

Culture shift in dismissal for delay motions – Delay alone is prejudice sufficient for dismissal

December 17, 2024

In Barbiero v Pollack, the Court of Appeal for Ontario overturned its prior decision in Langenecker v. Sauvé, 2011 ONCA 803 to the extent it denied that the passage of time, on its own, could constitute sufficient prejudice to dismiss an action for delay.

In Barbiero, the Court of Appeal was faced with a class proceeding that had been commenced and certified in 2003. Discoveries took place in 2004 and 2005 and a mediation in 2012. In 2022, the defendant moved to dismiss the class proceeding for delay under Rule 24.01 of the Rules of Civil Procedure and section 35 of the Class Proceedings Act, 1992 (CPA), which provides that the rules of court apply to class proceedings. The action had been dismissed for delay by the motions judge.

On appeal, the plaintiff argued that a 20-year period of delay was not inordinate and that Langenecker had held that the passage of time on its own could not constitute sufficient harm or prejudice to support the dismissal of an action.

In dismissing the appeal, the Court of Appeal overturned its prior decision in Langenecker to the extent it excused delay. The Court emphasized the impact of Hryniak v Mauldin on the judicial system as a whole and the culture shift necessary to remove indifference to delay. In particular, the Court noted:

- 1. **Delay causes harm**: Langenecker's approach to delay or the passage of time, that it alone cannot constitute sufficient harm or prejudice to support a dismissal, should not be followed. The passage of time, on its own, can constitute sufficient prejudice to dismiss an action for delay and not just a rebuttable presumption of prejudice.
- 2. **Litigation responsibility**: in all civil proceedings, including class actions, it is the party who initiates a claim who bears the burden of moving a proceeding to its final disposition on the merits.
- 3. Class actions are not immune from dismissals for delay : on appeal, the plaintiff argued that it would be inefficient to dismiss the action when other class members could simply start a new action given the suspension of limitation periods under section 28 of the CPA. The Court denied this argument, noting that section 35 of the CPA provides that class actions are subject to the Rules of Civil



Procedure, and the absence of any evidence that there was any class member indicating a willingness to start a new action.

This decision suggests a judicial desire to reframe attitudes about delay in civil litigation, and to take a more critical approach to those actions that pass the five-year benchmark set out by Rule 48.14 of the Rules of Civil Procedure.

Ву

John Hunter, Kevin McGivney

Expertise

Disputes, Class Action Defence

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary	

Centennial Place, East Tower 520 3rd Avenue S.W. Calgary, AB, Canada T2P 0R3

T 403.232.9500 F 403.266.1395

Montréal

1000 De La Gauchetière Street West Suite 900 Montréal, QC, Canada

H3B 5H4

T 514.954.2555 F 514.879.9015

Ottawa

World Exchange Plaza 100 Queen Street Ottawa, ON, Canada

K1P 1J9

T 613.237.5160 F 613.230.8842

Toronto

Bay Adelaide Centre, East Tower 22 Adelaide Street West Toronto, ON, Canada M5H 4E3

T 416.367.6000 F 416.367.6749

Vancouver

1200 Waterfront Centre 200 Burrard Street Vancouver, BC, Canada V7X 1T2

T 604.687.5744 F 604.687.1415

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2025 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.