Citation: Schneider v Moffatt, 2025 MBCA 3
Date: 20250116
Docket: AI24-30-10103

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***L. W. Bowles*** *and*
	)	***K. L. Dixon***
CHRISTOPHER PAUL SCHNEIDER and	)	*for the Applicant*
DR. CHRISTOPHER PAUL SCHNEIDER,	)	
A MEDICAL CORPORATION	)	***T. P. Harwood-Jones***
	)	*for the Respondents*
(Plaintiffs) Respondents	)	
	)	*Chambers motion heard:*
- and -	)	***August 29, 2024***
	)	
DANA MOFFATT	)	*Decision pronounced:*
	)	***September 27, 2024***
(Defendant) Applicant	)	
	)	*Written reasons:*
	)	***January 16, 2025***

BEARD JA

I. THE ISSUES

[1] The defendant, Dana Moffatt (Dr. Moffatt), is applying for leave under section 25.2(1) of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*], to appeal an interlocutory order (the order) of a judge of the Court of King's Bench (the motion judge) (see *Schneider v Moffatt*, 2024 MBKB 106 [*decision*]). On September 27, 2024, the motion was dismissed with reasons to follow. These are the reasons.

[2] In the order, the motion judge dismissed Dr. Moffatt's motion under r 24 of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*] to

dismiss the action against him for delay (the delay motion). Dr. Moffatt had moved to have the action dismissed on the bases that:

- the delay in the action had been inordinate and inexcusable within the meaning of r 24.01(1) and he had suffered significant prejudice; and

- a period of more than three years had passed between January 20, 2020, and December 7, 2023, without a significant advance in the action, within the meaning of r 24.02(1), having occurred and none of the exceptions set out in r 24.02(1) applied.

[3] The proposed issues to be determined on appeal, if leave to appeal is granted, are:

(i) the motion judge erred in law in her analysis of r 24.01;

(ii) the motion judge erred in law in her analysis of r 24.02;

(iii) the motion judge erred in law in her analysis of r 24.02(1)(e); and

(iv) the motion judge committed a palpable and overriding error of mixed fact and law in her analysis of r 24.02(1)(e).

[4] On the motion for leave to appeal, Dr. Moffatt argues that the proposed grounds of appeal raise an arguable case of substance and are of sufficient importance to warrant the attention of a full panel of this Court.

II. BACKGROUND

[5] The underlying facts are not in issue. The plaintiffs (together, Dr. Schneider) brought separate claims against Dr. Moffatt and another doctor for defamation, breach of common law fiduciary duty, breach of statutory fiduciary duty, misfeasance in public office, malicious prosecution, negligence and negligent misrepresentation. While the two claims arise out of the same circumstances, they are being pursued separately.

[6] Briefly, Dr. Schneider is a medical doctor who provided gastroenterology services under contract with the Winnipeg Regional Health Authority (the WRHA) between November 2015 and January 2019. Dr. Schneider alleges that Dr. Moffatt, in his capacity as the medical director of endoscopic services for the WRHA, deprived him of patients, operating room time, and the opportunity to provide services and remuneration. Dr. Schneider also claims that Dr. Moffatt submitted a false and defamatory complaint about him to the WRHA. Dr. Moffatt denies any wrongdoing and denies that Dr. Schneider has suffered any damage.

[7] As the motion judge found, the chronology of the litigation is as follows (see *decision* at para 3):

- December 11, 2019–Dr. Schneider filed the statement of claim.
- January 20, 2020–Dr. Moffatt filed his statement of defence.
- February 19, 2021–Dr. Moffatt served his affidavit of documents.

- December 23, 2022–Dr. Schneider filed and served a pre-trial brief and requested dates for a pre-trial conference.

- March 7, 2023–A pre-trial conference proceeded and trial dates were set for February 18 to March 7, 2025; the pre-trial judge directed that examinations for discovery be completed by January 31, 2024.

- March 7, 2023–Dr. Moffatt requested Dr. Schneider's affidavit of documents. The parties were under the misapprehension that Dr. Schneider had served their affidavit of documents on Dr. Moffatt. Through correspondence following the pre-trial conference initiated by Dr. Moffatt, it was determined that this was an error and that Dr. Schneider's affidavit of documents had not yet been provided. Although Dr. Moffatt requested that Dr. Schneider provide their affidavit of documents, that was not done.

- December 8, 2023–Dr. Schneider requested Dr. Moffatt's availability for examinations for discovery. Dr. Moffatt's counsel did not respond to this request and took the position that, in the absence of Dr. Schneider's affidavit of documents, examinations for discovery could not be conducted.

- January 25, 2024–A pre-trial conference proceeded and the motion judge granted leave to Dr. Moffatt to file a motion to dismiss the action for delay.

[8] The litigation continued as follows:

- February 23, 2024–Dr. Moffatt filed the delay motion to dismiss the action on the bases set out in para 2 herein.

- July 12, 2024–The motion judge released the *decision* dismissing the delay motion.

- August 9, 2024–Dr. Moffatt filed the present application before this Court.

III. MOTION FOR LEAVE TO APPEAL

[9] There is no dispute that the order being appealed is an interlocutory order (see e.g. *Knight v Daraden Investments Ltd*, 2022 MBCA 69 (in Chambers) at paras 6-7 [*Knight*]).

[10] The test for granting leave to appeal under section 25.2 of the *CA Act* requires the applicant to satisfy two criteria: first, the proposed ground of appeal must have arguable merit; and, second, it must be of sufficient importance to warrant the attention of a full panel of this Court (see *ibid* at para 22).

[11] A non-exhaustive list of the factors that a court may consider in determining whether a ground has arguable merit are (see *ibid* at para 23):

- Is the ground prima facie frivolous or vexatious?

- Is it prima facie destined to fail, taking into account the standard of review that will likely be applied?

- Does it have a reasonable prospect of success?
- Can it be dismissed through a preliminary examination?
- Is it likely to be rendered moot due to the natural progression of the proceedings?
- Will it unduly or disproportionately delay or add to the cost of the proceedings?

[12] A non-exhaustive list of the factors that a court may consider in determining whether a ground is of sufficient importance is (see *ibid* at para 25):

- Does it raise a novel or unsettled point of law or of practice?
- Will resolution of the issue likely affect the determination of disputes between others (aside from the parties to the proceedings)?
- How significant is the order to the course or outcome of the proceedings?

[13] Finally, given that the decision to grant leave to appeal is ultimately a matter of discretion, a judge can grant leave to appeal even if either or both of the criteria mentioned above have not been met, where denying leave might result in an injustice (see *ibid* at para 26).

IV. STANDARD OF REVIEW

[14] A motion for leave to appeal is an original motion in this Court. There is no lower court decision being reviewed on the issue of whether leave should be granted, so there is no applicable standard of review.

[15] While this is an application for leave to appeal and no final decision will be made regarding the grounds of appeal, the analysis of whether a proposed ground of appeal has arguable merit requires a consideration of the standard of review that would be applied to the ground on appeal (see *ibid* at paras 16, 20, 28).

[16] A decision to dismiss an action for delay under r 24.01(1) is discretionary, as the rule states that the motion judge "may" dismiss an action for delay. In *The Workers Compensation Board v Ali*, 2020 MBCA 122 at para 20 [*Ali*], quoting *Kostic v Merrill Lynch Canada Inc*, 2010 MBCA 81 at para 41, Burnett JA, for the Court, set out the applicable standard of review:

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

[17] As is explained in *Buhr v Buhr*, 2021 MBCA 63 [*Buhr*], r 24.02(1) does not attract a discretionary standard of review because there is no discretionary decision being made. This is because "r 24.02(1) states that a court 'must' dismiss an action if there has been a period of three or more years without a significant advance and none of the exceptions in rr 24.02(1)(a) to (e) apply" (*ibid* at para 30). In that situation, the applicable standard of review is the standard set out in *Housen v Nikolaisen*, 2002 SCC 33, being that questions of law are reviewed on the standard of correctness, and questions of fact or mixed fact and law are reviewed on the standard of palpable and overriding error (see paras 8, 10, 36; see also *Buhr* at para 30).

V. APPLICABLE *KB RULES*

[18] The applicable rules are as follows:

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.	**Rejet pour cause de retard** **24.01(1)** Le tribunal peut, sur motion, rejeter une action, en tout ou en partie, s'il estime qu'elle a fait l'objet d'un retard ayant causé un préjudice important à une partie.
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.	**Présomption de préjudice important** **24.01(2)** Lorsque le tribunal estime que le retard dont une action fait l'objet est inhabituel et inacceptable, ce retard est présumé, en l'absence de preuve contraire, avoir causé un préjudice important à la partie ayant présenté la motion.

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.

Retard inhabituel et inacceptable

24.01(3) Pour l'application de la présente règle, tout retard est inhabituel et inacceptable lorsqu'il excède ce qui est raisonnable compte tenu des circonstances et de la nature des questions du litige.

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

Rejet pour cause de long retard

24.02(1) Lorsqu'au moins trois ans s'écoulent sans que des progrès importants n'aient lieu dans le cadre d'une action, le tribunal la rejette sur motion, sauf dans l'un des cas suivants :

a) toutes les parties ont expressément accepté le retard;

b) il a été sursis à l'action ou l'action a été ajournée en conformité avec une ordonnance;

c) une ordonnance prolongeant le délai pouvant s'écouler avant que des progrès importants n'aient lieu dans le cadre de l'action a été rendue ;

d) le retard découle d'une conférence de cause ou de gestion de cause ou d'une conférence préparatoire au procès;

or other proceeding for a purpose and to the extent that warrants the action continuing.	e) une motion a été présentée ou une autre instance a été entreprise depuis le retard et la partie ayant présenté la motion ou entrepris l'instance y a participé à des fins ou dans une mesure justifiant la poursuite de l'action.

VI. ANALYSIS

(i) the motion judge erred in law in her analysis of r 24.01

[19] Rule 24.01(1) states that a court may dismiss all or part of an action if it finds that there was delay in the action that resulted in "significant prejudice to a party", and r 24.01(2) states that significant prejudice will be presumed if the delay is "inordinate and inexcusable".

[20] This ground of appeal relates to the issue of whether the delay, in this case, was inordinate and inexcusable. Applying *Ali*, the motion judge explained the principles as follows (*decision* at para 31):

> . . . To determine whether the delay is inordinate and inexcusable, I must consider whether the delay is in excess of what is reasonable, having regard to the nature of the issues in the action and the particular circumstances of the case. I must consider: the subject matter of the litigation; the complexity of the issues between the parties; the length of the delay; the explanation for the delay; and any other relevant circumstances. This would include a consideration of the current status of the litigation in comparison to a reasonable comparator and the role of each party in the overall delay (***Ali***, at paras. 41-42).

[21] Dr. Moffatt does not argue that the motion judge erred in her statement of the applicable legal principles or the legal test to be applied; rather, he argues that she misapplied the test for inordinate and inexcusable delay. He cites the following from *Ali* in support of his position (at paras 66, 68, quoting from *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48 at para 43 [*ICC*]):

> At its core, the court is asked to consider whether the delay is "out of proportion to the matters in question" (see *Wiegert v Rogers*, 2019 BCCA 334 at para 32). When making this assessment, a court is required to compare the progress in the action against that of a reasonable litigant advancing the same claim under comparable conditions; the delay will be considered inordinate if the difference between the delay in the present action and the comparator is so large as to be unreasonable (see *Trebilcock* at paras 115, 120).
>
> The Saskatchewan Court of Appeal has taken the same view in *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48, where the Court stated that the inquiry into whether the delay has been inordinate (at para 43):
>
> > . . . will involve considering the time the plaintiff has taken to get the litigation to the point where the application to strike is brought and comparing that lapse of time to what might typically be expected in a case of similar complexity. This is necessarily a matter of informed judgment grounded in the overall experience of the court and the particulars of the file in question.

[22] Dr. Moffatt describes the error as resulting from the motion judge having misapplied the test by basing her findings regarding delay on what might happen in the future, namely, speculating as to when the case might be completed, instead of what actually happened up to the date of the filing of the motion for delay, being February 23, 2024.

[23] In my view, the test from paras 66 and 68 of *Ali* that is referred to by Dr. Moffatt is an application of the test that was adopted by the motion judge from paras 41-42 of *Ali*, and in fact is referred to as such in para 31 of the *decision*.

[24] In applying that test, the motion judge did not consider "what might happen in the future, instead of the delay that has actually happened to date" (underlining omitted). What has actually happened to date included the fact that trial dates were set at the pre-trial conference on March 7, 2023, which was about ten and one-half months before Dr. Moffatt first requested leave to file the delay motion. The fact that trial dates have been set was part of the "current status of the litigation" (*Ali* at para 41) and "the case file and its chronology" (*ibid* at para 65).

[25] Further, the effect of having trial dates set before the filing or hearing of a motion to dismiss was not at issue in either *ICC* or *Ali* because, in those cases, trial dates had not been set when the motions to dismiss were filed or heard.

[26] In my view, the fact that the parties had set trial dates before the filing of the delay motion was a relevant circumstance and the motion judge did not err in law by weighing it as part of her analysis.

[27] After setting out the correct principles related to the determination of inordinate and inexcusable delay, the motion judge proceeded to apply them by considering each of the factors in relation to the circumstances in this case, as she was required to do (see *decision* at paras 32-37). I am not persuaded that there is an arguable case that the motion judge erred in law by misapplying the test for inordinate and inexcusable delay.

[28] Given my finding that there is no arguable error of law, I am not satisfied that the proposed ground of appeal is of sufficient importance to warrant the attention of a full panel of this Court. As a result, I would not grant leave to appeal on this ground.

(ii) the motion judge erred in law in her analysis of r 24.02

[29] Rule 24.02(1) requires a court to dismiss an action if three or more years have passed without a significant advance in the action, unless one of the exceptions in that rule applies. The motion judge found as follows (*decision* at para 25):

> As a result of [Dr. Schneider's] filing of the pre-trial brief and scheduling the pre-trial conference [on December 23, 2022], trial dates were set, a deadline was set for the completion of examinations for discovery, and the Court's pre-trial management mechanisms were engaged. I find that this was a step that moved the lawsuit forward in a material way and so was a significant advance in the action under Rule 24.02(1).

[30] Dr. Moffatt's position is that the motion judge erred in law because, while she set out the correct test for determining whether there had been a significant advance, she did not apply it, and that, by failing to apply the required legal criteria or misapplying them, she erred in law. In particular, he argues that, while the motion judge correctly set out the requirement for a functional analysis to determine whether the setting of a pre-trial conference constitutes a significant advance, she did not carry out that analysis.

[31] The motion judge adopted the functional test set out in *WRE Development Ltd v Lafarge Canada Inc*, 2022 MBCA 11 at para 19. This requires a judge to "view the whole picture of what transpired" (*ibid*), which

"necessarily involve[d] assessing various factors, including the nature, value and quality, genuineness and timing of the step at issue and whether that step moved the lawsuit forward in a meaningful way in the context of the action" (*ibid*). Thus, "[t]he focus is on the substance of the step taken and its effect on the litigation rather than its form" (*ibid*).

[32] A review of the motion judge's reasons shows that she did carry out a functional analysis. She noted that whether a pre-trial conference constitutes a significant advance depends on the circumstances of the case. She found that, in this case, filing the pre-trial brief satisfied the requirement for scheduling a first pre-trial conference, which is a prerequisite for setting trial dates (see *decision* at para 16). She noted that, in this case, the pre-trial conference proceeded, at which both trial dates and a deadline for completing discoveries were set (see *ibid* at para 17).

[33] The motion judge also noted that, since the pre-trial conference, little progress had been made towards preparation for trial, and she reviewed the events that had occurred in the intervening period. She also noted that, when Dr. Schneider contacted Dr. Moffatt to set discovery dates, Dr. Moffatt concluded that there was no point in proceeding because it was close to the deadline. She found, however, that "there is no indication that this concern was communicated to counsel for [Dr. Schneider]" (*ibid* at para 22).

[34] The motion judge acknowledged that a plaintiff was clearly responsible to prosecute the claim vigilantly and that a defendant had no responsibility to "move the action forward" (*ibid* at para 23), but a defendant "must not intentionally obstruct, stall or delay an action" (*ibid*). She concluded that "both parties bear some responsibility for the delay in

proceeding with examinations for discovery. That examinations did not proceed by the deadline does not render the pre-trial conference meaningless" (*ibid*).

[35] Finally, Dr. Moffatt argues that setting a trial date was not a significant event because it did not advance the proceedings in this case due to Dr. Schneider's indication, at the pre-trial conference, that he was considering seeking an adjournment of the trial so that this action could be consolidated with his other action. At the hearing of this motion, Dr. Schneider's counsel confirmed that there would be no motion to consolidate, and they would be moving forward with the trial dates that had been set. As a result, Dr. Moffatt's counsel confirmed that this is no longer an issue.

[36] All of this to say that the motion judge did carry out a functional analysis. While Dr. Moffatt may take issue with the motion judge's conclusions, that is, at best, a question of mixed fact and law; it is not a question of law. I am not persuaded that there is an arguable case that the motion judge erred in law by failing to apply the required legal criteria or misapplying them.

[37] Given my finding that there is no arguable error of law, I am not satisfied that the proposed ground of appeal has sufficient importance to warrant the attention of a full panel of this Court. As a result, I would not grant leave to appeal on this ground.

(iii) the motion judge erred in law in her analysis of r 24.02(1)(e)

[38] Rule 24.02(1)(e) contains an exception to the general rule in r 24.02(1) that an action must be dismissed if three or more years have passed without a significant advance in the action. This exception arises where "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."

[39] The motion judge found that r 24.02(1)(e) applied to exempt the action from dismissal under r 24.02(1) (*decision* at para 29):

> As noted above, I have found that the pre-trial conference of March 7, 2023 was a significant advance in the litigation, because trial dates were set, a deadline set for the completion of examinations for discovery, and mechanisms for the pre-trial management of the action were engaged. [Dr. Moffatt] participated in the March 7, 2023 pre-trial conference. Although [Dr. Moffatt] raised concerns about delay, and the fact that examinations for discovery had not been conducted, there is no indication that he objected to setting trial dates. In my view, [Dr. Moffatt's] participation could have led [Dr. Schneider] to fairly assume [Dr. Moffatt] had waived delay.

[40] Dr. Moffatt argues that the motion judge erred in law by interpreting the exception as only requiring a finding that Dr. Schneider *could* have been misled. He states that the correct interpretation requires a finding that *it was more likely than not* that Dr. Schneider was misled.

[41] Both the motion judge and Dr. Moffatt are citing different statements of the law as enunciated by Edmond J in *Fehr v Manitoba Public*

Insurance Corporation, 2019 MBQB 64 [*Fehr*]. Justice Edmond interpreted r 24.02(1)(e) as follows (*ibid* at para 28):

> The bottom line is that if a significant advance is made by the delaying party, and the defendants have actively participated in that action to an extent and degree that could lead the plaintiffs to fairly assume that the defendants have waived the delay, it is inappropriate to dismiss the action for delay.

[42] This is the authority cited by the motion judge (see *decision* at para 28), and this is the interpretation that she applied.

[43] In applying those principles in *Fehr*, Edmond J stated, "[i]n my view, the participation by the defendants would in all probability cause the plaintiffs to believe that the defendants were acquiescing in the previous delay and were prepared to proceed with the action" (at para 28(iv)).

[44] There is no indication that, by that finding on the facts of *Fehr*, Edmond J was intending to change the principles that he had set out earlier in that paragraph. In my view, the correct principles are those that were cited by the motion judge, on which she based her decision.

[45] I am not persuaded that there is an arguable case to be made that the motion judge erred in law in her interpretation of the exception in r 24.02(1)(e). Given my finding that there is no arguable error of law, I am not satisfied that this proposed ground of appeal has sufficient importance to warrant the attention of a full panel of this Court. As a result, I would not grant leave to appeal on this ground.

(iv) the motion judge committed a palpable and overriding error of mixed fact and law in her analysis of r 24.02(1)(e)

[46] Dr. Moffatt argues that the motion judge made a palpable and overriding error in finding that "[Dr. Moffatt's] participation [in the March 7, 2023 pre-trial conference] could have led [Dr. Schneider] to fairly assume [Dr. Moffatt] had waived delay" (*decision* at para 29) when she also found that "[Dr. Moffatt] raised concerns about delay" (*ibid*) at that conference.

[47] While the motion judge stated that delay concerns were raised at that pre-trial conference, there is no evidence as to the nature of those concerns or what, exactly, was said. Further, there is no mention of any delay issues in the pre-trial conference memorandum from that conference. In fact, the memorandum refers to Dr. Moffatt making a motion for summary judgment, to Dr. Schneider calling an expert witness at the trial and to discussing witness lists at the next pre-trial conference—all of which indicate that the action would be proceeding to resolution on the merits, not to a motion for delay. Dr. Moffatt did not request leave to bring a motion for delay until January 25, 2024, almost a year after that pre-trial conference.

[48] A palpable and overriding error is one that "must be clearly wrong and must affect the result" (*Knight* at para 30). There was evidence to support the motion judge's finding, and I am not persuaded that it was clearly wrong. Thus, I am not persuaded that there is an arguable case to be made that the motion judge made a palpable and overriding error of fact and law in her analysis of r 24.02(1)(e) when she concluded that Dr. Schneider could have understood that Dr. Moffatt was waiving delay.

[49] This issue relates to the circumstances of this case and will not have significance to other cases, each of which will be determined on its own facts and circumstances. Thus, I would conclude that this proposed ground of appeal is not of sufficient importance to warrant the attention of a full panel of this Court, and I would not grant leave to appeal on this ground.

[50] Finally, there was no argument that I should exercise my discretion and grant leave because refusing to do so would result in an injustice and, in my view, the facts of this case would not support such a finding.

VII. CONCLUSION

[51] For these reasons, the motion for leave to appeal is dismissed with costs to Dr. Schneider.

Beard JA