IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Knight v. Imperial Tobacco Canada Limited,* 2017 BCSC 1487

Date: 20170823
Docket: L031300
Registry: Vancouver

Between:

Kenneth Knight

Plaintiff

And

Imperial Tobacco Canada Limited

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:	D. Lennox D.S. Sall
Counsel for the Defendant:	B. Olthuis A. Coleman
Place and Date of Hearing:	Vancouver, B.C. June 23, 2017
Place and Date of Judgment:	Vancouver, B.C. August 23, 2017

INTRODUCTION

[1] The defendant, Imperial Tobacco Canada Limited, applies for an order that this class action be dismissed for want of prosecution.

[2] The representative plaintiff, Kenneth Knight, brings the action on behalf of British Columbia purchasers of "Light" and "Mild" brands of cigarettes manufactured by the defendant. The plaintiff alleges that the defendant deceptively marketed those cigarettes as posing a reduced health risk compared with other cigarettes. The plaintiff's claim includes return of money paid for the products or disgorgement of profits made by the defendant. It expressly excludes any claim for damages for personal injuries.

[3] It has been 14 years since the action was started, 12 years since it was certified as a class action, and 10 years since the products at issue were last sold in British Columbia. Prior to October 2016, the plaintiff had taken no steps in the action for seven years.

PROCEDURAL HISTORY

[4] The plaintiff commenced the action on May 8, 2003.

[5] On April 30, 2004, the defendant filed a statement of defence and, on the same day, filed a third party notice seeking contribution and indemnity from the federal government.

[6] On February 8, 2005, Madam Justice Satanove certified the proceeding as a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*"CPA"*]: *Knight v. Imperial Tobacco Canada Limited*, 2005 BCSC 172.

[7] On May 11, 2006, the Court of Appeal shortened the class period and narrowed the common issues, but otherwise upheld the certification: *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235.

[8] On July 3, 2007, Satanove J. struck the third party notice against the federal government: *Knight v. Imperial Tobacco Canada Limited*, 2007 BCSC 964.

[9] The Court of Appeal allowed the defendant's appeal from that order on December 8, 2009: *Knight v. Imperial Tobacco Canada Limited*, 2009 BCCA 541. The federal government appealed to the Supreme Court of Canada, which allowed the appeal and struck the third party proceedings in their entirety on July 29, 2011: *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42.

[10] On September 29, 2009, the plaintiff delivered a list of documents, but nothing else occurred until October 3, 2016 when plaintiff's counsel wrote to defence counsel serving a notice to admit, making document requests under R. 7-1(11) of the *Supreme Court Civil Rules* ["*SCCR*"] and requesting the nomination of a corporate representative for discovery under R. 7-2(5)(b). At the time of that correspondence, the plaintiff had not filed a notice of intention to proceed as required by R. 22-4(4), but did so on October 21, 2016. The defendant filed the present motion to dismiss the action for want of prosecution on March 17, 2017.

[11] Meanwhile, the issue of "Light" and "Mild" cigarettes was one of a number of issues in a Quebec action against three tobacco companies, including the defendant. On June 9, 2015, Justice Riordan found the defendants liable to class members for certain alleged misrepresentations and awarded a $15 billion judgment, but dismissed the specific claims relating to alleged deceptive practices in the marketing of "Light" and "Mild" cigarettes: *Létourneau c. JTI-MacDonald Corp*., 2015 QCCS 2382 [*Létourneau*]. An appeal from that decision was heard by the Quebec Court of Appeal in November 2016. No decision had been made as of the date of these reasons.

[12] The defendant stopped selling "Light" or "Mild" cigarettes in British Columbia in 2007.

[13] The defendant faces other litigation across Canada, including actions by all 10 provinces against the defendant and other tobacco companies for recovery of their health care costs associated with tobacco use.

THE PARTIES' POSITIONS

[14] The defendant says the delay in this case has resulted in significant prejudice. It lists a number of witnesses it says are important who have either died or become incapacitated during the period of the plaintiff's inactivity. These include three former executives of the defendant who were involved in the development and marketing of the kind of cigarettes at issue and seven former federal officials, including ministers, who had personal knowledge of the government's involvement in the development and promotion of them.

[15] The plaintiff says that if those witnesses were critical to this case, they would have been equally critical to the *Létourneau* case in Quebec and to all of the other litigation involving the defendant. Yet, the plaintiff says there is no evidence that the defendant took any steps in any proceeding in Canada to preserve their testimony by means of a deposition under R. 7-8 of the *SCCR*, or its equivalent, in other provinces. The plaintiff says this and all other pending trials will proceed on the basis of business records and expert evidence, as is common for product liability claims.

[16] The plaintiff also says the slow progress of this case is consistent with other tobacco litigation. The British Columbia government's case against the tobacco industry has been ongoing for 19 years, with no trial date yet scheduled, and the *Létourneau* action in Quebec took 14 years to reach trial.

[17] Counsel for the plaintiff submits that it was reasonable to take no steps while waiting, first, for the Supreme Court of Canada to decide on the validity of the third party proceeding in this action and then for the Quebec Superior Court to decide *Létourneau*.

THE LAW

[18] Rule 22-7(7) of the *SCCR* provides that, where it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed. The test for such a dismissal was described by the Court of Appeal in

0690860 Manitoba Ltd. v. Country West Construction Ltd., 2009 BCCA 535 ["*0690860 Manitoba*"] at para. 27:

> [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:
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> (1) the length of the delay and whether it was inordinate;
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> (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
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> (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
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> (4) whether, on balance, justice requires dismissal of the action.

[19] Section 40 of the *CPA* states that the *SCCR* apply to class proceedings "to the extent that those rules are not in conflict with this Act." The *CPA* is silent on whether class proceedings may be dismissed for want of prosecution. The *CPA* does provide that special requirements apply when ending a class proceeding: s. 35(5) requires the court to consider whether the class members should be notified of the result, and s. 35(1) requires court approval for discontinuance of the action.

[20] I find that an order dismissing the action would satisfy the approval requirement and, provided the special notice consideration is observed, there is no conflict between R. 22-7(7) and the *CPA.* There is, therefore, no statutory bar to a class action being dismissed for want of prosecution. However, the fact that a proceeding is a class action, with all the unique challenges and complications that may involve, is a relevant consideration in determining whether the delay in a particular case has been inordinate or inexcusable.

THE TEST FOR DISMISSAL

Inordinate Delay

[21] The first factor is whether there has been "inordinate delay". Inordinate delay means a lengthy delay that exceeds the normal timeframe for litigation of a similar type or nature, subject to the particular facts of the litigation in question. A relatively short delay in some cases may be inordinate while a very lengthy delay in other cases may not be: *Wright v. Yen*, 2013 BCSC 753 ["*Wright*"] at para. 26.

[22] The delay to be considered is the delay in prosecuting the action from the time it was commenced: *Ed Bulley Ventures Ltd. v. Pantry Hospital Corp.*, 2014 BCCA 52 ["*Ed Bulley*"] at para. 38. The relevant period in this case is, therefore, more than 14 years. In fact, although the plaintiff took some steps in October 2016, no examinations for discovery have been scheduled and there will likely have to be further document production. The matter is, therefore, still years away from reaching trial, meaning further delay.

[23] The plaintiff is not responsible for the entire delay period. The defendant and the federal government litigated the defendant's third party notice all the way to the Supreme Court of Canada. The plaintiff had little to do with those proceedings, and, although more than six years have now passed since the Supreme Court of Canada put the issue of third party proceedings to rest, he cannot be faulted for waiting until he knew who the proper parties to the action were.

[24] However, delay in an action should not be considered piecemeal. The proper approach is to consider it holistically; that is, whether the overall delay in prosecuting an action is inordinate: *Ed Bulley* at para. 38.

[25] The plaintiff refers to the length of time other tobacco litigation has taken and to class actions of other kinds that took more than a decade to reach trial, including:

- *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983 (10 years);
- *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2016 BCSC 1713 (12 years); and

- *Berry v. Pulley*, 2012 ONSC 1790 (14 years).

[26] However, the amount of delay in other cases is not particularly instructive, as delay must be considered on the specific facts of each case: *Lebon Construction Ltd. v. Wiebe*, [1995] B.C.J. No. 1537 (C.A.) at para. 40. In any event, the issue of inordinate delay is so factually dependent that I would require more detailed evidence about how the litigation progressed in those cases. In particular, there is no evidence that any of them were at a complete standstill for several years, as this case was.

[27] Whether there has been inordinate delay will depend on the nature of the litigation. Not only is this a class proceeding, the nature of the allegations (including claims of deceptive marketing practices and willfully concealing materials), the subject matter (tobacco litigation), the anticipated large amount of business records, and the need for expert evidence all suggest the complexity of this litigation. That clearly weighs in the plaintiff's favour.

[28] But although class proceedings may generally be complex, and this case is no exception, I find that a delay of 14 years and counting, with the litigation still in its early stages following a seven-year period of inactivity, exceeds the "normal timeframe" for class proceedings of this nature: *Wright* at para. 26. I conclude that the delay must be seen as inordinate.

Excusable Delay

[29] The second factor is whether the inordinate delay is excusable considering the reasons for the delay. The reasonableness of an excuse for inordinate delay must be considered in light of the circumstances of the case. What amounts to a reasonable excuse in one case may not be a reasonable excuse in another: *0803589 B.C. Ltd. (formerly Ralph's Auto Supply (B.C.) Ltd.) v. Ken Ransford Holding Ltd*., 2015 BCSC 1428 ["*Ralph's Auto Supply*"] at para. 27.

[30] The plaintiff has an obligation to prosecute the case with reasonable diligence. By contrast, the defendant has no obligation to spur the plaintiff to proceed

to trial, and is entitled to wait and then apply to dismiss for want of prosecution: *Campbell v. Nott*, 2016 BCSC 1520 at para. 21.

[31] The plaintiff says the delay was principally a result of a desire to wait until the *Létourneau* action was resolved before taking real steps to pursue this claim. There were good reasons to await that result. As the plaintiff submitted, the resolution of the *Létourneau* action had the potential to resolve all outstanding litigation against the defendant, whether, if successful, by forcing the defendant into bankruptcy or by motivating the defendant into national settlement discussions.

[32] In addition, by awaiting the result in *Létourneau*, the plaintiff could benefit from the lessons learned in that case and the evidence adduced in it in order to prosecute this claim in a more efficient and effective manner. That evidence in *Létourneau* included the testimony of 27 experts and 43 lay witnesses and over 20,000 admitted exhibits.

[33] The defendant argues that the plaintiff has adduced no evidence of a decision to await the resolution of the *Létourneau* case. I find that there is some evidence, although sparse, of such a decision. For example, an affidavit from plaintiff's counsel's legal assistant says she was advised by counsel that the events in the *Létourneau* case were being monitored. That monitoring included travel by counsel to Montreal to hear opening statements in the trial and arrangements to collect copies of transcripts and exhibits. Those copies were not received until Riordan J.'s judgment was issued. The court may consider any reasons for the delay "inferred from the evidence"; I am able to infer that the plaintiff, through his counsel, made a mainly tactical decision to await the results of the *Létourneau* trial: *0690860 Manitoba* at para. 27(2).

[34] The question then is whether a tactical decision to delay the proceedings is excusable. The defendant submits that *Ralph's Auto Supply* at para. 27 establishes that it is not:

> [27] … tactical delays intended to help the plaintiff's case are not a valid reason for delay. This was described in *Irving v. Irving* (1982), 38 B.C.L.R. 318 at 324 (C.A.), as follows:
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> > A delay as a means of gaining tactical advantage is not to be compared to a delay forced on the plaintiff by negligent solicitors, impecuniosity, or illness. This delay was intentional, calculated to help the plaintiff and therefore hurt the defendants.

[35] But *Tundra Helicopters Ltd. v. Alison Gas Turbine*, 2002 BCCA 145 [*Tundra Helicopters*] recognized an exception to that general rule. At para. 22, the court found that inordinate delay may be excused if a plaintiff was awaiting the resolution of a related proceeding in another jurisdiction in order to save litigation costs, obtain the benefit of a review of the available evidence or improve settlement prospects:

> [22] In my respectful view, it was error in principle for the learned judge to find … that the delay was unreasonable because the decision to do so was "tactical in nature". In circumstances such as arose here, it cannot be held against the plaintiffs that they wished to save litigation costs or obtain the benefit of a review of the available evidence or that they hoped to improve their settlement prospects. Those are legitimate objects, a view which the defendants appear to have shared.

[36] I find that that exception is applicable here. The plaintiff reasonably and sensibly awaited the outcome of the *Létourneau* action in order to save litigation costs by waiting to see if the verdict pushed the defendant into bankruptcy or a national settlement or, alternatively, to benefit from the lessons learned from that action, including a review of the available evidence.

[37] The defendant argues that this case is distinguishable from *Tundra Helicopters*, where the defendants, either expressly or implicitly, agreed to the plaintiffs' plan to await the results in related proceedings. No such agreement was reached in this case and, until recently, the plaintiff never communicated any rationale for the delay to the defendant.

[38] I do not read *Tundra Helicopters* as requiring such an agreement to excuse this type of delay. The decision appears to have turned primarily on whether the delay was "calculated to help the plaintiff and therefore hurt the defendants" in a

manner comparable to that in *Irving v. Irving* (1982), 38 B.C.L.R. 318 (C.A.) at 324 [*Irving*].

[39] As the court in *Tundra Helicopters* said at paras. 23–24:

> [23] The phrase "tactical in nature" is presumably derived from the reasons of Seaton J.A. for the majority in *Irving*, supra, who said at p. 324:
>
> > A delay as a means of gaining tactical advantage is not to be compared to a delay forced on the plaintiff by negligent solicitors, impecuniosity, or illness. The delay was intentional, calculated to help the plaintiff and therefore hurt the defendants.
>
> [24] Clearly, that passage cannot apply to a case such as this where the defendants acquiesced (two of them expressly and two by conduct). In my view, the passage quoted from Irving is applicable only to the type of situation in that case, one in which the delay was "calculated to help the plaintiff and therefore hurt the defendants". That factor was simply not present in this case.
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> [Emphasis added]

[40] The "situation" in *Irving* that the court was referring to was a decision by the plaintiff to put the proceedings on hold to await positive changes in the law. In *Irving* at para. 5, it was found:

> [5] The long delay in this matter was not due to inadvertence or to negligence on the part of the solicitors. Counsel for the plaintiff … thought that her examination for discovery had not gone well; and he was of the opinion that the law as it stood at the time offered little hope for success, but that the law might change in the future. In the words of the plaintiff's solicitor, "delay was the only weapon that would assist Mrs. Rankin's position". Delay was therefore decided upon, and practised. …
>
> [Emphasis added]

[41] The court in *Tundra Helicopters* further distinguished *Irving* and similar cases at para. 27:

> [27] The nature of this action and the characteristics of the parties are radically different from those involved in *Irving v. Irving* [(1982), 38 B.C.L.R. 318], *Busse v. Robinson* [*Morelli Chertkow* (1999), 63 B.C.L.R. (3d) 174 (C.A.)] and the vast majority of other cases in which actions have been dismissed for want of prosecution. In those two cases as in most others where prejudice has been found the defendants were individuals faced with claims that threatened their personal well-being. In *Irving*, it was the proprietor of a small business who faced a claim by his former wife to a share in the business — the impermissible tactic was to deliberately keep the action alive but inactive for a period of ten years or so until the decision in *Pettkus v.*

> *Becker*, [1980] 2 S.C.R. 834 provided some support for the claim. The plaintiffs' solicitor was quoted by Seaton J.A. as having said: "Delay was the only weapon that would assist the plaintiff's position."

[42] I find this case to be far more comparable to *Tundra Helicopters* than to *Irving.* The plaintiff had in mind the same "legitimate objects" found in *Tundra Helicopters* and was not concerned with gaining an inappropriate advantage as in *Irving.*

[43] Where there are similar class actions in multiple provinces, it is a judicially accepted practice for an action in one province to assume the lead and others to follow behind as necessary. In this way, Canadian courts may avoid an unnecessary duplication of effort: *McSherry v. Zimmer GMBH*, 2012 ONSC 4113 at para. 140.

[44] The defendant says it would be unfair to allow a plaintiff to unilaterally adopt that practice. Although it is always preferable to seek agreement to await the results of related litigation, I am not prepared to say that a failure to do so will, in and of itself, render the delay unfair and inexcusable. It is but one factor to consider in weighing the respective interests of the parties.

[45] In the circumstances of this case, I conclude that the delay, while inordinate, was excusable.

Serious Prejudice

[46] The third factor is whether the delay has caused the defendant serious prejudice in presenting a defence and, if so, whether it creates a substantial risk that a fair trial at the earliest date is not possible.

[47] When a case includes a lengthy delay, as is the case here, the court may infer that witnesses would no longer be able to remember the details of the events with any accuracy: *Brenner v. Brenner*, 2010 BCCA 553 at para. 14.

[48] The defendant points out that, because it has not sold "Light" or "Mild" cigarettes in British Columbia since mid-2007, a similar action, if commenced now, would be barred by the expiry of the applicable six-year limitation period: *Limitation*

Act, R.S.B.C. 1996, c. 266, s. 3(5), as repealed by *Limitation Act*, S.B.C. 2012, c. 13. The expiry of a limitation period is presumed to cause prejudice to the defendant's ability to respond to the dilatory plaintiff's claim: *Cal Coast Spas Inc. v. Coast Spas Inc.*, 2008 BCSC 846 at para. 84.

[49] However, s. 39 of the *CPA* suspends limitation periods while a class action is pending:

> **39** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when any of the following occurs:
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> (a) the member opts out of the class proceeding;
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> (b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;
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> (c) a decertification order is made under section 10;
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> (d) the class proceeding is dismissed without an adjudication on the merits;
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> (e) the class proceeding is discontinued or abandoned with the approval of the court;
>
> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
>
> (2) If there is a right of appeal in respect of an event described in subsection (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.
>
> [Emphasis added]

[50] In considering Ontario's equivalent of s. 39 of the *CPA*, the Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 ["*Green*"] at para. 60 said the purpose of the provision is to protect potential class members from the expiry of limitation periods:

> [60] The purpose of s. 28 [*Class Proceedings Act, 1992*, S.O. 1992, c. 6] is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights … Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right

> remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.

[51] Of course, suspending limitation periods does not affect the reality that witnesses' memories fade with time. But, in my view, s. 39 of the *CPA* directs the court to be mindful about protecting the rights of absent class members. That militates against dismissing the plaintiff's claim.

[52] The defendant points out that the Court in *Green* said the protection offered by s. 39 exists only "as long as the right remains actively engaged" and submits that condition has not been met. But I have found that the plaintiff's delay, although inordinate, was excusable which, in my view, would be sufficient to keep the right actively engaged. Put another way, the right remains "actively engaged" unless and until the court finds there has been a want of prosecution justifying dismissal.

[53] The defendant also alleges actual prejudice as a result of having material witnesses die or otherwise become incapacitated in the delay period. It submits that if this case had been prosecuted with reasonable diligence, it would have been able to rely on their evidence.

[54] No doubt the death of a material witness is evidence of prejudice: *Ed Bulley* at para. 55. Whether the defendant's now unavailable witnesses were material cannot be known with certainty at this early stage of the litigation, but I note that even without their evidence in *Létourneau*, the defendant was successful on the specific issues most comparable to the issues in this case. At this point, I do not know what evidence the plaintiff may rely on in an effort to persuade this Court to reach a different result in this case.

[55] I also note that if those witnesses were so crucial to the present litigation, I suspect they would be at least important to the *Létourneau* action, the health care cost recovery suit in this province, and to all of the other such suits in other provinces. Yet, there is no evidence that the defendant took any steps to preserve

their testimony in defence of this and all similar claims after first being notified of these types of claims almost two decades ago.

[56] On a similar note, prejudice will be ameliorated where, as in this case, a defendant is a sophisticated organization: *Tundra Helicopters* at paras. 27 and 29. Actions involving specific individuals may be very dependent upon the recollections of those persons, and so concerns about potential prejudice due to delay may be heightened. In contrast, lawsuits involving large and sophisticated organizations are more likely to turn upon business records and the corporations involved will likely have administrative processes and trained personnel to preserve institutional memory.

[57] The Government of British Columbia commenced its lawsuit against the defendant and other tobacco companies in 1998. That litigation, which is ongoing, includes allegations about the types of cigarettes at issue here. The defendant, therefore, had ample opportunity and an independent reason to investigate the allegations and preserve evidence even before this action was commenced.

[58] The dead or incapacitated witnesses that the defendant refers to include some whose involvement in relevant matters appears to have ended in the 1980s. Even if this case had gone to trial at a time when they were still available, I question whether their recollection would have been able to significantly add to what was recorded in business records.

[59] I also note that the “now-dead” witnesses the defendant refers to died at various dates between 2010 and 2013. Even if this matter had proceeded expeditiously, subject to the reasonable delay while appellate courts considered the validity of third party proceedings, I am not persuaded it could have gone to trial at a date when all of those witnesses would have still been alive.

[60] The plaintiff pleads that the defendant willfully concealed material facts. The burden of proving that allegation is on the plaintiff. The absence of *viva voce* evidence, including cross-examination of individuals who served in a decision-

making capacity with the defendant at the material times may be more prejudicial to the plaintiff than the defendant.

[61] Any efforts that could be made to ameliorate prejudice are also relevant. Two now-deceased witnesses gave evidence in an Ontario Small Claims action, which went to trial in 2000: *Battaglia v. Imperial Tobacco Ltd*. (5 June, 2001), Toronto NY21513/97 (Ont. S.C.J.) The plaintiff has agreed not to object to that evidence being read in at trial. Although that is certainly not a complete answer, I find that it is capable of attenuating at least some of the prejudice flowing from the plaintiff's delay.

[62] I have no doubt that the defendant has suffered some prejudice as a result of the plaintiff's delay. But some prejudice can be expected in all litigation and that does not necessarily create a substantial risk that a fair trial is not possible. As noted in *Tundra Helicopters* at para. 37:

> [37] … it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. …

[63] I am not satisfied the prejudice in this case rises to the level of being so serious that a dismissal for want of prosecution is required.

Interests of Justice

[64] The fourth and final factor is whether, on balance, justice requires dismissal. The fourth consideration encompasses the other three and is the most important and decisive question: *0690860 Manitoba* at para. 28.

[65] The core principle is that "the dismissal of an action without permitting it to be heard on its merits is a drastic measure, to be taken only when it is clearly required in the interests of justice": *Ralph's Auto Supply* at para. 23.

[66] If it can be established that the parties would have a fair trial in spite of the delay and prejudice, then the interests of justice require that the litigation go ahead: *Ed Bulley* at para. 59.

[67] The allegations made by the plaintiff against the defendant are serious, involving the alleged deceptive marketing of a product well known to be harmful to consumers and deliberate steps by the defendant to cover its actions. Those allegations are worthy of consideration by this Court on their merits.

[68] The delay in this case was a tactical decision made in good faith by plaintiff's counsel to await the results of *Létourneau*. The plaintiff, to say nothing of as yet unidentified class members, was not personally responsible for that decision and I doubt had any role in making it. I find it would not be in the interests of justice to deny the claim based solely on delay.

[69] In all the circumstances of this case, including the reasons for the delay, and for all the reasons set out above, I find that there is not a substantial risk that a fair trial is no longer possible, and I conclude that it would not be in the interests of justice to dismiss the claim.

CONCLUSION AND ORDER

[70] The defendant's application is dismissed, with costs in the cause.

"Smith J."