Date: 20240328
Docket: CI 18-01-13082
(Winnipeg Centre)
Indexed as: Mathias Colomb Cree Nation v. Saskatchewan Power Corporation et al
Cited as: 2024 MBKB 54

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

MATHIAS COLOMB CREE NATION, plaintiff,	)	Kate Kempton and Erika Richards for the plaintiff
-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 is my decision concerning the defendant Saskatchewan Power Corporation's ("SPC") motion to dismiss this matter for delay pursuant to The

Court of King's Bench Rules, M.R. 553/88 ("the rules"), and in particular rules 24.02 and/or Rule 24.01. For the reasons set out below the motion is dismissed.

[2] This matter was heard in conjunction with a similar motion filed by SPC in a related matter involving this plaintiff and others, specifically file CI 92-01-65290 (the "related action"). That motion is the subject of a separate decision which should be read in conjunction with these reasons as, with limited exceptions, I do not intend to reiterate all of the facts or principles of the law referenced therein.

[3] This claim seeks damages arising from the alleged ongoing flooding of the traditional lands of the plaintiff. The related action involves a request for certain findings and declarations from the court.

[4] The facts relevant to this motion are very simple. The plaintiff filed its statement of claim on February 22, 2018. The claim was then served on SPC and others.

[5] On March 6, 2018, counsel for SPC sought an undertaking from counsel for the plaintiff not to note SPC in default without reasonable notice. This request was responded to via email by plaintiff's counsel on March 8, 2018. The email says:

> I am in receipt of your fax of March 6 regarding the above-noted claim.
>
> As per your request in the fax, on behalf of the plaintiffs, we undertake not to note the defendant SaskPower in default of defence without reasonable advance written notice.
>
> Please let me know when you have received this message.

[6] That message was responded to with a confirmation of receipt later that same day.

[7] Following the filing and service of the claim, and the agreement not to note the defendant in default, nothing further happened on the court file until the within motion is filed on July 9, 2021. While the other defendants did attend the hearing, neither Manitoba nor Canada took a position on the motion.

[8] The plaintiff, in response to the motion, filed an affidavit from Chief Gordie Bear, sworn April 3, 2023. The affidavit explains, amongst other things, the history of the related action, and provides evidence of additional issues that the community has been impacted by since the filing of this claim, including the pandemic, significant flooding, and fires.

[9] There is no indication in any of the evidence that any other steps were taken in this litigation since the plaintiff agreed to extend the time for SPC to file its defence. On these facts, the only question for the court is simply whether that agreement satisfies the exception to mandatory dismissal in rule 24.02(1)(a).

[10] Briefly, as is noted in my reasons issued in the related action, if I find an agreement to delay existed such that the exception noted in rule 24.02(1)(a) applies, there can be no finding of inordinate and inexcusable delay under rule 24.01. In accordance with the decision in ***Knight v. Daraden Investments et al***, 2021 MBQB 279, any such agreement to hold the matter in abeyance operates as a fulsome explanation for the delay. Therefore, dismissal under rule 24.01 is not appropriate.

[11] For the reasons set out below, I am satisfied the language used in this case, in combination with the surrounding facts, support that an agreement to delay existed such that rule 24.02(1)(a) serves as an exception to mandatory dismissal. As such, per ***Knight***, the motion under rule 24.01 must also fail.

[12] As set out in the ***Knight*** case, which also references other Manitoba decisions, agreements to extend time for filing, or to not note parties in default without due notice, have been accepted by our courts in some circumstances, as the basis for the rule 24.02(1)(a) exception. ***Knight*** does caution that some of these types of agreements for "courtesy extensions" may need to be reviewed in the context of their timing and the introduction of the new delay rules. That point was contemplated by this court in its decision in ***River Ridge 2 Facility Inc. v. Manshield Construction LP et al***, 2023 MBKB 61.

[13] In ***River Ridge 2***, the issue of the timing of the filing of the pleadings and entering into the extension agreement was relied upon as one of the reasons to conclude that the specific extension agreement in place did not give rise to the exception in rule 24.02(1)(a). In that case, this court held that timing, i.e., the fact the entirety of the court case took place after January 1, 2018, when rule 24.02 was introduced, was a relevant factor in the granting of the dismissal for delay. Not surprisingly, ***River Ridge 2*** was heavily relied upon by SPC.

[14] However, upon review of the entirety of ***River Ridge 2***, it is clear that the decision was not based only on the fact that the pleadings and the extension agreement entirely post-dated the introduction of rule 24.02. While the timing of that agreement was, and remains a relevant consideration, other factors tipped the scales.

[15] The court's decision in ***River Ridge 2*** flowed also from the specific evidence filed, including the complete lack of contact between the parties throughout the relevant time, and the admission of the plaintiff concerning limitations to the extension of time granted. It was on an overall assessment of those facts, not just the timing, on which the court concluded no agreement to delay in accordance with rule 24.02(1)(a) could be inferred.

[16] In this case, while the timing may otherwise favour the moving party here, none of the other facts were present. This plaintiff was involved, throughout this time period, in dealing with the defendants on the related action, even filing motions to amend those pleadings, which facts are set out more clearly in my related decision. Furthermore, there is no admission by the plaintiff or defendants concerning their understanding of any limits to the offer to extend time, as was present in ***River Ridge* 2**.

[17] In my view, this case is distinguishable from ***River Ridge 2***, and more closely aligned with the facts in ***Knight*** and other Manitoba cases relating to standstill agreements. Based on the totality of the facts, including the ongoing litigation in the related action, the ongoing contact between the parties, and the

language used in this offer to not note default, I find the agreement is sufficient to give rise to the exception in rule 24.02(1)(a). The motion is dismissed.

[18] As indicated, while I find this case to be distinguishable from the decision in ***River Ridge 2***, it is important to note that even if there are insufficient facts to differentiate this case, since the hearing of this motion, ***River Ridge 2***, which was on appeal at the time of the hearing, has been overturned. Very recently, the Court of King's Bench issued its reasons for that appeal which clarify the appropriate analysis.

[19] Not only the timing of the filing of the pleadings and the alleged agreement, but the timing of this in relation to the availability of guidance from the court on the interpretation of rule 24.02 are relevant. Specifically, at paragraph 22 of ***River Ridge 2 Facility Inc. v. Manshield Construction LP et al***, 2024 MBKB 38, in overturning this court's decision, the learned justice notes:

> 22 However, in my view, I must look not only at the timing of the filing of pleadings but also consider that at the time of the email exchange, the new Rule had been in place just six months, and ***Krasulja*** and ***Knight*** had not yet been decided. The guidance those cases now offer to the effect that prudence would dictate a more clear and explicit agreement between counsel had not yet been delivered. Considering the language of the email exchange in this case, in the context of the litigation, the defendants are agreeing not to hold the plaintiff to the strict application of the Rules for pleadings. It is reasonable that the plaintiff assumed that the defendants would not seek to dismiss its claim for delay. This case is indistinguishable from ***Krasulja***.

[20] Given I have already found these facts distinguishable from the facts in ***River Ridge 2***, I do not need to hear any further from counsel in respect of this recent development. However, while each case must still be considered on its unique facts, it is now quite clear that an agreement such as this, which takes place very early in the transitional year of the new rule, and before any judicial guidance was available on the issue, such as that found in ***Knight*** and ***Krasjula v. Manaigre***, 2021 MBQB 131, these agreements will most likely meet the requirements of an agreement to delay pursuant to rule 24.02(1)(a). The appeal is binding on this court.

[21] As a result of the unique facts of this case, and in keeping with the most recent comments of the court on agreements to hold matters in abeyance, I find an agreement was in place, and the exception in rule 24.02 (1)(a) applies. There is no mandatory dismissal.

[22] Further, as noted above, in light of the binding comments of the court in ***Knight***, this agreement is a fulsome explanation for any delay, inordinate or otherwise, under rule 24.01. The motion is dismissed.

[23] If costs can not be agreed upon, they may be spoken to.

K. L. Clearwater
Senior Associate Judge