed factors that guide the Court in exercising its discretion to extend the time to appeal. The appellant must show:

1. that there was a *bona fide* intention to appeal while the right to appeal existed, and that there was some special circumstance that would excuse or justify the failure to appeal in time;
2. an explanation for the delay and that the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties;
3. that the appellant has not taken the benefits of the judgment from which appeal is sought; and
4. that the appeal would have a reasonable chance of success if allowed to proceed.

[6] The *Cairns* factors do not set rigid requirements and ultimately the court has a general discretion to extend time where justice requires it: *Cairns* at 829; *Li v Morgan*, 2020 ABCA 186 at para 4.

[7] The respondent submits that the applicant has not met its onus under the *Cairns* test because the applicant has not adduced evidence explicitly stating that there was a *bona fide* intention to appeal while the right of appeal existed and has not established that there is a reasonable chance of success on appeal. The third factor is not relevant in this application.

[8] The respondent agrees that the Simard Order was filed with the Court of King's Bench on March 5, 2024 and the applicant's attempt to file a notice of appeal on March 6, 2024 was one day late. I am persuaded that the intention to appeal existed within time given the applicant's attempt to file the notice of appeal on March 6, although it would have been preferable to have affidavit evidence directly from the party who is alleged to have the *bona fide* intention to appeal within the appeal period: *Paquin v Lucki*, 2017 ABCA 79 at para 6.

[9] Applicant's counsel explained that the failure to appeal in time was caused by waiting to receive a filed copy of the Simard Order and there was a misunderstanding within counsel's office about the requirement to file within "one month" of the order, as required by the *Alberta Rules of Court* as opposed to within 30 days. I accept there was confusion in counsel's office that caused the short delay.

[10] In my view, the respondent will not suffer prejudice from allowing the requested extension of time to file the notice of appeal.

[11] With respect to whether there is a reasonable chance of success, also described as a reasonably arguable appeal, the applicant submits the statement of claim pleads both an intentional tort and negligence, and one of its grounds of appeal is that the court below erred by analyzing only the negligence aspect of its claim. In support, the applicant has included in its affidavit excerpts from questioning of certain of the respondent's representatives that purportedly address contamination and remediation of the subject lands. Without commenting on the merits, I am satisfied that the appeal at least raises an arguable issue.

[12] In my view, the *Cairns* factors weigh in favour of granting an extension of time to file the notice of appeal and in any event, I am prepared to exercise my general discretion to grant the requested order.

[13] The application is granted and costs follow the event.

Application heard on May 15, 2024

Reasons filed at Calgary, Alberta
this 22nd day of May, 2024

Ho J.A.

Appearances:

C.O. Llewellyn
K.A. Sterling
for the Applicant

B.H. Walker
M.L. Sharpe
for the Respondent