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BRIEFING NOTE

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## BCCA invites reconsideration of the test for dismissal for want of prosecution

Inordinate delay in prosecuting actions is not an uncommon occurrence in insurance defence litigation in this Province, resulting in fading memories and sometimes, the loss of evidence through a witness passing away. It also has a concomitant effect on insurers, being required to maintain reserves over an extended period of time. In order to successfully strike a claim for want of prosecution (Rule 22-7(7)), the court must find *inter alia* that there has been inordinate delay, that the inordinate delay is inexcusable, and that the delay has caused, or is likely to cause, "serious prejudice" to the defendant.[1] In reasons released on March 4, the Court of Appeal has issued what appears to be an open invitation for it to revisit the legal test for dismissal.

***Drennan v Smith*** (2022 BCCA 86) involves a relatively straightforward claim for trespass. The plaintiff alleges the defendant entered his property without permission and cut down trees to enhance his own view from his neighbouring lot. The defendant alleges that in exchange for receiving blast rock at no expense, the plaintiff agreed to have the trees removed. The action was commenced in September 2016, and various interlocutory steps occurred; the last of which was an examination for discovery of the defendant in April 2019. In July 2021, the Supreme Court allowed the defendant's application to dismiss the action for want of prosecution (reasons at 2021 BCSC 1302).

The plaintiff appealed, and the Court of Appeal allowed the appeal, holding that the application judge erred in determining the threshold test had been met by, among other things, misapprehending the materiality of evidence lost to the defendant while awaiting a trial. However the court commented in Obiter:

[59]It is the law of this province that dismissal for want of prosecution based on delay requires a finding that the delay has caused, or is likely to cause, serious prejudice to the defendant. That element of the governing threshold was not established here, and it is determinative of the appeal.

[60] However, in my view, the judge's concern about the time it was taking for this action to reach a trial was not unwarranted. The case involves relatively simple

[1] See ***Wiegert v. Rogers***, (2019 BCCA 334), noted at para 16 of the BCCA Judgement in ***Drennan*** for a more complete recitation of the elements of the test as set out in the caselaw

claims. Almost five years had passed between the filing of the NOCC and the hearing of the application for dismissal. The anticipated trial dates were another 18 months away. In submissions before this Court, it was suggested that a delay of five years is not unusual in civil actions; it is not uncommon for parties to move at the pace seen here; and that to dismiss an action for want of prosecution after only five years would be extraordinary.

[61] If that is an accurate depiction of civil litigation practice in British Columbia, it may be time to revisit the legal test for dismissal. In particular, this Court may wish to reconsider the requirement for a likelihood of serious prejudice. The object of the Supreme Court Civil Rules is "to secure the just, speedy and inexpensive determination of every proceeding on its merits" (R. 1-3). Consistent with that object, reformulating the test for dismissal may incentivize parties to conduct themselves with increased dispatch in advancing and defending their claims. We cannot do that here. We were not asked to reconsider the legal standard and doing so would require a five-member division.

[62] In R. v. Jordan, 2016 SCC 27, a majority of the Supreme Court ruled that the absence of prejudice can no longer be used to justify delay in criminal proceedings. The majority emphasized that "[t]imely justice is one of the hallmarks of a free and democratic society" (at para. 1). Extended court delays "undermine public confidence in the [justice] system" (at para. 26), and Canadians "rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner" (at para. 27). While those comments were made in the criminal law context, where timely justice takes on "special significance" (at para. 1), some of the underlying policy concerns, contextually informed, also resonate in the civil law realm. See, for example, the discussion in The Workers Compensation Board v. Ali, 2020 MBCA 122 at paras. 84–87.

[63] This is a matter for another day, but, in my view, the case before us provides a good example of why it may be worthy of consideration.

(our emphasis)

We will monitor the Supreme Court interlocutory judgements, as we anticipate that it is likely at least one litigant will take up Madam Justice DeWitt-Van Oosten's open invitation.

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