In the Court of Appeal of Alberta

Citation: Takacs v International Union of Operating Engineers, 2025 ABCA 6

Date: 20250108
Docket: 2303-0094AC
Registry: Edmonton

Between:

Csaba Takacs

Appellant

- and -

International Union of Operating Engineers, Local 955, Pension Trust Fund

Respondents

The Court:

The Honourable Justice Dawn Pentelechuk
The Honourable Justice William T. de Wit
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice D.R. Mah
Dated the 5th day of April, 2023
Filed the 24th day of July, 2023
(2023 ABKB 248, Docket: 1813-00615)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] The appellant's action against the respondent was dismissed for long delay pursuant to Rule 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010: *Takacs v International Union of Operating Engineers*, 2023 ABKB 248 (Chambers Decision). Rule 4.33 requires the court to dismiss an action if three or more years have passed without a significant advance in the action. In the particular procedural context of this case, we allow the appeal and re-instate the appellant's action on the specific terms set out below.

PROCEDURAL HISTORY

[2] On August 31, 2018, the appellant filed a Statement of Claim alleging that the respondent had wrongfully failed to pay out the full value of his pension after he left his employment and stopped paying union dues. More details about the underlying dispute are set out in the Chambers Decision. The appellant filed an Amended Statement of Claim on February 28, 2019 and the respondent filed a Statement of Defence to Amended Statement of Claim on March 7, 2019. There is some discrepancy in the record as to exactly when the appellant filed his Affidavit of Records, but it was filed by August 20, 2019, at the latest. The respondent filed its Affidavit of Records on October 18, 2019.

[3] Nothing happened in the action between October 18, 2019 and the following events now in issue:

- On September 29, 2022, the appellant filed an application returnable November 28, 2022, requesting that the matter be set down for trial pursuant to Rule 8.5.

- On November 18, 2022, the respondent successfully applied to adjourn the November 28, 2022 date because the respondent's counsel was not available. The appellant's application was adjourned to January 18, 2023.

- On January 18, 2023, the application to set the matter down for trial was dismissed.

- On February 28, 2023, the appellant filed an application for an order directing a judicial dispute resolution (JDR), returnable April 5, 2023. The respondent cross-applied for an order dismissing the action for long delay pursuant to Rule 4.33.

[4] The parties agree that the "drop dead" date for the purposes of Rule 4.33 was January 3, 2023. This includes the three-year period contemplated by Rule 4.33 plus a 75-day suspension period set out by Ministerial Order 27/2020 to account for the Covid-19 pandemic.[1]

[5] After a hearing on April 5, 2023, the chambers justice found that the September 29, 2022 application to set the matter for trial, which was dismissed on January 18, 2023, was not a significant advance in the action for the purposes of Rule 4.33. The application did not narrow issues, lead to a greater appreciation of facts, put the parties in a better position to negotiate or put the court in a better position to adjudicate: Chambers Decision at para 22. Therefore, there had been no significant advance in the action between October 18, 2019 and the agreed drop dead date of January 3, 2023. The application for a JDR, filed after January 3, 2023, could not resuscitate the action: Chambers Decision at para 23.

[6] During the hearing, the chambers justice questioned the respondent's counsel about the fact that but for counsel's lack of availability, the application to set the matter for trial could have been heard on November 28, 2022, well before the January 3, 2023 deadline. The respondent's counsel answered that while nobody can know what would have happened had the application been heard on November 28, 2022, the only evidence is that the application was ultimately dismissed. Accordingly, neither the filing of the application to set the matter for trial nor its ultimate conclusion amounted to a significant advance in the action. In effect, the respondent's position was that it did not matter whether the application was heard before or after January 3, 2023. The chambers justice appears to have accepted this logic: Chambers Decision at para 22.

STANDARD OF REVIEW

[7] Applying Rule 4.33 to a set of facts is a question of mixed fact and law, to which some deference is owed: *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 11. More generally, failure to consider relevant evidence or information can constitute reviewable error: see *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St John's*, 2020 NLCA 27 at paras 41-42; *Madsen Estate v Saylor*, 2007 SCC 18 at paras 20-22; *Boreen v Mosaic Esterhazy Holdings ULC*, 2020 SKCA 132 at paras 74-76 (concurring reasons).

ANALYSIS

[8] In our view, the chambers justice did not consider a number of facts that were relevant to the analysis of the legal effect of the November 18 adjournment on the Rule 4.33 application.

[9] During the hearing of the adjournment application on November 18, 2022, counsel for the respondent made the following representation to the court: "The matter has been siting there for 3 years as of today roughly speaking without advancement. And so, I don't think there's any serious

[1] In light of the parties' agreement, we have not undertaken any independent assessment of the drop dead date itself.

prejudice to Mr. Takacs by having delayed [sic] for either some date in December or some date in January." There was no discussion about whether the three-year period under Rule 4.33 might still be running or the potential application of the Ministerial Order to extend the three-year period, nor was there a specific discussion about how the adjournment would impact the application of Rule 4.33. In granting the adjournment, the November 18 justice reassured the appellant:

> So, I am going to adjourn this matter to January 18th, and it will proceed at that time. Your application document will – is already filed so rather than being heard on the 28th it will be heard now on January 18th of 2023. Everything else will be the same**.** [emphasis added]

[10] The January 18 date was set based on the availability of the court and respondent's counsel. The delay between November 18, 2022 and January 18, 2023 was not attributable to the appellant and there was clearly no contemplation that he would take steps in the meantime. Given the assurances of the respondent's counsel and the November 18 justice, the appellant, who is self-represented, cannot be faulted for failing to ask for further clarification about the effect of the adjournment on his action. It may be reasonable to interpret the November 18 adjournment order as adjourning not only the application but the action for the purposes of Rule 4.33(2)(a), though we need not decide that point.

[11] On January 18, 2023, the respondent opposed the application to set the matter down for trial on three main grounds: 1) the parties had not engaged in an authorized dispute resolution process as required by Rule 8.5(1)(a) and that requirement had not been waived; 2) the case was not ready for trial because questioning had not taken place; and 3) the respondent intended to bring an application under Rule 4.33 because the three-year period had passed even before the originally scheduled November 28 hearing date for the application to set the matter for trial. There was no mention of the Ministerial Order or the potential extension of the drop dead period by 75 days into January 2023. The appellant argued that he was willing to attend dispute resolution, but he did not think there was a reasonable prospect of success because the parties were too far apart. He asked for a waiver of the dispute resolution requirement pursuant to Rule 4.16(2). The appellant advised the court that he was prepared to proceed to trial without questioning because all the necessary information was already in the documents.

[12] The January 18 justice[2] refused to set the matter for trial and he refused to waive the requirement for dispute resolution. The January 18 justice found that a dispute resolution process may well shed light on the parties' respective positions and push them towards resolution. He also held that questioning of some sort was required to refine the evidence and positions prior to setting the matter for trial. The January 18 justice added that although not directly a reason for dismissing the application, he was cognizant of the respondent's assertion that Rule 4.33 was engaged and the

[2] As it turned out, the January 18 justice was also the chambers justice on April 5, 2023, but nothing turns on that point.

respondent should have the opportunity to make that application. He stated that normally, he would call on the parties for submissions on a procedural order so that the matter could be heard at trial. However, he declined to do so because of the anticipated application for dismissal pursuant to Rule 4.33.

[13] We are satisfied that the chambers justice erred in failing to consider the foregoing circumstances and in treating the November 18 adjournment as legally irrelevant. The appellant argues that had he been able to proceed with his application on November 28, even if the outcome had been the same as it was on January 18, he would still have had five weeks to bring his application directing a JDR or to take other steps to advance the action. The appellant is responsible for his own failure to either advance the litigation between October 18, 2019 and September 29, 2022 or secure an agreement for a suspension of time pursuant to Rule 4.33(5). He may not have been able to salvage the case in five weeks following November 28, 2022. However, the chambers justice's treatment of the adjournment effectively deprived the appellant of the opportunity to try.

[14] Further, as referenced by the January 18 justice, even if an application pursuant to Rule 8.5 is refused, it is common for the court to make a procedural order to expedite or facilitate further steps in the action. Rule 8.5(2) expressly contemplates such an order. The January 18 justice declined to make a procedural order because the respondent intended to bring an application pursuant to Rule 4.33. The respondent now relies on the January 18 dismissal of the Rule 8.5 application to set the matter for trial as a basis for saying that regardless of when it was heard, the Rule 8.5 application did nothing to advance the action. However, there is a reasonable prospect that had the Rule 8.5 application not been adjourned, but rather heard on November 28, 2022, and the court informed at that time that the drop dead date would not expire until January 3, 2023, the presiding justice would have issued a procedural order even if the matter was not set for trial. Obviously, we are not in a position to say definitively that this would have occurred, or if so, whether such procedural order or any step ordered therein would have significantly advanced the action prior to the drop dead date. However, in all the circumstances, the benefit of the doubt must go to the appellant.

[15] We therefore conclude that the decision of the chambers justice to dismiss the appellant's action pursuant to Rule 4.33 is tainted by the failure to consider relevant facts going to the ultimate result and must be reversed. In these unusual circumstances, we direct that the appellant's action be reinstated as of the date of this decision. In doing so, neither party should receive a windfall. Accordingly, the appeal is allowed on the basis that as of the date of reinstatement (the date of this decision) two years and nine months have passed without a significant advance in the action for the purposes of Part 4, Division 6 of the *Alberta Rules of Court*. Nothing herein precludes the respondent from making a further application under Part 4, Division 6 if the circumstances warrant. The appellant's application for a JDR, filed February 28, 2023, is extant and may be rescheduled according to the procedures of the Court of King's Bench.

[16] We emphasize that this decision does not address the merits of the appellant's claim or the respondent's defence.

DISPOSITION

[17] The appeal is allowed. The order dismissing the appellant's action pursuant to Rule 4.33 is set aside and the action is reinstated on the terms set out in paragraph 15 above.

[18] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order or judgment.

Appeal heard on October 30, 2024

Memorandum filed at Edmonton, Alberta
this 8th day of January, 2025

Authorized to sign for: Pentelechuk J.A.

de Wit J.A.

Grosse J.A.

Appearances:

Appellant C. Takacs

C.H. Cook
for the Respondents