

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter v. Insurance Corporation of British  
Columbia,*  
2025 BCSC 1551

Date: 20250812  
Docket: S175872  
Registry: Vancouver

Between:

**Anna Walter, Sergey Walter and New Future Enterprises Ltd.**  
Plaintiffs

And

**Insurance Corporation of British Columbia**  
Defendant

Before: The Honourable Justice Lawn

## Reasons for Judgment

Counsel for the Plaintiffs: E.J. McNeney, K.C.  
R.B. McNeney

Counsel for the Defendant: T.M. Milne

Place and Dates of Hearing: Vancouver, B.C.  
April 9 and June 13, 2025

Place and Date of Judgment: Vancouver, B.C.  
August 12, 2025

**Introduction**

[1] The defendant ICBC applies to dismiss the plaintiffs’ claim for want of prosecution under R. 22-7(7) of the *Supreme Court Civil Rules*.

[2] When this matter initially came before me, ICBC objected to the late filing of an expert report by the plaintiff, Anna Walter. I granted an adjournment to allow ICBC to review the report and take instructions. The parties then came back before me to argue the application.

**Background**

[3] There were initially three plaintiffs in this matter: Anna Walter, her former spouse, Sergey Walter, and the vehicle leasing company of which they were the sole directors and officers, New Future Enterprises Ltd. (“New Future”).

[4] The defendant ICBC was the insurer of seven vehicles which were destroyed by a fire on residential premises in Wonowon, British Columbia, on July 21, 2016.

[5] Five of these vehicles are the subject of this litigation: the other two were the subject of a companion proceeding involving Anna Walter’s brother Aron Walter: *Walter v. Insurance Corporation of British Columbia*, Vancouver Registry, Action No. S187230 (the “Aron Walter action”).

[6] Four of the five vehicles at issue here were either owned or leased by New Future. Paccar Financial Services (“Paccar”) was the lessor of the fifth vehicle, and New Future the lessee. Paccar was eventually added to this action as a plaintiff.

[7] Anna Walter reported the fire to ICBC on July 21, 2016. On July 27, 2016, ICBC dispatched Robert Eyford to the property. He conducted a fire investigation over the course of one week, completing it on July 31, 2016. It was not until over two years later that ICBC informed Anna Walter that a report was being prepared, although it would seem likely that it had already been completed. Ms. Walter did not see a copy of the report – or even know that it had been completed – until August 16, 2019.

[8] On June 21 2017, not having had a reply to inquiries about the status of the insurance claim, the plaintiffs filed the notice of civil claim. ICBC would not file a response to civil claim until after Sergey Walter was examined under oath. That examination took place on March 19, 2018. ICBC would also not agree to produce a representative for examinations for discovery, on the basis that until they filed a response, ICBC was not a party of record. The response was finally filed on October 16, 2018.

[9] Also in 2018, Sergey Walter stabbed Anna Walter in the abdomen; he was arrested, convicted and incarcerated. In 2019, upon his release, he threatened Anna Walter's life and was re-incarcerated. He was released from prison again in March of 2021, and Anna Walter and her six children went into hiding outside of BC. Sergey Walter has been missing and unheard from since his 2021 release from prison.

[10] In March of 2019, ICBC applied to remove the Walters as plaintiffs and for security for costs. In May 2019, ICBC applied to sever coverage from bad faith and to defer discovery on bad faith until after the coverage decision. ICBC also brought four applications in the Aron Walter action. It was in the context of the affidavit evidence filed by ICBC in these applications that Anna Walter first learned of the existence of the Eyford Report.

[11] The eight applications in the two actions were heard on several dates in 2019, ending in December of that year. A decision was rendered in 2020: *Walter v ICBC*, 2020 BCSC 658 [*Walter 2020*], granting the plaintiffs' application to add Paccar as a plaintiff. ICBC appealed this decision. The appeal was heard and dismissed on June 22, 2021, five years after the fire and four years after the filing of the claim: *Walter v. ICBC*, 2021 BCCA 259 [*Walter BCCA*].

[12] Paccar settled with ICBC in 2022 and is no longer involved in these proceedings. The Aron Walter action involving the other two vehicles settled in 2023.

[13] In March of 2024, when the plaintiffs once again pressed ICBC for discovery dates, ICBC insisted that the plaintiffs file a notice of intention to proceed. The

plaintiffs promptly did so on April 3, 2024. Five months later, on September 9, 2024, ICBC finally agreed to discoveries which were to take place on December 2, 2024.

[14] Then, at ICBC's insistence, Anna Walter provided formal clarification in October 2024 that Sergey Walter could not be found. On November 5, 2024, ICBC set down discoveries of Sergey Walter, informing Anna Walter that it would not produce a representative of its own for discovery until after its want of prosecution application was heard.

[15] This application was originally scheduled for November 2024 and was finally heard on June 13, 2025.

### **Issue**

[16] Should the plaintiffs' claim be dismissed for want of prosecution under R. 22-7(7)?

### **Legal Principles**

[17] The long-standing test for dismissal of an action for want of prosecution was recently revised by a five-member panel of the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. Justice Horsman summarized the revised test as follows:

[69] For clarity, I will summarize the revised framework of analysis that, in my view, should govern applications to dismiss actions for want of prosecution in British Columbia. The first two questions are:

- (1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?
- (2) Is the delay inexcusable?

[70] These two questions are to be answered in accordance with the law that has developed in British Columbia under the existing test. If both questions are answered in the affirmative, the court should move to the third and final question:

- (3) Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[71] The non-exhaustive list of factors set out at paragraph 45 of *International Capital Corporation* provides a useful starting point for assessing the interests of justice. To that non-exhaustive list, I would add one

further factor: the merits of the action. While a judge should not engage in any searching examination of the merits on an application to dismiss for want of prosecution, if the action is bound to fail then the interests of justice favour its dismissal: *Ed Bulley* at para. 62.

[72] Under this framework of analysis, the prejudice to the defendant's ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interests of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[18] The cases decided under the former test continue to be relevant when determining the first two questions in the *Giacomini* test. As per *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288:

[70] As Justice Horsman stated, the law developed under the former test continues to govern the first two questions, namely, whether the delay is inordinate and whether it is inexcusable. In *Wiegert*, this Court summarized that law:

[32] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: *Azeri* at para. 8; *Sahyoun v. Ho*, 2015 BCSC 392 at para. 17. As Justice Saunders explained in *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25, the concept is relative: some cases are naturally susceptible of fast carriage or call for more expeditious prosecution than others. Although there is no universal rule as to when time starts to run, the date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion, and the extent to which it may be excusable is highly fact-dependent: *Ed Bulley Ventures Ltd., v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38; *0690860* at para. 29.

[19] Delay should be considered holistically to determine whether the overall delay is inordinate. Whether the reasons for a delay are excusable depends on the circumstances and may include consideration of whether the delay was intentional and tactical, or whether it was the result of dilatoriness, negligence, impecuniosity, illness or some other relevant cause. Where the delay is due to plaintiffs' counsel's lack of diligence, this may amount to an excuse in some cases but not in others: *Giacomini* at paras. 39, 40.

[20] As for the third element of the test, it is no longer solely focussed on prejudice to the defendant. As Horsman J.A. explained in *Giacomini*, the public interest in the administration of justice goes beyond ensuring that the defendant has a fair trial. Unreasonable delay itself undermines public confidence in the justice system: see *Giacomini* at paras. 52–58.

[21] Under the revised third element of the test, the relevant factors include those which Horsman J.A. referenced from para. 45 of *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 [*International Capital*], as well as the merits of the claim. These factors were recently summarized by our court in *Mao v. Bazuaye*, 2025 BCSC 1188:

- [6] A list of non-exhaustive factors relevant to the third question are:
- a) the prejudice the defendant will suffer defending the case at trial;
  - b) the length of the delay;
  - c) the stage of the litigation;
  - d) the impact of the delay on the defendant’s professional, business, or personal interests;
  - e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed;
  - f) the reasons offered for the delay;
  - g) the role of counsel in causing the delay;
  - h) the public interest in having cases that are of genuine public importance heard on their merits; and
  - i) the merits of the action – this is not a searching examination of the merits, but a consideration of whether the action is bound to fail: *Giacomini* at paras. 66 and 71.

[22] The object of the third part of the test is a nuanced balancing of the competing considerations of the defendant’s interests and the justice system as a whole. The plaintiff’s interest in a trial on the merits remains an important consideration: *Giacomini* at para. 75.

**Analysis**

**Is the delay inordinate?**

[23] The date of commencement of the action is generally the point from which delay is measured, although there are cases where the date used is the close of pleadings. The notice of civil claim in this case was filed on June 21, 2017. The response to civil claim was filed on October 16, 2018.

[24] Cases have considered that a delay of four years may be considered inordinate, at least where nothing occurs: *Krist v. British Columbia*, 2024 BCSC 1925 at para. 23. In this case, it cannot be said that nothing has occurred between the close of pleadings and this application, although there were periods of inaction and periods where the only action was through correspondence. In my view, despite the steps taken during this time, and even if the starting point is taken to be the close of pleadings, this delay is inordinate in the sense of being immoderate and out of proportion to the matter in question.

**Is the delay inexcusable?**

[25] The plaintiffs submit that this delay is excusable such that it is not necessary to address part three of the test. The plaintiffs' position is that this delay is a result of a combination of excusable factors, including the various steps taken in the litigation during the period in question. The plaintiffs submit that these steps were:

- a) Applications by both sides: one application filed by the plaintiffs to add Paccar as a plaintiff, and three applications brought by ICBC for security for costs; removal of the Walters as plaintiffs; and an application to sever and stay the bad faith claim.
- b) ICBC's appeal of the order adding Paccar as a plaintiff.
- c) Plaintiffs' counsel agreeing to several adjournments at the request of ICBC, which the plaintiffs describe as "professional courtesy".
- d) ICBC's delays in agreeing to a date for examinations for discovery.

- e) ICBC's requests for adjournments of the discovery of their representative or the non-appearance of their representative.

[26] In oral argument, the plaintiffs also pointed to *Walter* 2020 at para. 50, wherein the chambers judge held that neither the slow pace nor the lateness of the application before him – at that time about four years after the claim was filed – could be laid solely at one party's feet. See also the reasons of Justice Griffin in *Walter* BCCA at para. 30.

[27] ICBC submits that being unable to locate your client is not an acceptable excuse, citing *Lu v. Chiang*, 2024 BCSC 893 at paras. 10–11. I will return to that point below.

[28] ICBC also submits that the report of Dr. Kang is inadmissible because it relies on factual assumptions not in evidence and does not provide a credible excuse for the delay because it goes no further than potentially providing evidence that Ms. Walter is a battered woman, something I do not understand the defendant to be taking issue with. The defendant also submits that Dr. Kang's conclusion is belied by Ms. Walter's own evidence that she has kept in constant contact with her lawyer and has always intended to go forward with this matter.

[29] I accept the defendant's argument on the relevance and usefulness of Dr. Kang's report, leaving aside its admissibility. I have not taken the report into account.

[30] I accept, however, Anna Walter's evidence of the events leading up to Mr. Walter's incarceration, re-incarceration, and her relocation out of BC in view of her concerns for her own safety and that of her children. In my view, this is part of the context for this delay. Although she was in touch with her counsel, her personal circumstances were such that directing the course of this litigation was challenging. During much of this time, ICBC were pressing for an examination of Sergey Walter. The history of these two plaintiffs including Anna Walter's fear for her life, and Sergey Walter's incarceration and later disappearance, provides an excuse for Anna Walter's failure to move swiftly, particularly in the face of ICBC's demands.

[31] Standing alone, it is not clear that these difficult and unusual circumstances would be sufficient to fully excuse the delay, given that the plaintiffs were in contact with counsel throughout, as per the evidence of Anna Walter. I find, however, that there are other factors which, in combination with Anna Walter's personal circumstances, excuse this delay. In brief:

- a) ICBC's acquiescence in the delay and generally slow approach to this litigation which, while not conclusive, weigh against it on this application. For example:
  - i. It took ICBC 25 months to provide Ms. Walter with an answer as to whether or not her claim had been denied, despite her repeated communications asking for an update, and during which time ICBC was holding an undisclosed fire investigation report.
  - ii. It took ICBC 16 months after the notice of civil claim was filed to file a response to civil claim.
  - iii. It took ICBC six months to provide discovery dates in 2024 including a lag of three months between a reiteration of the plaintiffs' request in June 2024, and ICBC's response in September 2024.
- b) ICBC's decision to appeal the decision to remove the Walters as plaintiffs, which delayed matters by at least a year, and which appeal I observe was dismissed from the bench on the same day that it was heard.
- c) In the period following the dismissal of ICBC's appeal, the steps that were being taken in parallel litigation involving the same fire and the same counsel, which led to a settlement first with Paccar, and then the Aron Walter action.

[32] ICBC cites *Lu* for the proposition that failure to locate one's client is not an excuse for delay. In that case, counsel was unable to locate their client, who was the

sole plaintiff, and there was no material before the court to establish or raise any excuse for the delay. There, the court held:

[11] The plaintiff must take some ownership of the action, even if originally represented by counsel. It is incumbent upon litigants to remain in contact with their counsel and ensure that their interests are being protected, and that there is an ability at all times to be reached if issues arise in respect of the litigation. It is, in my view, not an excuse, and to be clear counsel is not suggesting that it is, that counsel is unable to reach his client. Put another way, a client cannot use as an excuse that he may not be aware of actions being taken in the proceedings when they ignore them or make themselves unreachable. I accept that the delay is, in all respects, inexcusable.

[33] The facts here are distinguishable, as there are multiple plaintiffs. I am not prepared to lay the blame for delay at the feet of the other plaintiffs solely due to the absence of one plaintiff, particularly in circumstances where the absent plaintiff has been incarcerated for a violent crime against another plaintiff.

[34] The judge in *Walter* 2020 at para. 50 found that the delay to that point could not be laid at one party's feet. I find that the pattern of delay largely continued in the following four years. While it is the plaintiffs' responsibility to move a file forward, the chronology highlights that these plaintiffs were often met with resistance and delay from ICBC. Counsel for the plaintiffs was candid in accepting some of the blame for failing to move things forward as quickly as possible. I find that these delays were not tactical and ought not to be visited upon the plaintiffs particularly as, from the plaintiffs' perspective, there were relatively few periods of true inactivity.

[35] In all the circumstances, the delay is excusable and therefore the defendant's application must fail.

### **Interests of Justice**

[36] Although I have found the delay here to be excusable, such that resort to part three of the *Giacomini* test is not necessary, I would have found that it is in the interests of justice for this action to proceed in any event.

[37] While there is no doubt that both parties will suffer some prejudice caused by the delay in this case, in particular due to Sergey Walter's absence and the possible loss of some banking records, this is mitigated by several circumstances.

[38] While there have been no lists of documents prepared, the plaintiffs have provided financial records. The plaintiffs provided the report of a forensic accountant dated May 5, 2017 which relied on banking records of the corporate plaintiff.

[39] I observe that in *Walter* 2020, the court held at para. 52 that ICBC had failed to show any prejudice to its ability to defend itself due to the passage of time: see also *Walters* BCCA at para. 31. Further, as noted above, ICBC conducted an investigation shortly after the fire and has in hand the investigator's report from this investigation.

[40] As to prejudice arising after 2020, ICBC points to Sergey Walter's disappearance. This occurred in 2021 when he was released from prison. ICBC submits that its ability to defend based on wilfully false statements is impaired due to the inability to cross examine Sergey Walter, citing *Luy v. Maple Leaf Projects Limited*, 2019 BCSC 685. I find that *Luy* is distinguishable on its facts because it involved a dispute that would turn on evidence as to discussions between two deceased witnesses and not written records, as there were none. Here, given the nature of the dispute and the existence of extrinsic documentary evidence such as the Eyford report, I am not persuaded that the absence of Sergey's oral evidence reaches the same level of prejudice to ICBC as the deaths of the two key witnesses did to the defendants in *Luy*.

[41] ICBC also had the ability to examine Sergey Walter under oath in March of 2018, something that had not occurred in *Luy*. ICBC emphasizes the difference between this examination and an examination for discovery or the presence of Mr. Walter at trial. I will refrain from ruling on the admissibility of evidence which will be a matter for the trial judge, but I observe that the transcripts of a deceased witness were admitted in *Malik (Admissibility of evidence of the Deceased Mr. Malik)*, 2007 BCSC 934 at para. 42.

[42] ICBC also points to lost banking and cell phone records, and the failure of the plaintiffs to grant authorizations which would have allowed them to preserve these records. The plaintiffs submit that its financial documents have already been disclosed. Accepting for the purpose of this analysis that there may be documents that are no longer available, I find that the degree of prejudice caused by these deficits does not tip the balance, particularly as it potentially impacts both sides. As the plaintiffs point out, ICBC does not take the position that it will be unable to defend the claim.

[43] ICBC argues that the delay here is seven or eight years. The court has already ruled that the delay up to 2020 cannot be laid at the feet of either party and there had been no prejudice shown up to that time: *Walter* 2020 at paras. 50, 52. Four years elapsed between that time and the originally scheduled date for this application. The court found a similar length of delay to be a factor in *Etcheverry v. Bhatti*, 2024 BCSC 1222 at para. 18. It was not, however, an overwhelming factor in that case and the same can be said here.

[44] Despite the passage of time, this litigation is still at an early phase. Some of the blame for this can be laid at the feet of ICBC, as set out above. The context in which the delay occurred is relevant to the determination of whether it is in the interests of justice for the action to proceed: *Giacomini* at para. 66, citing *International Capital* at para. 45. This requires considering whether the inexcusable delay took place in the face of pressure from the defendant to get on with things. As well, if it can be shown that a defendant was content to let a file sit in abeyance, that would weigh in favor of letting a claim proceed: *International Capital* at para. 45(e).

[45] I view the conduct of ICBC to be relevant in evaluating whether it is in the interests of justice that this matter proceed despite the delay.

[46] As noted above, ICBC took several opportunities to draw this litigation out. ICBC submits that the law prior to *Giacomini* was clear that a “defendant has no obligation to advance the action”. While post-*Giacomini*, defendants may choose to take a more active role in moving litigation forward, ICBC argues that “defendants

should not be penalized for not doing [so] when acting pursuant to a body of law that developed pre-*Giacomini*".

[47] In *Giacomini* itself, however, the Court of Appeal found the defendants at fault for making no effort to press the plaintiff to commit to timelines for steps in the litigation: see para. 83.

[48] Furthermore, in this case it is relevant that this defendant was not just passively standing by. ICBC had at least some part to play in the delays that occurred. To fault the plaintiffs now for the time which elapsed, for example, in the two years it waited for a coverage decision; or the six months and multiple requests it took to get discovery dates last year, is harsh. In my view, ICBC has had too much of a hand in these delays to now point to the time that has passed as a basis on which the claim against it ought to be dismissed.

[49] That said, however, there is an element of this delay that can be laid at the feet of plaintiffs' counsel. As the court recognized in *Giacomini* at para. 66, counsel's role in any delay is a relevant factor in considering the interests of justice, as per *International Capital* at para 45(g). It is also relevant to the issue of excuse under part two of the test, as referenced above. This factor should not be given undue weight, however. As the court in *International Capital* stated at para. 45(g):

... Care must be taken to ensure that plaintiffs' lawyers are not allowed to defeat applications to strike for want of prosecution by the simple expedient of assuming the blame for not moving the file forward.

[50] The final factor left to be determined is the merits of the claim. I find that the plaintiffs' claim is not bound to fail, and that therefore this factor ought not to weigh against allowing the matter to be heard.

[51] Having balanced the relevant considerations, and had it been necessary to consider the third part of the *Giacomini* test, I would have found that it was in the interests of justice in all the circumstances for this matter to proceed to be heard on its merits.

**Conclusion**

[52] For the reasons set out above, the defendant's application is dismissed.

[53] As I warned counsel at the close of submissions, this matter can no longer proceed at this leisurely pace. Rather than impose arbitrary timelines, I direct the plaintiffs to schedule a case planning conference within seven days of the date of the pronouncement of these reasons, to be held on a mutually agreeable date no later than October 17, 2025.

"Lawn J."