BRIEFING NOTE

B.C. Court of Appeal Reformulates the Test for Want of Prosecution – Dismissals for Delay Expected to Remain Elusive

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"All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare [in Hamlet] ranks it among the whips and scorns of time. Dickens [in Bleak House] tells how it exhausts finances, patience, courage, hope". – ***Allen v. Sir Alfred McAlpine & Sons Ltd.***, [1968] 2 Q.B. 229 at 245-246 (C.A.) (per Lord Denning)

A. Introduction

Delay in our justice system has received growing negative commentary in public discourse and in court decisions. In a recent news article, for example, the Canadian justice system was described as having reached a "crisis point due to years of delays". Similarly, the Supreme Court of Canada has critically commented on delays in both the criminal and civil context. In ***R. v. Jordan***, 2016 SCC 27 at paras. 1 and 27, the majority emphasized that "[t]imely justice is one of the hallmarks of a free and democratic society", and that extended court delays "undermine public confidence in the [justice] system". In ***Hryniak v. Mauldin***, 2014 SCC 7 at paras. 23–25, the Court noted that delay "denies ordinary people the opportunity to have adjudication", preventing the fair and just resolution of disputes.

Delay can be due to systemic weaknesses. However, delay can also arise from the litigants themselves – claimants who do not take steps to prosecute their claims in a timely manner. Defendants faced with this type of delay have few tools at their disposal to move things forward. One of these tools is an application to dismiss the claim for want of prosecution, pursuant to Supreme Court Civil Rule 22-7(7).

Historically, however, courts have been reluctant to take the "Draconian" step to dismiss an action on the basis that the plaintiff had not diligently pursued their rights. Such applications were granted only in the most egregious cases. Even five years was insufficient to justify a dismissal. This has attracted criticism that Rule 22-7(7) was feckless and mere window dressing. It was in this context that a five-member division of the B.C. Court of Appeal revisited the test for want of prosecution in the recent decision of ***Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173***, 2023 BCCA 473.

The Court reformulated the test. However, it is not expected that this will make dismissal applications any easier for defendants. The Court expressly stated that its decision was not an invitation for defendants to bring these applications.

Rather, the upshot for defendants appears to be that they should avail themselves of other avenues to move the matter forward, as a want of prosecution application will continue to be reserved for the most egregious cases.

B. Background

The litigation arose from a dispute over alleged failures in an HVAC system installed in a residential tower. The defendants (appellants) supplied HVAC-related components to the project.

The plaintiff (respondent) filed its claim on August 9, 2019 and served it in August 2020. The appellants filed a response to civil claim, but then no further substantive steps were taken in the action. The plaintiff did not produce documents, conduct examinations for discovery, or schedule a trial date.

In January 2023, the defendants sought to dismiss the claim for want of prosecution. The chambers judge applied the long-standing test for these applications:

1. Was there inordinate delay?
2. If there was inordinate delay, was it inexcusable?
3. Did the delay cause, or was it likely to cause, serious prejudice to the defendant, taking into account the length and reasons for the delay, the stage of litigation, the context delay occurred, and the role of counsel in causing the delay?
4. Even where these factors were established, however, the overarching consideration was whether or not the balance of justice demands that the action should be dismissed.

The chambers judge dismissed the application, because there was no evidence of obvious prejudice to the appellants in terms of their ability to properly defend the case. As such, it was not in the interests of justice to dismiss the claim for want of prosecution. The defendants appealed.

The Court of Appeal addressed two questions: (i) Should the test for dismissal for want of prosecution be revised?; and (ii) Should the action be dismissed?

C. Reformulating the Test for Want of Prosecution

The Court agreed with the appellants that the test for want of prosecution required revisions to address the fundamental weakness with the current test: it focuses too heavily on the requirement that the defendant be seriously prejudiced in its ability to defend the action. This prevented a court from giving appropriate weight to other factors relevant to the interests of justice, including the impacts on the public interest in a justice system. This promoted a culture of complacency and ignored the broader impacts of delay on defendants and the justice system broadly.

Nevertheless, the Court did not want to make wholesale changes to the test – as suggested by the appellants. Rather, the Court followed a recent decision from the Saskatchewan Court of Appeal, where the test removed "serious prejudice" as a standalone consideration. Instead, it is now one of several other factors to consider at the interests of justice stage of the analysis – and thus it is no longer, invariably, the overriding factor at that stage.

The test is now:

1. Is the delay inordinate?
2. Is the delay inexcusable?

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3. And if the first two questions are answered in the affirmative, is it in the interests of justice for the action to continue? The judge should consider several non-exhaustive factors: (i) the prejudice the defendant will suffer defending the case at trial; (ii) the length of delay; (iii) the stage of the litigation; (iv) the impact of the delay on the defendant's professional, business, or personal interests; (v) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed; (vi) the reasons offered for the delay; (vii) the role of counsel in causing the delay; (ix) the public interest in having cases that are of genuine public importance heard on their merits; and (x) the merits of the action.

Having reformulated the test to address its inherent weaknesses, however, the Court immediately sought to temper expectations around this revised test. While plaintiffs are expected to "get on with it", this case should "not be taken to signal an invitation to defendants to bring applications for dismissal for want of prosecution as a matter of routine". Rather, it merely provides a more nuanced balancing of the competing considerations of the interests of defendants and the justice system as a whole.

Moreover, the Court noted that defendants have other tools available to them if they wish to move matters forward. While defendants are not required to avail themselves of these avenues, "the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis".

In the result, the Court of Appeal held that dismissal should not be granted. The delay involved complex multi-party construction defects, which required time to investigate. The delay also did not prejudice the defendant in defending the action, nor did it prejudice its business interests more generally.

D. Discussion

The test has been revised so that "serious prejudice" no longer necessarily dictates the result. Yet, while it remains to be seen what other circumstances justify depriving a plaintiff of their presumptive entitlement to an adjudication on the merits, it can be anticipated that "serious prejudice" will remain a significant consideration. Moreover, defendants who choose to sit on a dormant file may be questioned why they did not take steps to move the matter forward.

In practical terms, therefore, for defendants, this case likely changes very little. A dismissal for want of prosecution will remain very difficult to obtain.

But where does this leave defendants who wish to move matters along? There are steps that can be taken. But they do not, singularly or together, provide a panacea for litigation delay. Also, they all cost money on the defendant's part.

Courts generally frown upon parties unilaterally setting down discovery dates. Document production applications can achieve only so much. And despite much talk more recently about quicker and dirtier justice, summary trial applications still are often set aside based on suitability concerns.

Case planning conferences, under Supreme Court Civil Rule 5-3, give parties an opportunity to set a schedule, and Rule 5-3(6) provides consequences for non-compliance with case planning orders. However, the sanctions may prove to be nothing more than hollow costs awards which simply go unpaid. And like want of

prosecution applications, while the ultimate sanction for non-compliance of case planning orders may be dismissal, such "guillotine" orders are seldom granted. See: ***Dhanani v. Dhalla***, 2005 BCCA 317 at paras. 28, 33-34; ***Badreldin v. Swatridge***, 2015 BCSC 1161 at para. 15.

Accordingly, despite the Court of Appeal's confirmation that delay undermines public confidence in the justice system, and should not be countenanced, plaintiffs continue to face little risk of dismissal and defendants continue to have few effective options to move an action to resolution in a timely manner – particularly where the plaintiff insists that it wishes to pursue a fair and just determination on the merits. So long as plaintiffs' interest in adjudicating matters on the merits is placed near or at the pinnacle of considerations, our civil litigation system will continue to tax litigants' finances and patience.

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