June 07, 2019

ARTICLE

The Alberta Court of Appeal adopts a Pragmatic Approach to the Rules of Court Drop Dead Rule

In February 2019, the Alberta Court of Appeal released three decisions on the Drop Dead Rule:*Delver v Gladue*, 2019 ABCA 54 [*Delver*],*Thiessen v Corbiell*, 2019 ABCA 56 [*Thiessen*], and *Roman Catholic Bishop of the Diocese of Calgary v Schuster*, 2019 ABCA 64 [*Schuster*]. This article discusses the three decisions and the Alberta Court of Appeal's approach to the Drop Dead Rule, which reflects the reality that efforts to advance an action without meaningful outcomes are unlikely to be successful in defending against a Drop Dead Rule application.

Background

Civil plaintiffs in Alberta who do not prosecute their actions in a timely manner risk losing their claims entirely. The *Alberta Rules of Court* has two primary Rules dealing with delay: Rule 4.31 (the "General Delay Rule") and Rule 4.33 (the "Drop Dead Rule"), available here. The General Delay Rule examines all of the alleged delay that has occurred in the life of an action and grants the Court broad discretionary powers to deal with any delay. The Drop Dead Rule is narrower and the power is not discretionary. The Drop Dead Rule specifically examines the three years preceding a given Drop Dead Rule application and, if there has been no "significant advance" in the action, the Court must dismiss the action. Dismissal must follow unless the action had been stayed or adjourned, the delay was provided for in a litigation plan, or proceedings have been taken since the delay and the Court finds that those proceedings warrant the action continuing (Rule 4.33(2)).

The Functional Test

The Court of Appeal reaffirmed that the correct test in considering the Drop Dead Rule is the "functional test." The functional test asks whether any step in the preceding three years actually moved the lawsuit forward in a meaningful way. Therefore one must examine, "the whole picture of what transpired in the three-year period, framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred."1

Delver v Gladue, 2019 ABCA 54

In *Delver*, case available here, the plaintiff was injured in a motor vehicle accident in July 2008. She commenced her action in July 2010. In May 2016, and following examinations for discovery, the defendants brought an application pursuant to the Drop Dead Rule. In the preceding three years, the plaintiff attempted to coordinate a trial of an issue and formally indicated a willingness to settle the claim for a specified sum. The attempt to coordinate the trial of an issue and the settlement were rejected by the master in chambers. The master found no significant advancement of the claim and dismissed the action. On appeal, the chambers judge found that either effort could have been successful and would have advanced the litigation.

On further appeal, a majority of the Court of Appeal allowed the defendant's appeal and dismissed the action. The point of disagreement among the judges related to whether the plaintiff's efforts were sufficient to significantly advance the action. The majority noted that while unsuccessful settlement attempts have constituted a significant advance in an action where new information was provided that narrowed the issues for trial, they held that the test is whether the efforts *did* significantly advance the action and not whether the efforts *could have* advanced the action. In this case, the unsuccessful settlement offer did not provide new information to narrow issues and did not constitute a significant advance. It was immaterial whether such efforts *could have* advanced the action.

*Thiessen v Corbiell,*2019 ABCA 56

In *Thiessen*, case available here, the plaintiff was involved in two motor vehicle accidents in 2007 and initiated two separate actions, the first commencing in January 2009 and the second in April 2009. On August 11, 2017, the two defendants applied to have the plaintiff's claims dismissed in accordance with the Drop Dead Rule. In the preceding three years, the two defendants had applied for an order directing a single trial to determine damages and the parties had all agreed to attend mediation. The mediation never occurred. The application by the two defendants regarding the trial was adjourned *sine die* in order to be resolved by a consent order but the consent order was never agreed to in form and never entered.

Upon the Drop Dead Rule application, the master found that the attempted consolidation and attempted mediation had no effect on either of the actions and the plaintiff's claims were dismissed. On appeal, the chambers judge found that the parties' efforts to consolidate the actions did significantly advance the actions. On further appeal, a unanimous Court of Appeal found that they did not. The Court of Appeal held that neither attempt served to narrow the issues, complete the discovery of documents and information, or clarify the positions of the parties, the type of activities said to comprise 'significant advances.' The unanimous decision in *Thiessen* was consistent with the decision and reasons of the majority in *Delver.*

Roman Catholic Bishop of the Diocese of Calgary v Schuster, 2019 ABCA 64

In *Schuster*, available here, the plaintiff brought an action against a lawyer and other parties for breach of fiduciary duty, breach of contract, and negligence. The action was commenced on June 8, 2012. On July 13, 2016, the plaintiff filed an application to amend its statement of claim and for summary judgment against the lawyer. At that point, the other defendants had been released from the action. The summary judgment application related only to the breach of fiduciary duty, and not the entire action. The lawyer applied to have the claim dismissed under the Drop Dead Rule. In the preceding three years, the plaintiff had filed a partial discontinuance releasing all defendants but the lawyer.

The master denied the applications. Regarding the Drop Dead Rule application, the Master found that the partial discontinuance constituted a significant advance as it simplified the claim. This conclusion was upheld by the chambers judge. On further appeal, the Court of Appeal upheld the lower decisions, and found that the number of defendants was reduced and the issues were narrowed. Accordingly, there was a significant advance in the action and the claim should not be dismissed.

Implications

The Alberta Court of Appeal decisions in *Delver,Thiessen*, and *Schuster* affirm the functional test for the Drop Dead Rule. Underlying the reasons in each decision is that, while outcomes should not be overemphasized, efforts to advance actions that fail to achieve that objective will not likely meet the functional test. In other words, efforts without meaningful outcomes will unlikely be found to significantly advance an action.

Plaintiffs always bear the ultimate responsibility for prosecuting claims in a timely manner. If they cannot demonstrate that they have significantly advanced their claims in a three-year window, they risk losing their claims entirely. These decisions sets the stage for plaintiffs and their counsel in making procedural plans for actions right from commencement. They caution plaintiffs to avoid unnecessary delay and to choose procedures wisely.

The emphasis is on the result of the efforts in achieving the objective of advancing the action. From this lens, a plaintiff's settlement efforts requires more art than usual to be able to achieve the grand objective of advancing the action if it turns out unsuccessful.

1*Delver*, para 7, citing *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel*, 2016 ABCA 123 at para 21 [*Ro-Dar]*.

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