

Court of King's Bench of Alberta

Citation: Sturek v Fernwood Developments Ltd, 2026 ABKB 564

Date: 20260811
Docket: 2103 15823
Registry: Edmonton

Between:

Justin Sturek

Plaintiff

- and -

**Fernwood Developments Ltd, Carl Rusnell, Lorraine Rusnell,
Brian Logue, Donna Logue and Phil Varley**

Defendants

**Memorandum of Decision
of the
Honourable Applications Judge S. Wanke**

[1] This is an application to dismiss Justin Sturek's (**Sturek**) claim on the basis that more than three years have passed without a significant advance in his action. The application is brought by Fernwood Developments Ltd (**Fernwood**), Brian Logue (**Brian**) and Donna Logue (**Donna**) (**Applicants**) (r 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010 (**Rules**)).

[2] Rule 4.33 of the *Rules* requires the Court to dismiss an action if three or more years have passed without a significant advance, unless a recognized exception applies. The parties agree the action was significantly advanced on May 12, 2022 when the Fernwood Defendants served their Affidavit of Records.

[3] Sturek relies on two subsequent matters, each of which he says independently significantly advanced this action:

- (a) November 8, 2024: Sturek filed a partial discontinuance (**Discontinuance**) of this action as against Carl Rusnell and Lorraine Rusnell, the president and secretary of Fernwood (**Rusnells**); and
- (b) January 15, 2025: The Applicants consented to Sturek's proposed Amended Statement of Claim (**Draft Amended Claim**).

[4] For the reasons that follow, I find the Discontinuance was a significant advance. The Applicants' consent to the Draft Amended Claim provides relevant context but is not an independent significant advance.

I. Context

[5] Sturek has been represented by the same law firm throughout, although counsel changed after the original lawyer left the firm. Fernwood, Brian, Donna and the Rusnells (**Fernwood Defendants**) have been jointly represented throughout. Phil Varley (**Varley**) retained counsel in late 2024/early 2025 and did not participate in this application.

[6] The Statement of Claim (**Claim**) alleges that Varley unlawfully conspired with the Fernwood Defendants to evict Sturek and block his access to the business he ran with Varley:

- (a) From June 2020 to August 30, 2021, Sturek operated a custom clothing printing business (MountOlympress) (**Business**) with Varley in four offices Sturek leased from Fernwood in a small commercial building in Industrial Heights, NE Edmonton (**Premises**).
- (b) On August 30, 2021, Brian and Donna, property managers employed by Fernwood, met with Sturek and threatened and intimidated Sturek, forcing him to sign a voluntary surrender agreement and immediately turn over his keys. Other than limited opportunities to later return for some of his personal items, Sturek lost access to the Premises as of August 30, 2021.
- (c) Varley continued to reside in and operate the Business at the Premises, also blocking Sturek's access to the Business's financial and digital assets.

[7] Sturek sued for unspecified damages for loss of property and income, aggravated, punitive and exemplary damages and injunctive and accounting relief for the Business.

[8] The Rusnells and the Logues defended, asserting the lack of a contractual or tortious basis for them to be sued personally.

[9] The Fernwood Defendants also defended on the basis that Fernwood was entitled to terminate the Lease due to Sturek's breaches. In brief, the Statement of Defence alleges Sturek and his unauthorized guests endangered the building and its other tenants by illegally using and selling drugs and alcohol, harassing the Logues, not keeping the building secure, and causing insect infestations. Sturek's garbage violations, noise complaints, unauthorized alterations to the Property, unauthorized use as living quarters, and unauthorized subletting are all also alleged as grounds for termination.

[10] The Fernwood Defendants denied any conspiracy with Varley or any interest in the Business and asserted that the Business dispute was only between Varley and Sturek.

II. Timeline

[11] Procedural litigation timeline:

- (a) **October 19, 2021:** Claim filed
- (b) **December 21, 2021:** Statement of Defence – Fernwood Defendants filed, served **February 15, 2022**
- (c) **February 15, 2022:** Statement of Defence – Varley filed
- (d) **March 13, 2022:** Sturek’s unsworn Affidavit of Records and records served
- (e) **May 12, 2022:** Fernwood Defendants serve sworn Affidavit of Records and records
- (f) **August 9, 2024:** Notice of Change of Counsel filed for Sturek
- (g) **November 1, 2024:** Discontinuance, on a without costs basis, consented to by counsel for the Fernwood Defendants, filed November 8, 2024. The Discontinuance was independently offered by Sturek following current counsel’s review of the file and materials.
- (h) **July 18, 2025:** Sturek serves a sworn copy of the otherwise identical Affidavit of Records and producible records served in 2022.

[12] Additional litigation activity:

- (a) **Efforts to amend the Claim:** (October 2024 – March 2025) Sturek’s counsel circulates the Draft Amended Claim. The Fernwood Defendants’ counsel endorses his consent on January 15, 2025. Varley’s counsel will not consent unless Sturek consents to Varley filing a counterclaim.

The Draft Amended Claim remains unfiled. It references Sturek and Fernwood’s prior 2020 lease and particularizes the conspiracy claim as Varley, Donna and Brian conspiring to evict Sturek and take over the Business and improvements made to the Property by Sturek.

- (b) **Efforts to set down Questioning:** (July – October, 2024) Limited unsuccessful efforts, slow on both sides, to schedule Sturek’s questioning.
- (c) **Requests for Varley’s Production:** (October 2024 – February 2025) Sturek requests Varley’s Affidavit of Records. On February 25, 2025, Varley notes that Sturek’s affidavit of records was not sworn.

[13] Sturek’s counsel advised it was waiting to bring an application for leave to amend the Claim to combine it with an application to compel Varley’s production, if that proved necessary.

III. Analysis of r 4.33 Application

[14] Rule 4.33 requires a functional analysis of the contested step to see if it significantly advanced the action. A significant advance “moves the action forward in an essential way, having regard to the nature, quality and genuineness and timing of the advancing action”: **Patil v Cenovus Energy Inc**, 2020 ABCA 385 at para 7 (**Patil**).

[15] The principles applicable for an application under r 4.33 are well-settled and agreed to by the parties. The dispute is in the application of those principles to the facts.

A. Did the Discontinuance significantly advance this action?

1. Position of the Parties

[16] The Applicants’ position is that the Discontinuance did not functionally advance the action because the only reference specific to the Rusnells in the Claim was to their position as officers of Fernwood. As the Claim did not disclose a tenable cause of action against the Rusnells personally, removing them as defendants did not narrow the real issues or clarify the position of a party. The Applicants also note that one of the Rusnells would still need to be questioned as the Fernwood representative.

[17] Sturek disagrees, noting that the Rusnells are included in the allegations made against the “Defendants”, including unlawful conspiracy with Varley to remove Sturek from the Premises and deny him access to the Business.

[18] The case law relied on by Sturek includes two decisions respecting similar disputed advances:

- (a) **Roman Catholic Bishop of the Diocese of Calgary v Schuster**, 2019 ABCA 64 (**Schuster**), leave to appeal dismissed [2019] SCCA 38595, which confirmed a partial discontinuance against Schuster’s limited liability law partners was a significant advance of the action (**Schuster** at para 27).
- (b) **Patil**, where the Court of Appeal found a significant advanced when Mr. Patil advised the defendant he was abandoning claims for mitigation expenses, financial hardship and emotional trauma (**Patil** at para 16). The chambers judge noted that the withdrawal followed a request for supporting records and inferred the claims were never capable of being supported. The Court of Appeal held:

First, Mr Patil abandoned his claims of mitigation costs, financial hardship and emotional trauma, but the chambers judge did not find this was significant as she found the claims to be weak and bound to fail in any event. Regardless of their ultimate strength or weakness, abandoning these claims narrowed the issues for questioning and trial. This promoted efficiency and cost effectiveness in these proceedings. (**Patil** at para 11)

[19] The Applicants distinguish **Schuster** on the basis that the partial discontinuance there followed questioning and a notice to admit facts limiting the impugned conduct to Schuster. The Applicants distinguish **Patil** because the totality of the steps taken by Mr. Patil before and during

the three-year period show litigation actively being moved forward. In contrast, the Applicants suggest that Sturek is in the same position today as he was in 2022.

2. Analysis

[20] Rule 4.33 applications are not evaluations of a plaintiff's overall diligence. The question is whether the Discontinuance, viewed functionally and in context, moved the action forward in an essential way.

[21] Partial discontinuances do not automatically constitute a significant advance: **Schuster** at para 27. Factually similar precedents are useful, but not determinative: **Patil** at para 7.

[22] Here, the Discontinuance moved the action forward in a genuine and significant way. The Claim included the Rusnells in the conspiracy allegations. Removing them narrowed the parties and the issues, clarified Sturek's position and improved the efficiency of subsequent litigation.

[23] Contrary to the Applicants' assertion, the possibility of personal liability for corporate officers in relation to a corporation's tortious conduct is recognized at law: **CHU de Québec-Université Laval v Tree of Knowledge International Corp**, 2026 ONCA 209 at paras 90-99.

[24] **Patil** makes clear that the ultimate strength or weakness of an abandoned claim is not determinative. The claims against the Rusnells may have faced real difficulties; removing them from this action nevertheless advanced this litigation in a significant way.

[25] The streamlining effect of the Discontinuance is not negated because one of the Rusnells may still be questioned as a representative of Fernwood. Questioning a person as a corporate representative is not the same as maintaining a personal claim against that person. The Discontinuance eliminated questioning of both Rusnells on issues of personal liability.

[26] The timing of the Discontinuance also supports its genuineness. It was offered following Sturek's new counsel's review of the action in 2024, a little over two years after the Fernwood Defendants served their Affidavits of Records. That supports that the Discontinuance was intended to refine this action, not as a mechanical step to avoid a delay application.

[27] As noted by the Applicants, this action has not moved quickly. That provides context for the nature, quality, and genuineness of the Discontinuance. But r 4.33 functions like a limitations period: it requires one significant advance within the three-year period, not continuous advancement or reasonable diligence throughout: **Patil** at para 7. The overall litigation pace does not negate the Discontinuance's genuine and significant advanced of the action.

B. Did the proposed amendment to the Claim significantly advance this action?

[28] Sturek also relies on the consent to the Draft Amended Claim by the Applicants as a significant advance.

[29] The Draft Amended Claim is relevant context because it supports Sturek's position that the Discontinuance formed part of counsel's broader review and refinement of the action. Standing alone, however, it did not significantly advance the action. The Discontinuance already notified the parties that Sturek was not pursuing the conspiracy claim as against the Rusnells.

[30] The Applicants' consent to the Draft Amended Claim did not constitute an agreement to proceed in a manner later breached by the Applicants. Sturek's analogy to the ambush in **Turek v Oliver**, 2014 ABCA 327 at paras 5 and 6 does not apply.

[31] The onus remained on Sturek to move the litigation forward. In multi-party litigation, a consenting party is not precluded from later seeking dismissal for delay simply because another party's objection prevented the completion of a proposed step.

IV. Unsworn Affidavits of Records

[32] Although it does not affect the disposition of this application, the role played by the unsworn affidavit of records warrants comment.

[33] Exchanging unsworn affidavits may be practical in some types of litigation, such as some personal injury litigation. In the absence of agreement of the parties, it is an unwise practice.

[34] Serving an unsworn affidavit of records does not satisfy the requirement to serve an affidavit of records in r. 5.5 as it is not sworn as contemplated by Form 26, which is mandated by r 5.6(1). An unsworn affidavit of records of a plaintiff does not trigger the reciprocal obligation under r 5.5(3) for defendants to provide their affidavits of records within two months.

[35] It is also not necessary to hold off on swearing an affidavit of records. Record production is not static. The obligation to disclose is continuous. Subsequent disclosure is required and contemplated when a new record is found, created, or obtained (r 5.10, *Rules*).

[36] Delaying the swearing of Sturek's Affidavit of Records served no practical purpose and led to significant delay.

V. Conclusion

[37] The application to dismiss this action for delay under r 4.33 is dismissed. If the parties cannot agree to costs, they may make written submissions to me within 30 days of this decision being released.

Heard on the 31st day of July, 2025, with additional written submissions made on September 12, 2025, and October 22, 2025.

Dated at the City of Edmonton, Alberta this 11th day of August, 2026.

S. Wanke
A.J.C.K.B.A.

Appearances:

Cory M. Dawson, Ritzen Olivieri LLP
for the Applicants Defendants, Fernwood Developments Ltd, Brian Logue and
Donna Logue

Ivan Ioudine, Hajduk LLP
for the Respondent Plaintiff, Justin Sturek

Patrick Smith, Morrison LLP (no appearance)
for the Defendant Phil Varley

Carl Rusnell, Lorraine Rusnell (no appearance, discontinued against on 8Nov2024)