

v. British Columbia (Minister of Public Safety and Solicitor General)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

M.G. Thomas J. (In Chambers)

Heard: April 28, 2022.

Judgment: April 28, 2022

Docket: [REDACTED]

Registry: Victoria

[2022] B.C.J. No. 1118 | 2022 BCSC 1049

Between [REDACTED] Plaintiff, and Her Majesty the Queen in Right of the Province of British Columbia, (Minister of Public Safety and Solicitor General), John/Jane Doe #1, John/Jane Doe #2, John/Jane Doe #3, John/Jane Doe #4, John/Jane Doe #5, and John/Jane Doe #6, Defendants

(32 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Applications and motions — Conduct of hearing — Procedure — Delay or failure to prosecute — Trials — Setting down for trial — Judgments and orders — Costs — Application by defendant applicant to have action dismissed for want of prosecution, dismissed — Applicant's position was plaintiff had failed to take procedural steps besides filing notice of civil claim over five-year period — Applicant noted that given time was short period for such Draconian remedy — Respondent argued that this was tactical decision by applicant to see if matter would go away on its own or if they could sit in weeds and wait for successful want of prosecution application — Application was not frivolous and applicant did not act unreasonably or improperly in bringing application.

Application by defendant applicant to have action dismissed for want of prosecution. The applicant's position was that the plaintiff had failed to take any procedural steps besides filing the notice of civil claim over a five-year period. The applicant noted that five years was a relatively short time period for a Draconian remedy, but three factors made dismissal appropriate. The applicant said that the allegations involve serious intentional misconduct by the Crown's agents, who were correctional officers. The respondent argued that this was a tactical decision by the applicant to see if the matter either would go away on its own or that they could essentially sit in the weeds and see if sufficient time would pass for want of prosecution application to be successful. The respondent said the applicant had conceded that delay in this case was at the low end of the scale in comparison to other cases that have been dismissed for want of prosecution.

HELD: Application dismissed.

The application was not frivolous, and the applicant did not act unreasonably or improperly in bringing the application. The court agreed with the applicant that awarding the respondent costs in any event of the cause would effectively reward the plaintiff for his inordinate delay in prosecuting an action that, by

hypothesis lacks merit. The respondent was awarded the usual order for costs, costs to the respondent in the cause.

Counsel

Counsel for the Plaintiff: R.L. Neary.

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia: K.S. Fast, L.F. de Lima, T. Brant.

For all John/Jane Doe Defendants: No appearances.

Oral Reasons for Judgment

M.G. THOMAS J. (orally)

1 This is an application to have the action dismissed for want of prosecution. The applicant's position is the plaintiff has failed to take any procedural steps besides filing the notice of civil claim over a five-year period.

2 The applicant notes five years is a relatively short time period for such a Draconian remedy, but three factors make dismissal appropriate:

1. the allegations involve intentional wrongdoing on behalf of prison guards employed by the Province;
2. insufficient explanation for the delay has been provided; and
3. the delay for at least three of the five years was for tactical reasons as the plaintiff had reason to expect a class action might encompass his action or he might be a representative for a class action.

3 The respondent says the critical issue is the delay has not caused any evidentiary issues that could impact the trial. The applicant cannot succeed without a finding of serious prejudice to the delay.

Underlying Facts

4 I am not going to read the underlying facts. Instead, I am going to refer to various paras. in the application record for the facts contained therein:

- a) for the applicant's response, para. 1;
- b) for the notice of application, paras. 3-5;
- c) from the application response, paras. 3-6;
- d) from the notice of application, paras. 5-6;
- e) from the application response, paras. 8-17;
- f) from the notice of application, para. 8;
- g) from the application response, para. 18;
- h) from the notice of application, para. 9;

- i) from the application response, paras. 19-21;
- j) from the notice of application, para. 10; and
- k) from the application response, paras. 22-31.

Legal Test

5 The parties are in agreement the appropriate legal test is set out in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, [2009 BCCA 535](#), at paras. [27-28](#):

[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.

6 I will consider each of the factors set out in para. 27.

Inordinate delay

7 In my view, at least three years of delay are due to the plaintiff's decision not to prosecute this action because he wished to see if he could join his action with a potential class action or see if a lawyer would use his action as the basis for a class action. I am aware of the respondent's position that the fact the defendant did not file a response and did not insist the matter be moved forward is a relevant consideration in considering delay and have considered it in coming to my conclusion.

8 The applicant says that the allegations involve serious intentional misconduct by the Crown's agents, who are correctional officers. In my view, the allegations are neither vexatious nor scandalous but do question the ethics and integrity of the Crown and the unnamed officers. There is no evidence that any of the unnamed officers have been emotionally impacted by the action. The thrust of the applicant's position is that the allegations could undermine public confidence in the Crown or prison system. I note the legislature did not address this issue in the *Crown Proceeding Act*, [R.S.B.C. 1996, c. 89](#) which specifically allows actions that contain these types of actions to be brought, and the allegations in this case as mentioned earlier are neither vexatious nor scandalous.

9 The respondent notes that if the impact on the public is of such a concern, the applicant should have raised these concerns and provided notice to the plaintiff that he should have proceeded with the litigation more expeditiously, and their failure to do so prior to this application should preclude their ability to raise it now. This issue was not raised in a manner critical of the conduct of the way that this matter

has been handled by Crown counsel. I have reviewed the correspondence and the conduct of counsel has been professional throughout the proceedings. Although the lack of notice is a factor to be considered, in my view it is not a bar to raise in this issue.

10 In considering all the circumstances, I am of the view the allegations against the Crown made in this case are not a factor which dictates that the case be prosecuted more quickly as suggested by the applicant.

11 The respondent argues that this was a tactical decision by the applicant to see if the matter would either go away on its own or that they could essentially sit in the weeds and see if sufficient time would pass for want of prosecution application to be successful.

12 In my view the plaintiff has an obligation to prosecute the claim; see *Cal Coast Spas Inc. v. Coast Spas Inc.*, [2008 BCSC 846](#), at para. [51](#). However, the conduct of the defendant is a factor that should be considered both in assessing whether delay is inordinate and the fourth part of the test. In this case, I find the applicant's conduct to be a neutral factor in both instances.

13 The respondent says the applicant has conceded that delay in this case is at the low end of the scale in comparison to other cases that have been dismissed for want of prosecution. Given the pandemic occurred, which suspended the limitation period for a year, the delay in this case is acceptable.

14 I was referred to and of the view the comments of the Court in *Drennan v. Smith*, [2022 BCCA 86](#), at paras. [59-62](#) [*Drennan*], are applicable. In the context of how cases of this type typically should proceed, I find there has been inordinate delay. In my view, the delay in this case has been inordinate.

Explanation for the delay

15 I agree with the applicant the inordinate delay was largely tactical in the sense the plaintiff hoped to obtain an advantage by waiting to see if a class action was brought or could be brought. As such, in my view the comments set out in para. 11 of *Irving v. Irving*, [1982 CanLII 475](#) [*Irving*], are appropriate. The respondent has provided some explanation for a limited part of the delay and issues related to the pandemic certainly were a factor, but in my view, the primary explanation is that the plaintiff chose to wait to see if he could attach himself to a class action or form the basis for a class action. On this basis, I find the delay associated with this decision under the meaning in *Irving* to be inexcusable.

Serious prejudice

16 The applicant concedes there is no specific indication that evidence has disappeared or being tainted and there is no specific issue with *viva voce* evidence outside of the general impact the passage of time has on the witness' memory. But on this latter part, he says there is presumption that the passage of time will impair the witness' memory. He relies upon *Gill v. Hepburn*, [2012 BCSC 439](#), at para. [88](#), for this proposition. He notes this matter has been delayed by five years due to the plaintiff's delay and it could take two to three years more for the matter to be ready for trial at its current stage. This could result in witnesses testifying nine to ten years after the event.

17 The respondent says the incident has been videotaped, there was an internal investigation, and the officers were interviewed and presumably provided statements. There is no real prejudice and the impact of fading memories in these circumstances could not possibly amount to serious prejudice. He points out that if there was a risk of serious prejudice, the applicant would have led evidence establishing this fact.

In this case, the applicant has admitted there is no specific prejudice and simply relies on the notion of general prejudice arising from fading memories due to the passage of time.

18 In my view, the applicant has overstated the impact of fading memories. The issue is not the impact that a nine to ten-year delay would have on the evidence, but what impact would the delay have on when the trial should have been heard absent the delay. In this case, the incident was videotaped from multiple angles, there was an extensive investigation conducted, and all the witnesses were interviewed as part of the investigation. The unpreserved evidence, if there is any, as to the motivation of the officers involved and the degree of force used in my view are not prone to significant degradation over the passage of time caused by the delay. The mere assertion of a general risk of memory degradation in these circumstances does not create serious prejudice resulting in a substantial risk that a fair trial would not be possible.

19 The respondent says no case is provided to me, nor is he aware of any case, in which this type of application has been dismissed without a finding of serious prejudice. Therefore, if I were to find the delay has not caused serious prejudice, I should end the inquiry and dismiss the application. I disagree. In my view, lack of serious prejudice is but one factor I need to consider, but the last factor of the test on the balance of justice encompasses at least the other three factors and is the most important and decisive question.

20 I now turn to the final consideration.

On balance, justice requires dismissal

21 Despite the inordinate and inexcusable delay, the lack of serious prejudice within all of the circumstances of this case is the most important consideration and in my view is the decisive factor in this case. However, in my view, it is important to assess all the factors together in this final analysis, even if one of the factors has not been met.

22 The application is dismissed.

23 I would like to thank both counsels for their helpful submissions.

Addendum

24 The parties provided me with written submissions on costs.

25 The usual order for costs arising from this application would be to the respondent in the cause.

26 In this case, the respondent wished to be awarded costs in any event of the cause payable forthwith on the basis:

- a) the application is of a discrete nature and lacks connection to the merits of the case;
- b) the application was bound to fail and ought not to have been brought because the delay of the plaintiff did not result in prejudice to the ability to have the case heard at trial; and
- c) to deter similar conduct by the applicant in this case and others.

27 The applicant says the plaintiff's inordinate and inexcusable delay gave rise to the application and for

that very reason the Court is justified in awarding costs to the defendant. The critical issue raised by the application was whether the interests of justice dictated the action be dismissed.

28 Although I ultimately dismissed the application, in my view, in the circumstances of this case, combined with the policy concern associated with delay in prosecuting actions set out in *Drennan*, at paras. 59-62, the application was not frivolous and the applicant did not act unreasonably or improperly in bringing the application.

29 The application was prompted by the plaintiff's inordinate and inexcusable delay in prosecuting the action.

30 I agree with the applicant that awarding the respondent costs in any event of the cause would effectively reward the plaintiff for his inordinate delay in prosecuting an action that, by hypothesis (if the action is dismissed), lacks merit.

31 For the reasons set out above, I also am of the view that an order for costs payable forthwith is not justified.

32 The respondent is awarded the usual order for costs, costs to the respondent in the cause.

M.G. THOMAS J.