In the Court of Appeal of Alberta

Citation: Megatrend Holdings Inc. (Megatrend Communications Inc.) v. Glenbow-Alberta Institute, 2008 ABCA 236

Date: 20080626
Docket: 0701-0195-AC
Registry: Calgary

Between:

Megatrend Holdings Inc. formerly known as Megatrend Communications Inc.

Appellant (Plaintiff)

- and -

Glenbow-Alberta Institute and Telus Corporation

Respondents (Defendants)

And Between:

Megatrend Holdings Inc. formerly known as Megatrend Communications Inc.

Cross-Respondent/Appellant (Plaintiff)

- and -

Glenbow-Alberta Institute

Cross-Appellant/Respondent (Defendant)

- and -

Telus Corporation

Cross-Appellant/Respondent (Defendant)

Corrected judgment: A corrigendum was issued on July 3, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Alan Macleod

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Mr. Justice S. LoVecchio
Dated the 22nd day of May, 2007
Filed on the 15th day of June, 2007
(Docket: 9801 14395)

Memorandum of Judgment
Delivered from the Bench

Côté J.A. (for the Court):

[1] This is an appeal from 2007 ABQB 346. A brief chronology is as follows:

October 26, 1998	Statement of Claim filed.
Nov. & Dec. 1998	Statements of Defence filed.
1999	Examinations for discovery conducted.
March 2000	Reg Barry (allegedly a representative of Telus) added as defendant.
Sept. 27, 2000	Barry files statement of defence and application for summary judgment.
March 2, 2001	Glenbow applies for security for costs.
March 23, 2001	Applications by Barry and Glenbow dismissed.
June 13, 2001	Barry files Notice of Appeal.
Feb. 28, 2002	Appellant settles with Barry; Barry's appeal is abandoned and partial discontinuance is filed.
Feb. 20, 2003	Joseph Konrad (CFO of Glenbow and a key witness) dies.
July 6, 2004	Appellant provides Certificate of Readiness to counsel for Glenbow.
Oct. 5, 2004	Counsel for Glenbow refuses to sign Certificate, saying matter is not ready for trial.
May 12, 2005	Appellant applies to set matter down for trial. That application is adjourned to allow application to dismiss to be filed.
Jan. 23, 2007	Respondents file application to dismiss for want of prosecution. By agreement, circumstances after May 12, 2005 are not considered as part of the delay.

March 20, 2007	Application to dismiss is heard.
May 22, 2007	Decision allowing application to dismiss.

[2] The first ground of appeal relates to the merits of the suit, but they are largely irrelevant and not within the traditional tests for dismissal for want of prosecution. The chambers judge never suggested that they are weak here nor did he rely on any such thing. In most cases, the court assumes that the plaintiff has an arguable lawsuit.

[3] The questions here are largely factual, and the standard of review does not let us upset the chambers judge. Very little happened from early 2001 to mid 2004, and really nothing much then either. The chambers judge did not commit any errors of law or principle harming the plaintiff, and the appellant's factum does contain some legal errors.

[4] The chambers judge was very kind to the plaintiff in suggesting that delay should be assessed as relative to the task at hand. If the plaintiff is doing nothing, then the size of the task being ignored little mitigates the inaction.

[5] The plaintiff's lack of funds caused by breach of contract cannot be an excuse for non-prosecution here, because the plaintiff before suit settled with Fonorola for both a big lump sum and ongoing revenue. As the chambers judge said, the plaintiff preferred to spend sums as small as $15,000 elsewhere. That delay was a deliberate choice is very weighty.

[6] The witness died over four years into the suit. The judge found that it would have been possible to get the suit to trial during the lifetime of the deceased, so the delay is relevant to the prejudice from his death. He need not be the only witness.

[7] The examination for discovery transcript of the deceased shows him heavily involved. There are not many places where he professed ignorance of the topic and the chambers judge showed critical conflicts in evidence between the plaintiff's officer and the deceased. There is no palpable error here.

[8] The deceased's examination for discovery transcript is not even admissible at trial. To make it admissible would endanger all future examinations for discovery. Laycraft C.J.A. held both in ***Paquin v. Gainers*** (1989) 101 A.R. 290 (C.A.) (especially para. 9). And an examination for discovery transcript is not close to being an adequate substitute for the deceased's live evidence.

[9] When the certificate of readiness was tendered but not signed, undertakings (i.e. discovery) were not complete, and R. 218.1 would be an impediment because the plaintiff planned to call an expert. So the defendants not only did not have to sign the certificate, but could not sign it honestly. They are guilty of no delay on that count, and could not even voluntarily have moved the action then.

[10] It is doubtful that the motions respecting Mr. Barry are relevant, let alone an excuse for the plaintiff's delay. They were separate from the case against the respondents, and the plaintiff delayed

vis-à-vis Mr. Barry too. Even if the motions would have barred the plaintiff's setting down for trial, so would have the plaintiff's failure to answer undertakings. It was the plaintiff's decision to add Mr. Barry as a defendant, then not to discover him.

[11] The Rules mandate dismissal of the suit unless all significant prejudice can be remedied by conditions (R. 244(2), (3)). The appellant did not suggest to the chambers judge any sufficient terms or conditions. He suggested some to us, but the standard of review does not let us weigh that for the first time.

[12] The main appeal on the merits is dismissed.

[13] Though a denial of costs must be based on relevant factors, a well-established factor is the conduct of the parties. There is no one short list of four exclusive factors. The notice of motion to dismiss took some years to bring. Besides, the discretion as to costs is hard to upset on appeal.

[14] The cross-appeals as to costs are dismissed.

[Counsel for the respondents made submissions as to costs of the appeal. Counsel for the appellant had no submission to make.]

Côté J.A.:

[15] The respondents will each get one full set of costs of the main appeal. The cross-appeals necessitated no factum in reply and took little time and there is no need to reduce the costs because of them. There will be no costs of the cross-appeal, but there will be no reduction of the costs for the respondents' factums.

[Discussion of column]

Côté J.A:

[16] The fees will be taxed on column 5 of Schedule C.

Appeal heard on June 12, 2008

Memorandum filed at Calgary, Alberta
this 26th day of June, 2008

"J. E. Côté"

Côté J.A.

Appearances:

T.C. Platnich
for the Cross-Respondent/Appellant (Plaintiff) Megatrend Holdings Inc.

E.A. McAlister
for the Cross-Appellant/Respondent (Defendant) Glenbow-Alberta Institute

C. Plante
for the Cross-Appellant/Respondent (Defendant) Telus Corporation

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Corrigendum of the Memorandum of Judgment
Delivered from the Bench

In the style of cause, Telus Corporation's status has been corrected to read "Cross-Appellant/Respondent".

Throughout the text of the judgment, Mr. "Berry" has been corrected to read Mr. "Barry".