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PUBLICATION

Court of Appeal for Ontario sets aside Administrative Dismissal and Restores Action to Trial List notwithstanding Five-Year Delay

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In its recent decision *Carioca's Import & Export Inc. v. Canadian Pacific Railway,*[1] the Ontario Court of Appeal has sent a clear message that the passage of time – albeit egregious – is not sufficient to dismiss an action for delay. In that case, the Court restored an action to the trial list, despite a five year delay, holding that the overall conduct of all parties in the litigation must be examined to determine if such a dismissal is warranted.

The Delayed Undertakings

The Plaintiff in *Carioca's* had initially prosecuted its action with reasonable diligence. The Statement of Claim was issued in early 2007. Documentary and oral discoveries took place in 2008. The action was set down for trial in mid-2009, but ultimately stalled at the undertakings stage.

Defendant's counsel refused to execute the relevant certification form because of certain outstanding undertakings given by the Plaintiff at examination for discovery. Between 2010 and 2013, Defendant's counsel continued to press the Plaintiff to answer outstanding undertakings. When partial answers were provided, Defendant's counsel made further requests for complete answers and clarifications. Defendant's counsel insisted that it could not obtain an expert report quantifying the Plaintiff's alleged damages until the outstanding undertakings were satisfied.

The Action is Struck Off the Trial List

The action was struck off the trial list in late 2013. The Plaintiff's motion to restore the action to the trial list was dismissed in late 2014, with the result that the action was administratively

dismissed shortly thereafter. The Plaintiff appealed the dismissal of its motion to restore the action to the trial list.

The Test to Restore an Action to the Trial List

Writing for a unanimous court, van Rensburg J.A. confirmed that the test to restore an action to a trial list is whether the Plaintiff can demonstrate, on a balance of probabilities, that (1) there was a reasonable explanation for the delay; and (2) if the action were allowed to proceed, the Defendant would not suffer non-compensable prejudice.

Van Rensburg J.A. held that a motion to restore an action to the trial list is not a "*blame game*." Rather, the motion judge must consider the overall conduct of the litigation in the context of local court practices. This will involve an assessment of the conduct of the Defendant as well as the Plaintiff, as all parties must "*play their part in moving actions forward."*

Application to the Facts

Although van Rensburg J.A. noted that the Plaintiff "*should have moved this case along to trial more briskly*", she held that when, all the circumstances were considered, the action ought to be restored to the trial list. In particular, she noted that the Plaintiff, a small business with limited resources, struggled to fulfill its undertakings.

Van Rensburg J.A. rejected the Defendant's assertions of prejudice, noting that the mere passage of time alone was insufficient to prove prejudice to the Defendant's case.

Takeaways

The Appellate Court in *Carioca* essentially excused the Plaintiff from an exorbitant delay in answering its undertakings. While van Rensburg J.A. noted that the Plaintiff was a small business with limited resources, the undertakings themselves related to the production of rather unremarkable documents, i.e., tax returns and inventory records.

Carioca's is an instructive decision for Defendants highlighting how best they can position themselves for success on dismissal for delay motions:

1. **Be persistent, but not overzealous, in insisting that the Plaintiff satisfy its outstanding undertakings.** The Defendant in *Carioca's* was diligent in requesting that the Plaintiff satisfy its outstanding undertakings. However, it may have crossed the line in making requests for clarifications, which may have been perceived as an attempt to "bury" the Plaintiff in an avalanche of undertakings.

2. **Make your position on delay clear.** The Defendant in *Carioca's* was penalized because its objection to the restoration of the action to the trial list was late. Defendants might be better positioned on motions of this type if they explicitly state their objection to the Plaintiff's dilatory prosecution of the action well before such motions arise.

3. **Actively document any prejudice to your case arising from the delay in the progress of the action.** The Defendant in *Carioca's* was unable to present much in the way of cogent evidence proving the prejudice to its case arising from the delay in the progress of the action. Defendants should actively document any prejudice to their case when an action is delayed for use at any future motion of this type.

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[1] 2015 ONCA 592 (CanLII).