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September 20th, 2008

Leisurely Pace, Standstill and Drop Dead: A Lawsuit's Journey

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Cases Considered:

Hein v. Barrett, 2008 ABQB 548

An application by a party for an extension of time is a very common application in a lawsuit. There is nothing especially note-worthy about this particular application by two Defendants, David Barrett and Chinook Accounting and Tax Services Ltd., for an order extending the time to file and serve a third party notice on two other Defendants, William Herman and Ross Todd and Company, save and except that seven years had gone by since Barrett and Chinook should have filed and served their third party notice. Nevertheless, the judgment by Master Judith Hanebury of the Alberta Court of Queen's Bench includes a nice summary of the relevant principles to be applied to applications such as this. It also includes a striking trio of metaphors used to refer to the progress or lack of progress of a lawsuit, the "leisurely pace," "standstill," and "drop dead" used in the heading for this post.

A Statement of Claim was filed in November 2000, alleging that the plaintiffs suffered losses due to negligent professional advice which caused their tax returns to be reassessed. There were a number of actions pending before the Federal Court of Canada, all related to plaintiffs' appealing their reassessments by the Canada Customs and Revenue Agency. The outcome of those tax appeals would affect the plaintiffs' action in the Alberta Court of Queen's Bench against Barrett and the other defendants. The plaintiffs' lawyer therefore suggested the Court of Queen's Bench action be held in abeyance pending the settlement or determination of the tax appeals. He proposed to Barrett and Chinook in May of 2002 that they enter into an informal "standstill agreement." There is no indication that Barrett and Chinook explicitly agreed to this proposal but they certainly went along with it.

Had this informal standstill agreement been formalized, this application would not have been needed. The *Alberta Rules of Court*, Alta. Reg. 390/1968, include a Part 24 governing "Delay in Prosecution of Action." Rule 243.1, however, allows parties to make their own rules about extensions of time and delays in prosecution of their action, side-stepping the Rule of Court:

> 243.1(1) Two or more parties to an action may by express agreement exclude or vary in whole or in part the application of any portion of this Part in relation to themselves.

> (2) The parties to an agreement referred in subsection (1) must give written notice of the agreement to all the other parties to the action, including parties to a counterclaim or to third or fourth party proceedings.

These agreements to exclude or vary the rules in Part 24 have acquired the name "standstill agreements." Note that these agreements do not have to be in writing, although they should be as a matter of good practice: *J.K. Campbell and Associates Ltd. (Trustee of) v. Lethbridge General and Auxiliary Hospital and Nursing Home District No. 65*, 2000 ABQB 331 at para 9; *525812 Alberta Ltd. v. Purewal*, 2004 ABQB 938 at para. 9. They do need to be "express" and, as already indicated, there is nothing in Master Hanebury's summary of the facts that indicates Barrett and Chinook expressly agreed. In order to be formalized, a standstill agreement also needs a written notice complying with Rule 243.1(2). In this case, the plaintiffs' lawyer had written to all the lawyers for all the parties involved in the lawsuit in January 2003 proposing that everyone wait for the outcome of the tax appeals. It was a proposal, however, and not notice of an agreement reached with Barrett and Chinook.

Over the next couple of years, there were only a few letters between counsel, basically asking whether the tax appeals had been concluded. Then, in later 2005, the parties began exchanging affidavits of records, with Barrett and Chinook filing theirs in December of 2005.

In May of 2006, one of the defendants' lawyers pointed out to all of the other defendants' lawyers that the "drop dead" rule would apply later in 2006. The so-called "drop dead" rule - Rule 244.1 - requires a court to dismiss an action if no step has been taken to materially advance the action for five years. In this case, none of the parties applied under the drop dead rule. As a result, as Master Hanebury notes (at para 9), "the action continued, albeit it at a rather leisurely pace."

In January 2007, a settlement agreement between the plaintiffs and the Canada Customs and Revenue Agency was finally provided to the other parties and the results of the reassessment followed in May 2007. It was not a lot of action, but enough to prompt the lawyer for Barrett and Chinook to dust off the third party notice they had prepared in 2001 and send it, in November 2007, to the lawyer for Herman and Ross Todd and Company, asking for their consent to the filing of the notice. Consent was refused. The application before Master Hanebury was therefore set down for hearing seven months later, in June 2008, and actually heard only two months after that, in August 2008. Nine months for an application to extend time was a relatively blistering pace for this lawsuit.

Master Hanebury canvassed a number of Alberta precedents on applications to extend the time for filing of third party notices. According to Rule 66(4), a defendant's third party notice has to be filed within six months of the filing of the defendant's Statement of Defence, and served within thirty days of filing. Rule 548, however, also give the courts a general discretion to enlarge or abridge the time periods set out in the Rules. The leading cases on the extension of time in the context of third party notices appear to be *Flight v. Dylan*, 2001 ABQB 211; *Lam v. Bockman*, 2006 ABQB 101; *Calgary Mack Sales Ltd. v. Shah*, 2005 ABCA 304; and

[Condominium Plan 9512180 v. Prairie Land Corp.], 2008 ABQB 269. From the case law, Master Hanebury synthesized six principles (at para. 23):

> 1. Three factors are considered when determining an application to extend the time for filing a third party notice: the length of the delay, the reason for the delay and the prejudice to the third party.
> 2. Depending on the length of the delay, different weights may be given to the other two factors.
> 3. For a short period of delay, the primary consideration is prejudice, and an excuse for the delay is of less importance. The relevant importance of these factors is reversed as the length of the delay increases. The longer the delay the greater the importance of an excuse for the delay and the lesser the importance of the question of prejudice.
> 5. When there is a significant delay, the lack of a reasonable excuse, without more, will be fatal to the application.
> 6. The pace of the litigation can also be considered when deciding the weight to be assigned to each of the three factors.

The delay in this case was of extraordinary length: between six and seven years. The reason advanced for the delay was the informal standstill agreement. Master Hanebury agreed that the litigation was stalled while the parties awaited the results of the tax appeals and that the informal standstill agreement provided a reasonable excuse for the delay until late 2005, when affidavits of records were filed and it was obvious the lawsuit was no longer standing still. That left a twenty-three month delay between the revitalization of the lawsuit and the plaintiffs' attempt to file their third party notice. A twenty-three months delay is bad, but not that bad, particularly when the lawyer for Herman and Ross Todd and Company admitted there was no prejudice other than the passage of time and the lawsuit had been proceeding at a leisurely pace. Based on this application of the six principles, Master Hanebury extended the time for filing the third party notice.

And the lawsuit ambles on . . .

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