
Dena N. Varah
416-865-3556
dvarah@litigate.com


Derek Hooper
416-238-7443
dhooper@litigate.com

December 23, 2024

Languishing in Langenecker? Court of Appeal Says â€œNo Moreâ€•

In *Barbiero v Pollack*, the Ontario Court of Appeal has departed from *Langenecker v Sauve* and changed the law of dismissal for delay under Rule 24.01. Where a delay is found to be both inordinate and inexcusable, that alone is sufficient to dismiss the action. Plaintiffs can no longer allow an action to languish for years and then rebut the presumption of prejudice to keep it alive.

Factual Background

The appellant sought to overturn the decision of the Motion Judge to dismiss a certified class proceeding that was 21 years old. The action was commenced in February 2003, and certified on consent as a class proceeding in December 2003. Discoveries took place in 2004 and 2005. An Order was issued in March 2005 with respect to testing by Health Canada of a sample that was at issue in the proceeding.

An unsuccessful mediation between the parties occurred on one day in late 2012. In 2019, the appellant advised that she wished to arrange for testing of the sample previously seized by Health Canada. By 2022, the parties learned that the sample, which the respondent purported to rely on to defend the action, had been lost. At that point, the matter had still not been set down for trial, following which the respondent moved to dismiss the proceeding for delay.

The Motion Judge found that virtually no substantive steps were taken by the appellant to advance the action between 2006 and the mediation in 2012, and again following the mediation in 2012 until late 2019.

Certified Class Proceedings Can Be Dismissed for Delay

The Court confirmed that the consequences of “dilatory regard for the pace of the litigation” falls on the plaintiff in the absence of resistance from the defendant. These principles apply to all civil proceedings, including certified class proceedings.

Refining the Court’s Approach from *Langenecker*

Previously, the Court of Appeal held in *Langenecker* that an action will be dismissed for delay where the delay (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 a presumption of prejudice that has not been rebutted, or by evidence of actual prejudice to the defendant.

However, in *Barbiero*, the Court expressed concern that its previous approach in *Langenecker* is "out of step" with the contemporary realities of Ontario's civil justice system, noting that the Supreme Court of Canada's decision in *Hyrniak v Mauldin* highlights a criticism of the Ontario civil justice system: its indifference to delay.

The Court noted that under the *Langenecker* approach, delay or the passage of time on its own cannot constitute harm or prejudice sufficient to support the dismissal of an action. In other words, a court may find inordinate delay but refrain from dismissing an action for delay because it found that there was no harm or prejudice.

The Court found that this "tolerant attitude" toward delay was not aligned with the general principle set out in Rule 1.04(1), to secure the "most expeditious … determination of every civil proceeding on its merits". The Court held that to the extent that *Langenecker* denies that the passage of time, on its own, can constitute sufficient prejudice to dismiss an action for delay and not simply a rebuttable presumption of prejudice, it should not be followed.

Key Takeaways on the Test for Delay

The Court of Appeal has refined its approach from *Langenecker* to avoid situations in which a delay is found to be both inordinate and inexcusable, yet the action nevertheless is permitted to proceed on the basis that the presumption of prejudice is rebutted by the plaintiff, and no actual prejudice is proven by the defendant. Against the backdrop of scarce judicial resources and a need to instill confidence in Ontario's civil court system, the Court makes clear that where a delay is both inordinate and inexcusable, that is enough to dismiss the action. The Court's decision is an attempt to effect a "culture shift" where indifference to delay in the system is endemic.

By seemingly removing the rebuttable presumption of prejudice "safeguard" in the test, which can allow plaintiffs to maintain actions notwithstanding long and inexcusable delays, it remains to be seen how judges will address delay moving forward, particularly in how they address the length necessary to find that the delay was inordinate. On that note, however, the Court noted that whether delay is "inordinate" should be made with reference to Rule 48.14 (i.e., because Rule 48.14 requires that an action be administratively dismissed if not set down for trial

within five years, that should serve as a measuring stick by which courts are to determine whether a delay under Rule 24.01 is inordinate).

The bottom line is that the Court is sending a message to litigants who commence proceedings but only progress those proceedings at a glacial pace, that they risk their proceedings being dismissed without any judicial recourse.