

In the Court of Appeal of Alberta

Citation: Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc, 2026 ABCA 249

Date: 20260724
Docket: 2503-0114AC
Registry: Edmonton

Between:

Baron Real Estate Investments Ltd.

Appellant

- and -

**Tri-Arrow Industrial Recovery Inc., Stericycle, ULC, Stericycle Inc. and
474588 Alberta Ltd. operating as Riteway Vacuum Service**

Respondents

The Court:

**The Honourable Justice Frans Slatter
The Honourable Justice Anne Kirker
The Honourable Justice Joshua B. Hawkes**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice K.L. Becker Brookes
Dated the 16th day of June, 2025
Filed on the 14th day of July, 2025
(2025 ABKB 367, Docket: 1503 06113)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant, Baron Real Estate Investments Ltd, commenced an action against several parties including the respondents Tri-Arrow Industrial Recovery Inc, Stericycle, ULC, Stericycle Inc, and 474588 Alberta Ltd operating as Riteway Vacuum Service. Statements of defence were filed and served, and affidavits of records were exchanged. Questioning was scheduled but was postponed so Baron could prepare a supplemental affidavit of records. After receiving the supplemental affidavit of records, the respondents applied to dismiss the action for long delay under rule 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010. The only issue was whether service of the supplemental affidavit of records constituted a significant advance in the action. The applications judge found that it did and dismissed the rule 4.33 applications. The respondents successfully appealed and the chambers judge dismissed Baron's action for long delay. Baron now appeals the chambers judge's order and asks this Court to restore its action.

History of the Proceedings

[2] Tri-Arrow was in the business of hazardous and non-hazardous waste disposal and treatment. It entered into an agreement with Baron to lease Baron's land for five years, commencing in February 2012. The lease permitted Tri-Arrow to occupy Baron's land for several purposes, including tote cleaning, hazardous waste processing, and the storage, bulking and transfer of equipment, materials and supplies.

[3] In February 2013, the shares of Tri-Arrow were sold to Stericycle, ULC. The respondents Tri-Arrow, Stericycle, ULC and Stericycle Inc are referred to collectively as Stericycle. The remaining respondent, Riteway, provided vacuum truck services to Stericycle on the leased land.

[4] Following a dispute between Baron and Stericycle, Baron terminated the lease in April 2014. It re-entered the land, locked Stericycle out and seized vehicles. In June 2014, Stericycle obtained an order terminating Baron's security agreement under the lease and the seizure was released.

[5] Baron filed a statement of claim in April 2015 and an amended statement of claim in August 2015. An amended amended statement of claim was filed and served on Stericycle, Riteway, and Alberta Production Machining Ltd in April 2016. Alberta Production Machining Ltd took no part in the proceedings underlying this appeal.

[6] In the amended statement of claim, Baron sought over \$12,000,000 in damages from Stericycle arising from breach of contract, negligence, trespass, nuisance, breach of the duty of honest performance, fraudulent misrepresentation or alternatively negligent misrepresentation, and the diminution of value of the leased land. Baron claimed, among other things, that Stericycle improperly handled, stored, and processed hazardous materials on its land. Baron alleged that Stericycle caused several losses, including land contamination and the cost of remediating the land and repairing physical damage. As against Riteway, Baron claimed that it contaminated the land while providing services to Stericycle due to spills in August 2013 and May 2014. Baron sought approximately \$2,000,000 in damages for Riteway's alleged negligence, trespass, nuisance and the diminution of value of the land.

[7] Riteway filed a statement of defence in May 2016. It admitted to providing services to Stericycle in August 2013 and May 2014, and that spills occurred on those dates; however, it denied that the waste involved in either spill was regulated or hazardous waste. Riteway further denied that it owed any duty to Baron or that it caused any damage to Baron's land.

[8] Stericycle filed a statement of defence in June 2016. It denied all allegations of fraud, misrepresentation, concealment, deceit, recklessness and other alleged misconduct. Stericycle further denied that any environmental contamination or building damage occurred due to its occupation of Baron's land, that it breached the lease or was liable to Baron for any additional amounts, or that Baron suffered the damages alleged. It also defended on the basis that Baron had terminated the lease and was estopped from relying upon it in the proceedings.

[9] Baron served an affidavit of records in December 2016. Riteway and Stericycle served affidavits of records in January 2017 and March 2018, respectively. Questioning was scheduled for September 2020. Baron's counsel advised opposing counsel in August 2020 that the upcoming questioning would have to be postponed because it was "in the process of revisiting a significant batch of document production" and needed time to prepare a supplemental affidavit of records. Baron's counsel served the supplemental affidavit of records on March 22, 2021. Many of the supplemental records were Tri-Arrow/Stericycle documents that had not been produced by Stericycle in the litigation. Stericycle did not know if it possessed the records before Baron's disclosure. The records included communications between employees, incident reports, spill reports, photographs, waste inventories and tracking spreadsheets. Baron's evidence was that it received these and other records from a former manager of the Tri-Arrow/Stericycle facility incrementally and in a disorganized fashion from July 2016 up to late 2019, and that it took time to review and determine their relevance.

Rule 4.33 Applications

[10] On August 3, 2021, Stericycle and Riteway filed applications to dismiss Baron’s action for long delay under rule 4.33 of the *Rules of Court*. Baron acknowledged the only step that could constitute a significant advance in the action in the relevant three-year and 75-day period¹ was service of the supplemental affidavit of records. The applications judge concluded that based on the pleadings, the supplemental records had a “potentially significant bearing” on what Baron alleged and what Stericycle and Riteway denied in the action: *Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc*, 2023 ABKB 531 (*Baron #1*) at para 36. The applications judge further held that the supplemental affidavit of records “was not just a matter of housekeeping” and “was not done at the eleventh hour as a pretext just to keep the action alive”: *Baron #1* at para 43. It was a genuine step taken to advance the litigation and Baron’s explanation for the delay in production was adequate. The long delay applications were dismissed. Stericycle and Riteway appealed.

[11] The chambers judge allowed the appeal. She accepted that the supplemental records were relevant and material to the issues raised in the pleadings. However, she found that the documents did not address the “central issue” in the action as of March 2021 when the supplemental affidavit of records was served; namely, the extent of the land contamination caused by Stericycle’s operations and the cost to remediate: *Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc*, 2025 ABKB 367 (*Baron #2*) at para 69. Therefore, the chambers judge held that the supplemental records “were, at best, relevant to peripheral issues”: *Baron #2* at para 86. The chambers judge also found that a significant number of the supplemental records were in Baron’s possession before it served its original affidavit of records and that Baron had failed to adequately explain why the records were not produced at that time. She concluded that service of the supplemental affidavit of records did not significantly advance the action and dismissed Baron’s action for long delay.

Grounds of Appeal

[12] Baron contends that the chambers judge mischaracterized the significance of the supplemental records by erroneously narrowing the issues beyond what the pleadings disclose, and that she erred by faulting Baron for not producing the supplemental records earlier. It also submits the chambers judge erred by misallocating the burden under rule 4.33, effectively treating Baron as having the persuasive burden to prove that the supplemental affidavit of records significantly

¹ It was not disputed that because of Ministerial Order 27/2020 issued during the COVID-19 pandemic, the three year “long delay” period was extended by 75 days.

advanced the action rather than requiring Stericycle and Riteway to prove the absence of such advancement.

[13] Stericycle and Riteway maintain that service of the supplemental affidavit of records did not significantly advance the action because i) the supplemental records are irrelevant to the issues that need to be resolved; and ii) Baron is attempting to benefit from providing a deficient affidavit of records in the first place. They argue the chambers judge's decision in relation to these issues is entitled to deference.

Standard of Review

[14] Questions of law are reviewed for correctness. Findings of fact and inferences drawn from the facts are reviewed for palpable and overriding error. Questions of mixed fact and law are reviewed for palpable and overriding error, unless an extricable question of law has been identified in which case the correctness standard applies: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 25, 36-37.

[15] Applying rule 4.33 to a set of facts is generally a question of mixed fact and law to which some deference is owed: *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 11. Determining if an action has been significantly advanced “involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the Rules of Court. The chambers judge's conclusion on that issue is entitled to deference”: *Ro-Dar* at para 11.

Discussion

Dismissal of an Action for Long Delay under Rule 4.33

[16] Rule 4.33(2) states that “[i]f 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant”. The exceptions under the rule do not apply in this case.

[17] Assessing whether there has been a significant advance in an action requires the court to consider if the step moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and timing of the step is also relevant to the analysis: *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at para 19. The question the court should ask when deciding a rule 4.33 application was articulated in *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 at paragraph 86, leave to appeal to SCC refused, [2020] 1 SCR xii, as follows:

Has anything that happened in the applicable period increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties’ positions and either settle or adjudicate the action? ... [footnotes omitted]

[18] In answering this question, it is helpful to remember that rule 4.33 is designed “to prune out actions that have truly died”: *Ursa Ventures* at para 10. Steps that serve to narrow the issues, complete the discovery of documents and information, or clarify the parties’ positions may constitute a significant advance: *Ro-Dar* at para 20. “Each piece of litigation is unique and the content, value, and timing of the advance in the action said to ‘reset the clock’ must be assessed within the context of that lawsuit”: *Ursa Ventures* at para 23; see also *McKay v Prowse*, 2020 ABCA 131 at para 20, citing *Weaver v Cherniawsky*, 2015 ABQB 157, aff’d 2016 ABCA 152; *Kallis v Schiffner*, 2026 ABCA 11 at paras 4-5.

Significance of the Supplemental Records

[19] The chambers judge accepted that the supplemental records produced by Baron were relevant and material to issues raised in the pleadings. However, she decided that the issues to which the records relate were “peripheral issues” and therefore the production of supplemental records did not significantly advance the action: *Baron #2* at para 86. In moving certain issues to the “periphery”, it is evident the chambers judge accepted the respondents’ submission that Baron’s claim would fail unless it could prove “the existence and extent of contamination, and the associated cost of remediation”: *Baron #2* at para 65. She noted that Stericycle had been seeking additional information and documentation related to these issues and that “the question had arisen whether [Baron] had any real intention to remediate the lands”: *Baron #2* at para 62. Because of this, she said, “the damage to the lands alleged to have been caused by Stericycle and Riteway and the cost to remediate the lands had emerged as the central issues to be resolved”: *Baron #2* at para 62. The chambers judge reasoned that:

- (a) Stericycle and Riteway “knew what was happening on the lands”: *Baron #2* at para 63. This inference is belied by the fact that Stericycle had not produced the records in question. Stericycle’s corporate representative had no knowledge of them.
- (b) Stericycle and Riteway “needed [Baron’s] evidence as to contamination and the cost of remediation to make an informed decision on next steps”: *Baron #2* at para 63. This was one sided and overlooked the importance of the information Baron

produced in circumstances where no admissions of liability had been made; and that,

- (c) it did not matter “whether Stericycle [was] liable under the Lease for remediation costs due to contamination during the Lease term, or for damages arising from a breach of contract” because “from a practical standpoint”, the “central issue” could not be resolved when the supplemental affidavit of records was served: *Baron #2* at paras 65 and 69.

[20] In effect, the chambers judge was persuaded to summarily determine Baron’s claim; essentially deciding that the supplemental affidavit of records did not significantly advance the action because it did not contain information required to resist summary dismissal. She failed to recognize that “[a] significant advance does not have to be so definitive that it would support an application for summary judgment”: *Ro-Dar* at para 28. There is a distinction between assessing an evidentiary record in a summary judgment context, and the qualitative assessment required to determine whether an action has truly died. The chambers judge erred in collapsing this distinction.

[21] It was undisputed that the supplemental records Baron produced were relevant and material to issues that remained in dispute. If all allegations raised and denied in the pleadings were to proceed to trial, the supplemental records would have significance in deciding the case. It was not for the chambers judge to narrow the live issues or forecast how the case would be decided in the context of the rule 4.33 applications. It is open to the respondents to apply for summary dismissal of the claims against them if they wish to do so.

Timing of Service of the Supplemental Affidavit of Records

[22] The remaining question the chambers judge considered was whether Baron could reasonably have produced the supplemental records in its original affidavit of records. The chambers judge agreed with the applications judge that service of the supplemental affidavit of records was not merely a housekeeping exercise or a disingenuous, last-minute step taken to keep the action alive. However, the chambers judge found that Baron’s explanation for failing to include the records in its original affidavit of records was inadequate. She noted that most of the supplemental records predated the original affidavit of records and that Baron could not particularize when it received many of them. This led the chambers judge to conclude that, for the most part, the supplemental records were in Baron’s possession before the original affidavit of records was served.

[23] The timing of an affidavit of records and whether it should have been served earlier is one factor the court may weigh in assessing whether it significantly advanced the action: *XS*

Technologies Inc v Veritas DGC Land Ltd, 2016 ABCA 165 at para 17; *Deja Vu Holdings Ltd v Securex Master Limited Partnership*, 2018 ABQB 597 at para 38; *Covey v Devon Canada Corporation*, 2020 ABCA 445 at paras 8-10. We appreciate the respondents' concern about the correction of a failure to meet disclosure obligations being treated as a significant advance. However, that is not what occurred here.

[24] Unlike in *XS Technologies* and *Deja Vu*, which the chambers judge found to be “in line” with the case before her (*Baron #2* at para 83), many of the records in Baron's supplemental affidavit of records were Tri-Arrow/Stericycle documents that Stericycle had not produced in the litigation and could not say it possessed before Baron's production. Relying on the fact that most of the records predated service of the original affidavit of records, the chambers judge decided that Baron possessed a significant number of the supplemental records before service of the original affidavit of records in December 2016. In arriving at this conclusion, the chambers judge overlooked that Baron did not create all the records at issue and their creation date does not necessarily correspond with Baron's possession date.

[25] At the questioning on his affidavit, Baron's corporate representative said that he received documents from a former manager of the Tri-Arrow/Stericycle facility from “probably either late 2016 or beginning of 2017 until late 2019”. When asked by way of undertaking to provide further information on when the records were received, he advised the documents described as “BAR007095 to BAR010625 in his supplemental affidavit of records” were received “incrementally between July 2016 and December 2019”. After using best efforts to review his records, he was unable to further particularize when he received each record. The chambers judge was alive to this evidence, and it was reasonable for her to conclude that Baron had some of the records when its original affidavit of records was served in December 2016. It was not reasonable on this record to conclude that most of the records were in Baron's possession as of December 2016, a finding the chambers judge held to be particularly relevant in determining that Baron ought to have produced the supplemental records earlier.

[26] As the chambers judge acknowledged, the timing of service of the supplemental affidavit of records did not detract from the genuineness of the step taken by Baron. In all the circumstances of this case, we agree with the applications judge that Baron's explanation for the timing of service of the supplemental affidavit of records was sufficient to conclude, in light of the relevance and materiality of the documents, that there had been a significant advance in the action.

[27] It is unnecessary to address Baron's remaining argument that the chambers judge erred in applying the burden of proof.

Conclusion

[28] The appeal is allowed and Baron’s action is restored.

[29] The result of this appeal should not be viewed as condoning the pace of this action. The delay began between March 2018 when Stericycle served its affidavit of records and March 2020 when Baron’s new counsel advised he had assumed conduct of the file because previous counsel was on medical leave. The record does not fully illuminate what was happening in this two-year period. Service of the supplemental affidavit of records approximately one year later on March 22, 2021 “reset the clock” because it was a significant advance in the action. While rule 4.33 does not require continuous and unbroken advancement of an action (*Ro-Dar* at para 28), its important objective remains. “The idea is that we usher these malingering files to trial or put them out of their misery”: *Ursa Ventures* at para 41, per Martin JA. The parties must agree to a litigation plan or alternatively apply to the Court of King’s Bench for directions to move this matter along expeditiously.

Appeal heard on June 9, 2026

Memorandum filed at Edmonton, Alberta
this 24th day of July, 2026

Slatter J.A.

Kirker J.A.

Hawkes J.A.

Appearances:

S.D. Petriuk, KC

M.J. LaFleche (no appearance)

C. Huang
for the Appellant

L.M.H. Belzil, KC

N. Juselius
for the Respondents Tri-Arrow Industrial Recovery Inc., Stericycle, ULC and Stericycle Inc.

P.D. Gibson

for the Respondent 474588 Alberta Ltd. operating as Riteway Vacuum Service