On appeal from an Order pronounced by an Associate Judge delivered on July 9, 2024.

Date: 20250523
Docket: CI 20-01-27798
(Winnipeg Centre)
Indexed as: Lenko v. Dobler et al.
Cited as: 2025 MBKB 71

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

GARY DALE LENKO,	)	Gary D. Lenko
	)	on their own behalf
plaintiff,	)	
	)	
- and -	)	
	)	Andrew C. Derwin
RENE DOBLER, KEITH TAYLOR and RE/MAX	)	Ryan Hall, Articling Student
PERFORMANCE REALTY STEINBACH,	)	for Keith Taylor and RE/MAX
	)	
defendants.	)	
(by original action)	)	
	)	
AND BETWEEN:	)	
	)	
GARY DALE LENKO,	)	Charles P.R. Murray
	)	for the Attorney General of
plaintiff,	)	Manitoba
	)	
- and -	)	
	)	
MERCEDES LYDIA CECILIA DOBLER, as	)	Bruce D. Haddad
Executor of the Estate of Rene Dobler,	)	for Estate of Rene Dobler
Deceased, KEITH TAYLOR and RE/MAX	)	
PERFORMANCE REALTY STEINBACH,	)	
	)	
defendants.	)	JUDGMENT DELIVERED:
	)	May 23, 2025

LANCHBERY J.

INTRODUCTION

[1] The appellant (Lenko) appeals a decision of an Associate Judge where this action was dismissed for what is known as long delay under King's Bench Rule 24.02 of the Manitoba, ***Court of King's Bench Rules***, M.R. 553/88. More specifically, Lenko argues the exception in rule 24.02(1)(b) alleges the dismissal of an action pursuant to the long delay rule where the action has been stayed or adjourned pursuant to an order.

[2] Lenko raises two grounds under the long delay rule during this appeal:

(a) The order for security for costs provided him with 120 days to satisfy the order, and should be an exception contained in rule 24.01(b); and

(b) The death of the defendant, Rene Dobler (Dobler), which required Lenko to continue the action in the name of the estate, should also be an exception contained in rule 24.01(b).

[3] Lenko filed a Notice of Constitutional Question challenging the automatic drop-dead rule as removing the inherent jurisdiction of a superior court to exercise discretion as it deems fit.

[4] The individual defendant, Keith Taylor, and the corporate defendant, Re/Max Performance Realty Steinbach (the realtor defendants) and Dobler

argued Lenko's appeal should be deemed abandoned under the provisions of rule 62.02(3).

FACTUAL BACKGROUND

[5] In 2018, Lenko and the late Rene Dobler entered into an agreement for the purchase and sale of undeveloped lands outside the City of Winnipeg.

[6] The realtor defendants prepared an Offer to Purchase. The realtor defendants acted for both Rene Dobler and Lenko. The agreement for sale was signed by Rene Dobler and Lenko on April 10, 2018, with possession for May 1, 2018.

[7] The purchase price was agreed to be $65,000, with a $5,000 deposit. It was agreed the seller would take a one-year "take back" for the balance of the purchase price with interest at the rate of six percent on the outstanding balance.

[8] Attached as Schedule "A" to the Offer to Purchase are the following conditions:

> This offer is subject to following conditions:
>
> 1. Buyer is aware GST is applicable to purchase.
> 2. Buyer agrees to title transfer upon payment of final amount of purchase price.
> 3. Interest (monthly) compounding) to outstanding balance and is subject to adjustment for any prepayment towards principal balance.
> 4. Buyer has right to occupy /use land for his purposes until title transfers.

[9] Schedule "A" was signed on April 10, 2018 by both Rene Dobler and Lenko. Lenko's position is he signed a blank schedule and would not have agreed to the terms set out in Schedule "A".

[10] The balance of the purchase price was never paid by Lenko to Dobler, with the exception of a $1,000 credit given by Dobler for work Lenko performed on other properties owned by Dobler.

[11] On May 15, 2019, Lenko registered a Caveat as Registration Number 5066997/1 against Certificate of Title No. 2324581/1 claiming an interest in land by virtue of an Agreement for Purchase and Sale of Land.

[12] In 2019, Lenko and Dobler orally agreed to a one-year extension to permit Lenko to complete his commitment to the transaction. When the purchase price was not paid by May 2020, Dobler indicated she would still accept the balance of the monies owed under the agreement but would not extend the agreement.

[13] On June 4, 2020, Rene Dobler filed a 30-day Request to Issue Notice to remove Caveat No. 5179992/1.

[14] In response to the Request to Issue Notice to remove Lenko's Caveat, he filed his Statement of Claim on July 27, 2020 claiming specific performance of the agreement, Caveat No. 5066997/1 is a valid instrument and that a take-back mortgage be provided in the sum of $59,000, and that a transfer of title be registered based on the agreement. Lenko further claimed against the realtor defendants for bad faith in how each of them dealt with him during the negotiation process.

[15] The realtor defendants filed a Statement of Defence on August 18, 2020. Dobler filed her Statement of Defence on February 18, 2021.

[16] Rene Dobler died on October 31, 2022.

[17] Lenko alleges the learned Associate Judge erred by failing to consider the importance of two orders issued after February 18, 2021, the date the pleadings closed and prior to the order dismissing the claim for long delay.

[18] The first motion was filed on February 23, 2022 by the defendant Dobler seeking security for costs.

[19] The remaining defendants filed a parallel motion on March 15, 2022.

[20] On April 4, 2022, Lenko filed a Notice of Motion seeking summary judgment, or in the alternative, for a pre-trial conference to be scheduled.

[21] On April 6, 2022, the plaintiff served a "draft" Affidavit of Documents. In response, the defendants sought electronic copies of the documents listed in the draft Affidavit of Documents, which were not provided as of the date of the motion for long delay.

[22] On April 19, 2022, this matter appeared on the civil uncontested list on the question of security for costs and summary judgment. Justice Champagne of this Honourable Court determined the costs motion was to be heard prior to any pre-trial conference or summary judgment motion.

[23] Lenko has not brought either a request for a pre-trial conference or a request for a summary judgment motion back before this Honourable Court once the security for costs motion was decided.

[24] Master Lee (now Associate Judge) heard the security for costs motion on May 30, 2022 by teleconference. On June 28, 2022, Master Lee ordered the sum of $4,000 for security for costs to be paid into court within 120 days from the date of signing the Order.

[25] On July 12, 2022, the plaintiff served a Notice of Appeal from the decision of the Master to a Judge.

[26] The appeal from the order of the Master was set for November 18, 2022. On November 10, 2022, Lenko advised the defendants he wished an adjournment of the appeal and confirmed this with the Court of King's Bench Civil Motions Coordinator on November 14, 2022.

[27] On December 14, 2022, Lenko wrote to the defendants advising he discovered Dobler had passed away and was in the process of continuing under King's Bench Rule 11.

[28] Lenko wrote to the defendants enclosing an Order to Continue the action, filed June 14, 2023.

[29] On March 19, 2024, the plaintiff e-mailed the defendants attaching a pre-trial brief filed March 12, 2024, but took no steps to schedule a pre-trial conference.

[30] The defendants, collectively, moved for dismissal of the action for long delay on April 3, 2024, alleging that three years had passed without any significant advance of the litigation.

[31] The motion was heard by Associate Judge Goldenberg on July 9, 2024 and she delivered her brief oral reasons on that day, but the court order was not signed until September 17, 2024.

[32] Lenko filed an appeal of that decision on October 1, 2024, under King's Bench Rule 62, to be heard by a Court of King's Bench Justice. King's Bench Rule 62.01(13) states the appeal shall be a "fresh hearing". However, Lenko did not adduce any new evidence at the appeal.

[33] Lenko's appeal was filed on October 1, 2024. Lenko's appeal brief was filed on December 2, 2024. Lenko's appeal brief was served on December 8, 2024. The hearing date for the appeal was set on January 8, 2025.

King's Bench Rules governing an Appeal from a Senior Associate Judge's Decision

[34] King's Bench Rule 62 governs the appeal process. The rule is attached hereto as "Appendix A". Lenko was required by King's Bench Rule 62.01 to file his appeal within 14 days of the decision. He filed his appeal on the 14th day following the September 17, 2024 decision.

[35] Lenko filed his appeal brief within 60 days of filing his appeal (rule 62.01(7)). The appeal was served on December 2, 2024. Notwithstanding the

argument advanced by the defendants, this filing date is within the 60 days as the 60th day fell on a Saturday.

[36] Lenko's appeal brief was served on December 9, 2024, which is outside the 60-day period contained in rule 62.01(7). King's Bench Rule 62.01(9) specifies an appeal date must be set within 30 days of serving the appeal brief. In this case, Lenko failed to set the appeal date within that timeframe.

[37] Lenko failed to file his brief within the required timeline.

[38] The defendant cites ***Lenko v The Government of Manitoba et al***, 2018 MBCA 129 in support of its position that Lenko had a history of ignoring deadlines imposed on him by courts in Manitoba (at paras. 3-11):

> The first order stayed the plaintiff's appeal pending the payment of security for costs and stated that if the costs were not paid within 90 days, the plaintiff's appeal would be dismissed. The first order also permitted the plaintiff to make an application to "this Court prior to the end of the 90 day period regarding the dismissal".
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> The plaintiff did not appeal the first order and he did not pay the security for costs within the 90 days.
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> By his motion heard by the chambers judge, he sought an extension of time to pay the security for costs.
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> Notwithstanding the fact that the plaintiff did not appeal the first order, he argued that the first order raises an issue of the jurisdiction of the chambers judge to order that his appeal be dismissed for non-payment of the security for costs. He pointed to sections 7(1) and 8 of *The Court of Appeal Act*, CCSM c C240. He said that the dismissal of an appeal is only within the jurisdiction of a panel of the Court. He relies on *PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 41.
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> The plaintiff asked that the first order and the second order be set aside and that his appeal be set down.
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> The defendants argued that the appeal of the second order should be dismissed for two reasons. First, the plaintiff did not appeal the first

> order and it is not before the Court on this appeal and, in any event, the dismissal contemplated by the first order is a matter of procedure and not substance. Second, the second order is a discretionary order which is entitled to deference.
>
> The chambers judge understood the protracted procedural background of the plaintiff's claim against the defendants. She noted that the plaintiff has not paid any amount towards the security for costs; he does not know when he will do so; "has also not paid any money toward the $13,312.50 in costs he currently owes to CMHC" (at para 8); and has refused to attend three scheduled examinations in aid of execution arranged by CMHC. She concluded that (at para 9):
>
> > [The plaintiff] has not shown good faith regarding [the first order] . . .. He has not attempted to make even a nominal payment toward the order nor has he offered any reasonable payment schedule to pay the order. Simply put, he cannot indicate when he would be able to satisfy the order.
>
> We agreed with the defendants that the appeal should be dismissed. The second order is a discretionary order. The chambers judge made no error in principle or a palpable and overriding error of fact and the second order is not unjust. Accordingly, the second order is entitled to deference (see *Brandt v Brandt*, 2000 MBCA 46 at para 4). As well, we thought it prudent and just that we also address the dismissal of the plaintiff's claim for his non-payment of security for costs by giving effect to the intention of the first order that the plaintiff not be entitled to proceed with his appeal in the event he does not pay the security for costs within 90 days (see section 8 of *The Court of Appeal Act*).
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> One final comment. Three days before the appeal hearing, the plaintiff contacted the court registry office requesting an adjournment of the appeal so that he could retain counsel. The defendants opposed the request. The parties spoke to the plaintiff's request at the appeal hearing. We denied the adjournment. In our view, the request was unreasonable in the circumstances, given the plaintiff has not had counsel throughout the protracted proceedings to date; the lateness of the plaintiff's request; and the lack of information as to any meaningful efforts on his part to retain counsel.

[39] The Estate of Rene Dobler argued Lenko had a history of protracted litigation. Counsel argued the fact circumstances of this case, although distinct from Lenko's previous dealings, are in fact a refusal to bring the matter to trial.

[40] An Agreement for the Purchase and Sale of Land led to a claim for specific performance. The claim was not advanced in the five years that followed, and it remains before the court as Lenko is solely responsible for the delay. Lenko, although self-represented, is not an inexperienced litigant. In fact, he is very knowledgeable of the court processes. To reward Lenko's continued behaviour is not reasonable. Counsel requested I consider Lenko failed to meet the clear deadlines imposed by rule 62.02, and Lenko's appeal should be abandoned. The rule specifies:

Deemed abandonment of appeal 62.02(3) An appellant is deemed to have abandoned an appeal, unless a judge orders otherwise, if the appellant (a) does not file and serve an appeal brief within 60 days after filing the Notice of Appeal, as required by subrule 62.01(7); or (b) does not, within 30 days after filing and serving the appeal brief, as required by subrule 62.01(9), (i) obtain a contested hearing date from the registrar, and (ii) file a Notice of Hearing Date.	**Désistement réputé** 62.02(3) Sauf ordonnance contraire d'un juge, l'appelant est réputé s'être désisté de l'appel lorsque, selon le cas: a) il omet de déposer et de signifier un dossier d'appel dans les 60 jours après avoir déposé l'avis d'appel, comme l'exige le paragraphe 62.01(7); b) il omet d'obtenir du registraire une date d'audience relativement à un appel contesté et de déposer un avis de la date d'audience dans les 30 jours après avoir déposé et signifié le dossier d'appel, comme le prévoit le paragraphe 62.01(9).

[41] In considering this request to deem Lenko's appeal abandoned, I examined the history of this litigation set out in paragraphs 12-33 of Dobler's

appeal brief. Although the deadlines to perfect Lenko's appeal from the decision of the Associate Judge were not complied with, I also note these delays were minimal. I am exercising my discretion, based on these facts, to not deem Lenko's appeal abandoned.

Constitutional Question

[42] Lenko argues the long delay rule is unconstitutional as it removes judicial discretion from determining if an action should proceed if there has been long delay. Lenko argues that removing judicial discretion that is present in all other cases is unconstitutional. Further, that the right of a litigant to argue he/she may have taken significant steps is removed by the long delay rule.

[43] I do note that once the Notice of Constitutional Question was filed, information was provided by Nancy Thomas, Lenko's assistant in the litigation, promising to provide an additional affidavit as well as case law, which was never provided. This argument formed part of the defendants' deemed abandonment argument. The fact the information was never provided by Lenko prevented Lenko from arguing any case he thought he may have. The court cannot consider facts and case law that is not presented to it.

[44] Lenko's argument, although framed as a constitutional question, lacks a jurisdictional argument. The questions posed by Lenko on the security for costs motion and continuing the motion in the name of another, are procedural steps.

[45] Procedural motions do not advance claims to trial. The Legislature passed changes to the rules to ensure claims were heard in a timely manner and not subject to long delay.

[46] I find Lenko's constitutional question, although well within his right to file, is another example of attempting to delay this litigation. The claim itself does not have any merit based on the facts of this case.

King's Bench Rule 24.02(1)

[47] Rule 24.02(1) states:

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	**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) all parties have expressly agreed to the delay;	a) toutes les parties ont expressément accepté le retard;
(b) the action has been stayed or adjourned pursuant to an order;	b) il a été sursis à l'action ou l'action a été ajournée en conformité avec une ordonnance;
(c) an order has been made extending the time for a significant advance in the action to occur;	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) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or	d) le retard découle d'une conférence de cause ou de gestion de cause ou d'une conférence préparatoire au procès;
(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.	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.

[48] I find Lenko's constitutional question argument is deficient for the following reasons:

(a) Although mandatory, there are exceptions to protect a unilateral dismissal of an action;

(b) Booking a pre-trial conference will stop the clock from running;

(c) Lenko is relying on subsection (e) to support his position on long delay; and

(d) Mandatory steps taken by a litigant count to pause the three-year drop-dead rule, which steps were not taken by Lenko.

[49] Lenko's position is summary judgment should be available to him and he was prevented from advancing that position. His evidence is although he indicated he wanted to bring a summary judgment application and/or hold a pre-trial conference, the pre-trial judge prevented him from doing so. This is incorrect.

[50] The defendants brought a motion for security for costs. The pre-trial judge ordered the security for costs motion to be heard first. The learned

Associate Judge granted the order for costs and provided Lenko with 120 days to satisfy the order.

[51] The Associate Judge granted the motion for security for costs and it was Lenko who failed to reschedule a pre-trial conference and/or a summary judgment application once the security for costs motion was determined. This responsibility falls solely on the shoulders of Lenko.

[52] I concur with counsel for the Government of Manitoba that "a civil plaintiff has a constitutional right of access to the court. The right to initiate an action is substantive. The long delay rule does not alter or interfere with that right (sic). Rather, it regulates the actions of litigants once the matter is before the court. The steps to be taken in litigation, and when those steps must be taken, are matters of practice and procedure. So are the consequences for failure to take such steps and the time allowed in which to take them".

[53] I also find in ***Papasotiriou-Lanteigne v. Tsitsos***, 2022 MBQB 41, Suche J. found (at paras. 18 and 19):

> Here, I am satisfied that fundamentally, rule 24.06(1) is about practice and procedure. It concerns the court process after an action is commenced, specifically "the disposition of proceedings without a hearing and the effect thereof" authorized by section 92(1) of the *QB Act*. It is true that rule 24.06(1) affects the substantive law created by the *LAA*, but in my view, the effect is incidental.
>
> In the result, I conclude rule 24.06(2) is valid.

[54] Justice Suche's decision was appealed. In ***Papasotiriou-Lanteigne v Tsitsos***, 2023 MBCA 66, the Manitoba Court of Appeal rested on whether rule

24.06(1) was correct and the court re-affirmed concerns about delay in general. Mainella JA confirmed that "dismissal of an action for delay is interlocutory and does not affect substantive rights…".

[55] Lenko argues Master Lee's stay of 120 days permitting him to pay the security for costs order should be considered as a delay not attributable to him. I find this question has been decided by the Manitoba Court of Appeal in ***Shreddfast Inc v Business Development Bank of Canada***, 2023 MBCA 9. The Court of Appeal's analysis is as follows (at paras. 18-23):

> Whether or not the exception to the long delay rule found in r 24.02(1)(b) applies to a stay pending the posting of costs is a matter of statutory interpretation. It is a question of law reviewable on the standard of correctness (see *Buhr v Buhr*, 2021 MBCA 63 at para 30; and *WRE Development Ltd v Lafarge Canada Inc*, 2022 MBCA 11 at para 15).
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> The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature]" (see *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87).
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> As noted in *Buhr*, "[i]nterpretation of court rules is governed by the same principles as the interpretation of other legislation" (at para 32).
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> In *Buhr*, Simonsen JA considered the purpose of r 24.02. In interpreting the rule, she noted that, because Alberta was the only Canadian province that had a rule similar to it, "jurisprudence from that province [was] of particular assistance" (at para 8).
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> She stated the purpose of the rule as follows (at para 33):
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> > Rule 24.02 is part of an overhaul of the *QB Rules* intended to expedite and bring finality to civil proceedings. It introduces a fundamentally different approach to delay than the former and current rr 24.01. Both the former and current rr 24.01 focus on the overall delay in the litigation

> as a whole; r 24.02 focusses on gaps. Rule 24.02 is a drop-dead rule that provides for dismissal when there has been three or more years of inactivity on a case. The rationale for the rule is to weed out inactive cases, and address complacency in advancing civil actions. . . .
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> Further, she explained that the word "must" in r 24.02(1) is imperative (at para 34). She said that such an interpretation is consistent with jurisprudence regarding the long delay rule in Alberta, which also uses the word "must" and "makes clear that dismissal is mandatory if there has been no significant advance in an action for three or more years and none of the exceptions apply" (at para 35).

[56] The law is clear; the motion for security for costs, the amount of time required by Master Lee to prepare his reasons, and the 120-day stay period is a procedural step, not a substantive step. Lenko's argument to exclude this delay fails.

[57] Lenko argues he was required to continue the action in the name of the estate due to the death of Dobler and any delay should be considered as a significant advance. I disagree. Following the logic in ***Papasotiriou-Lanteigne*** and ***Shreddfast***, the fact the action was continued in the name of another is procedural, not substantive. Therefore, this argument fails.

[58] Lenko, at any time after the pleadings closed, could have requested a pre-trial conference. The pre-trial conference judge could have considered any procedural motions, such as continuing the action in the name of another and granted an order. A request for summary judgment is also dealt with at a pre-trial conference.

[59] All Lenko needed to do was request a pre-trial conference to be scheduled after he paid the security for costs. Lenko is familiar with the process because he had requested a pre-trial conference earlier in these proceedings. Lenko could have also requested permission to file a summary judgment motion at the pre-trial conference, as he previously requested. He did neither.

[60] For five years since filing his Statement of Claim, Lenko has not taken any steps to move his claim to a hearing. The evidence before me is Lenko knew he could schedule a pre-trial conference and a summary judgment motion as he suggested same prior to the defendants' motion for security for costs. He was told he could bring these motions after the security for costs motion was heard. Lenko chose to ignore the advice to his detriment.

[61] Lenko requested that I not consider his appeal under section 24.01 of the King's Bench Rules. However, as this is a fresh hearing, I will consider whether his action falls within the rule. The rule states:

Dismissal for delay **24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has bee n 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 d e preuve contraire, avoir causé un préjudice importan t à la partie

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.	ayant présenté la motion. **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.

[62] Although not required, given my finding of long delay under rule 24.02, it is clear Lenko's delay in advancing this litigation also falls under rule 24.01. Lenko's failure to advance this action has prevented the Estate of Rene Dobler from selling an asset of the estate, being the land in question.

[63] Rene Dobler agreed to sell the land to Mr. Lenko in 2018 with a closing date in 2019. By agreement, the evidence shows the agreement was extended until 2020. Rene Dobler refused to extend the agreement any further.

[64] I find, based on the evidence before me, there was never a "take back" mortgage. There was only a delayed closing date. The evidence is clear Lenko has taken no steps to purchase the lands in question since 2020. Lenko filed a Pending Litigation Order followed by this Statement of Claim. The effect of Lenko's actions resulted in Rene Dobler, or her estate, from dealing with the land for over five years.

[65] I find the Estate of Rene Dobler has been significantly prejudiced by Lenko's actions as required by rule 24.01(2). I also find Lenko's delay is

inordinate and inexcusable. If Lenko really wanted to purchase the land, he could have taken any step in the past five years to do so (rule 24.01(3)).

DECISION

[66] Lenko bears full responsibility for his delay. Having considered the decision of the Associate Judge and no new evidence being proffered by Lenko, and although I am free to consider the evidence afresh, the evidence is more than three years elapsed since any action has been taken by Lenko. The actions he did take relating to the security for costs, and the continuation in the name of another are procedural and not substantive. Since the filing of the claim, Lenko has failed to take any substantive steps in accordance with King's Bench Rule 24.02. The same applies to Lenko's delay under King's Bench Rule 24.01. I find the applicants have proven delay under King's Bench Rules 24.01 and 24.02, and Lenko's claim is dismissed for delay.

[67] Costs are awarded to the defendants. If costs cannot be agreed, the parties shall present a Bill of Costs together with a brief being no more than ten pages. Each of the pages shall be formatted in accordance with the King's Bench Rules.

_____ J.

APPENDIX "A"

RULE 62
PROCEDURE ON APPEAL

Who may appeal
62.01(1) Any person affected by an order, decision or certificate of an associate judge, registrar, or assessment officer may appeal the order, decision or certificate to a judge.

Commencing an appeal
62.01(2) An appeal shall be commenced by

(a) filing a Notice of Appeal (Form 62A) in the administrative centre where the court file is located; and

(b) serving the Notice of Appeal on all parties whose interests may be affected by the appeal;

within 14 days after the order, decision or certificate appealed from is signed.

Hearing date set out in Notice of Appeal
62.01(3) In the Notice of Appeal, the appellant shall specify as the date of hearing, any date on which the court sits to hear motions, which must not be less than 14 days after the date the Notice of Appeal is served.

Place of hearing
62.01(4) Subrule 37.05(1) (place of hearing motions) applies, with necessary changes, to the place of hearing appeals under this rule.

Relief sought on appeal
62.01(5) The Notice of Appeal shall state the relief sought and the grounds of appeal. No grounds other than those stated in the notice may be relied on at the hearing, except with leave of the judge hearing the appeal.

On hearing date
62.01(6) On the date for hearing set out in the Notice of Appeal, the judge may

(a) in the case of urgency or where otherwise appropriate, proceed to hear the appeal; or

(b) if the appeal is to be contested, adjourn the hearing so that the appellant may obtain a date for a contested hearing from the registrar, in accordance with subrule (9).

Appeal brief filed and served within 60 days after appeal filed
62.01(7) The appellant shall file an appeal brief and serve it on all persons who are required to be served with the Notice of Appeal within 60 days after the Notice of Appeal is filed.

Contents of appellant's brief
62.01(8) The appeal brief shall consist of the following:

(a) a copy of the notice of appeal;

(b) a copy of the order, decision or certificate appealed from, as signed, and the reasons, if any;

(c) the evidence and all other material that was before the officer appealed from as is necessary for the hearing of the appeal;

(d) any further evidence allowed to be adduced under subrule (13);

(e) a list of any cases and statutory provisions to be relied on by the appellant;

(f) a list of the points to be argued.

Obtaining contested hearing date after appeal brief filed
62.01(9) The appellant may obtain a hearing date for a contested hearing from the registrar only after the appellant files and serves the appeal brief. But the appellant must, within 30 days after filing and serving the appeal brief,

(a) obtain a contested hearing date from the registrar; and

(b) file a Notice of Hearing Date (Form 62B).

Serving Notice of Hearing Date
62.01(10) The appellant shall serve the Notice of Hearing Date on all persons who are required to be served with the Notice of Appeal within seven days after obtaining the hearing date for a contested hearing from the registrar.

Respondent's brief
62.01(11) The respondent shall at least 14 days before the hearing, file a brief and serve it on the appellant and any persons who are required to be served with the Notice of Appeal.

Contents of respondent's brief
62.01(12) The brief filed by the respondent shall consist of the following:

(a) any further material that was before the officer appealed from and is necessary for the hearing of the appeal;

(b) any further evidence allowed to be adduced under subrule (13);

(c) a list of any cases and statutory provisions to be relied on by the respondent;

(d) a list of the points to be argued.

Bilingual statutory provisions in brief
62.01(12.1) If a party relies on a statutory provision that is required by law to be printed and published in English and French, their brief must contain a bilingual version of that provision.

Adducing further evidence at appeal hearing
62.01(13) The hearing of the appeal shall be a fresh hearing and

(a) if the appeal is from an order, decision or certificate of a registrar or assessment officer, the parties may adduce further evidence; and

(b) if the appeal is from an order, decision or certificate of an associate judge, the parties may not adduce further evidence, except with leave of the judge hearing the appeal.

APPEAL ABANDONED OR DEEMED ABANDONED BY APPELLANT

Abandoning appeal that was not served
62.02(1) Where the appellant has filed a Notice of Appeal but has not served it, the appellant may abandon the appeal by filing

(a) a Notice of Abandonment of Appeal (Form 62C); and

(b) an affidavit stating that the Notice of Appeal has not been served.

Abandoning appeal that was served
62.02(2) Where the appellant has filed and served a Notice of Appeal, the appellant may abandon the appeal

(a) by serving a Notice of Abandonment of Appeal (Form 62C) on the parties who were served with the Notice of Appeal; and

(b) by filing the Notice of Abandonment of Appeal together with proof that it was served.

Deemed abandonment of appeal
62.02(3) An appellant is deemed to have abandoned an appeal, unless a judge orders otherwise, if the appellant

(a) does not file and serve an appeal brief within 60 days after filing the Notice of Appeal, as required by subrule 62.01(7); or

(b) does not, within 30 days after filing and serving the appeal brief, as required by subrule 62.01(9),

(i) obtain a contested hearing date from the registrar, and

(ii) file a Notice of Hearing Date.

Costs of abandoned appeal
62.02(4) If an appeal

(a) is abandoned by the appellant filing a Notice of Abandonment of Appeal; or

(b) is deemed to be abandoned by the appellant under subrule (3);

a party on whom the Notice of Appeal is served, is entitled to the costs of the appeal, unless the court orders otherwise.