Federal Court Cour fédérale

Date: 20241223

Dockets: T-1119-20

Citation: 2024 FC 1845

Montréal, Quebec, December 23, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

JAMIE BOULACHANIS

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] His Majesty the King, the Defendant in the underlying civil litigation, brings a Motion to Dismiss for Delay the Plaintiff's Statement of Claim [Motion], pursuant to Rule 167 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[2] Rule 167 of the Rules provides that "the Court may, at any time, on the motion of a party who is not in default of any requirement of the Rules, dismiss a proceeding … on the ground that there has been undue delay by a plaintiff … in prosecuting the proceeding."

[3] This Motion comes in the following general context:

- On September 21, 2020, the Plaintiff filed the underlying civil liability claim against the Defendant for 15 million dollars;
- Since November 2020, the file has been case managed;
- Except for a period of one month in February and March 2022, the Plaintiff has been represented by counsel;
- Almost four years after the filing of the Statement of Claim, the file is still at the preliminary stage of fulfilling the undertakings agreed upon during the examination for discovery held in 2021 and 2022;
- On April 16, 2024, the Court issued a Direction that provided, amongst other things, that by no later than May 15, 2024 "the Plaintiff shall transmit all responses to outstanding requests for undertakings, after which time the answer to discovery will require either the consent of the Defendant or leave of the Court in order to be effective pursuant to Rule 248 of the *Federal Courts Rules*" and that by no later than July 15, 2024, the Defendant had to serve and file his Statement of Defence;
- On July 3, 2024, the Defendant filed this Motion;

- On July 10, 2024, the Court provisionally stayed other steps in this proceeding pending the adjudication of the Defendant's Motion with the exception of the Plaintiff's request to amend her Statement of Claim; and

- On July 15, 2024, the Plaintiff amended her Statement of Claim for the sixth time, and brought down the monetary claim to five million dollars.

[4] In his written submissions, the Defendant outlines the applicable legal test, relying on *Sweet Productions Inc v Licensing LP International SÀRL*, 2022 FCA 111 [*Sweet Productions*] at paragraph 35, reversed on other grounds 2023 CanLII 85851 (CSC); *Vermillion Networks Inc v Green Circle Ideas Inc*, 2024 FC 579 at paragraph 17 [*Vermillion*], affirmed 2024 FC 1455; *Nichols v Canada*, [1990] FCJ No 567 [*Nichols*]; *Hagwilget First Nation v Canada*, 1996 CanLII 10170 at paragraph 16 [*Hagwilget*].

[5] The Defendant submits that the Plaintiff was given multiple deadlines to provide answers to the undertakings agreed upon during her examination in 2021 and 2022, that she failed to respect these deadlines, either by not providing the undertakings, or by providing incomplete and/or unacceptable answers, and remains in default. Per the legal test applicable under a Rule 167 motion, the AGC submits that (1) there has been an undue delay since the filing of the Statement of Claim; (2) the delay incurred is inexcusable; (3) the Defendant is seriously prejudiced by the delay; and (4) there is no other appropriate sanction as case management, often seen as the alternative, has already been tried here without success. The Defendant asserts the only remaining option left is to dismiss the Plaintiff's Statement of Claim, with costs.

[6] The Defendant adduced two affidavits, one from Ms. Marie-Claude Doucet, a parajurist at Justice Canada, sworn on July 3, 2024, introducing 32 exhibits into evidence, and the second from Ms. Geneviève Thibault, Assistant Deputy Commissioner of Operations at Correctional Service Canada, sworn on June 28, 2024.

[7] In response, the Plaintiff asks the Court to dismiss the Defendant's Motion, and to order the scheduling of a Case Management Conference to address the timetable for the next necessary steps and to adjudicate on the applicability of the undertakings numbered, the whole with costs.

[8] The Plaintiff responds that the Defendant's Motion is unfounded. Relying on the same applicable legal test, the Plaintiff submits that (1) she has not caused any undue delay in this case; (2) if there has been undue delay, it is excusable; (3) there is no likelihood of serious prejudice to the Defendant; and (4) in any event, even if the Court found that the delay was undue, inexcusable and likely to cause serious prejudice, dismissing the case is not the proper sanction and a balanced approach is preferable (*Ruggles v Fording Coal Limited*, 1998 CanLII 8262 (FC) at paras 4, 10 [*Ruggles*]).

[9] The Plaintiff argues that the three-year and nine-month delay in this case is not inordinate and must be evaluated in light of the specific unique challenges she faced. She adds that the delay is excusable as it is attributable namely to (1) counsel's administrative inefficiency, as there were issues with her counsel's disorganization, and not her deliberate neglect; (2) the Defendant's contribution in excessive discovery, roadblocks and causing procedural delays; (3) the interruption of proceedings during the Motion for interlocutory injunction; (4) the

incarceration and pandemic challenges which have imposed severe constraints on her ability to manage the litigation effectively; and (5) the undertakings were made on a best effort basis.

[10] The Plaintiff filed her own affidavit, sworn on September 16, 2024, introducing 17 exhibits into evidence; and the affidavit of Ms. Neila Benferhat, a lawyer at the firm representing her, sworn on September 12, 2024, introducing six exhibits in evidence.

[11] None of the affiants were cross-examined.

[12] At the hearing of the Motion, the Plaintiff raised a new argument, qualifying it as a preliminary remark. The Plaintiff asserted that the Defendant's Motion is inadmissible based on the words of paragraph 1 of the Court's Direction on April 16, 2024.

[13] For the reasons that follow, the Defendant's Motion will be granted and the Statement of Claim will be dismissed.

II. History of Examination and Undertakings

[14] On September 27, 2021, a first full day of examination on discovery of the Plaintiff took place whereby 29 undertakings were made. The Defendant alleges that when his Motion was filed on July 3, 2024, there were nine outstanding undertakings that had not been properly addressed: five of these remained unanswered (numbers 8, 9, 13, 14, 19), two were incomplete (numbers 6, 29) and two were answered incorrectly (numbers 18, 22). On September 28, 2021, a second full day of examination on discovery of the Plaintiff took place whereby 37 undertakings were made. The Defendant alleges that when his Motion was filed, there were 13 outstanding

undertakings that had not been properly addressed: seven of these remained unanswered (numbers 44, 56, 57, 58, 62, 63, 66), one was incomplete (number 42) and five were answered incorrectly (numbers 33, 47, 51, 54, 60).

[15] On June 29, 2022, a third full day of examination on discovery of the Plaintiff took place whereby eight undertakings were made. The Defendant alleges that when his Motion was filed, two undertakings remained unanswered (numbers 68, 74). On June 30, 2022, a fourth full day of examination on discovery of the Plaintiff took place whereby 19 undertakings were made. The Defendant alleges that when his Motion was filed, there were eight outstanding undertakings that had not been properly addressed: two of these remained unanswered (numbers 92, 93), three were incomplete (numbers 81, 88, 90) and three were answered incorrectly (numbers 76, 82, 84). On July 11, 2022, a fifth full day of examination on discovery of the Plaintiff took place whereby 25 undertakings were made although one is under advisement (number 107) and two were skipped (numbers 94 and 95). The Defendant alleges that when his Motion was filed, there were 14 outstanding undertakings that had not been properly addressed: four of these remained unanswered (numbers 100, 101, 113, 114), two were incomplete (numbers 104, 105) and eight were answered incorrectly (numbers 102, 103, 111, 112, 115, 116, 117, 118).

[16] In summary, the Defendant submits that out of the 118 undertakings made, 115 were undisputed and addressed. However, at the time of filing his Motion on July 3, 2024, 46 of these undertakings remained problematic. Specifically, 20 were unanswered, 8 were incomplete, and 18 were answered incorrectly (Exhibit MCD-31 of Ms. Marie-Claude Doucet’s Affidavit).

[17] In her affidavit filed as part of the responding motion record of the Plaintiff, Ms. Benferhat mentions that the Defendant's counsel did not provide a list of outstanding undertakings until July 3, 2024, at which time Ms. Benferhat realized that the list of undertakings she had been relying on was not an internal document from their office but a list composed by the Plaintiff indicating which undertakings she had provided to their office. Ms. Benferhat adds that most of the 19 missing undertakings had been long provided by the Plaintiff and were on their server, which undertakings were unfortunately overlooked as presumed already submitted.

[18] On July 9, 2024, following the filing of the Defendant's Motion, the Plaintiff sent 12 undertakings via Dropbox to the Defendant. In her affidavit, Ms. Benferhat states that three undertakings are still awaiting a Freedom of Information Request [FIR] approval (numbers 74, 100, and 101), two undertakings are unavailable to the Plaintiff (numbers 44 and 62), one undertaking is inexistent due to stenographer error (number 19) and one undertaking corresponds to the desisted loss of future wages (number 114), which allegations were removed on July 12, 2024 in the re-amended Statement of Claim. I note that no evidence of the FIR was submitted to the Court.

[19] Also in her affidavit, Ms. Benferhat encloses a copy of the July 9, 2024 email in which the 12 undertakings were allegedly provided to the Defendant (Exhibit NB-6 of Ms. Neila Benferhat's Affidavit). However, only the Dropbox link is visible in the email: as such, the actual content of the 12 undertakings submitted to the Defendant is not before the Court. The record does not indicate if the Defendant was satisfied with the undertakings provided.

[20] The Plaintiff did not otherwise dispute the Defendant's position relating to the 46 unanswered, incomplete or answered incorrectly undertakings. Rather, at the hearing the Plaintiff submitted that if the Defendant was unsatisfied with the undertakings received, a motion to dismiss was not the appropriate remedy: this issue should be raised before the trial judge.

III. New Argument Raised by the Plaintiff at the Hearing

[21] At the hearing, counsel for the Plaintiff cited paragraph 1 of the Court's April 16, 2024 Direction for the proposition that it addresses the undertakings and constitutes a complete response, and that the Defendant's Motion is therefore inadmissible. This paragraph reads as follows:

> 1. By no later than **May 15, 2024**, the Plaintiff shall transmit all responses to outstanding requests for undertakings, after which time the answer to discovery will require either the consent of the Defendant or leave of the Court in order to be effective pursuant to Rule 248 of the *Federal Courts Rules*.
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> [Emphasis in the original.]

[22] The Plaintiff submits that paragraph 1 precludes the Defendant from bringing his Motion under Rule 167 of the Rules.

[23] The Defendant objected to the possibility for the Plaintiff to present this new argument and responded that in any event, the Plaintiff's argument remained unsubstantiated.

[24] I agree with the Defendant. The Plaintiff had ample time before the hearing to raise this argument, which clearly does not constitute a simple preliminary remark. In any event, the

Plaintiff has submitted no case law or authority in support of her position and has not shown how paragraph 1 of the Direction would operate to preclude the Defendant from bringing his Motion under Rule 167. Thus, the Plaintiff's argument cannot succeed.

IV. Analysis

A. *Legal Test Under Rule 167 of the Rules*

[25] The parties agree on the applicable legal test. In *Vermillion*, Madam Associate Judge Catherine A. Coughlan set it out as directing the Court to determine whether (1) there has been inordinate or undue delay; (2) the delay is excusable; and (3) the defendants are likely to be seriously prejudiced by the delay (*Vermillion* at para 17 citing *Allen v Sir Alfred McAlpine & Sons Ltd*, [1968] 1 All ER 543 (CA); *Canada v Aqua-Gem Investments Ltd*, 1993 CanLII 2939 (FCA); *Sweet Productions* at para 35; see also *TSD Holding Inc v Vancouver Fraser Port Authority (Port Metro Vancouver)*, 2024 FC 1376 at para 50 [*TSD*].)

[26] As Associate Judge Coughlan outlines:

> Rule 167 reflects the Federal Court's philosophical concern about the systemic cost of prolonged litigation to both the Court and to litigants, and vests control over the pace of the proceedings in the Court rather than the parties. Motions under Rule 167 have become relatively rare, largely owing to the extensive use of case management in this Court. Nevertheless, as the present motion demonstrates, the objectives of a case management regime can be frustrated by the failure of a party to advance their proceeding in a timely manner and to abide by the Orders and Directions of the Court.
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> (*TSD* at para 51; see also *Vermillion* at para 18.)

[27] At paragraph 13 of *Comartin v Marsh*, 2024 FC 160 [*Comartin*], Associate Judge Coughlan outlined as well that "[i]t remains however, that '[f]or a case to be allowed to move forward, there must be a fair prospect (usually within the framework of case management) that the plaintiff is intent on bringing the case to its end and has the means to do so. The Court cannot simply rely on a mere belief or hope that a plaintiff will change course in the absence of any substantiating evidence': *Sweet Productions* at para 46."

[28] The Federal Court of Appeal has also outlined that dismissal for delay can be granted when there has been almost total failure to advance the claim, inordinate delay, and no meaningful plan by the plaintiff to proceed in a timely manner (*Friedrich v Canada*, 2001 FCA 325). In any case, a dismissal for delay should not be lightly made and it is not a presumptive remedy upon a finding of undue delay (*TSD* at para 52 citing *Sweet Productions* at para 45).

B. *Inordinate or Undue Delay*

(1) Parties' position

[29] With respect to the first element of the test, the Defendant asserts that to decide whether the delay is undue, it must be measured from the commencement of the proceeding and not from the last step taken (*Vermillion* at para 26). The Defendant outlines that in the present file, the examination before plea has not been fully completed since the Plaintiff filed her Statement of Claim in September 2020, almost four years ago. The Defendant highlights that the Plaintiff has not proactively and diligently moved her case forward and that as a result, the file is still at the preliminary stage of answering the undertakings she agreed to during her examination before plea held in 2021 and 2022.

[30] The Defendant adds that (a) undertakings form part of the examination; (b) the Plaintiff's undertakings are still incomplete; (c) no justification was provided for her failure to honour the undertakings; and (d) she cannot unilaterally renege on an undertaking. Accordingly, the Defendant asserts that the Plaintiff's failure to complete her examination before plea four years after the filing of her Statement of Claim constitutes undue delay.

[31] The Plaintiff responds that, as spelled out in *Vermillion* at paragraph 25: "Rule 167 is silent on the length of delay required to trigger a determination of undue delay. Instead, the Court has discretion to assess the individual circumstances of each proceeding and the conduct of the parties to those proceedings to determine whether the delay is undue. What is inordinate delay in one proceeding may not be in another." Accordingly, the Plaintiff argues that what is "due" delay, by extension, also varies on a case-by-case basis.

[32] Further, the Plaintiff asserts that the *Vermillion* case stands out from the collection of case law submitted in support of the Defendant's Motion as the sole recent instance where delay in prosecuting a case was sanctioned by an actual dismissal of the action. Even then, the Plaintiff argues that *Vermillion*, a case where progress was delayed by seven years and the only substantive steps taken were a service of the Rule 306 affidavit and settlement discussions all occurring in the first year following the filing of the originating application, is highly distinguishable from the case at bar. The Plaintiff submits that at the time of the Defendant's present Motion, the case has been on the docket for three years and nine months, nearly half the time of the delay in *Vermillion*, and has progressed through five full-day discovery examinations of the Plaintiff, amassed a high number of undertakings, and this, despite an interruption for nearly a year by virtue of an interlocutory motion.

[33] The Plaintiff also submits that:

- She faced considerable challenges in her ability to gain access to any information whatsoever, another important distinguishing consideration separating the present case from *Vermillion*;

- Defendant's counsel could also have taken notice of some obvious difficulties on the side of the Plaintiff's counsel, especially in light of the departure for maternity leave of their main point of contact. However, at no point did the Defendant's counsel provide a list or mention of specific undertakings until urged expressly and repeatedly by the Plaintiff's counsel, and this after the Defendant lodged his present Motion;

- The Plaintiff and her counsel demonstrated their best effort with respect to providing the undertakings. However, a "best effort" undertaking "is not a guarantee that the relevant information/document(s) will be produced. If the subject of the undertaking cannot be provided, the court must be satisfied that a real and substantial effort has been made to seek out the information/document(s)." (*Mukhtiar v The Credit Valley Hospital*, 2020 ONSC 4267 (CanLII) at para 33 [*Mukhtiar*]);

- As for the Plaintiff's counsel's role in the non-communication of certain overlooked undertakings, case law does not support the proposition that the Plaintiff ought to suffer the brunt of dismissal on such basis (*Stein v Canada*, 2023 FC 1178 at para 10); and

- It was only during preparation of the present responding Motion Record that counsel for the Plaintiff noted the understanding between Defendant's counsel and the Plaintiff's prior lawyer stipulating that the undertakings would be provided within 60 days following the conclusion of the final day of examination.

[34] The Plaintiff adds that undue delay is not unlike inordinate delay (*Ruggles* at para 7) and has been defined as "delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question" (*Azeri v Esmati-Seifabad*, 2009 BCCA 133 at para 8). She concedes that delays are calculated from the commencement of an action and not the last step taken. However, she also submits - somewhat paradoxically - that whether a delay was due or undue, in a context such as this, can only be contemplated from the Plaintiff's alleged default, that is, from the due date of her obligation to provide undertakings, hence September 12, 2022 (60 days following the close of the examination). The Plaintiff argues that by this metric, the case has temporized for approximately one year and nine months. By virtue of all applicable jurisprudence, a delay of approximately 21 months falls short of being considered "undue" (*Pilot v McKenzie*, 2021 FC 396 at paras 14-15).

[35] At the hearing, the Defendant replied to the arguments raised by the Plaintiff with respect to her counsel's maternity leave and the undertakings made on a "best effort" condition during his submissions relating to the inexcusable delay criterion. They will be addressed below accordingly.

(2) Discussion

[36] The Court has confirmed that inordinate or undue delay is measured from the commencement of a proceeding and not from the last step taken (*TSD* at para 58 citing *Behnke v Canada (Department of External Affairs)*, 2000 CarswellNat 1543 at para 25 [*Behnke*]; see also *Vermillion* at para 26).

[37] As previously highlighted by the Plaintiff, and as stated by Associate Judge Coughlan in *TSD*: "[r]ule 167 is silent on the length of delay required to trigger a determination of undue delay". The Court therefore has the discretion to examine the individual circumstances of each proceeding and the parties' conduct in those proceedings to determine whether the delay is undue (*TSD* at para 57).

[38] In this case, the Defendant's Motion was filed almost four years after the Plaintiff filed her Statement of Claim. It took 22 months to complete the examination and the Court issued eight directions to address the examination and undertakings (Exhibits MCD-2, MCD-8, MCD-9, MCD-13, MCD-15, MCD-19, MCD-21 and MCD-28 of Ms. Marie-Claude Doucet's Affidavit). Further, the record shows that (1) the scheduling of the examination was at the initiative of the Defendant (Exhibits MCD-3 and MCD-11 of Ms. Marie-Claude Doucet's Affidavit); (2) the Plaintiff requested three out of the four postponements of the examination (Exhibits MCD-3, MCD-4, MCD-6 and MCD-12 of Ms. Marie-Claude Doucet's Affidavit); (3) none of the deadlines for the undertakings were observed by the Plaintiff; and (4) discovery is still not complete as some undertakings have still not been submitted, or adequately submitted, to the Defendant.

[39] I note that the Plaintiff stated in her written representations and during the hearing that the Defendant had still not filed his Statement of Defence. I am not convinced this is relevant as the record shows it was always expected that the Defendant would file his Statement of Defence after the undertakings arising from the Plaintiff's examination were answered (Exhibits MCD-2, MCD-8 and MCD-28 of Ms. Marie-Claude Doucet's Affidavit). Moreover, per the directions issued by the case management judge on July 10, 2024, following the filing of the Defendant's Motion, all other steps in this proceeding were provisionally stayed pending the adjudication of the Motion. Since the Statement of Defence was due no later than July 15, 2024, this step was thus stayed as well.

[40] As such, some four years after the Statement of Claim was filed, and in any event, more than two years after the Defendant last examined the Plaintiff, the record shows her examination before plea remains incomplete as not all undertakings have been provided. Given the circumstances of this case, and the purpose of examinations in the discovery phase detailed below, I am satisfied the delay is inordinate.

C. *Inexcusable Delay*

(1) Parties' positions

[41] Regarding the second element of the test, the Defendant submits that except for 15 days, the Plaintiff is solely responsible for the four-year delay incurred in the file and no legitimate justification was provided to explain the delay. The Defendant adds that the Plaintiff postponed her examination multiple times, continually failed to produce the undertakings she agreed to or

produced incomplete and/or unacceptable answers, and failed to comply with this Court's Directions.

[42] The Defendant asserts the record shows that the delay is inexcusable. For example, the Defendant refers to the delay of more than one year before the first day of examination of the Plaintiff could even proceed. The Defendant highlights that although not obligated to do so, he undertook numerous follow-ups with opposing counsel in an effort to advance the litigation.

[43] For her part, the Plaintiff submits that should the delay, whether from commencement of proceedings, that is, three years and nine months, or from the date of default of providing the remaining 67 undertakings (taking account of the 51 undertakings already provided prior to the conclusion of examinations), that is, 21 months, be found to be undue, there is ample justification for it.

[44] The Plaintiff raises three key justifications: (1) counsel's disorganization and misplacement of certain undertakings, mentioned above; (2) the Defendant's contribution to the length of these proceedings; and (3) the Plaintiff's set of circumstances preventing typical progression of litigation by virtue of her ongoing incarceration in a maximum facility prison during a pandemic.

[45] With respect to the Defendant's contribution to the length of these proceedings, the Plaintiff essentially argues that:

- It was to the Defendant's benefit and at his behest that the examinations took on such a gross proportion;

- It is by virtue of the excessive examination(s), that the Plaintiff's Statement of Claim (counting 116 paragraphs in total, some 112 of which contain an actual allegation) attracted 118 undertakings;

- As for the cancellations of examinations, the Plaintiff submits it is simply untrue that "no legitimate justification was provided" – the Defendant's own record reflects reasons for the cancellations of examinations and has not produced a single exhibit indicating any opposition from the Defendant to any of the postponed examinations; and

- The substantive amendments of the Statement of Claim are one by-product of a case wherein the events on which the litigation is based are ongoing and continuous.

[46] In regard to the challenges the Plaintiff asserts she faced in organizing undertakings in a maximum security prison, she submits that as an inmate under strict control of the Defendant, she has to actually rely on the latter so as to gain access to her own archives, records, as well as space to store her archives, space to arrange her undertakings, and means to have them sent out of the prison. The Plaintiff further submits that she also has to rely on the Defendant to have the time to execute her obligations.

[47] More specifically, the Plaintiff argues that throughout this litigation, the Defendant used his authority to create limits and impediments, not the least of which (the Plaintiff's access to her laptop computer) resulted in an interlocutory motion, which motion added nearly a year to this

case. She highlights different instances where she was in segregation, now known as in a Structured Intervention Unit [SIU], which prevented her from meeting her obligations. Accordingly, the Plaintiff submits that if the ultimate objective in assessing inordinate, inexcusable delay is the measure of a party's intention and dedication to carrying her case forward (citing *Hagwilget*), her efforts, combined with her cooperation, is a testament to such resolve.

[48] At the hearing, the Defendant replied to each excuse presented by the Plaintiff as well as the arguments she raised with respect to the undertakings made on a "best effort" condition and her counsel's maternity leave. First, with respect to the Plaintiff's submission that the file was interrupted by the interlocutory injunction she filed in 2023, the Defendant responds that the Court's November 24, 2022, Direction specifically provided that the Plaintiff and her counsel would continue to work on the undertakings from the examination for discovery held on June 29, 30 and July 11, 2022 (Exhibit MCD-21 of Ms. Marie-Claude Doucet's Affidavit). The Defendant adds that even after the order was made with respect to the interlocutory injunction, the Plaintiff never followed-up on the next steps of the proceedings while two emails from the Defendant were left unanswered (Exhibits MCD-25 and MCD-26 of Ms. Marie-Claude Doucet's Affidavit).

[49] Second, on the Plaintiff's set of circumstances, i.e., COVID and being incarcerated, the Defendant points to the fact that (a) she was already incarcerated when she filed her Statement of Claim; (b) her description of responding to undertakings is no different from a person that is not incarcerated as she had a computer in her cell until December 15, 2022, and the undertakings were still not entirely provided; and (c) COVID had limited consequences on her claim as she

spent a total of 63 days on a total of over 1,500 days in a SIU since she filed her Statement of Claim.

[50] Third, in response to the Plaintiff's submission that the Defendant contributed to the delay, namely that he had the possibility to obtain documents from his client, the Defendant submits this is simply irrelevant considering the goals of examination on discovery (*Glegg v Smith & Nephew Inc*, 2005 SCC 31 at para 22 [*Glegg*]). In addition, the Defendant asserts that if the Plaintiff had any objections to provide the documents, she had to make them in due time as undertakings are binding (*RE/MAX, LLC v Save Max Real Estate Inc*, 2021 CanLII 53761 at paras 10, 14 [*RE/MAX*]). The Defendant adds that the same reasoning applies for the duration of the examination: both parties agreed to this duration and the Plaintiff cannot now claim it was unreasonable.

[51] Fourth, in specific response to the Plaintiff's argument that the undertakings were made on a "best effort" condition, which "is not a guarantee that the relevant information/document(s) will be produced" (*Mukhtiar* at para 33), the Defendant submits that a best effort condition cannot remove the obligation to fulfill an undertaking (*RE/MAX* at para 45) and in any event, the Plaintiff has not submitted any evidence to show that she had in fact made her best effort.

[52] Fifth, with respect to the maternal leave of one of the Plaintiff's counsel, the Defendant argues that as early as September 2021, he tried to inquire multiple times if deadlines were met. The Defendant highlights that multiple Court directions provided that undertakings were to be provided on a continuous basis (Exhibits MCD-13 at para 1(b), MCD-15 at para 3 and MCD-19

at para 2 of Ms. Marie-Claude Doucet's Affidavit). Accordingly, the Defendant submits that the Plaintiff's difficulty to manage her file is irrelevant as she bears the onus to move her case forward (*Vermillion* at para 38; *Nichols* at para 10).

(2) Discussion

[53] There is little case law on what constitutes a valid excuse in the context of a dismissal for delay, as it is intimately related to the facts of each case.

[54] That being said, it is relevant to highlight that the Defendant's Motion comes at an early step of the claim, i.e., during the discovery phase. In this regard, the Defendant points to the Supreme Court of Canada's decision in *Glegg* with respect to the purpose of discovery:

> 22 … The examination on discovery facilitates the disclosure of evidence to ensure that trials are conducted fairly and efficiently. It thus enables a litigant to clarify the bases of the claim against him or her, to assess the quality of the evidence and, occasionally, to determine the appropriateness of carrying on with the defence or at least to better define its framework. Used properly, this procedure can help expedite the conduct of the trial and the resolution of the issues before the court (see Royer, at p. 411; *Lac d'Amiante*, at paras. 59-60). From this perspective, access to relevant evidence is inevitably linked to the defendant's right to make full answer and defence. If the relevance of the evidence is contested, the judge must settle the issue.
>
> [Emphasis added.]

[55] Further, the Federal Court of Appeal has outlined that examinations for discovery are the first step of an action and help to "render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them" (*Canada v CHR Investment Corporation*, 2021 FCA

68 at para 20 citing *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (TD) at para 5).

[56] More specifically, this Court has recognized that "the purpose of discovery before filing a defence is to assist the defendant in preparing the defence by discovering the case it has to meet" (*Victory Cycle Ltd v Polaris Industries Inc*, 2007 FC 466 at para 9, aff'd by 2007 FCA 259) and that "discovery is not a never-ending process" (*Nautical Data International, Inc v Navionics, Inc*, 2017 FC 756 at para 24 citing *John Labatt Ltd v Molson Breweries, a Partnership*, [1996] FCJ No 1047, 69 CPR (3d) 126 (TD)).

[57] On the significance of undertakings made during discovery, the Defendant highlights this Court's decision in *RE/MAX* in which Associate Judge Kathleen Ring found that undertakings are considered binding and that "[w]hen a party, being under no obligation to give an undertaking, freely undertakes to provide further answers or documents, the undertaking must be honoured" (*RE/MAX* at para 10 citing *Bruno v Canada (Attorney General)*, 2003 FC 1281 at para 5; *Angelcare Canada Inc v Munchkin, Inc*, 2021 FC 238 at para 62). As such, a party cannot unilaterally renege on an undertaking: only the Court may relieve a party of an undertaking (*RE/MAX* at para 11). Lastly, Associate Judge Ring outlines that "if a party is of the view that obtaining answers to the questions posed would be onerous or expensive, the time to object is when he is asked the question" and that a party who undertook to provide the information is obligated to answer the question (*RE/MAX* at para 14 citing *AE Hospitality et al v George et al*, 2017 ONSC 2861 at paras 52-53).

[58] I note that in her decision on *Vermillion*, Madam Justice Jocelyne Gagné highlighted that "it is well known that successive counsel take the file in the state in which they find it" (*Vermillion Networks Inc v Green Circle Ideas Inc*, 2024 FC 1455 at para 83).

[59] Given the above, I agree with the Defendant's arguments in response to the excuses, outlined above, and find the excuses are not justified and the delay is inexcusable. I am sensitive to the Plaintiff's general circumstances and appreciate the fact that her incarceration presents particular challenges in regards to the judicial processes. However, they do not excuse in a sufficient manner the four-year delay to complete her examination, particularly given the fact that she had a computer in her cell until December 2022, i.e., six months after the last undertakings were made, and that eight directions were issued by this Court to address the examinations and undertakings.

[60] Further, and in specific response to the Plaintiff's argument that the Defendant should raise his dissatisfaction with the undertakings provided to the trial judge, I highlight that this seemingly defeats the purpose of discovery. As outlined above, the discovery phase allows a defendant to know the case to be met, to assess the quality of the evidence and ultimately to make full answer and defence (*Glegg* at para 22). Undertakings are part of the discovery and when a party made a promise to provide the information, the other party is entitled to receiving the full and complete disclosure of that information (*RE/MAX* at paras 9-14; *Triteq Lock & Security, LLC v Minus Forty Technologies Corp*, 2023 FC 819 at paras 1, 8 [*Triteq*]).

D. *Serious Prejudice to the Defendant by the Delay*

(1) Parties' position

[61] Regarding the third element of the test, the Defendant submits that at this stage, the test is not whether the Defendant suffered prejudice but whether he is likely to be seriously prejudiced by the delay (*Vermillion* at para 59). According to the Defendant, in the present case, the Court should presume prejudice based solely on the undue and inexcusable delay (*Nichols* at para 11). Alternatively, the Defendant submits he is suffering real prejudice as a result of this undue and inexcusable delay, and highlights that:

1. The facts on which the Plaintiff's action is based go back to 2016 and will require several witnesses to recall events that would have occurred many years ago. The more time passes, the more difficult it will be for witnesses to recall the events in question and for the Defendant to secure the presence of key witnesses;

2. In 2022 and 2023, the Assistant Deputy Commissioner, Correctional Operations, for the Quebec Region and the warden of Joliette Institution respectively retired and are no longer under the control of the Defendant. In light of the allegations contained in the Claim, their functions make them key witnesses. The key role of the Assistant Deputy Commission, Correctional Operations is further illustrated by the evidence she gave in another proceeding filed by the Plaintiff (referring to *Boulachanis c Thibodeau*, 2020 QCCS 1020 at para 150); and

3. Litigation that drags on has adverse consequences (*1196158 Ontario Inc v 6274013 Canada Limited*, 2012 ONCA 544 at paras 33-45) and additional costs for the parties (*Behnke* at paras 31-32). The Defendant has the right to expect that a case will proceed without undue delay (*Ruggles* at para 4; *Hagwilget* at para 33; *Waterside Cargo Co-operative v Canada (National Harbours Board)*, [1986] FCJ No 921, 1986 CarswellNat 809 [*Waterside Cargo*]).

[62] In response, the Plaintiff asserts that the Defendant invokes a number of cases which are meant to support his claims that serious prejudice is likely in this case with a 45-month delay (that is three years and nine months), but none of the cases approach such passage of time. For example, in *Behnke*, *Nichols* and *Waterside Cargo*, the delay was ten years.

[63] The Plaintiff submits that in referring to the above-mentioned cases, the Defendant attempts to draw a line between those where witnesses had retired and those where they were difficult to summon as no longer under the "control" of a party. However, she argues this does not obstruct an action supported by a comprehensive paper trail of evidence, demonstrated such as here, and where the two retired witnesses were not the only sources of pertinent information.

[64] Citing *Dodd v Stork Craft Manufacturing Inc*, 2022 BCSC 512, the Plaintiff highlights that fading memories are not in and of themselves forms of prejudice. Accordingly, she argues the newly retired witnesses are not indispensable to the case, are not yet so removed from the events (contrary to case law) so as to be incapable of recalling key events, and not being under the Defendant's control is not dispositive of their utility as witnesses - if anything, it may

encourage them to be more candid about the events they may be asked about, should their testimony be, in fact, necessary.

(2) Discussion

[65] This Court has previously stated that “evidence of prejudice to other parties is relevant but not essential to an order of dismissal for delay” (*Underwriters Laboratories Inc v San Francisco Gifts Ltd*, 2009 FC 909 at para 4).

[66] On the issue of evidence relating to prejudice, Associate Judge Coughlan further noted in *Comartin* at paragraph 37 that “[d]efendants are not required to lead evidence of actual prejudice suffered” and that “[a]s the Court in *Sweet Productions* concluded at para 35, the test is whether the defendant is likely to be seriously prejudiced by the delay.” [Emphasis in the original.]

[67] At paragraph 79 of *TSD*, Associate Judge Coughlan agreed with the applicant’s submission that the Court may infer prejudice where there is a finding of inordinate or undue delay. Further, Associate Judge Coughlan outlined that the test is whether the defendant is likely to be seriously prejudiced by the delay without resorting to the fiction of discovering prejudice “by an assumption that the memories of witnesses have faded over time, or worse, by requiring the defendant to show, in fact, that the memories of witnesses have faded, thus prejudicing a defendant's position if the motion is unsuccessful” (*Universal Graphics Ltd v Canada*, 1997 CanLII 16683 (FC)).

[68] That being said, the longer the delay, the greater the likelihood of serious prejudice at trial as the passage of time weakens the witnesses' recollection of events. Where a plaintiff's

delay is sufficient to warrant an order dismissing the action, any subsequent delay on the part of the defendant does not alter that fact (Saunders et al in the *Federal Courts Practice, 2024* (Toronto: Thomson Reuters) at 681 on the case *Canada v Aqua-Gem Investments Ltd*, [1991] 2 CTC 277, [1991] FCJ No 1119, aff'd by 1993 CanLII 2939 (FCA), [1993] 2 FC 425).

[69] Additionally, in *Morrisonn v Canada (TD)*, 1995 CanLII 3557 (FC), this Court highlighted that where a key witness does not have an independent recollection of the events, there is sufficient prejudice to dismiss the matter:

> The defendant was likely seriously prejudiced by the delay because the witness who could have proven the defence was unable to give any relevant evidence. A witness may refresh memory for testifying at trial by using notes or a written statement made by the witness at, or nearly at, the time of the occurrence of an event. As to contemporaneity of the record, the Court will fix a time limit beyond which the memory of the witness may not be trusted. The requirement of contemporaneity must be more strictly enforced in the case of a witness who has no independent recollection. It is very probable that a court would reject the use of the witness' statement herein on the basis that it was not contemporaneous, particularly because the witness had no independent recollection of the events and was unable to say if the allegations therein were true.

[70] At the hearing, the Defendant highlighted that in this case, prejudice is not only inferred, it has also already materialized as two witnesses have already retired.

[71] I agree, based on the case law and the evidence, that the Defendant has established a likelihood of serious prejudice. As stated in Ms. Geneviève Thibault's affidavit, two potential key witnesses have already retired. Though the Plaintiff argued at the hearing that nowhere in the record does it indicate that these persons will be witnesses, I agree with the Defendant that the

functions occupied by these persons, i.e., Assistant Deputy Commissioner, Correctional Operations, for the Quebec Region and warden of the Joliette Institution, would likely make them valuable witnesses for the Plaintiff's claim, see *Boulachanis c Thibodeau*, 2020 QCCS 1020 at paragraph 150.

E. *Are There Other Appropriate Sanctions?*

(1) Parties' position

[72] Lastly, the Defendant asserts that there is no other appropriate sanction as this case has been under special case management since November 2020 to no avail. He adds that this Court has already issued multiple directions to manage this case and impose deadlines on the Plaintiff, but the case is still at a very preliminary stage four years in. In this context, the Defendant submits it is fair and reasonable for the Court to provide the ultimate sanction of dismissing the Claim as it is the only option left.

[73] The Plaintiff responds that even if the Court found the delay undue, inexcusable and likely to cause serious prejudice, dismissing the case is not the proper sanction. She reiterates that the delay occasioned in this case, if construed as unduly, are all excusable. However, even if their justification does not meet the standards applicable in light of the reticence and lack of fault on her part, the Plaintiff argues the Court can address the issue through a balanced approach as she suggests, such as extending deadlines or implementing case management strategies and improved communication between counsels.

[74] As a last argument, the Plaintiff stresses that her counsel had located missing undertakings and all have been duly provided to the Defendant, all subject to the Court's authorization for their use at trial. She adds there is ample evidence that the action has again come to life and she does not deserve to be deprived of her day in court.

(2) Discussion

[75] The Federal Court of Appeal has previously found that dismissal for late delivery of undertakings was too drastic a sanction since the matter could have proceeded to trial as scheduled in that matter (*Dick v Canada*, 2000 CanLII 15113 (FCA)). Also, as Associate Judge Coughlan outlined in *Comartin* at paragraph 21: "… in every case, Rule 167 requires the Court to consider the imposition of sanctions less drastic than dismissal." In other words, dismissal is not the presumptive remedy on delay and the Court must first determine whether another less drastic measure should be considered instead (*TSD* at para 81).

[76] At the hearing, the Defendant stressed, on the other hand, that this case was already specially managed and that the objectives of case management were frustrated (*Vermillion* at para 18). He pointed to *TSD* where this Court emphasized that "once a matter is placed in case management, the Court will have little patience for the party in default" (*TSD* at para 83).

[77] Further, the Defendant referred to Associate Judge Horne's findings in *Triteq* at paragraph 16: "If any part of the discovery process has been carved in stone for decades, it is that undertakings are expected to be answered in full and on time." The Defendant concluded by submitting that nothing in the record showed that the Plaintiff would act differently in the future

should the Motion be dismissed. Accordingly, the Defendant stated the dismissal for delay is the only remedy available here.

[78] On the other hand, the Plaintiff stressed at the hearing that the Court has been reluctant to dismiss cases under Rule 167 and that the case law cited by the Defendant concerned cases where no steps were taken, which is not the Plaintiff's case. Accordingly, the Plaintiff suggested that as an alternative to the dismissal, the Court could reiterate the April 16, 2024 Direction. The Plaintiff also submitted that at the trial, she would be foreclosed from using what had not been produced yet. She added that there was no reason for which the Statement of Defence could not be produced on an expeditious basis.

[79] I am mindful that the dismissal is a sanction of last resort and that alternatives must be considered if possible. However, in this case, the alternatives have already been exhausted without any concrete results: the file has been case managed and it has not been shown that reiterating the same Direction, as suggested, or extending deadlines, would bring different results. Rather, four years in, the examination on discovery of the Plaintiff is not completed and accordingly, the Statement of Defence has not been filed. It appears unrealistic to believe, as the Plaintiff suggested at the hearing, that the file would be ready for trial in about six months.

V. Conclusion

[80] Consequently, given my conclusion on each element above, I find dismissal is warranted in this case.

[81] Both parties requested costs. On the quantum, the Defendant requests costs at the high end of the Tariff considering the circumstances of the case while the Plaintiff did not make submissions. I am satisfied costs according to Rule 407 are appropriate.

JUDGMENT in T-1119-20

THIS COURT'S JUDGMENT is that:

1. The Defendant's Motion is granted.

2. The Plaintiff's Statement of Claim is dismissed.

3. Costs are awarded in favour of the Defendant according to Rule 407.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1119-20
STYLE OF CAUSE:	JAMIE BOULACHANIS v HIS MAJESTY THE KING
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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JUDGMENT AND REASONS:	ST-LOUIS J.
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APPEARANCES:

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