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When Enough is Enough: Court of Appeal takes hard line on delay

Lazy litigants beware: not only is your (in)action subject to a dismissal motion under Rule 24 of the *Rules of Civil Procedure*, it is also subject to the court's inherent jurisdiction.

According to the Ontario Court of Appeal in *Wallace v. Crate's Marine Sales Lotd*, 2014 ONCA 671, inordinate delay in pursuing an action could be construed as an abuse of process, and as undermining the administration of the civil justice system.

Background

In *Wallace*, the Court dismissed an appeal from a decision dismissing the plaintiffs' action for delay. The facts leading to the dismissal motion were straightforward: The plaintiffs bought a pricey yacht in 2000 from the defendants, and claimed it was so defective it constituted a fundamental breach of contract. The action was commenced in 2003. Discoveries were scheduled a year and a half later, but were adjourned to permit the appellants to amend their Statement of Claim. Counsel never took steps to amend the pleading.

In fact, until August 2011, no other steps were taken by either side to advance the litigation, apart from "a desultory exchange of correspondence". Then, in August 2011, in response to the plaintiffs' efforts to get the action moving again, the defence advised it would be bringing a motion for summary judgment and seeking dismissal of the action for delay.

Appellate Decision

Justice Lauwers, writing for the Court, rejected the argument that evidentiary issues arising from the delay did not create prejudice and were instead merely the risks inherent in litigation. For one thing, the documentary record could not compensate for fading memories. The earliest estimate of the action being ready for trial was 12 years after the action was commenced, and the only steps completed to date were the pleadings.

The argument that the defendants shared in the failure to move the action along also got no traction. Neither side availed themselves of motions to move matters forward, despite "neither counsel [being] considered 'wilting flowers' on the civil litigation stage". The fact is that the plaintiff bears responsibility

for moving the action forward.

The Court's consideration of the exercise of inherent jurisdiction appears to encourage a more aggressive tact in dealing with inactive litigants. Whereas a Rule 24 motion considers the effect of the delay on the litigation between the parties, an analysis based on the inherent jurisdiction of the court invites a broader consideration of factors, including the optics of allowing such litigation to proceed in the face of a resource-starved court system.

Justice Lauwers quoted the motions judge as stating:

A lengthy, unexplained delay in a case of this nature could well be defined as an abuse of the court's process. There is, indeed, a strong public interest in promoting the timely resolution of disputes in our civil justice system, which is already overburdened. Litigants and the public regularly complain about inordinate delays in obtaining civil motions and trial dates. The delay in this matter, of over a decade, strains the empathy of the court to excuse a delay of this "magnitude and gravity" and further undermines public confidence in the administration of our civil justice system.

Justice Lauwers agreed:

There comes a time, in short, when enough is enough, and the civil justice system will no longer tolerate inordinate and inexplicable delay. A court may then eject the action as an exercise of its inherent jurisdiction, whether or not the relevant rules expressly mandate it.