WeirFoulds LLP

Commercial Litigation Insights: Don't Delay – The Ontario Civil Court System's Renewed Focus on Dismissing Cases for Delay

February 25, 2025

By Piper McGavin

Delay in Ontario's civil justice system is a common issue, with litigants facing long wait times for motions and trials due to factors like interruptions in court functions due to the COVID-19 pandemic, an increase in self-represented litigants, and a shortage of judicial appointments to keep up with retirements, among other factors[1]. However, the backlog is not an excuse for intentional delay.

Rule 48.14(1) of the *Rules of Civil Procedure* sets a five-year time limit for civil court actions. If an action is not resolved within this period, the local Registrar will dismiss the action for delay. While courts stopped sending out dismissal notices due to the pandemic, in May of 2024 the notices resumed. The rationale behind Rule 48.14(1) is clear: over time, evidence may be harder to locate, witnesses' recollection may fade, lawyers may have changed firms or retired, legal costs increase, and the parties must anxiously live with a looming claim.

While the rule is that actions will be dismissed after five years, in practice, delay has become a common reality in the Ontario civil justice system. The Court of Appeal in ***Barbiero v Pollack***[2], recently reviewed the principles governing dismissals for delay.

In ***Barbiero*** the plaintiffs appealed a motion judge's decision to dismiss a 21-year old certified class proceeding for delay.

The motion judge applied the analysis in ***Langenecker v. Sauvé***[3], that an action will be dismissed for delay where the delay is (i) is inordinate, (ii) inexcusable, and (iii) results in a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay, whether through an unrebutted presumption of prejudice or by evidence of actual prejudice to the defendant's ability to have the case adjudicated on its merits[4].

The Court of Appeal held that the ***Langenecker*** approach to delay, which is the existence of delay as only giving rise to a rebuttable presumption of prejudice, is "out of step with the contemporary needs of the Ontario civil court system"[5].

The Court disagreed that delay alone is insufficient to show prejudice. It stated that the Ontario civil justice system requires a cultural shift to achieve prompt judicial resolution of legal disputes. For this reason, the passage of time on its own is sufficient to show prejudice and support dismissal for delay.[6]

The Court also discussed the meaning of "inordinate" delay and found that the delay is inordinate when it is "unusually large or excessive". The Court pointed to two relevant rules, Rule 24.01, which permits a defendant to move to have an action dismissed for delay where the plaintiff has failed to set the action down for trial within six months following the close of pleadings and Rule 48.14(1) which sets a benchmark of five years for an action to be set down for trial.[7] The Court stated that considering these timelines set out in the rules, once an action passes the five year benchmark, it moves into the realm of "inordinate".

Key Takeaways

Barbiero makes it clear that courts will no longer tolerate the "unhealthy characteristic [of] indifference to delay"[8]. Along with the reintroduction of Notices of Dismissal, the Court is signaling that dismissal is not just a threat but a reality litigants must be prepared for going forward. Plaintiffs must ensure that once they have commenced a claim, the responsibility to move the litigation forward rests with them. Defendants, though not bearing this burden, should be aware that delay tactics are frowned upon by the courts, and they cannot prevent the timely adjudication of the case.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] "Fighting the Backlog: How are Ontario's Courts Using Summary Processes to Address Civil Justice Delays?" Suzanne Chiodo, August 2024.

[2] *Barbiero v. Pollack*, 2024 ONCA 904 [***Barbiero***].

[3] *Langenecker v. Sauvé*, 2011 ONCA 803 [***Langenecker***]

[4] *Barbiero* at para 8.

[5] *Barbiero* at para 9.

[6] *Barbiero* at para 15.

[7] *Barbiero* at para 20.

[8] *Barbiero* at para 11.

For more information or inquiries:

Piper McGavin

Toronto
647.715.7027

Email:
pmcgavin@weirfoulds.com

Piper McGavin is an Associate in the Commercial Litigation and Employment & Labour Practice Groups. Her practice is focused on a broad range of employment and commercial disputes.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035