In the Court of Appeal of Alberta

Citation: 1199096 Alberta Inc v Imperial Oil Limited, 2025 ABCA 303

Date: 20250909
Docket: 2401-0054AC
Registry: Calgary

2025 ABCA 303 (CanLII)

Between:

1199096 Alberta Inc.

Appellant

- and -

Imperial Oil Limited

Respondent

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Joshua B. Hawkes
The Honourable Justice Karan M. Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.D. Simard
Dated the 5th day of February, 2024
Filed the 5th day of March, 2024
(Docket: 0901 03019)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant, 1199096 Alberta Inc (1199), appeals an order upholding dismissal of its claims against the respondent, Imperial Oil Limited (Imperial), for inordinate and inexcusable delay under r 4.31 of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*]. 1199 also applies to adduce fresh evidence on appeal.

[2] The appeal and the fresh evidence application are dismissed for the following reasons.

Background

[3] Imperial is an energy producer that explores, produces, refines, and markets oil and gas products. It had leases and licenses with respect to its oil and gas operations on certain lands that became the subject of a lawsuit launched by 1199.

[4] In 1996, Imperial sold the lands to Probe Exploration Inc. but retained certain well sites located in a section of the lands. MEC Operating Company (MEC), one of the defendants in the action but not party to this appeal, acquired the lands in 2003.

[5] In 2005, 1199 purchased approximately 185 acres of the lands from MEC. Before acquiring the lands, 1199 engaged Planning Protocol Inc (Planning Protocol) to, among other things, investigate the lands' environmental status. Employees from Imperial advised Planning Protocol that the lands had outstanding contamination issues because of previous oil and gas operations. Planning Protocol engaged another third-party consultant to conduct additional environmental assessments on the lands. The reports recommended that "the oil/gas lease operators complete remediation certificates" to remediate any possible traces of contamination.

[6] Nevertheless, 1199 completed the purchase. Imperial continued to advise 1199 and Planning Protocol of ongoing testing on the lands for the purposes of identifying the nature and extent of the remediation and reclamation necessary to obtain the remediation certificate.

[7] 1199 subsequently decided to sell the lands. Between October 2005 and April 2008, it received eight offers for purchase. These all fell through. 1199 alleged this was due to the environmental concerns for which Imperial and MEC were responsible and had failed to properly remediate. 1199's lenders eventually forclosed on the lands. They were later purchased by a subsidiary of Imperial, Devon Estates Limited.

[8] 1199 filed its statement of claim against Imperial and MEC on February 27, 2009, alleging negligence by the defendants in failing to discharge their statutory remediation obligations.

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Imperial filed a statement of defence on April 14, 2009 and served its affidavit of records on August 31, 2009. By 2020, however, the action still had not proceeded to trial.

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[9] On November 9, 2020, Imperial filed an application under r 4.31 to dismiss 1199's action, as against Imperial, for inordinate delay. The applications judge granted the application and dismissed 1199's claim against Imperial. 1199 appealed to the Court of King's Bench. The appeal was dismissed.

[10] The chambers judge conducted his analysis using the framework established by this Court in ***Humphreys v Trebilcock,*** 2017 ABCA 116, and ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 [***Transamerica***]. The chambers judge examined in detail the chronology of the steps taken in the action over an 11-year period. He found the evidence proved "conclusively" that the delay was inordinate, noting "1199 repeatedly failed to do anything to advance the action, instead doing nothing and letting the action languish to an extreme and unreasonable degree". AR at 33. He provided several examples of delays occasioned by 1199 including: 1199's failure to request questioning of Imperial's litigation representatives for 30 months after Imperial provided its affidavit of records; 1199's cancellation of a questioning, and its failure to seek alternative dates from Imperial for another 11 months; 1199's failure to respond to Imperial's response to undertakings for eight months; and a 14-month delay by 1199 in following up on dates to question a former Imperial employee. AR at 33-34.

[11] The chambers judge next considered whether the delay was inexcusable and in doing so, considered Imperial's and MEC's roles in causing the delay. The chambers judge concluded that while MEC was responsible for the significant delay, Imperial "consistently and promptly complied with its specific duties as a defendant, and it consistently responded to 1199's correspondence promptly and constructively, to progress the action". AR at 36.

[12] 1199 also argued that Imperial acquiesced in the delay MEC caused. The chambers judge rejected this. He found that while there was one example of Imperial relying on MEC's inaction to defer steps in the litigation, it had acted reasonably in doing so.

[13] Finally, 1199 argued that in not taking formal steps against MEC to advance the suit, counsel for 1199 was simply observing professional courtesy. The chambers judge rejected this argument, stating:

> Courtesy between counsel is certainly to be encouraged, and lawyers should obviously try to schedule litigation steps consensually in the first instance. However, when a plaintiff does so and is met with lengthy silences or inactivity (as 1199 experienced here with MEC), it has a duty to use the tools in the *Rules of Court* to advance the action.
>
> AR at 38.

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[14] The chambers judge then moved on to address whether 1199 had rebutted the presumption of prejudice arising from the inordinate delay and whether Imperial had demonstrated it would suffer significant prejudice if the action proceeded to trial. 1199 argued it had rebutted the presumption because the case was a ***Rylands v Fletcher*** (1868), LR 3 HL 330, strict liability claim that could be proved by simply tendering documents into evidence. It also argued witnesses could use documents to refresh their memories and, further, Imperial had not provided evidence that potential witnesses who had moved away or retired could not be produced for trial.

[15] The chambers judge rejected these arguments. With respect to the nature of the claim, he noted it was framed in only negligence. He then considered the type of evidence that would be required to resolve the issues between the parties, finding the pleadings raised “numerous issues about the parties’ states of mind at the time 1199 purchased the Lands”. AR at 41. He determined the case would require oral testimony, including expert opinion evidence on the standard of care at the relevant time. It was not a case that could be resolved solely or primarily on the basis of documentary evidence. Moreover, the chambers judge found the passage of time would impede Imperial’s ability to adduce oral testimony and expert opinion evidence, resulting in significant, actual prejudice to Imperial if it was forced to go to trial.

[16] Having found that Imperial would suffer actual, significant prejudice as a result of 1199’s inordinate delay in prosecuting its claim, the chambers justice then considered whether there was any compelling reason not to dismiss the action. He found there was no compelling reason, and, accordingly, he dismissed 1199’s appeal.

Grounds of Appeal

[17] The grounds of appeal can be distilled into two parts. First, 1199 argues the chambers judge incorrectly characterized 1199’s cause of action against Imperial as negligence, in turn leading him to conclude the case would require a trial with oral evidence, including expert testimony, and that Imperial would suffer significant prejudice as a result of the delay. Second, 1199 says the chambers judge failed to consider all relevant matters relating to the delay, specifically, the fact that some delay was caused by having to wait for MEC to take certain steps and the efficiency that would be achieved by proceeding against both Imperial and MEC at the same time; and that in not taking formal steps to advance the litigation, counsel for 1199 was exercising professional courtesy.

Standard of Review

[18] Applications made under r 4.31 of the *Rules* engage elements of judicial discretion. Unless the exercise of the discretion is based on an error in principle or a party establishes the exercise of the discretion was clearly unreasonable, deference is warranted on appeal. ***Canada (Attorney General) v Fontaine***, 2017 SCC 47 at para 36; ***Royal Bank of Canada v Levy***, 2020 ABCA 338 at para 11 [***Levy***].

[19] The question, whether there is significant prejudice, is one of fact. ***Cochrane (Town) v Austech Holdings Inc***, 2022 ABCA 377 at para 22; ***Levy*** at para 12. It is reviewed on a standard of palpable and overriding error. ***Housen v Nikolaisen***, 2002 SCC 33 at para 10.

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Discussion

The chambers judge properly concluded Imperial would suffer significant prejudice if forced to go to trial

[20] 1199 submits this is a case that can be resolved solely on the basis of documentary evidence, without the need for oral testimony, thus diminishing any prejudice to Imperial. Those documents would demonstrate "absolute liability under the principles in [***Rylands v Fletcher***] and otherwise under statutory liability". Appellant's Factum at para 51. Accordingly, 1199 says the only issue to determine would be the amount of damages to which it is entitled.

[21] We disagree. The chambers judge did not mischaracterize the cause of action. The only cause of action 1199 pleaded is negligence. Its argument that this is a ***Rylands v Fletcher*** claim is without merit: the consitutent elements were not pleaded.

[22] Further, the chambers judge did not err in concluding oral testimony, including expert testimony on the standard of care at the relevant time, would be required to resolve the issues in the case. 1199's statement of claim makes specific allegations regarding the defendants' knowledge of the pollution, the need for remediation, their intentions, and the *fides* of taking (or not taking) certain actions. As the chambers judge observed, while some of the allegations might be provable through documentary evidence, oral testimony would be required to wholly resolve the claims, and certainly, expert testimony would be required on the standard of care. Further, the documents that 1199 says will resolve the issues of liability in this action are hearsay and we agree with the chambers judge that even in the case of documents that might be admissible forms of hearsay, oral evidence would be required to speak to their authenticity, accuracy, and to allow a trial judge to determine the weight to afford them.

[23] Finally, the chambers judge did not err in concluding the delay would be prejudicial to Imperial. The fact that Imperial was able to locate the witnesses would not overcome the challenge of dealing with the effect of the long passage of time on the witnesses' memories, nor the difficulty in obtaining expert opinion evidence on standards of care going back to at least 2005.

The chambers judge considered all relevant factors

[24] 1199 argues the chambers judge erred in principle for two reasons. First, he did not recognize that MEC caused the delay, and it would have been more practical to proceed against both defendants at once. Second, he did not accept that 1199's failure to take formal steps to have MEC discharge its obligations as a defendant in an action was an appropriate exercise of professional courtesy between counsel. Neither of these arguments has merit.

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[25] That MEC was the primary cause of the delay was not disputed by the parties to this appeal. 1199 argued that after MEC refused to cooperate with it in advancing the action, it was left powerless to move the matter towards resolution. This reflects a misunderstanding of the law. The *Rules* give plaintiffs many tools to enforce compliance and assist in moving litigation forward. See ***Transamerica*** at paras 24-32. These tools were available to 1199. It chose not to use them.

[26] 1199's argument about professional courtesy fails for the same reason. As the chambers judge observed, courtesy and cooperation between counsel should be encouraged. Given the magnitude of delay that was occurring in this litigation, however, 1199 was required, as plaintiff, to do more than write letters. It had an obligation to take formal action, using the procedural tools available under *Rules*.

[27] While 1199 disagrees with the conclusions the chambers judge reached, it has not identified any error in principle that would justify appellate intervention. As noted, the decision to dismiss an action for inordinate delay is a discretionary decision, entitled to significant deference on appeal.

Fresh evidence application

[28] The fresh evidence 1199 seeks to admit on appeal primarily consists of documents which it says proves its case without the need for oral testimony. Our conclusion that the chambers judge did not err in determing oral testimony would be required to resolve the issues and properly dismissed 1199's claim for inordinate and inexcusable delay is dispositve. Accordingly, there is no need to consider the fresh evidence application further. It is dismissed.

Disposition

[29] The appeal and application are dismissed.

Appeal heard on June 10, 2025

Memorandum filed at Calgary, Alberta
this 9th day of September, 2025

Feehan J.A.

Authorized to sign for: Hawkes J.A.

Shaner J.A.

Appearances:

C.O. Llewellyn
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for the Appellant

B.H. Walker
J. Urquhart
for the Respondent

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