IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wenn v. Leibovitz,*
2026 BCSC 47

Date: 20260114
Docket: S124786
Registry: Vancouver

Between:

Kerry Wenn

Claimant

And

Yair S. Leibovitz

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

The Claimant, appearing in person:	K. Wenn
The Respondent, appearing in person:	Y.S. Leibovitz
Place and Date of Hearing:	Vancouver, B.C. April 11, 2025
Place and Date of Judgment:	Vancouver, B.C. January 14, 2026

Table of Contents

I. Introduction

[1] This is a notice of application (“Dismissal Application”) by Yair S. Leibovitz seeking dismissal of a notice of appointment to review of a legal bill (“Notice of Review”) before the Supreme Court Registrar. The Dismissal Application is based on a want of prosecution.

[2] The Notice of Review was filed by the claimant, Kerry Wenn, with respect to the legal bill of the respondent, Mr. Leibovitz, for his representation of Mr. Wenn in the appeal of a Provincial Court trial decision.

[3] At various times, Kerry Wenn has been assisted in relation to these matters by his brother, Trygve Wenn, and his nephew, Brandon Wenn. No disrespect is implied. Brandon was given leave to assist Mr. Wenn at the hearing before me. For purposes of these Reasons for Judgment, I will refer to Kerry Wenn as “Mr. Wenn”, and to Trygve and Brandon by their first names. This is solely for clarity and brevity.

II. Background Facts

[4] While the parties disagree as to whether certain conduct and communications were warranted or reasonable, there is little dispute as to the concrete facts in terms of communications and dates. Except as indicated otherwise, the background facts set out below are undisputed.

The Appeal Engagement

[5] In December 2011, Mr. Wenn retained Mr. Leibovitz to appeal a Provincial Court trial decision. The trial decision was in a family proceeding between Mr. Wenn and his ex-spouse, and was primarily focussed on parenting time issues. Mr. Leibovitz had not represented Mr. Wenn before the Provincial Court.

[6] In January 2012, Mr. Leibovitz provided a letter confirming his earlier advice that the appeal would cost upwards of $30,000 in fees (plus taxes and disbursements).

[7] The appeal was prepared for and set for a two-day hearing. It was initially set for hearing commencing on February 22, 2012, but there was no judge available. The appeal was reset to for hearing on April 3 and 4, 2012. Mr. Leibovitz engaged in additional preparation for the April dates.

[8] The appeal was heard over April 3 and 4, 2012, and dismissed by Justice Myers on April 4, 2012.

[9] The total billed by Mr. Leibovitz (including taxes and disbursements) under four statements of account was $38,701.78. Mr. Leibovitz issued his last statement of account (for $10,539.12) on April 11, 2012. Mr. Leibovitz returned the client file to Mr. Wenn not long after the appeal decision.

July 2012 Notice of Review

[10] On July 6, 2012, Mr. Wenn filed his Notice of Review setting a two-hour hearing on August 21, 2012. In the Notice of Review, Mr. Wenn provided a street address and a telephone number.

[11] Mr. Wenn did not consult Mr. Leibovitz about his availability for August 21, 2012. On July 10, 2012, Mr. Leibovitz wrote Mr. Wenn advising that he was not available on August 21, 2012, and asked Mr. Wenn to reschedule it to a mutually available date.

[12] On July 23, 2012, Mr. Wenn sent a fax letter to Mr. Leibovitz asking him to provide a number of available dates in September – October 2012, and indicating that once he had Mr. Leibovitz's dates, he would book a mutually convenient date.

[13] On July 25, 2023, Mr. Leibovitz's assistant called and left Mr. Wenn a message asking him to call back to discuss dates. Mr. Wenn did not call back.

[14] On July 26, 2012, Mr. Leibovitz wrote a letter to Mr. Wenn explaining that absent Mr. Wenn's calling back or providing him with an email or fax number to use, it would be difficult to set dates as Mr. Leibovitz was only prepared to hold the dates he provided open for 24 hours, and his calendar would fill quickly. Mr. Leibovitz

suggested that Mr. Wenn call Mr. Leibovitz's assistant to identify mutual dates, and then Mr. Leibovitz's assistant would book a date.

[15] On July 20, 2012, Mr. Wenn wrote Mr. Leibovitz back providing a fax number and an email address and requesting that Mr. Leibovitz provide at least five available dates over the period of September – October 2012.

[16] October 4, 2012, was subsequently identified as mutually acceptable, and a requisition was filed adjourning the review to that date.

October 2012 Cameron Order

[17] On October 4, 2012, Mr. Leibovitz, Mr. Wenn, and Trygve appeared before Master Cameron. Master Cameron made an order (the "Cameron Order"). The Cameron Order dealt with documents and opinion evidence, but also included terms requiring: Mr. Wenn to provide Mr. Leibovitz access, on reasonable notice, to the source documents (the returned client file); a pre-hearing conference to be scheduled at least 21 days prior to the review hearing; and, the review hearing to be reset for two full days and to mutually convenient dates.

[18] Mr. Leibovitz attests that he was the party that asked that the order specify "mutually convenient" dates. He says he made that request because the August 21, 2012, date had been set unilaterally and because of the difficulty encountered in resetting that date.

Setting the Review Hearing After the Cameron Order

[19] On October 16, 2012, Mr. Leibovitz sent a letter to Mr. Wenn. The letter was a follow-up to a telephone call earlier that day. The letter explained that it was inefficient for Mr. Leibovitz to provide hearing dates, and for those dates to then be cross-checked with Mr. Wenn's calendar, and then again cross-checked with Trygve's calendar, and then set down with the Court.

[20] Mr. Leibovitz suggested that Mr. Wenn and Trygve provide Mr. Leibovitz's assistant with a list of dates that worked for both Mr. Wenn and Trygve, and then

leave it to Mr. Leibovitz's assistant to check their list against Mr. Leibovitz's calendar and set the hearing down. He explained that this would accommodate the fact that he was not prepared to hold a series of dates open in his calendar for longer than 24 hours.

[21] In that same letter, Mr. Leibovitz commented that the tone of the earlier phone call with Mr. Wenn had been loud and aggressive. He noted that further calls of that nature would lead to Mr. Leibovitz to asking the Wenns to communicate with him only in writing.

[22] On October 23, 2012, Mr. Leibovitz wrote a follow-up letter saying he was waiting for the Wenns to provide their list of available dates. He reiterated that in a letter of October 31, 2012. No list was provided.

[23] On November 8, 2012, Mr. Leibovitz wrote saying that he would provide the Wenns a series of available dates, but wanted confirmation that it was understood that the dates would only be "good" until 4 p.m. on the day they were provided. He asked for the confirmation to be in writing.

[24] Mr. Wenn called Mr. Leibovitz and left a voicemail message.

[25] On November 19, 2012, in response to the voicemail message, Mr. Leibovitz wrote again saying he would provide his available dates if he was provided with a written confirmation of the understanding that they would be good for only 24 hours. In that same letter, Mr. Leibovitz asked that Mr. Wenn communicate with his office only in writing.

[26] On April 15, 2013, Mr. Leibovitz wrote as follows to Mr. Wenn:

> You finally telephoned my office on April 15, 2013. You requested my legal assistant send you my available dates for the hearing. However, you were too busy to talk to my legal assistant beyond that request. My legal assistant conveyed to me that you are still required to run the available dates through your brother.
>
> For reasons I fail to understand, you do not agree to have my office set the date in connection with this matter nor have you indicated your agreement with respect to my concerns or how to alleviate those concerns.

> I would like to have this matter dealt with as soon as possible. I presume you do as well. If so, send me your available dates. If you send me your available dates on or before noon on any Monday to Thursday, I will have my staff secure dates and report back to you before 4:30 p.m. on that same day. I presume, of course, you will send sufficient dates so a mutually convenient date can be scheduled.
>
> Please do not forget that a pre-trial [sic, hearing] conference date also has to be scheduled.
>
> [Emphasis added.]

[27] On January 20, 2014, Mr. Leibovitz filed a notice of change of address for service in this proceeding in the Registry. On January 28, 2014, Mr. Leibovitz sent Mr. Wenn a copy of the notice of change of address for delivery. The change of address reflected the fact that Mr. Leibovitz's law office had relocated.

[28] Mr. Leibovitz did not receive any communications from Mr. Wenn or Trygve in the period from April 15, 2013, through April 22, 2021.

[29] No pre-hearing conference was ever scheduled under the Cameron Order.

[30] No review hearing was ever set under the Cameron Order.

April 2021 Dismissal Application

[31] On April 22, 2021, Mr. Leibovitz filed the Dismissal Application. In support of the application, Mr. Leibovitz provided his first affidavit, setting out the background and attaching documents.

[32] Mr. Leibovitz attested he was closing his law practice at of the end of May 2021. He said that one of the reasons for his retirement, after 30 years of practice, was that he was facing health problems, including increasing issues with his memory. Mr. Leibovitz attested that he was, as of April 2021, already unable to recollect the nuances of his representation of Mr. Wenn during 2011-2012, and that he had relied heavily on his correspondence to prepare his affidavit for the Dismissal Application.

[33] Mr. Wenn filed a response to the Dismissal Application on May 7, 2021, opposing all orders sought. The legal basis portion of his response states: “disabled and medically unable to previously proceed” and “Nephew to assist”.

[34] In his first affidavit, Mr. Wenn attested that he had difficulty accessing help with the matter due to his disability and medical condition, but that his nephew (Brandon) was helping him now and had called multiple support agencies (e.g., Disability Alliance of BC, Justice Access Centre, and Access Pro Bono), seeking additional assistance for Mr. Wenn. Mr. Wenn attested that he has been delayed in getting help from any agencies due to COVID-19. In the submission portion of his affidavit, Mr. Wenn indicated that he was “requesting the time to get assistance with a disability advocate or access pro bono”.

Dismissal Adjournment Order

[35] On May 11, 2021, the Dismissal Application came on for hearing. Justice A. Ross granted Mr. Wenn’s request for an adjournment (“Dismissal Adjournment Order”). His reasons included the following paragraphs:

> [3] Upon receiving the application to dismiss, Mr. Wenn has taken steps, in [sic, including] an attempt to obtain counsel, through a disability advocate. In addition, Mr. Wenn has indicated that he has had health concerns since 2009, and since 2012 has been diagnosed with cancer and has been undergoing treatment.
>
> [4] On that basis, I am going to grant an adjournment to Mr. Wenn in order to obtain counsel. …
>
> [5] [Mr. Leibovitz] is also leaving the Vancouver area for a period of approximately five months, and he will cease to be a lawyer at the end of May.
>
> [6] As a result, Mr. Leibovitz has indicated that if an adjournment is granted, he would like the matter returnable at some point in October 2021, so that he will have arrived back in the city at that time. I am prepared to leave that matter up to the Scheduling.
>
> [7] However, on the basis set out above, I grant the adjournment sought by Mr. Wenn, with the parties to schedule the resumption of this hearing for dismissal on want of prosecution for sometime in October 2021.

Resetting the Dismissal Application with Mr. Shugarman

[36] Mr. Leibovitz swore a second affidavit sworn December 20, 2024. Mr. Leibovitz attests that, shortly after the Dismissal Adjournment Order, he provided Mr. Wenn with two weeks of available dates in October 2021 with a view to resetting the Dismissal Application. Mr. Leibovitz was subsequently contacted by a lawyer, Daniel Shugarman, on behalf of Mr. Wenn. Mr. Shugarman advised that Mr. Shugarman was not available in October 2021.

[37] Mr. Leibovitz and Mr. Shugarman had a series of email communications about the outstanding Dismissal Application and review hearing. On November 10, 2021, Mr. Shugarman sent Mr. Leibovitz an email that included the following statement:

> I have spoken with the Wenns and they would like to get the hearings reset as soon as possible.

[38] On November 21, 2021, Mr. Leibovitz wrote Mr. Shugarman saying he would provide his available dates for the Dismissal Application, but also setting out a list of requests (the “Requests”).

[39] Under the Requests, Mr. Leibovitz sought: (1) a copy of the letter Mr. Wenn’s trial counsel had written identifying possible errors in the trial decision; (2) to know whether Mr. Wenn continued to possess the entire client file that Mr. Leibovitz had returned following the appeal; (3) an affidavit from Mr. Wenn listing any court appearances Mr. Wenn had made in any matters since October 12, 2012; and (4) an outline of any materials Mr. Wenn had responded to or filed in any court matters since October 12, 2012.

[40] Mr. Leibovitz said the responses to the Requests would be used to inform a further affidavit that Mr. Leibovitz intended to draft in support of the Dismissal Application.

[41] Mr. Shugarman next contacted Mr. Leibovitz on December 23, 2021. Mr. Shugarman provided a list of dates for resetting hearings, but did not acknowledge the Requests.

[42] On December 27, 2021, Mr. Leibovitz responded to Mr. Shugarman repeating the Requests, and asking to be advised if the answer was that Mr. Wenn was refusing to respond to the Requests.

[43] Mr. Leibovitz heard nothing further in the matters for two years.

Resetting the Dismissal Application with Brandon Wenn

[44] On December 22, 2023, Brandon emailed Mr. Leibovitz. Brandon's email asserted that Mr. Leibovitz had never responded to Mr. Shugarman's December 23, 2021, email.

[45] Mr. Leibovitz replied to Brandon, advising that he had responded to Mr. Shugarman, and had made the Requests to Mr. Shugarman, and had had no response.

[46] Mr. Leibovitz did not hear anything further until March 1, 2024. On that day, Brandon emailed objecting to the Requests and stating:

> Kerry Wenn has been informed about the documentation that you have requested. The request you made is beyond the scope of his disability. He would like the judge to confirm what you are required to receive and vice versa. He would also like to finalize dates to be in front of a judge to move forward since you have not proved any dates other than requesting more documentation which in Kerry mind is further delay moving forward. [sic throughout]

[47] On March 8, 2024, Mr. Leibovitz sent a responding email. He outlined how he thought the Requests related to the Dismissal Application, but then went on to say: "I presume that you will not be providing the requested information." Mr. Leibovitz advised that he would draft his further affidavit for the Dismissal Application without responses to the Requests, and would get back to the Wenns about dates for after he had done that.

[48] On March 18, 2024, Mr. Leibovitz emailed the Wenns asking about their availability commencing late August 2024.

[49] On March 22, 2024, Brandon responded by email. He advised that Mr. Wenn had a medical emergency and said that he was unable to provide Mr. Leibovitz with any further information at that time.

[50] Brandon next communicated with Mr. Leibovitz on August 16, 2024, at which time he advised that Mr. Wenn was again looking to set hearing dates. After additional back and forth, Mr. Leibovitz and the Wenns agreed to January 24, 2025, in New Westminster. The Dismissal Application was reset by consent accordingly.

January 24, 2025 Hearing Date

[51] Mr. Leibovitz attests that he filed the application record for the hearing on the Dismissal Application by hand on January 20, 2025.

[52] On January 22, 2025, Brandon filed an affidavit sworn January 21, 2025. His affidavit speaks to events that took place after May 2021 (which appears to be about when he began assisting Mr. Wenn).

[53] The Dismissal Application was not heard on January 24, 2025.

[54] Mr. Leibovitz attests that on January 24, 2025, he attended the courthouse, but found the matter shown on the list as “TBA” and at “Counter 444”. He says he saw someone he thought might be Mr. Wenn sitting with another man near the Registry, but he was not certain it was Mr. Wenn. Mr. Leibovitz testified that he did not see either of those two men again that day.

[55] Mr. Leibovitz attests that he went to Counter 444 at 9:45 a.m. and was advised that the assigned judge was ill, but told to check back at 10:30 a.m., in case another judge had become available. When he checked back, he was advised his application would have to be reset. Mr. Leibovitz attests that Mr. Wenn was paged to Counter 444, but did not attend. Mr. Leibovitz says the Registry returned his application record, and he left the courthouse.

[56] In the afternoon, Mr. Leibovitz was served with a copy of an order by Associate Judge Hughes made that same day. The order required him to pay Mr. Wenn $500 in costs (within 30 days), and entitled Mr. Wenn the right to unilaterally set a pre-hearing conference for the review hearing unless Mr. Leibovitz provided his available dates within 7 days.

[57] On January 31, 2025, Mr. Wenn and Mr. Leibovitz appeared back before Associate Judge Hughes. No transcript is in evidence, but the January 24, 2025, order was vacated and a new order made requiring the parties to reset the Dismissal Application "at the earliest mutually available date in consultation with Supreme Court Scheduling."

April 2025 Dismissal Application Hearing

[58] Further to the second order made by Associate Justice Hughes, the Dismissal Application was reset, by consent, for April 11, 2025.

[59] Mr. Leibovitz filed a third affidavit sworn on March 11, 2025. It addresses events following the Dismissal Adjournment Order.

[60] Mr. Wenn also swore a third affidavit in the proceeding, sworn March 30, 2025, and filed April 8, 2025. The bulk of this affidavit deals with events following the Dismissal Adjournment Order or the merits of the review application. With respect to the events relating to the January 24, 2025, hearing date, Mr. Wenn attests that he and Brandon attended the Registry and were advised there would be no hearing that day because Mr. Leibovitz had not filed an application record. Mr. Wenn attests that the Registry further advised them that there was someone available to hear *ex parte* matters, and so they went before Associate Judge Hughes and provided her with "an explanation of what had transpired".

II. Legal Framework

[61] As acknowledged at the oral hearing, there was a change in the relevant law between the date of filing of the Dismissal Application and application coming on for

hearing before me. A helpful overview of the law, recent past and present, is found in *Ghag v. Ghag*, 2024 BCSC 400. There, Justice Hori wrote:

> [11] A five-member panel of the Court of Appeal for British Columbia in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173,* 2023 BCCA 473 [*Giacomini*] significantly changed the test for deciding whether a dismissal for want of prosecution is an appropriate order. The Court in *Giacomini* shifted the focus in these applications from whether the delay in prosecution has prejudiced the defendant's ability to have a fair trial to a broader focus on the interests of justice, which is to consider:
>
> a) the public confidence in the justice system; and
>
> b) the justice system's interest in promoting access to justice by having cases resolved in a timely manner.
>
> [12] Prior to *Giacomini*, an application for dismissal for want of prosecution required the court to consider the following four questions:
>
> a) Has there been inordinate delay?
>
> b) If there is inordinate delay, is the delay inexcusable?
>
> c) Has the delay caused, or is likely to cause, serious prejudice to the defendant? and
>
> d) If the former factors have been established, does justice demand a dismissal of the action?
>
> [13] The Court in *Giacomini* held that the previous test for dismissal over-emphasized the requirement that the defendant establish a delay which has prejudiced its ability to have a fair trial. As a result, Justice Horsman, in *Giacomini*, restated the test for dismissing an action for want of prosecution, at paras. 69–70, as follows:
>
> ***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?
>
> [14] In assessing whether it is in the interests of justice for the action to proceed, the Court in *Giacomini* directs us to a "non-exhaustive" list of factors, set out in para. 45 of *International Capital Corporation v. Schafer*,

2010 SKCA 48 [*International Capital Corp*.]. The factors outlined in *International Capital Corp*. are as follows:

> a) What prejudice will the defendant suffer in mounting its case if the matter goes to trial? Relevant considerations on the question of prejudice may 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;
>
> b) How long is the delay? The longer the unjustifiable delay, the more likely it is that letting the matter go to trial will not be appropriate;
>
> c) To what stage has the litigation progressed? 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;
>
> d) What impact has the delay had 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;
>
> e) In what context has the delay occurred? There is no obligation on the defendant to take any steps to move the plaintiff's case forward. However, the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action: *Giacomini* at para. 76. On the other hand, delay in the shadow of repeated requests by the defendant to move the action forward may be more serious than a delay where the defendant has not pressed the plaintiff;
>
> f) What are the reasons for the delay? When considering the justice of allowing a claim to move forward to trial, a court may revisit the reasons offered by the plaintiff for the delay. An explanation for the delay which falls short of establishing an "excuse" may inform the interests of justice analysis;
>
> g) What was the role of counsel in causing the delay? There are circumstances where it might be unjust to deprive a plaintiff of a remedy where the plaintiff is blameless in relation to the delay and his or her counsel is responsible for it. However, the Court in International Capital Corp. cautions that this consideration should not be given undue weight because plaintiffs select and instruct their counsel. If a litigant engages a lawyer and the lawyer then fails to move matters forward expeditiously, the litigant should bear the burden of his or her choice of counsel. Care must be taken to ensure that plaintiffs' counsel are not allowed to defeat applications to strike for want of prosecution by simply assuming the blame for not moving the action forward; and
>
> h) Is there a public interest in allowing the action to be decided on the merits? There is a narrow category of actions in which the public interest is served by allowing the action to proceed to trial. This

> category of actions includes cases of genuine public importance or cases that have significant implications reaching beyond the specific interests of the litigants themselves.
>
> [15] The Court of Appeal in *Giacomini* adds the merits of the action as an additional factor to consider. While a "searching examination of the merits" is not appropriate, the Court notes that if the action is bound to fail, then the interests of justice favour dismissal: at para. 71.

III. Analysis

[62] As I understand it, Mr. Leibovitz submits that the Dismissal Application would and should succeed based on the facts that existed at the time the Dismissal Application was filed. I agree.

[63] To the extent that Mr. Wenn's argument implies that Mr. Leibovitz's conduct in in relation to resetting the Dismissal Application amounted to a deliberate effort to delay the review or is otherwise indicative of bad faith, I am satisfied there is no evidentiary basis for such an assertion. First, it is not as if the Dismissal Application is without merit. The Dismissal Application is by no means frivolous or vexatious.

[64] Second, I find that Mr. Leibovitz made reasonable efforts to get the Dismissal Application on for hearing. Mr. Wenn was the one who sought the Dismissal Adjournment Order, under which the application was to reset in October 2021. Mr. Shugarman then came onboard for Mr. Wenn, and it was Mr. Shugarman who was not available in October 2021. In discussing scheduling with Mr. Shugarman, Mr. Leibovitz made the Requests – for the specific purpose of drafting materials for the application that was to be reset. Neither Mr. Shugarman nor the Wenns responded to the Requests for two years. While Mr. Leibovitz could have been more diligent in making additional follow-up inquiries about the Requests, he had already asked twice. From his view, the Requests were outstanding before the opposing side for entire two year period. When Brandon finally advised that Mr. Wenn would not provide responses to any of the Requests, Mr. Leibovitz completed his further affidavit and took active steps to bring the Dismissal Application before the Court.

[65] The court list for New Westminster on January 24, 2025, is consistent with Mr. Leibovitz's evidence that he did file an application record in a timely manner and

that the matter did show on the list. Whatever impression the Wenns obtained (and whatever impression they conveyed to Associate Judge Hughes), Mr. Leibovitz was not at fault regarding the failure of the Dismissal Application to be heard on January 24.

[66] Accordingly, the time period relevant to the want of prosecution application is July 2012 through April 2021.

[67] I now turn to the application of the test established in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*].

A. Whether Delay Inordinate

[68] Mr. Wenn filed the Notice of Review on July 6, 2012. The Dismissal Application was filed in April 2021 – just short of nine years later.

[69] While there is no dispute that Mr. Wenn filed in time, the applicable time limit for filling provides some context for assessing what might be considered “inordinate”. Under the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*], clients have the right to have a lawyer’s bill reviewed by a Supreme Court Registrar. Normally, a fee review must be filed no later than three months after the bill was paid or, if unpaid, within one year after it was sent to the client: *LPA*, s. 70(1). Extensions are possible, but special circumstances must be demonstrated: *LPA*, s. 70(11).

[70] In my view, there is no doubt that a nine year delay in advancing a review proceeding to hearing is an inordinate delay.

B. Whether Delay Inexcusable

[71] Mr. Wenn’s response to application opposes the orders sought in the Dismissal Application. Under “Factual Basis”, the response directs the Court to Mr. Wenn’s first affidavit and the “Exhibit A” submission attached to it. Under “Legal Basis”, the response states: “disabled and medically unable to previously proceed” and “Nephew to assist”.

[72] Mr. Wenn's first affidavit addresses his request for an adjournment of the Dismissal Application, the merits of the review, and his attempts to schedule the review up to July 30, 2012. It does not say anything about the failure to take any steps in pursuit of the review between April 2013 and April 2021.

[73] Mr. Wenn's first affidavit speaks only obliquely to his claim that his delay in pursuing the review was due to an impairment arising from a disability. He asserts baldly that it was "difficult to access help due to my disability and deteriorating medical condition". He says that he is "on disability income", but provides no further details.

[74] His first affidavit attaches two documents in respect of his asserted disability.

[75] The first is a four-paragraph "To Whom It May Concern" letter, dated January 24, 2010 (i.e., prior to the conclusion of the Provincial Court trial and some two years prior to filing of the Notice of Review). While it is not stated in an affidavit or even the letter itself, the letter appears to be by a family physician. In it, the physician states that, due to head and neck injuries suffered in a car accident, Mr. Wenn remains "a good 2-3 months away from any attempt at a return to work". In terms of active impairment, it describes problems with focus and concentration problems, but confirms that Mr. Wenn is capable of the activities of daily living.

[76] The second attachment is a notice to Mr. Wenn from the Canada Revenue Agency, dated December 23, 2019. The notice advises that Mr. Wenn is eligible to claim a "disability tax credit" for the income tax years 2009 to 2024. While the notice makes reference to a qualifying "impairment", it contains no information about whatever impairment was accepted as having been suffered by Mr. Wenn nor any information about the criteria for the eligibility determination made.

[77] The body of Mr. Wenn's first affidavit closes with the following:

> If court needs further medical, or disability details I can provide privilege sensitive information regard reasons for delay and complications. (For judge only due to the privacy).

[78] In Mr. Wenn's second affidavit, he asserts that he has "been disabled" from October 2009 to present as a result of "ongoing issues" that have been "compounded further with numerous separated serious ongoing health issues". There are no further details given. He asserts, without any explanation or elaboration, that he is "limited in [his] abilities". He states that he is awaiting "surgery", again without any further detail. Finally, he reiterates the offer in his first affidavit to provide medical information to the judge privately. (Interestingly, he immediately goes on to demand that Mr. Leibovitz provide medical evidence of any memory problems.)

[79] With respect to Mr. Leibovitz's Requests about whether the returned client file is still intact, Mr. Wenn provides no response either way. Instead, Mr. Wenn states that he is unable to see how the file is relevant to the Dismissal Application.

[80] Like in his first, Mr. Wenn's second affidavit only briefly touches upon the failure to advance the review. When he does address the point, he deals only with the period between filing (July 2012) and April 15, 2013. Mr. Wenn provides no evidence or explanation that specifically relates to the period of April 2013 through April 2021.

[81] Turning to Mr. Wenn's third affidavit, much of it relates to the merits of the review or the resetting the Dismissal Application. The only portion of Mr. Wenn's third affidavit that relates to pursuit of the Notice of Review reads as follows:

> Yair S Leibovitz past and present has been difficult to coordinate/supply dates.
>
> Following Numerous attempts to settle dates by phone, back and forth it was obvious to me he was unwilling to cooperate in setting dates. With the aid of my family, I went through the daunting task of faxing my communications to show how difficult Yair S Leibovitz was being. It was so taxing due to my disability, at that point I had asked my brother (Trygve) if he could help. (Set Dates on my behalf) He also found Yair S Leibovitz to be extremely difficult and voiced to me numerous times how uncooperative he was. Yair S Leibovitz refused phone/voicemail as it was my only means of communication. In 2012/2013 Yair S Leibovitz that he would supply dates but never did. Shortly in this period he also left his practice and didn't notify Kerry Wenn. My brother personally drove down to his office (In person) and advised me "He took off with your money", "He is gone". I panicked and called his

> office numerous times with no response. I was never notified of where he was, and with my limited abilities, did not have the means to find him as I was dealing with serious health issues. I did not hear from Yair S Leibvitz until a package arrived in my mail on April 28, 2021. I object to Yair S Leibovitz derogatory terms as fabricated reasons for not supplying a contact or address. I believe it is solely to make it difficult without help to deal with this matter. He sets conditions, he does not supply his available dates, and he shuts down phone voicemails which makes it near impossible for Kerry Wenn to communicate and coordinate. My nephew offered aid to respond moving forward. We had a phone appointment (with the court on May 11, 2021) Kerry Wenn was granted adjournment due to medical issues and trying to find counsel.
>
> [Emphasis added]

[82] Only the portions that I underlined deal with disability. Notwithstanding what is set out in Legal Basis of his response, much of Mr. Wenn's case is directed at establishing that the review hearing did not proceed because Mr. Leibovitz prevented it from proceeding. I will address both points.

Mr. Leibovitz's Conduct

[83] Mr. Wenn asserts that Mr. Leibovitz acted unreasonably and effectively frustrated Mr. Wenn's attempts to set down a review hearing in compliance with the Cameron Order.

[84] Mr. Wenn asked Mr. Leibovitz to provide at least five different available dates for a two-day hearing, which dates Mr. Wenn proposed to check against his own calendar, and then further cross-check with Trygve. Mr. Leibovitz's position was that, as a lawyer with a small family practice, he could not promise to keep those dates open in his calendar for more than 24 hours. As an effort at efficiency, Mr. Leibovitz suggested (repeatedly) that Mr. Wenn and Trygve create a combined list reflecting their availability, and then Mr. Leibovitz's assistant would not only check their list against Mr. Leibovitz's calendar, but deal with the court to set the date. In my view, that was a very reasonable proposal. Indeed, I would go further and say that it was a mindful offer given that Mr. Wenn was representing himself, whereas Mr. Leibovitz's assistant would be well-familiar with the process.

[85] For reasons that remain unexplained to date, Mr. Leibovitz's proposal was rejected. Mr. Wenn preferred to book the hearing himself.

[86] Mr. Leibovitz agreed to provide a series of dates to Mr. Wenn as requested, but wanted written confirmation that it was understood that the dates provided would only be held open for 24 hours. Neither seeking that confirmation nor seeking it in writing was an unreasonable term. Mr. Leibovitz was concerned that he might find himself double-booked by Mr. Wenn. Further, if that turned out to be the case, a written confirmation would allow Mr. Leibovitz to establish (to the Court, to the Law Society, to affected counsel) that Mr. Leibovitz had taken steps to avoid that.

[87] Mr. Wenn objects that Mr. Leibovitz advised that the Wenns should only communicate with his office in writing. That is not that unusual of a requirement. It is common in situations where a lawyer experiences difficulty communicating effectively with another party. Here, Mr. Leibovitz appears to have had concerns about tone and the creation of a record of communications.

[88] I accept Mr. Leibovitz's evidence that he did send a notice of change of address for service to Mr. Wenn. If, for some reason, that notice never arrived or arrived but went unnoticed, the notice of change of address had also been promptly filed in the Registry. The filed notice was on the court file, and the court file could easily have been consulted by Mr. Wenn at any time.

[89] I do not find the positions taken by Mr. Leibovitz's positions regarding the review hearing between the date of filing and April 2013 to have been unreasonable. But, even if Mr. Leibovitz had been unreasonable during that period, there is no evidence of Mr. Wenn taking or attempting to take any step to advance the review during the eight years that followed.

[90] Further, if Mr. Wenn thought Mr. Leibovitz was being unreasonable (or, for that matter, if Mr. Leibovitz had been unreasonable), that would not entitle Mr. Wenn to do nothing. Mr. Wenn could have, at any time, brought an application for an order akin to that made by Associate Justice Hughes on January 24, 2025. Mr. Wenn was

free to go back and ask for the Cameron Order to be varied (i.e., to enable him to set the review hearing unilaterally or under different court-ordered terms than those in the Cameron Order) on the basis of evidence that Mr. Leibovitz refused to co-operate.

Hindered by Impairment due to Disability

[91] Mr. Wenn references his having had a disability and/or health problems from October 2009 through to present. There is no evidence of a specific disability or medical condition, let alone of one giving rise to an impairment impacting the ability to pursue the review.

[92] The January 2010 physician's letter says that Mr. Wenn will not be able to return to his employment prior to March/April 2010. The letter does not indicate what work duties Mr. Wenn was considered able and unable to perform. A person may be unable to return to their employment, yet able to do many other things.

[93] Mr. Wenn's eligibility to apply for a disability tax credit for tax years 2009-2024 is not evidence on which the Court can conclude that Mr. Wenn was incapable of pursuing his review. The notice does not identify a disability, let alone provide specific information indicating the nature or degree of impairment caused thereby.

[94] Referring to the underlined portions in the quote set out above from Mr. Wenn's third affidavit, these are the only points at which Mr. Wenn has drawn a connection between his generic claim of "disability" and pursuit of the review. The first instance is an assertion that he found dealing with date setting "taxing", and so called upon Trygve for assistance. Trygve agreed to assist, and began doing so very shortly after the filing of the Notice of Review. Assistance was obtained. The second instance is an assertion that his disability hampered his ability to contact Mr. Leibovitz after his office relocated. However, as already noted, all that was required was to check the court file. A call to the Law Society would have sufficed as well. There is no evidence before me suggesting a disability that would have rendered those modest efforts beyond the pale.

[95] In this instance, although Mr. Wenn complains about the Dismissal Application having been reset, here the January 24, 2025, lack of a judge, like the adjournment granted by Justice Ross, gave Mr. Wenn opportunities to meaningfully improve his evidence of disability (if evidence was available), yet he did not. For the same reason, Mr. Wenn has had the benefit of abundant time seek such pro bono or advocacy assistance with respect to Dismissal Application as he wished.

[96] Finally, there is Mr. Wenn's suggestion that he would be willing to provide additional evidence if the Court wanted to see it. The suggestion is misconceived. It is not the role of the Court to seek out evidence or direct the parties as to what evidence to provide. By fundamental design, our system is not inquisitorial. The parties before the Court decide what and how much evidence to advance. Further, the suggestion that more evidence would be provided if there was an assurance that it would remain "private" is equally misconceived. The open court principle is fundamental one. The burden on an applicant seeking any exception to that principle is a high one: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 33-35. And that is setting the point that Mr. Wenn appears to have been suggesting terms that prevent Mr. Leibovitz from seeing this "private" evidence.

[97] Finally, I am cognizant of the fact that Justice Ross considered Mr. Wenn's bare assertion of "disability", coupled with his attestation that he had been actively seeking assistance on how to respond to the Dismissal Application from relevant sources, sufficient to warrant granting an adjournment to October 2021. I take no issue with that decision. However, the question of whether there is evidence of disability before the Court capable of excusing the nine year delay in advancing the review following the filing of the Notice of Review is an entirely different question. In my view, there is no evidence here establishing disability as an excuse.

[98] I conclude the delay here is inexcusable.

C. Interests of Justice

[99] The final consideration, then, is whether it is in the interests of justice for the review to proceed despite inordinate and inexcusable delay.

[100] Mr. Leibovitz will be somewhat prejudiced in conducting the review if it were to proceed. The short time limitation under *LPA* reflects, at least in part, the reality that the passage of time quickly makes it challenging for counsel to recall the details and nuances of communications and decisions that would be relevant in a review proceeding. Setting aside the issue of whether Mr. Leibovitz has any particular issues with his memory, it will become difficult for any counsel to, for example, recall why a telephone call required the amount of time shown on the time sheet with the passage of time.

[101] Mr. Wenn has declined to say whether he has the entire client file that was returned to him by Mr. Leibovitz after the appeal. Mr. Wenn is a lay person, however, the Cameron Order expressly drew a connection between Mr. Leibovitz's access to the client file and the review. Whether the client file continues to exist in the state it did at the time of its return to Mr. Wenn is relevant to whether Mr. Leibovitz would be prejudiced in responding to a review. Thus, it would be very much in Mr. Wenn's interests on the Dismissal Application to confirm that the client file is whole and remained in his possession, if that is the case. Mr. Wenn had declined to make such a statement. At the very least, I am satisfied that the possibility that the client file no longer exists is on the table.

[102] The period of delay is long by any standards. The Notice of Review had been filed for nine years when the Dismissal Application was brought. The sole step taken to concretely advance it towards hearing appears to be the Cameron Order. None of the steps contemplated by the Cameron Order have ever been completed.

[103] Mr. Leibovitz retired during the time the Notice of Review was outstanding. He was put in the position of winding up his practice without knowing the ultimate status of his bill in respect of Mr. Wenn's appeal. That said, there is no evidence of what, if any, difficulties would arise from a reduction of the bill at this point in time.

[104] There is no obligation on a respondent to take any steps to move the claimant's case forward. Nonetheless, Mr. Leibovitz repeatedly offered to have his assistant do the final cross-check of dates and set the date with the court. As I have

already observed above, this was an efficient and mindful proposal. It was an offer aimed at moving things along. Further, in his April 15, 2013, letter, Mr. Leibovitz stated: "I would like to have this matter dealt with as soon as possible." Notably, this was the communication that initiated Mr. Wenn's eight-year period of silence on the matter of the review.

[105] While an explanation for the delay may fall short of establishing an "excuse" yet still inform the interests of justice analysis, here there is, effectively, no explanation offered at all for April 2013 through April 2021 (i.e., given my finding that Mr. Wenn's generic assertion of "disability" is not sufficient evidence of incapability).

[106] This is not a case where allowing the matter to proceed would serve the public interest. If the review were heard, it would result in a fact-based assessment on a routine set of facts. No important principle or precedential issue has been identified.

[107] No additional factors were suggested for consideration by Mr. Wenn.

[108] In my view, the interests of justice do not warrant allowing the Notice of Review to proceed notwithstanding the inordinate and inexcusable delay.

IV. Disposition

[109] The Dismissal Application is granted.

[110] The Notice of Review filed July 6, 2012, seeking Registrar review of the respondent's legal bill, is dismissed for want of prosecution.

[111] The respondent is entitled to his costs in the proceeding.

"Tucker J."