

IN THIS ISSUE



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STALE CONSTRUCTION LAWSUITS DON'T DISMISS THEMSELVES: PRACTICAL LESSONS FROM THE B.C. COURT OF APPEAL

By: Cody Mann, Dolden Vancouver

Every claims examiner or adjuster has seen this defence file. The lawsuit starts. A few steps happen. Then nothing. Months pass. Then years. One wonders whether the plaintiff's claim can really just sit there, while memories fade, people move on, and the file stays open. A recent B.C. Court of Appeal decision, HUB International Canada West ULC v. Forgotten Treasures International Inc.,¹ offers valuable guidance for such files.

What Happened in HUB

The case involved an insurance coverage dispute over allegedly stolen sculptures, with claims raised against the brokers for negligence, breach of contract, and breach of fiduciary duty. After a long time of inactivity in the litigation, the defendants asked the court to dismiss the claim because of delay. The delay was serious: six and a half years overall, with about five years of that found to be inexcusable. Despite this, the Court of Appeal refused to dismiss the lawsuit, and allowed the claim to continue.

For insurers defending construction claims, the key lesson from this case is that: **delay matters, but delay alone may not be enough.** The court will still ask whether, looking at the whole file, it is fair to end the lawsuit instead of letting it proceed.²

¹ 2026 BCCA 230

² 2026 BCCA 230 at paras. 26–27, 46–52.



Technically speaking, the test the court will look at has three questions:

1. Was the delay too long?
2. Was there no good excuse for it?
3. If both answers are yes, is it still in the interests of justice to let the claim continue? Prejudice to the defence parties, resulting from the delay, is no longer a separate must-prove hurdle. However, it remains an important part of the final fairness analysis.³

That final step is where many dismissal applications are won or lost. In *HUB*, the Court of Appeal stressed that the factors are not a scorecard. A defendant cannot simply point to several factors favouring dismissal and expect the court to add them up. The court weighs the whole picture, including the length of delay, the stage of the case, prejudice, the impact on the defendant, the reason for delay, the merits of the claim, and (importantly) what the defence did while the file was sitting. On this latter point, the Court of Appeal stated the following:

[41] *Be that as it may, a defendant's conduct is also relevant in assessing whether it is in the interests of justice to dismiss an action for want of prosecution. All litigants are expected to guard against a "culture of complacency" that can produce delay and undermine confidence in the justice system. This is why the court considers "whether the plaintiff delayed in the face of pressure by the defendant to proceed", as part of the "context in which the delay occurred" ... "the plaintiff's delay does not tie the hands of a defendant who is motivated to bring the case to its conclusion", such that "the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis."*

[42] *The court may therefore look beyond passive expressions of concern about delay, to assess whether the defendant actually put pressure on the plaintiff to proceed. One way for a defendant to do so is to set out deadlines after which remedies will be sought for the plaintiff's inaction ... The chambers judge fairly noted that the defendants did not put any such pressure on the plaintiff in this case. The chambers judge was entitled to consider this in her assessment of the "context in which the delay occurred".⁴*

³ 2026 BCCA 230 at paras. 26–27.

⁴ 2026 BCCA 230 at paras 41-42

This offers the most practical “takeaway” point for defence teams. The BC Court of Appeal’s decision in *HUB* suggests that pressure should be put on the plaintiff to move the matter forward. A defendant does not have to move the plaintiff’s case forward; but the defendant’s conduct, in trying to move the litigation along, matters when the court decides whether dismissal (for delay) is fair. The court will look at what the defence team has been doing, and if they actually pressed the plaintiff to move the file, such as by making demands for documents or particulars, setting deadlines, seeking discoveries, asking the court for a timetable at a case planning conference, or warning that dismissal may be sought. In *HUB*, the defendants’ lack of real pressure on the plaintiff weighed against dismissal of the action.

Past Construction Delay Cases: What the Pattern Shows

This all translates directly to construction files. These claims often move very slowly. When looking at past construction cases, there is a clear pattern: delay helps the defence, but it rarely wins the dismissal application by itself (for more detail, see our table at the end of this article outlining key construction cases where dismissal applications were brought for delay). A review of these cases suggests that dismissal applications have the greatest chance of success on stale claims where the file is really old (8 years or more), the plaintiff has no strong excuse for the delay, the case is still at an early stage, and the delay has created real problems for the defence (for instance in relation to witnesses, documents, security, or other evidence).

On the other hand, judges are less willing to dismiss construction claims where the delay is tied to repair efforts, ongoing investigations, warranty discussions, owner deadlock, counterclaims, or thin evidence of prejudice.

Lastly, past construction cases also support the point that was made by the Court of Appeal in *HUB*: the best applications for dismissal are built while the file is going stale, with attempts by the defence parties to move the matter along using letters, demands, or by setting timelines via case plan order.⁵

⁵ *Trinity Western University v. Johnson Controls LP*, 2022 BCSC 1632 at paras. 24–32; *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 at para 76.

Takeaway

Overall, the bottom line is practical. *HUB* is not bad news for defendants in construction claims, and their insurers. It is a reminder that stale claims should be managed, not ignored. If the defence wants to dismiss a dormant claim, the application should tell a clear story: the delay was too long, there was no good excuse, attempts were made to move the matter along, and the delay has caused real problems for the defence. In essence, the record for dismissal applications should be built well before the application is brought. Given what the Court of Appeal has said in *HUB*, when a file goes quiet it is likely that the best defence is not silence. Rather, there should probably be a record of diligent steps, or attempts, that have been taken to move the matter along.

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Table of Past Construction Delay Cases

Case	What the case was about	Length of delay	Why it mattered
<i>Bonaparte Indian Band v. Lakeridge Contracting Ltd.</i> , 1999 BCCA 729	The claim concerned alleged defects in five houses built in the mid-1980s, with claims against contractors and CMHC for inspection-related issues.	The construction was about 10 years old by the time dismissal was sought; there had also been long periods of litigation inactivity. ¹	Claim dismissed. The Court found that the delay created real prejudice because old construction facts would depend on witnesses whose memories had faded, one witness had died, and others could not be found. ²
<i>TRAK Energy Corporation v. Happy Valley Resort Ltd.</i> , 2017 BCCA 201	A contractor/engineer claimed payment after being retained to design and install mechanical, plumbing, and HVAC systems for a Kelowna condominium project. <i>TRAK</i> said it stopped work because of non-payment; <i>Happy Valley</i> said <i>TRAK</i> abandoned the job and did poor work.	About 8 years overall. ³	Claim dismissed. The plaintiff's business reasons for delay did not excuse the failure to move the claim. The Court accepted that the defences raised old quality, misrepresentation, and workmanship issues that would depend on memory, not just invoices, and that property or cash security had been tied up for years. ⁴
<i>DEB Construction Ltd. v. Mondiale Development Ltd.</i> , 2023 BCSC 1167	A concrete polishing and forming subcontractor filed a builder's lien on a residential development and claimed about \$274,000 remained unpaid.	Over 8 years from filing the claim; about 5 years and 11 months of inactivity after document discussions ended. ⁵	Claim dismissed. The plaintiff blamed missing document production, but the court said the plaintiff still had to move its own case forward. The builder's lien context mattered because lien rights are powerful and must be pursued promptly. ⁶

¹ 1999 BCCA 729 at para 3

² 1999 BCCA 729 at paras 1 to 3, 10–13.

³ 2017 BCCA 201 at para 22

⁴ 2017 BCCA 201 at paras 1–9, 20–27.

⁵ 2023 BCSC 1167 at paras 34 and 36

⁶ 2023 BCSC 1167 at paras 38–46, 63–71.

Case	What the case was about	Length of delay	Why it mattered
<i>The Owners, Strata Plan EPS1977 v. Travelers Insurance Company of Canada/LA Compagnie D'Assurance Travelers Du Canada</i> , 2021 BCSC 178	A strata sued developers, warranty providers, consultants, contractors, manufacturers, and the City of Richmond over alleged defects, including concrete cracking, water ingress, and building envelope issues.	About 4 years and 2 months. ⁷	Dismissal refused. The delay was not treated as unusual in a complex construction defect claim. The strata had been pursuing warranty and repair efforts, and the defendants did not show serious prejudice because they did not explain what material evidence missing former employees would have given. ⁸
<i>Trinity Western University v. Johnson Controls LP</i> , 2022 BCSC 1632	TWU sued multiple defendants after an air handling unit allegedly malfunctioned, overheated a building, triggered sprinklers, and caused water damage. The manufacturer group (Johnson defendants) applied to dismiss the claim against them.	About 4 years of no meaningful steps against the Johnson defendants. ⁹	Claim dismissed (against the Johnson defendants). The claim against those defendants was vague and undeveloped. TWU had not shown whether the unit was preserved, whether key witnesses were available, or what specific case the Johnson defendants had to meet. ¹⁰
<i>Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173</i> , 2023 BCCA 473	A construction defect claim over alleged HVAC failures in a residential tower. The Giacomini defendants supplied radiator and fan coil components; the strata alleged breach of warranty and significant damages.	About 21 months with no steps to advance the litigation; about 3.5 years had passed since the notice of civil claim was filed. ¹¹	Dismissal refused. The claim was allowed to proceed because the action was complex, investigation was ongoing, prejudice evidence was generalized, the defendants had not pressed for firm timelines, and the claim was not bound to fail. ¹²

⁷ 2021 BCSC 178 at para 6

⁸ 2021 BCSC 178 at paras 6–18.

⁹ 2022 BCSC 1632 at paras 12–14, and 31

¹⁰ 2022 BCSC 1632 at paras 24–32.

¹¹ 2023 BCCA 473 at para 18.

¹² 2023 BCCA 473 at paras 79–84

Case	What the case was about	Length of delay	Why it mattered
<i>0690860 Manitoba Ltd. v. Country West Construction Ltd.</i> , 2009 BCCA 535	A structural steel subcontractor sued a general contractor and surety over unpaid amounts on a school project, including a builder's lien and bond issue.	About 43 months or about 3.5 years. ¹³	Dismissal refused. The Court of Appeal held that the prejudice evidence was too weak and too indirect. The cost and inconvenience of a lien bond did not, by itself, show prejudice in defending the claim, and the unexpired limitation period should have been considered. ¹⁴
<i>Almas Bros. Contracting Ltd. v. Tomax Enterprises Ltd.</i> , 2023 BCSC 68	A formwork and framing contractor filed a builder's lien after leaving a warehouse project during a payment dispute. The defendants alleged abandonment and deficiencies.	About 3 years and 1 month from the action being filed; and about 1 year and 10 months of inactivity in the litigation. ¹⁵	Dismissal refused. The delay was inordinate and inexcusable, but the defendants did not prove serious prejudice. The court also said a lien or CPL is not automatically prejudice for a want-of-prosecution application, and the dispute looked fairly document-driven. ¹⁶
<i>Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.</i> , 2012 BCCA 251	A bridge construction/design dispute involving an oral contract, alleged bridge deck cracking, design issues, insurance issues, and a counterclaim for unpaid contract amounts.	About 2.5 years of inactivity after April 2009, with much older underlying events from 2000. ¹⁷	Dismissal refused. The delay was serious, but the defendant's own counterclaim had also sat idle. The Court accepted that the counterclaim and claim were connected, and that the absence of strong specific prejudice evidence mattered. ¹⁸

¹³ 2009 BCCA 535 at para 9

¹⁴ 2009 BCCA 535 at paras 32–46, 50, 59–63.

¹⁵ 2023 BCSC 68 at para 32.

¹⁶ 2023 BCSC 68 at paras: 32–57.

¹⁷ 2012 BCCA 251 at paras 2 and 7

¹⁸ 2012 BCCA 251 at paras 8–12.