

CANADA / JUDGMENT

Boucher v. Garnett

2025 BCSC 1319

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Supreme Court of British Columbia

DECIDED

11 July 2025

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2025 BCSC 1319 Boucher v. Garnett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boucher v. Garnett,

2025 BCSC 1319

Date: 20250711

Docket: E14385

Registry: Rossland

Between:

John Patrick Boucher

Claimant

And

William Gurnull Garnett also known as William Gernal Garnett

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Claimant:

C.A. Miller

Counsel for the Respondent:

J.T. Gelber

Place and Date of Hearing:

Rossland, B.C.

January 30, 2025

Place and Date of Judgment:

Rossland, B.C.

July 11, 2025

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Introduction

- [1] The respondent, William Garnett, applies for an order dismissing the claim made by the claimant, John Boucher, for want of prosecution, pursuant to Rule 21-2(5) of the Supreme Court Family Rules, B.C. Reg. 169/2009. Mr. Boucher opposes the application.
- [2] The parties began living together in a marriage-like relationship in 2002. They disagree about the date of separation: Mr. Garnett says that they separated in 2012. The notice of family claim was filed by Mr. Boucher on April 16, 2016. Mr. Boucher pleaded in the notice of family claim that they separated on April 11, 2016. In his seventh affidavit, made September 13, 2024, and his application response, Mr. Boucher said that the parties reconciled on February 1, 2017, and that they finally separated on May 2, 2024.

- [3] This application was filed on August 22, 2024. For the reasons that follow, I have concluded that the over eight year delay since the claim was filed is both inordinate and inexcusable, and that it is not in the interests of justice to allow the claim to proceed. I therefore grant the application to dismiss Mr. Boucher's claim for want of prosecution.

Chronology

- [4] Mr. Boucher filed the notice of family claim on April 12, 2016 in Kelowna Supreme Court. He sought the division of family property and spousal support.
- [5] On April 14, 2016, Mr. Boucher caused certificates of pending litigation ("CPLs") to be registered against four properties owned by Mr. Garnett: Mawdsley Lane (in Procter); Old Waneta Road (in Trail); Van Horne (in Cranbrook); and Bailey Street (in Trail). I will briefly describe those properties and what has happened to them to date. Mr. Garnett lives in the Bailey Street Property. Mr. Boucher moved into that property with Mr. Garnett in or around 2002, and they lived there together until early 2012. The Mawdsley Lane Property was a recreational property. It was sold in 2024, with \$307,000 from the proceeds of sale held in trust pending court order or the parties' agreement. The Van Horne Property was sold in or about July 2022. The Old Waneta Road Property is a commercial property where Mr. Garnett operated Columbia Valley Greenhouses Ltd. CPLs remain in place against the Old Waneta Road and Bailey Street properties.
- [6] On May 2, 2016, Mr. Boucher obtained an ex parte order for exclusive occupancy of the Bailey Street Property, and other relief. Despite obtaining this order, Mr. Boucher did not subsequently reside at the Bailey Street Property.
- [7] On May 11, 2016, Mr. Garnett filed an application to set aside the ex parte order and to move the file to Rossland Supreme Court. Mr. Boucher filed a cross-application seeking interim spousal support.
- [8] On June 14, 2016, Mr. Garnett filed his response to family claim. In it, he asserted that Mr. Boucher's claims were brought out of time, relying on the April 2012 separation date.
- [9] On November 23, 2016, Mr. Justice Rogers heard both applications. He reserved judgment to December 6, 2016. In reasons indexed at 2016 BCSC 2284, Rogers J. dismissed Mr. Boucher's claim for interim spousal support. In separate reasons released that same date, Rogers J. granted Mr. Garnett's application to move the file to Rossland.
- [10] On November 29, 2016, counsel for Mr. Boucher wrote Supreme Court Scheduling with respect to setting the matter down for trial in Rossland in 2017. In his letter, he acknowledged that there was some urgency to the matter being heard in light of Mr. Garnett's then recent cancer diagnosis. Also on November 29, 2016, counsel for Mr. Boucher wrote counsel for Mr. Garnett with respect to scheduling an examination for discovery and obtaining appraisals of Mr. Garnett's properties.

- [11] The parties broadly agree that, starting in or about January 2017, they visited one another from time to time, and attempted to reconcile. Mr. Boucher says that those attempts were successful, and that the parties reconciled on February 1, 2017; Mr. Garnett agrees that they attempted to reconcile, and that they visited one another from time to time until in or about January 2019, but says that they never reconciled.
- [12] On February 3, 2017, counsel for Mr. Boucher wrote counsel for Mr. Garnett a letter, referring to a handwritten letter from Mr. Garnett saying that the date of separation was April 2016, and that the parties had reconciled. In the same letter, he requested confirmation that counsel for Mr. Garnett would be drafting a number of documents including a cohabitation agreement, the transfer of shares to Mr. Boucher in Columbia Valley Greenhouses Ltd., land title transfers making Mr. Boucher a joint tenant on all properties owned by Mr. Garnett, and a new will. On February 17, 2017, counsel for Mr. Boucher wrote counsel for Mr. Garnett, confirming that the scheduled examination for discovery would not be occurring. On May 25, 2017, counsel for Mr. Garnett wrote counsel for Mr. Boucher, stating that he had met with Mr. Garnett and confirmed that the parties had reconciled. Mr. Garnett had executed a new will bequeathing most of his property to Mr. Boucher. He asked counsel for Mr. Boucher to withdraw or discontinue the claim. On August 24, 2017, counsel for Mr. Boucher wrote counsel for Mr. Garnett stating that he understood the latter would be drafting a cohabitation agreement, and that once it and the other documents were signed, "our client will likely provide us with the instructions at that time to remove the various certificates of pending litigation."
- [13] On March 2, 2018, Mr. Boucher had the CPL on the Old Waneta Road Property cancelled.
- [14] On December 17, 2019, Mr. Garnett filed a notice of application seeking the cancellation of the remaining CPLs and dismissal of the claim for want of prosecution. The application was adjourned generally and never heard. Mr. Garnett says that that was due to his ill health and lack of funds.
- [15] On January 22, 2020, counsel for Mr. Boucher wrote counsel for Mr. Garnett about the then pending application. He indicated they were not available on the scheduled hearing date, and noted that no notice of intention to proceed had been filed. He suggested an alternate hearing date.
- [16] On March 2, 2020, counsel for Mr. Garnett wrote counsel for Mr. Boucher, in reply to his letter of February 6, 2020, with respect to setting dates for examinations for discovery and trial, and document disclosure. Dates were not set.
- [17] In July 2022, Mr. Boucher released the CPL from the Van Horne Property in exchange for the payment of \$18,560. This was done to facilitate the pending sale of the Van Horne Property.
- [18] On May 9, 2024, Mr. Boucher released the CPL from the Mawdsley Property in exchange for the transfer of a manufactured home owned by Mr. Garnett in New Brunswick into Mr. Boucher's name, and on condition that the proceeds of sale be held in trust.

- [19] On May 10, 2024, Mr. Boucher filed an amended notice of family claim. He did not file a notice of intention to proceed prior to doing so, as required by Rule 21-2(4). In his amended notice of family claim, Mr. Boucher continues to plead that the parties separated on April 11, 2016. In it, he made a claim on the Old Waneta Road Property, which as a result has a new CPL registered against it.

Analysis

The test for dismissal for want of prosecution?

- [20] I recently summarized the test for dismissal of a civil action for want of prosecution in *Weiser v. Marsh*, 2025 BCSC 459. I adopt the summary as set out at paras. 33-39 of that decision:
- [33] The current test for dismissal of civil action for want of prosecution was established by the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [Giacomini]. Under *Giacomini*, the first two factors remain as they were set out in the previous case law.
- [34] First, has there been inordinate delay? As stated at para. 38, an inordinate delay is one that is "uncontrolled, immoderate, excessive and out of proportion to the matters in question". The assessment of whether delay is inordinate requires a consideration of the circumstances of the case. Fraud is given as an example of the sort of case in which the court may be less forgiving of litigation delay. Delay is measured from the date the action was commenced.
- [35] Second, is the delay inexcusable? As set out at para. 40, the reason for the delay must be assessed in the circumstances of the case. "As a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable". The court should consider if the delay was intentional and tactical, or the result of "dilatoriness, negligence, impecuniosity, illness or some other relevant cause". A party who intentionally delays an action assumes the risk of its dismissal.
- [36] In *Giacomini*, the Court revised the third branch of the analysis. Under *Giacomini*, if the first two questions are answered in the affirmative, the court must consider if it is in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay. At paras. 66 and 71, the Court endorsed the non-exhaustive set of factors identified in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2019 SKCA 48 at para 45. Those factors are:
- a) The prejudice the defendant will suffer defending the case at trial;
 - b) The length of the delay;
 - c) The stage of the litigation;

- d) The impact of the delay on the defendant's professional, business, or personal interests;
- e) The context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure from 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.

[37] To this non-exhaustive list the Court in *Giacomini* added at para. 71 one further factor: the merits of the action. A judge should not engage in a searching examination of the merits, but if the action is bound to fail the interests of justice favour its dismissal.

[38] As explained at para. 72, prejudice to the defendant's ability to defend the action remains a relevant and important consideration. But prejudice to a defendant's ability to defend the action is no longer a pre-requisite for dismissal. The court must look to all relevant circumstances.

[39] At para. 68, the Court summed up the changes to the pre-existing test for dismissal as follows:

The approach would change the existing test in two respects: (1) serious prejudice to the defendant arising from delay is not a discrete element of the test, but rather a factor to consider at the interests of justice stage of the analysis, and (2) the impact of the delay on trial fairness is not, invariably, the overriding factor in considering whether it is in the interests of justice to permit a claim to continue.

Is the delay inordinate?

[21] I find that the delay in this case is inordinate. The notice of family claim was filed in April 2016 and this application was filed in September 2024, a delay of over eight years. In *Domirti v. Crescenzo*, 2024 BCSC 422, at paras. 33-37, a delay of almost eight years was held to be inordinate. The same is true here.

Is the delay inexcusable?

[22] In *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, the Court stated at para. 40 that "as a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable". The Court further stated that the explanation for the delay "may go to whether the delay was intentional or tactical, or whether it was the result of 'dilatatoriness, negligence, impecuniosity, illness or some other relevant cause'". Further, "where the delay is also tactical, in the sense that it is intended to prejudice the defendant, this will weigh more heavily against the plaintiff in the analysis".

[23] Mr. Boucher submits that the delay in this case is excusable, based on his position that the parties reconciled in or about February 2017 and did not finally separate until May 2024.

Did the parties reconcile in February 2017?

[24] The parties disagree about whether they reconciled in February 2017. As mentioned earlier, Mr. Boucher says in his seventh affidavit that they did. Mr. Garnett disagrees. In essence, Mr. Garnett's position is that he wanted to reconcile, and took various steps in an attempt to satisfy Mr. Boucher's financial demands for reconciliation, but that they never reconciled.

[25] This issue is significant in two respects in this litigation. Most importantly, for the purposes of the present application, it is relevant to whether Mr. Boucher's delay in prosecuting the claim was excusable. It is also important with respect to the ultimate success of the claim, in that if Mr. Garnett is correct that they separated in 2012, and never reconciled thereafter, the two-year limitation period for filing the notice of family claim had expired prior to it being filed in April 2016.

[26] In support of his position, Mr. Boucher relies on the following. First, on May 24, 2017, Mr. Garnett's counsel wrote Mr. Boucher's counsel a letter in which he wrote that he had met with Mr. Garnett, and confirmed that the parties had reconciled. Mr. Garnett had made a new will, executed May 24, 2017, which bequeathed most of his property to Mr. Boucher. Mr. Garnett executed another will on January 17, 2018, in which he left his entire estate to Mr. Boucher.

[27] Mr. Boucher says that he went to New Brunswick on October 23, 2019 to care for his ailing mother and father. Due to COVID-related travel bans, he says he could not travel to British Columbia after March 2020. His parents both passed away in December 2021; their estates were finalized in July 2023. He says that he spoke with Mr. Garnett multiple times a week on the telephone between October 2019 and May 2024. He says that Mr. Garnett told him many times that he was going to sell his British Columbia properties and live together with him in the manufactured home Mr. Garnett owned in New Brunswick. He says that Mr. Garnett stopped calling him and answering his calls on or about April 1, 2024.

[28] According to Mr. Boucher, he learned from his counsel about a conversation with Mr. Garnett's trustee in bankruptcy on May 2, 2024 that Mr. Garnett had said that their relationship was over. When his counsel told him this, Mr. Boucher said that he was relieved he had not removed the CPLs from the Mawdsley and Bailey Properties. He instructed his counsel to draft an agreement, dated for reference May 2, 2024. According to its recitals, the agreement was a final settlement of ownership of the manufactured home in New Brunswick. The recitals also say that the parties commenced a marriage-like relationship in May 2022, separated on April 11, 2016, and reconciled on February 1, 2017, before finally separating on May 2, 2024.

- [29] Mr. Boucher relies on this agreement as establishing that the parties agreed to the May 2, 2024 separation date. He submits that their agreement as to their separation date is binding on the court.
- [30] In response, Mr. Garnett relies on the following. He says that around the beginning of 2017 Mr. Boucher called him. He wanted to resolve this litigation. Mr. Garnett went to visit Mr. Boucher in New Brunswick in January 2017. According to Mr. Garnett, Mr. Boucher made it clear to him that, in order to reconcile, he would have to make financial arrangements that would ensure he received a portion of his property. He says that over the following two and a half years they visited each other several times, but they never resumed a marriage-like relationship. Mr. Garnett describes their relationship in this period as platonic and says that there was no sexual intimacy.
- [31] Mr. Garnett says that when he returned to British Columbia after visiting Mr. Boucher in New Brunswick in early 2017, he was so desperate to reconcile that he instructed his counsel to draft a cohabitation agreement that would have provided Mr. Boucher with a significant payout if they reconciled and Mr. Boucher remained with him for a fixed period of time. Mr. Boucher never signed the draft cohabitation agreement. Mr. Garnett remained intent on reconciling, so he executed the May 24, 2017 will relied on by Mr. Boucher. He sent the will to Mr. Boucher, who agreed to return to British Columbia, and instructed his counsel to write the May 24, 2017 letter relied upon by Mr. Boucher.
- [32] According to Mr. Garnett, Mr. Boucher stayed with him in British Columbia between July 2017 and late in 2017. He says they did not reconcile. They were cordial and had separate sleeping quarters. Mr. Garnett wanted to reconcile, but Mr. Boucher did not reciprocate. Mr. Boucher communicated to him that, in order to reconcile, Mr. Garnett had to leave him his entire estate. As a result, Mr. Garnett executed the January 17, 2018 will relied upon by Mr. Boucher. Mr. Garnett sent the new will to Mr. Boucher, who agreed to return to British Columbia. He did so for two weeks in February 2018.
- [33] According to Mr. Garnett, the parties still did not reconcile. Mr. Boucher insisted that, for them to reconcile, Mr. Garnett would have to add him as a joint owner of his various properties. Mr. Garnett refused to do so. He says that he knew that, if he did so, he would never see Mr. Boucher again. Further, Mr. Garnett says that he was starting to realize that Mr. Boucher was using his emotional dependence to extract financial gain from him.
- [34] Mr. Garnett says that he asked Mr. Boucher to withdraw this lawsuit and the CPLs, which he refused to do. He did agree to remove the CPL on the Old Waneta Road Property, but not on the Mawdsley Property, the Bailey Property or the Van Horne Property. Mr. Garnett says that, from this point on, he knew that Mr. Boucher had no intention of reconciling with him.
- [35] Mr. Garnett says that he went to visit Mr. Boucher one last time in New Brunswick in January 2019. As of November 27, 2024, the date of making his sixth affidavit, Mr. Garnett swore that the parties had not seen one another since he left New Brunswick on February 18, 2019.

- [36] Mr. Garnett executed a new will in or around 2021, leaving his estate to his then bookkeeper. He has since destroyed that will, and on April 18, 2023, executed his current will, in which he leaves his estate to a friend and her two children.
- [37] Mr. Garnett says that in 2024, he needed to sell the Mawdsley Property due to his impending bankruptcy. In order to do so, he needed Mr. Boucher to withdraw the CPL against that property. He instructed his real estate counsel (not present counsel) to get the transaction completed, including the removal of the CPL. He says that Mr. Boucher's counsel sent a without prejudice letter to his then counsel on May 7, 2024, setting out four conditions, including the transfer of the manufactured home to Mr. Boucher, in order for the CPL to be removed. Mr. Garnett says that he had no alternative but to agree in order to avoid bankruptcy. Mr. Garnett says that he attended his then counsel's office a couple of days later to sign the documents related to the various transactions, including the agreement with Mr. Boucher. Mr. Garnett says he did not read the documents and simply signed where he was told to. Mr. Garnett says that he was unaware until he read Mr. Boucher's recent affidavit that Mr. Boucher's counsel had inserted the May 2, 2024 separation date into the agreement. He says that it is false and that he was tricked.
- [38] Mr. Garnett denies that he and Mr. Boucher spoke multiple times a week on the phone from October 2019 to April 2024. He says the parties have hardly spoken since 2019. He recalls calling Mr. Boucher when his mother passed away in December 2021, and to plead for the removal of the CPL at various times.
- [39] Ultimately, for the purposes of this application, I need not finally determine if the parties reconciled in or about February 2017. It is clear, on the evidence before me, that even if they did reconcile for a period at about that time, they clearly were no longer reconciled by no later than December 2019. The parties' conduct since that time is inconsistent with Mr. Boucher's position that they remained in a marriage-like relationship until May 2024.
- [40] They have not lived together since October 2019 at the very latest. On Mr. Boucher's evidence, he did not return to see Mr. Garnett in British Columbia at any time after October 2019, when he left for New Brunswick. While he says that he could not return to British Columbia after March 2020 due to COVID-related travel bans, he does not provide any explanation for why he did not return to British Columbia after those bans were lifted, and in particular after his parents passed away in December 2021.
- [41] In December 2019, Mr. Garnett filed his first application to have the claim dismissed for want of prosecution. In his application response to the December 2019 application, Mr. Boucher pleaded that the parties had reconciled in February 2017, and that the first he learned of Mr. Garnett's position that they had separated again was when he received a copy of the application and supporting affidavit. He did not plead that they continued to be in a marriage-like relationship. The fact of the application being made is itself inconsistent with the proposition that the parties were in a marriage-like relationship in December 2019.

- [42] In February 2020, Mr. Boucher was taking steps to ascertain Mr. Garnett's counsel's availability for trial and, in March 2020, Mr. Garnett was attempting to set down examinations for discovery and schedule a trial. Again, this is entirely inconsistent with the parties being in a marriage-like relationship at that time. So too is Mr. Boucher's conduct in continuing to maintain the CPLs registered against Mr. Garnett's properties. Further, Mr. Garnett first changed his will in 2021 to remove Mr. Boucher as his beneficiary. Mr. Boucher says that he is unaware of Mr. Garnett executing any will after January 17, 2018.
- [43] The strongest evidence for Mr. Boucher's position that the parties did not separate until May 2024 is the agreement, dated for reference May 2, 2024, the recitals to which include that the parties reconciled on February 1, 2017 and separated again on May 2, 2024. I have already recounted Mr. Garnett's evidence with respect to the signing of this agreement. Mr. Boucher submits that the court is bound by that agreement to accept that the parties separated on May 2, 2024. No authority was provided for this proposition. I accept Mr. Garnett's counsel's submission that the agreement amounts to a statement against interest on Mr. Garnett's part. In the face of the weight of the evidence to the contrary, it is insufficient to persuade me that the parties did not finally separate until May 2024.
- [44] In this regard, it is notable that even when Mr. Boucher filed an amended statement of claim in May 2024, he continued to plead that the parties separated in April 2016. His counsel submits this was due to an oversight. Be that as it may, it was only in his September 13, 2024 affidavit, filed in response to this application, that Mr. Boucher changed his evidence to assert the May 2, 2024 separation date.

The delay is inexcusable

- [45] I conclude that Mr. Boucher's delay in prosecuting this claim is inexcusable. He has shown few signs of intending to pursue this claim since it was filed in April 2016. Even if the parties did reconcile for a period between 2017 and 2019, Mr. Boucher has not taken effective steps to move his claim forward since then. There was a flurry of correspondence in early 2020, when the parties were discussing scheduling examinations for discovery and trial dates. Mr. Boucher has provided no explanation for failing to take any steps to move the litigation forward since that time, beyond his assertion, which I do not accept at least since December 2019, that the parties had reconciled. He has been content to leave Mr. Garnett's properties saddled with CPLs, and to use them as leverage to obtain financial benefit, first in July 2022, when he agreed to remove the CPL from the Van Horne Property in exchange for the payment of \$18,560, and second in May 2024, when he agreed to remove the CPL from the Mawdsley Property in exchange for the transfer of the manufactured home. According to Mr. Boucher's September 13, 2024 affidavit, he was unaware that Mr. Garnett had executed a new will removing him as beneficiary. If that is so, Mr. Boucher may have felt secure that he would inherit Mr. Garnett's estate, removing any incentive for him to proceed with his claim. Mr. Boucher says several times in his affidavit evidence that he was prepared to discontinue this litigation and remove the CPLs as soon as Mr. Garnett put him on title on

his properties as a joint tenant. All of this strongly suggests that Mr. Boucher's delay in prosecuting his claim has been tactical and designed to ensure that, one way or another, he obtains Mr. Garnett's estate.

Is it in the interests of justice for the claim to proceed despite the existence of inordinate and inexcusable delay?

- [46] I find that it is not in the interests for this claim to proceed despite the existence of inordinate and inexcusable delay.
- [47] Mr. Garnett is extremely prejudiced by the delay in the prosecution of this claim. Mr. Garnett is 77 years of age. He was diagnosed with terminal cancer in March 2016. Mr. Garnett has explained his diagnosis, treatment and its side effects, and symptoms in a number of affidavits, beginning with his first affidavit, made May 10, 2016, sworn in support of his application to set aside the ex parte order and to move the venue for trial. At that time, he could not walk without assistance and was unable to drive. The medication he was taking to fight the cancer had caused cognitive and visual impairments. He was unable to concentrate and could not focus, making it difficult to instruct counsel. At that time, Mr. Garnett had been told by his oncologist that he likely had less than two years to live.
- [48] In his fourth affidavit, sworn December 12, 2019, sworn in support of his then pending application to dismiss the claim for want of prosecution, Mr. Garnett described the radiation and hormonal therapy he had received to treat the cancer. He said that the cumulative effect of his illness and therapies had been to significantly diminish his mental capacities, including his memory. He had needed intensive assistance to draft that affidavit and compile its exhibits. He believed he was mentally competent, but that it was becoming increasingly difficult to engage in lengthy, meticulous and detail-oriented tasks. His concentration was weak and his memory was significantly impaired.
- [49] In addition, his prior bookkeeper, who was a witness to many relevant events and uncovered alleged financial wrongdoing by Mr. Boucher, was no longer employed by Mr. Garnett and he did not know where she was now working or living. He had been unable to locate a number of key documents relating to Mr. Boucher's financial transactions. At that time, over seven years had gone by since most of these transactions occurred, and he could not retrieve records from the relevant institutions.
- [50] In his fifth affidavit, sworn August 21, 2024, in support of the present application, Mr. Garnett said that, due to his cancer and treatments, he had undergone profound changes, including to his memory. He stated that he could not recall events with much specificity and that it would now be very difficult for him to respond to Mr. Boucher's property division claims.

- [51] In that affidavit, Mr. Garnett also referred to the fact that he has no children and only one sibling, a brother aged 93. He swore that, once he passes away, there will be no one capable of providing the evidence required to rebut Mr. Boucher's claims. He is worried that this will leave his estate very vulnerable.
- [52] As discussed, the delay in this case is very lengthy, as the claim was filed in April 2016. Despite that length of time, this case has not proceeded forward. No examinations for discovery have been conducted. No trial dates are scheduled.
- [53] Mr. Garnett's financial interests have been negatively impacted by the delay in this case. Mr. Garnett has significant debts which he wishes to pay off before he dies. In his most recent affidavit, he swears that his debts are in excess of \$350,000. Mr. Boucher questions how much debt Mr. Garnett is responsible for, but I accept that it is a substantial amount. There is \$307,943.55 held in trust from the sale of the Mawdsley Property. Mr. Garnett wishes to access those funds to pay off some of his debts, and cannot do so while this litigation lingers on. If he could sell the Old Waneta Property, which currently has a CPL registered against it, he would be able to pay off all of his debts. Again, he cannot do so while the CPL remains in place.
- [54] As already discussed, I do not find Mr. Boucher's reasons for the delay to be credible.
- [55] Mr. Boucher delayed in the prosecution of his claim despite pressure from Mr. Garnett to proceed. In his May 10, 2016 affidavit, Mr. Garnett swore that he wanted this trial to proceed very soon, as he wished not to die prior to it being decided. Mr. Garnett filed his first application seeking to have this claim dismissed for want of prosecution in December 2019. He was unable to proceed with that application due to his ill health at the time and financial circumstances. But Mr. Boucher could have been left in no doubt that Mr. Garnett wanted him to proceed expeditiously.
- [56] This is confirmed by Mr. Garnett's counsel's March 2, 2020 correspondence, advising they were available to attend examinations for discovery in April 2020, and would be in touch with respect to trial dates once the 2021 Rossland rota was released. Mr. Boucher took no steps to schedule examinations for discovery or to set this matter down for trial.
- [57] In *Giacomini*, at para. 71, the Court of Appeal cautioned against judges engaging in a searching examination of the merits of the action. In the circumstances of this case, it is unnecessary for me to do so, and I decline to do so.
- [58] Mr. Boucher submits that if this claim is dismissed for want of prosecution, it would be open to him to file a new notice of family claim, relying on the May 2024 separation date. He submits that it is not in the interests of justice to dismiss this claim, as to do so would simply result in a new claim being filed. Without deciding if it would be legally open to Mr. Boucher to file and proceed with a new claim, I find that the prospect of him doing so does not mean that it is in the interests of justice for the present claim to proceed. Any new claim would be based on an entirely new separation date from that currently pleaded. If Mr. Boucher were

to establish that the parties did separate on that new date of May 2, 2024, the parties' rights pursuant to s. 81 of the Family Law Act, S.B.C. 2011, c. 25 to the equal division of property and debt would arise as of that date, and not, as currently pleaded, April 2016. I agree with Mr. Garnett's submission that that would be a completely different case than the one now before the court. The potential for it being filed does not render it in the interest of justice for this one to be allowed to proceed.

[59] In my view, this is a case in which the delay in its prosecution harms "the public interest in a justice system that delivers timely and affordable justice": Giacomini at para. 31. Mr. Boucher had every right to file his notice of family claim in April 2016. It was incumbent upon him, if he was serious about that claim, to take meaningful steps to prosecute it. He has not. I conclude that it is not in the interests of justice for the claim to proceed in the face of Mr. Boucher's inordinate and inexcusable delay.

Conclusion

[60] For these reasons, I grant Mr. Garnett's application to dismiss Mr. Boucher's notice of family claim for want of prosecution. As a result, I further order that all existing CPLs which Mr. Boucher has caused to be filed against Mr. Garnett's properties be discharged. There was no application before me with respect to the funds held in trust from the sale of the Mawdsley Property, although Mr. Garnett's submission was that they should be released out of trust to him. If the parties cannot agree on the disposition of the Mawdsley Property proceeds, they may appear before me to address that issue.

[61] Mr. Garnett is entitled to his costs of this application.

"L.M. Lyster J."

LYSTER J.

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