

DEFENDANTS BEWARE: COURTS MAY BE HESITANT TO DISMISS ACTION FOR DELAY EVEN WHEN PLAINTIFF IS THE MAJOR CONTRIBUTOR

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The burden of carrying an action forward falls mainly on the plaintiff. In Alberta, if a plaintiff's delay in bringing its action to trial rises to the level of "inordinate" and "inexcusable", a Court may dismiss all or any part of its claim. When assessing a plaintiff's delay, however, the Alberta Court of Appeal recently confirmed that it will also look to the defendant's role, if any, in delaying the action.

In *Nova Pole International Inc. v Permasteel Construction Ltd.*^[1], the Court of Appeal dealt with whether an action should be dismissed for delay where the plaintiff took almost 11 years to bring it to trial. Despite the fact that the Court found the plaintiff was the major contributor of the delay, it decided not to dismiss the action for delay. The Court's decision rested on the fact that the defendant had played a small role in delaying the trial of the action, which was enough to excuse the plaintiff's otherwise lengthy delay.

In allowing the action to proceed, the Court affirmed that defendants, not just plaintiffs, are responsible for the timely resolution of their disputes. Where defendants play even a small part in delaying an action from getting to trial, courts may be hesitant to dismiss a plaintiff's action for delay – even where the plaintiff's delay is extensive.

Background

The Court of Appeal's decision in *Nova Pole* involved two actions started in 2004 and 2005 relating to the negligent design and construction of a pole manufacturing facility. Third parties were added in 2006 and 2010. Questioning of the parties' witnesses took place between 2007 and 2011. During this time, the defendants and third parties requested further details of Nova Pole's damages.

In 2011, one of the defendants suggested postponing further questioning of Nova Pole's witness until Nova Pole provided its expert report on damages. All parties agreed to the postponement, even though it was not required by the Rules of Court. Nova Pole ultimately did not provide its expert report until August 2016. In September 2016 the defendants applied to the court to have Nova Pole's actions dismissed for delay.

For reasons not relevant to the Court of Appeal's decision, the Master dismissed the defendants' application, allowing the actions to proceed. The Chambers Judge, however, overturned the Master's decision and dismissed Nova Pole's actions for delay. In doing so, the Chambers Judge held that an almost 11 year delay was not justified by Nova Pole's submission that it encountered "complexities" in obtaining expert reports.

Nova Pole accordingly appealed the Chambers Judge's decision to the Court of Appeal.

Court of Appeal's Decision

The Court of Appeal allowed the appeal and dismissed the defendants' application to dismiss the claims for delay. In doing so, the Court of Appeal found that Nova Pole's delay in obtaining an expert report was the major contributing factor in the delay. However, relying on its prior decision in Transamerica^[2], the Court of Appeal held that the Chambers Judge erred by failing to consider the defendants' role in the delay.

In that regard, the Court of Appeal found that the defendants' suggestion and agreement to continue questioning Nova Pole's witness only after Nova Pole delivered its expert report was part of the reason the action was not ready for trial. As a result, the Court of Appeal concluded that both parties were responsible for the delay. The Court therefore held that Nova Pole's delay was excusable and there was no other basis to dismiss the action for delay.

Key Takeaways

The Court of Appeal's decision affirms the principle that defendants, not just plaintiffs, are responsible for the timely resolution of disputes. Despite the fact that Nova Pole took almost five years to produce its expert report, the Court of Appeal's analysis focused on whether the parties were otherwise ready for trial. The defendants were not ready for trial, and so were held to be sufficiently responsible for the delay such that Nova Pole's delay, while lengthy, was excusable.

The lesson learned: defendants dealing with a delaying plaintiff should ensure they have done everything in their power to ready their case for trial under the Rules of Court, but for the plaintiff's delay. Where a defendant has not completed a requirement, however small, a court may find a plaintiff's otherwise lengthy delay insufficient to dismiss the action for delay.

by Jeremy Rankin and Richard Jones

[1] [2020 ABCA 45](#).

[2] [2019 ABCA 276](#).

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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