

CANADA / JUDGMENT

Aldrich v. Molinaro

2024 BCSC 1156

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2024 BCSC 1156 Aldrich v. Molinaro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aldrich v. Molinaro,

2024 BCSC 1156

Date: 20240702

Docket: S2110127

Registry: Vancouver

Between:

Xiola Mae Aldrich

Plaintiff

And

Roger Molinaro and Linda Den Duyf

Defendants

- and -

Docket: S2110128

Registry: Vancouver

Between:

Katelyn Joan Pidperyhora

Plaintiff

And

Roger Molinaro and Linda Den Duyf

Defendants

Before: The Honourable Justice Greenwood

Reasons for Judgment on Application for a Stay

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Place and Date of Hearing:

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Vancouver, B.C.

May 1 & 3, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 2, 2024

Overview

- [1] This is an application by two plaintiffs in two separate but related actions to stay their civil actions pending the outcome of criminal proceedings. The plaintiffs, who are now in their early 20's, allege that the main defendant Mr. Molinaro, sexually abused them when they were children. Mr. Molinaro, along with his wife and children, lived in the same townhouse complex as the two plaintiffs and their families. All three families and children were close friends.
- [2] Mr. Molinaro was charged criminally and convicted, but his conviction was overturned on appeal. An application for leave to appeal to the Supreme Court of Canada was filed by the crown and is still pending. New trial dates have been fixed in the event the Court does not grant leave.
- [3] In the civil proceeding, document discovery is ongoing, and while the plaintiffs have both been examined for discovery by counsel for one of the defendants, they have not been examined for discovery by counsel acting on behalf of Mr. Molinaro. There is affidavit evidence outlining the psychological stress and anxiety experienced by the plaintiffs at their last examination for discovery, and their concerns about being retraumatized if they are compelled to undergo examination for discovery again in the near future.
- [4] The basis of the application for a stay is (1) alleged intent on the defendant's part to interfere with the criminal case, (2) mental and physical harm to the plaintiffs if examinations for discovery proceed, and (3) prejudice to the criminal proceeding if the actions continue. The plaintiffs also argue that the delay occasioned by a stay will not be excessive and is a factor which supports the granting of a stay.
- [5] The defendant's position is that the plaintiffs have not demonstrated exceptional circumstances which would warrant staying the actions that they themselves initiated. They argue that they have a right to respond to the allegations, which includes a right to examine for discovery and accommodations can be made to address the vulnerability of the plaintiffs. Their position is that a stay would not achieve its stated purpose because examinations for discovery will be required irrespective of the outcome of the criminal proceedings.
- [6] For the reasons that follow, I am satisfied this is an extraordinary or exceptional situation, and a stay is warranted based on the combined effect of the harm that would be caused to the plaintiffs and prejudice to the administration of justice.

Factual Background

- [7] Xiola Mae Aldrich and Katelyn Joan Pidperyhora are the plaintiffs and are currently in their early 20's. When they were young, they lived in the Peaks townhouse complex in Pemberton, B.C. with their respective families. Mr. Molinaro, the principal defendant, lived in the same complex with his wife and their children, and the three families became close friends.

- [8] In 2011, the defendant and his family moved out of the townhouse complex and into a new three-story home. The three families remained close friends. The plaintiffs were friends with the defendant's children and spent time at the new house.
- [9] In February of 2020, the plaintiffs came forward with allegations that the defendant had sexually assaulted each of them when they were young. The alleged assaults took place between 2007 and 2016.
- [10] Both plaintiffs were originally identified by initials designed to maintain their anonymity, but both put forward evidence that attaching their full names to the criminal and civil proceedings would assist in their healing and sense of re-empowerment. Applications were brought in this court, and granted that lifted anonymity orders in the various proceedings and ordered that the style of cause be amended to reflect the parties' full names.

The civil and criminal proceedings

- [11] The defendant was charged on June 23, 2020 with a variety of sexual offences, including sexual assault, touching for a sexual purpose, and inviting a person under the age of fourteen years to touch for a sexual purpose.
- [12] The criminal trial against the defendant took place on June 14-16, 2021, June 21, 2021 and July 21, 2021. Both plaintiffs testified for the crown. The defendant also testified.
- [13] On November 24, 2021, the plaintiffs filed notices of civil claim that are based on many of the same essential facts alleged in the criminal case. The allegations include "grooming", sexual touching, sexual interference, sexual assault and sexual battery.
- [14] On the same day that the notices of civil claim were filed, the defendant transferred his interest in four properties to his wife. This led to a further notice of civil claim filed some months later that alleged a fraudulent conveyance. That matter has been stayed pending the results of the main actions.
- [15] On November 25, 2021, Mr. Molinaro was convicted. The trial judge found both of the plaintiffs to be credible witnesses. She accepted the evidence of Ms. Aldrich with respect to two specific incidents and accepted the evidence of Ms. Pidperyhora with respect to three other allegations. The defendant was sentenced on August 5, 2022. He appealed his conviction on the same day.
- [16] Various steps were taken including demands for documents and the canvassing of dates for a case planning conference. By April 11, 2023, responses to the notice of civil claim had been filed and preliminary lists of documents had been exchanged. Counsel began corresponding about scheduling examinations for discovery. There were some disagreements about the order in which discoveries should take place, and about the scope of permissible questioning, but ultimately some examinations for discovery were scheduled to take place in the summer of 2023.

- [17] Between July 20-24, 2023, counsel for the plaintiffs examined all of the named defendants for discovery in both actions. While the examinations for discovery are not before me, I am told that counsel for the plaintiffs did not ask the defendant questions relating directly to his then criminal convictions, but he was examined with respect to liability in the civil proceeding.
- [18] Counsel for the defendant did not exercise their right to examine the plaintiffs for discovery in the summer of 2023. However, both plaintiffs were examined for discovery by counsel for Joanne Den Duyf, the defendant's former wife who was then also a defendant herself.

Discovery of the plaintiff Aldrich

- [19] Ms. Aldrich was examined for discovery on July 27-28, 2023. On the first day of her examination a disagreement arose with respect to the scope of the examination. Counsel for Ms. Aldrich objected to broad questioning that included questioning as to events for which there had been a conviction. She was prepared to allow wide latitude for issues on which there were no convictions, but would not permit her client to be re-traumatized. Counsel for the applicant disagreed with that approach, maintained it was a breach of an agreement they had reached, and suggested they would have to resolve the issue in chambers, if necessary.
- [20] Ms. Aldrich's affidavit outlines the fact that as a result of her trauma she suffers from conversion disorder which causes her to experience neurological symptoms and non-epileptic seizures. At the conclusion of the first day of discovery, she was crying and starting to tremor. Counsel broke for the day and agreed to come back the following day. Ms. Aldrich was distressed, crying and anxious.
- [21] On the second day, Ms. Aldrich did have a friend attend, as well as an emotional support dog that was permitted to be in the discovery room and sat on Ms. Aldrich's lap for parts of the examination. Despite these steps, Ms. Aldrich was again tearful. The second day concluded at 4:00 p.m. and the examination was adjourned generally.

Discovery of the plaintiff Pidperyhora

- [22] Ms. Pidperyhora was examined for discovery by counsel for Joanne Den Duyf on July 31 and August 1, 2023.
- [23] During the examination for discovery there were numerous objections and vociferous disagreements between counsel both in front of Ms. Pidperyhora and when she was excused from time to time for the purposes of allowing counsel for the plaintiffs to articulate the objections and counsel for Ms. Den Duyf to respond.
- [24] Counsel for the plaintiffs objected to questions about the timing and content of Ms. Pidperyhora's discussions with Ms. Aldrich prior to the allegations, any questions that went to the witness's credibility about what happened, questions about the witness's height and weight as those facts related to an incident on a motor bike that was the subject of a conviction, the sequence of various events, the locations where incidences of sexual

touching occurred, the accuracy of the witness's statement to police, whether the witness was a deep sleeper, how long one of the incidents was said to have lasted, and whether the witness went back to sleep after one of the alleged incidents.

[25] I will not review all of the reasons for each individual objection. In general terms, counsel for the plaintiff was opposed to any examination that would constitute relitigating a criminal conviction. In her view, it would be an abuse of process, a collateral attack and contrary to the doctrine of res judicata. Her position was that any evidence that was relevant to credibility or the factual underpinnings of the criminal trial was improper. She stated that if the defendant succeeded in his appeal of the criminal conviction, she would revisit her objection, but otherwise it stood.

[26] Counsel for Ms. Den Duyf responded that the questions were relevant to his client's liability and that he was entitled to ask them during the examination for discovery.

Further developments in the civil actions and appeal proceedings in the criminal proceeding

[27] The plaintiff, Ms. Aldrich, filed a notice of discontinuance in her case against Joanne Den Duyf on September 14, 2023.

[28] The defendant's appeal from conviction was heard on September 20, 2023.

[29] On November 15, 2023, counsel for the plaintiffs wrote all counsel to advise she would hold off scheduling a trial date until the Court of Appeal's decision in the criminal case was known.

[30] On December 11, 2023, the Court of Appeal allowed the defendant's appeal, overturned the convictions, and ordered a new trial (R. v. R.M., 2023 BCCA 455).

[31] On January 22, 2024, the crown sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

[32] On February 12, 2024, counsel for the defendant wrote to counsel for the plaintiffs in each action advising that she intended to examine both of them for discovery and requesting available dates.

[33] On March 12, 2024, counsel for the plaintiffs responded and advised that she had instructions to apply for a stay of proceedings pending resolution of the criminal proceedings.

[34] The crown's leave application in the criminal case was dismissed on June 27, 2024.

[35] New trial dates for the defendant's trial are currently scheduled to proceed on October 15-18, 21, 23-25, and December 11-13, 2024.

Affidavit evidence regarding the effect of further examinations for discovery

- [36] In her affidavit, Ms. Aldrich says she was physically and mentally exhausted and her tremors worsened after her first examination for discovery. She is concerned that if she has to undergo discovery again that includes a detailed history of abuse that she has already testified to at the criminal trial, she will have to relive her trauma complete with panic attacks and other physically distressing symptoms. She recounts a seizure that took place shortly before the criminal trial which required hospitalization and interfered with her ability to work. She is concerned that a new onset of seizures would again affect her ability to work.
- [37] Ms. Aldrich has attached to her affidavit an expert report from a forensic psychiatrist. While the report has not been tested or its significance and accuracy determined at trial, it is generally supportive of her claim of conversion disorder, cognitive impairment, depression, PTSD and overall psychiatric deterioration.
- [38] Ms. Pidperyhora's affidavit describes how during both days of the discovery, she was distressed and anxious. She states that she was physically, emotionally and mentally exhausted and had to take time off work to recover as a result.
- [39] Ms. Pidperyhora is concerned that if she has to undergo cross-examination of the detailed history of abuse she has already testified to at the criminal trial, she will relive her trauma. She says, she has already gone over her account three times (to the police, at the criminal trial and at her examination for discovery) and may have to go over it again at a new criminal trial. She describes having to tell strangers about her childhood sexual abuse as the most humiliating, private and distressing experience of her life, and questions how many times she has to go over it.

Legal Framework

- [40] The principles at play in an application to stay civil proceedings in the face of a related criminal case are not in dispute. In such cases, the ordinary three part test for a stay set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, is not used. Rather the onus is on the applicant to establish exceptional or extraordinary circumstances (*British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2023 BCSC 1557 at paras. 44-54, *Director of Criminal Property and Forfeiture v. Gurniak et al*, 2020 MBCA 96 at paras. 38-42).
- [41] There is a presumption against the granting of a stay of proceedings. Even if the applicant establishes exceptional or extraordinary circumstances, he or she also bears a further burden of persuading the court that there are no means available in the civil proceedings to ameliorate the prejudice that may arise as a result of the criminal proceedings (*PacNet Services*, *supra* at para. 54).

- [42] The threshold test for granting a stay is a high one. The mere fact that criminal proceedings are pending at the same time as civil proceedings is not a sufficient ground for a stay. A court will normally deny a stay unless the applicant demonstrates that his or her case is an extraordinary or exceptional one (*Schreiber v. the Federal Republic of Germany*, 2001 Canlii 20859 (ONCA) at para. 4, *Nash v. Ontario*, 1995 Canlii 2934 (ONCA)). The decision to order a stay remains discretionary and is guided by the particular circumstances of each case (*Onion Lake Cree Nation v. Stick*, 2018 SKCA 20 at para. 49).
- [43] Civil claims have been described as the "reciprocal of the criminal prosecution" if the outcome of the criminal proceedings would have a significant or decisive impact on the outcome of the civil proceeding (*Nash*, *supra*).
- [44] In many of the cases involving a stay, it is the defendant who applies for the stay and the rationale underlying the application is to protect the accused's right to a fair trial. In this case, the plaintiffs themselves are the moving party, and the accused's fair trial rights are not at issue. The test for a stay, however, remains the same.
- [45] Normally the applicant will have to point to some specific prejudice that would arise if the stay were not granted. That may include prejudice to the moving party or the administration of justice generally (*Stickney v. Trusz*, 1973 Canlii 423 (ONSC), *aff'd* (1974) 3 O.R. (2d) 538 (Div. Ct.), *aff'd* (1974) 3 O.R. (2d) 539 (C.A.), leave to SCC *ref'd*, *Schreiber*, *supra* at paras. 8 and 50-53).
- [46] A civil action cannot be used to pre-empt the normal operation of the criminal process. An apparent motive to interfere with the criminal process, or to use civil proceedings to gain greater pre-trial access to crown witnesses, is a relevant factor and may contribute toward the granting of a stay (*Nash*, *supra*, *Schreiber* *supra* at para. 11, *Further Detention of Things Seized (Re)*, 2024 BCSC 297 at paras. 91 and 99).

Issues

[47] The issue to be determined on this application is whether the plaintiffs have established exceptional or extraordinary circumstances by virtue of or more of the following factors:

- a) An improper intent to interfere with the criminal process;
- b) Mental and physical harm to the plaintiffs if the civil proceeding continues; or
- c) Prejudice to the administration of justice

Is there intent to interfere with the criminal process?

[48] The plaintiffs argue that this case is an example of a civil action being used to pre-empt a criminal case which amounts to an improper purpose and is a ground for staying the civil action. They rely on the defendant's opposition to the stay when there is no urgency and trial dates are already booking into November of 2025. They also point to the timing of the defendant's request for discovery six days after his new criminal trial was scheduled.

According to the plaintiffs, it is suspicious that the defendant chose not to exercise his right to examine for discovery before his convictions were overturned, but did so immediately after. They ask me to infer that the defendant's "sole purpose" in seeking discovery is to advance his defence in the criminal case.

- [49] I am not prepared to infer an improper purpose on the part of the defendant. In my view, the plaintiffs' submission overlooks the importance of the fact that the plaintiffs chose to start this action with a full understanding that criminal proceedings were underway and that the defendant would have procedural rights in the civil actions, including the right to examination for discovery. As the defendant points out, Rule 7-2(1) and 7-2(14) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 sets out the right to discovery in non-discretionary terms (see: *Kovacevic Consult Inc. v. Coastal Contacts Inc.*, 2015 BCSC 569 at para. 21, *National Bank Financial Ltd. v. LePoidevin*, 2018 BCSC 1175).
- [50] In my view, nothing that the defendant has done is inconsistent with the normal defence of a civil action under the rules. In those circumstances, I am not prepared to infer an improper purpose.
- [51] The plaintiff relies on the fact that the court in *Nash* drew an inference that the objective was to use the civil action to pre-empt the criminal proceeding despite there being no evidence of actual intent to interfere with the criminal case. However, in *Nash*, it was the criminally charged accused who sued the crown, and it was in that context that the Ontario Court of Appeal stated that the motivation was suspect and appeared to be an attempt to gain greater access to crown witnesses than would normally be afforded. In this case, the defendant did not initiate proceedings.
- [52] Nor does the recent decision of Donegan J. in *Further Detention of Things Seized (Re)*, *supra*, assist the plaintiffs on this point. In that case, as in *Nash*, it was the respondent who initiated civil proceedings in response to being served with a 490 application under which she was the target of a criminal investigation. Allowing the civil action to proceed would have delayed and in effect prevented the criminal investigation from proceeding. In this case, the defendant is not initiating proceedings to frustrate another proceeding; he is merely seeking to exercise his procedural rights in the context of an action that the plaintiff initiated against him.
- [53] I accept that the examination for discovery would present a rare opportunity for the defendant to test the plaintiffs' evidence outside of the criminal proceedings. The plaintiff also argues that the potential for witness intimidation, interference with the crown case, and subversion of the criminal process is substantial. However, in my view, these factors are better assessed in the context of prejudice to the administration of justice, than as factors that support an inference of an improper purpose, and I will address them in that context.

Will there be harm to the plaintiffs if the proceeding continues?

- [54] In my view, the plaintiffs have established harm in the event that a stay is not granted and examinations for discovery proceed. There is no question in my mind that both plaintiffs are vulnerable litigants, have been traumatized by their experiences, and would be re-traumatized during the examination for discovery process.
- [55] The plaintiffs are both young adults, who are testifying about alleged sexual abuse that took place when they were children. The trauma associated with children, who have to testify is well documented (R. v. Levogiannis, [1993] 4 S.C.R. 475, R. v. F.(W.J.), [1999] 3 S.C.R. 569 at paras. 13-16). Strictly speaking, the plaintiffs are no longer child witnesses, but there is a growing recognition in the law that trauma associated with testifying is not limited to child witnesses. For example, testimonial assistance is now available to those with a mental or physical disability, and on a discretionary basis to other vulnerable adult witnesses (R. v. Ndhlovu, 2022 SCC 38 at para. 1, R. v. Zakuti, 2021 BCSC 2309 at para. 21).
- [56] Both plaintiffs have outlined the psychological and physical distress they experienced following the last examinations for discovery.
- [57] Ms. Aldrich was physically and mentally exhausted, and her tremors worsened. She herself is fearful of reliving her trauma if she has to undergo discovery of the detailed history of abuse that she has already testified to at the criminal trial. She has experienced depression, PTSD, and conversion disorder that manifests itself in the form of physical tremors. A video clip of the plaintiff's tremors was submitted as an attachment to a filed affidavit, and demonstrates that when they occur the tremors are serious and could not be described as trivial.
- [58] Expert evidence tendered on this application outlines the fact that Ms. Aldrich's conditions have reduced her ability to cope with internal and external stressors, and she "remains vulnerable to being retriggered by cues and reminders of her abuse."
- [59] Ms. Pidperychora's affidavit describes being distressed and anxious. She was physically, emotionally, and mentally exhausted and had to take time off work. She is also concerned that if she has to undergo cross-examination of the detailed history of abuse she has already testified to at the criminal trial, she will relive her trauma. She points out that she has had to repeat her account three times already, and telling strangers about the abuse she suffered is the most humiliating and distressing experience of her life.
- [60] The examinations for discovery that have taken place to date in the civil proceeding have been very acrimonious, and without faulting any of the counsel involved, there is little doubt that this increases the stress and anxiety associated with further proceedings.
- [61] In my view, the requirement to testify multiple times about incidences of sexual abuse is also a relevant factor. The plaintiffs have already had to go over their accounts with strangers on three occasions, and are facing a new criminal trial in addition to the present civil proceeding.

- [62] I accept the defendant's point that the plaintiffs are not "incapable" of testifying, but in my view there is still prejudice that falls short of incapacity to testify. The case of *O'Neill v. The Seminary of Christ the King*, 2020 BCSC 2209 is distinguishable in my view, because it addressed the witnesses advanced age, his lack of energy or stamina, and general anxiety. The situation of a child victim of sexual abuse presents a unique form of trauma that must be considered.
- [63] A stronger argument for the defendant is that a stay would not actually relieve the plaintiffs from harm, and would only delay the problem. The defendant points out that the allegations in the civil actions include aspects of the defendant's alleged conduct that go beyond the criminal allegations, both in terms of specific activities and the number of allegations forming the basis of the civil claim as opposed to the criminal case which is based primarily on specific alleged incidents.
- [64] While it is true that some cross-examination will inevitably be required if the civil actions are to proceed, there is a potentially live issue with respect to the permissible scope of cross-examination depending on the final outcome of the criminal proceedings. This issue in fact manifested itself during the examinations for discovery that took place in 2023. There was a disagreement with respect to whether counsel could cross-examine so as to suggest that the assaults did not take place in light of the then guilty verdict, and if so, how far counsel was entitled to go. It is premature to rule on that issue in this application, but there is authority that can operate to prevent the re-litigation of issues determined in criminal proceedings (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 77, [2003] 3 S.C.R. 77 at paras. 46-54, *R.T. v. Lowe*, 2021 BCSC 590 at paras. 43-45).
- [65] I am satisfied that while a stay would not entirely prevent cross-examination of the plaintiffs, it could affect the scope of permissible cross-examination and ameliorate the harm that would occur if the examinations proceed now. The final outcome of the criminal proceeding is uncertain, but either way it would provide more certainty than exists at present. If the defendant is convicted, they will be able to advance arguments about the permissible scope of cross-examination in the circumstances. If the defendant is acquitted, the plaintiffs will have a choice to make about whether they wish to pursue their civil actions knowing they will be cross-examined on all aspects of their claims.
- [66] In all the circumstances, I am satisfied that refusal of the stay of proceedings would cause harm to the plaintiffs that might be avoided if the stay is granted. The plaintiffs were clearly traumatized by the examinations for discovery that already took place and proceeding with further examinations at this juncture, knowing that they may also have to testify at a further criminal trial, would cause further harm. Whether the harm is enough to make this an exceptional or extraordinary case, either alone or in conjunction with other factors, is addressed below.

Is there prejudice to the administration of justice?

- [67] In my view, the plaintiffs have succeeded in establishing prejudice to the proper administration of justice by virtue of an overlapping criminal proceeding. While I am not prepared to infer an improper purpose in the defendants request to proceed with examinations for discovery while a new trial is pending, the effect is the same. The civil proceeding would interfere with the normal criminal process.
- [68] The authorities are clear that the mere fact that there is a parallel criminal proceeding alone is not enough to justify a stay, but here there are particular concerns. If the examinations for discovery were to proceed now, the plaintiffs would be examined on all aspects of the allegations that underlie the criminal charges as well as the alleged civil liability. Allowing an accused person to freely cross-examine crown witnesses outside of court and in advance of trial goes far beyond the procedural rights an accused is normally entitled to, and is inconsistent with fundamental aspects of criminal procedure.
- [69] This concern is particularly acute in the present case, since the plaintiffs have already been cross-examined twice with respect to their allegations of abuse. In my view, it is neither necessary nor desirable to allow further cross-examination of central crown witnesses on the very substance of the criminal allegation in a separate proceeding that takes place before the criminal trial. I agree with the plaintiff that this raises concerns about the risk of witness intimidation, the continued availability of the crown evidence, and interference with the criminal case.
- [70] I am not impugning counsel's motives, or suggesting in any way that counsel for the defendants have acted or would act improperly. Indeed, the parties to civil litigation are subject to an implied undertaking not to use the answers given at a discovery for any purpose other than the action itself. However, one of the exceptions to the rule that can arise is where the deponent has given contradictory testimony about the same matter in different proceedings (*Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157 at para. 41). In my view, that underlines the concern about additional access and cross-examination of crown witnesses in a separate proceeding, irrespective of counsel's motives or intentions.
- [71] The defendant argues that the alleged prejudice on this ground is speculative as it was in *PacNet*, but I am not persuaded that is the case. In *PacNet*, the risk of self-incrimination was speculative because it was unclear if the defendants would choose to call evidence at the civil trial, and if so what they would say (paras. 96-97 and 101). The mischief sought to be avoided might never materialize. By contrast, the plaintiffs in this case will be examined for discovery if the stay is refused, and will be required to testify at the second criminal trial. The risk to the integrity of the criminal process will arise if the stay is refused.
- [72] In my view, it is also relevant to consider the overlap between the criminal proceeding and the civil actions. In *Nash*, the Ontario Court of Appeal considered the fact that the civil and criminal actions were reciprocal. The civil actions would have little merit if there were convictions in the criminal case. The degree of overlap was also considered in *PacNet*, where Fitzpatrick J. found at para. 106, that it was speculative in the circumstances of that

case to suggest that the outcome of the U.S. criminal case would have a material impact on the civil action.

- [73] In this case, the outcome of the criminal proceedings is likely to have a significant impact on the civil proceeding. The civil actions are based on the same underlying conduct as the criminal trial, even if the allegations are not exactly co-extensive. If the criminal case ends in a conviction and appellate review is exhausted, the doctrine of abuse of process may bar the relitigation of the facts essential to the conviction.
- [74] In *Cupe Local 79*, for example, the Supreme Court of Canada applied the doctrine of abuse of process to prevent relitigation of the merits of the appellant's conviction for sexual assault in the context of a grievance for wrongful dismissal. The appellant was not entitled to challenge the underlying conviction. *Arbour J.*, at para. 51, noted that the focus was on "the integrity of the adjudicative process." She observed that if relitigation were permitted, and the result was the same, it would prove to have been a waste of time. If the results were different, the inconsistency would undermine the credibility of the entire judicial process.
- [75] In my view, it is self-evident that the final verdict in the defendant's criminal case will have a significant impact on the scope of proceedings in the civil action. If the defendant is convicted, he will not likely be able to contest the essential facts that underlie the conviction -that there was one or more instances of sexual assault. If he is acquitted, there would be no restriction on his ability to contest the facts.
- [76] Continuing civil proceedings at this juncture, and proceeding to examinations for discovery, might ultimately end up being a waste of time. The criminal case is very likely to resolve before the civil actions are ready to proceed to trial and before a trial date can be secured. If examinations for discovery proceed without limitation on all aspects of the alleged assaults, it may turn out that some of the evidence cannot ultimately be used at trial, or even if it can be used, it may end up being a needless multiplicity of evidence on the same essential factual issue if the results in the civil trial are the same as the results in the criminal proceeding.
- [77] An additional concern, in my view, is the risk of inconsistent decisions. If the defendant is ultimately convicted, and all the same facts are litigated in the civil proceeding, but he is found not liable, it would have a negative effect on the administration of justice. A reasonable observer would wonder how the defendant could be found guilty beyond a reasonable doubt of sexually assaulting the plaintiffs in one proceeding, and yet also be found not to have sexually assaulted the plaintiffs in another.
- [78] Of course, the defendant may not be convicted, but I see no reason to risk parallel proceedings when there is no particularly urgency in the civil action, and the plaintiffs themselves are asking that their own action be delayed. In my view, delaying the civil action will in the circumstances of this case prevent any prejudice to the integrity of the criminal proceeding.

Other considerations

- [79] For the reasons stated, I am satisfied that the plaintiffs have established extraordinary or exceptional circumstances based on the combined effect of the harm to them in proceeding with further examinations for discovery at this particular time, and prejudice to the proper administration of justice and the normal resolution of the criminal case. Those concerns are sufficient to overcome the presumption against a stay. I am satisfied that this is an appropriate case in which to exercise my discretion and grant a stay.
- [80] I recognize that there are few cases in which it is the plaintiffs who are requesting a stay due to an ongoing criminal proceeding, but the authorities make it clear that the test is the same regardless of who the applicant is.
- [81] The defendant relies on *Filiatrault v. Secondary Pulp and Paper Inc.*, 2007 BCSC 412, which is one of the few cases where a plaintiff sought to stay their own action and the application was denied. In my view, *Filiatrault* is a very different case. It involved an arbitration not a criminal proceeding, and the primary reason for the plaintiff's desire to proceed with the arbitration first was tactical. Moreover, the parties in the arbitration and action were different, and there was greater uncertainty than there is in this case as to whether the arbitration would have any affect on the civil trial.
- [82] The defendant also says the application should be dismissed on the basis that the plaintiffs have control over the action and could file a discontinuance and resume at a later date since there is no limitation period. I am not persuaded that it would necessarily be so simple for the plaintiffs to proceed in that fashion. The effect of a discontinuance is that an action is "forever at an end" apart from costs (*DLC Holdings Corp v. Payne*, 2021 BCCA 31 at para. 33). In addition, as the Ontario Court of Appeal has observed, the case law demonstrates that in some instances a court "may find it to be an abuse of process for the plaintiff to seek to discontinue the action and to be able to recommence the same action, against the same defendant, on the same facts" (*Kawaguchi v. Kawa Investments Inc.*, 2021 ONCA 770 at para. 34).
- [83] I am satisfied that the plaintiffs have established that there are no other means of ameliorating the prejudice identified. The defendant points out that reasonable accommodations were made for the plaintiff Aldrich during her examination for discovery, and there is no reason similar measures could not be made for both plaintiffs again. However, despite those measures, the plaintiffs were left in considerable distress, were anxious, and were physically and emotionally exhausted. Moreover, while laudable, the adoption of such measures would not address any of the impacts examination for discovery would have on the integrity of the criminal proceeding.

- [84] This is an unusual case in that it is the plaintiffs asking the court to stay their own proceeding. Normally, when a defendant seeks to stay the proceeding, there is an issue of delayed access to justice. In this case, however, delayed access to justice for the plaintiffs is not a consideration because they are asking for the delay.
- [85] I have also considered the defendant's interest in access to timely justice. He is facing serious allegations in the civil proceeding and has an interest in resolving the claims which he denies took place. However, looking at the situation practically, he is facing the same allegations in the criminal proceeding anyway, and his situation will not be resolved until that proceeding has concluded. Given the Supreme Court of Canada has refused the crown's leave application, and new trial dates are already set, the delay is not inordinate.
- [86] No trial date is currently scheduled in the civil action, and it will likely be a considerable time before any trial is heard. In those circumstances, I see no particular urgency to proceed with examinations for discovery, or the remaining aspects of the litigation, in light of the harm to the plaintiffs and prejudice to the administration of justice.

Conclusion

- [87] Both actions at issue on this application are stayed pending final resolution of the criminal proceedings against the defendant and the expiration of any appeal period.
- [88] Unless there are facts that I am unaware of, the plaintiffs have been successful and are entitled to the costs of this application in the cause.

"Greenwood J."

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