

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Securities Commission v.  
Penko*,  
2025 BCSC 2278

Date: 20251119  
Docket: S2012909  
Registry: Vancouver

Between:

**British Columbia Securities Commission**

Petitioner

And

**Frank Penko**

Respondent

Before: Associate Judge Bilawich

## **Reasons for Judgment**

Counsel for the Petitioner:

A. Paczkowski

Counsel for the Respondent:

B. Lewis-Hand

Place and Date of Hearing:

Vancouver, B.C.  
September 16 &  
October 1, 2025

Place and Date of Judgment:

Vancouver, B.C.  
November 19, 2025

**Introduction**

[1] The respondent (“Mr. Penko”) applies to dismiss this proceeding for want of prosecution.

[2] The petitioner (the “Commission”) opposes the relief sought.

**Background**

[3] Mr. Penko is married to Renee Penko (“Renee”). I will refer to her by her given name in an effort to minimize confusion. I intend no disrespect by doing so.

[4] In 2014, the Commission commenced proceedings against Renee and others, alleging they had traded in securities without being registered and without having filed a prospectus, contrary to ss. 34 and 61 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the “*Act*”). She was involved in a Ponzi scheme.

[5] On January 14, 2016, Renee was found liable for contraventions involving illegal distributions to 22 investors and 31 investments with a value of \$1,171,003: see *Williams (Re)*, 2016 BCSECCOM 18. On August 17, 2016, the Commission issued a sanctions decision, *Re Williams*, 2016 BCSECCOM 283, in which Renee was ordered to pay the Commission (the “Sanctions Order”) the following:

- a) \$155,000, representing disgorgement of commissions she had received as a result of her contraventions, under s. 161(1)(g) of the *Act*; and
- b) \$40,000, representing an administrative penalty, under s. 162 of the *Act*.

[6] Any money which the Commission collects under s. 161(1)(g) is made available to investors who suffered pecuniary loss in the scheme, under ss. 15 and 15.1 of the *Act*.

[7] On September 22, 2016, the Commission registered the Sanctions Order with this Court for enforcement purposes, under Vancouver Action No. L160324. Various collections efforts were pursued against Renee, but with only nominal success.

[8] On May 22, 2019, Renee assigned herself into bankruptcy. This resulted in an automatic stay of the Commission’s execution proceedings against her. It filed a

Notice of Opposition to Discharge, citing ss. 173 (a), (b), (d), (e), (h), (k), (l) and (o) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”). I will refer to Renee’s bankruptcy as the “Bankruptcy Proceeding”.

[9] In March 2020, the *Act* was amended to allow the Commission to pursue claims against a family member of a person against whom an order under s. 161(1)(g) of the *Act* has been made who receives property from that person at less than fair market value. This is referred to as an “undervalue benefit”. The Commission was now able to seek an order that the family member is jointly and severally liable to the Commission for the amount of the undervalue benefit. See s. 164.09 of the *Act*.

[10] Section 164.10 of the *Act* provides that the Commission can apply for an order that property transferred by a person against whom an order under s. 161(1)(g) of the *Act* has been made to a family member (referred to as “claimable property”) is forfeit to the Commission.

[11] Section 164.13(1) provides that if a court determines that the forfeiture of property or the whole or a portion of the interest in property is clearly not in the interests of justice, it may do any of the following:

- a) refuse to issue a forfeiture order,
- b) limit the application of the forfeiture order, or
- c) put conditions on the forfeiture order.

Subsection (2) provides that, in the case of claimable property, in addition to the grounds under (1), the court may grant relief from forfeiture in certain circumstances.

[12] On December 4, 2020, the Commission started the present proceeding against Mr. Penko by filing a petition to the court and an affidavit sworn by a Senior Enforcement Officer. The relief sought includes:

1. An order ... that Frank Penko is jointly and severally liable to pay to the ... [Commission] the amount ordered to be paid by his wife, [Renee], under section 161(1)(g) of the *Securities Act*, to the extent of the undervalue benefit received by Frank Penko from [Renee];

2. An order ... forfeiting to the Commission \$95,000 in cash transferred by [Renee] to Frank Penko in or around June 2016, or the proceeds thereof

[13] Under Part 2: Factual Basis, the Commission alleges that:

10. On February 15, 2019, the Commission and [Renee] appeared at a subpoena to debtor hearing set by the Commission in Action No. L-160324 (the "**Hearing**").

11. During the Hearing, [Renee] stated the following:

- a. [Renee's] husband is the respondent Frank Penko;
- b. [Renee] was granted administration of the estate of her father, Frederick A. Smith, deceased, which included a bank account held at Royal Bank of Canada at 19888 Willowbrook Drive, Langley, British Columbia for "Frederick A Smith Estate c.o. Renee Penko" (the "**Estate Account**");
- c. [Renee] received proceeds from the estate of Frederick A. Smith of approximately \$128,000;
- d. On or about June 1, 2016, [Renee] transferred \$20,000 from the Estate Account the respondent Frank Penko in order to support his hobby of rebuilding vehicles; and
- e. On or about June 9, 2016, [Renee] transferred an additional \$75,000 from the Estate Account to the respondent Frank Penko's personal bank account.

[14] Under Part 3: Legal Basis, the Commission states:

20. The evidence establishes that [Renee] transferred a total of \$95,000 in cash to her husband, the respondent Frank Penko, in June 2016, for no consideration. At the time of the transfers, [Renee] had been found liable to the Commission for breaches of sections 34 and 61 of the *Act*, though the Decision ordering sanctions had not yet been issued.

21. In the circumstances, the court must order that Frank Penko be jointly and severally liable to the Commission, to the extent of the undervalue received from [Renee].

22. The court must also order that the \$95,000 transferred to the respondent Frank Penko by [Renee] in 2016, or its proceeds, is forfeit to the Commission.

[15] On December 29, 2020, Mr. Penko was personally served with the petition and supporting affidavit. On January 8, 2021, Mr. Penko's counsel contacted Commission counsel to discuss potential settlement of the issues raised in the petition. On January 19, 2021, Mr. Penko's counsel requested confirmation that the Commission would not set the petition for hearing while settlement discussions were

ongoing. On January 25, 2021, Commission counsel confirmed they would not set the petition for hearing without further reasonable notice to Mr. Penko.

[16] In February 2021, the parties exchanged settlement proposals. On May 4, 2021, Commission counsel advised that they wished to move forward with the petition and asked whether Mr. Penko's counsel was retained to defend it. She had previously indicated she was on a limited retainer to discuss possible settlement. Commission counsel sent follow ups on May 18 and June 3, 2021.

[17] On June 4, 2021, Mr. Penko's counsel presented a new settlement proposal. On June 15, 2021, the Commission sent a counteroffer. A follow up was sent on August 9, 2021.

[18] On September 9, 2021, Commission counsel advised they would be setting the petition for hearing and asked that Mr. Penko file and serve his response to petition and any affidavit material by September 27, 2021.

[19] On September 24, 2021, Mr. Penko agreed to submit to being examined by the Commission. Essentially, the parties had been negotiating the terms of a possible settlement and the Commission wished to examine Mr. Penko about his financial means before deciding whether the terms being discussed were reasonable. I appreciate that the settlement discussions were without prejudice, but counsel were content to share this insight into the status of the parties' negotiations at the time.

[20] On January 24, 2022, Commission counsel examined Mr. Penko. He admitted he had received the \$95,000 from Renee which is the focus of the Commission's petition. He answered questions about how those funds had been used and what became of certain investments and assets he had purchased with them. He also answered questions about his financial means generally. The Commission requested that he produce certain financial records.

[21] On January 31, 2022, Mr. Penko's counsel forwarded various documents which the Commission had requested at the examination. In her cover letter, his

counsel disclosed that there had been a fire at the home Mr. Penko and Renee were renting, which had destroyed most of their personal belongings. In November 2021, they had received insurance proceeds of \$24,397.01 for this loss. His counsel indicated that this sum was not sufficient to replace what had been lost.

[22] In September 2022, in the Bankruptcy Proceeding, Renee filed an application for a discharge from bankruptcy. The Commission notes that she had failed to disclose to her Trustee or in the affidavit material she tendered in support of her application that she and Mr. Penko had received the above-noted insurance proceeds.

[23] On October 18, 2022, in the Bankruptcy Proceeding, I presided over Renee's application for discharge. On December 6, 2022, I issued reasons, indexed as *Penko (Re)*, 2022 BCSC 2128. I dismissed her application, with liberty to re-apply after two years.

[24] On March 9, 2023, the Commission and Mr. Penko had further settlement discussions. The Commission suggested these discussions included issues arising in both this proceeding and Renee's Bankruptcy Proceeding. There were further without prejudice exchanges on May 29, 2023 and October 11, 2024.

[25] On November 27, 2024, in the Bankruptcy Proceeding, Renee filed a second application for a discharge. The Commission is opposing her application. The hearing began on January 3, 2025. Coincidentally, the application also came before me. The hearing did not complete and was adjourned to allow Renee an opportunity to tender additional affidavit material regarding her financial circumstances.

[26] On March 17, 2025, Renee filed additional affidavit material in which she disclosed that:

- a) In November 2021, she and Mr. Penko had received the fire insurance proceeds;

- b) Between February and May 2024, expenses of about \$27,000 had been incurred for boat repairs and a payment made to Mr. Penko's business partner; and
- c) In May 2024, the boat was sold for \$39,500.

[27] The Commission notes that when Mr. Penko was examined in January 2022, he was asked whether he owned a boat and answered no.

[28] On April 1, 2025, in the Bankruptcy Proceeding, Commission counsel wrote to Mr. Penko's counsel objecting to the disclosure in Renee's affidavit of certain communications which were subject to settlement privileged in the present proceeding. They demanded that her affidavit be redacted and re-filed. On May 5, 2025, Renee filed a redacted affidavit.

[29] On June 9, 2025, Mr. Penko filed his application to dismiss this proceeding for want of prosecution. On June 19, 2025, the Commission filed its application response.

[30] On June 27, 2025, the Commission filed a Notice of Hearing, unilaterally setting the hearing of its petition for August 20, 2025. On August 15, 2025, it filed a requisition adjourning the hearing generally.

[31] In the Bankruptcy Proceeding, the hearing of Renee's second application for a discharge was scheduled to continue on July 23, 2025, but was adjourned to allow the Commission to examine her, under s. 163(2) of the *BIA*.

### **Applicable Law**

[32] Mr. Penko's application is made pursuant to Rule 22-7(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*SCCR*"):

- (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[33] The test for dismissal for want of prosecution was modified in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*] at paras. 69-72:

**The revised test**

[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.

[34] The court said it is not helpful to characterize dismissal for want of prosecution as "Draconian": see *Giacomini* at para. 74:

[74] First, in my view, it is not helpful to characterize the remedy of dismissal for want of prosecution as "Draconian", to the extent this label implies the remedy is excessively harsh or punitive. It must be remembered that a plaintiff faces the risk of dismissal of an action only once they are guilty of inordinate and inexcusable delay. Undue litigation delay undermines public confidence in the justice system, and should not be countenanced. Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it. If, having regard to the circumstances, it is not in the interests of justice to allow an action characterized by such delay to continue, then the remedy of dismissal is not excessively harsh or punitive. Rather, it is justified.

## Analysis

[35] I turn now consider the factors identified in *Giacomini*.

### 1. Is the Commission's delay in prosecuting the action inordinate?

[36] Inordinate delay is summarized in *Giacomini* at paras. 38-39:

#### **Inordinate delay**

[38] An inordinate delay is one that is uncontrolled, immoderate, excessive and out of proportion to the matters in question: *Wiegert v. Rogers*, 2019 BCCA 334 at para. 32. The question of whether delay is inordinate is “not just a question of temporal arithmetic”, but rather requires consideration of the circumstances of the case: *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25. As explained by Saunders J.A. in *Sun Wave*, “some cases by their nature are susceptible of faster carriage or by the nature of the allegations call for more expeditious prosecution than others”: at para. 25. For example, a court may be less forgiving in assessing litigation delay where the allegations impact the defendant's personal reputation, such as where fraud is alleged: *Sun Wave* at para. 25.

[39] The date of the commencement of the action is typically identified as the point from which delay is measured: *Wiegert* at para. 32. Delay must be considered holistically; the question is whether the overall delay is inordinate: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38.

[37] When evaluating delay, it is not only formal steps in the proceeding which are to be considered, but also informal steps: See *British Columbia Securities Commission v. Pasquill*, 2023 BCSC 2150 [*Pasquill*] at para. 136:

[136] Further, the Commission sent and received regular communications about this and related Pasquill matters throughout the period. In assessing a want of prosecution application, a court is to consider not only formal steps in the proceeding, such as discoveries, but also informal steps such as correspondence between counsel. As stated by Justice Giaschi in *Mackenzie Delta*:

[44] The suggestion that a court should be limited to considering only formal steps in a proceeding is also completely inconsistent with the whole thrust and purpose of the test that has been established for such applications. The ultimate objective of the test is to do justice between the parties. That requires a consideration of all the circumstances and not just formal steps.

[38] The Commission filed its petition on December 4, 2020. Immediately after service, the parties agreed to focus on settlement discussions. The Commission

agreed it would not set the petition for hearing without reasonable notice to Mr. Penko.

[39] The next arguable formal step taken was when Mr. Penko was examined on January 24, 2022. The examination served a dual purpose. The Commission was able to question him about the transfers which are the focus of this proceeding and what became of those funds. It was also able to question him about his financial means and ability to pay generally, to assist the Commission in assessing its position for purposes of settlement discussions. One week later, Mr. Penko provided documents which the Commission had requested at the examination. No further formal steps were taken until June 9, 2025, when Mr. Penko filed his application to dismiss.

[40] Mr. Penko argues the Commission has failed to prosecute its claim against him for roughly 4-1/2 years and that this qualifies as inordinate delay. He also notes that since this is a petition proceeding, it is supposed to be resolved using summary processes.

[41] The Commission argues that any delay which has occurred has not been immoderate, uncontrolled, excessive or out of proportion. Mr. Penko asked the Commission to refrain from advancing the proceeding while the parties engaged in settlement discussions. It says those discussions continued until at least October 2024. It also argues that this is an “ancillary execution proceeding” which is interrelated with the enforcement proceedings it has been pursuing against Renee. I will address the Commission’s arguments on these two points in the next section, when considering whether the delay is excusable.

[42] When one measures delay from the date the petition was filed, this proceeding has been pending for 4-1/2 years. The Commission filed the evidence it initially intended to rely upon with the petition. After examining Mr. Penko in January 2022, it had secured admissions confirming his receipt of the \$95,000 from Renee which is alleged to be an undervalue benefit. At this point it appears it was in a strong position to proceed with the hearing of its petition on the merits. The only

issue which remains unclear is whether Mr. Penko intends to request relief from forfeiture of property under s. 164.13(1) or (2) of the *Act*. Frankly, it is not clear from the relief sought in the Commission's petition what specific property it may be seeking to have forfeited. It appears from the examination that the original \$95,000 which Renee transferred to Mr. Penko was spent, so it may be problematic to trace it through to specific property currently in his possession. In any event, Mr. Penko's position will not be known until and unless he files a response to petition.

Technically, the petition is currently unopposed.

[43] The Commission argues that Mr. Penko's failure to deliver a response to the petition is an invitation to delay, referring to *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 at para. 21. When assessing whether there has been inordinate delay, the Court can consider that where a response remains unfiled, it is the respondent's turn to move: See *Hanna's Construction v. Blue River*, 2006 BCCA 142 at paras. 26-27.

[44] In the present case, after Mr. Penko was served with the petition, his counsel wrote to Commission counsel as follows:

... We trust that while settlement discussions are ongoing you will not set the petition down for hearing without providing advance notice to the writer.

[45] Commission counsel replied:

... I confirm I will not set down the Petition without further reasonable notice to you.

[46] Both parties intended that prosecution of the petition be placed on hold to allow possible settlement to be explored. Both sides indicated that it was the Commission which was to notify Mr. Penko when it decided to set the petition for hearing. The proverbial ball was in the Commission's court, once it became apparent that settlement discussions had ceased to be productive.

[47] Considered holistically, I conclude that the Commission's delay in prosecuting this proceeding has been inordinate. From a procedural and evidentiary perspective,

there is no clear reason why this matter could not have proceeded to a hearing on its merits anytime after March 2022.

## 2. Is the delay inexcusable?

[48] The considerations when assessing whether delay is excusable are set out in *Giacomini* at para. 40:

### Delay is inexcusable

[40] Whether the reason offered by the plaintiff for the delay amounts to an excuse also depends on the circumstances. As a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable: *Irving* at para. 8. The evidence led to explain delay may go to the issue of whether the delay was intentional and tactical, or whether it was the result of “dilatoriness, negligence, impecuniosity, illness or some other relevant cause”: *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27. A party who intentionally delays the prosecution of an action may be said to assume the risk of dismissal. Where the delay is also tactical, in the sense of intended to prejudice the defendant, this will weigh more heavily against the plaintiff in the analysis: *Ralph’s Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120 at para. 47. Where the reason for the delay is a lack of diligence on the part of plaintiff’s counsel, this might amount to a reasonable excuse in some cases, but in others it might not: *0690860 Manitoba Ltd.* at para. 29; *Wiegert* at para. 33.

[49] Settlement discussions may constitute an excuse for delay, depending on the circumstances: see *Laurier Charters Ltd. v. Eggleton*, 2020 BCSC 262 at para. 40:

[40] Legitimate settlement discussions may constitute an excuse for delay in British Columbia, depending on the circumstances. This is in keeping with the general policy of the courts to promote settlement. However, given the object of the *Rules*, courts must also guard against inordinate and inexcusable delay that prejudices defendants to civil actions. As Master Elwood stated in *Parkerdean Plumbing and Mechanical Inc. v. Best Builders Ltd.*, 2019 BCSC 1969, at para. 20:

...While efforts at reaching a negotiated resolution are to be encouraged, they are not a substitute for prosecuting a claim in the absence of productive engagement between the parties.

[50] The parties did engage in intensive settlement discussions in 2021. These appear to have culminated in January 2022, when Mr. Penko was examined and produced documents to the Commission. At that point the discussions appear to

have reached an impasse. The Commission's focus shifted to opposing Ms. Penko's first application for discharge in the Bankruptcy Proceeding.

[51] There were additional "without prejudice" exchanges on March 9, 2023, May 29, 2023 and October 11, 2024. These appear to have been relatively isolated and less productive than those which occurred during 2021.

[52] The Commission also argues that this proceeding is an "ancillary execution proceeding" and is interrelated with the enforcement proceedings it has been pursuing against Renee. Her and Mr. Penko's financial circumstances are intermingled and interdependent. The pace at which it has been prosecuting this proceeding must be considered in the broader context of the enforcement efforts it is pursuing against Renee. On this point, it relies on *Pasquill* at paras. 133-145.

[53] In that case, there was a 4-1/2 year gap from when the subject action was started and when the application to dismiss was made. It remained at the pleadings stage. The Court noted that the subject action was merely an ancillary execution proceeding and that consideration had to be given to steps which were being taken in several related proceedings. The reasons set out in detail the many steps which had been taken in several related proceedings during the "gap" period. At para. 133:

[133] This ostensible gap must also be viewed, again, in the context that the present proceeding is merely an ancillary execution proceeding against the Vicker Defendants, and one of many heavily-fought and time-consuming proceedings between the Commission and the Pasquill parties, which proceedings continued through the gap.

[54] I agree the present proceeding is interrelated to the execution proceedings the Commission has been pursuing against Renee. The claim against Mr. Penko is based on Renee having been ordered to pay the Commission \$155,000 under s. 161(1)(g) of the *Act*, and on Mr. Penko allegedly having received an "undervalue benefit" in the form of the \$95,000 she transferred to him in June 2016.

[55] The Commission's efforts to collect from Renee through the enforcement action (L160324) in this Court did not meet with significant success. After Renee assigned herself into bankruptcy on May 22, 2019, the Bankruptcy Proceeding was

the only active proceeding against her. The only recent activity in it has been her two applications seeking a discharge from bankruptcy.

[56] Whether Renee is ultimately granted a discharge or not, there is no evidence suggesting this would impact the Commission's ability to prosecute its claim against Mr. Penko. It is true that Renee made several new disclosures in her most recent affidavit regarding receipt of fire insurance proceeds and ownership, repair and sale of the boat. Those disclosures do not appear to be directly relevant to the merits of the Commission's claim against Mr. Penko. At best, they may be relevant to his ability to pay a judgment which may be made against him.

[57] The Commission's ability to proceed with the hearing of its petition does not appear to be dependant upon anything that is or has been pending in the Bankruptcy Proceeding. As noted, it has secured admissions regarding the impugned transfers from both Renee and Mr. Penko. At this point Mr. Penko has not filed a response to petition, so it is not clear whether he intends to defend the claim, and if so, on what basis. He did not address this issue in his application materials.

[58] In my view, the settlement discussion-based delay which occurred between December 2020 and March 2022 was excusable. Following the examination of Mr. Penko, it appears the parties had reached an impasse. At that point, it was incumbent on the Commission to either resume meaningful settlement discussions or resume its prosecution of this proceeding. The isolated without prejudice exchanges which occurred in 2023 and 2024 did not justify further delay.

[59] I do not agree that the post March 2022 delay which was based on the Commission's decision to focus its attention on Renee's applications for discharge was excusable. There were no apparent implications that her applications could reasonably be expected to have on the Commission's ability to prosecute its claim against Mr. Penko.

[60] The inexcusable delay in this case is accordingly from April 2022 to June 2025, which is roughly 3 years + 3 months.

**3. Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?**

[61] For the purposes of assessing interests of justice, the court in *Giacomini* approved the non-exhaustive list of factors set out in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 [ICC] at para. 45, and it added one additional factor. These are summarized as follows:

- (a) prejudice the defendant will suffer in mounting its case if the matter goes to trial;
- (b) the length of the excusable delay;
- (c) stage of the litigation;
- (d) impact of the inexcusable delay on the defendant;
- (e) the context in which the delay occurred;
- (f) the reason offered for the delay;
- (g) the role of counsel in causing the delay;
- (h) the public interest; and
- (i) the merits of the action.

**a) Prejudice the respondent will suffer in mounting their case if the matter goes to trial**

[62] This factor is discussed in ICC at para. 45 (a):

... Relevant matters here would include failing memories on the part of witnesses, the disappearance or death of witnesses over the course of time and the loss or destruction of physical evidence. It will be to a defendant's advantage to file affidavit material detailing the anticipated prejudice. However, a court can infer that the passage of time will typically have at least some effect on the memories of witnesses. The more serious the prejudice a defendant will face at trial, the more likely it is that the interests of justice will tip in favour of striking the claim in question.

[63] Mr. Penko did not argue, nor did he tender evidence indicating he has suffered prejudice to his ability to defend the Commission's claim against him. While it is clear that the impugned transfers took place a considerable time ago (2016), both he and Renee have admitted that the transfers totalling \$95,000 did occur. As noted, Mr. Penko did not address what if any defence he intends to raise in the event prosecution of the petition does proceed.

**a) Length of the inexcusable delay**

[64] The inexcusable delay is 3 years + 3 months.

**b) Stage of the litigation**

[65] In *ICC* at para. 45(c):

... In general terms, a court should be less inclined to strike an action which is well advanced than one which is in its early stages. The interests of justice will normally weigh in favour of getting a case to trial if it has somehow stalled just short of that mark. On the other hand, by way of illustration, an action which has never progressed beyond the pleadings stage, and in which the parties have invested little time or resources, might be easier to strike.

[66] This is a petition proceeding, which means that normally it can be expected to proceed in a relatively summary manner. The Commission filed and served the petition and supporting affidavit at the outset of the process. Normally, if Mr. Penko wished to defend the claim against him, he has to file a response to petition and any supporting affidavit material. He has not done so, nor has he indicated whether he intends to defend the claim on its merits, and on what basis.

[67] Petition proceedings are not always resolved in a strictly summary manner. If triable issues are raised, the Court might refer the matter to trial or allow the use of hybrid procedures within the petition proceedings. The latter approach might include, for example, allowing discovery of documents or cross-examination on affidavits: see *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160. In this case, Mr. Penko voluntarily submitted to being examined, so the Commission also has evidence from him which it can read in as part of its case. The Commission appears to have the evidentiary portion of its case ready for a hearing of the petition on its merits.

[68] Neither party has yet suggested there is a triable issue or that other hybrid processes might be of appropriate. This may change if Mr. Penko decides to file a response and supporting affidavit material.

**c) Impact of the inexcusable delay on the respondent**

[69] In *ICC* at para. 45(d), the Court indicated this refers to something other than just litigation prejudice, in terms of the ability to present one's case at trial. It refers to the impact on the livelihood and reputation of the respondent. In *ICC* at para. 45(d):

(d) The impact of the inexcusable delay on the defendant – The court should be sensitive to the impact of claims which put in question the professional, business or personal reputation of the defendant, which put the livelihood of the defendant at risk or which involve significant or ongoing negative publicity for the defendant. In circumstances of those sorts, the court should be alert to the damage that can be caused by a plaintiff's failure to proceed with reasonable dispatch and, at least in general terms, should be less inclined to tolerate inexcusable delay.

[70] Mr. Penko tendered evidence regarding his physical and mental health and the impact these matters have had on him and his relationships with Renee. This was supported by a medical report of his general practitioner, Dr. Fasihy, dated December 20, 2024. Mr. Penko's evidence includes:

- a) In 2021, he suffered injuries to his lumbar spine, ribs and knees and was not able to work for a period thereafter;
- b) Dr. Fasihy states that:
  - i. Mr. Penko's overall health has declined over the last few years and he has become more frail, weak, stiff, depressed and anxious as a result of his medical conditions and the mental distress arising from this proceeding;
  - ii. His ability to do physical work has declined, his cognitive skills and mental abilities have declined, and constant worry and anxiety from the ongoing lawsuit has affected his health significantly. Typically, people with his physical and mental limitations are unemployable;
  - iii. His emotional and mental state is fragile, he has a tremendous amount of anxiety, mood disturbance and sleep problems. His use of cannabis has increased due to constant anxiety and depression. He has a constant sense of impending doom;

- iv. His mental health has deteriorated, in part, due to this proceeding. He feels a sense of hopelessness about his future and that has strained his marriage;
- v. His ability to continue working full time and support his family will be limited in the near future; he may not be able to continue working longer than a year or less;
- c) He has been the sole source of consistent income for his family for the past decade. He has no choice but to continue to work;
- d) His anxiety has affected his personality. He has developed outbursts of anger that are directed at Renee. That led to a physical altercation between them which was reported to police and led to them separating;
- e) The stress of this proceeding has affected his ability to do his job as a transportation operator and to provide related services for the BC film industry; and
- f) He has difficulty performing even routine tasks and has had to turn away work because of his physical limitations. He has significant difficulty with a variety of physical movements.

[71] The Commission argues that Dr. Fasihy’s report is primarily based on narration of self-reporting by Mr. Penko. It is not based on recent examination or objective testing by the author. On page 2 of the report, he states:

This report is based on the following assumptions: Frank Penko is suffering from symptoms that he has explained and he has sustained the past injuries he has described.

This report is based on interviewing and examining him (last visit was in 2022), as well as reviewing his records.

[72] I agree Dr. Fasihy’s qualification above is problematic and detracts from the weight and reliability of his opinion. I do not doubt that Mr. Penko has experienced significant stress by virtue of this proceeding and the issues Renee has been navigating. I note that when he was examined by Commission counsel, Mr. Penko

also mentioned that he had lost substantial amounts gambling, amongst other issues.

**d) Context in which the delay occurred**

[73] In ICC at para. 45(e):

... Defendants are generally understood to have no positive obligation to move litigation forward. Nonetheless, a court entertaining an application to strike for want of prosecution should note whether the inexcusable delay took place in the face of pressure from the defendant to move the file ahead. Delay in the shadow of repeated requests from a defendant to get on with things is generally more serious than delay where the defendant has not pressed the plaintiff. Similarly, if the plaintiff delays unjustifiably in the wake of a failed motion to strike for want of prosecution, such delay would typically be more serious than if the application to strike had not been made. On the other hand, if it can be shown that, for his or her own reasons, a defendant was content to let a file sit in abeyance, that would weigh in favour of letting a claim proceed.

[74] There is no evidence suggesting that Mr. Penko pressed the Commission to move ahead with the petition. He had no obligation to do so. The Commission bore the onus to move the petition forward.

**e) Reasons offered for the delay**

[75] In ICC at para. 45(f):

... In considering the justice of allowing a claim to move forward to trial, a court should revisit the reasons offered by the plaintiff for the delay. Not all explanations for delay which fall short of establishing an "excuse" will be the same. For example, a claim which is launched and then allowed to sit entirely dormant for years for no reason is not the same thing as a suit where a plaintiff makes progress but takes too long to make it.

[76] I addressed above the Commission's reasons for the delay.

**f) Role of counsel in causing delay**

[77] There is no suggestion that Commission counsel was responsible for any portion of the relevant delay. This is not a factor.

**g) Public Interest**

[78] In ICC at para. 45(h):

There may be a narrow category of actions in relation to which a court should think especially carefully before granting an order to strike for want of prosecution. It is not possible to describe this class of matters with great particularity but, in broad terms, it could be expected to include cases of genuine public importance. Normally, they will have implications and significance reaching beyond the specific interests of the litigants themselves. This is not to say that a different set of rules applies to such cases. It is merely an acknowledgment that, in some limited circumstances, the larger public interest can properly be put on the scales when balancing the pros and cons of striking a claim.

[79] Mr. Penko says that the March 2020 amendments to the *Act* gave the Commission extraordinary powers to pursue persons who are not parties to the original securities proceeding. He argues that it is in the public interest that the Commission be expected to prosecute claims based on these powers in a timely manner. The sentiment that claims ought to be prosecuted diligently applies equally well to most other categories of civil litigation.

[80] The Commission argues that it is in the public interest that the petition be allowed to proceed. The disgorgement order represents the amount Renee obtained, or the loss she avoided, from her contravention of the *Act*. Money collected in payment of this sum is made available to investors who suffered a pecuniary loss in the scheme, under ss. 15 and 15.1 of the *Act*. I agree there is a significant public interest component to this litigation.

#### **h) Merits of the Action**

[81] Based on the evidence the Commission tendered in support of its petition, as supplemented by the transcript of its examination of Mr. Penko, the Commission appears to have an arguable claim. It is not clear what if any defences Mr. Penko intends to raise should the petition proceed to a hearing on the merits.

#### **Conclusion - Interests of Justice**

[82] Considering all of the foregoing factors, I conclude that it is in the interests of justice that Mr. Penko's application be dismissed.

**Costs**

[83] In view of the Commission's inordinate delay, it is appropriate that the parties each bear their own costs of this application.

"Associate Judge Bilawich"