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B.C. Court of Appeal lowers the bar for dismissal for delay

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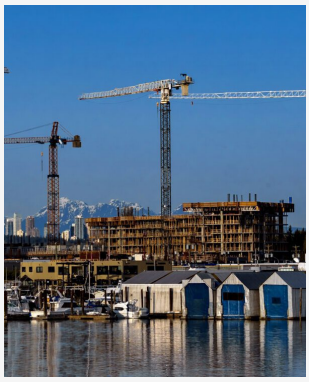

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In the recent decision of *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, the British Columbia Court of Appeal lowered the bar for when a court may dismiss an action for want of prosecution. Specifically, B.C. defendants seeking dismissal for delay no longer need to show that a plaintiff's delay impaired their ability to defend the action.

Background

Giacomini concerned a construction dispute. At the time the defendants brought an application to dismiss, the plaintiff had taken no steps to advance the litigation for 21 months.

The application judge applied the decades-old test for dismissal of an action for want of prosecution set out in *Irving v. Irving*, 1982 CanLII 475 (BCCA). In that pre-*Hryniak* era (i.e., before the Supreme Court of Canada's call for a culture shift to address delay and cost in the justice system), the Court of Appeal in *Irving* had considered dismissal for delay a "Draconian" remedy, and accordingly restricted it to where

1. there has been inordinate delay
2. the delay is inexcusable
3. the delay has caused, or is likely to cause, serious prejudice to the defendant
4. justice demands that the action should be dismissed

While the plaintiff's delay had been both inordinate and inexcusable, the application judge refused to dismiss the action because there was no evidence that the delay had caused, or would likely cause, the defendants serious prejudice by impairing their ability to defend the action.

Appeal decision

On appeal, a five-member division of the Court of Appeal was empaneled to reconsider *Irving*. The Court recognized that there have been both criticisms of *Irving* and increasing attention to how delays undermine public confidence in the justice system. Further, the Court

held that the defendants had a legitimate interest in having claims against them resolved promptly.

The Court concluded that the third *Irving* requirement — that a delay must have caused the defendant serious prejudice — was no longer tenable. Not only had there been significant practical problems in implementing this requirement, but it also created a high bar for dismissal that failed to incentivize plaintiffs to prosecute actions promptly and instead fostered a culture of complacency.

The Court of Appeal accordingly revised the *Irving* test by removing the requirement for the defendant to demonstrate serious prejudice. Defendants now are required to show only

1. an inordinate delay
2. which is inexcusable
3. that it is not in the interests of justice for the action to proceed

The Court stated that dismissal should no longer be seen as a "Draconian" remedy but rather a justified remedy in the face of inordinate and inexcusable delay. However, the Court cautioned that it did not intend to invite a flood of dismissal applications and that defendants concerned about the pace of litigation ought first to avail themselves of other tools, such as setting timelines.

Indeed, despite relaxing the test for dismissal, the Court of Appeal refused to dismiss the action in *Giacomini*. While the delays concerned the Court, dismissal was not in the interests of justice given that the action was a complex, multi-party proceeding that required time to investigate.

Takeaway

By removing the requirement to show, with evidence, significant prejudice, *Giacomini* leaves defendants in B.C. proceedings with a better tool to dispense with actions that have languished for want of prosecution. The heightened threat of dismissal may now also incentivize plaintiffs to be more diligent in their pursuit of their actions. However, it remains to be seen how lower courts will implement this new framework and whether it will be enough to overcome what the Court of Appeal described as a culture of complacency.