

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES  
as represented by the MINISTER OF PUBLIC WORKS AND SERVICES  
Plaintiff

- and -

831594 N.W.T. LTD. carrying on business under the name and style of  
FERGUSON SIMEK CLARK, FERGUSON SIMEK CLARK ENGINEERS AND  
ARCHITECTS carrying on business under the name and style of FSC GROUP,  
831594 N.W.T. LTD., FERGUSON SIMEK CLARK ENGINEERS AND  
ARCHITECTS, FERGUSON SIMEK CLARK, FSC GROUP, JOHN DOE NO.1,  
G.P. VALUE ENGINEERING LTD., ANTHONY P. SILVA, JOHN DOE NO. 2,  
JOHN DOE NO. 3 and JOHN DOE NO. 4, COMARC ARCHITECTS LIMITED  
and CLIVE HAROLD CLARK

Defendants

- and -

NINETY NORTH CONSTRUCTION AND DEVELOPMENT LTD.

Third Party

- and -

ANTHONY P. SILVA

Third Party

- and -

NINETY NORTH CONSTRUCTION AND DEVELOPMENT LTD.

Third Party

- and -

THE GOVERNMENT OF THE NORTHWEST TERRITORIES  
as represented by the MINISTER OF PUBLIC WORKS AND SERVICES

Fourth Party

## MEMORANDUM OF JUDGMENT

### I) INTRODUCTION

[1] This action arises from significant financial loss to the Plaintiff as a result of a fire that destroyed the Attagoyuk school in Pangnirtung on March 9, 1997. The Plaintiff alleges that the Defendants are liable for this loss because they failed to design and renovate the school in accordance with relevant building codes and standards.

[2] The Defendants filed an Application to have the claim dismissed on the basis of delay, pursuant to Rule 327 of the *Rules of the Supreme Court of the Northwest Territories* R-010-96, as amended (the *Rules of Court*). The Application was heard on May 10, 2017. On May 23, 2017, I filed a Memorandum advising the parties that the Application was dismissed and that written Reasons would follow.

### II) ANALYSIS

#### 1. Legal Framework

[3] The relevant portion of Rule 327 reads as follows:

327. (1) A party may at any time apply to the Court for a determination that there has been a delay on the part of another party in action or proceeding and, where the Court so determines, the Court

(a) May, with or without terms, dismiss the action or proceeding for want of prosecution or give direction for the speedy determination of the action or proceeding; or

(b) shall dismiss so much of the action or proceedings as relates to the Defendants, where for five or more years no step has been taken that materially advances the action or proceeding.

(...)

(4) Where, in determining an application under this rule, the Court finds that the delay in action or proceeding is inordinate and inexcusable, that delay shall be *prima facie* evidence of serious prejudice to the party bringing the application.

*Rules of Court, Rule 327.*

[4] The Notice of Motion filed by the Defendants refers to Paragraphs 327(1)(a) and 327(1)(b). At the hearing of the Application, the Defendants did not attempt to argue that Paragraph 327(1) (b) was engaged. On the evidence, it clearly is not. I will not address it further.

[5] Rule 327(1)(a) gives the Court a discretionary power. That power is exercised through the examination of three questions: whether there has been an inordinate delay in the prosecution of the action; whether this delay is inexcusable; and whether the moving party is likely to be seriously prejudiced by the delay. All three must be established for the moving party to succeed. *Watsyk v GNWT (Financial Board Secretariat)*, 2010 NWTSC 74, para 29.

[6] If the moving party establishes inordinate and inexcusable delay, it benefits from a presumption that the delay has resulted in serious prejudice. It then falls to the responding party to rebut that presumption and show that the delay did not result in any serious prejudice.

[7] What constitutes an “inordinate” delay has recently been described as a “differential between the norm and the actual progress of an action that is so large as to be unreasonable or unjustifiable”. *Humphreys v Trebilcock*, 2017 ABCA 116, para 120. The Defendants argue that a delay of over two decades clearly falls within this description.

[8] The Defendants place considerable emphasis on the length of the delay, and very little on what caused it. They argue that *Humphreys* has altered the legal framework that governs these types of applications. They appear to suggest that the broad societal concerns that arise when stale actions are allowed to proceed can, alone, justify dismissal, irrespective of what caused the delay.

[9] In my view, *Humphreys* does not support this position. Referring to the equivalent of Rule 327 in the Alberta rules, the Court made it clear that the relevant delay does not include delay caused by the moving party:

Rule 4.31(1) authorizes a court to dismiss an action if the nonmoving party has prosecuted at such a slow pace that delay has occurred and the delay has

resulted in significant prejudice to the other party. To make r. 4.31(1) more effective, r. 4.31(2) introduces a rebuttable legal presumption: proof of inordinate and inexcusable delay is proof of significant prejudice.

*Humphreys v Trebilcock, supra*, para 105.

[10] This is nothing new: courts do not usually allow a party who causes delay to later use that delay as a weapon against the other party. *32262 BC Ltd. v Cleaning by Page Ltd.*, Unreported, No.8903-13334, October 22, 1993 (ABQB); *Young (Next Friend of) v A. Dei-Baning Professional Corp.* (1996), 184 A.R. 209 (ABCA); *Maligne Lodge Ltd. v Stuart Olson Construction Ltd.*, 2015 ABQB 451.

[11] In the Northwest Territories, that principle is actually reflected in the wording of the rule. The rules that were engaged in *Humphreys* refer only to “delay” (*Humphreys*, paras 84-88), but Rule 327 refers to delay *on the part of another party*. This makes it very clear that a party cannot rely on its own delay when seeking dismissal under that Rule.

[12] In short, merely focusing on the length of the delay, even a very lengthy delay, is not the correct approach. Regard must be had for the causes for the delay and which party bears the responsibility for it.

## 2. Application of Legal Framework to the Facts

[13] The Defendants rely on the Affidavit sworn by Ross Abdurahman, their corporate litigation representative. Aspects of the Affidavit address the delay, and others address the issue of prejudice.

[14] Mr. Abdurahman’s Affidavit refers to dates when some of the steps in the litigation took place. But it is far from detailed: it sums up, in ten paragraphs, an action that has been ongoing for twenty years.

[15] The evidence filed in response by the Plaintiff is much more detailed: the Affidavit of Brian Nagel, the Plaintiff’s litigation representative, includes two hundred and twenty-one paragraphs and one hundred and sixty-four Exhibits. It goes over virtually every procedural step that has occurred during this litigation. It also refers to communications between counsel at various points in time. For the most part, Mr. Nagel’s assertions about what has transpired in this action since the

Statement of Claim was filed are supported by the pleadings or by Exhibits to his Affidavit.

[16] The assessment of evidence is not merely quantitative, of course; “more” is not necessarily “better”. But, in this case, the level of detail and the supporting documents in the evidence adduced by the Plaintiff highlights the shortcomings and gaps in the evidence adduced by the Defendants. It highlights how the lack of detail and context in Mr. Abdurahman's Affidavit renders some of his assertions misleading.

[17] For example, Mr. Abdurahman deposes that the Plaintiff did not file its Statement as to Documents until 2003, nearly six years after the fire at the school. That assertion is correct. But Mr. Abdurahman makes no mention of the fact that the Defendants did not file their Statement of Defence until 2003, or of the fact that the Plaintiff's counsel requested multiple times that the Statement of Defence be filed.

[18] Mr. Abduraham also deposes that the discovery process in this matter spanned thirteen-and-a-half years, with the most recent steps having taken place in January 2017. He fails to mention that the Plaintiff's discovery process was completed by the end of 2006. It was the Defendants' discovery process that was not completed in a timely manner. As well, the evidence shows that this was not the Plaintiff's doing.

[19] Mr. Abduraham deposes that “no significant steps were taken on this matter between March 2010 and September 2014”. If this were the case, it would be disturbing. On my review of the evidence, however, this is not in fact the case.

[20] The Plaintiff's evidence shows that the parties engaged in settlement discussions during this time frame. They agreed to schedule a settlement meeting. Identifying a date for that meeting proved difficult. On a number of occasions during the year 2011, in the face of the challenges in identifying a date for the settlement meeting, the Plaintiff's counsel expressed concern about delay. He suggested that the Defendants proceed with their examinations for discovery to get the matter ready for trial in the event that a settlement was not reached.

[21] In early 2012, the Plaintiff's counsel followed up again and asked the Defendants' counsel which witnesses he wanted to examine. Examinations were scheduled in November 2012. They were cancelled by the Defendants' counsel.

[22] In 2013, the Plaintiff's counsel continued to communicate with the Defendants with a view of having the discovery process continue and securing a trial date. The Plaintiff also engaged in settlement discussions with one of the other Defendants. The Plaintiff's counsel eventually requested to have the matter go into case management.

[23] In my view, this evidence establishes that the Plaintiff completed its discovery process within a reasonable time frame, having regard to the complexity of the case. Once that was done, the Plaintiff did not sit idly. It did several things in an effort to move matters along. Counsel attempted to secure earlier dates for a settlement meeting; suggested that the Defendants proceed with their discoveries in case the matter did not settle; expressed concerns about the delay and his wish to secure a trial date; made settlement proposals and actually settled with one of the Defendants; and, ultimately, applied for case management. In light of all of this, it is entirely inaccurate to say that "no steps were taken in this action between March 2010 and September 2014".

[24] There is no evidence that the Defendants raised the issue of delay, at any time, before the matter was placed in case management. The action has now been in case management for close to three years. Case management conferences were held on October 30, 2014; May 4, 2015; October 20, 2015; April 26, 2016; September 7, 2016; February 8, 2017; March 7, 2017; and May 26, 2017. The Defendants brought up the issue of delay for the first time at the February 2017 conference, when counsel indicated that there may be an application pursuant to Rule 327. At that point, the matter had been in case management for almost two and a half years and tentative trial dates had been in place for five months.

[25] At the hearing of the Application, in response to a question I asked about the timing of the Application, counsel's response was that what prompted the Defendants to bring the delay application was the Plaintiff's failure to comply with the direction, given at the April 2016 case management conference, to provide the Defendants its witness list no later than July 31, 2016. The Plaintiff acknowledges that this deadline was not met.

[26] The Defendants' assertion that the Plaintiff's delay in providing its witness list was the proverbial "straw that broke the camel's back" and was what prompted this Application is somewhat surprising. The missed deadline was mentioned at the September 2016 case management conference. I gave a direction that the witness list be provided by the end of that month. At the same case management conference, counsel were advised that the time frame of November 6 to 24, 2017, was set aside as the tentative trial. Accordingly, under the new witness list deadline, the Defendants would be getting the Plaintiff's witness list more than a year ahead of the trial date.

[27] It is difficult to see how, under those circumstances, getting the Plaintiff's witness list two months later than originally directed would cause the Defendants much consternation. And if, for whatever reason, it was such a major concern as to become the trigger for this Application, one would expect that more would have been said about this topic at the September 2016 case management conference. In any event, in the overall context of this case, the Plaintiff's delay in providing the witness list can hardly serve as a basis to dismiss this action.

[28] I am not satisfied that the Defendants have established any inordinate or inexcusable delay on the part of the Plaintiff. There undeniably has been significant delay on this matter, but I conclude it is almost entirely attributable to choices and decisions made by the Defendants.

[29] Given that conclusion, I need not examine the issue of prejudice in detail. I would simply note that I do not find the Defendants' case on that issue particularly convincing.

[30] For example, the Defendants say they are prejudiced because of the passing, in 2003, of Wolfgang Dautel, the assistant fire marshal who wrote the incident report after the fire. The Defendants did not have an opportunity to examine him before his passing.

[31] The problem with this argument is that Mr. Dautel's passing occurred well before any significant delay had occurred in this matter. For that reason, it is highly questionable that the Defendants could rely on it. *Pomedi v Allied Machinist Limited*, 2015 ABQB 146. In addition, most of the delay, at that point, was due to the Defendants having taken over three years to file their Statement of Defence.

[32] Another type of prejudice that the Defendants rely on is their potential liability for a significant amount of prejudgment interest in the event that the Plaintiff is successful at trial. But orders for prejudgment interest are not automatic. If there are legitimate reasons why prejudgment interest ought not to be ordered in this case, or ought not to be ordered for the full period of time that has elapsed since the loss, those submissions can and should be made to the Trial Judge, who will have the benefit of the full context of the trial evidence to make a decision on this issue. The mere exposure to significant prejudgment interest cannot serve as a basis to dismiss an action under Rule 327.

[33] The Defendants also allege prejudice arising from fading memories and lost records as a result of the passage of time. Many of the Defendants' assertions in this regard are contradicted by Mr. Nagel's evidence. To the extent that this is an issue, it would have been open to the Defendants to conduct examinations for discovery much sooner. They cannot now rely on prejudice that arose as a result of their own inaction.

### III) CONCLUSION

[34] There has been considerable delay in this matter but it was not caused by the Plaintiff. The Defendants' Application to have the action dismissed pursuant to Rule 327 is dismissed.

[35] The parties have indicated that they wish to make submissions as to costs. The Plaintiff has included some submissions on this issue in its written brief. The following timelines will apply for the filing of further submissions:

1. If the Plaintiff wishes to file additional written submissions as to costs, those are to be filed with the Registry no later than 4:00PM on August 25, 2017;
2. The Defendants' submissions as to costs are to be filed with the Registry no later than 4:00PM on September 8, 2017.

[36] If counsel wish to make oral submissions on this issue, I direct that they send their availabilities to the registry by 4:00PM on September 11, 2017. Otherwise, I will rely on the written submissions and issue a ruling in due course.



[37] Counsel are reminded that their written submissions, as well as any correspondence about this matter (aside from correspondence relating to case management conferences), should be directed to the Court Registry, and not to Judges' Chambers.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this  
16<sup>th</sup> day of August, 2017

To: Gary A. Holan  
J. Thorlakson - Agent for Dennis Picco

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Plaintiff

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MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE L.A. CHARBONNEAU

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