

Case Summary: LDS v SCA

Defence + Indemnity

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Forensic analysis of voluminous data and electronic devices can constitute steps which "significantly advance" an action to resist an application for dismissal of the litigation on account of delay.

LDS v SCA, 2020 ABQB 586

Facts + Issues

LDS v. SCA was a "revenge porn" claim commenced by Statement of Claim on May 6, 2016. The Plaintiff sued the Defendant (her former intimate partner), alleging that he had hacked into her personal email account, forwarded nude and semi-nude photos of her to her new partner, and posted them to various pornographic websites, all without her consent.

On May 11, 2016, the Court granted an Anton Pillar Order authorizing the Plaintiff to seize and forensically examine the Defendant's electronic devices under the supervision of an independent supervising solicitor ("ISS"). The ISS "encountered significant difficulty in undertaking, with technical assistance, the examination of these devices" (para. 31).

The ISS issued several Interim Reports prior to the conclusion of their investigation. The reports detailed that the ISS had reviewed extensive accounts and devices as well as several email accounts. Furthermore, the ISS concluded that the Defendant had lied with an intention to mislead the ISS as to the ownership and location of an iPad, which the Defendant claimed was stolen.

The case was in Case Management, which resulted in multiple appearances over time.

On March 9, 2020, the Defendant applied to dismiss the action for delay pursuant to Alberta Rules 4.31 and 4.33. Rule 4.33(2) (the "drop-dead" Rule) provides that "[i]f 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant". Rule 4.31 provides as follows:

Application to deal with delay

4.31(1) If delay occurs in an action, on application the Court may

- a. dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or. . .

(2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

HELD: For the Plaintiff; application dismissed

The Court rejected the Defendant's bid for dismissal pursuant to the Drop Dead Rule 4.33(2).

- a. The Court noted that this Rule was "designed to bring to an end an action that has become inactive and should be deemed to be abandoned" (*Turek v Oliver*, 2014

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- ABCA 327, at para 5) and that it must be applied through a "functional approach", in light of the functional rules (para. 8–9).
- b. Belzil, J. summarized the law as to what constitutes a "significant advance in the action":

[12] In *Jacobs v McElhanney Land Surveys Ltd.*, 2019 ABCA 220, at para 86, the majority stated the following about what constitutes a significant advance in the action:

[86] To determine whether there is a significant advance – important or notable progress – a court must assess at the start and end points of the applicable period the degree to which the factual and legal issues dividing the parties have been identified and the progress made in ascertaining the relevant facts and law that will affect the ultimate resolution of the action. Has anything that happened in the applicable period increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action? Are the parties at the end of the applicable period much closer to resolution than they were at the start date?

- c. The Court concluded that "[g]iven that civil actions are so diverse, it necessarily follows that what constitutes a significant advance in a given action is inextricably linked to the nature of that action". (para. 15)
- d. The Court held that in light of attempts by the Defendant to mislead the ISS, the ongoing ISS investigations of the voluminous data involved had generated sufficient information towards a final ISS report that they had "significantly advanced" the action:

[17] This action cannot be properly litigated in the absence of a detailed forensic analysis of these electronic devices to determine what data was generated by the Defendant using them and to what extent, if any, the data includes the images of the Plaintiff, as alleged in the Statement of Claim.

[18] Steps undertaken to retrieve and forensically analyze this data constitute significant advances in the action because without them the action cannot proceed.

...

[22] It is noteworthy that even though the Second and Third Reports of the ISS are interim reports only, they contain significant new information which builds a foundation for the completion of the Final Report of the ISS which has not yet been received.

[23] While I acknowledge that the work of the ISS is not yet complete, he has been able to forward substantial information in these Interim Reports which identify the factual and legal issues in the case.

[24] Given the foregoing, it is clear that reports of the ISS received thus far significantly advance the action.

- e. In addition, the Court noted that the facts of the Case Management supported this conclusion:

[25] Moreover, this file remains under active Case Management. There have been multiple appearances before me in the subject three year period, all of which were conducted for the purpose of significantly advancing the action.

[26] There is no air of reality to the argument that this action has become inactive and should be deemed to have been abandoned. The action has significantly advanced in the period March 9, 2017 to March 9, 2020. The application to dismiss pursuant to R 4.33 is dismissed.

The Court also rejected the Defendant's position regarding the general delay rule (Rule 4.31):

[28] In *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd.*, 2019 ABCA 276 at para 18 it was observed that whether delay is inordinate "is to be determined in light of all of the circumstances in a particular case".

[29] As noted above, the pivotal issue in this litigation is whether the Defendant, without the consent of the Plaintiff, posted intimate images of her on the internet.

[30] The APO was granted for the express purpose of searching the Defendant's electronic devices to determine whether they contain data relevant to the issues in the action.

[31] The ISS has encountered significant difficulty in undertaking, with technical assistance, the examination of these devices.

[32] The sheer volume of data and the multiplicity of electronic devices and accounts underlie the delays which have been encountered by the ISS in completing his work.

[33] Moreover, this situation has been exacerbated by the Defendant's own conduct, including misleading the ISS and delaying the provision of search parameters intended to safe guard the privilege claims of the Defendant.

[34] In light of these circumstances, it would not be just and equitable to find that the delay complained of by the Defendant is inordinate.

COMMENTARY

This very practical and well-reasoned analysis is likely to be of significant value in a growing number of cases in the context of the modern world, as it involved the use of electronic records and communications. It was wise for the Plaintiff to have interim reports produced as time went on, as evidence of the progress being made and to keep the matter's status current by way of Case Management.