IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krist v. British Columbia,* 2024 BCSC 1925

Date: 20241021
Docket: 1812339
Registry: Vancouver

Between:

John Krist

Plaintiff

And

His Majesty the King in Right of British Columbia

Defendant

Before: The Honourable Justice Giltrow

Reasons for Judgment

Counsel for the Plaintiff:	G. Douvelos
Counsel for the Defendant:	M.C. Abraham
Place and Date of Hearing:	Vancouver, B.C. September 18, 2024
Place and Date of Judgment:	Vancouver, B.C. October 21, 2024

2024 BCSC 1925 (CanLII)

Table of Contents

OVERVIEW AND BACKGROUND 3
WANT OF PROSECUTION 8
INORDINATE DELAY 12
EXPLANATION FOR DELAY 14
INTERESTS OF JUSTICE 18
CONCLUSION 24

2024 BCSC 1925 (CanLII)

2024 BCSC 1925 (CanLII)

Overview and Background

[1] This is an application by the defendant for dismissal of the plaintiff's civil claim, for want of prosecution pursuant to Rule 22-7(7). The civil claim arises from a separate civil forfeiture action ("Forfeiture Action") which settled by consent order made October 6, 2011.

[2] The applicant additionally seeks an order pursuant to Rule 13-5 permitting the sale of personal property ("Personal Belongings") that had been removed from the property at issue in the civil forfeiture proceedings (the "Mission Property"), and which has been stored by the Director of Civil Forfeiture since its removal in 2012.

[3] The history of the Forfeiture Action and the present civil claim is somewhat complex, and have been the subject of several decisions of this Court, and one by the Court of Appeal. A chronology of the proceedings is appended as Schedule A to this judgment.

[4] The notice of civil claim ("NOCC") was initially filed November 16, 2015. The defendant promptly brought an application to strike portions of the NOCC. The plaintiff amended the notice of civil claim ("ANOCC") on December 15, 2015, and the plaintiff brought a further application to strike portions of the ANOCC.

[5] The application to strike was with respect to those portions of the ANOCC that allege facts and advance claims of negligence and for a civil *Charter of Rights and Freedoms* remedy relating to the Director's actions in bringing on and prosecuting the Forfeiture Action under the *Civil Forfeiture Act,* S.B.C. 2005, c. 29*.* The application to strike was granted by Justice Grist on February 18, 2016 (*Krist v. British Columbia*, 2016 BCSC 494), and Mr. Krist's appeal from that order was dismissed by the Court of Appeal February 20, 2017 (*Krist v. British Columbia*, 2017 BCCA 78, "*Krist,* BCCA").

[6] A helpful summary of the history of both the Forfeiture Action and the present action as of February 2017 was provided by Justice Savage in *Krist,* BCCA:

> **I. Introduction**

[1] John Krist appeals a chambers decision granting the respondent's ("HMTQ") application to strike portions of Mr. Krist's notice of civil claim (the "NOCC") and granting HMTQ special costs.

[2] In the NOCC Mr. Krist seeks damages from HMTQ in bringing and prosecuting a forfeiture proceeding under the *Civil Forfeiture Act*, S.B.C. 2005, c. 29, alleging negligence against the Director of Civil Forfeiture in failing to explicitly name Mr. Krist as a defendant. Mr. Krist says this failure to name him violated his s. 7 *Charter* rights, and resulted in a loss of his equity in certain property, as well as the loss of some gold and silver secreted in chattels on the property.

[3] The forfeiture proceeding was brought in respect of a Mission property (the "Property") registered in the name of Mr. Krist's once common-law wife, Lois Lynne Griffey. The forfeiture proceeding followed a search of the property in March 2008 by the RCMP which disclosed dried marihuana and equipment commonly associated with a marihuana grow operation. Mr. Krist was charged in connection with the grow operation and acquitted of those charges in Provincial Court in 2012.

II. The Forfeiture Proceedings

[4] On 14 March 2011, the Director of Civil Forfeiture started forfeiture proceedings (the "Forfeiture Proceedings") that listed as defendant "The Owners and all Others Interested in the Property and in Particular Lois Lynne Griffey". To understand the order under appeal it is necessary to describe the various orders made in the Forfeiture Proceedings.

A. The Consent Order

[5] On 6 October 2011, a consent order was entered in the Forfeiture Proceedings (the "Consent Order"). The Consent Order provided the Property was forfeit to the Director, gave Ms. Griffey conduct of the sale, and ordered the sale proceeds be divided 20% to Mr. Miller in trust for Ms. Griffey and 80% to the Director. Mr. Miller, counsel for Ms. Griffey, approved the Consent Order on her behalf.

B. Amended Order

[6] On 23 October 2013, an application was made before Madam Justice Gropper to amend the 6 October 2011 order. The order was amended to give conduct of the sale to the Director (the "Amended Order"). The Amended Order in the preamble lists the appearances and refers to "Lois Lynne Griffey, appearing on her own behalf with John Krist". At the hearing before Madam Justice Gropper, Ms. Griffey and Mr. Krist took the position that they had not authorized the Consent Order. Madam Justice Gropper directed that there should be a separate application to determine whether to set aside the Consent Order.

C. Sewell Order

[7] On 18 November 2013, an application was filed by Ms. Griffey and Mr. Krist, who were represented by counsel, seeking to set aside the Consent Order on the basis that it was signed by Mr. Miller without authority from Ms. Griffey and Mr. Krist. Mr. Miller was subpoenaed, privilege was waived, and he gave evidence and was cross-examined. Ms. Griffey and Mr. Krist

2024 BCSC 1925 (CanLII)

swore affidavits in support of the application. Justice Sewell dismissed the application with reasons on 26 February 2014. His order (the "Sewell Order") notes that Mr. Krist was represented, as the preamble refers to hearing "Joel Whysall, solicitor for Lois Lynne Griffey and John Krist". The Sewell Order was not appealed.

D. Possession Order

[8] On 21 January 2015 the Director obtained an order (the "Possession Order") from Madam Justice Russell requiring all persons in possession of the property "including Ms. Griffey and Mr. John Krist" to deliver vacant possession of the Property and remove all personal property by 31 March 2015. The Possession Order was enforceable by a Writ of Possession and the Director was authorized to dispose of any personal property left on the Property "without being liable therefore".

[9] No one appeared at the hearing on behalf of Ms. Griffey or Mr. Krist but they had notice of the application and are referred to in the preamble to the Possession Order and in the body of the Possession Order as I have noted. The Possession Order was not appealed.

[10] On the day before the Possession Order was obtained, Counsel for the Director was advised that a solicitor (Ms. Tonia Grace) was in the process of taking instructions from Mr. Krist and that counsel might be commencing an action against the Director on behalf of Mr. Krist outside the Forfeiture Proceedings and might be seeking to set aside the Consent Order. This information was communicated to Madam Justice Russell together with some of the history of the application for the Possession Order, which included an adjournment and ancillary orders requiring the production of a response to the application.

E. Silverman Order

[11] Mr. Krist applied to be added as a defendant in the Forfeiture Proceeding, which was returnable on 31 March 2015, the deadline for compliance with the Possession Order. Mr. Krist appeared with counsel (Mr. Hendery) before Mr. Justice Silverman, and argued that Mr. Krist should have been named as a defendant in the Forfeiture Proceeding because he had an unregistered beneficial interest in the Property. Counsel sought to have Mr. Krist added as a party saying "Well, I mean, if he is added as [defendant] the whole thing starts again" and that "under Rule 6-2(8) the proceedings would start again".

[12] Justice Silverman denied the application (the "Silverman Order"), noting that the Consent Order was a final order, that Mr. Krist had notice of the proceedings and that his interest had been at stake from early in the proceedings. He considered the application a collateral attack on the Consent Order and the Sewell Order. Importantly, the Silverman Order was not appealed.

III. The Current Proceeding

[13] On 16 November 2015 Mr. Krist commenced a civil claim against HMTQ seeking an interlocutory injunction and damages. An amended notice of civil claim was filed 15 December 2015. It alleges that the Forfeiture Proceedings

2024 BCSC 1925 (CanLII)

as against Mr. Krist were fatally flawed; that the Director owed Mr. Krist a duty of care and the Director was negligent in failing to name him in the Forfeiture Proceedings.

[14] Mr. Krist says the Director's negligence resulted in his loss of equity in the Property and the loss of valuable chattels. It was a breach of his s. 7 *Charter* rights. Mr. Krist says that a vehicle and shipping container on the property contained, *inter alia*, 420 ounces of gold (in the vehicle) and 1200 ounces of gold, 2500 ounces of silver, and coin and stamp collections (in the shipping container). Mr. Krist says that the forfeiture of the Property was a breach of his *Charter* rights and he claims *Charter* damages equivalent to the value of the property allocated to the Director in the Consent Order.

2024 BCSC 1925 (CanLII)

IV. The Application to Strike and Decision Below

[15] HMTQ brought an application to strike parts of the pleadings based on Rule 9-5(1)(a) (no reasonable claim), (b) (unnecessary, frivolous, scandalous or vexatious), and (d) (abuse of process) of the *Supreme Court Civil Rules*. Mr. Justice Grist, after reviewing the history of the Forfeiture Proceedings said:

> [16] The Province's application to strike the impugned pleadings is brought pursuant to Rule 9-5(1)(a), (b), and (d). Rule 9-5(1)(a) relates to striking pleadings that disclose no reasonable claim. Rule 9-5(1)(b) empowers striking pleadings that are unnecessary, frivolous, scandalous, and vexatious. Rule 9-5(1)(d) allows pleadings to be struck if they are an abuse of the process of the court.
>
> [17] Counsel for Mr. Krist concedes that the order of October 6, 2011 and the subsequent orders including the order made by Madam Justice Russell on January 21, 2015, granting the Director vacant possession, are valid orders binding on Mr. Krist. The matters are well beyond any appeal and there is no turning back the fact that the property has been declared to be forfeit to the Director who is now entitled to vacant possession.
>
> [18] As a result of the following:
>
>> 1. the decision of Mr. Justice Sewell that the October 6, 2011 forfeiture order should not be set aside based upon a finding that Mr. Miller acted with the actual authority given by both Mr. Krist and Ms. Griffey; and
>>
>> 2. the decision of Mr. Justice Silverman refusing to add Mr. Krist as a named defendant based on a finding that the Director had acted appropriately in framing the forfeiture action and because Mr. Krist did not initially or at any relevant time thereafter make known any beneficial interest or claim in the property.
>
> [19] It is clearly established there is no basis for claim in negligence against the Director, nor is there any basis for a claim for *Charter* remedy. There can be no negligence in drafting what the court has held to be an appropriate form of pleadings and, by the same logic, bringing the proper form of action cannot constitute a *Charter* breach.

> [20] It is also clear from another perspective that the action is misconceived. The decision of Mr. Justice Sewell established that the October 6, 2011 forfeiture order was entered by consent on the actual authority of Ms. Griffey and Mr. Krist. It is clear from the preamble to each of the orders that Mr. Krist was included in the notice process, and where the matter was spoken to, the orders followed Mr. Krist being given the opportunity to respond.
>
> [21] Throughout the course of the proceedings leading to a forfeiture order, Mr. Krist could have revealed any alleged beneficial interest and pressed to be named as a defendant. He could also have advanced the *Charter* arguments on his own behalf or in concert with Ms. Griffey, who was clearly in a position of having an obligation to safeguard Mr. Krist's position if, in fact, she was holding legal title when Mr. Krist had a beneficial interest. None of these options were taken and in the circumstances, there can be no detriment found, no basis for damages, because Mr. Krist was fully involved, given the opportunity, and if steps were not taken, the author of his own misfortune.
>
> [22] The impugned action could be labeled as a collateral attack on the now complete proceedings, as was found to be the case in respect of the application to be formally joined as a defendant but, in my view, the more appropriate finding is that in light of the above, the action as it relates to the forfeiture proceedings, specifically, the claim in negligence relating to the form of the forfeiture action and the *Charter* s. 7 claim, is an abuse of process. This part of the actions falls into the fourth category of an abuse of process listed in *Babavic v. Babowech*, [1993] No. 1802 (S.C.), a proceeding without a foundation and which serves no useful purpose.
>
> [Emphasis added by Savage J.A.]
>
> [16] In the result, Mr. Justice Grist allowed the application, in part, to strike portions of Mr. Krist's amended notice of civil claim on the basis that the impugned pleadings were an abuse of process.

[7] Justice Grist listed the paragraphs to be struck ["Struck Paragraphs"] and granted special costs against the plaintiff in the application. As noted, the Court of Appeal dismissed Mr. Krist's appeal from that order for reasons I will address below, as they relate to the application of the test for want of prosecution in this case.

[8] After the appeal from the order to strike was dismissed in February 2017, Mr. Krist took no action. A case planning conference was held October 23, 2017 at which Mr. Krist was ordered to file a further amended notice of civil claim ("FANOCC") in compliance with Grist J.'s order and the Court of Appeal's February 20, 2017 order. Mr. Krist was allowed 90 days to do so.

2024 BCSC 1925 (CanLII)

[9] However, instead of meeting this requirement, the plaintiff filed a requisition January 22, 2018 seeking to adjourn the 90 day timeline to file the FANOCC. The defendant responded February 1, 2018, objecting to the extension. After no further steps had been taken by the plaintiff, it was not until the defendant applied on August 29, 2018 to strike the ANOCC that the plaintiff took a further step. On September 24, 2018 a consent order was issued adjourning the defendant's strike application and directing that the plaintiff was to file the FANOCC by October 31, 2018.

[10] The FANOCC was filed October 26, 2018. Other than signing and returning the consent order on November 7, 2018, this is the last step the plaintiff has taken to advance the claim.

[11] The defendant filed its response to the FANOCC December 3, 2018.

[12] The defendant now brings the present application to dismiss the civil claim for want of prosecution.

Want of Prosecution

[13] The test for want of prosecution was considered and revised by a five-member division of the Court of Appeal for British Columbia, in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473. The revision was very recently summarized by the Court of Appeal in *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288:

> **Legal Framework**
>
> ***Want of Prosecution***
>
> [65] A judge may dismiss a proceeding under Rule 22-7(7) for want of prosecution. Rule 22-7(7) provides:
>
> > **Dismissal for want of prosecution**
> >
> > (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.
>
> [66] In *Giacomini Consulting*, a five-member division of this Court recently revised the long-standing test for dismissal of an action for want of prosecution described in *Wiegert*. That long-standing test required a judge to

2024 BCSC 1925 (CanLII)

be satisfied that: there had been inordinate and inexcusable delay in the prosecution of the action; the delay had caused, or was likely to cause, serious prejudice to the defendant; and it was in the interests of justice to dismiss the action. Speaking for the Court in *Giacomini Consulting*, Justice Horsman noted the pattern of delay in civil proceedings in British Columbia, emphasized undue delay undermines public confidence in the justice system, and asked whether the existing test adequately accounted for the full measure of harm caused by delay: *Giacomini Consulting* at paras. 4, 5, 31. She concluded that it did not.

[67] Justice Horsman explained that the long-standing test in this province failed to account adequately for the public interest in a justice system that promotes timely and cost-effective dispute resolution. Nor did it account adequately for the interest of defendants in the expeditious resolution of claims: *Giacomini Consulting* at para. 51. She went on to conclude that a revision was justified because "[t]he current test is unduly focussed on litigation prejudice to the defendant, at the expense of consideration of the broader impacts of delay on defendants and the justice system more broadly": *Giacomini Consulting* at para. 58.

[68] Justice Horsman adopted a revised test for dismissing proceedings for want of prosecution that is similar to the test the Saskatchewan Court of Appeal articulated in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48. In doing so, she described the assessment of the interests of justice articulated in *International Capital Corporation* like this:

> [65] Under the modified test in *International Capital Corporation*, the question of prejudice is not a stand-alone criterion. Rather, prejudice is considered within the assessment of whether it is in the interests of justice for the case to proceed to trial notwithstanding the existence of inordinate and inexcusable delay: *International Capital Corporation* at para. 45.
>
> [66] At paragraph 45 of *International Capital Corporation*, the Court set out a non-exhaustive list of factors that are relevant to the court's assessment of the interests of justice: (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; and (h) the public interest in having cases that are of genuine public importance heard on their merits.

[69] Finally, Justice Horsman summarized the revised test in British Columbia this way:

> [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?

2024 BCSC 1925 (CanLII)

> (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 interest of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[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.

[71] In *Kultak Financial Inc. v. Grewal*, 2018 BCCA 94, Justice Willcock emphasized that the goal of an application to dismiss for want of prosecution is to secure the effective and efficient administration of justice. Accordingly, it relates to the proceeding itself, not to the underlying cause of action. For that reason, he stated, it is an error to measure the period of delay from the date the cause of action arose for purposes of determining whether it is inordinate. However, as he also stated, the passage of time itself may prejudice the defendant: *Kultak* at paras. 26–27.

2024 BCSC 1925 (CanLII)

[14] Neither party to the present application referred the Court to the revised test in *Giacomini Consulting*.

[15] Respondent's counsel referred the Court to the test as set out in *Murphy, Battista v. McGivern*, 2017 BCSC 3:

> **THE LEGAL TEST**
>
> [31] To consider dismissing an action for want of prosecution, Low J.A. formulated the following test, in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, cited above at para. 3 of these reasons:
>
> > [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:
> >
> > > (1) the length of the delay and whether it was inordinate;
> > >
> > > (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
> > >
> > > (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
> > >
> > > (4) whether, on balance, justice requires dismissal of the action.
> >
> > [28] I consider the fourth question to encompass the other three and to be the most important and decisive question.
> >
> > [29] I would not attempt to state what reasons for the delay might serve as an excuse for the plaintiff. In some cases, for example, negligence of the plaintiff's lawyer might amount to an excuse, in others it might not. Whether the reason for the delay amounts to an excuse will depend on the circumstances of the particular case.
>
> For summarizing the test, I would add the following paragraph from the Plaintiff's written submissions:
>
> > 121. The onus is initially on the applicant seeking to dismiss the claim to prove the first two criteria: that delay is inordinate and inexcusable. If the Court finds that the delay is inordinate and inexcusable, the onus shifts to the plaintiff to establish on a balance of probabilities that the defendant has not suffered serious prejudice, or that other circumstances would make it unjust to terminate the action.

2024 BCSC 1925 (CanLII)

[16] The first two elements of the traditional test remain unchanged. The previous 3rd and 4th elements are now combined to:

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

[17] In my view the applicant satisfies the test on both the previous, more narrow grounds of prejudice to the defendant relied on by respondent's counsel, as well as on the broader *Giacomini Consulting* grounds which consider public interest and the interest of justice. The Court of Appeal made clear in *Giacomini Consulting* that even if particular prejudice to the defendant is not established, the broader public interest in the timely determination of proceedings within the justice system may be a sufficient and appropriate basis to dismiss for want of prosecution: see *Giacomini Consulting* paras. 58, 72 which I set out here again for ease of reference:

> [58] …The current test is unduly focussed on litigation prejudice to the defendant, at the expense of consideration of the broader impacts of delay on defendants and the justice system more broadly.
>
> …
>
> [72] However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interest of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.

[18] In this case I am satisfied, based on the evidence, that the prejudice to the defendant and the impact on trial fairness to the defendant is sufficient in itself to satisfy this aspect of the test, without looking to the broader issue of public interest in a justice system that promotes timely and affordable dispute resolution. I would, however, find that the applicant's grounds for dismissal are strengthened when the impacts of unreasonable delay on public confidence in the justice system are considered.

Inordinate Delay

[19] The events at issue in this civil claim occurred over 12 years ago. Almost nine years have passed since the action was commenced by the plaintiff. Almost six

2024 BCSC 1925 (CanLII)

years have passed since the filing of the FANOCC. No steps have been taken by the plaintiff since then.

[20] At the hearing of the application counsel for Mr. Krist conceded that the delay in the proceedings lay within the range that has been found to be inordinate in other cases, and that the burden had shifted to the plaintiff to provide reasonable explanation for the delay.

[21] I agree. The delay in the proceedings to date has been inordinate. I find this to be so both with reference to the overall time that has passed since the filing of the claim, and with reference to the lack of any recent steps taken to advance the claim. The Court of Appeal has held in *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation,* 2014 BCCA 52 that the appropriate measure is the overall length of time since the action was commenced:

> [38] With respect to the issue of calculating delay, in my view, the chambers judge was overly generous to Ventures when he focused on the time "between the last step in the proceeding and service of the plaintiff's notice of intention to proceed". I agree with Madam Justice Ballance in *Cal Coast Spas Inc.* that what matters is a plaintiff's delay in prosecuting the action once it has been commenced. This was the approach articulated by this Court in *Pacific Hunter Resources Inc. et al. v. Moss Management Inc.*, 2004 BCCA 40 at para. 36, and is an accurate reflection of the law. Additionally, delay in an action should not be considered piecemeal. The proper approach is to consider it holistically; that is, whether the overall delay in prosecuting an action is inordinate.

[22] I have, however, considered both measures of time to allow for any argument that the plaintiff should not be prejudiced by the period of time in which the application to strike was being litigated. It has been over seven years since the Court of Appeal upheld Justice Grist's order striking portions of the claim, and almost six years since the FANOCC was filed. No further steps have been taken to advance the claim since then.

[23] A delay of over four years, in which nothing has occurred, is inordinate, and should not be normalized by the court: *Trinity Western University v. Johnson Controls LP,* 2022 BCSC 1632 at para. 13. Actions have been dismissed for delays of comparable length, especially when the plaintiff has failed to take any real steps

2024 BCSC 1925 (CanLII)

to advance the action - see e.g. *Trinity* (four years); *Mangat v. Hehar*, 2022 BCSC 480 (five years); *Unrau v. McSween*, 2013 BCCA 343 (three years); *Drennan v. Smith*, 2021 BCSC 1302 (five years).

2024 BCSC 1925 (CanLII)

[24] As I have said, I agree with the defendant that the delay in advancing this civil claim is inordinate.

Explanation for Delay

[25] The next stage in the analysis examines the explanation for the delay.

[26] The applicant's thorough canvassing of the facts demonstrated no ostensible excuse for the inordinate delay.

[27] For his part, counsel for the plaintiff acknowledged that it may appear to the defendant applicant that no steps had been taken for some time in advancing the claim, but that this is, in fact, not so. Instead, he says, the plaintiff has been taking steps outside the trial process that should be considered as either advancing the process or as an excuse for the inordinate delay in the process.

[28] The explanation for the delay advanced by counsel for the plaintiff is that Mr. Krist was trying to gather information from third parties relating to the RCMP and Director's knowledge of his equitable interest in the Mission Property in 2011. He further states that this issue goes to what he described as "the crux" of Mr. Krist's civil claim, which was that Mr. Krist was never granted standing in the Forfeiture Action, but should have been, because of his interest in the Mission Property.

[29] The two particular points of evidence counsel for the plaintiff pointed to in support of this assertion were a) a 2023 letter from the RCMP with respect to a complaint the plaintiff had filed against two RCMP officers that indicated the RCMP were aware in 2008 of the plaintiff's equitable interest in the Mission Property, and b) a 2012 email exchange between the plaintiff and the Director of Civil Forfeiture regarding the personal property left at the Mission Property that was the subject of civil forfeiture.

[30] Neither the explanation nor these two documents provides a reasonable or sufficient excuse for the delay in prosecuting this claim.

[31] This explanation must be considered in light of what has preceded the present application, including the Court of Appeal's dismissal of Mr. Krist's appeal from Justice Grist's order to strike.

[32] In addressing the grounds of appeal, Savage J.A. reviewed the evidence, writing for the Court:

> **C. Participation in Forfeiture Proceeding**
>
> [37] Mr. Krist says the Chambers Judge erred in fact and law in finding that he "fully participated" in the Forfeiture Proceeding. He says the Chambers Judge mischaracterized Sewell J.'s findings.
>
> [38] Mr. Krist particularizes the erroneous findings on full participation as (1) finding that the Consent Order was entered into with Mr. Krist's ostensible and actual authority, and (2) by including Mr. Krist by name in the preamble to the orders in the Forfeiture Proceeding he was provided an opportunity to respond.
>
> [39] With regard to actual and ostensible authority Justice Sewell said:
>
>> [28] In this case, I am satisfied that Mr. Miller had ostensible authority to enter into the settlement and that no limitation on his authority, if any existed, was disclosed to the Director's counsel at any time before the consent order was entered and acted upon.
>>
>> …
>>
>> [30] <u>I am also of the view that the evidence does not show that Mr. Miller acted without actual authority when he signed the order. Neither applicant before me stated in their affidavits that they did not agree to the settlement terms embodied in the consent order. The language of the affidavits of both applicants is carefully drafted and quite limited. If focuses entirely on the form of the order and says nothing about the substance of the settlement embodied by that order</u>.
>>
>> [Emphasis added by Savage J.A.]
>
> [40] As I read it, the finding that Mr. Miller had authority applies to both Ms. Griffey and Mr. Krist. Earlier in his reasons the judge referred to affidavits filed by Ms. Griffey and Mr. Krist. Mr. Krist described the engagement of Mr. Miller as counsel in these terms:
>
>> 5. <u>I knew Michael Miller as a personal friend and a lawyer and so I approached him to discuss the situation</u>.
>>
>> 6. <u>He agreed to take the case</u>.
>>
>> 7. He spoke to <u>both</u> Ms. Griffey and myself about the case.

2024 BCSC 1925 (CanLII)

> 8. In summer and fall of 2011, Ms. Griffey and myself spoke to him regarding an order.
>
> [Emphasis added by Savage J.A.]

[41] In the proceedings before Mr. Justice Silverman, counsel (Mr. Hendery) advised the Court:

> Mr. Krist and Ms. Griffey hired counsel when they found out in March ’11 that proceedings had began. That was March 14th, ’11, the proceedings began. Three years later, after the police searched the property in 2008, alleged unlawful activity, and three years later proceedings began for forfeiture for the Degraff property.
>
> Mr. Krist and Ms. Griffey hired counsel. In 2011 a consent -- the preservation order was made in August, the consent order was made in October…”

[42] It should be emphasized that the application before Mr. Justice Sewell was made by both Ms. Griffey and Mr. Krist to have the Consent Order set aside. The judge was being asked to set aside the Consent Order on the basis that neither Ms. Griffey nor Mr. Krist had consented to the order. The application was dismissed.

[43] The Chambers Judge found that “It is clear from the preamble to each of the orders that Mr. Krist was included in the notice process, and where the matter was spoken to, the orders followed Mr. Krist being given the opportunity to respond”. The Sewell Order says “on hearing Joel Whysall, solicitor for Lois Lynne Griffey and John Krist”. In the Silverman Order Mr. Krist is the applicant. Mr. Krist appeared before Madam Justice Gropper when the Possession Order was granted. I have outlined above his participation in the proceedings which gave rise to the Consent Order.

[44] Mr. Krist argues that because he was not separately represented throughout the Forfeiture Proceedings he did not fully participate in those proceedings. I disagree. He was involved in retaining counsel (Mr. Miller) at the outset and conferred with counsel leading up to the Consent Order, and was variously represented (by Mr. Whysall, Ms. Grace, Mr. Hendery) in the continuation of those proceedings. Not being separately represented throughout does not mean that Mr. Krist did not fully participate. In my view the Chambers Judge made no error in finding that Mr. Krist had “fully participated” in the Forfeiture Proceedings.

[Emphasis added]

…

[54] The Chambers Judge recognized that Mr. Krist fully participated in the Forfeiture Proceedings. It was open to Mr. Krist to assert his interest in the Property at the very outset. He was aware that a settlement of the Forfeiture Proceedings was achieved by the Consent Order which he unsuccessfully attacked in the proceedings giving rise to the Sewell Order and the Silverman Order. In his affidavit before the Chambers Judge Mr. Krist said “…I have been following developments in the case closely….”

[55] Mr. Krist says that he has new information that the Director, having access to the RCMP files, would have had documents showing Mr. Krist had

2024 BCSC 1925 (CanLII)

> an interest in the Property beyond the 20% allowed to Ms. Griffey in the settlement. He says that the 20% allowed to Ms. Griffey was not a "good deal". However the information Mr. Krist has is not new, but information he had or should have had all along, and is not the proximate cause of any loss he might have.
>
> [Emphasis added]

2024 BCSC 1925 (CanLII)

[33] The last paragraph reproduced above is particularly relevant to the explanation Mr. Krist now advances for his delay in advancing this civil claim. As set out above, Mr. Krist argues that his inordinate delay in advancing the claim should be excused because he has been pursuing evidence, outside the litigation process, that will demonstrate that the Director of Civil Forfeiture knew (because the RCMP knew) that by 2011, that Mr. Krist had an equitable interest in the Mission Property, and accordingly, should have named him directly in the Forfeiture Action.

[34] Not only does para. 55 of *Krist* BCCA demonstrate that the Court of Appeal said evidence of this issue was not "new" information in 2017, it undermines the explanation offered for the delay in proceeding now, in 2024.

[35] It also highlights that the Court of Appeal has already ruled that this is not the proximate cause of any loss Mr. Krist claims.

[36] Furthermore, this provides no reasonable explanation for delay in this proceeding, as pleadings relating to the issue of RCMP or Director of Civil Forfeiture knowledge of Mr. Krist's interest in the Mission Property are Struck Pleadings, pursuant to the Order of Grist J., upheld on Appeal.

[37] I also note that in the January 2018 requisition applying to extend the 90-day timeline within which he was to have filed his ANOCC, Mr. Krist averted to further applications for document discover he wished to make. He has not made those applications. I will not address the further explanation offered by counsel for Mr. Krist that he has been pursuing documents through third party processes because Mr. Krist does not trust the document discovery process under the Rules of Court, as this was not an assertion made in affidavit, nor was any rationale provided for it.

[38] Finally, Mr. Krist pointed to criminal charges that were sworn against him in December 2018 and withdrawn in July 2023. However, it was not apparent how if at all these outstanding charges provided any reasonable explanation for the inordinate delay in advancing this civil claim. His counsel did not press this at the hearing.

2024 BCSC 1925 (CanLII)

Interests of Justice

[39] The third aspect of the test as articulated in *Giacomini Consulting* is “Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?”. Justice Horseman pointed to the non-exhaustive list of factors set out a paragraph 45 in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 as providing a useful starting point for assessing the interests of justice in the context of an application to dismiss for want of prosecution. To this list she 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.”: *Giacomini Consulting* at para. 71.

(a) the prejudice the defendant will suffer defending the case at trial

[40] The applicant provided persuasive evidence of the specific prejudice arising to the defence with the accrual of time.

[41] The events to which the claim relates occurred over 12 years ago. The defendant submits the plaintiff’s claim suggests his evidence will be:

a. the Mission Property did not require cleanup or removal of personal property;

b. the plaintiff had valuable personal property, including gold and silver worth over $2,300,000, which he kept in the sea-can container at issue in these proceedings (the “SeaCan”) and Dodge Aries vehicle at issue in these proceedings (the “Dodge Aries”) on the Mission Property;

c. the plaintiff’s personal property was secure and safe at the Mission Property;

d. the plaintiff's personal property was lost or stolen when the defendant's agents accessed the Mission Property, or when it was in storage after the Director authorized its removal;

e. the plaintiff's personal property was not being stored securely by the Director's agent after removal; and,

f. the Dodge Aries was in good reliable working condition.

2024 BCSC 1925 (CanLII)

[42] The defendant denies the plaintiff's version of events, and says facts the defendant would have to prove at trial through witness evidence include:

a. in May 2012, after the Mission Property had been forfeit to the Director, the Director's agent was provided keys by L. Griffey to access the Mission Property;

b. moveable property appeared to have been abandoned at the Mission Property;

c. clean up of the Mission Property was needed in order to market it for sale;

d. the SeaCan appeared abandoned and was unsecure by May 2012;

e. the Dodge Aries likewise appeared abandoned and was unsecure by May 2012; and

f. the Mission Property had long been uninhabitable and subject to vandalism.

[43] The defendant says witnesses with the necessary knowledge and observations regarding these points and to assist the court in determining facts relevant to the dispute may not be available or cannot be found. For example, the employee who accessed the Mission Property on behalf of the Director retired five years ago. The individual who was contracted by the Director to do the clean up of the Mission Property cannot be found, including through his former company, despite the defendant's efforts. The defendant says there has been actual loss of evidence. I accept this, particularly with respect to the individual who cannot be located.

[44] Furthermore, the defendant says this Court should presume that delay will result in witnesses being less able to recount events, citing *Ed Bulley Ventures* at para. 55. The defendant says the extent of the loss of evidence at this point is unclear. Witnesses may no longer be available, or their memories will have faded

over the past twelve years and will continue to fade before this action can be brought to trial. There is no trial date. The steps necessary to prepare for trial, such as document production and discovery, remain outstanding and unscheduled.

[45] As I have explained, I accept that the particular prejudice to the defendant, without considering the additional *Giacomini Consulting* factors, is sufficient to satisfy the third aspect of the test for want of prosecution in the particular circumstances of this case.

[46] However, as noted, in my view the rationale for dismissal for want of prosecution is only strengthened when the additional factors are considered.

(b) the length of the delay

[47] The length of delay is significant, approximately six years since the last step, nine years since the action was commenced. This is beyond the range of delays found to be insupportable in other cases, as set out above.

[48] As noted, counsel for the plaintiff concedes the delay is inordinate. He argues however that equitable principles should be considered where the delay lies outside the range under common law. It is not, however, apparent what equitable principle applies.

[49] It is not in the interests of justice to allow the claim to proceed in light of the length of delay.

(c) the stage of the litigation

[50] The litigation is at an early stage. It has not progressed past the first steps of exchange of pleadings.

[51] I note that on the test for want of prosecution cited by the respondent, the Court is directed to consider “the earliest date by which the action could be readied for trial after its reactivation by the plaintiff.” As noted, the test relied on by the respondent is narrower than that endorsed by the Court of Appeal in *Giacomini Consulting*, however, even on the test relied upon by the respondent, the standard is

2024 BCSC 1925 (CanLII)

not met. The respondent provided no evidence nor made any submissions as to the date by which the trial of the action could be readied. In fact, based on the respondent's submissions, there is no estimation of when discovery processes may be underway, as the respondent does not trust the document disclosure process under the Supreme Court Rules, and has preferred to seek evidence outside the trial process.

2024 BCSC 1925 (CanLII)

[52] In his January 2018 requisition seeking an extension of time to file his FANOCC the plaintiff indicated he would be making applications for document production. He has not done so in over six years.

[53] Consideration of this factor does not weigh in favour of allowing the claim to proceed.

(d) the impact of the delay on the defendant's professional, business, or personal interests

[54] The defendant points to two factors relevant to the impact of the delay on the defendant's interests:

a) The assertions made within the litigation are extremely serious, and include allegations of wilful malice against the Director and other individuals in carrying out their statutory and professional duties.

b) There is also actual prejudice to the defendant in the form of ongoing storage costs.

[55] I agree that both of these factors weigh in favour of dismissing the action for want of prosecution.

[56] In *Sean Coutts Consulting Inc. v. SendtoNews Video Incorporated,* 2021 BCSC 1458, in which "various allegations of improper and fraudulent conduct on the part of the defendant" were set out in the pleadings, Chief Justice Hinkson (as he then was) held at para. 9: "The question of prejudice to the defendant is satisfied, in my view, by the scandalous allegations that are included in the pleadings and remain unresolved." In my view, the same principle applies in this case.

2024 BCSC 1925 (CanLII)

[57] Additionally, the storage costs of the plaintiff's personal property that are being borne by the Director while the case remains outstanding are significant. They are estimated by the Director to be approximately $400,000 to date. The Director has attempted to avoid these costs and deliver the plaintiff's Personal Belongings to him, but the plaintiff has refused. The Director is not prepared to sell the personal property without an order of the Court while the civil claim is outstanding, as there may be evidentiary value to the property.

[58] At the hearing of the application, counsel for the plaintiff argued that these costs should not be held against the plaintiff, as the January 21 2015 Possession Order issued by Justice Russell authorized the Director to dispose of all personal property left on the Mission Property, and therefore the Director need not have retained the personal property, and nor is the relief allowing sale that is sought in the within application necessary.

[59] I note that Russell J.'s order required all persons in possession of the property "including Ms. Griffey and Mr. John Krist" to deliver vacant possession of the Mission Property and remove all personal property by 31 March 2015. As the Court of Appeal noted: "No one appeared at the hearing on behalf of Ms. Griffey or Mr. Krist but they had notice of the application and are referred to in the preamble to the Possession Order and in the body of the Possession Order as I have noted. The Possession Order was not appealed." Based upon his submission in the within application, Mr. Krist appears to continue to accept the Possession Order is a valid order binding on him, as he did before Justice Grist.

[60] The defendant says that this is a new position advanced by the plaintiff, and that in any event the Possession Order does not allow for the sale of the Personal Belongings, which were taken into possession of the Director in 2012.

[61] I accept this, and will make the order for sale sought in the within application.

2024 BCSC 1925 (CanLII)

(e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed

[62] The applicant submits that almost all of the steps in this proceeding, since it was brought in 2015, nine years ago, have been initiated by the defendant, and it is not a defendant's responsibility to prosecute a proceeding.

[63] Only after the defendant brought compliance proceedings after the order to strike was upheld in February 2017 did the plaintiff file his FANOCC in October 2018. The plaintiff has taken no steps since then.

[64] This factor additionally weighs in favour of dismissal for want of prosecution.

(f) the reasons offered for the delay

[65] I have reviewed above the reasons offered for delay which focus on the plaintiff's efforts to obtain evidence that the RCMP and Director knew he had an interest in the Mission Property in 2011.

[66] The Court of Appeal held in February 2017 that that was not "new" information, nor did it pertain to the proximate cause of any loss the plaintiff suffered. Moreover, the issue the plaintiff continues to pursue—what his counsel called the "crux of his case" at the hearing of this application, that "he never had standing" in the Forfeiture Action—has been struck from his claim, under the Struck Pleadings.

[67] I do not find that those reasons suggest that it is in the interests of justice that the action proceed despite the existence of inordinate and inexcusable delay.

(g) the role of counsel in causing the delay

[68] I do not give this factor significant weight in these circumstances. I note only that the plaintiff has been represented by different legal counsel over the course of these proceedings. His present legal counsel came on record as counsel more than a year ago, on August 3, 2023.This application was filed just before that in July 2023. No steps were taken by the plaintiff's present counsel until the application was brought on for hearing.

(h) the public interest in having cases that are of genuine public importance heard on their merits

[69] There is nothing in the record before me that suggests this factor warrants allowing the case to proceed despite inordinate and inexcusable delay.

(i) merits—is the claim bound to fail?

[70] Given the above, I see no reason to go further and determine whether the claim is bound to fail. Even if it is not, the factors I have considered above weigh against allowing the claim to proceed despite inordinate and inexcusable delay.

2024 BCSC 1925 (CanLII)

Conclusion

[71] Accordingly, I allow the application and make the following order:

1. The plaintiff's claim is dismissed pursuant to Supreme Court Civil Rule 22-7(7) for want of prosecution.

2. All items moved from 12975 Degraff Road, Mission, BC, currently being held by the Province with respect to this action (the "Personal Belongings") are deemed abandoned and shall be sold or disposed of by the Province, as the case may be.

3. The Province has exclusive conduct of sale of the Personal Belongings and shall make reasonable efforts to sell the Personal Belongings as soon as practicable.

4. The Province may retain one or more auctioneers, liquidators or agents to offer the Personal Belongings for public sale. In the event that no offer for purchase of some or all of the Personal Belongings is received, the Province may dispose of some or all of that Personal Belongings.

5. The net proceeds of the sale of the Personal Belongings, if any, shall set off any costs payable by the plaintiff to the Province in this action, and sale proceeds shall be paid out in the following order:

a. the reasonable expenses of the Province of inventorying, moving, repairing, processing or preparing for disposition and disposing of the Personal Belongings, including auction fees and commissions, and storage from the date of this Order;

b. the reasonable expenses of the Province in storing the Personal Belongings from May 14, 2012 to the date of this Order;

c. costs payable by the plaintiff to the Province.

6. Costs of this action are awarded to the Province.

"Giltrow J."

2024 BCSC 1925 (CanLII)

Appendix A

March 14, 2011	Civil Forfeiture Action filed by Director of Civil Forfeiture (“Director”) re: 12975 Degraff Road, Mission (“Property” and “CF Action”)
April 12, 2011	L. Griffey files response to civil claim (CF Action)
October 6, 2011	Consent settlement order filed (CF Action)
May 2012	Director’s agent accesses Property
October 23, 2013	Order for conduct of sale of Property to Director (CF Action)
February 4, 2013	J. Krist files affidavit alleging theft of gold and other valuables occurring May 2012 (CF Action)
February 26, 2014	Dismissal of J. Krist application to set aside consent settlement order (CF Action)
January 21, 2015	Order for vacant possession of Property to Director (CF Action)
March 31, 2015	Dismissal of J. Krist application to be added as defendant (CF Action)

2024 BCSC 1925 (CanLII)

October 30, 2015	Order for writ of possession of Property to Director (CF Action)
November 16, 2015	Plaintiff files notice of civil claim herein
December 4, 2015	Defendant files application to strike portions of notice of civil claim
December 15, 2015	Plaintiff files amended notice of civil claim
January 12, 2016	Defendant files application to strike portions of amended notice of civil claim
February 5, 2016	Plaintiff files application for injunction to prevent Defendant taking possession of Property
February 17-18, 2016	Strike application granted with special costs against plaintiff; injunction application dismissed with special costs against plaintiff ("Strike/Injunction Decision")
February18, 2016	J. Krist held in contempt of court and ordered to vacate Property by March 14, 2016 (CF Action)
March 18, 2016	Plaintiff files appeal of Strike/Injunction Decision

2024 BCSC 1925 (CanLII)

April 29, 2016	J. Krist held in contempt of court re: vacating Property (CF Action)
July 2016	Property sold (CF Action)
February 20, 2017	Appeal of Strike/Injunction Decision dismissed with costs against plaintiff
October 23, 2017	Case Planning Conference. Plaintiff ordered to file further amended notice of civil claim in compliance with Strike/Injunction Decision within 90 days
January 22, 2018	Plaintiff files requisition seeking to adjourn 90-day deadline to file further amended notice of civil claim
February 1, 2018	Defendant responds to requisition, objecting to extension
August 29, 2018	Defendant files application to strike further amended notice of civil claim for non-compliance with case plan order (“Strike Application”)
September 24, 2018	Order by consent adjourning Strike Application and that plaintiff file further amended notice of civil claim by October 31, 2018
October 26, 2018	Plaintiff files further amended notice of civil claim

2024 BCSC 1925 (CanLII)

November 7, 2018	Plaintiff's legal counsel returns signed September 24, 2018, order
December 3, 2018	Defendant files response to civil claim
December 18, 2018	Criminal charges sworn against plaintiff
July 12, 2023	Criminal charges stayed

2024 BCSC 1925 (CanLII)