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

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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*.

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