SUPREME COURT OF YUKON

Citation: *Secerbegovic v. Media North Ltd. et al*, 2010 YKSC 49

Date: 20100902
S.C. No. 05-A0027
Registry: Whitehorse

Between:

SAID SECERBEGOVIC

Plaintiff

And

MEDIA NORTH LTD., carrying on business as YUKON NEWS, YUKON NEWS, STEPHEN ROBERTSON and RICHARD MOSTYN

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

David A. Gault — Counsel for the Plaintiff
David F. Sutherland — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendants to dismiss these proceedings for want of prosecution. The plaintiff is a medical doctor practicing in the town of Watson Lake, Yukon. On November 26, 2004, the defendant newspaper, Yukon News, published an editorial about a previous report on CBC Radio discussing a perceived problem in Watson Lake due to the over-prescribing of prescription drugs. The plaintiff filed his statement of claim in 2005, and it was followed soon after by the filing of a statement of defence on behalf of all of the defendants. Counsel for the parties engaged in

communications about the possible scheduling of examinations for discovery, however these were ultimately postponed because the defendants' counsel indicated that he wanted to make an application to obtain certain documents from CBC before conducting the examinations for discovery.

[2] In the fall of 2006, former counsel for the plaintiff retired from the practice of law, following which the plaintiff's current counsel was retained. There was a period of inactivity in the litigation from late September 2006 to mid May 2009, which is the principal issue on this application. During that time, the plaintiff's current counsel was involved in a motor vehicle accident which resulted in his having back surgery in December 2007. He also moved from his previous law firm to his present one in January 2008. In June 2010, the plaintiff's current counsel scheduled a case management conference for the purpose of setting a trial date, among other things. At that point, the defendants' counsel indicated he would be bringing this application to dismiss the matter for want of prosecution.

ISSUES

[3] The case law is relatively clear that the issues in such an application can be summarized as follows:

1. Has there been an inordinate delay?
2. If so, is the delay inexcusable?
3. If so, has the delay caused serious prejudice to the defendants, or is it likely to do so?
4. Even if all three of the above questions are answered in the affirmative, does the balance of justice demand that the action be dismissed?

See: *PMC Builders & Developers Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535, at para. 27.

CHRONOLOGY

[4] The following is a chronology of the relevant dates in this litigation. It includes reference to two letters marked "without prejudice" from the plaintiff's current counsel. The defendants' counsel submitted that it would be inappropriate for me to take those letters into account because they fall within the scope of settlement privilege. However, because the substantive content of the communications has not been revealed in evidence, but rather only the fact that the communications were made, I have included them in the chronology. I would note though, as O'Connor J. held in *SAAN Stores Ltd. v. 328995 Alberta Ltd.*, 2006 YKSC 46, at para. 4, when settlement negotiations are considered in determining whether a delay is excusable, an exception to settlement privilege arises:

> "Normally, it is not permissible to refer to the details of without prejudice communications; however, there is an exception to the privilege that attaches to without prejudice communications when settlement negotiations are offered as an excuse for delay in the context of an application to dismiss an action for want of prosecution. See *Family Housing Association (Manchester) Ltd.* v*. Michael Hyde & Partners et al.,* [1993] 2 All E.R. 567, *Guccione* v*. Bell*, [2004] A.J. No. 1115, 2004 ABQB 729."

[5] The chronology is as follows:

DATE	EVENT
November 26, 2004	Article titled "The Messenger Hit Again" published in the Yukon News.
February 24, 2005	Notice given to defendants of plaintiff's intention to bring an action, per s. 14 of the *Defamation Act*.

February 28, 2005	Publisher, Stephen Robertson, sent correspondence to plaintiff's former counsel asking him to identify incorrect facts in the editorial.
May 26, 2005	Statement of Claim filed.
June 3, 2005	Defendants' Demand for Discovery of Documents and Notice to Produce provided to plaintiff's former counsel.
June 6, 2005	Statement of Defence filed.
June 16, 2005	Plaintiff's Demand for Discovery of Documents and Notice to Produce provided to defendants' counsel.
July 6, 2005	Plaintiff's List of Documents provided to defendants' counsel.
August 5, 2005	Defendants' counsel left a message for Plaintiff's former counsel, indicating he would like to put off discoveries and cancel a Court Reporter booked for August 22, because he preferred to wait for CBC documents. However, he would go ahead if plaintiff's former counsel wished.
August 17, 2005	Defendants' counsel sent an email inquiring about discovery dates in March and April 2006. NOTE: A series of emails between August 8, 2005 and August 16, 2005 confirm counsel had no compatible dates from October 17 – November 4.
August 22, 2005	Defendants' Interrogatories provided to plaintiff's former counsel.
August 23, 2005	Defendants' counsel delivered unfiled and unsigned Notice of Motion and affidavit in support of application for documents in the possession of the CBC to plaintiff's former counsel.

July 21, 2006	Legal Assistant of plaintiff's former counsel sent an email to defendants' counsel indicating they would like to set discoveries for September or November 2006.
July 21, 2006	Defendants' counsel sent an email to plaintiff's legal assistant stating he preferred to schedule discoveries in September and that he would like to speak to plaintiff's former counsel about possible settlement and delaying examinations for discovery until production of the CBC documents.
September 5, 2006	Plaintiff's former counsel sent correspondence to defendants' counsel, stating November would be a good time to schedule examinations for discovery and agreeing it would be desirable to have the CBC documents prior to discoveries.
September 12, 2006	Defendants' counsel sent correspondence to plaintiff's former counsel, asking whether there was a prospect of resolution. If not, he would immediately pursue production of the CBC documents.
September 19, 2006	Plaintiff's former counsel sent correspondence to defendants' counsel, confirming the plaintiff wished to pursue his lawsuit. He suggested they could fix a discovery date for November or December, in anticipation that the CBC documents would be produced by that time.
September 20, 2006	Plaintiff's former counsel requested the defendants' List of Documents and copies of same.
Fall 2006	At some point after September 20, 2006, defendants' counsel telephoned the office of the plaintiff's former counsel, and was informed that he had just retired. He did not learn if new counsel was retained.
December 2007	Plaintiff's current counsel had back surgery and his recovery took approximately three months.
January 2008	Plaintiff's current counsel changed law firms.

May 13, 2009	Plaintiff's current counsel wrote a "without prejudice" letter primarily respecting settlement. Plaintiff's counsel also requested, for a second time, the defendants' List of Documents and inquired about the status of the application to produce CBC documents.
May 14, 2009	Defendants' counsel wrote to plaintiff's counsel, stating he would advise of any response to the May 13, 2009 without prejudice letter in accordance with his clients' instructions. He also requested a copy of the Notice of Change of Solicitor. This letter was mistakenly faxed to an incorrect fax number and the plaintiff's counsel did not receive a copy until July 21, 2009.
July 15, 2009	Plaintiff's counsel sent correspondence to defendants' counsel requesting a response to the May 13, 2009 without prejudice letter.
July 21, 2009	Defendants' counsel sent correspondence to plaintiff's counsel enclosing a copy of the May 14, 2009 letter and the fax confirmation sheet. He confirmed that he had no instructions to respond to the settlement offer contained in the May 13, 2009 without prejudice letter, but stated he would respond with "without prejudice" communications of his own if he did obtain instructions to respond to the offer.
October 29, 2009	Plaintiff's counsel obtained a Certificate of Permission to Act in Yukon.
November 9, 2009	Notice of Appointment or Change of Lawyer and Notice of Intention to Proceed filed by plaintiff's counsel.
Mid-December 2009	Plaintiff's current counsel had back surgery. Six weeks prior to this surgery he was working at a reduced capacity, and it took him approximately six weeks to recover from surgery.
April 9, 2010	Plaintiff's current counsel sent without prejudice correspondence to defendants' counsel requesting a substantive response to the May 13, 2009 letter and the defendants' List of Documents. He inquired about

	the status of the application to produce CBC documents.
May 5, 2010	Plaintiff's current counsel sent correspondence to defendants' counsel requesting the defendants' List of Documents and indicating he would bring on an application if he did not receive a List of Documents within 30 days.
May 6, 2010	Plaintiff's current counsel requested a Case Management Conference.
June 8, 2010	Defendants' List of Documents and copies of listed documents that the Defendants' did not object to producing were delivered to plaintiff's current counsel.
June 9, 2010	Case management conference held.

ANALYSIS

1. Inordinate Delay?

[6] In addressing this issue, the defendants' counsel urges me to adopt the relatively strict definition of what constitutes a "step" in the proceedings, set out in *Goldstein v. Vancouver Timber and Trading Co.*, [1909] B.C.J. No. 62 (S.C.). In that case, Morrison J. accepted the following quote by Lord Lindley in the 1894 English case of *Ives & Barker v. Willans*:

> "The authorities show that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is in the technical sense, a step in the proceedings."

[7] On that basis, the defendants' counsel submits that the last step taken by the plaintiff was providing his List of Documents to the defendants' counsel on July 6, 2005. Further, says counsel, the next substantive step taken by the plaintiff's counsel was on

May 6, 2010, when he requested a case management conference. Viewed this way, the total period of delay would be approximately 58 months.

[8] With respect, I find this characterization of the total period of delay unrealistic. First, it should be noted that this is an application under Rule 2(7) of the *Rules of Court*, which is discretionary, and does not include the word "step". It reads:

> "If upon application by a party it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed." (my emphasis)

This sub-rule contrasts with the mandatory nature of Rule 2(9)(b), which reads:

> "The court … except in a family law proceeding, shall dismiss so much of the proceeding that relates to the applicant where for five or more years no step has been taken that materially advances the action or proceeding." (my emphasis)

[9] Second, in *Muckpaloo v. MacKay*, 2002 NWTSC 12, Vertes J., interpreted the meaning of the word "step" in their equivalent to our sub-rule 2(9)(b) somewhat more expansively than in *Goldstein*, cited above. Rule 327(1) of the Supreme Court of the Northwest Territories reads:

> "A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court
>
> (a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or
>
> (b) shall dismiss so much of the action or proceeding as relates to the applicant, where for five or more years no step has been taken that materially advances the action or proceeding."

At paras. 20 and 21, Vertes J. viewed a "step" as some act furthering or materially advancing an action, in the sense of moving it closer to trial:

> “Rule 327(1)(b) is almost self-defining. A step is something that "materially advances the action". That is the accepted definition of what constitutes a step in a proceeding. "Materially advancing" an action are those steps which move the action toward trial…
>
> In *Fathers of Confederation Building Trust v. Pigott Construction Co.* (1974), 44 D.L.R. (3d) 265 (P.E.I.S.C.), Trainor C.J. held that a "step" is some act furthering the action or putting it in such a condition as to be dealt with by the court. These types of steps will normally be either procedural steps based on the rules of court taken in the course of litigation or some act, in replacement for a procedural rule, whereby the action moves closer to trial. But, generally speaking, discussions and even settlement negotiations do not come within the concept…” (my emphasis)

The *Fathers of Confederation* case also referred to the quote of Lindley L.J. in *Ives & Barker*, which is set out above at para. 6.

[10] In my view, the communications between counsel relating to the scheduling of examinations for discovery and the need for the defendants’ counsel to make a motion to obtain production of the CBC documents were all acts intended to move the matter closer to trial, and therefore can be properly viewed as ‘steps’. I find support for this conclusion in *Kidder v. Coldswitch Technologies Inc.*, 2009 BCSC 1274, where H. Hyslop J. gave similar treatment to an extensive record of communications between counsel principally about the scheduling of examinations for discovery (paras. 49-108).

[11] Looking at the matter from this perspective, the most significant period of delay was from September 20, 2006, when the plaintiff’s former counsel wrote to the defendants’ counsel to request the defendants’ List of Documents and copies of the documents contained in the list. At some unidentified time after that letter was sent, the plaintiff’s former counsel retired, and arrangements were made to transfer the file to the plaintiff’s current counsel. Nothing further was done by the plaintiff’s current counsel until

he wrote his without prejudice letter of May 13, 2009 containing a settlement offer, requesting the defendants' List of Documents, and inquiring about the status of the application to produce the CBC documents. The total length of this delay was approximately 32 months (the "period of delay").

[12] In *Lebon Construction Ltd. v. Wiebe*, [1995] B.C.J. No. 1537 (C.A.), Rowles J.A., speaking for the Court, said at para. 40:

> "… what may be regarded as inordinate delay varies with the nature of the action and the particular facts of the case. For that reason, reference to time periods in other cases, is generally not of assistance…"

[13] However, O'Connor J. in *SAAN Stores*, cited above, at para. 20, said that determining whether a delay is inordinate is often obvious. As he put it: "You know inordinate delay when you see it."

[14] It is also important to remember that this Court, like many courts across the country, has moved into an era of increased case management, with a view to securing the just, speedy, and inexpensive determination of proceedings in a manner which is proportionate to the dollar amounts involved, the importance and the complexity of those proceedings. Significantly, in Rule 1(9), in any proceeding where no action has been taken for a year, a judge may even consider dismissing the proceeding. This sub-rule reads:

> "In a proceeding where judgment has not been obtained and the proceeding has not been settled or set down for trial or hearing, excluding applications, within one year from the date of filing the statement of claim or petition, a judge may require the parties or their lawyers to appear on an Appearance Day to explain the delay. At the Appearance Day, the judge may:
>
> (a) dismiss the proceeding;
>
> (b) award costs;

(c) make any case management order under Rule 36(6)."

[15] I am also cognizant of the fact that in applications to dismiss for want of prosecution, each case turns on its own facts. Nevertheless, it strikes me that a period of 32 months, without the plaintiff taking any steps at all, is indeed inordinate.

2. Is the delay inexcusable?

[16] The defendants' counsel submits that there is an onus on the plaintiff to explain the inordinate delay, and that he has failed to discharge that onus. For example, he points to the absence of evidence regarding the date of the retirement of the plaintiff's former counsel or any information relating to the retainer of the plaintiff's current counsel and why no steps were taken between September 20, 2006 and May 13, 2009.

[17] While I accept that, in a given case, there may be an evidentiary burden on the plaintiff to explain how the delay is excusable, I reject the notion that there is a legal burden upon him to do so. The following passage from *PMC Builders & Developers*, cited above, supports this conclusion. At para. 27 of that decision, Low J.A., delivering the judgment of the Court, was addressing the four part test for whether an action should be dismissed for want of prosecution. With respect to the question of whether the delay is excusable, he said that a court is bound to consider the following:

> "…any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances…" (my emphasis)

This suggests that the question of whether the delay is excusable can be considered on the basis of all of the evidence on the application and that there is no particular onus upon the plaintiff. It must also be remembered that it is the defendants who are the

applicants on this motion to dismiss and they therefore bear the ultimate burden of persuasion, on a balance of probabilities, that the motion should be granted.

[18] In any event, the plaintiff attempted to explain the delay to some extent by pointing to the conduct of the defendants' counsel in repeatedly expressing his preference to delay examinations for discovery until he obtained the CBC documents. Indeed, the plaintiff's current counsel suggests that the plaintiff's former counsel and the defendants' counsel effectively had an agreement to proceed in that fashion, and that since the defendants' counsel did not in fact pursue the CBC documents, there was no particular urgency in proceeding with the litigation. In particular, the plaintiff's current counsel points to the number of times the defendants' counsel indicated that he would like to put off the examinations for discovery until he had obtained the CBC documents and the extent to which the plaintiff's former counsel apparently relied on those representations:

1. On August 5, 2005, the defendants' counsel left a telephone message for the plaintiff's former counsel to that effect.
2. On August 17, 2005, the defendants' counsel emailed the legal assistant of the plaintiff's former counsel about potential discovery dates, indicating that "Meantime I'll get working on CBC' documents [as written]"
3. On August 23, 2005, the defendants' counsel emailed the plaintiff's former counsel attaching an unfiled motion and affidavit in connection with an application to the Court for the CBC documents. He further indicated that he would be instructing an agent in Whitehorse to file the documents, set a hearing and appear to speak to it. However, this was never done.

4. On July 21, 2006, the defendants' counsel emailed the legal assistant of the plaintiff's former counsel again discussing potential discovery dates, in which he states:

> "… when we last thought about XFD I thought we agreed that it should be delayed until we had obtained CBC's documents, ie, the documents underlying the CBC report that the editorial refers to, and was the subject of questions in the legislature, etc. CBC has indicated they will only produce their documents if ordered by a court… I suspect we should get the documents before we examine."

5. On September 5, 2006, the plaintiff's former counsel wrote to the defendants' counsel stating as follows:

> "With respect to the CBC documents, I agree that it would be desirable to have those documents prior to the Examination for Discovery. I assume that your client will want to reference those documents. If you have any suggestion as to the mechanism that we utilize to obtain those documents, perhaps you could advise."

6. On September 12, 2006, the defendants' counsel wrote to the plaintiff's former counsel stating:

> "If we are going ahead, it is my view that the first step (perhaps before scheduling Examination for Discovery) is to obtain CBC's documents…I can tell you that I was working with CBC's lawyer in this regard, Fred Kozak of the Reynolds Mirth law firm in Edmonton, and that he advised CBC will not take sides nor will it voluntarily produce the reporters material, absent a court order (lest they be sued again for defamation)…My own preference is, of course, to delay Examination for Discovery until we have the documents that we know we will need in order to conduct the examination."

In the same letter, the defendants' counsel again referred to the draft motion and affidavit which was to have been filed and argued

by counsel's Whitehorse agent, indicating that he would deal with the agent "to see what is necessary to get the matter underway". Further, in the event the plaintiff wanted to pursue the action, rather than consider settlement, defendants' counsel indicated that he would accept the word of the plaintiff's former counsel in that regard "… and immediately pursue CBC. Once we have the documents in hand, I believe dates for Examination for Discovery and trial can be set…".

7. On September 19, 2006, the plaintiff's former counsel wrote to the defendants' counsel confirming that his client wished to pursue the lawsuit and suggesting that they consider a discovery date in November or December, in anticipation that the CBC documents would be obtained by that time.

[19] After the letter from the plaintiff's former counsel dated September 19, 2006, there was no mention by the plaintiff's current counsel of the issue of obtaining the CBC documents until his letter of April 9, 2010.

[20] With respect, I fail to see how this issue can excuse the plaintiff's failure to take any steps to move this matter forward during the period of delay. While it was understandable that the plaintiff's former counsel would want to allow the defendants' counsel the professional courtesy of attempting to obtain the CBC documents before proceeding with the examinations for discovery in the early stages of this litigation, that excuse does not explain why the plaintiff waited for 32 months before communicating again with the defendants' counsel. Although the circumstances of each case will vary, it

seems reasonable to presume that 6 to 12 months into the period of delay, the plaintiff's current counsel might have proposed a deadline by which the defendants' counsel should obtain the CBC documents, failing which the plaintiff would proceed with his examinations for discovery. Therefore, this argument does not assist the plaintiff in explaining or excusing the period of delay.

[21] The plaintiff's counsel also points to the fact that there was an outstanding demand for the defendants' List of Documents and copies of those documents since June 15, 2005, and that the plaintiff's former and current counsel reminded the defendants' counsel of this obligation by way of:

1. The letter of September 20, 2006;
2. The letter of May 5, 2010; and
3. The letter of April 9, 2010.

The List and the documents were not provided until June 8, 2010, the day before the case management conference. However, the plaintiff's current counsel fails to explain why there were no efforts made to obtain the defendants' List of Documents and copies of same over the period from September 20, 2006 to May 13, 2009. Therefore, I fail to see how this argument in any way excuses the delay.

[22] Finally, the plaintiff's counsel points to the fact that there was some discussion of potential settlement during the early communications between counsel which he says tacitly encouraged delay in the litigation.

[23] In that regard, the plaintiff's counsel referred to *Kennedy v. Newitt*, [1999] B.C.J. No. 2627 (S.C.). In that case, Kennedy brought an action against Newitt for negligent chiropractic treatment. The writ of summons was filed in 1992. Between June and

September 1993, the plaintiff's counsel and the defendant's insurer exchanged correspondence respecting the possibility of settlement as well as the need to obtain clinical records respecting the plaintiff. After a further exchange of pleadings in 1995, the parties again exchanged correspondence respecting the possibility of settlement negotiations, subject to the plaintiff completing a course of treatment and providing updated medical information. At para. 17, Macaulay J. commented on the extent to which these settlement discussions had contributed to the delay:

> "It is significant that the defendant was alerted to the claim within two years of events. The defendant's insurer and, at a later point, his counsel both investigated the matter and expressed a willingness on behalf of the defendant to explore settlement. Necessarily, they must have considered the issues relating to liability before doing so. The willingness to engage in settlement discussions tacitly encouraged delay rather than early judicial determination of liability." (my emphasis)

[24] In *SAAN Stores*, cited above, O'Connor J. also took note of the fact that it was reasonable to pursue settlement initiatives and to allow some amount of time to attempt to resolve actions before incurring further expense in prosecuting them (para. 26).

[25] The problem I have with this argument in this case is that there is no evidence of any settlement discussions or any offers being exchanged until the letter from the plaintiff's current counsel dated May 13, 2009, at the end of the period of delay. Although the defendants' counsel first mentioned the prospect of settling the action in his email dated July 21, 2006, that prospect was never pursued by either side until the letter of May 13, 2009. In that sense, the case at bar is distinct from *Kennedy* and *SAAN Stores*, where settlement communications were actually made.

[26] On the other hand, the fact that the plaintiff's current counsel was injured in a motor vehicle accident in November 2006, which led to back surgery in December 2007

and a period of recuperation of approximately three months, is a proper factor to take into account in determining whether there was a valid reason for at least a portion of the delay. As noted in *PMC*, cited above, at para. 27, if "illness" is one of the causes of the delay, then that can serve to counter the suggestion that the delay was intentional or tactical.

[27] Further, the fact that the plaintiff's current counsel changed law firms in June 2008 also seems to be a reasonable explanation for a portion of the delay.[1]

[28] Finally, the fact that the plaintiff's former counsel retired, necessitating that the plaintiff retain new counsel would also logically have contributed to a portion of the delay: see *SAAN Stores*, cited above, at para. 13.

[29] Nevertheless, taking all of the plaintiff's arguments as a whole, I remain unpersuaded that there is a reasonable excuse for the entire 32 months of delay from September 20, 1996 to May 13, 2009. Therefore, the period of delay is inexcusable.

3. Serious prejudice?

[30] As the defendants have established that there was an inordinate and inexcusable delay, the next question is whether the defendants have suffered, or will likely suffer, serious prejudice as a result. In *PMC*, cited above, Low J.A., at para. 27, said that on this point, a court is bound to consider:

> "…whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff."

[1] This fact was not formally in the evidence before me, but rather was presented through the submission of the plaintiff's current counsel. The defendants' counsel did not object to this submission, but suggested that I treat this as a neutral factor only.

[31] A rebuttable presumption of prejudice arises where there has been inordinate and inexcusable delay: see *Busse v. Robinson Morelli Chertkow*, 1999 BCCA 313, at para. 18. Logically, the plaintiff should bear the burden of having to rebut the presumption, subject to the fact that the defendants are the applicants on the motion, and as such continue to have the persuasive burden at the end of the day. Further, as was noted in *Tundra Helicopters Ltd. v. Allison Gas Turbine, a Division of General Motors Corp.*, 2002 BCCA 145, at paras. 35 and 36, the "presumption of prejudice" is not a presumption of law. Rather, it can be termed a "presumption of fact", in the sense that the facts are such that a certain inference should, but need not, be logically drawn. Further, in most cases, the plaintiff will only be able to point to the overall circumstances, including the absence of any evidence from the defendant of specific prejudice, in establishing on a balance of probabilities that serious prejudice has not been suffered. Therefore, the absence of specific prejudice tendered by the defendants' remains an important consideration.

[32] In the case at bar, the plaintiff's counsel stresses that the defendants have failed to adduce any evidence of specific serious prejudice. The defendants' counsel apparently concedes the point, but submits that his clients do not have to provide evidence of specific serious prejudice as they are entitled to rely upon the presumption.

[33] In any event, the defendants' counsel further submitted that prejudice can be inferred from the nature of the defences raised by the defendants. These include "fair comment" and "justification", and for either of these defences to succeed, the defendants will bear the onus of proving the truth of the contents of the alleged defamatory editorial. As noted above, the editorial referred to an earlier CBC Radio report in which a reporter visited Watson Lake in June 2004 and interviewed 11 people about prescription drug use.

She subsequently re-interviewed five of those people in November 2004 and apparently commented that five of the original 11 interviewees had seen their lives “spiral further out of control”. In November 2004, two of the male interviewees were dead and prescription painkillers were found at the scene. One interviewee, then a 23 year old woman, had been the victim of domestic assault and was coping with a diseased liver. A further interviewee had been charged with second degree murder. The final interviewee had been charged with breaking and entering, domestic assault and was going to jail.

[34] Counsel for the defendants submitted, without objection from the plaintiff’s current counsel, that three of the five persons who were interviewed a second time in November 2004 were then youth. Although one has apparently consented to the notes of their interview to be released, the other two have not. Accordingly, counsel for the defendants will still need to make a court application to have CBC produce all documentation associated with those interviews.

[35] Further, since the case management conference on June 9, 2010, I understand that the defendants’ counsel has had discussions with counsel for CBC and that the latter plans to rely upon the case of *Wasylyshen v. Canadian Broadcasting Corp.*, 2005 ABQB 902, as authority for the proposition that any application for production of documents which contain the identity of confidential sources should be made to the assigned trial judge. As a result, the defendants’ counsel advised me at the hearing of the application to dismiss for want of prosecution that his motion for the production of the CBC documents was being adjourned by consent to the start of the trial, set to commence May 9, 2011.

[36] The defendants’ counsel submitted that this case may well turn on the credibility of the three identified interviewees, and that the passage of time until the start of the trial will

make it more difficult for the defendants to prove that the lives of the interviewees were in fact spiralling out of control when they were interviewed in November 2004. While that may be so, it is not uncommon that some cases must be tried many years after the relevant events took place and courts must frequently cope with the passage of time when deciding such cases: see *SAAN Stores*, cited above, at para. 30. In *Tundra Helicopters*, cited above, Esson J.A., delivering the judgment of the Court, said this about prejudice and the passing of time, at para. 37:

> "…It matters not who puts forward the evidence. The question remains whether, on a balance of probabilities, absence of prejudice has been established. In considering that, it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. It is no light matter to dismiss an action for want of prosecution…"

[37] Further, it should not be necessary to await the start of the trial to make the CBC application, because I confirmed, after the hearing, that I am the assigned trial judge. Therefore, there is no reason the defendants cannot bring on their application for production as soon as my calendar will allow.

[38] In any event, the defendants have known since the outset of this litigation that the information that the three remaining interviewees can provide may well be important to establish the defences of fair comment and justification. Therefore, it seems to me that any prejudice the defendants may suffer from their failure to secure this evidence up until now must be of their own making. Similarly, the defendants must bear the responsibility for any prejudice they may suffer as a result of their not moving sooner to obtain production of the CBC documents.

[39] Finally, many of the particulars of the facts which the defendants have pled in their statement of defence as grounding the defence of fair comment should not be difficult to prove. Firstly, the defendants have pled that the Town of Watson Lake has a single doctor's clinic and a single pharmacy, both of which are owned and operated by the plaintiff. That would not seem to be a difficult allegation to prove. Secondly, the defendants have pled that public records of a public drug plan reveal that the use of Ativan in Watson Lake increased to 898 claims from 260 and Tylenol 3 increased to 1222 from 474 claims in the year 2002 - 2003. Presumably those records have been preserved and are still available to the defendants. Thirdly, I assume the notes and other information related to the interviews by the CBC reporter have also been secured and preserved, since the defendants' counsel was in communication with CBC's counsel about the issue as early as August 23, 2005.

[40] As for the two male interviewees who were dead as of November 2004, that was a fact known to the defendants at the time the defamation action was commenced and was unaffected by the inordinate and inexcusable delay.

[41] In the result, I am not persuaded that the factual presumption of prejudice in this particular case inexorably leads to the conclusion that the defendants will suffer "serious prejudice" or that there is a substantial risk that a fair trial is not possible. Conversely, I am satisfied that, on all of the evidence, the plaintiff has rebutted the factual presumption of prejudice and, accordingly, the application should be dismissed on that basis alone.

4. Balance of justice?

[42] In the event that I am wrong in concluding that the defendants have not, and likely will not, suffer serious prejudice from the plaintiff's inordinate and inexcusable delay, I will

turn to the fourth aspect of the four part test, i.e. whether, on balance, justice requires dismissal of the action. In *PMC*, cited above, Low J.A., considered this "fourth question to encompass the other three and to be the most important and decisive question" (para. 28). Alternatively, as Finch C.J.B.C. put it in *Azeri v. Esmati-Seifabad*, 2009 BCCA 133, at para. 16, the overriding concern "is that essential justice must be done".

[43] In *Irving v. Irving*, (1982), 140 D.L.R. (3d) 157 (BCCA), at para. 8, Seaton J.A. quoted from Lord Diplock's reasons in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, cited above, that dismissal for want of prosecution is a "Draconian order" which should "not be lightly made". Rather, such authority should only be exercised if:

> "… the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue." (my emphasis)

At para. 22 of *Irving*, Seaton J.A. again referred to the fourth component of the test as follows:

> "The demonstration of inordinate delay, inexcusable delay and serious prejudice does not lead necessarily to dismissal. Those three factors are only the primary considerations; all of the circumstances must be considered. It is still for the courts to decide "whether or not on balance justice demands that the action should be dismissed". Salmon L.J. in *Allen v. Sir Alfred McAlpine & Sons Ltd.* (above). All of the statements of law are subject to the overriding principle that essential justice must be done. (See Freedman J.A., as he then was, in *Ross and Ross v. Crown Fuel Co. Ltd. et al* (1962) 41 W.W.R. 65 at 88)." (my emphasis)

[44] I agree with the submission of the plaintiff's counsel that, like the assessment of whether an inordinate delay is excusable, or whether the defendants have been prejudiced, deciding whether justice favours dismissal of a claim for failure to prosecute

requires an assessment of the overall circumstances, including an assessment of the defendants' conduct, the level of the sophistication of the parties, and whether there is any evidence of actual prejudice.

[45] I also agree that if the defendants find themselves disadvantaged by the overall delay, they have no one to blame but themselves. The defendants' counsel gave notice of an intended application to obtain documents ostensibly necessary to their defence within months of receiving the plaintiff's statement of claim. Yet, despite reminders from the plaintiff's former counsel, the defendants' counsel took no steps to properly complete, serve and set down that application for five years. The defendants have provided no explanation for this.

[46] Throughout 2005 and 2006 the discussion between counsel to schedule examinations for discovery was continually peppered with requests from the defendants' counsel to preferably postpone the same, pending the application for the CBC documents. Indeed, the defendants' counsel indicated that as soon as he received word from the plaintiff's former counsel that the plaintiff was indeed intent on pursuing his lawsuit, he would "immediately pursue CBC". That simply was not done.

[47] Further, while I recognize that there was no obligation on the defendants to press the matter on (see *Kidder*, cited above, at para. 5), there was not a single complaint from them about delay until the defendants' counsel raised the issue at the case management conference on June 9, 2010, some five years after the action was commenced. Certainly, there was never any suggestion that an application to dismiss for want of prosecution would be brought before that time.

[48] Finally, when the plaintiff's current counsel sent his without prejudice settlement offer to the defendants' counsel on May 13, 2009, the latter replied with a short letter which included the following paragraphs:

> "We are relaying your letter to our clients and we will advise you of any response in accordance with our instructions.
>
> We look forward to receipt of your Notice of Change of Solicitor. In order that this matter not be further delayed, we will accept "service" on behalf of our clients, of your Form 24 in accordance with Rule 3(6) of the *Rules of Court*."

When it was discovered that this letter was sent to the wrong fax number, the defendants' counsel again wrote to the plaintiff's current counsel on July 21, 2009, stating as follows:

> "I have your letter of July 15, 2009 requesting a response to your letter of May 13, 2009.
>
> It may have escaped your notice that we did respond to your May 13, 2009 letter on May 14, 2009 and we enclose a copy of our May 14th letter and the fax transmission confirmation sheet.
>
> Please note our change of address effective April 2008.
>
> Your letter of May 13, 2009 was appropriately marked "without prejudice." If we obtain instructions to respond to the offer that your letter contained, we will do so in "without prejudice" correspondence of our own. At present, we have no such instructions."

[49] In my view, nothing in the letters from the defendants' counsel dated May 14 or July 21, 2009, can be interpreted as an expression of dissatisfaction with the pace of the litigation to that point. On the contrary, the words used can be taken as implicit encouragement to the plaintiff's current counsel to continue to move the action forward. That is similar to the situation in *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2004 BCCA 40. In that matter, the action was commenced in 1994 and was based on a

cause of action arising in contract. The statement of defence was filed some 11 months later, and in 1995 the parties commenced oral and documentary discovery. In 1996 there were applications filed relating to document discovery and further examinations took place. The matter then sat until 2001. The plaintiff retained new counsel who filed a notice of change of solicitor in January 2001. Smith J.A. commented upon this at para. 20:

> "It is noteworthy that when Mr. Winstanley [the plaintiff's new counsel] became involved, Mr. Delaney [the defendant's counsel] did not complain of delay or of prejudice to his client. Rather, he insisted that Mr. Winstanley must file a notice of intention to proceed before taking further steps…"

Mr. Winstanley did so and three further letters were exchanged between counsel, with Mr. Winstanley indicating his intention to amend the statement of claim. Mr. Delaney responded on February 5, 2001. In that letter, he raised for the first time the "inordinate delay" in the prosecution of the claim, but only in the context of expecting that the plaintiff's materials on the motion to amend would explain the delay. Mr. Delaney also mentioned the timing of future steps following the filing of the plaintiff's Notice of Intention to Proceed. His letter was quoted at para. 24 of the decision, with Smith J.A.'s comments immediately following at para. 25:

> "Thus, even at this point Mr. Delaney was not treating delay as dispositive but was expecting Mr. Winstanley to account for the delay. It does not appear that Mr. Delaney was contemplating an application to dismiss the action for want of prosecution. <u>By his words and his conduct, he clearly encouraged Mr. Winstanley to continue in his attempts to move the action forward.</u>" (my emphasis)

[50] At para. 38, Smith J.A. commented upon the decision of the chambers judge dismissing the action for want of prosecution and her failure to take into account the conduct of the defendant after Mr. Winstanley was retained:

> "Finally, and most importantly, she failed to take into consideration the conduct of Moss Management after Mr. Winstanley was engaged. She overlooked the principle evinced by Lord Diplock in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, supra, which I will reproduce for convenience:
>
> > ... if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay."

[51] In my view, the conduct of the defendants' counsel in his letters of May 14 and July 21, 2009, can be seen as inducing the plaintiff to incur further costs in the reasonable belief that the defendants intended to exercise their right to proceed to trial, notwithstanding the plaintiff's delay. Therefore, the defendants cannot obtain dismissal of the action unless the plaintiff has, after that point, been guilty of further unreasonable delay, which was not seriously argued by the defendants' counsel in this case.[2]

[52] Finally, the conduct of the defendants' counsel in this regard can also be construed as a waiver or acquiescence in the previous delay by the plaintiff and the application to dismiss for want of prosecution cannot succeed in these circumstances: See *Kidder*, cited above, at paras. 7 and 122; and *Allen*, cited above, where Lord Salmon said, at p. 563 All E.R.:

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[2] Although the defendant's counsel did raise the delay following the May 13, 2009 "without prejudice" letter, at para. 61 of his Outline, he failed to acknowledge the delay caused by his faxing a reply to the wrong fax number, which was not sorted out until July 21, 2009. It must also be remembered that the plaintiff's current counsel had further back surgery in mid December 2009. Six weeks prior to that surgery he was working at a reduced capacity and his period of recuperation was also approximately six weeks.

> "… Clearly no defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay."

CONCLUSION

[53] The plaintiff's delay from September 20, 2006 to May 13, 2009 was both inordinate and inexcusable. However, I do not find that the defendants have suffered, or are likely to suffer, serious prejudice as a result. Further, any prejudice the defendants may suffer is of their own making. Finally, if I am wrong about the issue of prejudice, I would conclude that the balance of justice demands that the application be dismissed.

[54] Costs may be spoken to if they can not otherwise be agreed upon. I note that the Outline of the plaintiff sought costs in any event of the cause, payable forthwith, on the basis that the application to dismiss was "clearly without any merit whatsoever". Without prejudging any future decision on costs, I would simply point out that my findings that the plaintiff's delay was both inordinate and inexcusable are inconsistent with the suggestion the application was entirely without merit.

Gower J.