Federal Court of Appeal

Cour d'appel fédérale

Date: 20220610

Docket: A-100-21

Citation: 2022 FCA 111

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

SWEET PRODUCTIONS INC. AND
ENCHANTED RISE GROUP LIMITED

Appellants

and

LICENSING IP INTERNATIONAL S.À.R.L.,
9279-2738 QUEBEC INC., 9219-1568 QUEBEC INC., SOCIETE DE
GESTION FDCO INC., FERAS ANTOON AND DAVID TASSILLO

Respondents

Heard by online video conference hosted by the Registry on February 10, 2022.

Judgment delivered at Ottawa, Ontario, on June 10, 2022.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
RIVOALEN J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20220610

Docket: A-100-21

Citation: 2022 FCA 111

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

SWEET PRODUCTIONS INC. AND
ENCHANTED RISE GROUP LIMITED

Appellants

and

LICENSING IP INTERNATIONAL S.À.R.L.,
9279-2738 QUEBEC INC., 9219-1568 QUEBEC INC., SOCIETE DE
GESTION FDCO INC., FERAS ANTOON AND DAVID TASSILLO

Respondents

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Zinn) dated March 10, 2021, allowing an appeal of Prothonotary's Steele's Order dated October 16, 2020, and dismissing the underlying action brought by the appellants for copyright infringement in respect of cinematographic works appearing on the respondents' "Pornhub websites".

[2] The main issue on this appeal (and before the Federal Court) relates to the proper remedy when undue delay has been found pursuant to Rule 167 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules). More specifically, should the Court start with the presumption of dismissal if undue delay is found, as determined by the Federal Court, or is the Court's discretion unfettered and dismissal only to be used as a remedy of last resort?

[3] For the reasons that follow, I am of the view that the Federal Court erred in law by interfering with Prothonotary Steele's findings absent a palpable and overriding error. I would therefore allow the appeal in part.

I. Background

[4] It bears noting at the outset that most of the factual issues are not contested by the parties. Indeed, the appellants did not challenge the Prothonotary's assessment that there was undue delay before the Federal Court (see paragraph 26 of the Federal Court's reasons). There is no need, therefore, to go into the nitty-gritty of the protracted dispute that followed the filing of the statement of claim by the appellants on August 30, 2019, alleging copyright infringement by the respondents.

[5] Suffice it to say that the respondents made a request for particulars on September 23, 2019, which was met with a partial response on September 30, 2019, and a full response on October 21, 2019; by and large, the appellants refused to provide most of the requested particulars. The appellants' responses referred to an intent to file an amended statement of claim, which ultimately occurred on February 13, 2020.

[6] On March 11, 2020, the respondents submitted a new demand for particulars. In the same letter, the respondents mentioned that they would move for particulars and/or to strike if the requested information was not received by March 25, 2020.

[7] Shortly thereafter, the Court responded to the emerging COVID-19 pandemic by suspending the running of time in relation to deadlines imposed by the Rules, in stages, beginning March 16, 2020, and ultimately suspended until June 20, 2020, for Western and Atlantic Canada, and until July 14, 2020, for Ontario, Québec and the Territories: *Practice Direction and Order (COVID-19)* – March 17, 2020; *Consolidated COVID-19 Practice Direction* (June 25, 2020) (Practice Directions).

[8] Not having heard from the appellants, the respondents followed through with their March 11 letter and filed a motion to dismiss for delay on May 11, 2020. A few weeks later (on June 4, 2020), the appellants provided the particulars requested by the respondents, and undertook to provide a further amended statement of claim which was ultimately filed on June 16, 2020.

[9] On October 16, 2020, Prothonotary Steele dismissed the respondents' motion for leave to file reply evidence in the form of an affidavit from Lynn Chacra sworn on July 13, 2020, but granted the dismissal motion in part.

[10] On the leave motion, the Prothonotary found that the additional evidence concerned events that occurred after the dismissal motion had been filed, namely alleging further occurrences of delay on the part of the appellants. She found that the evidence was thus not

particularly useful, as it did not pertain to events prior to the filing of the motion, and that, to the extent that it did, it merely reinforced the statements and arguments already made. Balancing the factors set out in *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121, 2016 CarswellNat 1363 (WL Can) [*Amgen*], she did not find that the interests of justice warranted granting leave, and dismissed the motion with costs.

[11] On the dismissal motion, the Prothonotary found that the respondents had never been in default of the Rules, and that they had been justified in holding off serving their statement of defence until they received the particulars requested, thereby satisfying the first requirement of Rule 167. She also determined that the respondents had discharged their burden of showing that there had been an inordinate delay, the bulk of which had occurred prior to the suspension of the deadline due to the pandemic, and that there was inadequate evidence to explain or justify the delay. The Prothonotary was also prepared to infer a likely prejudice to the respondents as a result of the delay.

[12] Being satisfied that the three-part test for undue delay was met, Prothonotary Steele then considered what sanction was appropriate in the circumstances and ruled that the case should proceed under case management. Interestingly, the appellants had opposed this conclusion, while the respondents had put it forward as an alternative to striking. She found that the respondents appeared ready to move forward despite the delay, and that the Court could not be certain whether the further amended statement of claim filed on June 16, 2020, was sufficiently precise to address the respondents' March 11, 2020, request for particulars. In any event, she noted that there had been efforts made in the spring and summer of 2020 to move the matter forward.

Ultimately, she held that case management would be the most appropriate remedy, consistent with the culture shift relative to judicial delay espoused by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 [*Hryniak*].

II. Decision under review

[13] On March 10, 2021, the Federal Court overturned Prothonotary Steele's Decision (2021 FC 216). Justice Zinn first established the standard of review as correctness for issues of law and mixed fact and law, and palpable and overriding error for all others. On the leave motion, Justice Zinn held that the question of whether the reply evidence was relevant was subject to the standard of correctness. In his view, Prothonotary Steele erred in failing to consider whether the reply affidavit was relevant when assessing the remedy for undue delay. Justice Zinn noted that the Prothonotary gave the appellants credit for events that occurred after the motion to strike was filed, without allowing the respondents to file the impugned affidavit speaking to the circumstances surrounding these events and the appellants' continuing conduct in prosecuting this litigation. Accordingly, he found the reply affidavit relevant to the issue of the remedy and that leave should have been granted.

[14] With respect to the motion to strike, Justice Zinn found that the questions of whether the respondents were in default and whether there had been undue delay were not properly before the Court, since the appellants did not file a cross-appeal challenging the Prothonotary's findings. The only issue that was properly before him was the remedy, relating to which the respondents raised three arguments.

[15] The respondents first argued that the Prothonotary failed to apply the culture shift espoused in *Hryniak*. After briefly referring to the teachings of this case, Justice Zinn found that the Prothonotary had erroneously referenced it in a prospective manner, and failed to recognize that both parties were already under an obligation to embrace the culture shift the case propounds, prior to the commencement of this litigation. By failing to grant leave to file the reply affidavit, she excluded evidence of the appellants' continuing delay. Thus, Justice Zinn found that Prothonotary Steele erred in law by not applying the principles of *Hryniak* to the events that had occurred up to the date of the decision.

[16] The respondents had also submitted that the Prothonotary erred by not starting her analysis from the presumption of dismissal once Rule 167 was satisfied. On that point, Justice Zinn found that the cases did not support such a presumption. However, he opined that it was appropriate to apply Rule 167 in such a way, given its wording and the *Hryniak* culture shift. He stated (at para. 40):

> Where a party has established on the balance of probabilities that there has been undue delay in prosecuting a proceeding, the proceeding will be dismissed unless the Court is convinced that imposing another sanction is more appropriate. The burden of satisfying the Court that it ought to order another sanction rests on the party facing the dismissal of its action.

[17] In light of the fact that the appellants gave no commitment to moving the action forward at a reasonable pace, presented no litigation plan and opposed case management, combined with the evidence of their "continuing failure to meet self-imposed deadlines after the motion was filed", Justice Zinn was not convinced on a balance of probabilities that any sanction would move this matter along satisfactorily.

[18] Finally, Justice Zinn agreed with the respondents that the Prothonotary had considered four irrelevant factors in her assessment, namely that: (1) the respondents appeared ready to proceed despite the delay; (2) the respondents could have moved to strike the allegations; (3) the appellants filed an amended statement of claim after the dismissal motion; and (4) case management had been requested as an alternate remedy. In his view, the "only relevant evidence is that which goes to convincing the Court that an alternative sanction is appropriate because on a balance of probabilities it will result in the proceeding being reasonably prosecuted" (at para. 44).

[19] Moreover, he found that Prothonotary Steele failed to consider relevant evidence that pointed to the inappropriateness of case management in the circumstances. Specifically, she failed to consider the reply affidavit speaking to continued delays occasioned by the appellants, the lack of a promise from the appellants to prosecute their case expeditiously, and the fact that they opposed case management. Accordingly, Justice Zinn found that case management was not an appropriate sanction, and ordered that the action be dismissed for delay.

III. Issues

[20] In my view, this appeal raises three issues:

A. Did the appellants file their appeals in compliance with subsection 27(2) of the *Federal Courts Act*?

B. Did the Federal Court err in granting leave to file the reply evidence?

C. Did the Federal Court err in dismissing the proceeding for delay?

IV. Analysis

[21] As the Federal Court properly noted, discretionary orders of a prothonotary are to be assessed against the standards enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Accordingly, such orders should only be reversed if they are incorrect in law or are based on a palpable and overriding error concerning the facts. As for questions of mixed fact and law, they are also reviewable on the deferential standard of palpable and overriding error absent an extricable error of law: *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 at para. 64 [*Hospira*]; *Canada (Attorney General) v. Iris Technologies Inc.*, 2021 FCA 244, 2021 CarswellNat 5998 (WL Can) at para. 33 [*Iris*]; *Boily v. Canada*, 2017 FCA 180, 2017 CarswellNat 4336 (WL Can) at para. 23. Needless to say, that same standard also applies to the decision of the Federal Court reviewing the decision of a prothonotary on appeal, such that the question before us is whether Justice Zinn erred in law or made a palpable and overriding error in allowing the appeal of the Order made by the Prothonotary: *Hospira*, at paras. 83-84; *Iris*, at para. 33; *Sikes v. Encana Corp.*, 2017 FCA 37, 144 C.P.R. (4th) 472 at para. 12, leave to appeal to the SCC ref'd., 2017 CarswellNat 6020 (WL Can).

[22] Applying these principles, there is no doubt that the standard of review for admissibility of evidence is generally correctness, to the extent that the alleged error relates to the applicable legal test and principles. However, an admissibility ruling is entitled to deference if it is informed by the correct principles of law: *Eli Lilly Canada v. Teva Canada*, 2018 FCA 53, 2018

CarswellNat 1114 (WL Can) at para. 145, leave to appeal to the SCC ref'd., 2018 CarswellNat 6301 (WL Can).

[23] In the case at bar, there is no doubt that the Prothonotary applied the correct legal principles as she considered the factors laid out in *Amgen*, one of which is the usefulness of the evidence, to determine whether the filing of the reply affidavit should be permitted. The real issue before us is therefore whether the Federal Court erred in setting aside the Prothonotary's decision because she failed to consider the relevance of the reply affidavit when assessing the question of the appropriate remedy. The Prothonotary's finding in that respect could only be disturbed by the Federal Court if it was based on a palpable and overriding error.

[24] As for the decision to dismiss the proceeding instead of imposing another sanction under Rule 167, it is largely a question of mixed fact and law. However, the issue of whether the Federal Court judge erred by starting from a presumption of dismissal is undoubtedly an extricable question of law subject to the correctness standard.

A. *Did the appellants file their appeals in compliance with subsection 27(2) of the Federal Courts Act?*

[25] As a preliminary matter, the respondents argue that Justice Zinn's decision, insofar as it concerned the leave motion, was an interlocutory judgment, an appeal of which could only be brought within 10 days from the date of the judgment, pursuant to subsection 27(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Yet, the appellants did not file a notice of appeal of the leave motion within 10 days of the judgment, and chose instead to file a single notice of appeal

relating to both the leave motion and the dismissal motion some 27 days after the date of the judgment. As a result, the respondents seek the dismissal of the appeal of the reply evidence motion for non-compliance under subsection 27(2) of the *Federal Courts Act*.

[26] Section 2 of the *Federal Courts Act* defines a final judgment as "any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding". As this Court held in *Ontario Federation of Anglers and Hunters v. Alderville Indian Band*, 2014 FCA 145, 461 N.R. 327 at para. 21, leave to appeal to the SCC ref'd, [2014] S.C.C.A. No. 344 [*Alderville*], a final judgment must determine "in whole or in part any substantive right" in any "judicial proceeding". A "proceeding" means a matter before the Court, such as an action or an application, and not a component of the matter, such as a motion.

[27] The *Federal Courts Act* does not define "interlocutory judgment". However, as this Court held in *Alderville* (at para. 26), any order being appealed that does not determine substantive rights is interlocutory. Had the Federal Court ruled on the reply evidence motion in a stand-alone judgment, there is no doubt it would have been considered an interlocutory judgment. The scope of available evidence is clearly a procedural right, not a substantive one: *Szczecka v. Canada (Employment and Immigration)* (1993), 116 DLR (4th) 333, 170 N.R. 58 at para. 6 (F.C.A.); *Eli Lilly Canada v. Apotex*, 2006 FC 953, 298 F.T.R. 70 (Eng.) at paras 23-25. Moreover, the word "proceeding" means "the matter before the Court – such as an action or application – and not a component of the matter, such as a motion": *Alderville*, at paras. 20-21.

[28] In the case at bar, however, Justice Zinn (as did the Prothonotary) made a single judgment on both motions. Not only were they argued together but they were also closely intertwined. The admission of the reply evidence was clearly instrumental in the decision to dismiss the underlying action. To require the appellants to file two separate appeals in those circumstances would not favour the sound administration of justice, would unduly multiply the proceedings, would not align with our jurisprudence on appeals from interlocutory decisions save in exceptional circumstances, and would allow form to triumph over substance. I am therefore of the view that the reply evidence appeal has been filed in a timely manner and should be entertained.

B. *Did the Federal Court err in granting leave to file the reply evidence?*

[29] The appellants essentially argue that the Prothonotary was right to consider that the reply evidence was of limited usefulness, since a motion under Rule 167 principally concerns the delay in prosecuting the matter up to the motion to strike, as opposed to post-filing events. To rule otherwise would only lead to fragmentation of the evidence and "serial dueling [*sic*] reply and sur-reply affidavits" (Appellants' Memorandum of Fact and Law, at para. 101). The appellants also claim that the respondents never characterized their reply affidavit as being directed to remedies.

[30] In my view, these arguments do not hold water. As correctly noted by the Prothonotary, three questions must be addressed under Rule 167: (1) whether the moving party is in default of the Rules; (2) if not, whether there has been undue delay by the plaintiffs in prosecuting the matter; and (3) if so, whether the matter should be dismissed or other sanctions be imposed. I

agree with the Prothonotary and the appellants that the reply affidavit was largely irrelevant to the second question, which concerns the delay in prosecuting the matter up to the motion to strike.

[31] The reply affidavit is clearly of assistance to the Court, however, when exercising its discretion as to the remedy. Post-motion conduct is relevant when deciding whether to dismiss a proceeding for delay or to impose other sanctions. As the respondents suggest, a plaintiff who resolves the delay shortly after a Rule 167 motion is filed should stand in a better position than a plaintiff who continues to delay beyond the motion date when comes the time to determine the appropriate remedy.

[32] Given the discretionary nature of the Court's power to dismiss a proceeding or impose another sanction, I agree with Justice Zinn that Prothonotary Steele should have turned her mind to whether the evidence would assist her in determining the appropriate remedy in the circumstances. The fact that the respondents did not explicitly characterize the reply affidavit as being directed to remedies is irrelevant; in their written representations and notice of motion, they framed relevance broadly and indicated that the events which arose after service of their motion record would be "helpful to the adjudication" of the motion to dismiss. In any event, it was for the Prothonotary and, eventually, the Federal Court judge to determine their relevance.

[33] Furthermore, I agree with Justice Zinn that it was inconsistent for the Prothonotary to give the appellants credit for events that occurred after the motion was filed, while denying the

respondents the possibility to file affidavit evidence on post-filing activity that provides context on the appellants' own behaviour.

[34] For these reasons, I am of the view that the Prothonotary made a palpable and overriding error in her assessment of the usefulness of the reply affidavit for which the respondents sought leave to file, and that the Federal Court judge was justified in intervening and setting aside her decision in that respect.

C. *Did the Federal Court err in dismissing the proceeding for delay?*

[35] As the Prothonotary noted in her reasons at paragraph 11, existing Federal Court jurisprudence has laid out a three-pronged test for determining if a proceeding should be dismissed for delay. The Court must determine whether: (1) there has been an undue delay; (2) whether the delay is excusable; and (3) whether the defendants (respondents) are likely to be seriously prejudiced by the delay. As previously mentioned, she found that the appellants had failed to proactively and diligently move their case forward, that they had provided no justification for their failure to do so, and that the delay was likely prejudicial to the respondents. The appellants do not challenge these findings on appeal. Rather they challenge the Federal Court's decision to set aside the sanction imposed by the Prothonotary (case management) and to substitute dismissing the action as the appropriate remedy, after reading into Rule 167 a presumption of dismissal triggered once the elements of the Rule are met.

[36] The appellants argue that Justice Zinn erred by imposing this presumption. First, they argue that this conclusion is unsupported by the language of the Rule, which is discretionary in

nature and expressly provides for "other sanctions" with no mention of presumptive dismissal. See: *Nichols v. Canada*, 36 F.T.R. 77, [1990] F.C.J. No. 567 at para. 7; *Pilot v. McKenzie*, 2021 FC 396, 2021 CarswellNat 1575 (WL Can) at para. 12.

[37] Second, they argue the holding ignores Rule 3, which provides that the Rules must be interpreted and applied so as to secure the "just, most expeditious and least expensive outcome" on the merits. Necessarily, they argue, dismissal prevents any determination on the merits, and its presumption strips the Court of its discretion.

[38] Third, the appellants contend that *Hryniak* does not call for courts to "short-circuit" the adjudication of cases, but instead merely recognized that delay is one factor that renders justice less accessible. Finally, they argue that dismissal is a remedy of last resort – one that courts should only grant reluctantly – and that none of the cases Justice Zinn cites support a presumption of dismissal. Accordingly, in the appellants' view, Justice Zinn erred in holding that Rule 167 presumes dismissal, and Prothonotary Steele's discretionary decision should have been left alone.

[39] I agree with the appellants that an interpretation of Rule 167 that would import a presumption of dismissal when undue delay has been found would not align with the text, context and purpose of that Rule. The fact that dismissal is explicitly referred to as a possible sanction of undue delay is insufficient to create a presumption in favour of that sanction over any other. It merely signals, in my view, how far the Court can go in a case of undue delay, without preventing it from opting for lesser sanctions. The central element of Rule 167 is the

discretionary power granted to the Court to impose any type of sanction it sees fit to ensure the orderly and timely prosecution of a proceeding.

[40] As for context, the respondents assert that Rule 167 is placed in a part of the Rules titled "Summary Disposition", and that the other provisions found in that part are concerned with terminating proceedings since they involve discontinuance (Rule 165) and dismissal where continuation is impossible (Rule 168). However, this is not sufficient to conclude that Rule 167 must be interpreted to serve the same purpose exclusively. Such an interpretation would clearly fail to account for the clear wording of Rule 167, which allows the Court not only to dismiss a proceeding but also to impose "other sanctions".

[41] The drafters of the Rules would have used a more explicit wording if they had meant to create a presumption in favour of dismissal. In that respect, it is useful to compare the drafting of Rule 167 with that of Rule 382.2 governing the status review regime. That rule places the burden of justifying non-dismissal squarely on the plaintiff or applicant, thereby signalling that dismissal will likely ensue if they cannot justify the delay. Interpreting Rule 167 in the same manner would conflict with the broad discretion given to the Court when an undue delay has been established, and I fail to see why, as argued by the respondents, the interpretation of the two rules should be harmonized. A court-ordered status review is quite different from a motion brought by one of the parties. Indeed, Justice Zinn himself acknowledged that he would be hard-pressed to find any jurisprudential support for presumptive dismissal in the context of Rule 167.

[42] The respondents (with whom the Federal Court agreed) made much of the decision rendered by the Supreme Court in *Hryniak*, and claims that it created a culture shift in how courts and lawyers should approach delay. They claim that the Prothonotary erred in law by applying that culture shift solely on a going-forward basis, and only after she had dismissed the respondents' motion. Relying on *Hryniak*, *R v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, and *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, Justice Zinn understood the Supreme Court to be directing that "'judicial delay is objectionable in all contexts' and that parties should not engage in delay and the judiciary should not be complacent in the face of delay" (at para. 32). It is against the backdrop of this understanding that he applied Rule 167 to the events of this case.

[43] When read in context, *Hryniak* stands for the proposition that proportionality should infuse judicial proceedings, and that parties and the judiciary should select the procedure and apply the rules in the most proportionate, timely, and affordable manner that will allow for a fair and just adjudication of the dispute on the merits. More specifically, parties and the judiciary are invited to stop treating the full trial as the only means of properly adjudicating a claim, and to consider alternate means such as summary judgment.

[44] I do not think it can be fairly inferred from that principle, as the respondents and the Federal Court would have it, that dismissal should be presumed under Rule 167 once undue delay has been established. *Hryniak* calls on judges to manage the legal process in line with the principle of proportionality, requiring them to consider, in the exercise of their discretion, the "appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given

the nature and complexity of the litigation" (at para. 31). Interpreting Rule 167 to presume dismissal when an undue delay has been established paints it with too broad a brush because it would unduly constrain the Court from considering each case on its own facts and context.

[45] I am therefore of the view that the Federal Court erred in law in finding that a presumption of dismissal applies if undue delay is found. Neither the wording of Rule 167, its purpose, nor the case law support such an interpretation. I wholeheartedly agree with the Court below that judicial delay should never be condoned and that complacency in the face of obfuscation, delay tactics, and sheer lack of diligence in advancing a case ought to be strongly discouraged. This is essential to promote access to justice for all, and to avoid tying up precious and scarce public resources that could be better spent on meritorious cases that are run efficiently. Such a laudable goal, however, should not be pursued at the expense of proportionality and without regard for the right of litigants to bring their disputes to the courts and to expect them to be adjudicated in a fair and just manner. This is precisely why Rule 167 grants the Court a wide discretion to craft the remedy that is appropriate in the circumstances of each case.

[46] I should add, in closing on this topic, that the "not impossible to hope" standard to which the Prothonotary alluded in her reasons is too low a bar for a case to be allowed to proceed. At paragraph 47 of her reasons, she found that "with a case management scheduling order setting out clearly defined steps and deadlines, it is not impossible to hope that this case could henceforth move forward at a reasonable pace towards a determination on its merits". This standard is clearly deficient and finds no support in the jurisprudence. For a case to be allowed to

move forward, there must be a fair prospect (usually within the framework of case management) that the plaintiff is intent on bringing the case to its end and has the means to do so. The Court cannot simply rely on a mere belief or hope that a plaintiff will change course in the absence of any substantiating evidence.

[47] The respondents claim that even if the Federal Court erred with respect to the burden of proof or the presumptive remedy, its error did not affect its conclusion. In other words, they argue that quite apart from the starting point, that is, whether a presumption in favour of dismissal applies, the appellants' action was properly dismissed by the Federal Court. I do not agree. In my view, the error was material in the Federal Court's decision to reverse the discretionary decision of the Prothonotary to order case management. The issue is not so much whether the Federal Court's decision is entitled to deference, but whether the Prothonotary's discretionary decision, when assessed on the palpable and overriding error standard, should have been left to stand. Having carefully reviewed the record and the arguments, I cannot conclude that the Prothonotary committed such an error.

[48] Once the Federal Court's decision is stripped of its erroneous finding that dismissal is the presumptive remedy pursuant to Rule 167, one is left with the assessment of the evidence considered (or that ought to have been considered) by the Prothonotary. The Federal Court found that the Prothonotary misapprehended the evidence by considering irrelevant factors and ignoring relevant ones. The irrelevant factors, submitted by the appellants and endorsed by the Federal Court, are: (1) that the respondents appeared ready to proceed despite the delay; (2) that the plaintiffs (by which he obviously meant the defendants/respondents) could have brought a

motion to strike or for particulars; (3) that the plaintiffs filed an amended statement of claim after the dismissal motion; and (4) that case management had been requested as an alternative.

[49] With all due respect, I fail to see how these factors can be considered irrelevant to the question of whether an alternative sanction to dismissal was appropriate in the circumstances, and considering them certainly does not strike me as being so egregious as to rise to a palpable and overriding error. Even constraining the relevant evidence to "that which goes to convincing the Court that an alternative sanction is appropriate", as did the Federal Court (at para. 44), it seems to me that the factors considered by the Prothonotary were certainly helpful in determining the appropriate sanction and whether case management would result in timely prosecution and would move the proceeding towards adjudication.

[50] As for the relevant evidence the Federal Court found was ignored, it included the reply affidavit relating to the continuing delays by the appellants after the dismissal motion was filed, the absence of an assurance from the appellants that they would prosecute their case expeditiously, and the fact that they opposed case management.

[51] I have already indicated that Prothonotary Steele should have accepted the reply evidence. I do not think, however, that this error is overriding as it did not change the result. It is true that the appellants' responding motion record relating to the May 11, 2020, dismissal motion was only served on the respondents on June 24, 2020, well beyond the 10-day limit prescribed by Rule 369(2). Yet, in considering this fact, as well as the rest of the events outlined in the affidavit, Justice Zinn failed to appreciate that the intervening period took place in the early days

of the COVID-19 pandemic, specifically the time during which the Court's Practice Directions temporarily suspended all filing deadlines. In her reasons, Prothonotary Steele acknowledged that much of the delay occurring post March 16, 2020, flowed from the COVID-19 pandemic, which "halted most commercial and judicial activities" (at para. 30).

[52] The same reasoning applies from the date the respondents filed their motion to dismiss, on May 11, 2020, and the date the reply affidavit was affirmed, on July 13, 2020. The appellants may not have done themselves any favours by promising service of documents and the further amended statement of claim on certain dates and failing to meet those self-imposed deadlines, but I would be hard-pressed to blame them entirely for how things played out. Indeed, the Chief Justice acknowledged this Court's concern about the practical effects of the pandemic on litigants in *Reference re Section 6 of the Time Limits and Other Periods Act (COVID-19) (CA),* 2020 FCA 137, 2020 D.T.C. 5072. He noted at paragraph 22 of his reasons that unavoidable, practical difficulties encountered by a party "will always be a significant factor in favour of granting an extension of time or varying a court order". In my view, the corollary must be that this Court will take full account of such difficulties where they cause a party to fall behind. This is in no way meant to detract from the Prothonotary's conclusion that the delay was undue and unjustified, but it puts it in perspective and informs her choice of remedy. I cannot, in those circumstances, conclude that the Prothonotary committed a palpable and overriding error in opting to place the proceeding under case management rather than dismissing it.

[53] Neither does such an error flow from Prothonotary Steele's omission of two facts from her analysis, namely the lack of an assurance from the appellants that the action would proceed

expeditiously and their opposition to case management. Nothing in the record suggests that the appellants would likely fail to meet court-imposed deadlines or attempt to skirt any other requirements. Moreover, this is a requirement in respect of a status review under Rule 382.2, and not of a motion to dismiss for delay under Rule 167. Contrary to the former, the latter is prospective and not backward looking.

[54] Finally, an opposition to case management does not strip the Court of its remedial powers under case management, its inherent power to control its own process, or its ability to hold parties in contempt for failing to comply with court orders.

V. Conclusion

[55] For all of the foregoing reasons, I find that the Federal Court erred in law by interfering with the Prothonotary's findings absent a palpable and overriding error. Accordingly, I would allow the appeal in part, set aside the Federal Court's judgment in relation to Rule 167, and reinstate the Prothonotary's Order that the underlying action proceed as a specially managed proceeding. Costs are fixed in the amount of $5,000, all-inclusive, as agreed by the parties.

"Yves de Montigny"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-100-21
STYLE OF CAUSE:	SWEET PRODUCTIONS INC. AND ENCHANTED RISE GROUP LIMITED v. LICENSING IP INTERNATIONAL S.A.R.L., 9279-2738 QUEBEC INC., 9219-1568 QUEBEC INC., SOCIETE DE GESTION FDCO INC., FERAS ANTOON AND DAVID TASSILLO
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 10, 2022
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. RIVOALEN J.A.
DATED:	JUNE 10, 2022

APPEARANCES:

Paul Smith Garth Leslie	FOR THE APPELLANTS
Michael Shortt Denis Douville	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Oyen Wiggs Green & Mutala LLP Vancouver, British Columbia	FOR THE APPELLANTS
Fasken Martineau Dumoulin LLP Montréal, Quebec	FOR THE RESPONDENTS