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Docket: CI 13-01-81893
(Winnipeg Centre)
Indexed as: City Sheet Metal Co. Ltd. v. Euramax Canada Inc.
Cited as: 2021 MBQB 118

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
CITY SHEET METAL CO. LTD.	)	Michael Clark and
	)	Michael Gerstein
plaintiff,	)	for the plaintiff
	)	
- and -	)	Eric Blouw
	)	for the defendant
EURAMAX CANADA INC.,	)	
	)	Judgment delivered:
defendant.	)	May 27, 2021

EDMOND J.

Introduction

[1] The defendant seeks an order dismissing this action for delay pursuant to Queen's Bench Rule 24.01. The defendant submits that there has been inordinate and unexplained delay in the prosecution of the action and the defendant has suffered significant prejudice as a result.

[2] The plaintiff denies that it has caused delay that can be characterized as inordinate and unexplained or that any delay has resulted in significant prejudice to the

defendant. The plaintiff submits that the motion should be dismissed with costs on a solicitor and client basis payable immediately.

[3] For the reasons that follow, the motion to dismiss the action for delay is dismissed with costs to the plaintiff in any event of the cause.

Background facts

[4] The plaintiff claims that it was a distributor of the defendant's products in Canada and alleges that in 2008 its distributorship agreement was wrongfully terminated by the defendant without reasonable notice. The statement of claim was issued on February 1, 2013 and after extensions of time were granted, a statement of defence was filed June 26, 2013.

[5] I do not propose to review the detailed chronology of events referenced by the parties. The defendant prepared a table summarizing the "key steps" that have been taken in the action to date in paragraph 5 of its motion brief. The motion brief of the plaintiff at page 6 of 19, paragraph 2 references what the plaintiff refers to as "several important clarifications and omissions". I have attached a chronology of the events and summary of the correspondence referenced by the parties as Schedule "A" to this decision.

[6] The defendant raised the issue of filing a motion to dismiss the action for delay for the first time in a pre-trial conference memorandum filed November 26, 2020. At the pre-trial conference on December 3, 2020, trial dates were set for November 29, 2021 to December 1, 2021. Timelines were set to file material regarding the motion to dismiss for delay at the pre-trial conference.

Issue

[7] The issue to be decided is whether the plaintiff's action should be dismissed for delay pursuant to Queen's Bench Rule 24.01.

The Law

[8] Both the former Queen's Bench Rule and jurisprudence as well as the current Queen's Bench Rule and jurisprudence are reviewed in detail by the Court of Appeal in ***Manitoba (Workers Compensation Board) v. Ali***, 2020 MBCA 122, [2020] M.J. No. 290 (QL).

[9] Queen's Bench Rule 24.01 provides:

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

[10] The accepted approach in Manitoba on motions to dismiss for delay is articulated as follows in ***Manitoba (Workers Compensation Board)***:

> **39** I will begin with the obvious. There are two issues to be addressed on a motion to dismiss for delay pursuant to r 24.01. The first is whether there has been delay; the second is whether the delay has resulted in significant prejudice (r 24.01(1)).
>
> **40** When assessing the issue of delay, the court must decide whether it has been inordinate and inexcusable. The wording is conjunctive; the moving party has the onus to establish both requirements.

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

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

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

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

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

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

Position of the Parties

[11] The defendant submits that the action ought to be dismissed pursuant to Queen's Bench Rule 24.01 as the delay has been inordinate and inexcusable and significant prejudice is therefore presumed. The onus is on the plaintiff to rebut that presumption and the plaintiff has failed to do so.

[12] In the alternative, the defendant submits that the action ought to be dismissed on the basis that there has been delay and the delay has resulted in significant prejudice to the defendant. More than eight years has elapsed since the statement of claim was filed and there are a number of long periods of time during which no steps were taken by the plaintiff to advance the action. According to the defendant, the periods of inactivity total approximately 61 months. Relative to a reasonable comparator, the delay falls at the extreme end of the spectrum. This is a simple case that should have been heard and decided on its merits years ago. The factual issues are not complex and there are no special circumstances that might justify the significant delay in this case.

[13] As to prejudice, the defendant submits that the events at issue in this action took place between 1994 and 2008. The defendant references faded memories, unavailability of witnesses or lost or degraded evidence. The defendant says that there has been a significant turnover of key employees and principals of the defendants and its related companies. There are no current key employees or principals of the defendant who were employed during the relevant period of 2005 to 2008. The evidence of the defendant is that defence counsel received instructions from four

different individuals, the first three of which have ceased to be employed with the defendant. General Counsel and Corporate Secretary of the defendant, Mr. Chris Berg, affirmed an affidavit on January 28, 2021 (the "Berg affidavit") and addresses the issue of prejudice at paras. 31-41. Based on Mr. Berg's review of the defendant's file, he states that Mr. Gord McCusker was an employee in 2008 and was familiar with the principal of the plaintiff, Mr. Allan Abosh.

[14] The defendant says that Mr. McCusker ceased being an employee in approximately August 2014 and his current whereabouts are unknown. Another employee, Ms. Lynda Johnstone had direct dealings with Mr. Abosh and the defendant says that Ms. Johnstone's employment was terminated and there was a dispute regarding severance pay. The defendants says that Ms. Johnstone is not prepared to cooperate whatsoever in its preparation for trial.

[15] Further, the defendant says that it was unaware of the plaintiff's intention to issue a statement of claim and no extraordinary effort was made by the defendant to preserve records related to the facts at issue in this action. The defendant says that it is unable to retrieve numerous e-mails and other records relevant to the action.

[16] Finally, the defendant says that it has been reporting the action to its auditors as a potential liability and the fact that this action continues without resolution has damaged the defendant's reputation within the Canadian home improvement market. The bottom line is that the defendant submits that it has suffered significant prejudice as a result of the delay.

[17] The plaintiff does not dispute there has been a delay in this action. However, the defendant played a role in the delay and the delay attributable to the plaintiff is far less than the periods of delay identified in the various cases referenced by the defendant. Specifically, the types of cases the courts have previously found appropriate to dismiss for delay include:

a) ***Manitoba (Workers Compensation Board)***, where the court stated:

> **72** Significantly, an examination of the chronology of events reveals numerous periods of unexplained delay, and virtually all of that delay is attributable to, or was within the control of, the plaintiff. For example:
>
> * Approximately two years elapsed between the filing of the statement of claim (April 25, 2007) and the filing of the statement of defence (March 2, 2009).
> * Preliminary documentary discovery was not completed for nearly five years following issuance of the statement of claim.
> * There were two years between the examinations for discovery (April 10, 2012) and the next communication between counsel (April 7, 2014).
> * Although answers to some of the plaintiff's undertakings were provided six weeks after the discoveries (May 22, 2014), further answers and information were provided in "bits and pieces" over the next two and one-half years.
> * On February 28, 2017, plaintiff's counsel advised that a complete settlement proposal would be provided but it was not provided for 15 months (June 1, 2018).
> * There was a period of nearly seven years between examinations for discovery and the filing of the motion and, although the plaintiff said in May 2014 that it would set the matter down for trial when answers were provided, that was not done until after the motion was decided by the motion judge.

b) ***J.A.O. Estate v. C.P.***, 2019 MBQB 42, [2019 M.J. No. 77 (QL), the court dismissed a third party claim for delay after five years elapsed following the close of pleadings with "no material advance" including that examinations for discovery had not commenced (at para. 47).

c) ***WRE Development Ltd. v. Lafarge Canada Inc.***, 2021 MBQB 37, [2021] M.J. No. 54 (QL), the action was dismissed under the new "long delay rule" since there had been no significant advance in the litigation for a period of more than three years following the filing of the statement of claim (at paras. 15-18).

d) ***Dmytriw v. Odim***, 2020 MBCA 112, [2020] M.J. No. 265 (QL), the Court of Appeal noted that the plaintiff had not advanced the action for a period of 15 years, stating at para. 64:

> **64** Apart from producing some records and documents in 2010, 2013 and again shortly after the motion for dismissal for delay was filed, the plaintiffs have not advanced this action since the examinations for discovery were conducted in 2005. …

e) ***Buhr v. Buhr***, 2020 MBQB 107, [2020] M.J. No. 173 (QL), the court found that the long delay rule applied and in the alternative, a 33-month delay by the plaintiff to provide partial answers to undertakings given at the examinations for discovery within the context of the litigation was inordinate and inexcusable (paras. 3, 17 and 20).

f) ***Humphreys v. Hanne***, 2017 ABCA 116, 51 Alta. L.R. (6th) 1 (QL), the Alberta Court of Appeal dismissed an action for delay considering the following facts:

   i. the claim was filed in 2006;

   ii. the plaintiff had failed to permit defendant's counsel to complete its examination for discovery by September 30, 2015 despite repeated requests;

iii. the plaintiff had breached the case management judge's direction for the parties to have completed their examinations by September 30, 2015 (at para. 65).

[18] The plaintiff disagrees with the defendant's submissions regarding the periods of delay and emphasizes the following:

a) The correspondence filed support the fact that there were periods of time in which the parties attempted to resolve the matter and were involved in settlement negotiations;

b) On February 1, 2017, plaintiff's counsel sent its answers to undertakings made at the plaintiff's examination for discovery, its estimated damages and a pre-trial conference brief to counsel for the defendant, providing a list of available dates for the pre-trial conference provided by court registry;

c) On March 1, 2017, defendant's counsel advised that they were unwilling to proceed to a pre-trial conference until the plaintiff provided more details of its damage assessment and the defendant completed its examination for discovery of the plaintiff's representative;

d) Further documents were provided in July, September and October 2017, by the plaintiff to the defendant in connection with the plaintiff's damage assessment and on October 16, 2017, defendant's counsel advised that the documents provided were insufficient disclosure and further documentation was requested;

e) On October 5, 2018, the plaintiff provided a supplementary affidavit of documents with 158 documents and after canvassing dates, the examination for discovery of the plaintiff's representative was continued on January 22, 2019;

f) The plaintiff made a without prejudice settlement offer to the defendant in November 2019 and the defendant never responded;

g) The pre-trial conference was originally scheduled to proceed in April 2020, and it was adjourned as a result of the pandemic. The plaintiff submits that its counsel had to twice threaten to bring a motion to impose a new pre-trial conference date in order to schedule the pre-trial conference, which proceeded on December 3, 2020;

h) The pre-trial conference brief of the defendant filed on November 26, 2020 is the first time that the defendant indicated that it may bring a motion to dismiss the action for delay. At no time did the defendant complain or take the position that it was being prejudiced as a result of delays.

[19] The plaintiff submits that the delay has not been inordinate and inexcusable taking the position that:

a) the periods of delay complained of are not even close to periods in prior case law in which delay motions have been granted;

b) the litigation is presently scheduled for trial later this year;

c) the defendant is partially responsible for the delay; and

d) the plaintiff has a strong case including documentary evidence from the defendant in which defendant's management appears to acknowledge that it needs to keep the plaintiff "whole".

[20] As to prejudice, the plaintiff submits that the evidence does not support a finding that the defendant has been prejudiced and submits:

a) there is no evidence that any witnesses have died;

b) there is no evidence of any failed efforts to contact witnesses;

c) there is no evidence that any witnesses have been uncooperative to prepare for this litigation;

d) the plaintiff has already examined Lynda Johnstone, the defendant's representative put forward in this proceeding, which alleviates concerns she may subsequently be uncooperative; and

e) the defendant has failed to identify what evidence it requires for trial that it must obtain from witnesses and is unavailable within the documentary evidence.

Analysis and Decision

[21] Following the accepted approach in Manitoba, I must address two issues, namely:

a) whether there has been a delay; and

b) whether the delay has resulted in significant prejudice.

[22] There is no doubt that there has been a delay in moving this matter to trial. Looking at the big picture, it took approximately five years to issue the statement of

claim which relates to events that took place between 1994 and 2008. A notice of motion seeking an order dismissing the action for delay was filed on January 28, 2021, almost eight years after the statement of claim was issued. To assess the issue of delay, the court must first decide whether the delay has been inordinate and inexcusable. The moving party has the onus to establish both requirements.

[23] To decide whether the delay is inordinate and inexcusable, I must determine whether the delay is "in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case". (Queen's Bench Rule 24.01(3))

[24] This involves consideration of the first four factors identified in ***Law Society of Manitoba v. Eadie***, [1988] 54 Man.R. (2d) 1, 6 W.W.R. 354 (Man. C.A.) (QL), which are:

a) the subject matter of the litigation;

b) the complexity of the issues between the parties;

c) the length of the delay;

d) the explanation for the delay; and

e) the prejudice to the other litigant.

[25] In ***Manitoba (Workers Compensation Board)***, the court stated that in addition to the first four factors, the court should consider any other relevant circumstances, and 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.

[26] I start my review with a consideration of the first four factors identified in the ***Eadie*** decision. This is a wrongful termination action which is not very complex. There are not that many witnesses and the trial is scheduled to be completed in three days. While there is a dispute about whether the parties entered into a distributorship agreement, the facts are not complex and the applicable law is well settled. There are no expert witnesses to be called in the case. There were no interlocutory proceedings other than the motion to dismiss for delay and there was no JADR held.

[27] The total length of the delay alleged by the defendant, is 61½ months during the course of the proceeding. My initial reaction is that a delay of approximately five years 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.

[28] In assessing the delay, it would have been preferable if the plaintiff had provided affidavit evidence to explain the various delays that occurred that are attributable to the plaintiff. Instead, the affidavit of Allan Marvin Abosh affirmed February 25, 2021 (the "Abosh affidavit") concentrated primarily on the strength of the plaintiff's case and the period of time before the statement of claim was issued. This evidence does assist in explaining to a certain extent why the plaintiff delayed in commencing proceedings. Although not clearly articulated in the Abosh affidavit, it is reasonable to infer that the plaintiff wanted to determine how the steps taken by the defendant would affect its profit levels and wanted get advice to assess its position before proceeding with the action and incurring the costs of litigation. Unfortunately, the Abosh affidavit does not explain the reasons for all of the delay once the claim is commenced.

[29] Relying upon the evidence filed by the defendant in the Berg affidavit, defendant's counsel point to the following periods of delay:

a) Period 1 (July 2013 - July 2014, 1-year delay) - Plaintiff's counsel requested an extension to decide whether to amend its statement of claim on July 3, 2013. The next significant advance identified occurred approximately one year later when plaintiff's counsel wrote defendant's counsel advising that he had finalized the plaintiff's affidavit of documents and inquired about scheduling examinations for discovery.

b) Period 2 (September 26, 2014 – June 10, 2015, 8½-months' delay) - Plaintiff's counsel sent an unsworn affidavit of documents together with copies of Schedule "A" documents. The next significant step taken by plaintiff's counsel is a letter dated June 10, 2015, requesting the defendant's availability for examinations for discovery.

c) Period 3 (October 28, 2015 – February 1, 2017, 15-months' delay) - Examinations for discovery were conducted on October 28, 2015 and the next step did not occur until February 1, 2017 when Plaintiff's counsel sent defendant's counsel answers to undertakings and advised that they intended to schedule a pre-trial conference.

d) Period 4 (March 1, 2017 – September 12, 2017, six months' delay) - Defendant's counsel requested a detailed summary of damages and supporting documents. Numerous e-mails were exchanged and

documents were not sent until September and October 2017 by plaintiff's counsel.

e) Period 5 – (October 16, 2017 – August 28, 2018, 10½-months' delay) - Defendant's counsel advised plaintiff's counsel that the documents provided were insufficient in October 2017. Further steps were not taken by plaintiff's counsel until August 28, 2018 advising that they were in the process of obtaining additional documents regarding the damages claim.

f) Period 6 – (January 23, 2019 – November 8, 2019, eight months' delay) - Examinations for discovery continued on January 22, 2019 and answers to undertakings from plaintiff's counsel were not received until November 8, 2019.

[30] The onus is on the moving party to prove that the delay is inordinate and unexplained. A close examination of the evidence does provide explanations for some of the delay in this matter. The Berg affidavit and specifically the exhibits attached to the Berg affidavit do assist with that assessment. Exhibit "E", a letter from plaintiff's counsel to defendant's counsel dated July 3, 2014 states " … our client has every intention of pursuing the litigation given that the negotiations to buy out our client proved unsuccessful." This correspondence lends support to the plaintiff's position that there were settlement negotiations which occurred and initially resulted in some delay in prosecuting the action. Exhibit "E" does provide evidence that negotiations occurred between the plaintiff and the defendant respecting a "buy out" during Period 1.

[31] Exhibit "H" to the Berg affidavit, a fax from plaintiff's counsel to defence counsel, dated June 10, 2015, also references settlement discussions that occurred at a meeting between counsel on September 12, 2014. That letter also references the fact that the principal providing instructions to the defendant had recently changed. Plaintiff's counsel inquires whether settlement discussions can occur, and if not, requests availability for examinations for discovery in August 2015. Those references would, in my view, explain a portion of the Period 2 delay.

[32] Some of the delays were caused as a result of the defendant's ongoing request for a further documentation to prove the plaintiff's damage claim. While I do not suggest that the requests are improper, or that the delays referenced above in Periods 3, 4 and 5 have been explained, I am not satisfied that each of these delays can be characterized as inordinate and inexcusable.

[33] Unlike the facts and circumstances in most cases in which the court rules on motions to dismiss the action for delay, there were significant advances made in this action and the longest period of delay appears to be 15 months following the first round of examinations for discovery held October 28, 2015.

[34] In my view, because there were numerous steps that were taken in this action, the role of each party must be assessed in considering the overall delay. One of the reasons for the delay in scheduling this action for a pre-trial conference was the refusal of the defendant to agree to schedule a pre-trial in February 2017. Notwithstanding the objection of the defendant, the plaintiff had the option of moving the matter to a pre-trial conference at that stage. No explanation has been provided other than it appears

that plaintiff's counsel agreed with the request made by defence counsel that a detailed summary of the damage claim was necessary and there were numerous exchanges between counsel addressing the sufficiency of the documents required dealing with both damages and mitigation. There is no question the evidence is that the defendant expected to resume an examination for discovery of the plaintiff's representative prior to agreeing to proceed to pre-trial.

[35] In assessing delay, the court should ask whether the delay is out of proportion to the matters in question, specifically, I must compare the progress in the action against that of a reasonable litigant advancing the same claim under comparable conditions. In assessing the periods of delay, I did not consider the delay to be inordinate because I am not satisfied that the delay in prosecuting this action when compared to the reasonable litigant advancing the same claim under comparable conditions is so lengthy as to be unreasonable.

[36] In assessing the overall delay, I must include a consideration of the role of each party in the overall delay. The evidence filed points to the defendant having responsibility for contributing to some of the delay including:

a) As noted above, Exhibit "E" to the Berg affidavit confirms the parties were involved in settlement negotiations during the first year after the statement of claim was issued considering a buyout.

b) After a telephone call and e-mail sent September 10, 2014 (Exhibit "B" to the Berg affidavit) counsel met to review sales figures with a view to resolving the matter. By letter delivered September 26, 2014, plaintiff's

counsel delivered an unsworn affidavit of documents and copies of the Schedule A documents. (Exhibit "G" of Berg affidavit) The defendant did not provide its unsworn affidavit of documents and Schedule A documents until October 27, 2015 (Exhibit "I" to Berg affidavit), the day prior to the scheduled examinations for discovery.

c) In the fax dated June 10, 2015 (Exhibit "H" to the Berg affidavit), plaintiff's counsel states: "When we met on September 12, 2014, you have have advised that you would go back to your client and review the documentation that we provided with a view to providing a position with respect to settlement discussions. We have not heard from you in this regard other than your advising that the principal that you receive instructions from had recently changed. We again inquire whether settlement discussions can be had at this time, and if not, then we are prepared to set Examination for Discovery dates as soon as possible. I am wondering if you and your client are available August 18th, 19th or 20th, 2015 for Examinations for Discovery. Please advise at your earliest." This letter is important for two reasons:

   i. It confirms that counsel met on September 12, 2014 to discuss the documentation provided and to provide the defendant with time to consider its position and advise regarding settlement discussions.

   ii. Secondly, this letter confirms the plaintiff was interested in having further settlement discussions and failing that, wanted to proceed

to discoveries in August 2015. The examinations for discovery actually proceeded on October 28, 2015.

d) Defendant's counsel examined the plaintiff's representative for discovery in October 2015 and there is no evidence the defendant took any steps to request answers to the undertakings;

e) On February 1, 2017, the plaintiff sent answers to undertakings and requested that the matter proceed to pre-trial conference. The defendant refused to agree to a pre-trial conference date in the spring of 2017, indicating that further disclosure of documents was required;

f) On October 5, 2018 the plaintiff provided a supplementary affidavit of documents with 158 documents and the defendant's further examination for discovery continued on January 22, 2019. At the pre-trial conference held December 3, 2020, the defendant advised the court that the defendant wished to conduct a further examination for discovery of the plaintiff's representative;

g) The plaintiff made a without prejudice settlement offer in November 2019 and the defendant never responded. The plaintiff then moved to schedule a pre-trial conference which was initially set for April 24, 2020. The pre-trial was adjourned due to COVID-19 concerns;

h) Plaintiff's counsel made efforts to re-schedule the pre-trial and counsel had to twice threaten to bring a motion to set a new pre-trial date;

i) On November 26, 2020, the defendant filed its pre-trial brief and for the first time raised that it may bring a motion to dismiss the action for delay. The motion to dismiss for delay was filed after the trial dates had been set at the pre-trial conference on December 3, 2020.

[37] While there were delays which arguably exceed what would be considered reasonable when compared to a reasonable comparator for certain advances in this action, the overall delay must be considered in the context of the case including, the role of the defendant.

[38] Further, I agree with the plaintiff's submission that none of the delays referenced by the defendant exceed the delays in the cases noted above in which the court determined it was appropriate to dismiss the action for delay, including the delays considered in the ***Manitoba (Workers Compensation Board)*** decision. That said, I do not accept that comparing periods of delay is the correct way to conduct the analysis as the assessment must be conducted in accordance with the ***Eadie*** factors and the ***Manitoba (Workers Compensation Board)*** decision which requires an assessment based on the particular facts of each case. The length of the delay is one factor and it must be assessed against the reasonable comparator.

[39] To conclude on the first part of the test, I am not satisfied that the delay in this case having regard to the nature of issues as well as the role of the defendant, in the particular circumstances of this case is inordinate and inexcusable. The paucity of evidence filed by the plaintiff made it difficult to assess whether the delay is inexcusable because the plaintiff failed to provide an explanation for each of the delays. However,

the test is that the moving party has the onus of proving that the delay is inordinate and inexcusable. For the reasons stated above, I am not satisfied the delay in this case by the plaintiff is inordinate and when I examine all of the evidence presented in this case, I am satisfied that there is a reasonable excuse for at least some of the delay.

[40] Had I found the delay to be inordinate and inexcusable, significant prejudice to the defendant is presumed. (See Queen's Bench Rule 24.01(2)) That presumption is rebuttable.

[41] Because I have found that the delay is not inordinate and inexcusable, I must still consider whether I should dismiss the action if the delay has resulted in significant prejudice to the defendant.

Prejudice

[42] The events at issue in this action took place in 2008 or earlier. There is no doubt that the time that it has taken to have this action set down for trial has been lengthy and the longer it takes for a matter to be set down for trial, the more likely it is that a party will be prejudiced in mounting a defence owing to faded memories, unavailability of witnesses, or lost or degraded evidence. (See ***Manitoba (Workers Compensation Board)*** at para. 85; ***R. v. Jordan***, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 20 and 25)

[43] In ***Hryaniuk v. Mauldin***, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada made it clear that a culture shift is required to ensure that justice is accessible, proportionate, timely and affordable.

[44] The direction from the Court of Appeal in ***Manitoba (Workers Compensation Board)*** is clear. At para. 87, Burnett J.A. concluded:

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

[45] I have no doubt that it may be difficult for witnesses to recall and accurately testify regarding events that occurred in 2008. That said, this is an action based on an alleged wrongful termination of a distributorship agreement. The issues to be determined will be whether there was a distributorship agreement in place, and if so, who are the parties to the agreement and whether reasonable notice was given to terminate the agreement. Other issues include mitigation and damages. It is anticipated that the trial will only last three days and not many witnesses are required. The determination of the issues will probably be largely dependent upon the documents that will be filed, some of which are attached to the Abosh affidavit. While I accept that the delay may make it more difficult for the defendant to prepare for trial, I am not satisfied that the threshold of a significant prejudice has been met in this case.

[46] I say that for the following reasons:

a) I accept the evidence that there are no current key employees or principals of the defendant who were employed by the defendant during the period from 2005 to 2008. However, that does not mean that there are no witnesses or that prior employees cannot be subpoenaed to give evidence at the trial;

b) Reference is made in the Berg affidavit to defendant's counsel receiving instructions from four different individuals employed with the defendant. One of those persons is Mr. Gord McCusker. The evidence states that Mr. McCusker ceased being an employee in August 2014 and that his current whereabouts is unknown. No evidence was filed regarding the efforts, if any, made to contact this witness and whether Mr. McCusker can be located and subpoenaed to give evidence at the trial;

c) Reference was also made to Ms. Lynda Johnstone who had direct dealings with Mr. Abosh. Ms. Johnstone's employment with the defendant was terminated in 2017 and it is stated that she is not expected to cooperate with the defendant in its preparation for trial. While that may amount to prejudice, Ms. Johnstone was the representative examined for discovery on behalf of the defendant and if required, she could be subpoenaed to give evidence. It is reasonable to infer that her evidence will be consistent with her evidence given at the examination for discovery. If not, there are remedies available to the defendant that could be considered at the trial;

d) The defendant has not identified specifically what evidence it may have lost or is unable to receive from witnesses or is unavailable within the documentary evidence that has been exchanged during the discovery process to permit the defendant to defend a claim;

e) As to documents, the Berg affidavit states " … it appears that no extraordinary effort was made by Euromax to preserve records related to the facts at issue in the within litigation during the period beginning in the spring of 2008 and ending on February 1, 2013." The Berg affidavit goes on to indicate that certain documents have not been located by the defendant. The limitation period in Manitoba for breach of contract is six years. It is reasonable to expect that sophisticated business entities, like the defendant, would have document retention policies that require documents to be preserved for a minimum of six years, if not longer. In any event, there is no evidence as to when a decision was made to make "no extraordinary effort" to preserve records and more importantly, what relevant documents are not available;

f) I accept that the defendant has had this litigation hanging over its head for a number of years and has reported the claim to its auditors as a potential liability. I agree that amounts to a prejudice in every legal action.

[47] In addition to the above, I also took another factor into consideration to decide whether it is just to take away the plaintiff's right to have this case determined on its merits. The defendant, for the first time in its pre-trial conference brief, raised the issue that the plaintiff had commenced proceedings against the wrong entity. It asked the court to grant leave to permit the defendant to make a motion for summary judgment dismissing the claim. That request was denied at the pre-trial conference for

the reasons set out in my pre-trial conference memorandum. Rather than raise this issue at the time the litigation was commenced or during the discovery process, this was not raised until the matter proceeded to pre-trial in December 2020. During the course of this action, the defendant filed a statement of defence, participated in the discovery process, refused to proceed to a pre-trial conference in 2017 and made numerous requests for additional documents regarding the damage claim, all of which are inconsistent with the position now advanced that the plaintiff sued the wrong party. In assessing the overall delay in this case, it is my view that the actions and conduct of the defendant contributed to the delay of a rather straightforward claim.

[48] That said, it is generally the plaintiff that has the obligation to prosecute the action without unreasonable delay. As pointed out in ***J.A.O Estate*** and ***WRE Development Ltd.***, the changes made to Queen's Bench Rule 24 mean that "a sharper, perhaps harsher, dawn is at hand" and that counsel and parties will have to be most vigilant to advance actions.

[49] To conclude, I borrow the words of Twaddle J.A. in ***Eadie***, when I put all relevant considerations into balance and decide whether it is just to take away from the litigant responsible for the delay the right to have its case determined on its merits, I am satisfied that this action should not be dismissed for delay. While I accept that the delays have caused some prejudice, I am not satisfied the defendant has proven that it has suffered significant prejudice. The trial is now set to proceed on November 29, 2021, no further delays should occur and none will be permitted by the court.

[50] For the foregoing reasons, the motion to dismiss the action for delay is dismissed with costs to the plaintiff in any event of the cause.

[51] Plaintiff's counsel submitted that I should award costs on a solicitor and client basis payable to the plaintiff immediately. In my view, this is not an appropriate case to award solicitor and client costs. Such an award is exceptional and is generally limited to cases where the conduct of a party is "reprehensible, scandalous or outrageous". (See ***Young v. Young***, [1993] 4 S.C.R. 3 (S.C.C.) and ***Provincial Judges' Assn. v. Manitoba***, 2013 MBCA 74, 294 Man.R. (2d) 273)

[52] I do not accept the plaintiff's submission that bringing the delay motion amounts to reprehensible, scandalous or outrageous conduct by the defendant. The motion had some merit. The court has discretion to fix costs pursuant to s. 96(1) of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280. Queen's Bench Rule 57.01 lists numerous factors and principles the court may consider in exercising its discretion to award costs. Applying the factors set forth in Queen's Bench Rule 57.01, I am satisfied that costs should be awarded to the successful party in accordance with the Court of Queen's Bench tariff. Since this was a significant motion, costs should be awarded to the plaintiff in any event of the cause.

_____ J.

Schedule "A"

Key steps taken in the action referenced by the defendant.

Date	Event	Affidavit of Chris Berg Reference
2013		
February 1, 2013	plaintiff files its statement of claim	Paragraph 4
February 19 – 20, 2013	plaintiff's counsel writes to Euamax's counsel enclosing the statement of claim for service	Paragraph 6, Exhibit A
March 1, 2013	defendant's counsel writes to plaintiff's counsel confirming an extension of time to file its statement of defence	Paragraph 7, Exhibit B
April 29, 2013	plaintiff's counsel reconfirms in an e-mail to defendant's counsel that there is an ongoing extension to file the defence, and that the plaintiff will provide reasonable notice in the event that it requires the defence to be filed	Paragraph 7, Exhibit B
June 3, 2013	plaintiff's counsel requests that the defence be filed within three weeks' time	Paragraph 8
June 26, 2013	The defendant files its statement of defence	Paragraph 8
June 28, 2013	defendant's counsel serves its statement of defence on plaintiff's counsel	Paragraph 8, Exhibit C
July 3, 2013	plaintiff's counsel writes to defendant's counsel requesting an extension of time to decide whether to amend the statement of claim and/or file a reply to the defence no later than July 26, 2013	Paragraph 9, Exhibit D
July 11, 2013	defendant's counsel e-mails plaintiff's counsel confirming that the defendant is agreeable to a reasonable extension, as requested	Paragraph 9, Exhibit D
2014		
July 3, 2014	plaintiff's counsel advises defendant's counsel that the plaintiff has finalized its Schedule "A" documents and enquires about defendant's availability for examinations for discovery	Paragraph 10, Exhibit E

August 21, 2014	plaintiff's counsel contacts defendant's counsel regarding examinations for discovery	Paragraph 10, Exhibit E
September 12, 2014	defendant's counsel and plaintiff's counsel meet to discuss the within litigation	Paragraph 11, Exhibit F
September 26, 2014	plaintiff's counsel sends plaintiff's unsworn affidavit of documents to defendant's counsel together with copies of the Schedule "A" documents	Paragraph 12, Exhibit G
2015		
June 10, 2015	plaintiff's counsel contacts defendant's counsel concerning examinations for discovery, and requests defendant's availability in late August 2015	Paragraph 13, Exhibit H
October 27, 2015	defendant's counsel sends defendant's unsworn affidavit of documents to plaintiff's counsel, together with copies of the Schedule "A" documents	Paragraph 14, Exhibit I
October 28, 2015	Examinations for Discovery are conducted	Paragraph 15, Exhibit J
2017		
February 1, 2017	plaintiff's counsel sends plaintiff's answers to undertakings, trial record and pre-trial conference brief to defendant's counsel	Paragraph 16, Exhibit K
March 1, 2017	defendant's counsel sends a letter to plaintiff's counsel in reference to defendant's expectation that it was to receive a detailed summary of damages, which was agreed to by counsel for the plaintiff during the examinations for discovery	Paragraph 17, Exhibit L
March 16-17, 2017 and March 29-30, 2017	defendant's counsel leaves a voicemail for plaintiff's counsel, and e-mails are exchanged concerning the matter of the damages claim summary	Paragraph 18, Exhibit M
June 23 and 27, 2017	defendant's counsel follows up with plaintiff's counsel regarding plaintiff's damages claim	Paragraph 19, Exhibit N
July 4, 2017	plaintiff's counsel sends an e-mail to defendant's counsel concerning plaintiff's lost profits, and advises that his office is awaiting additional information from the plaintiff	Paragraph 20

August 8, 2017	defendant's counsel e-mails plaintiff's counsel regarding the outstanding information concerning damages	Paragraph 21, Exhibit O
September 12, 2017 to October 23, 2017	plaintiff's counsel sends defendant's counsel various documents related to plaintiff's mitigation efforts	Paragraph 22, Exhibit P
October 16, 2017	defendant's counsel sends plaintiff's counsel a letter concerning defendant's position that the plaintiff has not provided sufficient documents	Paragraph 23, Exhibit Q
2018		
August 28, 2018	plaintiff's counsel advises defendant's counsel by e-mail that his office is in the process of obtaining additional documents regarding the plaintiff's damages claim	Paragraph 24
October 5, 2018	plaintiff's counsel sends plaintiff's unsworn supplemental affidavit of documents to defendant's counsel, together with copies of the Schedule "A" documents	Paragraph 25, Exhibit R
October 25 and November 5, 2018	plaintiff's counsel and defendant's counsel exchange e-mails concerning the continuation of the examinations for discovery	Paragraph 26, Exhibit S
2019		
January 22, 2019	Examinations for Discovery are continued	Paragraph 27, Exhibit T
November 8, 2019	Plaintiff's counsel sends plaintiff's answers to undertakings to defendant's counsel	Paragraph 28, Exhibit U
2020		
January 15-16, 2020	plaintiff files its pre-trial conference brief and delivers it to defendant's counsel	Paragraph 29, Exhibit V
July 15, 2020	The plaintiff reschedules the pre-trial conference to December 3, 2020	Paragraph 30

The important clarifications and omissions referenced by the plaintiff include:

1. On February 1, 2017, four years after the start of plaintiff's lawsuit, counsel for the plaintiff sent the defendant its answers to undertakings, its estimated damages, its pre-trial conference Brief, and a list of available dates for the pre-trial conference as provided

by the court. (Ref: Affidavit of Chris Berg, affirmed January 28, 2021 at para. 16, Exhibit K)

2. On March 1, 2017, the defendant sent plaintiff a letter to advise they were unwilling to schedule this proceeding to a pre-trial conference until the plaintiff provided more details of its damage assessment and for further examination for discovery of Alan Abosh, President of the plaintiff, be conducted. (Ref: Affidavit of Chris Berg at para. 17, Exhibit L)
3. In July, September and October 2017, the plaintiff provided the defendant with additional documentation to support its damage assessment. (Ref: Affidavit of Chris Berg at para. 20-22)
4. On October 16, 2017, defendant's counsel advised that in their view, the prior sales records that were provided by the plaintiff in its affidavit of documents were insufficient disclosure and alleged that the plaintiff was required to provide further documentation to prove its damages. (Ref: Affidavit of Chris Berg at para. 23, and Exhibit Q)
5. On October 5, 2018, the plaintiff sent the defendant a supplemental affidavit of documents listing an additional 158 documents. (Ref: Affidavit of Chris Berg at para. 25)
6. On January 22, 2019, the defendant conducted further examinations of Mr. Abosh, President of the plaintiff. (Ref: Affidavit of Chris Berg at para. 27)
7. On November 8, 2019, the plaintiff sent the defendant a without prejudice offer. To date, the defendant has not responded to accept, reject or send any counteroffer. (Ref: Affidavit of Mr. Abosh at para. 16)
8. By e-mails in May to July 2020, plaintiff's counsel corresponded with defendant's counsel regarding available dates to reschedule the pre-trial conference that had been automatically adjourned by the court due to Covid-19 concerns. To obtain responses from defendant's counsel, plaintiff's counsel had to twice threaten to bring a motion to impose a new pre-trial conference date. (Ref: Affidavit of Mr. Abosh at para. 17)
9. On November 26, 2020, the defendant filed its pre-trial conference brief in which the defendant for the first time in this proceeding, indicated it may bring a motion to dismiss for alleged delay. (Ref: pre-trial conference brief of the defendant filed on November 26, 2020, court document No. 6)
10. At the pre-trial conference on December 3, 2020, the parties set trial dates to November 29, 2021 to December 1, 2021. Further, the defendant indicated it may still bring its

motion to dismiss for alleged delay, for which Justice Edmond set a deadline of January 29, 2021, for the defendant to file its motion. (Ref: pre-trial memorandum of Edmond J. filed on December 23, 2020, court doc. No. 8)

11. On January 29, 2021, the defendant filed the within motion to dismiss the plaintiff's action for alleged delay.