

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

WESTLAND CONSTRUCTION LTD.,	)	<u>Brent C.A. Kaneski</u>
	)	for the plaintiff
plaintiff,	)	
	)	
-and-	)	
	)	
4732449 MANITOBA LTD. carrying on,	)	<u>Madison Laval</u>
business as CON-RESTOR TECHNOLOGIES,	)	for the defendant
	)	
defendant.	)	
	)	
	)	
	)	<u>Judgment Delivered:</u>
	)	July 9, 2026

ASSOCIATE JUDGE BERTHAUDIN

INTRODUCTION

[1] This is a motion by the defendant to dismiss the plaintiff's action for "long delay" under Rule 24.02 of *The Court of King's Bench Rules*, M.R. 553/88 (the "*King's Bench Rules*"), on the basis that three years in the litigation passed

without a significant advance in the action. The plaintiff's position in response is that it served a supplemental affidavit of documents during the relevant three-year timeframe and, as such, there was a significant advance during that period. Further, the plaintiff argues that one of the exceptions to the long delay rule applies, in that it alleges an express agreement to the delay under King's Bench Rule 24.02(1)(a).

FACTUAL BACKGROUND

[2] This proceeding was commenced by statement of claim filed by the plaintiff on January 13, 2020. The statement of claim describes a construction project for Manitoba Hydro for which the plaintiff was the prime contractor. The plaintiff retained the defendant on a sub-contract to perform certain work on the project. Both contracts were entered into in June, 2013. The plaintiff claims that certain of the defendant's work was defective and caused damages to the plaintiff. It appears from the pleadings that the dispute between the plaintiff and defendant came to a head in October, 2014. The relief claimed in the statement of claim includes general, special and punitive damages.

[3] The defendant filed its statement of defence on June 9, 2021. The parties exchanged affidavits of documents on August 18 and 29, 2022. The defendant then sent an unsworn supplemental affidavit of documents, including copies of the Schedule "A" documents, on October 20, 2022. This is the date on which the defendant suggests the three-year period starts running, without any significant advance by the plaintiff after that date.

[4] In October, 2022, the parties began discussing scheduling examinations for discovery. These discussions continued for some time and resulted in two days of

examinations for discovery being scheduled for August 22 and 23, 2023. These discoveries did not proceed as plaintiff's counsel advised on August 11, 2023, that the plaintiff's representative had an unforeseen scheduling conflict and could not attend.

[5] The discoveries were rescheduled for November 15 and 16, 2023. These were then changed at the request of defendant's counsel to December 5 and 6, 2023. These dates, however, were later cancelled as plaintiff's counsel was notified that surgery he was awaiting was scheduled for one of those dates. The discoveries were then rescheduled for April 23 and 24, 2024.

[6] On April 10, 2024, defendant's counsel emailed plaintiff's counsel requesting documents arising out of the arbitration that the plaintiff had ongoing with Manitoba Hydro relating to the same construction project. This email message included the following:

. . . We understand that Westland is involved in an ongoing dispute with Manitoba Hydro, and that same is proceeding by way of arbitration. We note that we do not have all documents relating to the ongoing dispute between Westland and Manitoba Hydro, which are relevant to Westland's claim against Con-Restor as the same project is at issue in both matters.

We therefore ask that you provide copies of the documents relating to the ongoing Westland / Manitoba Hydro dispute ahead of the April 23 and 24 discoveries.

[7] With no response from plaintiff's counsel, defendant's counsel followed up with an email message on April 18, 2024 that included the following:

. . . As we do not have all documents relating to the ongoing arbitration between Westland and Manitoba Hydro on the project at issue, our plan is not to proceed with our examination of your client next week – it will be more efficient for us to review the above-noted documents before examining Westland. We've let our client know that you may still want to proceed with your examination of him, and that is fine with us.

[8] Later that same day, plaintiff's counsel replied with the following message:

. . . Westland has produced all relevant documentation as required by the rules. With respect to your request for "all documents relating to the ongoing arbitration between Westland and Manitoba Hydro", my client is not in a position to share any information with respect to arbitral proceedings with Manitoba Hydro given it is contractually bound by confidentiality provisions and is prohibited from doing so. In addition, documents obtained in the course of the arbitral proceedings are subject to the implied undertaking rule and cannot be used in another proceeding. The only information we are in a position to share in that regard is that there has been no resolution as between Westland and Manitoba Hydro and the matter is ongoing.

We intend to proceed with our examination of Paul Phaneuf on Tuesday.

[9] Defendant's counsel replied on the same date with the following:

When we spoke in August, you indicated that Westland is seeking global damages of approximately \$2.8 million with respect to the Project, that a portion of that amount is being claimed by Westland against Hydro, only, and that the claim against Con-Restor related to the costs to remediate fish tank coating issues, as well as delay to other parts of the project on account of those coating issues. It is not clear to us how much of the \$2.8 million is being claimed against Con-Restor, as we have not seen any expert reports, prepared for either Hydro or Westland, regarding the alleged delay or other damages claim. To the extent that your client has such documents, outlining the portion of the delay or other damages which are being claimed by Westland against Con-Restor, we are entitled to copies of same.

. . .

We therefore do not see a reason to proceed with our examination of Westland until its claim against our client has been particularized.

[10] On April 22, 2024, plaintiff's counsel responded to the latest email with the following:

. . . In the circumstances, and in light of the position you have taken, my client is in agreement with you that it makes sense to defer the examinations until such time as that particular matter has been settled and with a view to conducting the examinations of both parties on consecutive days. As such, we will not be proceeding with the examination of Paul Phaneuf tomorrow.

In addition, we noted in the course of preparing for discoveries that Westland's affidavit of documents contain certain deficiencies that need to be corrected. Accordingly, we will be serving a supplemental affidavit of documents shortly (before the end of May).

[11] The final email in this exchange was from defendant's counsel to plaintiff's counsel later that same day stating the following:

. . . Thanks for the email. We will let our client know that we will not be proceeding this week and look forward to receipt of your supplemental affidavit of documents soon. I trust you will notify the reporter.

[12] On September 2, 2025, plaintiff's counsel sent defendant's counsel a letter attaching a supplemental affidavit of documents of the plaintiff, and requested availability in November or December of the same year for examinations for discovery.

[13] The plaintiff alleges in its motion brief that the supplemental affidavit of documents was served after the conclusion of the arbitration proceeding with Manitoba Hydro and served to reduce the amount claimed against the defendant in this proceeding. Despite this being referred to in the motion brief, there is nothing in the evidence to suggest that the Manitoba Hydro arbitration had concluded or that the supplemental affidavit of documents evidenced a reduction in the amount claimed in this proceeding against the defendant.

[14] The defendant states in its evidence that the supplemental affidavit of documents consists of 148 invoices issued to the plaintiff by various companies between February 7, 2014, and December 6, 2015. The invoices are attached to the affidavit relied on by the defendant in this proceeding.

[15] After some back and forth email communication between the offices of plaintiff's counsel and defendant's counsel, defendant's counsel advised on October 17, 2025, that instructions had been received to file a motion to dismiss the action for long delay.

[16] The notice of motion to dismiss for long delay was filed on October 24, 2025.

ISSUES

[17] The key questions to be decided on this motion are the following:

- a. Does service of the supplemental affidavit of documents on September 2, 2025, represent a significant advance?; and
- b. If not, did the parties expressly agree to the delay?

ANALYSIS AND DECISION

A. Supplemental Affidavit of Documents

[18] Courts in Manitoba have adopted the Alberta approach to defining "significant advance" in relation to its similar long delay rule. In ***Buhr v. Buhr***, 2021 MBCA 63, the definition is discussed as follows:

[69] The parties adopt, as do I, the approach the Alberta Court of Appeal has taken in defining a "significant advance" in an action, for the purpose of application of the long-delay rule. In *Morrison v Galvanic Applied Sciences Inc*, 2019 ABCA 207, the Court confirmed the following definition that it had set out in *Ro-Dar* at para 20 (at para 35):

A significant advance exists if the nonmoving party in the applicable timeframe has done something that increased by a measurable degree the likelihood that either the parties or the court would have sufficient information to rationally assess the merits of the parties' positions and be in a better position to either settle or adjudicate the action. Has the nonmoving party done something that "narrow(ed) the issues, complete(d) the discovery of documents and information, or clarif(ied) the positions of the parties"?

[footnotes omitted]

[19] The court in ***Buhr*** also set out the functional approach to be followed:

[71] In determining whether there has been a “significant advance”, Ro-Dar articulated the applicable functional test, citing *Nash v Snow*, 2014 ABQB 355 at para 30 (at para 21):

...

... Put another way, the court must view the whole picture of what transpired in the three-year period, framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including, but not limited to, the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred.

[20] From the beginning of the alleged three-year period in October, 2022, counsel scheduled, adjourned and rescheduled examinations for discovery on a number of occasions. The final adjournment of discoveries took place in April, 2024. Defendant’s counsel first decided that they would not proceed with the examination of the plaintiff’s representative as they had:

... not seen any expert reports, prepared for either Hydro or Westland, regarding the alleged delay or other damages claim. To the extent that your client has such documents, outlining the portion of the delay or other damages which are being claimed by Westland against Con-Restor, we are entitled to copies of same.

[21] Defendant’s counsel suggested that plaintiff’s counsel could still choose to examine the representative of the defendant for discovery on the scheduled date in April, 2024. Plaintiff’s counsel ultimately decided that it would not proceed with the examination of the defendant’s representative. In the course of advising defendant’s counsel of this position, plaintiff’s counsel noted the following:

In addition, we noted in the course of preparing for discoveries that Westland’s affidavit of documents contained certain deficiencies that need to be corrected. Accordingly, we will be serving a supplemental affidavit of documents shortly (before the end of May).

[22] The self-imposed May deadline for providing the supplemental affidavit of documents was not kept, and it was not served until September 2, 2025. This was approximately 1.5 months before the end of the three-year period relied on by the defendant.

[23] I note at this point that the email from plaintiff's counsel suggests that the original affidavit of documents it served was deficient and that was the reason for the supplemental affidavit of documents being required.

[24] The additional documents disclosed in the supplemental affidavit of documents were put before the court. They consist of 148 invoices issued to the plaintiff between February 7, 2014 and December 6, 2015. Given that they were invoices issued to the plaintiff, they were clearly not the confidential documents noted by plaintiff's counsel in his email dated April 18, 2024. Nor were any of the documents in the supplemental affidavit of documents expert reports or other new information. Given the dates of the invoices, all of the documents in the supplemental affidavit of documents had been in the possession of the plaintiff for 10 years or more. The plaintiff suggests (in argument by its counsel, but not in evidence) that the documents in the supplemental affidavit of documents comprised the damages claimed against the defendant in this proceeding.

[25] Counsel did not put before me any Manitoba authorities in which the court considered whether a supplemental affidavit of documents was considered to be a significant advance in the action. As noted in *Buhr*, however, Alberta authorities are often considered in interpreting Rule 24.02 given its similarity to the Alberta rule. Counsel

for the defendant filed a number of Alberta authorities considering whether a supplemental affidavit of records (as it is referred to in that province) may be considered a significant advance in an action.

[26] In ***XS Technologies Inc. v. Veritas DGC Land Ltd.***, 2016 ABCA 165, the Alberta Court of Appeal upheld an order granted by a chambers judge dismissing for delay despite service of a supplemental affidavit of records during the relevant period, saying the following:

[16] The Supplemental Affidavit was included in the appellant's extracts of key evidence. Although there was no application to adduce fresh evidence on appeal, we have reviewed it. There are 246 documents. Most are dated in 2000 and 2001, and predate the original affidavit of records.

[17] The balancing of the factors to be considered in assessing whether something significantly advances an action is an exercise of discretion. Timing is a relevant factor and although the Supplemental Affidavit was not served on the eve of the drop dead date (November 1, 2013), it was served over six years after it was requested. Even after a review of the Supplemental Affidavit, we are not persuaded that there was any reviewable error in the chambers judge's decision. She was entitled to conclude that the Supplemental Affidavit, served over six years after a request and containing documents which existed, for the most part, prior to the original affidavit of records, and certainly no later than 2009, did not significantly advance the action. See also *Huerto v Canniff*, 2015 ABCA 316 (available on CanLII).

[27] The factual circumstances in ***XS Technologies Inc.*** are similar in that the documents contained in the supplemental affidavit of records predated the original affidavit of records. In the present case, the documents dated in 2014 and 2015 predate the original affidavit of documents by 7 to 8 years and the supplemental affidavit of documents by 10 to 11 years.

[28] The next case referred to by the defendant is ***Deja Vu Holdings Ltd. v. Securex Master Limited Partnership***, 2018 ABQB 597. In deciding that the production of the

supplemental affidavit of records was not a significant advance in the action, the court stated the following:

[38] Applying the functional analysis to the Supplemental Affidavit of Records, and examining the nature of the documents produced and their importance to the litigation, I find that the service of the Supplemental Affidavit of Records did not significantly advance the Action. The Supplemental Affidavit of Records included Déjà Vu's General Ledger which purports to show some deposits from Securex to Déjà Vu, however, the General Ledger ought to have been included in the original Affidavit of Records, instead of almost ten years after this Action began.

[39] The other information produced in the Supplemental Affidavit of Records – namely, Balance Sheets from 1999, 2005, and 2006 - does not significantly advance the Action.

[29] The final Alberta decision relied on by the defendant is ***Baron Real Estate Investments Ltd. v. Tri-Arrow Industrial Recovery Inc.***, 2025 ABKB 367. In this case, near the end of the relevant three-year period, the plaintiff produced a supplemental affidavit of records that contained more than 7000 new documents. The court found that most of these documents in the supplemental affidavit of records were in the plaintiff's possession prior to the date the original affidavit of records was sworn. The court used the functional approach and determined that the documents did not help narrow the substantive issues or remove issues from the table such that they did not significantly advance the action. The court was also concerned with the timing of the production of the supplemental affidavit of records:

[83] In my view, the timing of service of the Supplemental Affidavit of Records, and the nature of the Supplemental Records themselves, are more in line with the facts in *XS Technologies* at para 17 where the Supplemental Affidavit contained documents which existed, for the most part, prior to the original affidavit of records and did not significantly advance the action. Or the facts in *Déjà Vu Holdings* at paras 33 to 39, where the supplemental affidavit of records contained some records which ought to have been included in the original

affidavit of records and some records which were not sufficiently relevant and material to significantly advance the action.

[84] In the circumstances, I am not persuaded by the Plaintiff that the Supplemental Affidavit of Records significantly advanced the Action because it contained records which were in the Plaintiff's position, for the most part, prior to the original Affidavit of Records, and which did not significantly advance the Action.

[30] Using the functional approach requires the court to view the whole picture of what transpired in the three-year period at issue. Part of the task is to assess where the parties were in the litigation at the time. In this case, the material facts underlying the litigation occurred in 2013 and 2014. There may have been a carryover into 2015 given the invoices produced in the supplemental affidavit of documents which are said to outline the damages claimed. Thus, at the commencement of the three-year period in October, 2022, the material facts underlying the claim were already 7 to 9 years old. Pleadings had closed and affidavits of documents were produced by the time of this three-year period. The parties spent most of the three-year period scheduling and then cancelling examinations for discovery for various reasons. Thus, there has been no opportunity to question a representative of the other party on the documents produced. In essence, and despite the lengthy passage of time, the action was still in its infancy.

[31] In most cases, production of an affidavit of documents, being a required step in a proceeding, would be considered a significant advance. In my view, it is also possible for service of a supplemental affidavit of documents to be considered a significant advance. For example, the plaintiff may come into possession of documents that previously were not its possession, or obtain an expert report, and a supplemental affidavit of documents is then produced. This case is different, however. It is clear from review of the Alberta

decisions noted above that a supplemental affidavit of documents which contains documents that predate the original affidavit of documents and were in the plaintiff's possession all along, may not be considered a significant advance in the action.

[32] I am also of the view that production of documents that outline damages would tend in most cases to narrow the issues in dispute between the parties such that it may be a significant advance. The question is whether such documents which have been in the plaintiff's possession all along, but undisclosed, become a significant advance when disclosed.

[33] My conclusion, after using the functional approach and considering all the circumstances of this particular case, is that the service of the supplemental affidavit of documents was not a significant advance in this action. In essence, it was a correction to a deficient earlier step taken in the litigation when the original affidavit of documents was served without disclosing all relevant documents in the plaintiff's possession, control or power, as is required. To find that a supplemental affidavit of documents which discloses documents that the plaintiff has had all along constitutes a significant advance, would be to reward delay, the very thing Rule 24.02 is designed to eliminate.

[34] I will make one comment here about the start date chosen by defendant's counsel for the three-year period without a significant advance. The chosen start date was October 20, 2022, when the defendant's own supplemental affidavit of documents was served on plaintiff's counsel. Counsel did not address, nor have I considered, whether this was a significant advance in the action. The submissions of counsel were made on the assumption that it was the last significant advance before the time started running.

I note that if this was not a significant advance, the plaintiff's service of its original affidavit of documents on August 29, 2022, was likely the last significant advance prior to that date. As that date is more than three years before the plaintiff's supplemental affidavit of documents was served on September 2, 2025, my conclusion that the Rule 24.02 test is met would be the same in that scenario.

[35] In any event, I have concluded that the service of the supplemental affidavit of documents on September 2, 2025, is not a significant advance in the action, such that three or more years passed without a significant advance. With that conclusion, the action must be dismissed unless the parties expressly agreed to the delay, engaging the exception in Rule 24.02(1)(a).

B. Express Agreement to the Delay

[36] King's Bench Rule 24.02(1)(a) provides an exception to the mandatory dismissal upon three years passing without a significant advance in an action when "all parties have expressly agreed to the delay". This exception has been considered numerous times, including in the leading decision of ***WRE Development Ltd. v. Lafarge Canada Inc.***, 2022 MBCA 11. It is noted in ***WRE Development Ltd.*** that determining whether such an express agreement has been entered into is a question of fact and stated at para 28: "Determining if such an agreement exists and its nature depends on the facts and circumstances of the case (see *Turek v Oliver*, 2014 ABCA 327 at para 6)".

[37] In ***WRE Development Ltd.***, the court further discusses the meaning of an express agreement:

[31] In *Bugg*, the Alberta Court of Appeal explained the meaning of an express agreement in the following way (at paras 8-9, 18):

Rule 243.1(1) dictates that a standstill agreement must be “express”. Black’s Law Dictionary defines that term as follows:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied”.

Henry Campbell Black, *Black’s Law Dictionary*, 6th ed.
(St. Paul. MN: West Publishing Co., 1990.)

In the context of R. 243.1(1), express means that the parties’ intention is clear and not left to inference: *Webber v. Canada (Attorney General)*, 2005 ABQB 718 at para. 54. A standstill agreement cannot be implied from conduct: *525812 Alberta Ltd. v. Purewal (2004)*, 366 A.R. 1, 2004 ABQB 938 at para. 13. At the very least, the evidence must establish the basic elements of an agreement: for example, the identity of the parties to the contract, when the standstill began and its essential terms.

It follows that a standstill agreement can be written, oral, or partly written and partly oral, as long as it is express and not based on intent or inference. This interpretation is consistent with *Webber*, supra and *525812 Alberta Ltd.*, supra. Because it will be more difficult to prove an oral agreement, the best course of action is to reduce the agreement to writing and specifically set out its terms. This Court has said: “when a standstill agreement is entered into, it would be preferable to describe it as such, and to state precisely what steps in the litigation process are waived or suspended pending the exploration of settlement”: *Wasyleshko v. Chamakese* (1999), 228 A.R. 384, 1999 ABCA 47.

[38] Finally, in ***WRE Development Ltd.***, the court comments on the form of an express agreement:

[33] As well, in *Flock*, the Court stated that an agreement to excuse time may be oral, but it cannot be implied and, under the rule, must be express; so conduct alone will not suffice. An exchange of correspondence will suffice if it is clear and precise enough (i.e., parties, start of period and essential terms) (see para 17(11)).

[39] The plaintiff’s contention is that in the email communication which led to the adjournment of the examinations for discovery scheduled for April 23-24, 2024, the parties expressly agreed to delay the proceeding until the plaintiff’s arbitration with Manitoba Hydro related to the same construction project had concluded. The plaintiff therefore suggests that the period from April 22, 2024 to when it says in its motion brief

the arbitration concluded on September 19, 2025, should be excluded from the three-year calculation under Rule 24.02, such that three years or more did not pass since the last significant advance in the proceeding.

[40] While the exchange of emails was noted earlier in this decision, I reproduce it here for ease of reference:

From defendant's counsel on April 10, 2024

. . . We understand that Westland is involved in an ongoing dispute with Manitoba Hydro, and that same is proceeding by way of arbitration. We note that we do not have all documents relating to the ongoing dispute between Westland and Manitoba Hydro, which are relevant to Westland's claim against Con-Restor as the same project is at issue in both matters.

We therefore ask that you provide copies of the documents relating to the ongoing Westland / Manitoba Hydro dispute ahead of the April 23 and 24 discoveries.

From defendant's counsel on April 18, 2024 at 2:45 p.m.

. . . As we do not have all documents relating to the ongoing arbitration between Westland and Manitoba Hydro on the project at issue, our plan is not to proceed with our examination of your client next week – it will be more efficient for us to review the above-noted documents before examining Westland. We've let our client know that you may still want to proceed with your examination of him, and that is fine with us.

From plaintiff's counsel on April 18, 2024 at 3:06 p.m.

. . . Westland has produced all relevant documentation as required by the rules. With respect to your request for "all documents relating to the ongoing arbitration between Westland and Manitoba Hydro", my client is not in a position to share any information with respect to arbitral proceedings with Manitoba Hydro given it is contractually bound by confidentiality provisions and is prohibited from doing so. In addition, documents obtained in the course of the arbitral proceedings are subject to the implied undertaking rule and cannot be used in another proceeding. The only information we are in a position to share in that regard is that there has been no resolution as between Westland and Manitoba Hydro and the matter is ongoing.

We intend to proceed with our examination of Paul Phaneuf on Tuesday.

From defendant's counsel on April 18, 2024 at 4:48 p.m.

When we spoke in August, you indicated that Westland is seeking global damages of approximately \$2.8 million with respect to the Project, that a portion of that amount is being claimed by Westland against Hydro, only, and that the claim against Con-Restor related to the costs to remediate fish tank coating issues, as well as delay to other parts of the project on account of those coating issues. It is not clear to us how much of the \$2.8 million is being claimed against Con-Restor, as we have not seen any expert reports, prepared for either Hydro or Westland, regarding the alleged delay or other damages claim. To the extent that your client has such documents, outlining the portion of the delay or other damages which are being claimed by Westland against Con-Restor, we are entitled to copies of same.

. . .

We therefore do not see a reason to proceed with our examination of Westland until its claim against our client has been particularized.

From plaintiff's counsel on April 22, 2024 at 9:12 a.m.

. . . In the circumstances, and in light of the position you have taken, my client is in agreement with you that it makes sense to defer the examinations until such time as that particular matter has been settled and with a view to conducting the examinations of both parties on consecutive days. As such, we will not be proceeding with the examination of Paul Phaneuf tomorrow.

In addition, we noted in the course of preparing for discoveries that Westland's affidavit of documents contain certain deficiencies that need to be corrected. Accordingly, we will be serving a supplemental affidavit of documents shortly (before the end of May).

From defendant's counsel on April 22, 2024 at 9:27 a.m.

. . . Thanks for the email. We will let our client know that we will not be proceeding this week and look forward to receipt of your supplemental affidavit of documents soon. I trust you will notify the reporter.

[41] The plaintiff suggests that by virtue of this exchange of emails the parties expressly agreed to delay the matter until the arbitration was concluded. In particular, plaintiff's counsel notes his comment in the April 22, 2024 email that his "client is in agreement with you that it makes sense to defer the examinations until such time as that particular matter has been settled and with a view to conducting the examinations of both parties on consecutive days". Counsel suggests that if the defendant was of the view that such an agreement had not been reached, it was incumbent upon counsel for the defendant to so advise him. Plaintiff's counsel notes that in the response from defendant's counsel on April 22, 2024, no issue was taken with his characterization of the circumstances of the adjournment of the examinations for discovery. The plaintiff refers to the Manitoba Court of Appeal decision in ***Sarbit v. Booth Fisheries (Canadian) Company***, 1950 CarswellMan 5, 58 Man. R. 377, where the following principle was noted:

24 Silence so operates as assent particularly where it would be "the ordinary practice of mankind to answer" (Lord Esher at 537); or "circumstances which would render it more reasonably probable that a man would answer the charge made against him than that he would not," as put by Bowen, L.J., at 539: *Wiedemann v. Walpole*, [1891] 2 Q.B. 534, 60 LJQB 762.

[42] For its part, the defendant says that the plaintiff's characterization of the email exchange as an "express agreement to the delay" is a misreading of the communications between counsel. The defendant says that it is clear that its counsel took the position that it was not proceeding with the examination of the plaintiff's representative until such time that it received documents setting out damages. The defendant says that it was open to the plaintiff to examine the defendant's representative for discovery on the

scheduled dates. In fact, this was suggested by defendant's counsel in the email communication.

[43] The defendant says that there is no meeting of the minds set out in the email communications such that there is not a clear intention stated to delay the matter. Further, the defendant argues that the plaintiff is asking the court to infer an agreement to delay the matter and reminds the court that the Manitoba Court of Appeal in ***WRE Development Ltd.*** noted that the agreement cannot be one that is implied or reached by inference.

[44] Having considered the submissions of counsel and the communications between counsel at the relevant time, it is my view that an express agreement to delay was not reached between counsel for the parties. I note that defendant's counsel opened the conversation on April 10, 2024, noting that certain documents relating to the arbitration were to be provided before the discoveries scheduled for April 23-24, 2024 could proceed. I further note that with no response from plaintiff's counsel, counsel for the defendant followed up with an email on April 18, 2024, and advised that the defendant's plan was not to proceed with its examination of the plaintiff because it would be more efficient to do so once the documents were received. Defendant's counsel specifically notes that the plaintiff may still want to proceed with its examination of the defendant, and that would be fine with them.

[45] Later that same day, plaintiff's counsel replied to indicate that all documents relating to the ongoing arbitration could not be shared due to confidentiality provisions and an implied undertaking rule. Plaintiff's counsel indicated that they intended to

proceed with their examination of the defendant's representative on the scheduled date. Clearly there was no express agreement to delay at this point.

[46] Counsel for the defendant replied the same day expressing that it was not clear how much of the \$2.8 million sought against Manitoba Hydro was being claimed against the defendant as counsel has not seen any expert reports regarding the delay or damages claim against the defendant. Counsel suggested that if the plaintiff had such documents, the defendant would be entitled to same and concluded that they did not see reason to proceed with their examination of the plaintiff until the "claim against our client has been particularized".

[47] Nowhere in the communications from defendant's counsel is it suggested that the parties delay this proceeding until such time that the arbitration concluded. Rather, defendant's counsel was simply noting that it had no documents particularizing the damages claim against the defendant and it would not proceed with its examination of the plaintiff until the claim was particularized.

[48] Counsel for the plaintiff responded later on the same day suggesting that his client is "in agreement with you that it makes sense to defer the examinations until such time as that particular matter has been settled and with a view to conducting the examinations of both parties on consecutive days". As a result, plaintiff's counsel did not proceed with the examination of the defendant's representative. I conclude having reviewed these communications that plaintiff's counsel mischaracterized the defendant's position indicating that there was "agreement" between the parties to defer examinations until the arbitration was settled. The communication from defendant's counsel contained no

reference at all to deferring examinations until the Manitoba Hydro arbitration was concluded. Counsel simply advised that it would not proceed with the examination of the plaintiff's representative until the claim against the defendant was particularized. While plaintiff's counsel may have felt that it would not be able to particularize the claim until after the arbitration was concluded, this was not the position expressed on behalf of the defendant. In my view, this is not an agreement between the parties at all, let alone an express one.

[49] Even if the communications could be read as an agreement between the parties, it was only an agreement to defer examinations for discovery. Deferring examinations for discovery is not an agreement to delay the proceeding as a whole. It remained open to the plaintiff to take other steps to advance the matter, including setting the matter down for pre-trial conference.

[50] The facts of this case set it apart from most of the decisions surrounding this exception to the long delay rule. In most of the other cases, the agreement that is considered by the court is one party providing to the other party an extension of time to file a pleading. In those circumstances, the action is essentially brought to a standstill as most required advancements in a proceeding require pleadings to be closed. In those decisions interpreting whether there is an express agreement to delay by way of extension of time to file a pleading, there is no ability for the party to advance the matter for that reason. Here, and with pleadings closed, the plaintiff had the ability to advance the matter if it wished, regardless of whether examinations for discovery had been held.

[51] I also wish to address the suggestion by plaintiff's counsel that if defendant's counsel thought that there was not an agreement to delay the matter until the arbitration was concluded, it was incumbent upon defendant's counsel to say so and not remain silent. As noted earlier, the plaintiff relies on *Sarbit* for the proposition that silence operates as assent.

[52] In my view, it is not open to the plaintiff to have its counsel mischaracterize the communications of defendant's counsel and call it an agreement unless defendant's counsel objects or says something to the contrary. The defendant's position was clear in the communications from defendant's counsel. Until such time that it received particularization of damages, it was not going to proceed with its examination of the plaintiff. There was no suggestion at all that the proceeding as a whole should await the conclusion of the arbitration. In fact, defendant's counsel suggested that plaintiff's counsel could still use the scheduled dates to examine the defendant's representative. I do not see a requirement for defendant's counsel to correct plaintiff's counsel's mischaracterization when its position had already been clearly stated twice.

[53] I have concluded that the email communications between counsel for the parties in April, 2024, do not constitute an express agreement to the delay such that the exception in Rule 24.02(1)(a) is not engaged.

CONCLUSION

[54] Having concluded that three years or more passed without a significant advance in this action and that the parties did not expressly agree to the delay, I therefore dismiss the plaintiff's action for long delay. The defendant

would ordinarily be entitled to tariff costs. If the parties wish to suggest otherwise or have difficulty in quantification of costs, an appointment for brief submissions may be made.

Associate Judge