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(Winnipeg Centre)
Indexed as: Mathias Colomb Cree Nation et al v. Saskatchewan Power Corporation et al
Cited as: 2024 MBKB 53

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

MATHIAS COLOMB CREE NATION and THE BARREN LANDS FIRST NATION,	)	Kate Kempton and Erika Richards for Mathias Colomb Cree Nation
	)	Abram Silver for The Barrens Lands First Nation
-and-	)	
SASKATCHEWAN POWER CORPORATION, THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF MANITOBA,	)	James S. Ehmann, K.C. and Kamara Q. Willett for Saskatchewan Power Corporation
defendants.	)	Samantha Gergely and Sharlene Telles-Langdon for The Attorney General of Canada
	)	Jim Koch for The Attorney General of Manitoba
	)	JUDGMENT DELIVERED: March 28, 2024

SENIOR ASSOCIATE JUDGE CLEARWATER

[1] This matter concerns a motion by the defendant Saskatchewan Power Corporation ("SPC") to dismiss the within action for delay as against both of the plaintiffs, Mathis Colomb Cree Nation ("MCCN") and The Barren Lands First

Nation ("BLFN"). A similar motion was filed on a related file, CI 18-01-13082, involving only MCCN as the plaintiff, and the same named defendants. That motion is addressed in a separate decision that is being issued concurrently, and may be read in conjunction with this decision. The other two listed defendants, The Attorney General of Canada, and The Attorney General of Manitoba, while attending, did not participate in the process.

[2] For the reasons set out below the motion of SPC in this matter is dismissed. The parties are to proceed to finalize the amendments of the pleadings, and take other necessary steps, as directed herein.

[3] This motion was brought pursuant to The Court of King's Bench Rules, M.R. 553/88 ("the rules") and in particular rules 24.01 and 24.02. The relevant parts of the rules are set out here for ease:

> **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.
>
> **Dismissal for long delay**
> **24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless
>
> (a) all parties have expressly agreed to the delay;
> (b) the action has been stayed or adjourned pursuant to an order;

> (c) an order has been made extending the time for a significant advance in the action to occur;
> (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
> (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.
>
> **Transitional — no application to motions before January 1, 2019**
> **24.02(4)** The court may only apply subrule (1) in a motion to dismiss an action for delay that has been brought after January 1, 2019.

[4] I intend to deal firstly with the request to dismiss the motion pursuant to rule 24.02(1), which is commonly referred to as the long delay rule. This rule compels the court, unless one of the listed exceptions applies, to dismiss the action if no significant advances were made within the three-year period at issue.

[5] After consideration of rule 24.02 and its applicability to these particular facts, I then intend to address rule 24.01, and whether I should dismiss the claim for inexcusable and inordinate delay. This rule, unlike rule 24.02, is discretionary.

[6] While both rules 24.02 and 24.01 are relatively new in Manitoba, having come into force on January 1, 2018, they have been considered on a number of occasions by the Courts in Manitoba, including our Court of Appeal. I do not intend to reiterate all the principles set out in those cases, most of which have been provided by the parties, but I have had the opportunity to consider same, and will reference as needed in these reasons.

FACTS

[7] This case has a long history, with the original statement of claim having been filed in 1992 by a number of individually named plaintiffs, on behalf of both MCCN as it is now known, and BLFN. I intend to set out in point form the notable steps taken in this action from the time the statement of claim was filed, to the date the within motion was filed. It is on these facts that I must determine the applicability of both rules 24.02 and 24.01:

- The statement of claim was filed August 4, 1992, by a number of individually named plaintiffs, members of the two First Nations involved. At that time, all the plaintiffs were represented by the same counsel.
- On October 6, 1992, the defendant SPC filed a notice of motion to set aside the statement of claim, or in the alternative, stay the proceedings. The plaintiffs filed their own motion on December 23, 1992, in response.
- The Attorney General of Manitoba ("Manitoba") and the Attorney General of Canada ("Canada") filed statements of defence on January 11, 1993. The pleadings remained open.
- The motions of SPC and the plaintiffs were heard together. On June 1, 1993, the learned justice dismissed the motion to set aside the statement of claim, but stayed the claim as against the Mathias Colomb plaintiffs (as they were then listed), until those plaintiffs

amended the claim in a manner sufficient to give them proper standing before the court. The order issued on June 30, 1993.

- SPC appealed that decision, which appeal was dismissed by the Manitoba Court of Appeal on January 5, 1994. Leave to appeal to the Supreme Court of Canada was refused on May 19, 1994.
- While there is some disagreement between the parties as to the end date, the parties engaged in formal settlement discussions starting in 1994, which were precipitated by an agreement in writing to hold the matter in abeyance during that process. Specifically, the agreement says:

> It is understood that the litigation shall be held in abeyance during the currency of the discussions, and as between counsel, that any such delay shall not form the subject of any application, defence or position which could have otherwise be taken with respect to the passage of time. I would suggest that any party desiring to recommence the running of this clock give each other two weeks' written notice of its intentions in this regard (Exhibit D to the affidavit of Chief Trina Halkett affirmed February 4, 2022).

- Despite the stay issued by the learned justice after the hearing of SPC's initial motion to dismiss the statement of claim, these settlement discussions involved all the parties, including the MCCN plaintiffs.
- On February 12, 1997, BLFN, MCCN and SPC entered into a negotiation agreement. This led to a statement of common objectives signed on or about May 1, 1998.

- On or about April 6, 1998, MCCN representatives sent a letter to the Minister of Indian and Northern Affairs at the time, indicating that the discussions were going nowhere, and seeking to set aside the current negotiations.
- Then again, on or about January 29, 2008, a letter from SPC was sent to the plaintiffs indicating that it was unable to move forward with negotiations in light of other proceedings in the Province of Saskatchewan, while reiterating SPC remained committed to negotiated resolution.
- Despite the two letters referred to above, the evidence supports that the discussions continued at various times until on or about September 25, 2012. On this date, BLFN formally, and clearly ended the agreement to hold the claim in abeyance, and demanded SPC file its statement of defence. SPC did so on October 26, 2012.
- In September 2014, BLFN provided its unsworn affidavit of documents to all of the defendants, including SPC.
- Examination dates were set for March 2015. As a result of ongoing discussions concerning amendments, and including an indication that SPC would be filing a motion for summary judgment, the examinations were cancelled by agreement of the parties.
- On or about June 4, 2015, BLFN provided SPC with all documents from its affidavit of documents.

- On June 19, 2016, BLFN filed a motion to amend the statement of claim to remove the individual representative plaintiffs who brought the claim on behalf of BLFN. This motion was granted, and an order was registered on December 20, 2016.
- On October 9, 2018, the counsel then acting for BLFN was appointed to the Court of Queen's Bench.
- BLFN filed a motion for summary judgment on certain portions of the claim, along with supporting affidavits and its legal brief, on December 31, 2018. It was set down for a first appearance in January 2019.
- On January 11, 2019, counsel for SPC sent a letter to counsel for BLFN seeking a courtesy adjournment and indicating it would bring its own summary judgment motion. SPC's letter also enclosed its draft amended statement of defence.
- On February 7, 2019, SPC filed its own summary judgment motion requesting, amongst other things, an order that its motion for summary judgment be heard and determined before BLFN's motion for summary judgment.
- On February 11, 2019, SPC filed a second motion seeking to add the Province of Saskatchewan as a party to the action.
- On February 12, 2019, the Attorney General of Canada filed its own motion seeking to amend its statement of defence.

- On or about February 12, 2019, counsel for SPC asked for an adjournment of the summary judgment motions which were set to appear on the courts regular civil uncontested lists. The adjournment was agreed to by all and attended to by BLFN.
- On April 12, 2019, BLFN's counsel wrote to all parties to suggest a longer-term adjournment to allow the parties to amend their pleadings, set timelines, and move forward. On the same day counsel for SPC responded in writing saying, "Sask Power is in agreement with an adjournment sine die. Timelines for amending pleadings is also acceptable." All other parties agreed to the adjournment as well.
- While MCCN did not actively take steps in the court proceedings throughout this time due to the stay issued in 1993 against it, there was ongoing involvement of MCCN in the settlement process, and in the recent discussions concerning next steps.
- MCCN and BLFN are now represented by separate counsel.
- In addition to the above, the evidence presented by both plaintiffs supports that the two remote communities were also challenged, throughout the relevant time period, with communication outages, floods, fires, illnesses and covid related complications, all requiring a great deal of attention from community leaders.
- The within motion was filed on July 9, 2021.

- MCCN ultimately filed a motion to amend the statement of claim to remove the individual plaintiffs who had sued on its behalf originally, which order was granted. This motion and amendment took place after the filing of the within motion.
- There is also a pending motion concerning the separation of the claims of MCCN and BLFN, given they now have separate counsel. However, these motions were also filed after the within motion by SPC.

ANALYSIS RE 24.02

[8] Starting firstly with consideration of rule 24.02, the long delay rule, there are a number of issues to be considered, including determining the proper period of delay at issue. The moving party suggests the three years immediately preceding the filing of the motion are the relevant three years. I am not convinced that is the correct period to consider on these facts.

[9] Caselaw in Manitoba suggests that the relevant three-year period of time ought to begin at the ending of the last significant advance, and that it ought to include at least a portion of time post the introduction of the new rule, that is all or part of 2018, the transition period. This was, as has been considered by our courts, a time built into the rules to allow litigants to acclimatize to the changes, take steps on old, otherwise dormant files, and advance those actions, (see comments in ***Buhr v. Buhr***, 2021 MBCA 16, at para. 67 (***Buhr***) and ***Krasulga v. Manaigre***, 2021 MBQB 131, at para. 13 (***Krasulga***)).

[10] ***Buhr*** remains the leading authority in Manitoba on the proper analysis under rule 24.02. According to ***Buhr***, paragraphs 52 through 55 and paragraph 65, while there may be more than one appropriate way to determine the relevant time period, generally speaking it begins with the last significant advance, and must include at least a part of the transition year that is built into the rule, that being 2018. Determining the relevant time period is an important first step, as it can impact which, if any, exceptions under rule 24.02(1) may apply.

[11] Once this three-year period has been determined, and assuming that there is a finding that no significant advance has occurred during that time, then the next step is to consider the listed exceptions in rule 24.02(1). If one of the exceptions applies, then the dismissal of the claim is not mandatory, and the court can move to an assessment under rule 24.01, the discretionary dismiss for delay rule.

[12] The relevant exceptions on these facts, are found in rule 24.02(1)(a) and (e). More specifically, I will consider, assuming I am satisfied a three-year period as defined in ***Buhr*** has passed, whether there were any express agreements to delay the matter which may impact my findings, or whether any motion or proceeding has been taken *since* the delay that was participated in by the moving party, such that acquiescence to the delay may be inferred. I note that I agree with the submissions of SPC that on these facts no other exception is relevant, including the court ordered stay against MCCN.

[13] In this case, based on the comments in ***Buhr*** noted above, while it may be that the three years immediately preceding the filing of the motion can be considered, the starting point, in my view, is when the last significant advance took place.

[14] Based on a review of the facts, I am satisfied there was an unequivocal agreement to hold the action in abeyance from 1994 through to 2012, and that none of this period may be considered in either the rule 24.02 or 24.01 analysis. While there may have been some communications through that time that put the formal abeyance agreement from 1994 to 2012 at risk, the period of agreed delay only clearly comes to an end when SPC indicated it was finished with the settlement negotiation process.

[15] This notice by SPC culminates in the September 2012 demand by BLFN that SPC file its defence. That defence was filed October 26, 2012. For the purposes of Rule 24.02, and 24.01 for that matter, I find no unexplained, or any delay occurs until after that point in time.

[16] In Manitoba, the courts have accepted that the proper approach to a determination of whether a step taken is a significant advance pursuant to rule 24.02, is to consider whether that step actually moved the matter closer to a hearing, or final determination of the issues. This requires a factually based assessment of each step in any given case, including a practical and functional assessment of whether that step has actually advanced the litigation closer to its end.

[17] This functional approach to the analysis was originally adopted in one of the first cases in Manitoba to consider the new rule, that being the case of ***Fehr v. Manitoba Public Insurance Corp.***, 2019 MBQB 64. It has been applied in every case since that time.

[18] Keeping the principles of ***Fehr*** in mind, prior to December 31, 2018, the last step taken by the plaintiffs that significantly advanced the action was on June 4, 2015. This is the date on which BLFN provided the defendants with the actual documents included in its previously shared affidavit of documents.

[19] I am satisfied that the provision of those documents, as is evidenced in the materials filed in this motion, gave all the defendants a good first look at the materials available to the plaintiffs in support of their claim. This represents, on the available facts, a significant advance in the action, and the last significant advance taken by either of the plaintiffs, at least until the end of the transition period. This encompasses a period of over three years. June 4, 2015 is the appropriate starting point for this motion.

[20] After the provision of the documents by BLFN, and over the next three years, the only other court related step is BLFN's motion to amend the pleadings to solidify that the First Nation was suing on its own behalf. That motion, in my view, did not significantly advance the action. While it may have been a necessary step, and one that may be relevant to the overall delay analysis under rule 24.01, it did not represent a functional advance towards an end result in this case.

[21] It is also clear that throughout the relevant time, i.e., June 4, 2015 to June 4, 2018 (three years), discussions continued concerning the necessity of further amendments to pleadings, possible introduction of new defendants (specifically the Government of Saskatchewan), and the desire of SPC to file a summary judgement motion. However, nothing of note actually happens until BLFN takes the initiative to file its own summary judgment motion on December 31, 2018, over three years after the provision of documents by BLFN, and during, but at the end of the relevant transition period (per ***Buhr***).

[22] As is clear in the relevant case law, settlement or scheduling discussions alone do not usually reflect significant advances in an action. In this case, despite the ongoing discussions, the parties were no closer to the end of the claim on December 30, 2018, then they were on June 4, 2015. As such, I find there was a period of three or more years, including the transition year, where no significant advances in the action took place.

[23] However, in accordance with ***Fehr*** and other case law, if three years have passed without a significant advance, I still must determine whether any other exception applies to save the action from mandatory dismissal. For example, if pursuant to rule 24.01(1)(a) or (e), an agreement to the delay is found, and/or a motion is filed after the relevant three years that is either participated in, or perhaps even taken by the moving party such that acquiescence to the delay may be inferred, then dismissal is not mandatory. In this case, we have both.

[24] On December 31, 2018, BLFN files a summary judgment motion, including additional evidence, and importantly a fulsome brief of law that outlines its case on the matters at issue. While this is, in my view, a step that on these facts would have significantly advanced the action given the inclusion of the evidence and legal position of BLFN, this step is taken by the plaintiffs after the relevant three years have passed as noted above. In accordance with the reasoning in ***Buhr*** and other cases, if nothing else had followed the taking of this step by the plaintiffs, it may not have been able to be relied upon by the plaintiffs in defence of this motion.

[25] However, that did not end the situation. After filing this motion, a step taken by the plaintiffs within the transitional year in the rule, and after the three-year period of delay, I find that the defendant SPC specifically participated in that motion, and/or took steps of their own, such that the exception in rule 24.02(1)(e) applies.

[26] The court in ***Fehr*** at paragraph 26 said one must consider the following when reviewing the exception in rule 24.01(1)(e):

> i. The step taken by the plaintiffs must be a motion or other proceeding;
> ii. The proceeding … must have occurred since the delay;
> iii. The defendants must have participated in the proceeding;
> iv. The defendants' participation must be for a purpose, and to the extent that warrants the action continuing."

[27] The step taken, in this case, the filing of a summary judgment motion by BLFN satisfies the first two parts of the test in ***Fehr***. In my view, what follows by

SPC shows both active participation in the motion, and participation for a purpose, and to the extent that warrants the action continuing.

[28] SPC took steps immediately following the filing of BLFN's summary judgment motion to request an adjournment of the motion despite BLFN being entitled to obtain dates under the court rules. SPC made the request first informally, by letter dated January 11, 2019, which also enclosed a draft amended statement of defence, and then more formally with its own motion for summary judgment filed on February 7, 2019. In SPC's summary judgment motion it specifically seeks, as part of the relief, that it be entitled to proceed with its motion before BLFN's is heard. SPC did not file a dismiss for delay motion at that time, an option that was available to it.

[29] Further, and if that participation alone doesn't show acquiescence to the previous delay such that a continuation of the action is appropriate, SPC files a second motion on February 11, 2019, to add another defendant to the proceedings, also after the three-year period of delay in this case. In addition, SPC is actively discussing, with all the parties, the possible use of historical evidence from a different action as part of its requisite disclosure. In my view, the plaintiffs are entitled to assume any previous delay has been forgiven. The exception in 24.02(1)(e) applies.

[30] Finally, and also important to the later rule 24.01 analysis, following the filing of the motions for summary judgment and related material and after some back and forth communications, SPC expressly agrees that a sine die

adjournment of all the motions is appropriate. Specifically, in response to a plan proposed by BLFN for amending the pleadings of all parties, adding the relevant defendants, putting in place filing deadlines and then proceeding to hear the summary judgment motions, SPC, through its counsel, advises all parties that "SaskPower is in agreement with an adjournment *sine die*. Timelines for amending pleadings is also acceptable."

[31] At this point, in my view, not only has SPC acquiesced to the previous delay such that the rule 24.02(1)(e) exception applies, they have now additionally agreed to take no further steps until certain others are completed, or further notice provided. The parties clear understanding that agreement was that time was needed to complete the requisite interim steps, and then address the potentially dispositive interim motions, before moving on with the action on the merits if still required. This satisfies the terms of a standstill agreement like those found in ***Krasulga*** and other authorities, and gives rise to the exception in rule 24.02(1)(a) on these facts.

[32] In my view, the active participation of SPC following the three-year delay, and then further entering an agreement to hold the matter in abeyance pending certain steps, both qualify as exceptions to rule 24.02. Mandatory dismissal for long delay does not apply, and the motion must be dismissed.

[33] As noted, SPC had argued the relevant period of time for consideration is the three years directly preceding the filing of this motion. This is important, submits SPC, because if that is the case, then there can be no applicability of the

exception at 24.02(1)(e), given nothing has occurred *since* the expiry of the three-year period. SPC says no significant advances occurred during those three years, and no exceptions apply.

[34] Even if I accept the position of SPC that I should consider only the three years immediately preceding the filing of this motion, the result is not changed. If the period of consideration starts July 9, 2018, three years before this motion is filed, then the following actions are relevant:

1. The summary judgment motion, affidavits and brief filed by the plaintiff BLFN on December 31, 2018;
2. The letter from SPC on January 11, 2019, requesting an adjournment of BLFN's motion and SPC's provision of an amended statement of defence to BLFN and others;
3. The email on January 25, 2019 from SPC, requesting that the plaintiffs and others consent to the use of certain disclosure;
4. The filing by SPC of its summary judgment motion on February 9, 2019;
5. The filing by SPC of its motion to add the Government of Saskatchewan on February 11, 2019;
6. The filing of a motion by the Department of Justice, Canada to amend its statement of defence;
7. The original general extended adjournment agreement to April 16, 2019 for the hearing of all the motions; and

8. The ultimate agreement in writing on April 12, 2019 from all parties for an adjournment sine die to allow for amendments, adding parties and timelines.

[35] I am of the view that the summary judgment materials of BLFN do, on these facts, represent a significant advance during SPC's proposed three-year period. This is not simply the filing of a motion that does not proceed, it includes filing specific evidence and an extensive legal brief on some of the issues. The brief alone gives the defendants their first formal look at the legal position being advanced by one of the plaintiffs. While it remains outstanding, I agree with the plaintiffs that, on these facts, it is a significant advance.

[36] Further, the filing of SPC's own motions show the matter continued to progress in the relevant time period. These are steps, although not taken by the plaintiff, that may be considered in a 24.02 analysis. The identification of other relevant parties, and the defendants' acknowledgement that they too needed to amend the pleadings to properly frame issues, are both significant advances.

[37] Finally, if I am wrong on the issue of significant advances in this proposed time period, the agreement for the *sine die* adjournment of summary judgment motions satisfies the rule 24.02(1)(a) exception. Following the line of authorities on standstill agreements, this agreement meets the requirements of clarity, formality, offer and acceptance, such that the clock is paused pending next steps, or further notice.

[38] Given the above, I do not find that rule 24.02 applies in this case. While I have found there was a three-year period of delay with no significant advances commencing June 4, 2015, I have found the exceptions in rule 24.02(1)(a) and (e) operate to save the action form mandatory dismissal.

[39] Finally, and very briefly, I had raised the question with the parties of whether it was open to me to dismiss the action under rule 24.02 as against one of the plaintiffs, rather than both, had the facts warranted same. The parties provided me with some submissions on that issue and, failing to have found any law directly on point, I find it is not open for the court to dismiss only a portion of the action under rule 24.02.

[40] Specifically, I find a plain language reading of the relevant rules speak only to dismissal of an "action". An "action is defined in our rules to include:

> **1.03** In these rules, unless the context requires otherwise,
> …
> **"action"** means a civil proceeding, other than an application, that is commenced in the court by,
> (a) a statement of claim,
> (b) a counterclaim,
> (c) a crossclaim,
> (d) a third or subsequent party claim, or
> (e) a petition;

[41] Rule 24.02 in Manitoba seems to speak to an all or nothing option only. Where I have found rule 24.02 does not apply to the facts, the action should continue. The motion on this ground is dismissed. However, that does not end the analysis. I must turn now to the question of whether, despite striking the motion under 24.02, the action should still be dismissed by virtue of rule 24.01.

ANALYSIS RE 24. 01

[42] Rule 24.01 is meant to address the dismissal of claims that have inordinate and inexcusable delay. Where that is the case, the new rule 24.01 requires us to infer prejudice, and subject to the right to rebut that presumption, the matter may be dismissed. Rule 24.01, unlike 24.02 is a discretionary rule.

[43] The leading case in Manitoba on the analysis pursuant to rule 24.01 remains ***The Workers Compensation Board v. Ali***, 2020 MBCA 122 (***Ali***). The principles of ***Ali*** are helpfully summarized in ***Forsythe v. Castelane***, 2023 MBKB 18, a decision of the Court of King's Bench. In that decision the learned justice indicates the following principles flow from ***Ali***:

- there are two primary issues to be addressed under this rule:
    - has there been delay; and
    - has the delay resulted in significant prejudice;
- in determining whether there has been delay:
    - the moving party has the onus to establish the delay has been both inordinate and inexcusable;
    - 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, because until a credible excuse for the delay is proffered, the natural inference is that inordinate delay is inexcusable delay. Supporting evidence is critical to show a clear and meaningful explanation for the delay in the circumstances of the case;
    - a delay will be inordinate and inexcusable if 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" (KBR 24.01(3)). Thus, the court should consider the following factors:

- the subject matter of the litigation;
- the complexity of the issues between the parties;
- the length of the delay;
- the explanation for the delay;
- other relevant circumstances, including:

    - consideration of the current status of the litigation assessed against a non-specific, typical 'reasonable comparator';
    - the role of each party played in the overall delay; and
    - any other unique circumstances.

- if the delay is inordinate and inexcusable, significant prejudice is presumed in favour of the moving party, but rebuttable by the plaintiff;

- if the delay is not inordinate and inexcusable, a court may dismiss the action regardless if the delay has resulted in significant prejudice as established by the moving party; and
- finally, the court retains a residual discretion, to be exercised only in exceptional circumstances for a compelling reason that can be clearly articulated, to refuse to dismiss the action, even if the moving party establishes inordinate and inexcusable delay, or delay, and significant prejudice.

[44] Of assistance to the analysis required in this case is a consideration of the impact of any periods of agreement to delay. As previously noted, I am satisfied that all parties believed the matter in abeyance between 1994 and October 26, 2012. This narrows the period of delay to approximately 8.5 years at the date this motion is filed, down from a possible 19 years. I have also found a further agreement to delay the hearing is entered on April 12, 2019, which continued in place until the within motion is filed (July 9, 2021), the end point of this analysis.

[45] In ***Knight v. Daraden Investments Ltd. et al***., 2021 MBQB 279, given the agreement between the parties as concluded by the learned justice, and

despite finding inordinate delay on the facts, the learned justice notes at paragraph 34:

> **34** However, while I do find the delay in this action to be inordinate, I also find it to be excusable. The excuse for the delay, of course, lies in the fact that the parties agreed to a delay of the proceedings in August 2015.

[46] Overall, while I am satisfied, given the nature of the claim at issue in this case, an approximate 6.5 year delay between 2012 and the April 12, 2019 *sine* die agreement is inordinate, the delay must still be inexcusable for presumed prejudice to apply under the rule. On this latter point, I am satisfied the delay is explained, and excusable on these unique facts.

[47] Requiring consideration in this respect, is the evidence of specific hardships experienced in these communities during the relevant time. These facts are not regularly, or to the same extent, experienced in less remote locations. These include extreme floods, fires and communication outages/challenges, all adding to the delay in the circumstances.

[48] As a result, and specifically in light of the agreements to delay noted herein, and the specific, and unchallenged evidence of other hardships in play during the relevant time, I find there is a valid excuse for a large part of the delay. The presumption of significant prejudice pursuant to Rule 24.01 does not apply.

[49] While I accept that ***Ali*** leaves it open for the court to exercise its discretion in any event, to dismiss for delay based on actual or proved significant prejudice, I do not find that appropriate on these facts. The evidence is

primarily historic as pointed out by the parties. There was no significant prejudice proved by the moving party. On balance, given the importance of the matters at issue, I decline to exercise my discretion in this case.

[50] For these reasons I would dismiss the motion pursuant to rule 24.01 as well.

[51] At the time of the hearing, I had left the issue of the prejudice of any decision to be adjourned for future submissions if required. Given my decision, that issue need not be addressed.

CONCLUSION

[52] Concerning SPC's motion pursuant to rule 24.02, I have found that, while there had been a period of three or more years without a significant advance between June 4, 2015 and December 31, 2018, the exceptions in rule 24.02(1)(a) and (e) apply such that there is no mandatory dismissal of the action.

[53] Alternatively, utilizing the suggested three-year period immediately preceding the filing of the within motion as suggested by SPC, I have found both that significant advances did occur during that time frame, and that the parties nevertheless agreed to hold the matter in abeyance at least as of April 12, 2019. Rule 24.02 does not apply, and the motion in that respect is dismissed.

[54] Concerning rule 24.01, while this matter has progressed much more slowly than an average claim of this nature may have, a factor indicative of

inordinate delay, I find the delay has been adequately explained, such that presumed prejudice does not arise.

[55] Finally, I have found no actual prejudice in the circumstances. Given rule 24.01 is discretionary, on these facts I am not satisfied the delay is such that it warrants dismissal. The motion under rule 24.01 is similarly dismissed.

[56] As is my purview under the rules, while I have dismissed the motion for the reasons stated, I do find that further direction to prevent ongoing challenges is appropriate in this case. It is clear there are still some pleadings issues to address, including MCCN's lifting of the stay, all party's amendments, and potential additional defendants. I am inclined to set some timelines for the completion of at least those preliminary steps in order to move the matter forward in the interests of justice.

[57] The parties must proceed to set down the motion to separate the actions to be heard as soon as is practical. Further, all necessary amendments to the pleadings at this stage, including the addition of any other defendants, must be completed within 90 days of this Order, or as otherwise may be agreed by the parties in writing. Failure to move forward at this point may lead to further motions to dismiss being heard.

[58] If costs cannot be agreed upon, they may be spoken to.

K. L. Clearwater
Senior Associate Judge