Citation: The Workers Compensation Board v Ali, 2020 MBCA 122
Date: 20201210
Docket: AI20-30-09407

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

THE WORKERS COMPENSATION BOARD	)	***K. T. Williams*** *and* ***J. M. Nordlund*** *for the Appellant*
(Plaintiff) Respondent	)	
	)	***W. S. Gange*** *and* ***J. G. Collins*** *for the Respondent*
- and -	)	
	)	*Appeal heard:* ***September 18, 2020***
DR. MOSSADEQ BEN ALI	)	
(Defendant) Appellant	)	*Judgment delivered:* ***December 10, 2020***

BURNETT JA

[1] The defendant appeals a decision denying his motion (the motion) to dismiss the claim for delay pursuant to rr 24.01 and/or 24.02 of the MB, *Court of Queen's Bench Rules*, MR 553/88.

[2] The motion judge concluded that "this case comes very close to, but *just shy* of, justifying dismissal on the basis of inordinate and inexcusable delay."

[3] It is not possible to ascertain why the motion judge reached that conclusion and, for the reasons that follow, it would be an injustice not to dismiss the action where the requirements of r 24.01 were met.

Background

[4] On May 6, 2005, Germaine De Cosse (De Cosse) sustained a crush injury at work which resulted in a capitate fracture of her right wrist. Surgery was performed by the defendant on May 8 and June 6, 2005.

[5] De Cosse's claim for compensation under Part I of *The Workers Compensation Act*, CCSM c W200 (as it then appeared) was approved, and her right of action to recover damages was vested in the plaintiff.

[6] On April 25, 2007, a statement of claim was filed seeking general damages, damages for loss of wages, special damages for medical expenses, interest and costs. In the claim, it is alleged that the defendant failed to diagnose and treat the fracture and that he was therefore negligent. It is further alleged that, as a result of his negligence, De Cosse had to undergo further surgical treatment and that she suffered permanent injury to her wrist, permanent disability of her right hand, stiffness of the right hand and wrist, loss of income, and general damages for pain and suffering.

[7] On March 2, 2009, a statement of defence was filed in which the defendant denied that he was negligent. Notably, the defendant said that, at that time, he had "no recall of the review and consideration made on May 7, 2005 by himself and/or the plastic surgery resident of the x-rays which accompanied De Cosse from [another hospital]".

[8] On January 9, 2019, the defendant filed the motion. In support of the motion, the defendant filed an affidavit attaching 21 exhibits, consisting of 18 emails and three letters exchanged between counsel. In response, the plaintiff filed an affidavit attaching 27 emails and eight letters.

[9] Each party filed a short supplemental affidavit attaching a few more documents. In the plaintiff's supplemental affidavit, the deponent advised that the answer to one interrogatory relating to medical information remained outstanding and that it was "in the process of being obtained and [would] be provided to the defendant as soon as it [was] received."

[10] A chronology of events and summary of the correspondence attached to the affidavits is attached hereto as Appendix A.

[11] I have serious concerns about the adequacy of the affidavits filed in this matter which will be addressed later in this decision.

[12] The motion was heard by the master on May 17, 2019. In a subsequent written decision, the master expressed concern "with the length of time it has taken the plaintiff to get to this point" but found that there had "not been three years without significant advances" (see r 24.02(1)) and that "on balance, I do not find the delay in this case rises to the level that would warrant dismissal" (see r 24.01). The master then "put in place certain procedural rulings to ensure the case [did] not languish further."

[13] The defendant appealed the master's decision to the Court of Queen's Bench. In accordance with r 62.01(13), the hearing was a fresh hearing.

[14] In an endorsement dated November 28, 2019, the motion judge dismissed the motion.

[15] The motion judge's principal reasons for exercising his discretion in this manner were that there was some complexity to the litigation involving secondary injuries and competing expert reports on liability and damages; that steps of significance to the litigation had occurred with some regularity over the past two and one-half years; and that the defendant could have brought the motion earlier and prior to the interactions between February 2017 and November 2018.

[16] The motion judge's endorsement is attached hereto as Appendix B.

[17] At the appeal hearing, this Court was advised that, after the motion judge's decision was released, the action was set down for trial. The trial is scheduled to commence on February 22, 2021.

Issues and Standard of Review

[18] The defendant submits that the motion judge erred:

1) when he failed to find that the delay in the action was "inordinate and inexcusable" (r 24.01(3));

2) when he failed to exercise his discretion to dismiss the action for delay pursuant to r 24.01(1); and

3) when he failed to dismiss the action for delay pursuant to r 24.02(1).

[19] Given my decision in relation to the first two issues, it is not necessary to address the third issue.

[20] The standard of review for these issues is set out in *Kostic v Merrill Lynch Canada Inc*, 2010 MBCA 81 (at para 41):

> The standard of review for a discretionary order is not at issue. The motion judge's exercise of discretion is entitled to deference and should not be interfered with unless he misdirected himself or if his decision is so clearly wrong as to amount to an injustice. (See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, and *Homestead Properties (Canada) Ltd. v. Sekhri et al.*, 2007 MBCA 61, 214 Man.R. (2d) 148.) Whether there is a misdirection with respect to a question of law is assessed on the standard of correctness. For errors of mixed fact and law, or fact alone, the standard is palpable and overriding error, unless an error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard of correctness applies to that extricable question. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, and *Homestead*, at para. 13.

See also *Oliver v The Government of Manitoba et al*, 2019 MBCA 62 (*Oliver CA*) at para 4; and *Ian Dmytriw et al v Jonah NK Odim et al*, 2020 MBCA 112 at paras 42-44.

The Law

Manitoba

The Former Rule and Jurisprudence

[21] Before addressing the accepted approach to the current r 24.01, a brief consideration of the previous rule is necessary.

[22] The former Queen's Bench r 24.01 stated:

> **Motion**
> **24.01(1)** The court may on motion dismiss an action for delay.
>
> **Grounds**
> **24.01(2)** On hearing a motion under this rule, the court may consider,
>
> (a) whether the plaintiff has unreasonably delayed the prosecution of the action;
>
> (b) whether there is a reasonable justification for any delay;
>
> (c) any prejudice to the defendant; and
>
> (d) any other relevant factor.

[23] In *Dmytriw*, Simonsen JA observed (at paras 18-19, 22):

> The law governing motions for dismissal for delay under the former rule was summarised in *Mauer v McDougall*, 2001 MBCA 2, adopting the approach set out in *Law Society (Manitoba) v Eadie*, 1988 CarswellMan 157 (CA) (at paras 10-11):
>
> > There is no dispute as to the applicable law. In *Law Society of Manitoba v. Eadie*, [1988] 6 W.W.R. 354; 54 Man.R. (2d) 1 (C.A.), this court outlined the factors to be taken into account on a motion for delay (at para. 16):
> >
> > > Amongst the matters which should be taken into account on a motion such as this are:
> > >
> > > (i) the subject matter of the litigation;
> > > (ii) the complexity of the issues between the parties;
> > > (iii) the length of the delay;
> > > (iv) the explanation for the delay;
> > > (v) the prejudice to the other litigant.
> >
> > But as Twaddle J.A., writing for the court, noted (at para. 15):

> > > For myself, I prefer to put all relevant considerations into a balance and decide, as a single question, whether it is just to take away from the litigant responsible for the delay the right to have his case determined on its merits. This involves, of course, the difficult task of balancing the basic right of that litigant with the right of the other party not to have his rights prejudiced by undue delay.
> >
> > See as well *Hughes and Hughes v. Simpson-Sears Ltd.* (1988), 54 Man.R. (2d) 5 (C.A.), *Singh v. Transcona Dodge Chrysler (1980) Ltd. et. al*. (1992), 73 Man.R. (2d) 74; 3 W.A.C. 74 (C.A.), *Pank-hurst v. Matz et. al.* (1991), 71 Man.R. (2d) 271 (C.A.), *Jacobson Estate v. Freed et. al.* (1994), 97 Man.R. (2d) 197; 79 W.A.C. 197 (C.A.), and *Hansen v. Manitoba Hydro* (1993), 85 Man.R. (2d) 261; 41 W.A.C. 261 (C.A.).
>
> In this case, as in all others like it, there are three key interrelated issues, namely, the explanation for the delay, whether the delay is unreasonable, and the prejudice, if any, to the defendants as a result of the delay. While all elements are important, the issue of prejudice is often decisive.

The overriding principle was that essential justice be done between the parties (*Dubois v Manitoba Lotteries Corporation et al*, 2009 MBCA 108 at paras 18-24).

This Court, in *Mauer*, also confirmed the need for personal injury claims to be tried without delay because of concern about the quality of the evidence of the parties and the medical evidence (see paras 18-19; and *Dubois* at paras 28-30).

[24] In *DeCorby v Richardson Greenshields of Canada*, 1994 CarswellMan 230 (CA), the motion judge declined to dismiss the action, despite the presence of inordinate and unexplained delay, indicating that the inference of prejudice was not so irresistible so as to deny the plaintiff his day in court. In allowing the appeal and dismissing the action, Philp JA found that

the motion judge relied on irrelevant factors to conclude that the inferred prejudice was not substantial enough, and stated (at paras 5-6):

> However, it is not necessary to decide whether or not specific prejudice to Richardson has been established on the record. In our view, in the circumstances of this case inherent prejudice must be presumed. The delay in this case is inordinate; and it remains unexplained.
>
> . . . The absence of any explanation for the inordinate delay was the crucial factor, and in failing to address that factor the motions court judge fell into error.
>
> [emphasis added]

[25] Under the former rule, factors such as the subject matter of the litigation, the complexity of the issues, the length of the delay and other relevant circumstances of the case were considered to determine whether the delay was undue, inordinate or unreasonable. This Court emphasised that a motion judge had to address three interrelated issues when considering whether essential justice required the plaintiff's action to proceed or be dismissed: the explanation for the delay; whether the delay was unreasonable; and the prejudice, both specific and inherent, to the defendant as a result of the delay. If undue and unexplained delay by the plaintiff was found, and it was determined that the defendant had suffered either from "specific" prejudice or significant "inherent" prejudice, then dismissal of the action for delay generally followed. The issue of prejudice was the "often decisive" factor (*Mauer v McDougall*, 2001 MBCA 2 at para 11).

The Current Rule and Jurisprudence

[26] Queen's Bench r 24.01 provides:

> **Dismissal for delay**
> **24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.
>
> **Presumption of significant prejudice**
> **24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.
>
> **What constitutes inordinate and inexcusable delay**
> **24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.

[27] In an unreported endorsement, *Oliver v The Government of Manitoba et al* (14 June 2018), Winnipeg CI07-01-50896 (Man QB) (*Oliver QB*), the motion judge determined that there had been delay by the plaintiff and then considered the complexity of the litigation, the subject matter or nature of the issues in the action, the length of the delay, and the explanation given for the delay, as well as other circumstances. Those factors replicate the first four factors identified in *Law Society (Manitoba) v Eadie*, 1988 CarswellMan 157 (CA); and subsequently in *Hughes v Simpson-Sears Ltd* (1988), 52 DLR (4th) 553 (Man CA).

[28] Consideration of these factors led the motion judge to conclude that the plaintiff's delay exceeded what was reasonable, and thus established that the delay was "inordinate and inexcusable" by virtue of r 24.01(3). This

finding, in turn, established that a presumption of significant prejudice resulted to the defendant by virtue of r 24.01(2). The motion judge concluded that the plaintiff's evidence failed to rebut the presumption of significant prejudice to the defendant, and he dismissed the plaintiff's action.

[29] On appeal, this Court agreed with the motion judge's approach (see *Oliver CA* at para 2).

[30] A number of other lower-court decisions have considered the current r 24.01 and, in each case, the court applied the first four factors in *Eadie* (see *DL et al v CP et al*, 2019 MBQB 42 at para 35; *Widmer Thrush v Selby*, 2019 MBQB 156 at para 33; *Buhr v Buhr*, 2020 MBQB 107 at paras 11, 19; and *Nygard International Partnership v Canadian Broadcasting Corporation et al*, 2020 MBQB 71 at paras 49, 58). Clearly these factors are the factors to be considered under r 24.01 when determining whether the delay will be considered unreasonable or, in the language of r 24.01(3), "in excess of what is reasonable".

Alberta

[31] There are no other court rules in Canada which define an "inordinate and inexcusable" delay.

[32] As noted in *Dmytriw* at para 23, Manitoba's r 24.01(2) is similar, but not identical, to Alberta's r 4.31(2) (see AB, *Rules of Court*, AR 124/2010, vol 1, r 4.31).

[33] One approach to the Alberta rule was discussed in *Humphreys v Trebilcock*, 2017 ABCA 116, leave to appeal to SCC refused, 37626 (14 December 2017).

[34] In *Trebilcock*, the Court determined that the motions court had made a number of errors, including a failure to explain why the delay did not constitute inordinate and inexcusable delay (see para 19), and a failure to analyse the issue of delay prior to considering prejudice to the defendant (see para 20). In particular, the Court stated that, where 10 years had passed since the suit was commenced and trial was still years away, the motions court "was obliged to provide compelling reasons to support a conclusion that the delay in this proceeding was not inordinate" (at para 159). Furthermore, consideration should have been given to whether the plaintiff provided an adequate explanation for the pedestrian pace of proceedings (see para 162). The Court concluded that the record compelled a finding, contrary to that of the motions court, that the delay was inordinate and inexcusable (at paras 164-175). Given the presumption of prejudice arising from this determination and the lack of rebuttal, the Court concluded that there was "no reason, let alone a compelling reason, not to dismiss the actions" (at para 188).

[35] Subsequent Alberta Court of Appeal decisions have established that the *Trebilcock* approach is not a code to be followed in all cases but, rather, provides direction on the considerations to be taken into account on a delay application, adaptable to the circumstances of a particular case (see, for example, *Arbeau v Schulz*, 2019 ABCA 204 at para 23; and *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 at para 20).

[36] In *Arbeau*, the Court utilised similar words to those found in Manitoba r 24.01(3), indicating that inordinate delay is that which is "much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case" (at para 36).

[37] In *Transamerica*, the Court ultimately approved the approach to inordinate and inexcusable delay taken by the master and the motion judge, whereby they considered the chronology of events, the length of the delay, the plaintiff's explanations for the delay, as well as the role and responsibilities of each party with respect to the overall delay.

[38] Subsequent decisions by the Alberta Court of Appeal emphasise the need to consider the relevant circumstances of the particular case and recognise that the determination of inordinate and inexcusable delay is highly fact-dependent and discretionary (see, for example, *Nova Pole International Inc v Permasteel Construction Ltd*, 2020 ABCA 45; *4075447 Canada Inc v WM Fares & Associates Inc*, 2020 ABCA 150; and *Royal Bank of Canada v Levy*, 2020 ABCA 338).

The Accepted Approach in Manitoba

[39] I will begin with the obvious. There are two issues to be addressed on a motion to dismiss for delay pursuant to r 24.01. The first is whether there has been delay; the second is whether the delay has resulted in significant prejudice (r 24.01(1)).

[40] When assessing the issue of delay, the court must decide whether it has been inordinate and inexcusable. The wording is conjunctive; the moving party has the onus to establish both requirements.

[41] In keeping with *Oliver*, the proper approach to be taken when deciding whether a delay is "inordinate and inexcusable" is to determine whether the delay is "in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case" (r 24.01(3)). This involves consideration of the first four factors identified in *Eadie*, as well as any other relevant circumstances, and would include a consideration of the current status of the litigation in comparison to a reasonable comparator (discussed below) and the role of each party in the overall delay.

[42] Although the moving party has the onus to prove that the inordinate delay is inexcusable, "[a]s a rule, until a credible excuse is made out, the natural inference would be that [inordinate delay] is inexcusable" (*Allen v McAlpine (Sir Alfred) & Sons, Ltd*, [1968] 1 All ER 543 at 561 (CA)). Appellate courts across Canada have adopted this principle. Thus, upon inordinate delay being established, the onus upon the moving party to establish inexcusable delay will essentially be met, and the plaintiff will be called upon to justify the delay (see *Ross v Crown Fuel Co Ltd et al* (1962), 37 DLR (2d) 30 at 50 (Man CA)). The issue is then whether the nature and quality of the evidence provides the judge with a clear and meaningful explanation for the delay in the particular circumstances of the case.

[43] If the delay is found to be inordinate and inexcusable, significant prejudice to the moving party is presumed (see r 24.01(2)). The presumption is rebuttable.

[44] In my view, where the delay is found to be inordinate and inexcusable, the presumption of significant prejudice is meant to avoid further litigation on the issue of inherent prejudice and its strength in a given case.

[45] If the delay is not inordinate and inexcusable, the court may nevertheless dismiss the action if the delay has resulted in significant prejudice. In these circumstances, there is no presumption of prejudice, and significant prejudice must be proved by the moving party.

[46] Finally, even if the moving party establishes delay and significant prejudice, the court may refuse to dismiss the action. The decision is an exercise of judicial discretion (see *Oliver CA* at para 4). That said, it is also my view that this residual discretion should only be exercised in exceptional circumstances where there is a compelling reason, and the compelling reason must be clearly articulated. In the absence of a compelling reason, a decision not to dismiss an action would be an injustice.

[47] I now turn to the present appeal.

The Position of the Parties

[48] Before the motion judge, the defendant argued that: the plaintiff is a sophisticated institution; there were significant gaps in its prosecution of this case; progress was generally initiated by the defendant with expressions of concern about the pace of the litigation; the plaintiff had not set the matter down for pre-trial despite assurances made in 2014; the litigation was not complex, nor had there been numerous interlocutory proceedings; and there was no real explanation for the delay.

[49] On appeal, the defendant repeats those arguments and submits that the motion judge made a palpable and overriding error in finding that the delay was not inordinate and inexcusable and by failing to apply the presumption of significant prejudice to the defendant.

[50] The defendant says that this is not a complex action that requires the critical dissection of a physician's acts or omissions in the course of a complicated medical procedure.

[51] The defendant points to numerous examples of delay. In one instance, the plaintiff allowed two years to lapse without taking any action to move the matter forward, and in another instance, the plaintiff took a year and a half to prepare a single eight-page letter.

[52] The defendant says that, given the motion judge's findings in relation to the existence of delay and the absence of a reasonable explanation for that delay, the motion judge's decision not to exercise his discretion pursuant to r 24.01(1) is so clearly wrong as to amount to an injustice. This is particularly true given the Supreme Court of Canada's recent emphasis on timely access to justice.

[53] In response, the plaintiff says that the defendant's affidavit materials are incomplete and fail to disclose his own delay in this litigation.

[54] The plaintiff submits that the weighing and balancing of the *Eadie* factors are matters that fall squarely in the discretion of the motion judge.

[55] The plaintiff says that, even in a circumstance where the presumption of significant prejudice arises, the court must still examine the

effect of prejudice and whether it impacts upon the possibility of a fair trial. According to the plaintiff, there is no evidence of the effect of prejudice and its impact upon the possibility of a fair trial as the defendant has not sworn an affidavit.

[56] The plaintiff relies on Alberta cases which have held that, even where the delay is inordinate and inexcusable, it is necessary to consider whether the delay has impaired a sufficiently important interest of the moving party so as to justify overriding the non-moving party's interest in having the action determined by the court. Alberta courts have also considered whether there is a compelling reason not to dismiss the action.

[57] In this case, the plaintiff says there is no evidence that the defendant has a sufficiently important interest which would justify overriding the plaintiff's interest in having this action heard. Further, the conduct of the defendant and the steps he took in 2018, by seeking consent to an independent medical examination and by serving interrogatories, are compelling reasons not to dismiss the action. According to the plaintiff, such conduct constitutes waiver of any delay.

[58] Finally, the plaintiff submits that the defendant does not identify any error that is palpable and overriding, nor does he identify any way in which the motion judge misdirected himself or in which his decision is so clearly wrong as to amount to an injustice.

Analysis and Decision

[59] In my view, the motion judge misdirected himself by failing to follow the accepted approach to motions made pursuant to r 24.01.

[60] The motion judge found the defendant's submissions "compelling", but he concluded that "this case comes very close to, but *just shy* of, justifying dismissal on the basis of inordinate and inexcusable delay" (emphasis added).

[61] In making this decision, the motion judge makes no finding that the delay is not inordinate (i.e., reasonable or not "in excess of what is reasonable" (r 24.01(3))) or that the delay was excusable. As a consequence, it is not possible to know why the motion judge decided that he was not dismissing the action on the basis of inordinate and inexcusable delay.

[62] In addition, while the motion judge lists the various factors he considered, he fails to explain how those factors led him to justify not dismissing the action on that basis.

[63] Did the motion judge find inordinate delay that was satisfactorily explained, and thus dismissal was not justified? Did he find unexplained delay that was just barely reasonable, and thus dismissal was not justified? Or did he find both inordinate and inexcusable delay, but then applied his residual discretion not to dismiss the action?

[64] Had the motion judge followed the approach endorsed by this Court in *Oliver CA*, there would have been a clear conclusion as to whether the delay was in excess of what was reasonable under r 24.01(3), which would have established whether significant prejudice to the defendant was presumed for the purpose of r 24.01(2).

[65] As previously discussed, Manitoba courts have routinely considered the length of the delay, the complexity of the issues and the subject matter of the litigation to determine whether the delay is inordinate or not. These factors

can often be assessed on the basis of the case file and its chronology, and judges must utilise their own experience and judgment to decide whether a delay is inordinate or not. Although the moving party bears the onus of establishing inordinate delay, it does not need to submit any particular evidence to show that the action is taking much longer than what would normally be expected.

[66] At its core, the court is asked to consider whether the delay is "out of proportion to the matters in question" (see *Wiegert v Rogers*, 2019 BCCA 334 at para 32). When making this assessment, a court is required to compare the progress in the action against that of a reasonable litigant advancing the same claim under comparable conditions; the delay will be considered inordinate if the difference between the delay in the present action and the comparator is so large as to be unreasonable (see *Trebilcock* at paras 115, 120).

[67] In *Arbeau*, the Court held that evidence is not necessarily required to establish a comparator timeline with respect to inordinate delay, as judges and masters are "quite capable of making this assessment in most cases, based upon the nature of the action and the court record" (at para 26). Likewise, in *Transamerica*, the Court indicated that "whether there has been delay in any particular case is to be determined based on an examination of the record, the submissions of counsel, and the experience of the judiciary" (at para 22), and that expert evidence of a comparator "is not to be expected" (*ibid*).

[68] The Saskatchewan Court of Appeal has taken the same view in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA

48, where the Court stated that the inquiry into whether the delay has been inordinate (at para 43):

> . . . will involve considering the time the plaintiff has taken to get the litigation to the point where the application to strike is brought and comparing that lapse of time to what might typically be expected in a case of similar complexity. This is necessarily a matter of informed judgment grounded in the overall experience of the court and the particulars of the file in question.

[69] In my view, the overall delay in this case has been well "in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case" (r 24.01(3)).

[70] This is a relatively straightforward medical malpractice claim. I share the view of the motion judge that while "[t]here is some complexity to this litigation", it is "certainly not the most complex". Moreover, as was the case in *Dmytriw*, the complexity of the case is limited by the fact that the applicable law is well settled (see para 62).

[71] At the time the motion was filed in January 2019, pleadings had been closed for 10 years, the action had been ongoing for nearly 12 years, and 13.5 years had passed since the defendant performed the surgeries on De Cosse.

[72] Significantly, an examination of the chronology of events reveals numerous periods of unexplained delay, and virtually all of that delay is attributable to, or was within the control of, the plaintiff. For example:

- Approximately two years elapsed between the filing of the statement of claim (April 25, 2007) and the filing of the statement of defence (March 2, 2009).

- Preliminary documentary discovery was not completed for nearly five years following issuance of the statement of claim.

- There were two years between the examinations for discovery (April 10, 2012) and the next communication between counsel (April 7, 2014).

- Although answers to some of the plaintiff's undertakings were provided six weeks after the discoveries (May 22, 2014), further answers and information were provided in "bits and pieces" over the next two and one-half years.

- On February 28, 2017, plaintiff's counsel advised that a complete settlement proposal would be provided but it was not provided for 15 months (June 1, 2018).

- There was a period of nearly seven years between examinations for discovery and the filing of the motion and, although the plaintiff said in May 2014 that it would set the matter down for trial when answers were provided, that was not done until after the motion was decided by the motion judge.

[73] In some cases, a simple chronology of the activity on the file, by someone with first-hand knowledge, may be enough to establish that the delay in question was justified by that activity. Ultimately, however, the issue is whether the nature and quality of the evidence provides the judge with a satisfactory explanation or excuse for the delay. In order to be placed in the best position, it clearly would be prudent for a plaintiff, or someone else with first-hand knowledge, such as the plaintiff's lawyer during the relevant period,

to provide a sworn affidavit containing a clear and meaningful explanation of the reasons for the delay.

[74] In *Langenecker v Sauvé*, 2011 ONCA 803, Doherty JA said that "[t]he requirement that the delay be 'inexcusable' requires a determination of the reasons for the delay and an assessment of whether those reasons afford an adequate explanation for the delay" (at para 9). These explanations need to be "reasonable and cogent" or "sensible and persuasive" (*ibid*), and cannot simply amount to "a description of the usual problems encountered by litigants" (at para 14).

[75] It is important to note that if counsel's conduct contributes to inordinate and inexcusable delay, such conduct will not be a valid adequate excuse for the delay, nor is it a compelling reason to deny a motion that otherwise meets the requirements of r 24.01. In *Hughes*, Twaddle JA stated for the majority (at p 559):

> . . .
>
> There is nothing unjust about an action being dismissed for want of prosecution where the delay has been caused by the plaintiff. That is also true where the delay has been caused by the plaintiff's solicitors for whose acts the plaintiff is responsible. . . .

[76] As I said at the outset, I have a number of concerns relating to the affidavits filed in this proceeding. With one minor (and inconsequential) exception, there is no narrative or explanation in any of the affidavits, and they do nothing more than attach copies of communications between counsel and a few additional documents.

[77] The defendant's first affidavit was potentially misleading and certainly deficient in that it appended a select portion of the correspondence between counsel. Without the plaintiff's responding affidavit, it would have been impossible to know the true history of these proceedings. It goes without saying that, if a party is suggesting that an action should be dismissed for delay and is relying on the steps taken or not taken in the proceeding, the entire record of what has transpired should be placed before the court.

[78] While the plaintiff's affidavit addresses that concern, there is no direct explanation for much of the delay, and little or no evidence to support a finding that the delay was reasonable. For example, why did it take nearly 12 years to obtain the wage loss (actuarial) report? To a large extent, the Court is left to read "between the lines" in the correspondence and to infer what has transpired and why. In the absence of a reasonable explanation for the delay, the Court is left with the impression that the delay is attributable to the failure of counsel to act diligently and in a timely manner.

[79] Simply put, there has been no clear and meaningful explanation of, or justification for, the delay in the particular circumstances of this case. Essentially, the plaintiff says, here is what happened, it has just taken a long time. That is not enough.

[80] The evidence before this Court, such as it is, reveals repeated efforts by the defendant to move the action forward, and it cannot be said that the conduct of the defendant in 2018 constitutes waiver of the lengthy prior delay.

[81] Having found inordinate and inexcusable delay, significant prejudice is presumed and has not been rebutted. I would add that, even if the presumption did not apply in this case, a sufficiently important interest of the

defendant has been impaired in that the possibility of a fair trial of the issues more than 15 years after the surgeries in question is highly unlikely. The plaintiff was told in 2009 that the defendant had no recall of the events on May 7, 2005. Clearly, his ability to recall those events ten years later will not have improved.

[82] Finally, there was no evidence of a compelling reason not to dismiss.

[83] In my view, balancing all of the relevant factors, it was an injustice for the motion judge not to dismiss the action when the requirements of r 24.01 were met. I adopt the views of Bateman JA in *Fagan v Savoie*, 1998 NSCA 41, where she said (at p 15):

> . . . [A] patent injustice would result if the action were permitted to proceed. I make this determination taking into account the prejudice presumed to result from this inordinately lengthy delay; the fact that the delay was not adequately explained; the fact that the respondent is not an unsophisticated plaintiff . . . ; that there is a serious issue of liability; that the respondent's professed excellent recollection of the events is suspect; that the appellants, although no onus lies upon them to do so, actively prompted the respondents to move the action along, and warned of this application some two years in advance.
>
> . . .

[84] I conclude with a few important observations about delay in civil matters.

[85] Almost seven years ago, the Supreme Court of Canada made it clear that a shift in culture is required, that when court costs and delays become too great, people simply give up on justice, and that a fair process is illusory unless it is also accessible—proportionate, timely and affordable (see *Hryniak v Mauldin*, 2014 SCC 7 at paras 25-28). While the Court in *R v Jordan*, 2016

SCC 27 was concerned with timely proceedings in the criminal law context, many of its observations also apply in the civil law context. In *Jordan*, the Court recognised that fair trial interests are affected because the longer a trial is delayed, the more likely it is that a party will be prejudiced in mounting a defence owing to faded memories, unavailability of witnesses, or lost or degraded evidence, and that timely trials are important to maintain overall public confidence in the administration of justice (see paras 20, 25).

[86] As my colleague Mainella JA emphasised in *Glenwood Label & Box Mfg Ltd v Brunswick Label Systems Inc et al*, 2019 MBCA 12 at para 5, there is a strong public interest in promoting the timely resolution of disputes in our civil justice system. In *Letang v Hertz Canada Limited*, 2015 ONSC 72, Myers J observed (at paras 18-19):

> . . . The Supreme Court of Canada has ruled that the goal of achieving a fair and just civil dispute resolution process becomes illusory unless it is proportionate, timely, and affordable. . . . There are real people behind lawsuits – even claims involving sophisticated corporations. These people are entitled to timely justice. Because the civil justice system does not deliver timely, affordable and proportionate justice, people are looking elsewhere for dispute resolution to the detriment of the public and the common law. Fixing the civil justice system requires a culture shift on the part of the players in the system. . . .
>
> . . . Justice delayed is justice denied. The courts and the profession cannot implement a culture shift by continuing to operate on a "business as usual" basis. Courts and counsel must recognize that delay is itself a disease that eats away at the justice and justness of the system. The Court of Appeal has recognized the importance of prosecuting civil cases quickly in many cases dealing with dismissal for delay. But the last decade of efforts has proven that delay cannot be combatted successfully just by dismissing the oldest cases. Delay at all stages should be recognized as a serious form of prejudice that undermines affordability and

> proportionality and rots the uncompromisable goals of fairness and justice.
>
> [footnotes omitted]

[87] The time has come to stop paying lip service to the phrase "justice delayed is justice denied". Unreasonable delays in civil matters can no longer be tolerated for numerous reasons, but chiefly because they seriously undermine access to justice.

[88] For the foregoing reasons, I would allow the appeal and dismiss the action for delay. The defendant shall have its costs in this Court and below.

"Burnett JA"

I agree: "Cameron JA"

I agree: "Pfuetzner JA"

APPENDIX A

May 6, 2005	De Cosse sustained injury to her right wrist.
April 25, 2007	Statement of claim filed.
March 2, 2009	Statement of defence filed.
June 1, 2009	Defendant's counsel seeks confirmation that he can obtain an expert report from physician who previously treated De Cosse.
August 12, 2009	Plaintiff's counsel advises that "my clients do not object".
April 12, 2010	Defendant's counsel provides a copy of a medical expert's report and inquires as to the plaintiff's "intention with respect to this litigation."
July 23, 2010	Defendant's counsel requests plaintiff's position.
August 17, 2010	Plaintiff's counsel advises she is obtaining a report and will advise "once that has been received, and I have instructions."
October 29, 2010	Defendant's counsel requests plaintiff's position.
December 22, 2010	Defendant's counsel requests plaintiff's position.
January 19, 2011	Plaintiff's counsel advises that the matter is being reviewed by an expert.

May 13, 2011	Plaintiff's counsel provides two medical expert reports (from the same expert) and requests the defendant's affidavit of documents.
December 20, 2011	Plaintiff's counsel provides signed affidavit of documents, again requests defendant's affidavit and seeks dates for examinations for discovery.
January 12/13, 2012	Defendant's counsel requests a copy of plaintiff's documents and advises that: "We are in the process of preparing our client's Affidavit of Documents".
January 25, 2012	Defendant's counsel proposes examinations for discovery be conducted on April 11 and 12, 2012.
March 21, 2012	Plaintiff's counsel provides information regarding De Cosse's loss of earnings and medical expenses, and requests defendant's affidavit of documents and copies of his Schedule "A" documents.
April 10, 2012	Two emails dated April 9, 2012, suggest that the examinations for discovery were conducted on this date.
April 7, 2014	Defendant's counsel notes that it has been "9 years since this accident occurred" and two years since the examinations were conducted and asserts that plaintiff "has done nothing to advance its claim since those examinations." Defendant's counsel states: "If your

	client intends to proceed with this litigation it should do so expeditiously failing which I expect I will be instructed to move to dismiss the matter for delay."
May 22, 2014	Plaintiff's counsel provides answers to "[t]he bulk of the undertakings" and requests defendant's answers. Plaintiff's counsel states: "Once all answers to undertakings have been completed, I will be proceeding to set this matter down for a pre-trial conference. I would ask that you provide me with [the defendant's] answers to undertakings."
August 20, 2014	Defendant's counsel acknowledges receipt of the "partial set of answers" and advises that he "regard[s] many of the answers provided as insufficient and/or improper" and that he expects "to take a motion to compel further and better answers".
October 19, 2014	Defendant's counsel requests balance of plaintiff's answers.
December 3, 2014	Defendant's counsel requests balance of plaintiff's answers.
January 6, 2015	Plaintiff's counsel provides the balance of the answers and seeks clarification as to which answers are not complete.

April 22, 2015	Defendant's counsel provides clarification and makes further inquires.
June 14, 2015	Defendant's counsel seeks response to last communication. (Thereafter, counsel exchange a number of e-mails in which defendant's counsel seeks a response.)
December 9, 2015	Plaintiff's counsel provides revised answers to some of the undertakings. Plaintiff's counsel advises that a calculation of De Cosse's wage loss is being obtained and that: "Upon receipt of that information, we can have a discussion as to whether resolution of this matter is possible."
February 3, 2016	Defendant's counsel seeks clarification regarding answers to undertakings.
April 3, 2016	Defendant's counsel seeks response to last correspondence.
July 29, 2016	Plaintiff's counsel responds and advises that she is in the process of obtaining the calculation of wage loss.
September 14, 2016	Defendant's counsel seeks "quantification of the plaintiff's entire claim, by return."
October 21, 2016	Defendant's counsel seeks response to last correspondence. (Thereafter, counsel exchange a

	number of emails in which defendant's counsel seeks a response.)
February 28, 2017	Plaintiff's counsel provides actuarial report and current list of medical expenses. She advises that a comprehensive settlement proposal will now be prepared.
March 18, 2017	Defendant's counsel says updated tax, medical information and particulars of Workers Compensation payments will likely be needed. (Thereafter, counsel exchange a number of emails in which defendant's counsel seeks a response.)
June 1, 2018	Plaintiff's counsel provides detailed proposal for resolution.
June 18, 2018	Defendant's counsel requests updated medical information and inquires "whether you will consent to an independent medical examination of Ms DeCosse or whether we need to take a motion in order to have that completed."
September 11, 2018	Plaintiff consents to De Cosse undergoing an independent medical examination.
September 11, 2018	Defendant's counsel advises that he is seeking all of the plaintiff's medical records and requests a "general consent we can use to obtain her current records".

October 31, 2018	Plaintiff's counsel inquires as to the status of the independent medical examination.
November 14, 2018	Defendant's counsel serves questions on interrogatories.
January 9, 2019	Notice of motion filed for an order dismissing the action for delay.
May 17, 2019	Hearing before the Master.
May 28, 2019	Master's endorsement dismissing the motion.
June 10, 2019	Notice of Appeal to Court of Queen's Bench.
November 12, 2019	Hearing before the motion judge.
November 28, 2019	Motion judge's endorsement dismissing the appeal.

APPENDIX B

FILE NO. CI 07-01-51731

THE QUEEN'S BENCH
GENERAL DIVISION
WINNIPEG CENTRE

BETWEEN:

THE WORKERS COMPENSATION BOARD,

Plaintiff,

- and -

DR. MOSSADEQ BEN ALI,

Defendant.

ENDORSEMENT SHEET

SITTING DATE: **November 12, 2019**

JUDGE: **Mr. Justice D.J. Kroft**

COUNSEL:

William S. Gange/Jacqueline G. Collins	☑ **Plaintiff**
Kevin T. Williams/J. Matthew Nordlund	☑ **Defendant**

ENDORSEMENT:

INTRODUCTION

[1] This is an appeal of Master Clearwater's May 28, 2019 decision dismissing the defendant's motion for an order striking the plaintiff's claim for delay.

[2] It is a hearing *de novo*. While the cases instruct me to carefully review and consider the Master's decision, the Manitoba *Court of Queen's Bench Rules* are clear that, at the end of the day, I need not show deference, can look at the facts and law with fresh eyes, and can come to fresh conclusions.

[3] In addition to the capable submissions of counsel for the parties, I have read Master Clearwater's reasons, the parties' briefs, the affidavit of Leslie Kovnats sworn

January 11, 2019, the supplemental affidavit of Leslie Kovnats sworn May 8, 2019, and the affidavit of Lynne Wilson sworn January 31, 2019.

[4] Having done so, and after independently considering all submissions in respect of rules 24.01 and 24.02, I ultimately come to the same conclusions reached by Master Clearwater.

RULE 24.02

[5] As to rule 24.02, I believe Master Clearwater's application of the facts and law to that rule is sound (see paragraphs 5 to 10 of her endorsement). I adopt the following:

> [5] There is one recent reported decision of the Manitoba Court of Queen's Bench considering rule 24.02, that is the decision of ***Fehr et al v. Manitoba Public Insurance Corporation et al.***, 2019 MBQB 64, which provides some guidance. In that case, the learned justice reviewed rule 24.02, and, as the defendant in this case has urged me to do, relied on the law coming out of Alberta to assist with interpretation of the new rule. Alberta's rule is very similar to ours, and has been tested a number of times. The parties in this case have also provided a number of those authorities to assist.
>
> [6] As did the learned justice in ***Fehr***, I accept that rule 24.02 requires a functional analysis of any steps taken within the three-year period at issue. That analysis means the court must consider whether any steps taken have "meaningfully" advanced the litigation. If so, that acts to "re-start the clock". The period at issue in this case [is] December 2016 to January 2019.
>
> [7] Having considered the functional approach, I find that rule 24.02 does not apply to these facts. There has not been three years without significant advances to this action.
>
> [8] In this regard, I agree with the plaintiff that the provision of the expert report concerning the valuation of the claim, which report was provided on February 28, 2017, represents a significant advance as contemplated by the rules. The report provided a detailed assessment of the quantum of damages sought by the plaintiff, which was required for this case to proceed to trial.

> [9] The provision of this expert report also permitted additional steps to be taken by both parties. Firstly, the defendant would have been able to contemplate what, if any additional information he might require in light of the expert report provided. Secondly, the report led to the provision of a detailed settlement proposal by the plaintiff, albeit a number of months later. Finally, these steps prompted the defendant to request whether the plaintiff would willingly participate in an independent medical. The plaintiff agreed to that request in the fall of 2018.
>
> [10] I find the totality of these facts persuasive, and I am satisfied that there has been meaningful advances to this action during the three year period in question. The parties are closer to the ultimate resolution of this matter as a direct result of the expert report, and the consent to an independent medical should the defendants wish to pursue that avenue. For those reasons, I do not find this is a case in which the court is compelled to dismiss the action in accordance with Rule 24.02.

RULE 24.01

[6] As to rule 24.01, although my conclusion is the same as Master Clearwater's, I articulate my reasons in a slightly different manner.

[7] Rule 24.01 permits the court, in its discretion, to dismiss a claim where there has been delay and that delay has resulted in significant prejudice to a party.

Has there been delay?

[8] There can be no question that the plaintiff is *not* the poster child for prompt prosecution of a case. The statement of claim was filed on April 25, 2007. The wrist injury at issue occurred on May 6, 2005. There has been delay.

Has there been significant prejudice?

[9] Prejudice can take a tangible form such as when, as a result of time passing, witnesses die or documents are lost. Where that happens, a court can determine whether it amounts to prejudice significant enough to justify dismissing the claim.

[10] Under the latest version of our court rules, even if not tangible, significant prejudice will be presumed where a party establishes, on a balance of probabilities, the delay has been inordinate and inexcusable.

[11] In the current motion, the defendant relies principally on presumed prejudice.

[12] The test for whether the delay is inordinate and inexcusable (and therefore amounting to significant prejudice) is: Was the delay in excess of what is reasonable having regard to the nature of the issues and the circumstances of the case? When addressing this question, the court should balance such things as:

(a) the subject matter of the litigation

(b) the complexity of the issues between the parties

(c) the length of the delay

(d) the explanation for the delay

(e) other special circumstances

See ***D.L. et al. v. C.P. et al.***, 2019 MBQB 42 (CanLII) at para. 35; ***Law Society of Manitoba v. Eadie*** (1988), 54 Man. R. (2d) 1 at paras. 16–21 (C.A.).

[13] The defendant asserts, among other things:

- The plaintiff is a sophisticated institution, not a person struggling to move a matter forward. Moreover, the injured party has already been compensated by the plaintiff.

- There have been repeated, at times significant, gaps in the prosecution of this matter. Movement, when it occurred, was then prompted by the defendant, including expressions of concern about delay.

- The plaintiff indicated in 2014 that it would set the matter down for a pre-trial conference, but took no steps to do so until following Master Clearwater's decision.

- The litigation is not complex, nor has there been a significant number of interlocutory proceedings.

- There is no real explanation for the overall delay.

[14] I have carefully considered the defendant's submissions and find them compelling. For me, this case comes very close to, but *just shy of*, justifying dismissal on the basis of inordinate and inexcusable delay. The principal reasons for me exercising my discretion in this manner are:

- There is some complexity to this litigation. While certainly not the most complex, it is not as straightforward as suggested by the defendant. It does involve a secondary injury and competing professional opinions/reports as to liability and damages.

- Although I unequivocally agree with the defendant that in a motion for delay, the *whole time period* is relevant for the court's consideration and mere "puffs" of activity cannot save the day, as noted earlier, steps of significance to the litigation have occurred with some regularity over the past approximately two-and-a-half years, including:

    - The plaintiff obtained and provided to the defendant on February 17, 2017, an actuarial expert report.

    - The plaintiff provided to the defendant on June 1, 2018, a comprehensive statement of the plaintiff's position, including some concessions, which statement concluded, "Please review this with your client and let me know whether this can be resolved on this basis."

- On September 11, 2018, the plaintiff and the injured party consented to the defendant obtaining an independent medical evaluation.

- On November 14, 2018, the defendant served interrogatories on the plaintiff.

- Without shifting the burden of advancing the claim to the defendant, this motion could have been brought prior to the interactions between February 2017 and November 2018.

[15] I want to repeat my view that this case is as close as one can be to the dismissal line given the new rules. I agree with the following passage from ***D.L.*** at para. 32:

> "The revised Rules change the focus to spotlight delay, which is often more defined and demonstrable than prejudice. A sharper, perhaps harsher, dawn is at hand. Particularly with Rule 24.02 now in force, with its very limited exceptions, counsel and parties will have to be most vigilant to advance actions. Stagnant actions will be weeded out, and active claims finished swifter. Balancing for 'a kind of essential justice' will not save the day."

[16] Note also that, while I concur with Master Clearwater's observation that "neither party . . . would have been under the impression that this was an abandoned case" (at para. 17), those words do not constitute the test in a delay motion.

CONCLUSION

[17] To sum up, I dismiss the appeal.

[18] Despite its success on this appeal, I am not prepared to order costs in favour of the plaintiff nor, unless already agreed, should it be entitled to costs in respect of the motion before Master Clearwater.

DATE: November 28, 2019 JUDGE _____J.

Copies of this Endorsement Sheet have been sent to counsel on November 28, 2019.