IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gemex Developments Corp. v. Sekora,*
2011 BCSC 318

Date: 20110317
Docket: S035251
Registry: New Westminster

Between:

Gemex Developments Corp.

Plaintiff

And

**Louis Sekora, The City of Coquitlam,
Brian Robinson, Louella Hollington,
Dieter Soukup and Soukup Land Surveying Inc.**

Defendants

– AND –

Docket: S045308
Registry: New Westminster

Between:

Gemex Developments Corp.

Plaintiff

And

**City of Coquitlam, Don Buchanan, Robert Lee,
Jason Cardoni, Her Majesty the Queen in Right of the Provincial
Government of British Columbia as represented by the Ministry of
Environment, Lands and Parks, Colin Stewart, Robert Edwards,
Neil Peters, Her Majesty the Queen in right of the Government of
Canada as represented by the Department of Fisheries and Oceans,
C.D. Patterson, Scott Coultish, Markus Feldoff, Kon Johansen, Bruce Reid,
David Griggs, Deborah Brown, Norm Cook, Jon Kingsbury, Louis Sekora,
Soukup Land Surveying Inc., Dieter Soukup, Brian Robinson,
Louella Hollington, Barry Elliott, CH2M Gore & Storrie Limited,
Neil Nyberg, Frank Quinn, Tom Field, Shinji Goto,
Richard Roe and Jane Doe**

Defendants

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiff:	A. Tobin and J. Dhahan
Counsel for Defendants: The City of Coquitlam, Robert Lee, Louella Hollington, Jon Kingsbury, Brian Robinson, Norm Cook, Jason Cardoni, Barry Elliott, Louis Sekora, Deborah Brown, Don Buchanan:	J. Singleton, Q.C., and S. Brearley
Place and Date of Hearing:	Vancouver, B.C. December 2-3, 2010
Place and Date of Judgment:	Vancouver, B.C. March 17, 2011

INTRODUCTION

[1] The applicants, the City of Coquitlam and a number of present or former City councillors and officials, seek an order dismissing the plaintiff's action against them for want of prosecution. Alternatively, they seek an order striking certain portions of the plaintiff's pleadings, on the ground that the allegations in those pleadings have already been adjudicated.

[2] The applicable Rule is now Rule 22-7(7), *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which provides:

> If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[3] In the action, the plaintiff corporation, Gemex Developments Corp. ("Gemex") seeks damages against the City of Coquitlam and a number of individual defendants. The plaintiff alleges tortious conspiracy, negligence, breach of fiduciary duty and abuse of process. It seeks not only general and special damages, but also aggravated, punitive and exemplary damages.

[4] There have been four actions involving Gemex and the City of Coquitlam. The action with respect to which this application is brought is a consolidation of two of those four actions.

[5] This application relates to Action S035251, New Westminster Registry, which was commenced on October 30, 1996, by Gemex against Louis Sekora, the City of Coquitlam, Brian Robinson, Louella Hollington, Dieter Soukup and Soukup Land Surveying Inc. That action has been consolidated with Action S045308, New Westminster Registry, which was commenced on February 24, 1998, by Gemex against the City of Coquitlam, Her Majesty the Queen in Right of the Provincial Government of British Columbia as represented by the Ministry of Environment, Lands and Parks, Her Majesty the Queen in right of the Government of Canada as represented by the Department of Fisheries and Oceans, Soukup Land Surveying

Inc., CH2M Gore & Storrie Limited, and 25 named individuals as well as “Richard Roe” and “Jane Doe”.

[6] The parties have referred to Action S035251 as the “second action” and Action S045308 as the “third action” in their materials, and I will do the same in these Reasons. I will refer to them together as the “consolidated action”.

[7] The applicants (the “Coquitlam defendants”) are the City of Coquitlam and ten individuals. The individual applicants are all either former employees, current employees, or former or current city councillors in the City of Coquitlam. Two of the applicants, Don Buchanan and Deborah Brown, are now deceased.

[8] Specifically, the individual Coquitlam defendants who bring this application are: Robert Lee, who was employed as an engineer with the City of Coquitlam, Louella Hollington, now retired, a former city councillor of the City of Coquitlam; Jon Kingsbury, a former city councillor and mayor of the City of Coquitlam; Brian Robinson, retired, a former city councillor of the City of Coquitlam; Norm Cook, retired, a former city manager of the City of Coquitlam; Jason Cardoni, currently employed as the Supervisor of Development Servicing of the City of Coquitlam; Barry Elliott, currently employed as a Facility Sustainability Manager of the City of Coquitlam; Louis Sekora, a former mayor and current city councillor of the City of Coquitlam; Deborah Brown, deceased March 6, 2009, who was employed in the City of Coquitlam City Solicitor’s office as a lawyer; and Don Buchanan, deceased January 11, 2000, who was also a City of Coquitlam employee.

[9] The litigation in the consolidated action has been resolved as against all of the defendants listed in the style of cause, except those (the Coquitlam defendants) who bring this application. Of the applicants, the City of Coquitlam, Louis Sekora, Brian Robinson and Louella Hollington are defendants in both of the actions that have been consolidated.

THE UNDERLYING DISPUTE AND OTHER LITIGATION

[10] Gemex is a private company, the principal shareholder of which is Diane Spraggs. Gemex owns a large parcel of land in the City of Coquitlam, of some 20.5 acres. The land is bisected by the Coquitlam River. In 1996, Gemex built an eight-foot concrete wall (the "fence") along three sides of its property. Gemex was concerned about trespassers, particularly since Ms. Spraggs was in the process of constructing a family residence on the property.

[11] Public outcry regarding the concrete fence led Coquitlam City Council to obtain an independent engineering report on the stability of the structure. Gemex brought an action (the "first action") in damages against the firm, CH2M Gore & Storrie Ltd., that had prepared the engineering report. In the first action (No. S034541, New Westminster Registry), Gemex claimed the engineering report was negligently prepared. It was unsuccessful in that litigation: 2005 BCSC 604; 2006 BCCA 401; [2006] S.C.C.A. No. 439 (application to the Supreme Court of Canada for leave to appeal dismissed).

[12] In the consolidated action that is the subject of this application, Gemex makes serious claims against the Coquitlam defendants, alleging that they acted improperly and conspired to stop the construction of the fence and to have it removed, and conspired to interfere with and acquire Gemex's property. The plaintiff claims that the Coquitlam defendants' actions amounted to tortious conspiracy, negligence, breach of fiduciary duty and abuse of process. It also says that the City of Coquitlam requested the assistance of the federal Department of Fisheries and Oceans ("DFO") and the provincial Ministry of Environment, Lands and Parks ("MOE") to stop construction of the fence and to have it removed.

[13] The Gemex statement of claim in the consolidated action alleges that the defendants, in various ways, acted without authority and improperly. With respect to the Coquitlam defendants, the statement of claim contains the following allegations, among others:

> 51. The City of Coquitlam, as represented by its employees, Don Buchanan and Robert Lee and Jason Cardoni, had communication with

employees of the Ministry of Environment, Lands and Parks of the Province of British Columbia and, in particular, Colin Stewart, Robert Edwards, Neil Peters, and with employees with the federal Department of Fisheries and Oceans and, in particular, C.D. Patterson, Scott Coultish, Markus Feldoff, Kon Johannson and Bruce Reid to, firstly, utilize a collective authority between all of them to officially stop the construction of the plaintiff's concrete replacement fence and, secondly, to remove the concrete replacement fence from within approximately fifty (50) feet of the river bank.

...

61. The defendant, Deborah Brown, co-ordinated activities through and between the various defendants in endeavouring to stop the construction of the plaintiff's concrete replacement fence, as well as to having the fence removed, when she knew or should have known that the activities of the defendants and the activities of herself were improper, illegal, negligent and without a basis in law, and were aiding and abetting others in activities that were an abuse of process in attempting to remove, acquire or destroy the fence and property of the plaintiff.

62. The defendant, DON BUCHANAN, acted as a senior co-ordinator on behalf of the defendant, the CITY OF COQUITLAM, in respect to trying to stop the construction of the plaintiff's concrete replacement fence, as well as trying to have a portion or all of the fence removed.

63. The defendant, DON BUCHANAN, actively co-ordinated activities with the employees of the defendants, the MINISTRY OF ENVIRONMENT. LANDS AND PARKS and the DEPARTMENT OF FISHERIES AND OCEANS, with a view to seeing that the construction of the plaintiff's concrete replacement fence would be stopped and removed, as well as attempting to acquire for the defendant, the CITY OF COQUITLAM, land belonging to the plaintiff without compensation.

64. The defendant, NORM COOK, is the Manager for the defendant the CITY OF COQUITLAM, and as such was aware of the activities of the defendant, the CITY OF COQUITLAM, employees and directly assisted the defendant, the CITY OF COQUITLAM, employees in conspiring together with the other defendants to stop construction of and remove the plaintiffs concrete replacement fence.

65. The defendant, JON KINGSBURY, is an elected official on the defendant. the CITY OF COQUITLAM's, council and in such capacity actively became involved in efforts to stop the construction of and remove a portion of the plaintiff's concrete replacement fence when he knew or should have known that such activities were improper, illegal, negligent and without a basis in law, and were aiding and abetting others in activities that were an abuse of process in attempting to remove, acquire or destroy the fence and property of the plaintiff.

66. The defendant, LOUIS SEKORA, is the Mayor of the defendant the CITY OF COQUITLAM, wherein he played an active role in assisting

the other defendants to stop construction and to remove a portion of the plaintiff's concrete replacement fence.

67. The defendant, LOUIS SEKORA, actively published statements through the media which were derogatory to the plaintiff and the plaintiff's principal shareholder's family with a view to gain public support to assist in the illegal stoppage and removal of the plaintiff's concrete replacement fence, as well as attempting to acquire land belonging to the plaintiff without compensation.

68. The defendant, the CITY OF COQUITLAM, through its employees, agents and elected officials did deliberately and without the colour of right and/or through negligence and by conspiring with the defendants and others with a view to seeing that the construction of the plaintiff's concrete replacement fence would be stopped and removed, as well as attempting to acquire for the defendant, the CITY OF COQUITLAM, land belonging to the plaintiff without compensation.

69. The defendant, the CITY OF COQUITLAM, has, and continues to, carry out a policy of interference and harassment in respect to the plaintiff; deliberately and without the colour of right and/or through negligence and by conspiring with the defendants and others, and in particular, the following:

    ...

    (i) They, and in particular the defendant, LOUIS SEKORA, encouraged people to continue trespass upon the plaintiff's property in public statements wherein he degraded the family, with which the principal shareholder is associated, because the family would not allow continued trespass and misuse of the property;

    (j) They tried to have the concrete replacement fence removed by the Department of Fisheries and Oceans, even though they knew or should have known, that the Department of Fisheries and Oceans did not have the authority to issue a Stop Work Order;

    (k) They tried to have the concrete fence removed by the Ministry of Environment, Lands and Parks, even though the fence was entirely on dry land, by requesting that they find some way to utilize the rights that they were given under the statute to have the fence removed;

    ...

    (dd) They created without public demand, a special by-law for the sole purpose of restricting the plaintiff's ability to maintain and re-create their current fencing requirements, which by-law was advanced by the defendant, LOUIS SEKORA, and voted upon by certain councilors who knew, or should have known, they were in a conflict position because of a law suit against them by the plaintiff.

...

71. The defendant LOUIS SEKORA, Mayor of the City of Coquitlam publicly indicated to the Caliente residents and to those individuals that had previously trespassed on the Gemex property and used a pathway for

pedestrians, animals and cyclists that he would do all he could to see that the fence was removed and the Plaintiff's land was acquired to allow road access to the Caliente residents and to the Coquitlam River and pathway access to others on the easterly side of the Coquitlam River.

72. On the 23rd day of September 1996, in a secret, in-camera, special council meeting, the defendants, BRIAN ROBINSON and LOUELLA HOLLINGTON, moved to acquire, without compensation, various portions of the Gemex property through the legal device of resumption of a portion of the plaintiff's property.

...

78. The defendant, the CITY OF COQUITLAM, with the support of the defendants, LOUIS SEKORA, BRIAN ROBINSON and LOUELLA HOLLINGTON, devised a plan of resumption that they intended to use to remove the plaintiff's concrete, constructed fence, without payment or compensation.

79. The defendant, the CITY OF COQUITLAM, retained the services of the defendants, SOUKUP LAND SURVEYING INC. and DIETER SOUKUP, to enter and trespass upon the plaintiff's property for purposes of surveying out the property that they intended to resume.

...

82. The defendant, the CITY OF COQUITLAM, and the defendants, LOUIS SEKORA, BRIAN ROBINSON and LOUELLA HOLLINGTON, owed a duty to the plaintiff, Gemex Developments Corp., to act in good faith and not to abuse the benefits, privileges and obligations that were given to them under law and by the citizens of the Coquitlam.

...

84. The defendant, the CITY OF COQUITLAM, and the defendants, LOUIS SEKORA, BRIAN ROBINSON and LOUELLA HOLLINGTON, breached their fiduciary duties to the plaintiff and were in abuse of their process in endeavouring to put into operation through the guise of a by-law a plan that was devised to acquire some of the plaintiff's land and assets without compensation.

85. The defendants conspired to enter into a process to .acquire, without compensation, some of the plaintiff's land and property under the guise that the land was required for a road when no previous road layouts were in place, no road design had been created and the road patterns had not been created in the normal City bureaucratic process and there would be no consultation in respect to the road location with the Department of Highways, or the defendants, the DEPARTMENT OF FISHERIES and OCEANS and MINISTRY OF ENVIRONMENT, LANDS AND PARKS, and the road layout did not meet currently accepted engineering standards for the creation of the road.

...

88. The defendant, the CITY OF COQUITLAM, and its employees and elected officials have carried on a continuing program for years directed

at the plaintiff to increase their costs and decrease the natural benefits to be received from the plaintiff ownership of their property with a view to obtaining the land (some or all of the property) for their own benefit.

89. The defendant, BARRY ELLIOTT, assisted and encouraged the defendants, and in particular the defendant, the CITY OF COQUITLAM, and the public to allow for continued trespass upon the plaintiff's lands and to acquire river frontage illegally from the plaintiff and to remove the plaintiff's concrete fence, which was preventing the public from accessing the Coquitlam River.

90. The defendant the CITY OF COQUITLAM, through its engineers, the defendants, NEIL NYBERG and FRANK QUINN, enlisted the assistance of the defendant, CH2M GORE & STORRIE LIMITED, and CH2M Gore & Storrie Limited employees or principals, the defendants, TOM FIELD and SHINJI GOTO, to put forward an engineering report that would deem the fence unsafe and, therefore, under the powers granted to the City of Coquitlam under the *Municipal Act* and with the assistance of the Mayor, Council and others, would have the fence removed.

...

97. The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, were responsible for producing an engineering report bearing date 29 March 1996, which report was done in secret without the knowledge of the plaintiff, with a view to assisting the defendant, the CITY OF COQUITLAM, and the other defendants herein, in stopping and/or removing the plaintiff's concrete fence by putting forward conclusions and recommendations in respect to its safety and the impact upon the Coquitlam River, which were not based upon a proper engineering report or proper engineering principles.

...

112. At the date of the issuance of this Statement of Claim the plaintiff continues to suffer the effects of the negligence of the defendants.

113. The defendants conspired together to attempt to cause greater losses to the plaintiff than actually the plaintiff actually suffered [sic].

114. The destruction or removal of the plaintiff's concrete fence and the taking of some of the plaintiff's land without compensation was prevented solely by the efforts of the plaintiff, whose efforts were resisted fully by the defendants.

...

117. The defendants, knowing their obligations and responsibilities to the plaintiff, deliberately conducted themselves in a manner without due care and attention with a view that it would cause damage to the plaintiff's property, as well as, financial loss and, as a result, the plaintiff is entitled to punitive and exemplary damages from the defendants.

118. As a result of the defendants conspiring together and their negligent actions and breach of duty, and in having acted in bad faith in abusing their process, the plaintiff has suffered damages.

[14] The claims in the consolidated action against the MOE, the DFO, various engineers and CH2M Gore & Storey Ltd., have all been resolved.

[15] In addition to the consolidated action that is the subject of this application, and the first action regarding the engineering report that has been resolved, there is other outstanding litigation involving the parties. In Action No. 126264, New Westminster Registry, filed March 19, 2010, Gemex claims damages from the City on the basis that a bridge built across the Coquitlam River trespasses on remaining Gemex property. As well, a class action, *Antoniali v. Coquitlam*, No. L022644, Vancouver Registry, commenced in 2002, involved Gemex. However, its subject matter seems wholly unrelated to the present litigation. Counsel advised that the plaintiff has since settled with the City separately from the class action proceedings, on a confidential basis.

LEGAL PRINCIPLES

[16] This Court's discretion to dismiss proceedings for want of prosecution is continued in the new *Supreme Court Civil Rules*, Rule 22-7(7), and is governed by clearly established principles. The over-riding principle is that the dismissal of an action without permitting it to be heard on its merits is a drastic measure, to be taken only when it is clearly required in the interests of justice.

[17] In *Irving v. Irving* (1982), 140 D.L.R. (3d) 157, 38 B.C.L.R. 318 (C.A.) [*Irving*], the Court laid out the fundamental principles, approving at para. 8 this statement by Lord Justice Salmon in *Allen v. Sir Alfred McAlpine & Sons Ltd.,* [1968] 2 Q.B. 229 [*Allen*]:

> A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: – In order for such an application to succeed, the defendant must show:
>
> (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case

> to case, but inordinate delay should not be too difficult to recognize when it occurs.
>
> (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault.

[18] These principles have been affirmed many times, for example in *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2002 BCCA 145, 98 B.C.L.R. (3d) 238 at para. 15 [*Tundra*].

[19] The rationale for the existence of the Court's jurisdiction to put an end to litigation that has not been prosecuted is embodied in these passages from Lord Diplock's speech in *Allen* at 255-259:

> And where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. But there may come a time when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.
>
> […]
>
> It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on

> the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.
>
> […]
>
> It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago.

[20] On an application to dismiss for want of prosecution, there are four questions to be addressed:

(1) Has there been inordinate delay on the part of the plaintiff in pursuing its claim?

(2) Has the delay been inexcusable?

(3) Has the delay caused serious prejudice, or is it likely to cause serious prejudice to the defendants?

(4) Does the balance of justice require an order dismissing the plaintiff's claim?

[21] Where allegations go to the defendant's character and credit, there is a particular onus on the plaintiff to proceed with appropriate expedition and diligence: *Vic Van Isle Construction Ltd. v. Lomenda*, [1999] B.C.J. No. 3032, 93 A.C.W.S. (3d) 988 (S.C.) at para. 19 [*Vic Van Isle*]; *Cal Coast Spas Inc. v. Coast Spas Inc.*, 2008 BCSC 846, 62 C.P.C. (6th) 57 at paras. 74-75 [*Cal Coast*].

[22] The delay is to be measured from the date of the commencement of the action, rather than from the date at which the cause of action arose: *Pacific Hunter Resources Inc. et al. v. Moss Management Inc.*, 2004 BCCA 40, 23 B.C.L.R. (4th) 154 [*Pacific Hunter*] at para. 36. In *Cal Coast*, after a careful review of the authorities on this point, Madam Justice Ballance stated at para. 64:

> In summary, the authorities establish the proposition that in determining whether delay is inordinate, the court ought to look at the period of time after the commencement of the action rather than when the cause of action arose. The inquiry is to focus on the delay in prosecuting the action once a plaintiff has enlisted the judicial process as a forum for adjudication.

[23] In describing what will constitute inordinate delay, words such as "uncontrolled, immoderate or excessive" have been used: *Azeri v. Esmati-Seifabad*, 2009 BCCA 133, 91 B.C.L.R. (4th) 236, at para. 9. In *Osolin v. Aquila Holdings Ltd.*, [1982] B.C.J. No. 1225 (S.C.), at para. 4, Mr. Justice Tyrwhitt-Drake put it this way:

> Inordinate delay must mean more than simple delay. "Inordinate" is a strong adjective, importing a quality to the delay which goes beyond the normal or even, in some circumstances, the abnormal: an inordinate delay must be one which strikes at the root of justice, and makes a fair trial a virtual impossibility.

[24] In assessing whether or not the delay is excusable, one must look at the reasons for it in all of the circumstances. If there is no credible excuse for the delay, then it is inexcusable: *Allen*, cited at para. 8 in *Irving*. In assessing whether the delay is excusable, the Court should take into account the complexity of the case: *Rhyolite Resources Inc. v. CanQuest Resource Corp.*, 1999 BCCA 36, 64 B.C.L.R. (3d) 80 at para. 24 [*Rhyolite*].

[25] In *Tundra*, the Court of Appeal clarified some earlier discussion in the authorities to the effect that a presumption of prejudice arises once inordinate inexcusable delay has been established. Mr. Justice Hall stated at para. 35-36:

> I also regard it as error in principle to dispose of the issue of prejudice by asking whether the plaintiffs had rebutted 'the presumption of prejudice that arises in the circumstances' and by going on to answer that question in the negative. The "presumption of prejudice" is not a presumption of law. It can be termed a presumption of fact but only in the sense, as it is put in Sopinka and Lederman "*The Law of Evidence in Civil Cases*", 1974 at p. 378:

> > The term "presumption of fact" is used in many instances in which it is desired merely to shift the secondary burden to a particular party. When used in this sense, it means that the facts are such that a certain inference should, but need not, be logically drawn.
>
> It is in that sense that the word "presumption" is employed in *Busse v. Robinson Morelli Chertkow*, *supra*. In considering whether the presumption of prejudice has any application in a particular case, the question properly to be asked, as stated by Goldie J.A. in para. 27 of *Busse*, is:
>
> > ... has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action?
>
> In considering that question it may be misleading to approach it by asking whether the plaintiff offered evidence on the point. In most cases, it will only be the defendant who is in a position to offer evidence as to the existence of specific prejudice - as two of the defendants attempted to do in this case. The plaintiff often will be able only to point to the overall circumstances, including the absence of any evidence from the defendant of specific prejudice, as establishing on the balance of probabilities that serious prejudice has not been suffered.

[26] The defendants must establish that they are likely to be seriously prejudiced: *Fraser Cedar Products Ltd. v. Oceanic Underwriters Ltd.*, [1997] B.C.J. No. 837 (Q.L.) [*Fraser Cedar*], Vancouver Registry No. C901408 at paras. 21-22. The prejudice must be such that the defendants' ability to have a fair trial is imperilled.

[27] In assessing whether there has been inexcusable delay and whether there has been prejudice to the defendants, as well as in looking at the balance of justice, the extent to which the defendants themselves have contributed to the delay is relevant. (See, for example, *De Cotiis v. Viam Holdings Ltd.*, 2004 BCSC 1301, 3 C.P.C. (6th) 349 [*De Cotiis*], where the defendants had not filed a statement of defence despite having been contacted by the plaintiffs with a request that they do so. The application, after five years' delay, to dismiss for want of prosecution was dismissed.)

[28] The role of the defendants' conduct was a subject of comment in *Allen* at 260:

> > Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. But also, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts

> himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the *Rules of Court* is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial.

[29] Thus, *Allen* suggests that mere non-activity by the defendants where no procedural step on their part is called for by the *Rules* is irrelevant. However, the delay for which the plaintiff is responsible must be identified, and that requires consideration of which parts of the delay were caused or contributed to by the defendants themselves. Even after the plaintiff has been responsible for inordinate delay, the defendants' conduct is relevant if it has been such as would induce the plaintiff to incur further costs in the reasonable belief that the defendants intended to proceed to trial.

ANALYSIS

1. Has there been inordinate delay on the part of the plaintiff in pursuing its claim against the Coquitlam defendants?

[30] Attached as Appendix "A" is a chronology of the steps involving the Coquitlam defendants in the two actions (the "second action" and the "third action") that now have been consolidated as Action S045308. Appendix "A" also includes reference to litigation steps involving other defendants in those actions.

[31] The second action, No. S035251, against the City and three of the individual applicants (Mr. Sekora, Ms. Hollington and Mr. Robinson) was commenced October 30, 1996. The third action, No. S045308, involving all of the applicants, was commenced February 24, 1998. Because the actions have been consolidated, it is most convenient, and fairest to the plaintiff, to take as the starting point of the alleged delay the later date, February 24, 1998, when the third action was commenced.

[32] The defendants' notice of motion for an order dismissing the actions for want of prosecution was filed on January 28, 2010, and set for hearing on May 4, 2010. No judge was available to hear the application that day, but Madam Justice Gerow granted a temporary stay in both actions pending a hearing of the stay application. Mr. Justice Leask on June 7, 2010 ordered the actions stayed pending this hearing. He also ordered that the parties were at liberty to set a trial date and a mediation or a judicial settlement conference, and that the plaintiff was at liberty to consolidate the two actions.

[33] I will take May 4, 2010, the date of the court order granting an interim stay of proceedings, to be the end point of the alleged delay. After that date, the plaintiff was precluded from taking further steps.

[34] Therefore, the central question is whether there has been inordinate delay by the plaintiff in prosecuting its claim against the Coquitlam defendants in the period of just over twelve years between February 24, 1998 and May 4, 2010.

[35] Although the overall context must be considered (including the fact that there was related litigation in which the plaintiff was engaged, and that there were formerly other defendants in the consolidated action), the essential focus must be on the delay experienced by the applicants, the Coquitlam defendants.

(a) The second action (S035251)

[36] The Coquitlam defendants say that there have been no meaningful steps by the plaintiff in the second action for 12 years, since 1998. The plaintiff delivered a demand for particulars to Mr. Sekora on June 2, 1998, and filed a notice of motion to compel answers to interrogatories by Mr. Robinson and Ms. Hollington on September 30, 1998 (it appears to have been a motion that was never heard). The defendants point to long pauses in this litigation during which there were no steps at all, in particular to total inactivity in these periods:

- 10 months between June 13, 1997 and April 30, 1998;

- four years between September 30, 1998 and October 3, 2002 (the defendants Robinson, Hollington, Sekora and Coquitlam filed amended defences on October 3, 2002);

- eight years between October 3, 2002 and the present (with the exception of the November 15, 2010 order by consent consolidating the two actions pursuant to the June 7, 2010 order of Mr. Justice Leask).

[37] One reflection of the length of time that has passed is that Michelle Taylor, an associate with Singleton Urquhart LLP, solicitors for the Coquitlam defendants, deposes that she learned, when she requested copies of appearances filed in the second action, that the court file was unavailable because the Registry had destroyed all civil files up to and including those filed in 1997.

(b) The third action (S045308)

[38] On January 31, 2001, the plaintiff filed a notice of trial setting the trial in the third action for nine days, starting August 12, 2002. That trial date was adjourned generally on May 31, 2002, by consent, at the instigation of the defendants. Ms. Taylor deposes that solicitors for the Coquitlam defendants made numerous attempts to elicit the plaintiff's position on moving forward with the two actions following the adjournment in 2002 and that the solicitors indicated that there would be a want of prosecution application if the actions did not proceed "substantively". Brian Robinson, Louella Hollington, Louis Sekora and the City of Coquitlam filed an amended statement of defence on October 3, 2002 and the Coquitlam defendants' solicitor wrote on October 7 and 28, 2002, to solicitors for the plaintiff, asking about re-scheduling the trial and referring to a suggested trial date of February 2004.

[39] After October 2002, the action remained almost wholly dormant for five years.

[40] On December 20, 2007, a different group of defendants, the engineering defendants (CH2M Gore & Storrie Limited and two named defendants), filed their statement of defence and shortly thereafter brought a motion to have the action

against them dismissed as *res judicata*. That application was heard on February 14, 2008 and allowed on January 26, 2009. The plaintiff's claim against those defendants was dismissed, as having already been determined in the first action.

[41] For 6.5 years, between mid-2002 and early 2009, the plaintiff took no steps with respect to the Coquitlam defendants.

[42] The first written reference to an application for dismissal for want of prosecution is found in a February 12, 2009 letter, from Mr. Singleton to Mr. Thomas L. Spraggs, stating (with reference to both of the two now-consolidated actions):

> Gemex has not taken any steps to advance either of the above noted actions for at least a decade.
>
> My client would likely agree to a dismissal of these actions on a without costs basis. I would appreciate receiving your client's agreement to resolve these actions on this basis. Alternatively, we are left to seek a dismissal of both actions for want of prosecution and further orders of costs against Gemex.
>
> May I please hear from you.

[43] The plaintiff's solicitors filed a notice to mediate on March 3, 2009. The Coquitlam defendants' solicitor replied on March 4, 2009, taking the position that the notice to mediate was issued pursuant to *B.C. Reg. 127/98*, respecting motor vehicle accidents, and would therefore be inapplicable. The solicitor's letter then states:

> More importantly, no steps have been taken to advance either of the above-noted actions for more than a decade. Pursuant to Rule 3(4), before Gemex takes any further step, it must serve and file a Notice of Intention to Proceed. That will be met by our application for dismissal for want of prosecution.
>
> As I previously outlined, my client would likely agree to a dismissal of both actions on a without costs basis. Gemex will not achieve any greater result at mediation, if it was able to proceed. If these actions do not resolve on a without costs basis, we will seek costs on our application for dismissal for want of prosecution.
>
> I respectfully suggest that you reconsider pursuing mediation and seek instructions to resolve these actions in the manner I have suggested.

[44] In a reply dated March 9, 2009, Thomas L. Spraggs wrote on behalf of the plaintiff, stating that it had mistakenly invoked the incorrect Regulation, and sent a notice to mediate under another Regulation. He then stated:

> You indicate in your letter that no steps have been taken in either of these actions for over a decade however, these actions are inextricably intertwined with the *Gemex Developments Corp. and CH2M & Gore et al.* action which has been ongoing. As such, it is our position that steps have been ongoing in these proceedings. We note that you have recently brought in an Application to Dismiss in the *Gemex Developments Corp. and CH2M & Gore et al.* action and thus you cannot now take the position that no steps have been taken in these proceedings.

[45] A judicial settlement conference was scheduled for February 24, 2009, which was adjourned by consent. The parties attended an unsuccessful, voluntary mediation on June 24, 2009.

[46] The Coquitlam defendants assert that nothing of consequence was done by the plaintiff thereafter by way of steps that would move the litigation to trial. No examinations for discovery were scheduled and no trial date was set. The plaintiff did file a notice of motion with respect to the defendants' list of documents, and sent notices to admit to the City and the individual defendants.

[47] On January 27, 2010, Mr. Spraggs for the plaintiff wrote to counsel for the Coquitlam defendants requesting their updated list of documents, and further information regarding their reply to notice to admit, and forwarding interrogatories for the City and for Mr. Sekora. Replies to the interrogatories were provided on April 19, 2010.

[48] The Coquitlam defendants' notice of motion in this application for dismissal for want of prosecution was filed on January 28, 2010.

[49] Following that date, the plaintiff sent a second supplemental list of documents, filed a notice of motion with respect to the defendants' list of documents, sent notices to admit to the City and the individual defendants, filed a notice of motion to seek to examine Maxine Wilson, a former Mayor of Coquitlam, as a witness under Rule 28, and filed a notice of motion requesting that the Coquitlam defendants' defence be struck because of destruction of documents.

[50] The Coquitlam defendants point to long pauses in the third action during which nothing was done by the plaintiff or by any of the defendants:

- almost 14 months between September 9, 1998, when the surveying firm and surveyors (the "Soukup defendants") filed their appearance and November 3, 1999, when the plaintiff delivered appointments to examine for discovery various MOE defendants;

- 10 months between February 22, 2001, when the Soukup defendants entered a consent dismissal order, and December 31, 2001, when the MOE defendants moved for dismissal of the action against them;

- over five years between October 3, 2002, when the Coquitlam defendants filed an amended statement of defence, and December 20, 2007, when the CH2M engineering defendants filed a statement of defence.

[51] In addition to those periods of total inaction with respect to all parties, as I have noted, there was a 6.5-year period of inaction with respect to the Coquitlam defendants. Between May 31, 2002 (when the plaintiff adjourned the trial by consent), and March 3, 2009 (when the plaintiff served a notice to mediate, after it had received Mr. Singleton's February 12, 2009 letter advising of the Coquitlam defendants' position regarding dismissal for want of prosecution), the plaintiff took no steps in the litigation as against the Coquitlam defendants.

(c) Overall progress of the consolidated litigation

[52] It appears that no examinations for discovery have been conducted as between the plaintiff and the Coquitlam defendants in either action, and that no examinations for discovery have yet been scheduled.

[53] Although apparently counsel have agreed that 20 days will be needed for trial, no trial date has been set. The plaintiff's intention is to set a trial date for 20 days in 2012, either commencing September 3 or October 1, 2012; however, counsel advised, the Registry cannot confirm these dates until 18 months prior to the

proposed first day of trial. Pam Carriere, legal assistant to Thomas L. Spraggs, deposed that Mr. Spraggs advises her that he intends to proceed immediately with the plaintiff's applications regarding the Coquitlam defendants' document disclosure obligations, and with setting down examinations for discovery for all of the remaining defendants at the rate of about one per month beginning in October 2010 and extending to the summer of 2011. She deposed that Mr. Spraggs advises that he will be prepared to proceed to trial in the fall of 2012.

(d) The Coquitlam defendants' position

[54] The position of the Coquitlam defendants is that there has been inordinate delay on the part of the plaintiff in proceeding with the consolidated action against them.

(e) The plaintiff's position

[55] Counsel for the plaintiff says that the delay is not inordinate in all of the circumstances. Mr. Tobin submits that the pertinent circumstances are the complexity of the litigation, taken as a whole, between the plaintiff and the City, and the applicants' failure to respond to steps in the litigation in a reasonable and timely way. He says that the Coquitlam defendants have induced the plaintiff to believe that delay was acceptable, and that the Coquitlam defendants did not give notice to the plaintiff of any concerns regarding any alleged delay.

Standstill agreement

[56] The plaintiff's position is that there was a "standstill agreement" whereby the defendants consented to delays. The plaintiff relies in this respect on the evidence of Derek Ashford.

[57] Derek Ashford is a professional engineer who worked for the City of Coquitlam between 1970 and 1974. He also did a report for a real estate development company in 1974 regarding development in the Burke Mountain area. The report included consideration of the Gemex property. Mr. Ashford deposes that in 2001, Gemex commissioned him to prepare a report on proposed locations for a

road crossing of the Coquitlam River, and that he did further work for Gemex in 2003. He deposes that in September 2006, in a discussion with then Mayor of Coquitlam Maxine Wilson, he "identified the special knowledge I had with respect to the Gemex Property and the associated contentious issues". He deposes that Ms. Wilson indicated she would support an attempt to bring the parties together to try to resolve matters.

[58] Gemex retained Mr. Ashford to attend various negotiation meetings with the City. Mr. Ashford says that Trevor Wingrove, Manager of Corporate Services for the City, agreed that Gemex and its counsel, Mr. Spraggs, could communicate directly with the City, without the presence of outside counsel, in order to facilitate the negotiation process. He sent a letter to Mr. Wingrove on October 30, 2006, setting out three items to be addressed prior to full negotiations between the City and Gemex. The third item was "a discontinuance of further legal actions being undertaken by either party in the Gemex v. CH2M Gore & Storrie et al. matter (B.C. Court of Appeal Registry No. CA032975)" (the first action). He sent a further letter on November 17, 2006, to Mr. Wingrove, again referring to Gemex's preconditions and to the CH2M litigation (and, apparently, to Gemex's application for leave to appeal to the Supreme Court of Canada in that litigation, which was eventually unsuccessful). The letter then states, "Gemex have agreed that other ongoing court matters can be set aside for a period of 30 to 60 days with further extensions agreed as necessary and expeditious to assist a resolution of all matters", and expresses hope that the City Council can accept Gemex's preconditions.

[59] Mr. Ashford deposes that sometime between November 2006 and March 2007 he attended a further meeting with representatives of Gemex and the City, including Mr. Spraggs, Ms. Spraggs, Mr. Wingrove and Lisa Parkes, solicitor for the City. He calls this the "Standstill Meeting" and says that he recalls that Mayor Maxine Wilson was present at the meeting for a few minutes. He deposes that at that meeting, the City agreed with Gemex to "enter a standstill" on all outstanding issues between them while they attempted settlement in order to save costs, time and energy. He says that the City agreed to so advise their lawyers. He says that

he understood the standstill agreement was to continue at least as long as the negotiations were ongoing, and that it included the two actions that are the subject of the current application.

[60] Mr. Ashford's affidavit states that the City informed Gemex that the City's outside counsel objected to the standstill agreement, but that the City agreed to it nevertheless. He specifies that in or about March 2007, he was informed by Mr. Wingrove that Mr. Singleton took issue with the meetings, as Mr. Singleton did not wish the City to communicate directly with Mr. Spraggs.

[61] Mr. Ashford wrote a memorandum to Mr. Wingrove on March 30, 2007, summarizing his understanding of the state of the negotiations, and stating:

> You and I also understood that a standstill agreement on all legal matters and associated costs, including the Supreme Court of Canada case, was in place (except for the Supreme Court of Canada process which was date led). The Supreme Court of Canada Appeal is now concluded and therefore the issue of costs should be covered by the standstill agreement we have in place. Would you please so advise Mr. Singleton. Mr. Singleton has also taken issue with Mr. Spraggs talking directly with the City, although we have discussed this as being part of our negotiation process. I would ask that you instruct Mr. Singleton that there are no restrictions with whom Mr. Spraggs may speak.
>
> It now appears that in order for Gemex to negotiate all outstanding matters, it is necessary for the City to:
>
> 1. Continue to honour the standstill agreement.
> 2. Eliminate the problem of the illegality emanating from the trespass. Gemex has advised me that Deborah Brown has stated that the rate the City would charge for any work stoppage during bridge construction would be $10,000.00 per day. Gemex are suggesting that this should be the rate per day for the current trespass.

[62] Mr. Wingrove on behalf of the City of Coquitlam replied on May 15, 2007, as follows:

> I am in receipt of your Memo dated March 30. 2007. While I intend to respond more fully to that memo in the coming weeks, I did want to clarify, in the shorter term, one issue raised in that memo. You indicate at paragraph four of the memo that you and I had understood and agreed that a standstill agreement was in place regarding all legal matters between Gemex and the City, including the costs associated with the dismissal of Gemex's action

> against the City and others by the Supreme Court of British Columbia ("BCSC"). which dismissal was subsequently upheld by the British Columbia Court of Appeal ("BCCA"), and the appeal of which was declined to be heard by the Supreme Court of Canada ("SCC"). You also suggest in that paragraph that the issue of costs "should be covered by the standstill agreement we have in place."
>
> As you are aware, and have confirmed to me verbally since sending the March 30th memo, there was in fact no standstill agreement in place between the parties respecting this litigation or the costs. Gemex broached the subject of such an agreement with the City, and in response, John Singleton, counsel for both the City and the other defendants in the dismissed action, advised Gemex that in return for Gemex's agreement not to pursue an appeal against the individually-named defendants to that action in the event that the SCC agreed to hear such appeal, the defendants would agree not to take action respecting the costs of the BCSC and BCCA matters pending the SCC's decision on whether to grant leave to appeal. Gemex declined to make such agreement, and as a result, there was never a standstill agreement entered into by the parties with respect to this litigation. For clarity's sake, I confirm that even had such an agreement been reached, it would only have postponed the defendants' pursuing costs against Gemex until the SCC issue was determined, and was never to be an agreement that the defendants would waive their right to costs.
>
> As discussed previously, the City does not have the authority to instruct its counsel not to pursue the costs of the dismissed action, and Gemex should expect that these will be pursued.
>
> [Emphasis added.]

[63] In response, on June 10, 2007, Mr. Ashford wrote:

> Thank you for your May 15, 2007 letter which was not received until June 08, 2007.
>
> I had understood that you would be instructing your lawyer, Mr. John Singleton, that as far as the City was concerned, there would be a standstill agreement on all the legal matters and associated costs (that he was involved with) whilst our discussions were ongoing. However you did advise that there were more than the City of Coquitlam named as defendants and those defendants, or their insurers, may not agree to the standstill. The one exclusion was the appeal to the SCC which was time led and certain procedures were needed to be in place by certain dates. This exception was discussed and understood, and I had no indication from you that the SCC appeal would affect the City's instructions to Mr. Singleton with respect to the underlying standstill agreement.
>
> I recall no agreement that Gemex would not pursue an appeal against the individually named defendants. In fact the appeal that involved individual defendants was filed and served long before the standstill agreement was agreed upon by ourselves.

> If I may take this opportunity to recap Gemex's position. Gemex feel that the current trespass by the City has to be legalised before any further discussions can proceed. It is their continued wish that those discussions do proceed. The matter of the trespass is not before the Courts at this time, and therefore, as no external counsel is in place for the City, there is an opportunity for a meeting between Gemex and their lawyer and the City and their lawyer once our negotiations bear fruit, as I am hopeful, they will.

[64] There is no evidence of any exchange between counsel regarding a standstill agreement in these proceedings.

[65] A review of Mr. Ashford's evidence and the absence of any other evidence leads to the conclusion that, whether or not there was a limited standstill agreement with respect to other litigation (the "first action"), there was no standstill agreement or other agreement to delay proceeding with respect to the two actions (the consolidated action) that are the subject of this application.

Document disclosure and response to interrogatories

[66] The plaintiff says that the Coquitlam defendants caused, acquiesced in or consented to delays in other ways.

[67] The plaintiff says that, despite receiving a demand for the production of documents in the third action in 1998, the Coquitlam defendants failed to deliver an adequate list of documents until 2010, and that they did so only after receiving a notice of motion to strike the defence. I note that although it appears that the Coquitlam defendants did not produce a list of documents following the 1998 demand, neither did the plaintiff take steps to follow up on its demand or to bring an application to compel production of documents, until February 24, 2010. Gemex says that the failure to provide the updated list of documents led to the adjournment of the judicial settlement conference in 2010. I am not satisfied that the evidence supports that proposition, but in any event, the Coquitlam defendants' failure to provide a list of documents following the 1998 demand does not appear to have played any significant role in prolonging the delay in these proceedings.

[68] Gemex says that the Coquitlam defendants have failed to disclose all relevant documents. It refers to an admission by the City that it recently discovered four boxes of documents and one folder, not previously disclosed.

[69] In an affidavit sworn on December 22, 2009, Lauren Hewson, who is the Legislative and Administrative Services Manager in the City Clerk's Office at the City of Coquitlam, deposes that there was no City-wide filing system in place before January 1, 2000. She says that the majority of the old documents were not scanned into the current document management system. When Ms. Hewson was asked to search the paper archives for old documents pertaining to the plaintiff, she deposes, she located two boxes that had been slated to be destroyed six years ago pursuant to the City's document retention policy but that, for unknown reasons, had escaped destruction.

[70] Michelle Taylor deposes that she has reviewed those boxes of documents and that although they relate primarily to other matters, there are a few potentially relevant documents regarding the Gemex fence. Ms. Taylor also deposes that two other boxes and a folder of documents relating to Gemex in general were located that had not been archived. She deposes that they relate primarily to other matters, including Gemex issues arising in the 1990s, and include a few potentially relevant documents regarding the Gemex fence.

[71] There is no doubt that these documents have come to light late in the day, but there is nothing to indicate that that fact has played any role in causing the delay in this litigation.

[72] The plaintiff says that the Coquitlam defendants have failed to provide supplemental lists of documents when new documents were created in relation to an expropriation and the construction of a bridge, which it says are relevant to this action.

[73] The Coquitlam defendants' position is that the expropriation and bridge construction matters are not relevant to this litigation.

[74] Even if the expropriation and bridge construction matters are relevant to this litigation, and I am not convinced that they are, the Coquitlam defendants' failure to provide supplemental lists of documents does not appear to have caused any specific delay in these proceedings.

[75] Mr. Tobin for the plaintiff also submits that another example of the Coquitlam defendants' delay is with respect to Mr. Sekora's response to the interrogatories delivered to him on January 27, 2010 – after further demands, he responded on April 19, 2010.

[76] Taking all of the above into account, it does not appear that the Coquitlam defendants' responses to their document disclosure obligations or to the delivery of interrogatories have caused any material part of the delay, or would have led the plaintiff reasonably to believe that the Coquitlam defendants were acquiescing in the delay in these proceedings.

Complexity of the litigation

[77] The plaintiff submits that the complexity of this litigation must be taken into account in deciding whether the delay has been inordinate.

[78] The plaintiff is correct that complexity is a relevant factor; it will usually take longer to move a complex matter to trial than a straightforward one, and I note that the plaintiff's pleadings make allegations involving a large number of parties and raising potentially complex legal issues.

[79] The plaintiff says that it has been attempting to settle this matter through mediation or a judicial settlement conference. It points to the fact that it has resolved its claims against four groups of defendants: against the Soukup defendants on January 23, 2002; the MOE defendants by 2003 in court, and as a result of the administrative hearing in May 2004; the engineering (CH2M) defendants on January 26, 2009; and by settlement with the DFO defendants in May 2010.

[80] The plaintiff points to the steps it has taken since 2009, including issuing a notice to mediate, attending a mediation, delivering a supplementary list of documents, delivering notices to admit, setting a judicial settlement conference that was later adjourned, delivering interrogatories, requesting documents about the bridge, beginning to schedule examinations for discovery, filing notices of motion to compel the production of documents about the expropriation and the bridge, challenging claims of privilege, and applying to examine as a witness a former mayor of Coquitlam, Maxine Wilson.

[81] The plaintiff says that delay must be considered in the context of the overall situation, including the plaintiff's other litigation.

[82] Mr. Tobin for the plaintiff refers to *Wallersteiner (Trustee of) v. Wallersteiner*, 22 B.C.L.R. (2d) 34, 8 A.C.W.S. (3d) 196 (S.C.), in which, despite a 6.5 year delay, the application to dismiss the proceedings failed, due to the complexity of the matter. I note that in *Wallersteiner*, unlike in these proceedings, the defendant had world-wide business dealings, requiring the plaintiff to undertake extensive investigations in order to locate the defendant's assets. The court in *Wallersteiner* also noted that the defendant's business and commercial affairs were complex, and that the defendant had moved from various jurisdictions. In contrast, the Coquitlam defendants have not been difficult to locate or to keep track of, nor is there a basis for concluding that it has been unusually difficult for the plaintiff to secure evidence due to the complexity of the defendants' affairs or for other reason.

[83] I will return to the question of complexity in discussing whether the delay has been inexcusable, but at this juncture I simply observe that, in considering whether the delay has been inordinate, I take into account the degree of complexity of the litigation.

Acquiescence Through Inactivity

[84] The plaintiff submits that the Coquitlam defendants did not express any concern regarding delays, and that this is evidence of their acquiescence in the length of the proceedings. Mr. Tobin notes that the Coquitlam defendants shared

counsel (Mr. Singleton) with the engineering (CH2M) defendants and that in the course of the proceedings with the engineering defendants (which led to the engineering defendants' successful application for a ruling that the claims against them in these proceedings were *res judicata*), no concerns were expressed about delay with respect to these applicants.

[85] The plaintiff seeks to rely upon the decision in *Tundra*, which stated at para. 20 that:

> ... the other defendants during that period gave no indication that they were not content to await the resolution of the other litigation . . .the question was not whether the remaining defendants were "committed to" the arrangement. It was enough that, by their inactivity, they appeared to acquiesce.

[86] It is the plaintiff's position that the Coquitlam defendants have similarly given no indication that they were not content to await the resolution of other litigation, and that by their inactivity they appeared to acquiesce in the delay. However, in *Tundra* the evidence showed that there had been some communication between the parties regarding whether they would be "content" to await the outcome of the other litigation (at para. 10). This and other evidence suggested that the defendants were, if not committed to the arrangement, content with it.

[87] In my view, the facts in *Tundra* were quite different from the facts in the present case. The fact that the Coquitlam defendants shared counsel with the engineering defendants and that the Coquitlam defendants did not themselves take steps to move this litigation to trial is not sufficient to lead me to infer that the Coquitlam defendants were content to await the outcome of other litigation. The City of Coquitlam's unwillingness to enter a "standstill agreement" confirms that it did not acquiesce in a delay while other litigation was settled.

(f) Conclusion on delay

[88] Although the plaintiff submits that the Coquitlam defendants induced the plaintiff to believe that the lengthy delay would be acceptable, relying in part on the existence of a standstill agreement, I have found that the evidence does not

establish the existence of a standstill agreement with respect to the second and third actions. Further, the plaintiff has not pointed to any particular conduct by the Coquitlam defendants that would reasonably lead the plaintiff to think that it was unnecessary to continue to take steps to move the matter to trial against those defendants. Nor is there evidence that the Coquitlam defendants have themselves caused any significant part of the delay.

[89] Thirteen years have passed since the third action was launched and it has been over fourteen years since the second action was filed. In both actions there have been very prolonged periods of time during which no steps whatsoever were taken by the plaintiff.

[90] After 6.5 years of no steps taken by the plaintiff in pursuit of its claim against the Coquitlam defendants, came Mr. Singleton's February 12, 2009 letter, in which he indicated that the Coquitlam defendants intended to bring this application to dismiss for want of prosecution. The plaintiff then bestirred itself in a relatively minimal way, sending notices to mediate, delivering a supplemental list of documents, proposing a settlement conference, and delivering a notice to admit and some interrogatories. It took a few further steps after this notice of motion was filed and before the interim stay of proceedings.

[91] It was not specifically argued that the Coquitlam defendants' participation in a mediation in June 2009 was an indication of their acquiescence in the delay, but I have considered whether that was the case. I find that voluntary participation in mediation following Mr. Singleton's February 12, 2009 letter did not constitute acquiescence in the delay. The Coquitlam defendants had stated their position that the delay was inordinate but that they would consider consent dismissal without costs. To view their participation in mediation thereafter as acquiescence in delay would be inconsistent with the policy goal of encouraging parties to attempt to resolve their disputes through mediation, and would be to ignore the course of the litigation and the context in which that mediation occurred.

[92] Despite the complexity of the litigation and the steps the plaintiff has taken in the past two years, the delay has been inordinate both in terms of the total time that has passed and the length of the different periods of inactivity.

[93] I find that the plaintiff has been responsible for almost all of the delay.

[94] I conclude that the Coquitlam defendants have established inordinate delay, and will proceed to address the next question.

(2) Has the delay been inexcusable?

[95] In considering whether the delay has been inexcusable, the complexity of the matter and the number of litigants involved again are relevant. Part of the complexity, the plaintiff says, arises from the nature of the allegations – that the City, in particular former Mayor Sekora – acted in bad faith in pursuing its intention to build a bridge on Gemex lands. The plaintiff suggests that the location of that bridge was chosen because it favours a real estate development known as River Walk. It says that Mr. Sekora, as Mayor, was the beneficiary of an unsecured $150,000 loan from the developer of River Walk (Landview Construction Company Ltd.). The plaintiff says that claims of abuse of power, such as the claim it makes, are complex and difficult to prove, particularly when so many sophisticated parties are involved, and that the plaintiff has had to untangle an intricate factual web. It says that some evidence has come to light late in the day, when the bridge and expropriation issues came to the fore.

[96] It is the plaintiff's position that the expropriation and bridge issues are relevant to this litigation, and that for this reason steps taken with regard to the expropriation and the bridge should be considered steps in furtherance of these proceedings. The plaintiff argues that its prospect for success in this litigation is strengthened by evidence regarding the City's plan to construct the bridge. It points to ongoing interaction from 2004 to the present between Gemex and the City with regard to the bridge and the expropriation as steps in these proceedings.

[97] I am not persuaded that such interaction is sufficiently related to this litigation, and particularly to the prosecution of the plaintiff's case, to be considered steps in these proceedings, or to provide an excuse for the delay in these proceedings.

[98] The plaintiff says that it has been continually engaged in this litigation, whether with the Coquitlam defendants or with other defendants to these actions. The plaintiff submits that the delay has not been a matter of tactics but rather the result of the plaintiff needing to divide its efforts amongst numerous defendants.

[99] The plaintiff says that the Coquitlam defendants – the City, its Councillors and officials – were the primary tortfeasors, and that it is only appropriate that claims against other, lesser tortfeasors were addressed and resolved first. Further, the plaintiff says, other related matters gained prominence for a time: the expropriation of a portion of the land, the engineering litigation, the City of Coquitlam's applications to Land and Water B.C., events involving the Surveyor General of B.C. and certain accreted lands, and negotiations about the expropriated wall and the level of compensation required.

[100] The plaintiff also refers to the alleged "standstill agreement" (which I have found did not exist), and to the instances in which the Coquitlam defendants did not respond promptly, for example, to interrogatories.

[101] The Coquitlam defendants say that the central question is the overall pace of the litigation, bearing in mind that it is the plaintiff's responsibility to move to trial. Mr. Singleton submits that although there may have been some interrogatories not responded to promptly and some documents produced late in the day, those are not matters that excuse the plaintiff's delay.

[102] I find that, in general, the Coquitlam defendants took few positive steps to move the action forward. However, it is not their responsibility to do so; it is the plaintiff's. In my view the Coquitlam defendants' delayed production of some documents and somewhat slow responses to notices to admit or to interrogatories do not provide an excuse for the plaintiff's delay.

[103] I have carefully considered whether the unusual circumstances of this case and the matters to which the plaintiff has referred, including the Coquitlam defendants' conduct, the complexity of the litigation, and the fact that it has been necessary for the plaintiff to focus on other defendants or other matters, provide a credible excuse for the plaintiff's delay.

[104] I have concluded that they do not. The plaintiff chose to launch an action against some 29 defendants, making very serious allegations against individuals and asserting multiple claims against them. The plaintiff, having chosen to invoke the court's process, is required to proceed in a reasonably expeditious way to bring the matter to trial with respect to all of the defendants that it has named. Particularly given the plaintiff's allegations of bad faith, abuse of power and misconduct against the Coquitlam defendants, leaving certain defendants to be dealt with at the end means that those defendants may be seriously prejudiced as a result of the lengthy passage of time. As well, the fact that the plaintiff has become involved in other litigation, only some of which is related to this litigation, has been the plaintiff's choice.

[105] The plaintiff should have dealt with a surfeit of litigation, largely of its own creation, by devoting adequate resources to proceeding against all of the defendants it sued with reasonable expedition.

[106] I find that the delay has been not only inordinate, but also that there is no reasonable excuse for it.

(3) Has the delay caused serious prejudice, or is it likely to cause serious prejudice to the defendants?

[107] I turn to the third question, which is prejudice.

[108] I begin with the fact that two of the defendants have now passed away. Mr. Buchanan died in 2000 and Ms. Brown passed away in 2009.

[109] The Coquitlam defendants say that Ms. Brown, as a City solicitor during many of the relevant events and as instructing counsel in this litigation, would have been a

key witness regarding the plaintiff's allegations that the City and its officials acted pursuant to a conspiracy and with improper motives, in abuse of power. Mr. Singleton argues that the City would have waived privilege in order to have the benefit of Ms. Brown's evidence in defence against these allegations.

[110] It is notable that Ms. Brown was in frequent communication with Gemex regarding the fence and the issues surrounding the City's dealings with the Gemex property. A review of the Coquitlam defendants' list of documents shows some 107 documents regarding the Gemex property either authored by or addressed to Ms. Brown in 1996 alone. As recently as June 23, 2004, Ms. Brown, in her capacity as City solicitor, was in communication with one of the principals of the plaintiff, Ms. Diane Spraggs, regarding the Gemex property.

[111] If the litigation had been pursued with anything like reasonable expedition, Ms. Brown would have been available to give evidence at trial or would have been examined for discovery before she passed away. The nature of Ms. Brown's involvement in the interaction between Gemex and the City indicates that her evidence would likely have been highly relevant. The prejudice to the Coquitlam defendants is serious, and was caused by the plaintiff's delay .

[112] Even though Mr. Buchanan passed away in 2000, it is also possible that his evidence could have been preserved if discoveries had been conducted at a reasonable time.

[113] Further, a number of the surviving individual Coquitlam defendants (Dorothy Hollington, Jon Kingsbury, Brian Robinson, Norm Cook, Jason Cardoni, and Barry Elliott) have sworn affidavits in which they describe specific prejudice flowing from the delay.

[114] Mr. Cook, who was the City Manager from October 15, 1990 until he retired in 2003, deposes that he is 64 years old and has been retired for about six years. He states:

> ... I have not had occasion to turn my mind to the issues before Council in the 1990s for quite some time, particularly in light of my retirement 6 years ago.

> Consequently, my memory of specific issues before Council in the 1990s is weak and getting worse as time passes.
>
> While I recall the Mayor making various statements regarding the Fence and know the Fence would have come before Council, I no longer recall any specific details about the issues put before Council, discussions had, the content of the Mayor's statements or what Council decided to do, if anything, about the Fence.
>
> By virtue of my position with the City and, as the issue must have been discussed by Council, I would likely have had discussions with my staff, including some of the other Defendants in this Action, regarding the Fence. However, I do not recall which individuals or what was discussed.

[115] Mr. Robinson, who was a Councillor from November 1976 until he retired in 1996, deposes that:

> I am 73 years of age. While, I am familiar with the Plaintiff as they were before Council on various occasions with concerns and complaints, I have no specific memory of meeting with or discussing the Fence, Gemex Property and/or expropriation of Gemex land.
>
> As a City Councillor, I would have discussed issues before Council with other City Councillors; therefore, I believe that I did have some conversations with other City Councillors about Gemex. However, I do not recall the substance of those conversations or meetings or which specific Councillors I spoke with.
>
> I vaguely recall a complaint about a surveying company trespassing on Gemex Property; however, I do not recall which company, when the alleged trespass occurred or what Council did with the complaint.
>
> Additionally, I recall Mrs. Spraggs calling me at home sometime in the mid-1990s, as I was asleep when she called. I do not recall the specifics of her complaints or what was said.
>
> As a Councillor, I kept notes of the various Council meetings I attended; however, it was not my practice to keep them for extended periods of time. Presently, I do not have any of my Council notes. I do not recall when I disposed of these notes; however, I have been retired for 13 years, so I believe I would have disposed of them a number of years ago.
>
> Additionally, I received numerous documents prior to each Council meeting along with the agenda. I do not recall what I did with these documents or how long I kept them. I did take some documents with me when I left Council; however, throughout the years, I disposed of most of them. The remaining documents in my possession were destroyed in a flood in my basement in 2008. Consequently, I no longer have any documents relating to my years as a City Councillor. I seldom, if ever, reviewed the documents during the past 13 years that I've been retired; therefore, I did not have occasion to refresh my memory on the topic prior to the documents being destroyed.

[116] Mr. Kingsbury, who was a City Councillor from November 1988 until he was elected Mayor of the City in 1998 and served as Mayor until December 1, 2005, is 63 years of age and is employed as a part-time consultant. He deposes that:

> While I have some documents from my tenure with the City, I no longer have any of the documents relating to the Fence or Gemex. I do not recall exactly when I disposed of these documents; however, it was my practice to purge my copies of Council documents relating to resolved Council issues every couple of years.
>
> I do recall taking a trip to see the Fence; however, it was not an official City visit and I do not recall any other City employees or Council members attending with me.
>
> I also recall having a few interactions with Gemex's representatives, in particular Mrs. Spraggs. Due to the length of time that has passed and the varied interactions involving Gemex and the City, I do not recall the specifics of any conversations I had with Gemex representatives in the 1990s. In particular, I do not recall how many times the Fence was discussed as opposed to other Gemex issues.
>
> I relied on various City employees, including Norm Cook and Neil Nyberg, for briefings about City activities and issues; however, I do not have any specific recollection of any conversations I may have had with those individuals regarding the Fence. It is also possible that I discussed the Fence with other City employees; however, due to the amount of time since these issues arose I do not recall the names of any of the individuals or what discussions may have occurred.

[117] Ms. Hollington is 66 and has been retired for three years. She deposes that her memory of events in the 1990s is poor and getting worse as each day passes, and that she has not had occasion to turn her mind to the events involved in this litigation in a number of years. She deposes:

> I was elected as a Councillor of the City in 1993 and served as such until 2006, when I retired. During that time, I was Acting Mayor for a couple months in 1997.
>
> As a Councillor, I attended all City Council meetings and I recall the Fence issue being discussed; however, I do not recall what was discussed or who else may have been present at these meetings.
>
> As a Councillor, I received an agenda and attached relevant documentation before every Council meeting. It was my practice to review the agenda and documents prior to each meeting. I do not recall how many documents relating to the Gemex Fence would have been made available to the Councillors; however, I expect that there would have been one or more engineering reports provided to the Council members addressing the safety of the Gemex Fence.

I recall receiving a copy of an engineering report at some time relating to the Fence; however, I do not recall when the report was submitted or by whom. I recall that the general theme of the report was that the Gemex Fence was not structurally sound and required some reinforcement to make it safe. I also recall one or more of the City engineers being available to answer any of the Councillors' questions if necessary; however, I do not recall who these individuals were.

It was my practice to maintain files regarding ongoing matters before Council at my home, as when I was first elected to City Council, Councillors were not provided with office space at City Hall. Eventually, a new City Hall was constructed with offices and some filing space for Councillors.

Originally, the files I kept at home contained all the documents I received on current issues before Council. When the new City Hall was finished, I continued to maintain files at home consisting of smaller reports and documents I received from City staff and I used my City Hall filing space for large reports received from agencies such as Translink.

I did not have a specific policy for how long I kept documents in my files at home; however, as new issues took precedence at the City, I usually removed the files relating to past issues. It was my practice to bring irrelevant files back to City Hall and either recycle them or have them shredded, depending on the sensitivity of the issue.

I recall having a file or files relating to the Fence as well as other Gemex issues that were before Council; however, I do not recall what documents I had in those files. I do not recall when I originally got the documents or who gave them to me. Additionally, I do not recall when I disposed of the documents.

Given that there was ongoing litigation involving Gemex, I believe that I would have kept the documents longer than usual even though the issue wasn't always at the forefront of Council affairs.

When I retired, I brought all my City documents from home to City Hall and recycled or shredded them accordingly. Therefore, I no longer have any documents relating to Gemex and have not looked at any of the relevant documents for at least 3 years.

At some point I was quoted in a local newspaper regarding my views on the Fence. I recall that Mrs. Spraggs was unhappy with my comments and my view of the Fence; however I do not recall when I made these comments which reporter I spoke with or which paper the quote was published in.

I also recall being present when the then-current Mayor, Louis Sekora, was served with some documents by Mrs. Spraggs. I was in attendance at a ceremony marking the completion of the Como Lake Road bypass to Gaglardi Way. I do not recall the date of this ceremony or who else related to this Action was present. Moreover, I no longer recall what if any words were exchanged between the Mayor and Mrs. Spraggs.

I recall going to the Gemex Property to see the Fence a number of times; however, I do not recall making an official City visit.

> I recall seeing the Mayor at the Gemex Property on a couple of my visits; however, I do not recall the dates of these visits or who else was with the Mayor. On one occasion, the Mayor was addressing a group of residents who had gathered at the Fence and I stood among them and listed [sic]. I do not recall when this was or what exactly was said by the Mayor I do not recall if any other City related people were present.
>
> I recall that the Department of Fisheries and Oceans was involved in the Gemex Fence issue at some point, and I recall that the Councillors sought status reports regarding their investigations into the construction of the Fence. However, I do not recall whether or not they made any final determinations regarding the Fence or if they provided Council with any reports regarding their position on the Fence and what they planned to do or not do about the Fence.

[118] I take the point made by Mr. Tobin for the plaintiff, that as soon as the litigation began, the individual defendants should have been advised to secure documents that might assist them in their defence and to produce those documents. If they failed to do so, responsibility for the consequences cannot be laid at the door of the plaintiff. Accordingly, I do not take the destruction or loss of documents by the individual defendants into account as a factor in assessing prejudice to the Coquitlam defendants (except for those documents accidentally destroyed in a flood in Mr. Robinson's basement in 2008). I further take into account that retention of their documents may have assisted these defendants to some extent in giving evidence.

[119] However, I accept the evidence of the deponents that their memories of events in the 1990s are poor and growing worse.

[120] Given the nature of the plaintiff's allegations of conspiracy and abuse of power, it is most probable that the trial of this action will turn on the assessment of *viva voce* evidence. The Coquitlam defendants are called upon to explain actions, or motives for actions, that occurred many years ago and that would not necessarily have been documented.

[121] It is relevant, when considering prejudice, to note the length of time that will have passed between the date of the events that are the subject of the litigation and the proposed trial date, because it is the total passage of time that affects the

memory of witnesses. If the case proceeds to trial in 2012 (which is what the plaintiff proposes), 16 years will have passed since 1996, when Gemex built the concrete fence and the City, its officers and elected officials responded, allegedly conspiring against the plaintiff, breaching their fiduciary duties and harming the plaintiff.

[122] I find that the Coquitlam defendants will be seriously prejudiced at trial due to the passage of time. Without the evidence of Ms. Brown, and with other defendants understandably unable to recall events from the mid-1990s, they will be greatly disadvantaged in putting forward their defence.

(4) Does the balance of justice require an order dismissing the plaintiff's claim?

[123] The final question is whether the balance of justice warrants the exercise of discretion to dismiss this case for want of prosecution. Dismissal is a draconian remedy. It should be granted only in very clear circumstances.

[124] The plaintiff has not pursued its litigation against the Coquitlam defendants with reasonable diligence. Over twelve years passed between the commencement of the second action on February 24, 1998 and the interim stay of proceedings on May 4, 2010. For 6.5 years of that time, nothing whatsoever was done to move the matter ahead as against the Coquitlam defendants, and there were other lengthy periods of total inactivity. Very little of the delay can be laid at any door except the plaintiff's. Even taking into account the complexity of the litigation, there is no good reason for the extent of the delay, which has been extreme.

[125] I have concluded that it will be virtually impossible for the Coquitlam defendants to have a fair trial. The fact that no discoveries have been held means that the testimony of two deceased persons who were allegedly part of these events, one of them in a key role, has not been preserved. The remaining defendants will be very seriously hampered in their ability to defend against allegations of very serious misconduct.

[126] I have concluded that the balance of justice favours the Coquitlam defendants and that their application to dismiss for want of prosecution should be granted.

CONCLUSION

[127] The application to dismiss the consolidated action for want of prosecution is granted.

[128] The applicants may have their costs at Scale B, unless counsel wish to make submissions as to costs. If so, they may do so by setting the matter down before me.

"Lynn Smith J."

Appendix "A": Chronology of Steps in the Litigation

For the purposes of this chronology, steps relating to the two actions appear in distinct columns. Steps that do not involve the Coquitlam defendants in the consolidated action appear in *italics*.

The sources for this chronology include exhibits filed and statements made by counsel.

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
1996:		
Oct 30/96	The Plaintiff filed a Writ of Summons and Statement of Claim.	
Nov 5/96	An Appearance was filed on behalf of the City of Coquitlam and Louis Sekora.	
Nov 8/96	The Plaintiff filed a Demand for Discovery of Documents and a Notice to Produce to Louis Sekora, the City of Coquitlam, Soukup Land Surveying Inc., Dieter Soukup ("Soukup Defendants"), Brian Robinson and Louella Hollington.	
Nov 19/96	The City of Coquitlam and Louis Sekora filed a Demand for Discovery of Documents and a Notice to Produce to Gemex Developments Corp.	
Nov 21/96	The City of Coquitlam and Louis Sekora filed their Statement of Defence.	
Dec 18/96	The City of Coquitlam and Louis Sekora sent a Demand for Particulars regarding the Defendants' alleged negligence to the Plaintiff.	
Dec 19/96	Louis Sekora and the City of Coquitlam provided a List of Documents to the Plaintiff.	
Dec 24/96	The Plaintiff confirmed receipt of the City of Coquitlam's Dec. 18 Demand for Particulars.	
Dec 24/96	The Plaintiff provided a List of Documents to Louis Sekora, the City of Coquitlam, Soukup Land Surveying Inc., Dieter Soukup, Brian Robinson and Louella Hollington.	
1997:		
Mar 4/97	An Appearance was filed on behalf of Brian Robinson and Louella Hollington.	
Mar 5/97	*An Appearance was filed on behalf of Dieter Soukup and Soukup Land Surveying Inc ("the Soukup Defendants").*	

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
Mar 11/97	The Plaintiff sent a Demand for Discovery of Documents and Notice to Produce to Brian Robinson and Louella Hollington.	
Mar 13/97	Brian Robinson and Louella Hollington filed a Statement of Defence.	
June 5/97	*The Soukup Defendants filed an Amended Statement of Defence.*	
June 13/97	The Plaintiff sent a Demand for Particulars to the City of Coquitlam.	
1998:		
Feb 24/98		The Plaintiff filed a Writ of Summons and Statement of Claim.
Mar 25/98		An Appearance was filed on behalf of the City of Coquitlam, Deborah Brown, Don Buchanan, Robert Lee, Jason Cardoni, Norm Cook, Jon Kingsbury, Brian Robinson, Louella Hollington, Louis Sekora, Barry Elliott ("the Coquitlam Defendants"), Neil Nyberg, and Frank Quinn.
Apr 8/98		The Plaintiff delivered a Demand for Discovery of Documents and a Notice to Produce to the Coquitlam Defendants, and to Neil Nyberg and Frank Quinn.
Apr 15/98		The Coquitlam Defendants, Neil Nyberg and Frank Quinn delivered a Demand for Discovery of Documents to the Plaintiff.
Apr 15/98		The Coquitlam Defendants, Neil Nyberg and Frank Quinn filed a Statement of Defence.
Apr 21/98		*Appearances were filed on behalf of Bruce Reid, the Ministry of Environment, Lands and Parks, Colin Stewart, Robert Edwards and Neil Peters.*
Apr 27/98		*The Plaintiff sent a Notice to Produce and a Statement of Defence to Bruce Reid.*
Apr 30/98	The Plaintiff issued Interrogatories to Brian Robinson.	
May 1/98		*The Plaintiff sent a Demand for Discovery of Documents and a Notice to Produce to the MOE and the MOE Defendants.*
May 3/98	The Plaintiff issued Interrogatories to Louella Hollington.	
May 6/98		*Appearances were filed on behalf of Scott Coultish and Markus Feldhoff.*

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
May 8/98		*The Plaintiff sent a Demand for Discovery of Documents and Notice to Produce to Scott Coultish and Markus Feldhoff.*
May 11/98		The Plaintiff sent Interrogatories to Jon Kingsbury.
May 12/98		The Coquitlam Defendants, Neil Nyberg, Frank Quinn, CH2M Gore & Storrie Ltd., Tom Field and Shinji Goto delivered a Notice of Motion that they would be seeking a dismissal of Action #3 pursuant to Rule 19(24), on the basis that the claim sought relief already sought in existing proceedings in Actions No. S034541 and No. S035251, New Westminster Registry.
May 19/98		*An Appearance was filed on behalf of C.D. Patterson.*
May 25/98		*An Appearance was filed on behalf of Kon Johansen and David Griggs.*
May 26/98		*The Plaintiff sent Kon Johansen, David Griggs, and C.D. Patterson a Demand for Discovery of Documents and a Notice to Produce.*
May 28/98		*An Appearance was filed on behalf of CH2M Gore & Storrie Ltd., Tom Field and Shinji Goto ("The Engineering Defendants").*
June 2/98		The Plaintiff sent a demand for "further and better particulars of the Statement of Defence" from the Coquitlam Defendants, Neil Nyberg and Frank Quinn.
June 2/98	The Plaintiff delivered a Demand for Particulars to Louis Sekora.	
June 2/98	Louella Hollington provided an Affidavit in reply to the Plaintiff's Interrogatories.	
June 3/98	The City of Coquitlam replied to the Plaintiff's Demand for Particulars.	
June 3/98	Brian Robinson provided an Affidavit in reply to the Plaintiff's Interrogatories.	
June 8/98	Counsel for Louis Sekora replied to the Plaintiff's June 2, 1998 Demand for Particulars.	
June 9/98		*The Plaintiff delivered a Demand for Discovery of Documents and a Notice to Produce to CH2M Gore & Storrie Ltd., Tom Field and Shinji Goto.*

Date	**"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry**	**"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry**
June 16/98		The hearing of the application to dismiss by the Coquitlam Defendants, Neil Nyberg, Frank Quinn, CH2M Gore & Storrie Ltd., Tom Field and Shinji Goto was adjourned by consent from July 2, 1998 to October 7, 1998.
June 19/98		*The Department of Fisheries and Oceans, C.D. Paterson, Scott Coultish, Markus Feldhoff, Kon Johansen, Bruce Reid and David Griggs ("DFO Defendants") requested Further and Better Particulars from the Plaintiff.*
June 24/98		*The Ministry of Environment, Lands and Parks, Colin Stewart, Robert Edwards and Neil Peters ("MOE Defendants") filed a Statement of Defence.*
Aug 18, 20/98		*The Plaintiff responded to the DFO Defendants' Request for Further and Better Particulars.*
Oct 2/98	The Plaintiff sent a letter to Counsel for the Coquitlam Defendants serving a Notice of Motion set to be heard on October 7, 1998 in respect to Answers to Interrogatories on behalf of Louella Hollington and Brian Robinson.	
Oct 2/98	Louella Hollington and Brian Robinson filed an Amended Statement of Defence.	
Oct 2/98		*C.D. Patterson provided an Affidavit in response to the Plaintiff's Interrogatories.*
Oct 5/98		*Scott Coultish provided an Affidavit in response to the Plaintiff's Interrogatories.*
Oct 6/98		*An Appearance was filed on behalf of the DFO.*
Oct 28/98		Counsel for the Defendants (Singleton Urquhart Scott) sent a letter to the New Westminster Trial Coordinator to re-set the application to dismiss Action #3. The application was never heard.
Dec 9/98		*An Appearance was filed on behalf of the Soukup Defendants.*
1999:		
Nov 3/99		*The Plaintiff delivered Appointments to Examine the MOE Defendants.*
Nov 3/99		The Plaintiff scheduled Examinations for Discovery of the Coquitlam Defendants for June and July, 2000.
2000:		
Jan 11/00		Coquitlam Defendant Don Buchanan died.

Date	**"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry**	**"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry**
Feb 21/00		*The MOE and MOE Defendants sent a List of Documents.*
Mar 29/00		*The MOE and MOE Defendants sent a First Supplemental List of Documents.*
Apr 6/00		The Plaintiff delivered Appointments to Examine for Discovery Neil Nyberg, Deborah Brown, Brian Robinson, Jon Kingsbury, Louella Hollington, Louis Sekora, Scott Coultish, Barry Elliott, Bruce Reid, C.D. Patterson and Markus Feldhoff in June and July 2000.
May 18/00		*The MOE and MOE Defendants sent a Second Supplemental List of Documents.*
June 14/00		Counsel for the Coquitlam Defendants responded to the April 6, 2000 Appointments, advising that counsel or examinees were not available, and providing alternate dates for Deborah Brown, Brian Robinson and Louella Hollington. Discoveries did not proceed, nor were further dates set.
Sep 27/00		The Plaintiff sent a letter to the City of Coquitlam regarding its estimate for the length of trial.
Sep 29/00		The Plaintiff received a note indicating Mr. Singleton's trial length estimate.
Dec 11/00		*The MOE and MOE Defendants sent a Third Supplemental List of Documents.*
2001:		
Jan 31/01		The Plaintiff delivered a Notice of Trial, setting the matter down for a 9-day trial commencing August 12, 2002.
Feb 22/01	*The Plaintiff consented to the dismissal of all claims against the Soukup Defendants*	*The Plaintiff consented to the dismissal of all claims against the Soukup Defendants.*
July 25/01		*The MOE sent a letter to the Plaintiff regarding compliance with undertakings following the Examinations for Discovery of Colin Stewart and Robert Edwards.*
Nov 14/01		*The MOE notified the Plaintiff of its intention to bring a Notice of Motion seeking an Order to dismiss the Action.*
Dec 10/01	*The Plaintiff conducted settlement discussions with the Soukup Defendants.*	*The Plaintiff conducted settlement discussions with the Soukup Defendants.*
Dec 13/01		*The MOE Defendants brought a motion dismissing the action against them.*

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
2002:		
Jan 22/02	*The Plaintiff resolved its claim against the Soukup Defendants and filed a Notice of Discontinuance.*	*The Plaintiff resolved its claim against the Soukup Defendants and filed a Notice of Discontinuance.*
Jan 22/02		The Plaintiff delivered its List of Documents to the Coquitlam Defendants.
Jan 28/02		*The Plaintiff sent a letter to the Soukup Defendants regarding discontinuing the claim.*
Feb 5/02		*The MOE sent a letter to the Plaintiff refusing to revoke the MOE Order and suggesting that the Appeal should proceed.*
Feb 12/02		*The Soukup Defendants sent a letter regarding discontinuing the claim and closing the file.*
Mar 19/02		*The Plaintiff advised the Ministry of the Attorney General by letter that it had reached a settlement with the Soukup Defendants in Action #3, and sought consent to amend its pleadings accordingly.*
Mar 21/02		*Madam Justice Wedge of the BC Supreme Court made an Order dismissing the action against the MOE Defendants.*
Apr 4/02		*The Plaintiff filed a Notice of Appeal of the March 21, 2002 Order of Madam Justice Wedge.*
May 18/02		*The MOE sent a Second Supplemental List of Documents.*
May 24/02		Counsel for the Coquitlam Defendants on behalf of the various Action #3 Defendants brought a Notice of Motion seeking to have the trial in Action #3, scheduled for August 12, 2002, adjourned.
May 31/02		The August 12, 2002 trial of Action #3 was adjourned by consent.
June 20/02		*The DFO and DFO Defendants filed a Statement of Defence.*
June 24/02		*The Plaintiff sent a Demand for Discovery of Documents and Notice to Produce to the DFO and the DFO Defendants.*
June 28/02		*the DFO and DFO Defendants sent a List of Documents.*
June 28/02		*The DFO sent a request to Examine a representative of the Plaintiff for Discovery.*
July 3/02		*The Plaintiff sent a letter to the MOE regarding removing the Fence.*
July 4/02		*The DFO and the DFO Defendants sent a First Supplemental List of Documents.*
July 5/02		*The MOE filed an Appointment to Settle their Bill of Costs on September 16, 2002.*

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
July 12/02		*The Department of Justice sent a Notice of Motion to the Plaintiff regarding a Rule 18A Application to Dismiss the action against Kon Johansen.*
July 17/02		*The Plaintiff responded to the City's July 12, 2002 Notice of Motion.*
July 18/02		*The Plaintiff wrote to the Department of Justice, confirming that it wished to reschedule the trial for late 2003 and early 2004.*
July 18/02		*The Plaintiff sent a letter regarding Examinations for Discovery in Action #3 to Kon Johansen.*
July 25/02		*Kon Johansen replied to the July 18, 2002 letter, requesting more information regarding trial dates and examination.*
July 29/02		*The Plaintiff wrote to Kon Johansen, indicating that either July 2003/2004 or August 2003/2004 would be available for a 9-day trial.*
July 31/02		*Kon Johansen replied to the July 29, 2002 letter, requesting a copy of Diane Spragg's Examination for Discovery, and indicating that he was reviewing availability for trial.*
Oct 3/02		Brian Robinson, Louella Hollington, Louis Sekora, and the City of Coquitlam filed an Amended Statement of Defence.
Oct 7/02		Singleton Urquhart wrote to Plaintiff's counsel inquiring about a new Notice of Trial in Action #3, and asking for clarification regarding the progress of the other actions.
Oct 28/02		The Coquitlam Defendants wrote to Plaintiff's counsel following up on the October 7, 2002 letter in regard to Action #3.
Dec 11/02		*The MOE sent a Third Supplemental List of Documents.*
2003:		
June (no dates)/03		*A Judicial Review Panel heard the Plaintiff's Appeal of the MOE Order to the Comptroller of Water Rights.*
July 24/03		*The MOE provided a Bill of Costs for the Appeal.*
2004:		
Mar 3/04		*The Comptroller of Water Rights revoked the MOE Order.*

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
May 13/04		*Land and Water BC informed the Plaintiff that it would no longer be appealing the revocation of the MOE Order.*
2005	**NO ACTIVITY**	**NO ACTIVITY**
2006:		
Oct 30/06		Derek Ashford wrote to the City of Coquitlam regarding his role in "bringing together" representatives of Gemex and of the City of Coquitlam, and identifying what he considered to be issues needing to be addressed before negotiations between the parties could proceed.
Nov 17/06		Mr. Ashford sent the City of Coquitlam a follow up letter, referencing a September 2006 meeting with the Mayor in which he had supplied the City with a written list of three items which he felt were essential to be addressed prior to "full negotiations" between the parties being able to proceed.
Mar 30/07		Mr. Ashford wrote to the City of Coquitlam, summarizing where he believed the parties were at in their negotiations, and indicating where he thought they needed to go. He made reference to "continuing to honour the standstill agreement".
May 15/07		Trevor Wingrove for the City of Coquitlam replied to Mr. Ashford, stating that Mr. Ashford was aware and had confirmed verbally that there was in fact no standstill agreement.
Jun 10/07		Mr. Ashford wrote to the City of Coquitlam, indicating that he had understood that counsel for the City would be instructed that there would be a standstill agreement on all the legal matters and associated costs while their discussions were ongoing.
2007:		
Dec 20/07		*CH2M Gore & Storrie Ltd., Tom Field and Shinji Goto filed their Statement of Defence.*

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
2008:		
Jan 31/08		*The Engineering Defendants filed their Notice of Motion seeking that Action #3 be dismissed as* res judicata.
Feb 1/08		*The Engineering Defendants' Application was adjourned by Master Keighley,ont the motion of the Plaintiff.*
Feb 4/08		*The hearing of the Engineering Defendants' Application was set down for February 14, 2008.*
Feb 14/08		*Master Caldwell heard the Engineering Defendants' Application.*
2009:		
Jan 26/09		*Master Caldwell's Reasons for Judgment were released with respect to the Engineering Defendants' Application. He dismissed Action #3 against the Engineering Defendants.*
Feb 12/09	Counsel for the Coquitlam Defendants wrote to Plaintiff's counsel regarding the Plaintiff's failure to take any further steps, and indicating that the Coquitlam Defendants intended to bring a Want of Prosecution Application.	Counsel for the Coquitlam Defendants wrote to Plaintiff's counsel regarding the Plaintiff's failure to take any further steps, and indicating that the Coquitlam Defendants intended to bring a Want of Prosecution Application.
Feb 23/09		*Order entered dismissing Action #3 against the Engineering Defendants.*
Feb 23/09	Counsel for the Coquitlam Defendants wrote to Plaintiff's counsel regarding efforts to speak to Plaintiff's counsel about a dismissal of Action #2.	Counsel for the Coquitlam Defendants wrote to Plaintiff's counsel regarding efforts to speak to Plaintiff's counsel about a dismissal of Action #3.
Mar 3/09		The Plaintiff filed a Notice to Mediate.
Mar 4/09	Counsel for the Coquitlam Defendants wrote to Plaintiff's counsel regarding the Plaintiff's failure to take any further steps, and reiterating the intention to bring a Want of Prosecution Application.	Counsel for the Coquitlam Defendants wrote to Plaintiff's counsel regarding the Plaintiff's failure to take any further steps, and reiterating the intention to bring a Want of Prosecution Application.
Mar 6/09		Deborah Brown, one of the Coquitlam defendants, died.
Mar 9/09	The Plaintiff wrote to Singleton Urquhart indicating that both Actions were inextricably intertwined with other ongoing litigation, and reiterating interest in mediation.	The Plaintiff wrote to Singleton Urquhart indicating that both Actions were inextricably intertwined with other ongoing litigation, and reiterating interest in mediation.

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
Mar 27/09		The Plaintiff issued a Notice to Mediate in Action to the MOE, Engineering, DFO and Coquitlam Defendants. The Soukup Defendants are also named in this Notice, although they had settled in 2002.
Apr 14/09		*The Plaintiff filed a Requisition scheduling a Hearing before Master Caldwell on April 30, 2009.*
Apr 30/09		*A Hearing was held before Master Caldwell.*
Jun 24/09		The Parties attended mediation in the 3rd Action, but outside the Notice to Mediate provisions.
July 23/09		The Plaintiff delivered a Supplemental List of Documents, primarily related to correspondence among counsel following the commencement of the various actions, to the remaining Defendants.
Aug 6/09		Singleton Urquhart wrote to the Plaintiff indicating that the Defendants were not interested in a judicial settlement conference.
Aug 6/09		The Plaintiff wrote to Michelle Taylor at Singleton Urquhart, suggesting a settlement conference on August 31, 2009.
Aug 13/09		*Michelle Taylor wrote to the Plaintiff, enclosing a copy of Master Caldwell's August 12, 2009 Order regarding Action #3, and requesting payment of the costs ordered.*
Oct 26/09		The Plaintiff delivered a letter to Singleton Urquhart, acknowledging receipt of their October 16, 2009 letter, and confirming their amenability to a judicial settlement conference. The letter also proposed a 20-day trial in September or October 2012.
Oct 27/09		The Plaintiff delivered a Notice to Admit certain facts to the Coquitlam Defendants.
Nov 10/09		The Coquitlam Defendants delivered a Reply to the Notice to Admit, denying the truth of several statements made in the Notice.
Nov 18/09		The Plaintiff filed a Requisition requesting a Judicial Settlement Conference on February 24, 2010.

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
Nov 24/09		The Plaintiff advised Singleton Urquhart of the Requisition for a Judicial Settlement Conference.
Dec 9/09	Louella Hollington swore her Affidavit #1.	Louella Hollington swore her Affidavit #1.
Dec 9/09		Jon Kingsbury swore his Affidavit #1.
Dec 10/09	Brian Robinson swore his Affidavit #1.	Brian Robinson swore his Affidavit #1.
Dec 10/09		Norm Cook swore his Affidavit #1.
Dec 14/09		Jason Cordoni swore his Affidavit #1.
Dec 15/09		The Plaintiff sent a "Reply to the Defendants' Reply to Notice to Admit" dated November 10, 2009.
Dec 17/09		Barry Elliott swore his Affidavit #1.
Dec 18/09		The Coquitlam Defendants delivered an Amended Reply to the Notice to Admit to the Plaintiff.
Dec 22/09		Lauren Hewson swore her Affidavit #1.
2010:		
Jan 11/10		Heather Bradfield swore her Affidavit #1.
Jan 12/10	Louis Sekora swore his Affidavit #1	Louis Sekora swore his Affidavit #1.
Jan 22/10	Michelle Taylor swore her Affidavit #2	Michelle Taylor swore her Affidavit #2.
Jan 27/10		The Plaintiff sent Interrogatories to the City of Coquitlam and to Louis Sekora.
Jan 28/10	The Coquitlam Defendants brought a Notice of Motion seeking an Order dismissing the Action against them for want of prosecution	The Coquitlam Defendants brought a Notice of Motion seeking an Order dismissing the Action against them for want of prosecution.
Feb 5/10	The Plaintiff filed a Response to the January 28, 2010 Notice of Motion	The Plaintiff filed a Response to the January 28, 2010 Notice of Motion.
Feb 9/10	*The DFO filed a Response to the January 28, 2010 Motion*	
Feb 11/10		The Plaintiff sent a Second Supplemental List of Documents.
Feb 17/10		The Plaintiff filed a Requisition adjourning the Judicial Settlement Conference scheduled for February 24, 2010.
Feb 17, 24/10		The Plaintiff filed a Notice of Motion regarding an application that the Defendants have their Statement of Defence in Action #3 struck for failure to produce a Supplemental List of Documents, and requesting Default Judgment against the Defendants in Action #3.

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Mar 1/10		The City of Coquitlam filed a Notice of Hearing scheduling a hearing of their January 28, 2010 Application in Action #3 for May 4, 2010.
Mar 1/10		Pam Carriere swore her Affidavit #3.
Mar 10/10		Counsel for the Defendants sent a List of Documents to the Plaintiff.
Mar 10/10		The Plaintiff sent a Notice to Admit to the Coquitlam Defendants.
Mar 15/10		*The Plaintiff sent First Supplemental Interrogatories to Scott Coultish.*
Mar 24/10		*Scott Coultish sent the Plaintiff an Affidavit in Reply to the First Supplemental Interrogatories.*
Mar 30/10		The City of Coquitlam sent a Reply to the Plaintiff's March 10, 2010 Notice to Admit.
Apr 1/10		The Plaintiff filed a Notice of Hearing scheduling a hearing of the Plaintiff's Notice of Motion dated February 23, 2010 for April 8, 2010.
Apr 13/10		The Plaintiff filed an Order dated April 13, 2010 allowing for the substitutional service of Ms. Maxine Wilson.
Apr 19/10		Louis Sekora swore an Affidavit in response to the Plaintiff's Interrogatories of January 27, 2010.
Apr 22/10	The Coquitlam Defendants filed a Notice of Hearing scheduling the hearing of their Notice of Motion, dated January 28, 2010, for April 22, 2010.	
Apr 27/10		Pam Carriere swore her Affidavit #6.
Apr 27/10		Diane Spraggs swore an Affidavit.
May 3/10		Thomas L. Spraggs swore an Affidavit.
May 4/10		The City of Coquitlam's Notice of Motion dated January 28, 2010 came on for hearing and was adjourned to September 2010.
May 6/10		The City of Coquitlam brought a Notice of Motion for a stay of proceedings until the Motion to Dismiss for want of prosecution had been heard.

Date	"Action #2": *Gemex Developments Corp. v. Sekora et al*, No. S035251, New Westminster Registry	"Action #3": *Gemex Developments Corp. v. City of Coquitlam et al*, No. S045308, New Westminster Registry
May 6/10		The City of Coquitlam filed a Notice of Hearing scheduling a Hearing of their Notice of Motion dated May 6, 2010 for May 19, 2010.
May 20/10		The Plaintiff brought a Notice of Motion seeking an Order that the temporary Stay of Proceedings be lifted.
May 26/10		The Coquitlam Defendants filed a Response to the Plaintiff's Notice of Motion dated May 20, 2010.
Jun 1/10		The Parties attended before Madam Justice Gerow of the BC Supreme Court, to vary her Order dated May 4, 2010. Stay Application was scheduled to be heard on June 7, 2010.
Jun 3/10		The Coquitlam Defendants filed a Notice of Hearing scheduling the Hearing of their Notice of Motion in Action #3 dated June 1, 2010 for June 7, 2010.
Jun 7/10		Mr. Justice Leask ordered the actions stayed pending this hearing. He also ordered that the parties were at liberty to set a trial date and a mediation or a judicial settlement conference, and that the plaintiff was at liberty to consolidate the two actions.
Nov 15/10	**Actions #2 and #3 consolidated pursuant to Leask J.'s June 7, 2010 Order**	
Dec 2-3/10	**Coquitlam Defendants' Application to Dismiss for want of prosecution heard**	