

Federal Court



Cour fédérale

Date: 20140930

Docket: T-1269-06

Citation: 2014 FC 930

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

BETWEEN:

**LA SOCIÉTÉ ÉDUCATIVE DU PROJET
CONJOINT DE L'ALBERTA**

**Plaintiff
(Defendant by Counterclaim)**

and

HER MAJESTY THE QUEEN

**Defendant
(Plaintiff by Counterclaim)**

REASONS FOR ORDER

PROTHONOTARY LAFRENIÈRE

[1] These reasons apply to Court files T-1269-06, T-1270-06, T-1271-06 and T-1272-06, given that the facts and points raised respectively by each of the parties in the four actions are practically identical. A copy of the reasons will be placed in each of these files.

[2] The defendant, Her Majesty the Queen (the Crown), seeks an order dismissing the actions on the ground that the plaintiffs' pursuit of the actions would cause undue delay. Even though the *Federal Courts Rules* provide at section 167 for a motion to dismiss an action on the ground

of undue delay, such motions will be only very rarely brought in case management, given the active role assumed by the Court in monitoring the status of all proceedings: *Multibond Inc v Duracoat Powder Manufacturing Inc*, 1999 CanLII 8948 (FC), (1999), 177 FTR 226 (FC), para 15. However, after a careful review of the background of proceedings, I have concluded that the unusual and excessive delays in these matters by the plaintiffs constitute extraordinary circumstances that justify the Court's intervention.

[3] In support of its motion, the Crown relies on the affidavit of Jessica Winbaum, sworn on August 26, 2014. The plaintiffs did not file any evidence by affidavit in reply. However, the plaintiffs' counsel made submissions on the merits of the motion. The relevant and undisputed facts may be summarized in the following manner.

[4] The four actions were initiated when a statement of claim was filed on July 21, 2006. The Crown produced its defence in the four files on September 5, 2006, as well as a counterclaim in T-1269-06 and T-1271-06. The Crown subsequently filed a joint motion in case management, which was allowed on November 9, 2006. The four actions were then part of a single case management. The pleadings have been closed since August 2007.

[5] The plaintiffs served their affidavits of documents on April 10, 2007. According to the Crown, the description of certain documents was insufficient and the grouping did not comply with the Rules. The plaintiffs were required by the Court to provide further and more detailed affidavits of documents.

[6] The Crown served its affidavits of documents in April 2007 and additional affidavits on August 28, 2007. Two Crown representatives were examined beforehand by counsel for the

plaintiffs in July 2008 and January 2010. The Crown provided answers to the undertakings made during the last examinations, in July 2011.

[7] The examinations by the plaintiffs' representative did not take place in 2008 as their counsel at the time was not bilingual and all the documents had to be translated from French to English. The new counsel for the plaintiffs then requested an extension to familiarise himself with the four files.

[8] In preparing for the examinations of the plaintiffs' representative at the beginning of 2010, counsel for the Crown realized that the amended affidavits of documents and the documents produced by the plaintiffs were inadequate, which interfered with the right to an effective examination. These deficiencies were brought to the attention of counsel for the plaintiffs by letter dated February 17, 2010.

[9] In a report dated April 8, 2010, counsel for the plaintiffs informed the Court that a problem with the electronic version of documents produced by the plaintiffs had been identified by the Crown. He explained in his letter:

We are in the process of attempting to resolve this issue with Counsel for the Defendant following which we would expect to schedule and complete examinations for discovery of the Plaintiffs' representative in a reasonably timely manner with the anticipated cooperation of Counsel for the Defendant.

[10] By order, dated December 3, 2010, the Court ordered as follows:

2. The Plaintiff shall use best efforts and take reasonable steps to rectify any outstanding issues that the Defendant may have identified with regard to the use of the Plaintiff's electronic records production on or before January 31, 2011.

[11] By order dated June 30, 2011, the Court once again ordered the plaintiffs to address the problems raised by the Crown regarding the production of documents as soon as possible and serve an amended affidavit of documents. The plaintiffs have continued to procrastinate since then. As regards the communication of documents, different orders have resulted in obtaining several extensions to fulfill its obligations.

[12] The constant failure of the plaintiffs to completely produce and disclose the relevant documents, in a timely manner and in accordance with the disclosure orders, has considerably delayed the hearing of these matters and has resulted in ample correspondence from counsel for the Crown requesting that the plaintiffs comply with the disclosure orders and in the Court's intervention on numerous occasions. For several years, the Court has tried unsuccessfully to encourage the plaintiffs, by any means (including issuing a peremptory order on January 10, 2014), to fulfill their undertakings.

[13] I note that the progress of the four actions has been remarkably slow over the eight years and especially since 2012. The plaintiff failed to provide, in a timely manner, electronic documents in a readable format, even though they made undertakings several times to do so. Finally giving up, the Crown requested that the actions be dismissed.

[14] The plaintiffs today claim that there were difficulties that prevented them from acting in a timely manner and they want to obtain an additional delay without providing any tangible

evidence of their ability follow up on their undertakings. In his written submissions, counsel for the plaintiffs is limited to promising to take all necessary steps to advance the actions as soon as the Court agrees. It may be deduced, from the fact that the plaintiffs did not include a schedule in their written submissions, that the plaintiffs have not yet rectified their failure and that they will always be unable to complete these files. The plaintiffs' failure to propose a schedule or concrete measures to advance the file is sufficient in itself to dismiss the application for delay.

[15] I recognize that the drastic remedy, consisting in dismissing an action, should only be raised as a last resort. However, the Court has no alternative, given that the plaintiffs neglected several times to fulfill their undertakings and comply with the Court's orders.

[16] Since I agree with the substance of the written submissions filed on behalf of the Crown, which I adopt and make mine, I find that the plaintiffs' actions should be dismissed with costs.

“Roger R. Lafrenière”

Prothonotary

Vancouver (British Columbia)
September 30, 2014

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1269-06

STYLE OF CAUSE: LA SOCIÉTÉ ÉDUCATIVE DU PROJET CONJOINT
DE L'ALBERTA and HER MAJESTY THE QUEEN

**MOTION IN WRITING CONSIDERED AT VANCOUVER (BRITISH COLUMBIA)
PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

DATE OF HEARING: SEPTEMBER 30, 2014

REASONS FOR ORDER: PROTHONOTARY LAFRENIÈRE

DATED: SEPTEMBER 30, 2014

APPEARANCES:

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